

IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF OKLAHOMA

**FILED**

LAURA G. BISHOP, Personal )  
Representative of the Estate )  
of SHAWN D. BISHOP, Deceased, )  
)  
Plaintiff, )  
)  
vs. )  
)  
GENERAL MOTORS CORPORATION, )  
)  
Defendant. )

AUG 1 1995  
WILLIAM B. GUTHRIE  
Clerk, U.S. District Court  
By                      Deputy Clerk

Case No. CIV-94-286-B

**ORDER**

This matter comes before the Court on the following pleadings:

- A. General Motors Corporation's Motion in Limine to Exclude Evidence of Other Incidents filed February 6, 1995 (Docket Entry #371); Plaintiff's Response to Defendant's Motion filed February 21, 1995 (Docket Entry #428); Defendant's Reply to Plaintiff's Response filed March 10, 1995 (Docket Entry #477); Defendant's Supplemental Memorandum in Support of its Motion filed April 7, 1995 (Docket Entry #509); and Plaintiff's Response to Defendant's Supplemental Memorandum filed April 24, 1995 (Docket Entry #517).
- B. General Motors Corporation's Motion in Limine to Exclude the Testimony of Victims of Other Incidents filed February 7, 1995 (Docket Entry #376); Plaintiff's Response to Defendant's Motion filed February 21, 1995 (Docket Entry #428); Defendant's Reply to Plaintiff's Response filed March 10, 1995 (Docket Entry #477).
- C. Defendant General Motors Corporation's Motion to Schedule a Pre-trial Hearing and Discovery to Determine the Admissibility of Plaintiff's Allegedly

"Similar Incident" Evidence filed January 13, 1995 (Docket Entry #297) with Brief in Support thereof (Docket Entry #298); Plaintiff's Response to Defendant's Motion filed January 31, 1995 (Docket Entry #342); and Defendant's Reply Memorandum in Support of the Motion filed February 14, 1995 (Docket Entry #406).

Essential to the determination on all of these pending matters is the presentation and evaluation of evidence of whether the other incidents in question are, in fact, "substantially similar" to the facts and circumstances of this case. In following the suggestion of the Tenth Circuit Court of Appeals that the preferable method of determining "substantial similarity" is through a hearing out of the presence of a jury at trial, this Court conducted an evidentiary hearing on March 27-29, 1995 for receipt of any such evidence that the parties deemed necessary to determine the similarity of the other incidents in question. See Wheeler v. John Deere Company, 862 F.2d 1404, 1407 (10th Cir. 1988) citing Rexrode v. American Laundry Press Company, 674 F.2d 826, 830 (10th Cir.) cert. denied, 459 U.S. 862, 103 S.Ct. 137, 74 L.Ed 2d 117 (1982).

In this case, Shawn Bishop, the son of the Plaintiff, ran off the roadway while driving a 1979 General Motors K-20 pickup truck. Shawn Bishop struck a portion of a concrete bridge railing on the truck's passenger side front bumper. The impact resulted in portions of the truck and/or the concrete railing spearing through the truck and striking the passenger side fuel tank. As a result, the truck rolled on its driver's side, the fuel tank leaked, and a fire ensued, resulting in the death of Shawn Bishop. Plaintiff Laura Bishop ("Bishop") seeks to introduce evidence of other incidents involving the C/K model General

Motors pickup truck for the purpose of demonstrating that Defendant General Motors Corporation ("GM") was on notice that the placement of its fuel tanks on the C/K model pickup trucks outside of the steel frame rails represented a defect, thereby warranting remedial action by GM.

GM asserts that the evidence of the other incidents which Bishop seeks to introduce at trial are irrelevant to this Court's determination since they are not "substantially similar" to the circumstances of the accident at issue in this case.

The threshold question in the admissibility of any evidence at trial is whether it is relevant to the jury's determination of the issues in dispute. Rule 402, Fed. R. Evid. Incidents that are "substantially similar" to the circumstances surrounding the case at trial are considered relevant "to demonstrate notice, the existence of a defect, or to review testimony given by a defense witness" that a given product was designed without safety hazards. Four Corners Helicopters, Inc. v. Turbomeca, S.A., 979 F.2d 1434, 1440 (10th Cir. 1992); C.A. Associates v. Dow Chemical Company, 918 F. 2d 1485, 1489 (10th Cir. 1990); Wheeler, 862 F.2d at 1407; Ponder v. Warren Tool Corp., 834 F.2d 1553, 1560 (10th Cir. 1987); Johnson v. Colt Industries Operating Corporation, 797 F.2d 1530, 1534 (10th Cir. 1986); Rexrode v. American Laundry Press Company, 674 F.2d 826, 829 at n. 9 (10th Cir. 1982). If the evidence of other incidents is offered to demonstrate the existence of the actual defect, the law requires a "high degree of similarity" since a jury is more likely to find the existence of a defect in the case before it if it is demonstrated through other instances. Four Corners Helicopters, Inc., 979 F.2d at 1440 citing Wheeler, 862 F.2d at 1407. However, the requirement of "substantial similarity" is relaxed when

the evidence of other incidents is intended to demonstrate notice or awareness of the potential defect on the part of its manufacturer. Id. "Any differences in the accidents not affecting a finding of substantial similarity go to the weight of the evidence" rather than its admissibility when it is offered for notice purposes only. Four Corners Helicopters, Inc., 979 F.2d at 1440; Wheeler, 862 F.2d at 1408; Ponder, 834 F.2d at 1560.

