SUPERIOR COURT OF DECATUR COUNTY
STATE OF GEORGIA

JAMES BRYAN WALDEN and LINDSAY WALDEN, Individually and on Behalf of the Estate of Their Deceased Son, REMINGTON COLE WALDEN,	*	
Plaintiffs,	*	
	*	CIVIL ACTION
vs.	*	
	*	FILE NO. 12-CV-472
CHRYSLER GROUP, L.L.C. and BRYAN L. HARRELL,	*	
Defendants.	*	

PLAINTIFFS' REPLY TO CHRYSLER GROUP, LLC'S BRIEF IN OPPOSITION TO PLAINTIFFS' RULE 702 MOTION CHALLENGING CHRYSLER EXPERT M. LAURENTIUS MARAIS' "EXPERT" TESTIMONY ABOUT STATISTICS

Just like Chrysler Group LLC's ("CG") 'expert' Paul Taylor, M. L. Marais cannot be saved from the Rule 702 guillotine. CG has failed to adequately address the fatal problems afflicting Marais' proposed testimony.

First, CG made the absurd argument that Marais' testimony should *not* be excluded *because* his statistical analyses are based on insufficient data. That makes no sense that Plaintiff's counsel can see.[1] CG admits that the Marais testimony it proposes to present to the jury is based on insufficient data, but argues that is okay because Marais supposedly did not reach "a conclusion about the comparative safety of the vehicles studied."[2] That is false. The whole purpose of the proposed testimony is to suggest there is no distinction between locating

[1] CG's Response at 6: "Thus, Plaintiffs' argument for limiting Dr. Marais' testimony would be meaningful *if* the witness were offering an opinion that the NASS data *could lead* to a conclusion about the comparative safety of the vehicles studied. But in the face of Dr. Marais' actual testimony, their argument that the data is insufficient to reach such a conclusion is meaningless. *The insufficiency of the available data is not a basis for excluding Dr. Marais' testimony* that the data available, in fact, shows no statistically significant difference or any "pointer" or "indication" of such a difference." (Emphasis added.)

[2] *Id.*

gas tanks in the rear or midships. Marais' point is his contention there is no "statistically reliable distinction in the fire rates, depending on whether the fuel tank is located in the rear or midships." That is intended to tell the jury that the 1999 Grand Cherokee is just as safe as the comparison vehicles with midships tanks. That is nonsense. It is a claim contrary to common sense, and to the sworn testimony of CG's own engineers, *e.g.* Judson Estes, who admitted that the rear gas tanks on Chrysler's Jeeps is vulnerable in rear impact.

Second, CG ignores the fact that Marais opinions are not reliable because the sample sizes on which the same are based are too small to yield any modicum of reliability.[3] CG did not tell this Court the truth that Marais reached his supposedly "statistical" conclusion by studying only six wrecks involving post collision fuel system leakage in rear impact.[4] The inadequacy of Marais' opinions is further illustrated by the undisputed fact his analyses results in an exceedingly and unacceptably high standard error.[5] Such a high standard error for his analyses further evidences the fact his sample sizes are inadequate for producing reliable opinions.[6]

Third, Marais has not performed any analysis specifically related to this case.[7] He did not even review the entry in the FARS database for the Walden wreck.[8] His testimony is based on analyses he performed for CG in response to the investigation into the Jeep Grand Cherokee, Cherokee, and Liberty launched by NHTSA's Office of Defects Investigation.[9] His work defending Chrysler in the ODI investigation focused on the supposed "overall safety" of

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[3] *See, e.g.*, Hubele Aff., ¶ 18 (Exhibit 10 to Plaintiffs' 702 motion). CG's response does not address the fact several courts have excluded statistical evidence based on sample sizes of automobile traffic crash databases where the sample size used was too small. *See, e.g.*, *Heco v. Midstate Dodge, LLC*, 2013 WL 6978689, Case No. S08692010 at*2-3 (Vt. Super. June 4, 2013); *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 792, 174 Cal. Rptr. 348, 371 (1981).
[4] Hubele Aff., ¶ 18 (Exhibit 10 to Plaintiffs' 702 motion).
[5] *Id.* at ¶ 20.
[6] *Id.*
[7] Marais Dep., 58:09-14 (Exhibit 2 to Plaintiffs' 702 motion).
[8] *Id.* at 234:19-21.
[9] *Id.* at 56:16-57:03.

