DEVELOPMENTS IN THE EVIDENTIARY RULES APPLICABLE TO PRODUCT LIABILITY CLAIMS: OTHER SIMILAR INCIDENTS

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The following paper addresses two topics of interest to product liability lawyers: other similar incidents and intervening causes.

With a proper showing, other similar incidents are admissible in products liability suits. This paper will discuss the standard courts use in deciding whether to admit evidence of other similar incidents, and what types of evidence may be used in showing other similar incidents.

I. What are "Other Similar Incidents"?

In very general terms, "other similar incidents," called "OSI's", are what the term says they are: they are other instances in which events like the ones at issue in a given lawsuit occurred.

II. Other Similar Incidents are Admissible to Prove Certain Matters.

Under federal and Georgia law, OSI's are admissible in tort cases, including products liability cases.

A. Federal law.

Under the Federal Rules of Evidence, other similar incidents are admissible if they tend to prove or disprove an issue in dispute in the case, as defined by the substantive law. See Fed. R. Evid. 404(b).

Evidence of other incidents is admissible:

* to show that the manufacturer was on inquiry notice of the defect;[1]
* to show the existence of a defect;
* to refute testimony given by a defense witness that a given product was designed without safety hazards;
* to show primary negligence;[2]
* to show the need for punitive damages;
* to show substantive product liability claims;
* to show that another similar result stemmed from the same cause;
* to show the magnitude of the risk created by a particular condition or by particular conduct;
* to show motive or intent;
* to show a lack of safety for intended uses;
* to show the standard of care;
* to show causation;
* to show a defendant's failure to warn the public of the danger by continued marketing of the dangerous product;
* to rebut the manufacturer's contentions, e.g., as to causation.[3]

See Ponder v. Warren Tool Corp., 834 F.2d 1553, 1560 (10th Cir. 1987); Karns v. Emerson Elec. Co., 817 F.2d 1452, 1460 (10th Cir. 1987); Johnson v. Colt Indus. Operating Corp., 797 F.2d 1530, 1533-35 (10th Cir. 1986); Rexrode v. American Laundry Press Co., 674 F.2d 826, 829-31 (10th Cir. 1982); Julander v. Ford Motor Co., 488 F.2d 839, 845-47 (10th Cir. 1973); Hessen v. Jaguar Cars, Inc., 915 F.2d 641, 649-

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[1] See Wheeler v. John Deere Co., 862 F.2d 1404, 1407-08 (10th Cir. 1988).

[2] See Johnson v. Colt Indus. Operating Corp., 797 F.2d 1530, 1533-35 (10th Cir. 1986).

[3] See, e.g., Four Corners Helicopters, Inc. v. Turbomeca, 979 F.2d 1434, 1439 (10th Cir. 1992) (substantially similar incident evidence was offered on the issues of design defect, notice of design defect, duty to warn, negligence, causation, and to refute Defendant's claims).

50 (11th Cir. 1990); Jones v. Otis Elevator Co., 861 F.2d 655, 661-62 (11th Cir. 1988); Worsham v. A.H. Robins Co., 734 F.2d 676, 688-89 (11th Cir. 1984); Ramos v. Liberty Mut. Ins. Co., 615 F.2d 334 (5th Cir. 1980).

B. Georgia Law.

Under Georgia law, other similar incidents relating to product defects are admissible on the same sorts of issues. See, e.g., General Motors Corp. v. Moseley, 213 Ga. App. 875, 447 S.E.2d 302, 306 (1994), citing Mack Trucks, Inc. v. Conkle, 263 Ga. 539, 436 S.E.2d 635 (1993) for the proposition that "[i]n product liability actions, evidence of other incidents involving the product is admissible, and relevant to the issues of notice of a defect and punitive damages"; Monk v. Dial, 212 Ga. App. 362, 441 S.E.2d 857, 859 (1994) (when evidence of prior similar incident tends to show condition or knowledge of condition, evidence is admissible; all that is required is that prior incident be sufficient to attract owner's attention to dangerous condition which resulted in the litigated accident), citing Pembrook Management, Inc. v. Cossaboon, 157 Ga. App. 675, 677, 278 S.E.2d 100 (1981)); Mack Trucks, 436 S.E.2d at 639-40 (Georgia Supreme Court affirmed the admission into evidence of the defendant's reception of "numerous complaints" about defect similar to that at issue, such evidence being relevant to notice and punitive damages); Ford Motor Co. v. Stubblefield, 171 Ga. App. 331, 319 S.E.2d 470, 479 (1984) (evidence of similar incidents involving a prior vehicle model to the one at issue were admissible as to notice and punitive damages, including to the issue of defendant's "continuing negligence in regard to its knowledge of the safety hazard, its failure to warn the public of the danger and its continued marketing of the dangerous product"); Skil Corp. v. Lugsdin, 168 Ga. App. 754, 309 S.E.2d 921 (1983) (evidence of prior similar incidents would be relevant to show both the fact of defect as well as notice of defect); Gunthorpe v. Daniels, 150 Ga. App. 113, 257 S.E.2d

199 (1979) (other similar incidents admissible to prove contemporary knowledge of the defect).

III. The Standard for Admitting Evidence of Other Incidents: "Substantial Similarity."

In determining whether to admit evidence of other similar incidents, courts look at whether the incidents are "substantially similar" to an incident at issue in the present case. The application of the standard varies to some degree depending on the type of evidence offered.

A. The General Standard.

To be relevant and admissible, other incidents must be "substantially similar" to the incident in question. See, e.g., Moseley, 447 S.E.2d at 307; Mack Trucks, 436 S.E.2d at 640. Cf., Anderson v. Whitaker, 894 F.2d 804 (6th Cir. 1990); Mitchell v. Fruehauf, 568 F.2d 1139 (5th Cir. 1978); Jones & Laughlin v. SteelCorp., 348 F.2d 394 (5th Cir. 1965).

Generally, disputes about whether an alleged OSI is similar go to the weight of the OSI evidence, rather than to its admissibility, unless the circumstances surrounding the alleged OSI are "wholly different" from the incident at issue. See Mack Trucks, 436 S.E.2d at 639-40 ("numerous complaints" of cracks in the frame rails of the same type of truck as that at issue properly admitted for issues of notice and punitive damages; Georgia Supreme Court noted with approval that trial court had only excluded "evidence of frame cracks which were caused by circumstances **wholly different** from the one at issue" (emphasis added)). Cf., Platt v. National General Ins. Co., 205 Ga. App. 705, 423 S.E.2d 387, 392 (1992) ("Georgia rules of evidence favor the admissibility of any relevant evidence, no matter how slight its probative value; even evidence of doubtful relevancy or competency should be admitted and its weight left to the jury"); Karns, 817 F.2d at 1460, n. 8; Kehm v. Proctor & Gamble Mfg. Co., 724 F.2d 613, 625-26 (8th Cir. 1983); Bowman v. General Motors Corporation, 64 F.R.D. 62 (E.D.

Pa. 1974) (substantial identity "is a function not only of component parts, but also of engineering principles. We eschew a narrow construction of the notions of similarity and identity").

B. The Relaxed Standard When an Incident Is Offered to Show Notice or Knowledge.

If the other incidents are offered to show notice or knowledge, the required showing of similarity is "relaxed." The standard for admissibility in such a case is whether the incidents would have served to warn the defendant of the "potential defect."

In Stubblefield, the Georgia Court of Appeals affirmed the admissibility of similar incidents involving a prior and different model vehicle; the evidence was tendered to show the same "`failure mode' which occurred in the instant collision, thereby putting Ford on notice of the safety problem." Stubblefield, 319 S.E.2d at 479. The court also affirmed the admissibility of other such evidence which postdated the manufacture of the vehicle to show the "same characteristics of crush and collapse" as in the instant collision, to show "Ford's knowledge of the hazard at a point in time prior to the collision in which Terri Stubblefield was fatally injured," and "to illustrate the dynamics of a typical post-collision fuel-fed fire to substantiate the testimony that the fire in issue was `typical.'" Id. Cf. Weinstein's Evidence Manual ¶ 6.01[06], at 6-13 ("a lack of exact similarity of conditions will not cause exclusion provided the accident was of a kind which should have served to warn the defendant").

C. The Standard for Admitting OSI's from Identical Products.

When OSI's involve the **identical products** at issue in a given lawsuit, courts require less factual similarity between the circumstances of the OSI's and the incident in the lawsuit. Jackson v. Firestone Tire & Rubber Co., 788 F.2d 1070 (5th Cir. 1986); Worsham v. A.H. Robins Co., 734 F.2d 676 (11th Cir. 1984); Mitchell v. Fruehauf Corp., 568 F.2d 1139 (5th Cir. 1978); Hessen v. Jaguar Cars, Inc., 915 F.2d 641 (11th Cir. 1990); Jones v. Otis Elevator Co., 861 F.2d 655 (11th Cir. 1988).

D. The standard when an incident is offered to prove the existence of a defect.

In order to use OSI's to prove the existence of a defect, the proponent of the testimony must show that the incidents occurred in a similar way and were caused by the same alleged defect. Wheeler v. John Deere Co., 862 F.2d 1404, 1408 (10th Cir. 1988). (citing Exum v. General Elec. Co., 819 F.2d 1158, 1162-63 (D.C. Cir. 1987)). "The fact that a prior lawsuit against the defendant involved allegations substantially similar to those in the present case has at least some tendency to show that defendant was on notice concerning possible defects concerning its product." Karns, 817 F.2d at 1460, n. 8 (citing Worsham v. A.H. Robins Co., 734 F.2d 676, 688-89 (11th Cir. 1984) (emphasis supplied).

If the same defect is alleged to have caused the injury in the other incidents and the litigated incident, the incidents are most likely substantially similar, whether offered to show notice of or existence of a defect. "The substantially similar predicate for the proof of similar accidents are defined . . . by the defect . . . at issue." Ponder v. Warren Tool Corporation, 834 F.2d 1553 (10th Cir. 1987). The other incident must be substantially similar, but the alleged defect (not the factual circumstances of the accident) defines what is substantially similar:

> "[P]rior complaints to a defendant concerning an alleged hazardous condition are admissible as being probative of defendant's knowledge". Julander v. Ford, 488 F.2d 839, 846 (10th Cir. 1973).
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> "In determining whether accidents are 'substantially similar' the factors to be considered are those that relate to the particular theory underlying the case". Ponder, supra.
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> "Substantially similarity depends upon the underlying theory of the case." Four Corners Helicopters v. Turbomeca, 979 F.2d 1434 (10th Cir. 1992).

> "The substantially similar predicate for the proof of similar accidents is defined . . . by the defect . . . at issue." Exum v. General Electric, 819 F.2d 1158 (D.C. Cir. 1987).

The proper analysis about what is substantially similar does not depend on an analysis of the facts of prior accidents. For example, in Four Corners Helicopters, a helicopter crash case, evidence was admitted as substantially similar by the trial court, and its admission was affirmed by the Tenth Circuit, even though the substantially similar evidence offered by the plaintiff did not even involve a helicopter crash. Four Corners Helicopters v. Turbomeca, 979 F.2d 1434 (10th Cir. 1992). The case involved a helicopter accident, but the court admitted prior incidents that involved helicopters not in flight, not under power, with different engines, in instances in which no accidents had occurred. Id. The court focused on the fact that the same defect tied the incidents together:

> The problem is the magnitude of the danger of multi-piece rims cannot be proved when the experience with those rims is limited to cases in which an LW ring was put together with a five-degree base. The 'substantially similar' predicate for the proof of similar accidents is defined, again, by the defect (or, as we have also termed it, the product) at issue. If the disputed defect were restricted to the mismatch of these two parts, then the trial court's ruling would have been correct. But if that defect is the danger of all multi-piece parts because of the great risk of poor fit, then some proof of other accidents involving multi-piece rims is admissible on the issue of the magnitude of the danger.

Jackson v. Firestone Tire & Rubber, 788 F.2d 1070 (5th Cir. 1986).

E. OSI's that occurred after the sale of the product in the instant suit also are admissible.

Depending on the use for which they are offered, OSI's may be relevant even if the OSI's occurred after the sale of the product that is the basis of the lawsuit, and after the incident that is the basis of the lawsuit. For example, if the offer of OSI evidence is to prove issues relating to magnitude of the danger, lack of safety for

intended uses, standard of care, causation, and/or entitlement to punitive damages, the OSI's will be relevant even if they occurred after the date of the incident in the present lawsuit. Lohr v. Stanley-Bostitch, Inc., 135 F.R.D. 162, 166 (W.D. Mich. 1991) (OSI's relevant to "the issue of the existence of a defect even if they occurred after the sale of the product in question"; OSI's relevant to issue of dangerousness); Stubblefield, 319 S.E.2d at 479; Exum v. General Electric Co., 819 F.2d 1158, 1162-63 (D.C. Cir. 1987) (evidence of subsequent accident admissible to show dangerousness, even though it could not be used to prove notice since it occurred after the date of plaintiff's accident); Uitts v. General Motors Corp., 58 F.R.D. 450, 453 (E.D. Pa. 1972) (evidence of subsequent accident discoverable on issue of dangerousness); Four Corners Helicopters v. Turbomeca, 979 F.2d 1434 (10th Cir. 1992) (prior substantially similar incidents relevant to the defendant's failure to warn and thus plaintiff's strict liability claim).

IV. What Types of Proof Can Be Made to Show Other Similar Incidents.

OSI's can be proven in several different ways:

(a) **Depositions of fact witnesses.** In Gardner v. Q.H.S., Inc., 448 F.2d 238, 244 (4th Cir. 1971), the court held:

> Where the issue is one of foreseeability, evidence of what has actually been experienced in the same or comparable situations constitutes proof of the greatest probative value. . . . In our view, depositions of other users of the product who had experiences similar or identical to that of [the plaintiff] were clearly admissible to show defendants' knowledge of the harm their product could inflict, provided only that those experiences were brought to the attention of the defendant prior to the incident involved here. . . .

(b) **Expert testimony**, if the testimony has a supporting factual basis. See, e.g., Stubblefield, 319 S.E.2d at 479 (plaintiff's expert testified as to what the other incidents showed).

(c) **Complaints or other lawsuits.** The complaints themselves are admissible. See Monk, 436 S.E.2d at 639-40; Skil Corp., 309 S.E.2d at 922-23; Karns v. Emerson Elec. Co., 817 F.2d 1452 (10th Cir. 1987) (citing Worsham, 734 F.2d at 688-89 (11th Cir. 1984)).

V. How a Court Decides Whether to Admit OSI Testimony.

Generally a court holds a hearing to determine whether the incidents offered are similar enough to be admitted. The hearing does not need to be a "mini-trial." See, e.g., Skil Corp., 309 S.E.2d at 922-23 (affirmed admission of evidence that product manufacturer "had received at least 48 informal complaints or lawsuits" involving same or similar models despite lack of testimony as to the "particular facts, allegations or outcomes of any of the individual incidents reported"; evidence was relevant to plaintiff's entitlement to punitive damages, and "sufficient foundation" was laid to establish relevancy where manufacturer's corporate representative testified as to similarity of models and plaintiff's expert testified that products "did not differ significantly in design or operation").

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