Bishop contends that a determination of substantial similarity should be reflected in the nature of the defect alleged rather than in the circumstances surrounding each individual accident and the similarity of each to this case. The defect Bishop alleges in this case is the placement of fuel tanks on the C/K model pickup trucks outside the steel frame rails. In so arguing, Bishop offered the testimony of Mr. Fred Arndt of Arndt and Associates, an engineering consulting firm. In providing his opinion of "substantial similarity" of the other incidents in question to the accident occurring in this case, Mr. Arndt offered some seven characteristics against which each incident was assessed to determine its similarity to the Bishop accident. These factors include, notice of the incident to General Motors, whether a C/K model pickup truck was involved in the accident, whether a collision occurred, whether the fuel tank ruptured as a result of the collision, whether a leak of gasoline occurred from the tank, whether a fire ensued and whether death or injury resulted from the accident and fire. Mr. Arndt based his characteristics, in part, upon a National Highway Traffic Safety Administration report stemming from an investigation of accidents involving the C/K model truck. In so doing, Mr. Arndt prepared a spreadsheet of some 227 other incidents which he asserts are "substantially similar" to

the Bishop accident.<sup>1</sup>

In turn, GM introduced the testimony of Mr. Allen Thebert in support of GM's contention that the incidents in question are not sufficiently similar to justify the admission of these other incidents into evidence at trial. Specifically, Mr. Thebert generated certain key characteristics, similar to the methodology utilized by Mr. Arndt, upon which to evaluate each of the allegedly similar incidents against the backdrop of the Bishop accident. Specifically, Mr. Thebert examined each of the other incidents with consideration as to the to whether the vehicle involved was a GM model C/K pickup truck for the model years, 1973-87, whether the accident in which the vehicle was involved was a frontal impact; whether the impact of the vehicle was with a bumper-high fixed object; whether a rollover was involved in the accident; whether the occupant of the vehicle sustained injury by fire; and whether the severity of the crash involving the vehicle in the other incident was equivalent to or lower than the Bishop accident. GM produced numerous reports evidencing Mr. Thebert's findings with regard to each of the allegedly similar incidents. Mr. Thebert concluded that the incidents were not "substantially similar" to the Bishop accident and therefore should not be admissible at trial.

Initially, this Court notes that the parties are in some disagreement as to the number of instances in question. Mr. Arndt's report identifies some 227 accidents. However, of these incidents, two such accidents occurred after the November, 1993 Bishop collision. Additionally, 42 of the identified incidents involve different claimants in the same accident,

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<sup>1</sup> See Plaintiff's Exhibit No. 3 entitled "Bishop v. GM, lawsuits/incidents, prepared 3/8/95".

thereby resulting in the appearance of duplicitous incidents. After considering the parties' arguments on this issue, this Court finds that the two accidents occurring after the Bishop accident are not relevant, considering that Bishop offers the evidence of these other incidents to show notice or awareness on the part of GM of the defect involving the outside the rail fuel tanks. Further, since this Court is evaluating the incidents which would result in notice to GM, the number of occupants of each vehicle is irrelevant. Rather, the vehicles involved in the accidents which ostensibly bear the defect of the outside the rail fuel tanks determines the similarity of the incidents in question. Consequently, this Court finds that in determining substantial similarity, the number of other incidents involved totals 183.

Clearly, Bishop has offered evidence of other incidents for the purpose of demonstrating notice, knowledge or awareness of the defect in the C/K model pickup truck involved in this case. Thus, as previously stated, the requirements for a showing of "substantial similarity" are somewhat relaxed. The parties are in fundamental disagreement as to whether when determining "substantial similarity" the Court is required to compare the similarity of the accident which is the subject of the lawsuit, with the accident involved in the other incidents, as advocated by GM, or whether the examination is of the similarities in the defects alleged to be present and common between the subject vehicle and the vehicles involved in the other incidents, as asserted by Bishop. The Tenth Circuit Court of Appeals has ruled that the determination of whether accidents are substantially similar "depends largely on the theory of the case." Wheeler, 862 F.2d at 1407. "Differences in the nature of the defect alleged may affect a determination of whether the accidents are substantially similar . . . how substantial the similarity must be is in part a

function of the proponent's theory of proof." Ponder, 834 F.2d at 1560.

Since Bishop offers evidence of other incidents for the purpose of showing notice of a potential defect on GM's part, it follows that the determination of "substantial similarity" centers on the similarity of the alleged defect between the subject vehicle and the vehicles involved in other incidents and the circumstances stemming directly from that defect in each incident which resulted in injury.