Chrysler's Jeeps. "Overall safety" is not at issue in this case. Because Marais's analyses do not address the issues in this case, they do not "fit" the issues in this case. *Marais' proposed testimony is irrelevant* ***to this case.***

Fourth, Marais admitted he knows nothing about substantial similarity. When asked about "substantial similarity" at his deposition, Marais professed to have *no familiarity* with the concept, and said Chrysler's lawyers had not taught him what it meant.[10] He did nothing to assure the underlying wrecks in his analyses were substantially similar to the Walden wreck. CG cannot and will not be able to prove that any wreck used for Marais' analysis is substantially similar to the Walden wreck. Marais' testimony is indisputably inadmissible.

Fifth, there are no exceptions to the substantial similarity requirements under Georgia law. This part of the law has been fully litigated, and the Georgia appellate courts have established the standard for what is, and what is not, admissible. Georgia law does not allow a party to tender to a Court or jury other incidents that are *dissimilar* to the incident giving rise to the lawsuit. CG has not and cannot cite a Georgia case creating such an exception. Georgia law does not permit CG to bypass the substantial similarity rule for any reason. Period.

CG's reliance on *Heath v. Suzuki Motor Corp.*, 126 F.3d 1391 (11th Cir. 1997) is misplaced. In *Heath*, the trial court admitted evidence of "other rollover incidents involving dissimilar vehicles." 126 F.3d at 1395. The Eleventh Circuit expressly rejected Heath's contention that the "trial court erred in not applying Georgia law to determine the admissibility of the evidence at issue." *Id.* at 1396 ("we find no merit to his position"). Instead, the court applied an entirely different rule based on federal law and the Federal Rules of Evidence—"[t]his

[10] *Id.* at 120:14-123:06.

evidentiary doctrine applies when one party seeks to admit prior accidents or occurrences *involving the other party . . . Id.* (emphasis added). That is not the law in Georgia.

The black-letter rule in Georgia is that statistical evidence regarding other wrecks is not admissible unless the other wrecks are "substantially similar" to the wreck at issue. *Cooper Tire & Rubber Co. v. Crosby*, 273 Ga. 454, 455 (2001); *Colp v. Ford Motor Co.*, 279 Ga. App. 280, 281 (2006). It applies equally to plaintiffs and defendants. *Id.; see also* Order, *Hatfield v. Ford* (substantial similarity rule "applies to the proponent of the evidence in question, whether it be the Plaintiffs or Defendant Ford.") (Exhibit 5 to Plaintiffs' 702 motion).

The substantial similarity rule does not vary based on the reasons for which the proponent seeks to admit something. The Court of Appeals has expressly *held* that "[i]n product liability actions, evidence of other similar incidents involving the product is admissible, and relevant to the issues of notice of a defect and punitive damages, provided there is a showing of substantial similarity. *Without a showing of substantial similarity, the evidence is irrelevant* ***as a matter of law.*** *" Volkswagen of Am., Inc. v. Gentry*, 254 Ga. App. 888, 895 (2002) (emphasis added); *see also Crosby*, 273 Ga. at 460 ("substantially similar evidence is admissible because it is relevant to the issues of notice and punitive damages and evidence that is "wholly different" should be excluded.") (emphasis added).

Sixth, even if there was an exception to the substantial similarity rule—which there isn't—the evidence CG seeks to admit through Marais is not relevant to "balancing risk against utility." CG never considered Marais' statistical analyses when making the decision to locate the gas tank behind the rear axle in the 1999 Grand Cherokee—that is not and will not be disputed. Marais did not perform the statistical analyses that CG now seeks to tender *until after* NHTSA's Office of Defects Investigation started investigating the Jeep Grand Cherokee, Cherokee, and

Liberty. CG did not even know about those statistical analyses when it made the design decisions (*for the obvious reason the statistical analysis did not exist*). Marais' statistical analyses are calculated to confuse and mislead the jury.

In summary the law requires that this Court exclude any testimony Marais which involves statistics, statistical analysis, and any related conclusions. His samples sizes are too small and his standard error is too large. There are no exceptions to the substantial similarity rule in Georgia. Marais's proposed testimony has no probative value and would only confuse and mislead the jury—that is its sole purpose.

This 18th day of February, 2015.

Respectfully submitted,

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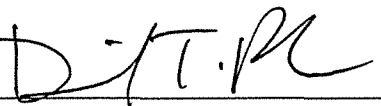
BY: 

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