STATE OF MICHIGAN

COURT OF APPEALS

CITY OF MADISON HEIGHTS and MICHIGAN MUNICIPAL RISK MANAGEMENT AUTHORITY, as Subrogee of City of Madison Heights,

Plaintiffs-Appellants,

v

ELGIN SWEEPER COMPANY, FEDERAL SIGNAL CORPORATION, and BELL EQUIPMENT COMPANY,

Defendants-Appellees.

UNPUBLISHED
May 8, 2007

No. 266333
Oakland Circuit Court
LC No. 2004-055598-CZ

Before: Neff, P.J., and O'Connell and Murray, JJ.

PER CURIAM.

In this products liability case, plaintiffs appeal by leave granted the trial court's interlocutory order granting defendants' motion in limine excluding evidence of other incidents of fires involving Elgin GeoVac Street Sweepers. We affirm.

The City of Madison Heights purchased a 1998 Elgin GeoVac Street Sweeper ("GeoVac") from Bell Equipment. On April 18, 2003, a fire destroyed a number of vehicles in the City of Madison Heights Public Works, causing more than $5.5 million in damages. Subsequent inspections indicated that the cause of the fire could not be determined; however, several experts opined both that the fire was most likely caused by the GeoVac's electrical system and originated in the GeoVac's auxiliary engine compartment.

Plaintiffs City of Madison Heights ("Madison Heights") and Michigan Municipal Risk Management ("MMRMA")[1] filed a complaint against Elgin Sweeper Company ("Elgin"), Federal Signal Corporation ("Federal"), and Bell Equipment ("Bell")[2] (hereafter referred to as

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[1] MMRMA is a subrogee of Madison Heights, having paid amounts pursuant to its coverage documents for the damage allegedly caused by defendants.

[2] Elgin Sweeper Company designed and manufactured the 1998 GeoVac. Elgin Sweeper (continued…)

"plaintiffs" and "defendants," respectively), alleging breach of contract, negligence, and breach of warranty. Plaintiffs also alleged that a design or manufacture defect in the GeoVac caused the fire. Plaintiffs further alleged that the City of Fraser experienced a similar fire involving an Elgin Street Sweeper, of a similar make and model, on April 22, 2002, and that defendants failed to warn its customers about the potential despite defendants' knowledge of the design or manufacture defect. Defendants claim that the cause of the fire was listed as undetermined by fire inspectors.

The case proceeded through discovery, which revealed other incidents of GeoVacs involved in fires between 1998 and 2004. There have been seven fires, including the instant case, involving GeoVacs that were produced in 1997 or 1998.[3] Plaintiffs contended that the other six incidents were substantially similar to the fire in the instant case, because all of the fires occurred in either 1997 or 1998 Elgin GeoVacs, originated in the auxiliary engine compartment and were electrical in nature.

Defendants filed a motion in limine to exclude admission of this other incident evidence. The trial court granted the motion concluding that plaintiffs failed to establish that the other incidents were substantially similar to the instant case. Additionally, the trial court found that the probative value of the evidence of other incidents was substantially outweighed by the danger of unfair prejudice, would mislead the jury, and would require numerous "mini-trials" on the case of the other fires. We granted leave to consider plaintiffs' argument that this evidence was improperly excluded, because it was relevant to show the existence of a defect, causation, and notice.

This Court reviews a decision to admit or exclude evidence for an abuse of discretion, *Elezovic v Ford Motor Co*, 472 Mich 408, 419; 697 NW2d 851 (2005). "[A]n abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). However, preliminary questions of law regarding admissibility, including the proper application of the rules of evidence, are reviewed de novo. *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002). Our Supreme Court indicated that "when such preliminary questions of law are at issue, it must be borne in mind that it is an abuse of discretion to admit evidence that is inadmissible as a matter of law." *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

Our Supreme Court ruled that "[l]ogical relevance is the foundation for admissibility of evidence," *People v Small*, 467 Mich 259, 264; 650 NW2d 328 (2002), and "[l]ogical relevance is determined by the application of Rules 401 and 402," *People v VanderVliet*, 444 Mich 52, 60; 508 NW2d 114 (1993). Under MRE 402, "[a]ll relevant evidence is admissible." MRE 401

(…continued)

Company is a wholly owned subsidiary of Federal Signal Corporation. Bell Equipment is an authorized Elgin dealer and the seller of the 1998 GeoVac, which is the subject of this litigation.

[3] The GeoVac's first two model years were 1997 and 1998, and an expert indicated that there were no changes to the GeoVac for model years 1997 and 1998. Less than 40 Elgin GeoVacs were produced in those two model years, with three of those vehicles involved in fires prior to the instant case.

defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Relevant evidence may be excluded, however, by operation of MRE 403:

> [I]f its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

"Prejudice" means more than damage to the opponent's case; a party's case is always damaged by evidence that the facts are contrary to his contentions. *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995). Our Supreme Court observed that a determination of the prejudicial effect of evidence is "best left to a contemporaneous assessment of the presentation, credibility, and effect of the testimony" by the trial court. *VanderVliet, supra* at 81. This Court held that "[u]nfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence." *People v Taylor*, 252 Mich App 519, 521-522; 652 NW2d 526 (2002).

The instant case involves the admissibility of evidence of other acts or accidents in the context of a products liability case. Some 40 years ago, our Supreme Court reaffirmed the general rule to determine the admissibility of other incidents or accidents:

> An issue as to the existence or occurrence of particular fact, condition, or event, may be proved by evidence as to the existence or occurrence of similar facts, conditions, or events, under the same, or substantially similar, circumstances. [*Savage v Peterson Distributing*, 379 Mich 197, 202; 150 NW2d 804 (1967).]

In *Savage*, the plaintiff filed suit against the defendants "for damages arising from the sale of allegedly adulterated animal feed." *Id.* at 199. One defendant, Peterson, manufactured, processed, packaged and sold a mink food product; the other, Ralston, manufactured and supplied one of the components used by Peterson. *Id.* at 200. At trial, the plaintiff introduced testimony from other ranchers, all of whom used the same product to feed their animals, during the same time period as the plaintiff, and experienced the same injury as the plaintiff. *Id.* at 201-202. One of the key pieces of evidence for the plaintiff was the testimony of one of the defendant's corporate officers, which indicated that the mink were fed the same food; the food contained salmonellae; and autopsies of the mink revealed salmonellae. *Id.* at 201. Further, there was testimony by ranchers who did not use that food and had unharmed mink. *Id.* at 201-202. The jury found for the plaintiff, and thereafter Peterson settled with the plaintiff. *Id.* Ralston appealed, and this Court reversed on the ground that there was no evidence that the food fed to the plaintiffs' animals caused death. *Id.* Our Supreme Court concluded that the plaintiff need not prove its case only with direct evidence. *Id.* at 201.

The Supreme Court noted that the plaintiff sought to prove its case by using evidence of "the existence or occurrence of similar facts, conditions, or events under the same or substantially similar circumstances." *Id.* at 202. Moreover, the Court noted a letter, and substantially similar testimony, by defendant Peterson, which,

> if believed by the jury, was sufficient to prove the presence of some lethal contaminant in defendant Ralston's products as manufactured at the time in [Ralston's] plant and to link actionably such products—through defendant Peterson's admixture thereof in its 'Redi-Mix'—with the ailments and deaths of plaintiff's mink. [*Id.* at 204-205.]

The Supreme Court concluded that:

> As to this proof, favorable view suggests a permissible inference that the facts thus brought forth amounted to something more than a series of disconnected and purely coincidental occurrences. The common time, source and effect elements brought them together with evidentiary significance. [*Id.* at 205.]

The Court then rejected the defendant's argument that the trial court erred in admitting the testimony of other ranchers who experienced the same problems at the same time after feeding their animals the defendant's animal food. *Id.* The Court determined that there was no evidentiary error because of "the common nature of the trouble these mink ranchers experienced after having fed [the defendant's] mink food in the forepart of 1961." *Id.* at 205-206. In reaching its conclusion, the Court explained that:

> It was proper to show these circumstantial facts as some evidence from which the jury might conclude that there was a pattern of casually connected carelessness at [Ralston's] plant in manufacturing, for the market at the particular time, Ralston's various types of mink food.
>
> The proof of sale of such food, for the purpose mutually intended by the defendant manufacturer and the respective rancher-witnesses, coupled with proof of a common, widespread and almost simultaneously damaging aftermath, rendered it admissible and its probative worth was for the jury. The foundation for its introduction was laid by the substantially corresponding time of feeding of defendant Ralston's mink food and the substantially corresponding effect of such feeding. [*Id.* at 206.]

Our courts have had rare occasion to use the rule expressed in *Savage*. In *Royal Mink Ranch v Ralston Purina Co*, 18 Mich App 695, 699; 172 NW2d 43 (1969), the plaintiff wanted to present testimony from the same expert as in the *Savage* case regarding events from that case. This Court held that the evidence was inadmissible because the plaintiff's case and *Savage* involved different feed mixes and different allegations of the specific problem with the feed, i.e, salmonella bacteria in *Savage, supra*, and vitamin deficiency in the plaintiff's case. *Id.* at 700. Similarly, in an indemnity action, the plaintiff argued that the trial court abused its discretion by refusing to admit "previous laboratory failures" of the defendant's product at trial. *Fireman's Fund American Ins Cos v General Electric Co,* 74 Mich App 318, 328; 253 NW2d 748 (1977). This Court concluded that the trial court did not abuse its discretion in refusing to admit the

evidence, because "the tests sought to be admitted by plaintiff . . . were unlike the situation herein where the [product] had operated in the field." *Id.* at 329.

In this case, plaintiff sought to introduce other incidents of GeoVacs involved with fire as evidence of notice,[4] causation, and the existence of defect. Plaintiff identified six other incidents of 1997 or 1998 GeoVacs involved in fires between 1998 and 2004. While these fires were of undetermined origin, there were indications that the fires started or occurred in the auxiliary engine compartment.

We hold that two out of the six incidents were substantially similar to the instant case,[5] and that the trial court should have concluded that those two incidents were relevant in this case. Specifically, the Black and White Sweeping fire in 2001 and the Fraser fire in 2002 were substantially similar to the instant case, as they involved 1998 GeoVacs; the fires occurred several years after those GeoVacs were placed in service; and there was testimony that the fires were electrical in nature and originated in the auxiliary engine compartment. Also, the fires occurred within a two-year window, beginning with the Black & White Sweeping fire in 2001, the Fraser fire in 2002, the instant case in 2003.[6] The testimony of the experts and other evidence was sufficient to demonstrate that electrical fires originated in the 1998 GeoVac's auxiliary engine compartment after the GeoVacs had been in use for a period of time. Thus, those two incidents are relevant pursuant to MRE 401 and MRE 402. We find that the trial court erred in reaching a contrary conclusion.

To the contrary, the East Chicago, RAVO, and TECO incidents were properly excluded because they were neither substantially similar nor relevant under a so-called "relaxed approach" to this test for notice issues. First, the East Chicago GeoVac fire involved a 1997 model, and the fire occurred in 1998. This incident fails the substantial similarity test because the fire occurred relatively soon after that GeoVac was placed in service. The timing of the fire makes it distinct from the other fires, which occurred several years after the GeoVacs were placed in service. Second, the RAVO incident was different because there was evidence that the auxiliary engine compartment was placed on a different type of vehicle. Finally, the TECO fire occurred one year after the instant case and therefore was irrelevant to any notice issue, and it occurred six years after the East Chicago fire. In viewing all of the circumstances, it would be reasonable to conclude that there was something different about the 1997 model than the 1998 model. Under an abuse of discretion standard, excluding these four incidents (including the Millville fire discussed in footnote six) was a reasonable and principled outcome under the circumstances.

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[4] As it pertains to notice, we held that in products liability cases, "[a]s a general matter, evidence of prior accidents is admissible to show notice of the defect or to show that the defect, in fact, existed." *Gregory v Cincinnati Inc*, 202 Mich App 474, 479; 509 NW2d 809 (1993).

[5] Because of this conclusion, we need not consider plaintiff's argument that the evidence should be considered under a lower threshold test.

[6] The Millville fire occurred in 2004 and therefore had no relevance to the notice aspect of plaintiffs' case.

With respect to the two admissible incidents, and assuming the other incidents were admissible, we nevertheless conclude that the trial court did not abuse its discretion when it excluded these incidents by operation of MRE 403. The trial court found that there was a danger of misleading the jury, as introducing the other incidents would be like presenting minitrials on collateral matters. The documentation supplied by the parties supports the conclusion that allowing plaintiff to attempt to establish the other incidents are substantially similar to the instant fire would allow trial in this matter to devolve into many sub-trials. Such minitrials on collateral matters pose a significant danger of misleading or confusing the jury and are not proper. See *Wischmeyer v Schanz*, 449 Mich 469, 488; 536 NW2d 760 (1995) and *Depue v Sears, Roebuck & Co*, 812 F Supp 750, 753-754 (WD Mich, 1992). Although we may have not ruled as did the trial court were we ruling on a clean slate, that is not our standard of review. *Peña v Ingham County Rd Comm*, 255 Mich App 299, 309; 660 NW2d 351 (2003). We simply conclude that the trial court reached a reasoned and principled outcome when it excluded the evidence of other relevant incidents pursuant to MRE 403 and, therefore, it did not abuse its discretion. *Maldonado, supra* at 388.[7]

We also disagree with plaintiffs' contention that the trial court abused its discretion in failing to hold an evidentiary hearing. *Brown v Loveman*, 260 Mich App 576, 599; 680 NW2d 432 (2004). Generally, an evidentiary hearing is not necessary when there is no dispute of fact but only legal questions at issue before the trial court. See *People v McMillan*, 213 Mich App 134, 142; 539 NW2d 553 (1995). The trial court did not abuse its discretion in not conducting an evidentiary hearing as the trial court was very familiar with the case, having fully reviewed the parties' briefs and the relevant portions of the experts' testimony regarding the other incidents in question. See *Campbell v Sullins*, 257 Mich App 179, 202; 667 NW2d 887 (2003). As a result, the trial court's decision to reject plaintiffs' request for an evidentiary hearing was a reasonable and principled outcome under the circumstances. *Maldonado, supra* at 388.

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[7] Additionally, federal cases provide a wealth of examples of the discretion afforded trial courts in admitting or excluding evidence of other incidents. *Hessen for Use & Benefit of Allstate Ins Co v Jaguar Cars, Inc*, 915 F2d 641, 650 (CA 11, 1990) (no abuse of discretion in admitting evidence of other complaints where the timing and circumstances of the incidents were similar); *Anderson v Whittaker Corp*, 894 F2d 804, 813 (CA 6, 1990) (no abuse of discretion in admitting the evidence, because the other incidents were substantially similar with testimony that the incidents involved the same product model, the same design, the same defect, and the same injury); *Rye v Black & Decker Mfg Co*, 889 F2d 100, 102 (CA 6, 1989) (no abuse of discretion in excluding evidence of prior accidents, where the accidents were not substantially similar, and even if they were, that evidence would be excluded by operation of FRE 403); *Moe v Avions Marcel Dassault-Breguet Aviation*, 727 F2d 917, 935 (CA 10, 1984) (trial court did not err in excluding evidence of other incidents, where such evidence's probative value was outweighed by the danger of unfair prejudice, confusion of issues and misleading the jury, and would constitute a mini-trial within a trial, resulting in undue delay, waste of time, and needless presentation of cumulative evidence).

Affirmed.

/s/ Janet T. Neff
/s/ Peter D. O'Connell
/s/ Christopher M. Murray