In this case, the identified alleged defect is the location of fuel tanks outside the frame rails of the 1973-84 C/K model pickup truck manufactured by GM. Crucial to the determination of similarity are the same model and make of pickup truck, with fuel tanks located outside the frame rails, wherein after an accident, rupture of these tanks, leakage and subsequent fire with injury occurred. For notice purposes, the precise manner in which the vehicle was struck is irrelevant.

Under this criteria, a review of the remaining 183 incidents reveals that 164 of these incidents are admissible as being "substantially similar". The remaining 19 incidents were challenged by GM's expert, Mr. Thebert, as not involving a fire or fire injury. However, on cross-examination, Mr. Thebert's analysis appeared to be overly restrictive.<sup>2</sup> Mr. Thebert drew the facts for his report from accident reports of each of the incidents. Upon being presented with additional evidence on these 19 other incidents, including complaints filed against GM and provided to the National Highway Traffic Safety Administration, Mr.

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<sup>2</sup> In one incident, Mr. Thebert indicated on his report the injury by fire was "not likely", although the police report upon which he ostensibly based his characteristic worksheet clearly indicates that the vehicle "caught fire and burned before the witness could help the driver out." Although Mr. Thebert indeed included this as an injury by fire incident, his interpretation of the report is unreasonably restrictive.

Thebert conceded that these incidents involved fire and possible fire injury as well. Accordingly, this Court finds that sufficient evidence was presented at the hearing for this Court to determine that the remaining 19 incidents are also "substantially similar" and therefore admissible for the purpose of demonstrating notice or awareness on the part of GM of the potential defect alleged in this case.

GM also seeks to exclude the testimony of victims of these incidents that this Court has determined to be "substantially similar" to the Bishop accident. Primarily, GM argues that the testimony of these victims will be unfairly prejudicial to GM in light of the probative value of this evidence and therefore should be excluded from evidence at trial. Rule 403, Fed. R. Evid. Instead, if testimony about these incidents is admitted into evidence, GM urges this Court to only permit the testimony of the investigators of the various accidents, rather than the victims.

When evaluating admissibility under Rule 403, this Court is mindful of the Tenth Circuit Court of Appeals' pronouncement that, "the exclusion of relevant evidence under Rule 403 is an extraordinary remedy to be used sparingly. The decision to exclude (or admit) evidence under this rule is within the sound discretion of the trial court . . ." Wheeler, 862 F.2d at 1408 citing Romine v. Parman, 831 F.2d 944, 945 (10th Cir. 1987)(remaining citations omitted). In the Wheeler case, the defendant objected to the victims of an alleged defect in a vertical unloading augur of a combine as being prejudicial, since these victims had limbs amputated. The Court concluded that the district court did not err in permitting the live testimony of these victims. The Tenth Circuit noted that ". . . the favored method of presenting evidence of other accidents is through the testimony



of those familiar with such acts. Johnson v. Colt Industries Operating Corp., 797 F.2d 1530, 1534 n. 4 (10th Cir. 1986). Most evidence may lead to prejudicial conclusions, but Rule 403 prohibits only 'unfair' prejudice. United States v. Williams, 816 F.2d 1527, 1532 (11th Cir. 1987). 'Proof of other accidents, when offered in the form of testimony by persons who have had sudden or traumatic experiences, can be particularly forceful and effective. It will be entirely proper in such cases to receive not only testimony describing the physical facts, but also describing the experience of the witness . . .' D. Louisell and C. Mueller, Fed. Evid. Section 98 at 722 (1977)." Wheeler, 862 F.2d at 1408. This Court agrees that while overly inflammatory descriptions of the injuries sustained by the victims of the other similar incidents may become prejudicial at some point, the wholesale prohibition of testimony by these victims is not warranted. Accordingly, GM's motion in regard to this testimony shall be denied.

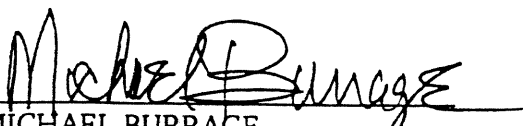
IT IS THEREFORE ORDERED THAT General Motors Corporation's Motion in Limine to Exclude Evidence of Other Incidents filed February 6, 1995 (Docket Entry #371) is hereby DENIED.

IT IS FURTHER ORDERED THAT General Motors Corporation's Motion in Limine to Exclude the testimony of victims of other incidents filed February 7, 1995 (Docket Entry #376) is hereby DENIED.

IT IS FURTHER ORDERED THAT General Motors Corporation's Motion to Schedule a Pre-Trial Hearing and Discovery to Determine the Admissibility of Plaintiff's Allegedly "Similar Incident" Evidence filed January 13, 1995 (Docket Entry #297) is hereby deemed MOOT, since this Court conducted a hearing on the other similar incidents question,

wherein evidence was presented.

IT IS SO ORDERED THIS 18<sup>TH</sup> day of August, 1995.

  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE