STATE OF MICHIGAN

COURT OF APPEALS

RALPH HARDWICK, personal representative of the ESTATE OF BRYCE HARDWICK,

Plaintiff-Appellant,

v

GENERAL MOTORS CORPORATION and JIM FRESARD PONTIAC, INC.,

Defendants-Appellees.

UNPUBLISHED
April 23, 1999

No. 190686
Macomb Circuit Court
LC No. 90-003667 NP

THOMAS E. SNAPKE, personal representative of the ESTATE OF JOAN ELLEN SNAPKE,

Plaintiff-Appellant,

v

GENERAL MOTORS CORPORATION and JIM FRESARD PONTIAC, INC.,

Defendant-Appellees.

No. 191270
Macomb Circuit Court
LC No. 90-002993 NP

Before: Corrigan, C.J., and MacKenzie and Gribbs, JJ.

PER CURIAM.

Plaintiffs, whose decedents died in December 1988 when their allegedly defective 1986 Pontiac Grand Am caught fire, appeal from judgments for defendants entered following a joint jury trial. After this Court initially denied plaintiffs' applications for delayed appeals, the Supreme Court remanded the cases to us for consideration as on leave granted. See *Hardwick v General Motors Corp*, 450 Mich 920; 543 NW2d 313 (1995), and *Snapke v General Motors Corp*, 450 Mich 920; 543 NW2d 314 (1995). We subsequently consolidated the cases, and we now affirm.

Plaintiffs argue that the trial court should have granted a mistrial after one of defendants' attorneys mentioned in his opening statement that the decedents may have used cocaine and may have been acquainted with a cocaine dealer. They argue that (1) defense counsel acted in bad faith by making these comments because there was no proof that the decedents were involved with cocaine, and (2) by allowing counsel to make the comments, the trial court contradicted an earlier ruling it had made on the admissibility of evidence regarding the decedents' use of drugs. We review a denial of a motion for a mistrial for an abuse of discretion. *People v Messenger*, 221 Mich App 171, 175; 561 NW2d 463 (1997).

We disagree that defendants' attorney acted in bad faith by making the challenged comments. The record indicates that a friend of one of the decedents had knowledge of their possible involvement with a drug dealer, and at the time of opening statements, this involvement appeared relevant to defendants' theory that the decedents had been intentionally killed. Reversal is not required merely because the drug evidence was later deemed inadmissible, since counsel was not obligated to anticipate the trial court's later ruling on evidence counsel believed admissible. *In Re Ellis Estate*, 143 Mich App 456, 461; 372 NW2d 592 (1985). That counsel did not act in bad faith is further indicated by the trial court's ruling that defendants could mention the decedents' potential involvement with drugs in their opening statement. In other words, defendants' attorneys knew that the comments were condoned by the trial court and thus did not act improperly in making them. Moreover, the trial court's ruling regarding the comments did not, as plaintiffs argue, contradict an earlier ruling it had made with respect to drug evidence. The earlier ruling indicated only "that no blanket statement regarding [the] decedents' lifestyles would be made in opening statements" and that the trial court wanted to hold special hearings before deciding whether witnesses could testify regarding the decedents' alleged involvement with drugs. The court did not contradict this ruling by allowing defendants to mention in their opening statement that they had a witness who believed that the decedents had been involved with a cocaine dealer. In sum, we conclude that the trial court did not abuse its discretion when it denied plaintiffs' motion for a mistrial based on defendants' opening statement.

Plaintiffs argue that even if the opening statement alone was insufficient to warrant a mistrial, the trial court should nonetheless have granted their later motion for a new trial because other misconduct of defendants' attorneys, when viewed in light of the opening statement, resulted in great prejudice to them. Specifically, they point to three drug references that occurred even though evidence of the decedents' alleged drug use had not been deemed admissible, and they point to six instances where defense counsel referred to the complete police and fire reports, parts of which had been declared inadmissible. Plaintiffs argue that defendants' attorneys purposefully referred to drugs and to the reports in order to make plaintiffs' attorneys look like they were hiding something when they objected to these references. We review alleged attorney misconduct to determine whether the attorney purposefully tried to prejudice the other party and whether prejudice in fact resulted. *Means v Jowa Security Services*, 176 Mich App 466, 475-476; 440 NW2d 23 (1989). Denial of a motion for a new trial is reviewed for an abuse of discretion. *Hamann v Ridge Tool Co*, 213 Mich App 252, 254; 539 NW2d 753 (1995).

We disagree that defendants' attorneys purposefully attempted to prejudice plaintiffs, and we disagree that any significant prejudice resulted from defense counsel's conduct. Two of the three challenged references to drugs did not even evidence improper behavior. First, the question posed to Jeffrey Lasecki – whether he had smoked marijuana during a party on the night of the fire – was a proper attempt to elicit the mental clarity of an eyewitness who admitted drinking that night and who arrived on the scene before the fire had been extinguished. Second, a defense witness' reference to looking for "tetrahydrocannabinol" in the decedents' bodies, even assuming that the jurors knew that this word referred to marijuana, was unresponsive to defense counsel's question, which spoke only to a the reliability of certain tests that had been performed on the decedents' blood and urine. We agree that the third drug reference – defense counsel's asking a witness whether the police had inquired about the decedents' alleged use of drugs – was improper, but we conclude that this question, to which the witness responded that he could not remember, was not particularly prejudicial in light of the lengthy trial, which lasted approximately thirty days and was spread out over fourteen weeks. See *Kewin v Massachusetts Mut Life Ins Co*, 79 Mich App 639, 658; 263 NW2d 258 (1977), rev'd in part on other grounds 409 Mich 401 (1980) (impact of isolated prejudicial statements greatly diminished in light of lengthy trial).

As with the drug references, three of defense counsel's six allegedly prejudicial references to the police and fire reports evidence no impropriety. In two instances, the attorney was merely asking a witness, as a form of impeachment, whether certain relevant information had been included in the police report. In another instance, the attorney was simply ensuring that documents to which a witness was asked to refer were marked for the record. We agree that in the three remaining instances, defense counsel improperly asked for the reports to be admitted or improperly displayed the reports in front of the jury. Each of these incidents, however, was fleeting and isolated, and the trial court issued a cautionary statement in which it told the jury that parts of the reports were inadmissible. The brief references to the police and fire reports simply do not evidence a purposeful attempt to prejudice plaintiffs, and no meaningful prejudice in fact resulted, given the length of the trial and the court's cautionary statement. *Kewin, supra* at 658. Plaintiff Snapke raises other instances of alleged attorney misconduct, which consisted of leading questions, a brief sarcastic remark, and objections made by one of the defense attorneys when only his co-counsel had been authorized to make objections. The record reveals, however, that these were instances of minor misconduct with a negligible effect. The trial court did not abuse its discretion in refusing to grant plaintiffs a new trial on the basis of attorney misconduct.

Next, plaintiffs argue that the verdict was against the great weight of the evidence and that the trial court should have granted them a new trial on this basis. We are to give the trial court great deference in determining whether it erred in concluding that the verdict was not against the great weight of the evidence. *Arrington v Detroit Osteopathic Hospital Corp (On Remand)*, 196 Mich App 544, 560; 493 NW2d 492 (1992). The verdict should have been upheld unless the evidence clearly preponderated in the opposite direction. *Fletcher v Fletcher*, 447 Mich 871, 878; 526 NW2d 889 (1994). We find that the evidence did not clearly preponderate in favor of plaintiffs. Although plaintiffs' expert testified that the fire likely started because of a defect in the flexible fuel lines of the vehicle, defendants' expert testified that this was unlikely because of the burn patterns on the automobile. On the basis of these patterns, two of defendants' witnesses believed that the fire had multiple origins and

was intentionally set. Additionally, defendants presented evidence that the automobile's ignition was turned off when the fire started; if true, this would make unlikely plaintiffs' scenario of an engine spark igniting leaking fuel. Given the conflicting testimony, we conclude that the evidence did not clearly preponderate in favor of either party, and we therefore decline to disrupt the trial court's determination that the verdict was not against the great weight of the evidence.

Plaintiffs argue that defendants' theory of an intentionally started fire was so far-fetched that any reasonable jury would have ruled in plaintiffs' favor. Plaintiffs must keep in mind, however, that they bore the burden of proof at trial, and that even if the jury disbelieved defendants' theory, it may have nonetheless concluded that there was insufficient evidence of negligence on the part of defendants and that operator misconduct was just as likely to have caused the fire. See *Skinner v Square D Co*, 445 Mich 153, 164-165; 516 NW2d 475 (1994) (plaintiff bears the burden of proving that more likely than not, plaintiff's injuries were caused by defendant). Such a conclusion would not have been unfounded, given the entirely circumstantial nature of plaintiffs' case. Thus, even if defendants' theory of the case was indeed unlikely, this would not warrant a reversal of the jury's verdict on the facts of this case.

Finally, plaintiffs claim that the trial court erred by refusing to allow them to question defendants' expert about other fires occurring in Grand Ams. We review a trial court's decision to exclude evidence for an abuse of discretion. *Price v Long Realty, Inc*, 199 Mich App 461, 466; 502 NW2d 337 (1993). An abuse of discretion exists only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification for the ruling. *Gore v Rains & Block*, 189 Mich App 729, 737; 473 NW2d 813 (1991). Evidence of other incidents is admissible to prove the occurrence of a particular condition or event as long as the circumstances surrounding the other incident were the same or substantially similar to the one at issue. *Haglund v Van Dorn Co*, 169 Mich App 524, 528-529; 426 NW2d 690 (1988). Here, the trial court ruled that evidence of the other fires was inadmissible because plaintiffs had failed to establish an adequate foundation for its admission. In light of the "substantial similarity" requirement of *Haglund, supra* at 528-529, we are not persuaded that this ruling was an abuse of discretion, since plaintiffs produced no evidence that the other fires resulted from defects similar to the one alleged in the instant case, i.e., from defects in the flexible fuel lines of the automobiles. Plaintiffs imply that even if evidence of other fires was inadmissible to prove the existence of a defect, they should nevertheless have been allowed to question defendants' expert about the fires in order to impeach him by suggesting that he did not thoroughly investigate these other fires. Given the highly prejudicial nature of the desired questioning, however, we conclude that the refusal to allow it for impeachment was not an abuse of discretion.

Affirmed.

/s/ Maura D. Corrigan,
/s/ Barbara B. MacKenzie
/s/ Roman S. Gribbs