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## NOTES

# THE ADMISSIBILITY OF SIMILAR INCIDENTS IN PRODUCT LIABILITY ACTIONS

### *Hale v. Firestone Tire & Rubber Company*<sup>1</sup>

On October 4, 1977, Larry Hale was struck by an “exploding” wheel rim which separated as he attempted to inflate a flat tire.<sup>2</sup> Hale brought a strict products liability action against Firestone Tire & Rubber Co., the manufacturer of the wheel rim, alleging a defect in the design of the rim.<sup>3</sup>

At the first trial, Hale sought to introduce evidence of similar incidents involving separations of Firestone wheel rims.<sup>4</sup> The Eighth Circuit held that, absent a showing by the proponent of the evidence of a substantial similarity of circumstances between the previous incidents and the present incident, admission of any previous incident was in error.<sup>5</sup> However, in the second appeal, the Eighth Circuit permitted the use of this similar incident evidence to impeach the testimony of Firestone’s expert witness without a showing of substantial similarity of the incidents.<sup>6</sup>

In a products liability action alleging failure to warn or design defect, evidence of other accidents<sup>7</sup> involving the same product can be highly beneficial to its proponent.<sup>8</sup> Plaintiffs use this type of evidence for a variety of reasons. These reasons include demonstration of the defendant’s ability to correct a known defect, a lack of safety for the product’s intended use, the strength or quality of the product, and notice to the defendant of some inherent “problem” with the product.<sup>9</sup>

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1. 820 F.2d 928 (8th Cir. 1987) [hereinafter *Hale II*].

2. *Hale v. Firestone Tire & Rubber Co.*, 756 F.2d 1322, 1327 (8th Cir. 1985). This case, referred to as *Hale I* in the text, was the predecessor to the Note case.

3. *Id.* at 1332.

4. *Id.* at 1334.

5. *Id.* at 1332.

6. *Hale II*, 820 F.2d at 935.

7. The terms “accidents,” “occurrences,” and “incidents,” generically refer to any past allegations or claims of a similar nature to the particular claim at bar.

8. As a practical matter, plaintiffs will be the typical proponents of such evidence. However, defendants may also seek to introduce evidence of a lack of previous incidents. Though the analysis of the two situations is similar, the latter is beyond the scope of this Note.

9. J. WEINSTEIN & M. BERGER, *WEINSTEIN’S EVIDENCE* 401 [10] (1982).

Because of the impact previous incident evidence may have on a jury, courts are hesitant to permit its introduction without limitations.<sup>10</sup> Thus, courts require the proponent of similar incident evidence to lay a substantial foundation before such information may be admitted.<sup>11</sup>

The proponent of similar incident evidence bears the burden of clearing three evidentiary hurdles so as to lay a proper foundation. First, the proponent must show a substantial similarity of circumstances between the offered incident and the case at bar.<sup>12</sup> This fact intensive determination includes three separate inquiries: 1) whether the evidence involves the same make and model as the product at issue,<sup>13</sup> 2) whether the incident to be offered was too remote in time from the case at bar,<sup>14</sup> and 3) whether the previous incident involved the same specific complaint as the case at issue.<sup>15</sup>

10. In a non-jury trial, the judge should hear all relevant information and withhold evidentiary rulings on the grounds of undue prejudice. *Gulf State v. Ecodyne Corp.*, 635 F.2d 517, 519 (5th Cir. 1981).

11. *See, e.g., Hale v. Firestone Tire & Rubber Co.*, 756 F.2d 1322, 1332 (8th Cir. 1985); *Peterson v. Auto Wash Mfg. & Supply Co.*, 676 F.2d 949, 953 (8th Cir. 1982).

12. *See, e.g., Hale v. Firestone Tire & Rubber Co.*, 756 F.2d 1322, 1332 (8th Cir. 1985); *Peterson v. Auto Wash Mfg. & Supply Co.*, 676 F.2d 949, 953 (8th Cir. 1982); *McKinnon v. Skil Corp.*, 638 F.2d 270, 277 (1st Cir. 1981); *Julander v. Ford Motor Co.*, 488 F.2d 839, 846-47 (10th Cir. 1973).

13. *See, e.g., Ramos v. Liberty Mut. Ins. Co.*, 615 F.2d 334, 339 (5th Cir.), *cert. denied*, 449 U.S. 1112 (1980) (plaintiff's expert witness laid sufficient foundation by testifying that offered incident model and model at issue were virtually identical); *Lolie v. Ohio Brass Co.*, 502 F.2d 741, 745 (7th Cir. 1974) (evidence excluded where plaintiff offered no evidence of similar product specifications and quality); *Prashker v. Beech Aircraft Corp.*, 258 F.2d 602, 608 (3d Cir.), *cert. denied*, 358 U.S. 910 (1958) ("The [district] court was justified in putting the plaintiffs to their proof that the five similar Bonanza models involved in a series of accidents were similar."); *see also Kontz v. K-Mart Corp.*, 712 F.2d 1302, 1304 (8th Cir. 1983); *Wojciechowski v. Long-Airdox Div. of Marmon Group, Inc.*, 488 F.2d 1111, 1116 (3d Cir. 1973); *Sturm v. Clark Equip. Co.*, 547 F. Supp. 144, 145 (W.D. Mo. 1982), *aff'd*, 732 F.2d 161 (8th Cir. 1984); *Keller v. International Harvester Corp.*, 648 S.W.2d 584, 589 (Mo. Ct. App. 1983).

14. *See, e.g., Ramos v. Liberty Mut. Ins. Co.*, 615 F.2d 334, 339 (5th Cir.), *cert. denied*, 449 U.S. 1112 (1980). *See also Julander v. Ford Motor Co.*, 488 F.2d 839, 845-46 (10th Cir. 1973) (error to admit evidence of incidents relating to the same model as the product involved in the case at bar when the allegations are made *after* the accident at issue); *Jones & Laughlin Steel Corp. v. Matherne*, 348 F.2d 394, 400 (5th Cir. 1965) ("The requirement that the prior accident not have occurred at too remote a time is a special qualification of the rule requiring similarity of conditions."). Additionally, in a breach of warranty action, the Eighth Circuit permitted evidence of similar glass panel failures, stressing that other buildings containing defendant's panels were constructed at approximately the same time as the plaintiff's building. *R.W. Murray, Co. v. Shatterproof Glass Corp.*, 758 F.2d 266 (8th Cir. 1985).

15. *See, e.g., Quillen v. International Playtex, Inc.* 789 F.2d 1041, 1045 (4th Cir. 1986); *Brooks v. Chrysler Corp.*, 786 F.2d 1191, 1197 (D.C. Cir.), *cert. denied*, 107 S. Ct. 185 (1986); *Gumbs v. International Harvester, Inc.*, 718 F.2d 88, 98 (3d Cir. 1983); *McKinnon v. Skil Corp.*, 638 F.2d 270, 277-78 (1st Cir. 1981); *Wolf v. Procter & Gamble Co.*, 555 F. Supp. 613, 621 (D.N.J. 1982); *Uitts v. General Motors Corp.*,

If these requirements of similarity between the offered evidence and the present case are met, the proponent then must fulfill the standard of relevancy defined in Federal Rule of Evidence 401.<sup>16</sup> To be relevant, the evidence must relate to some element of the proponent's case.<sup>17</sup> Possible elements include: 1) defendant's notice of a defect, 2) the magnitude of the risk involved, 3) the defendant's ability to correct or repair a known defect, 4) a lack of safety for intended uses, 5) the strength of the product, 6) the defendant's standard of care, and 7) causation.<sup>18</sup>

Even if evidence of prior incidents is found to be substantially similar and relevant, its opponent may move to exclude it under Federal Rule of Evidence 403.<sup>19</sup> Faced with this motion, the court must balance the probative value of such evidence against its prejudicial impact.<sup>20</sup> The evidence is more likely to be admissible if coupled with a jury instruction limiting the use of such evidence to the issue of notice to the defendant and not as actual proof of any other element, including design defect.<sup>21</sup>

The Eighth Circuit, in addressing previous incident admissibility, has been anything but consistent in its application of the "sufficient similarity"

411 F. Supp. 1380, 1381 (E.D. Pa. 1974), *aff'd mem.*, 513 F.2d 626 (3d Cir. 1975); *see also* Carlton v. Shelton, 722 F.2d 203, 206 (5th Cir. 1984), *cert. denied*, 467 U.S. 1206 (1984) (admission of evidence of similar deaths at defendant's "fasting facility" was proper where deaths resulted from "virtually identical causes."). *But see* Jackson v. Firestone Tire & Rubber Co., 788 F.2d 1070, 1083 (5th Cir. 1987) ("substantially similar" requirement satisfied by similar defect, not by the specific complaint); *Worsham v. A.H. Robbins Co.* 734 F.2d 676, 686-87 (11th Cir. 1984) ("substantial similarity" inquiry focus upon the type of injury suffered rather than upon the similarity of contacting conditions).

16. "Relevant evidence means 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." FED. R. EVID. 401.

17. *Gumbs v. International Harvester, Inc.*, 718 F.2d 88, 98 (3d Cir. 1983) ("The plaintiff has the burden of establishing sufficient similarity between the accidents that were the subject of the [previous] investigation and his own theory of how his accident occurred. . .").

18. *Ramos v. Liberty Mut. Ins. Co.*, 615 F.2d 334 (5th Cir.), *cert. denied*, 449 U.S. 1112 (1980). *See also* *Kehm v. Procter & Gamble Mfg. Co.*, 724 F.2d 613, 625-26 (8th Cir. 1983); *Farner v. Paccar, Inc.*, 562 F.2d 518, 528 (8th Cir. 1977); *Payne v. A.O. Smith, Corp.*, 99 F.R.D. 534, 537-39, (S.D. Ohio 1983); *Rhodes v. Michelin Tire Corp.*, 542 F. Supp. 60, 62 (E.D. Ky. 1982).

19. "Although relevant, evidence may be excluded if 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." FED. R. EVID. 403.

20. *See* *Brooks v. Chrysler Corp.*, 786 F.2d 1191, 1198 (D.C. Cir.), *cert. denied*, 107 S. Ct. 185 (1986) (evidence that was only "minimally probative" not automatically excluded; probative value must be substantially outweighed by unfair prejudice).

21. *See* *Hendrix v. Raybestos-Manhattan, Inc.*, 776 F.2d 1492, 1498-1502 (11th Cir. 1985); *Mauldin v. Upjohn Co.*, 697 F.2d 644, 648 (5th Cir.), *cert. denied*, 104 S. Ct. 155 (1983).

standard prior to *Hale v. Firestone*,<sup>22</sup> ("Hale I"). For example, in *Farnar v. Paccar*,<sup>23</sup> the Eighth Circuit held that the admission of more than fifty warranty claims concerning the same type of suspension system as on the plaintiff's truck was properly admissible circumstantial evidence of a design defect.<sup>24</sup> The court did not mention the similarity of circumstances between the previous warranty claims and the plaintiff's suspension system claim.

In contrast, the Eighth Circuit in *Peterson v. Auto Wash Manufacturing & Supply Co.*,<sup>25</sup> held that evidence of another accident at the same car wash should be excluded due to a lack of sufficient similarity to the accident in issue.<sup>26</sup> The court refused to permit the evidence simply because it involved the same type of hand-held pressure hose. Rather, the court determined that the factual settings of the two incidents were dissimilar.<sup>27</sup>

Likewise, in *Kontz v. K-Mart Corp.*,<sup>28</sup> where plaintiff was injured by the collapse of a folding lawn chair, the Eighth Circuit affirmed the district court's decision to exclude the results of a Consumer Products Safety Commission study which listed some 8,000 injuries that had occurred involving folding chairs.<sup>29</sup> The court stated the lack of a showing of similarity of circumstances was one reason for excluding the information.<sup>30</sup>

Following *Kontz*, the Eighth Circuit again upheld an exclusion of previous incident evidence on the grounds of a lack of similarity in conditions. In *Thomas v. Chrysler*,<sup>31</sup> the plaintiff was injured when the driver's side door of his Chrysler van opened unexpectedly while the vehicle was moving.<sup>32</sup> He sought to introduce testimony of two other van owners who would have said that the same type incident occurred in their own vans.<sup>33</sup> The Eighth Circuit held that this testimony was properly excluded in that the plaintiff's proof "[d]id not demonstrate a sufficient similarity of the conditions of the vans or the circumstances of the accidents."<sup>34</sup>

The Eighth Circuit's requirement that the plaintiff show similarity of circumstances between the previous incidents and the present case seemed solid after *Peterson*,<sup>35</sup> *Kontz*,<sup>36</sup> and *Thomas*.<sup>37</sup> However, the circuit appeared to

22. 756 F.2d 1322 (8th Cir. 1985).

23. 562 F.2d 517 (8th Cir. 1977).

24. *Id.* at 522-23.

25. 676 F.2d 949 (8th Cir. 1982).

26. *Id.* at 953.

27. *Id.* at 951, 953. The trial court found that plaintiff's accident occurred after plaintiff had rested the hose on the floor of the car wash, while the previous accident involved a hose that jumped out of the replacement meter.

28. 712 F.2d 1302 (8th Cir. 1983).

29. *Id.* at 1304.

30. *Id.*

31. 717 F.2d 1223 (8th Cir. 1983).

32. *Id.* at 1224.

33. *Id.*

34. *Id.* at 1225.

35. *Peterson v. Auto Wash Mfg. & Supply Co.*, 676 F.2d 949 (8th Cir. 1982).

36. *Kontz v. K-Mart Corp.*, 712 F.2d 1302 (8th Cir. 1983).

37. *Thomas v. Chrysler Corp.*, 717 F.2d 1302 (8th Cir. 1983).

back away from this rigorous standard in its next two decisions in the area.

First, in *Kehm v. Procter & Gamble*,<sup>38</sup> the Eighth Circuit upheld the admission of evidence of prior consumer complaints regarding the use of Rely tampons.<sup>39</sup> The court held that “[t]he consumer complaints need not match the exact scientific description of toxic shock syndrome (TSS) in order to show substantial similarity between other consumer’s illnesses and Mrs. Kehm’s illness.”<sup>40</sup> It noted that the defendant had the opportunity to point out dissimilarities between the prior complaints and the plaintiff’s TSS symptoms. The jury was therefore properly allowed to consider and weigh the evidence.<sup>41</sup>

*Kehm* represents a completely different approach in determining the similarity of circumstances. Instead of conducting a factual determination of the attendant circumstances in each incident, *Kehm* focuses the inquiry upon the type of injury suffered. Further, the *Kehm* court did not discuss whether a plaintiff was required to lay a foundation of substantial similarity before admitting prior complaints. Rather, the court shifted the burden to the defendant to rebut the force of the evidence through cross examination.

Finally, in *Roth v. Black & Decker, Inc.*,<sup>42</sup> the Eighth Circuit stated that the admissibility of similar incidents is subject to the wide discretion of the trial court. The decision will not be disturbed absent a showing of a clear and prejudicial abuse of discretion.<sup>43</sup>

In *Hale v. Firestone Tire & Rubber Co.*,<sup>44</sup> plaintiff brought suit against Firestone, the manufacturer of the wheel rim base and side, and against co-defendant Budd Co., the manufacturer of a disc which it attached to the Firestone rim.<sup>45</sup> Firestone manufactured the rim base and side, while co-defendant Budd Co. manufactured a disc which it attached to the Firestone rim/disc unit.<sup>46</sup>

38. 724 F.2d 613 (8th Cir. 1983).

39. *Id.* at 626. In *Kehm*, the survivors of a consumer who had died from toxic shock syndrome (TSS) sought to introduce seven documents and the testimony of one witness which all related to complaints concerning the use of Rely. “Two of the documents [a consumer letter and Procter & Gamble memo summarizing complaints in late 1980] were admitted to show only notice of the Rely-TSS link before this plaintiff became ill. The other five documents and the testimony of Susan Myers [who stated that after using Rely in 1979 she became ill and promptly notified Procter & Gamble] were admitted to show notice, causation, and Rely’s dangerousness.” *Id.* at 625.

40. *Id.* at 625-26.

41. *Id.* at 626.

42. 737 F.2d 779 (8th Cir. 1984).

43. *Id.* at 783.

44. 756 F.2d 1322 (8th Cir. 1985).

45. *Id.* at 1328. The rim in question was a RH5 model which was manufactured in 1956. The unit, when properly assembled with the tire inflated, formed a pressure vessel which mounted on an axle through the disc which was riveted or welded to the rim base. *Id.*

46. *Id.* at 1327-28.

At trial, the district court allowed plaintiffs to offer evidence of previous incidents involving violent separations of RH5 rims. Plaintiffs had compiled a list with names and dates of 210 accidents that had occurred over a twenty-seven year period (1955-1982). The list, which the plaintiffs read into evidence, was compiled from interrogatory answers provided by the defendants.<sup>47</sup> The plaintiffs also read the deposition of Paul Hykes, a former Budd engineer, and a 1969 letter used in that deposition. These discussed three accidents involving RH5 tire rims in which at least eight people died.<sup>48</sup> The plaintiffs further introduced a computer printout of rim accident claims.<sup>49</sup>

The Eighth Circuit held that the district court erred in admitting evidence of the previous incidents and thereby shifting to the defendants the burden of "showing dissimilarity after the evidence was admitted."<sup>50</sup>

The plaintiffs argued that the evidence of other incidents was properly admitted to show a *defect* in the product, in that the product's record showed it had a propensity to explode under certain conditions.<sup>51</sup> The court rejected this argument, stating that such evidence is only admissible when the circumstances of such accidents are substantially similar to the circumstances of the case at bar.<sup>52</sup> The only similarity offered was that the rim had exploded. This was insufficient to show substantial similarity.<sup>53</sup> Because the district court erred in admitting this "compelling" evidence, the Eighth Circuit set aside a jury verdict for the plaintiffs and ordered a new trial.<sup>54</sup>

Upon remand, a four-day pretrial hearing was held in which the plaintiffs attempted to lay a foundation for the 210 excluded accident reports.<sup>55</sup> After the hearing, the parties stipulated that Budd had received reports of approximately sixty (of the 210) incidents as of 1985. Of these sixty-odd accidents, only thirteen were admissible because they were the only ones considered "substantially similar" to the plaintiff's accident and were the only ones known to Budd prior to October 4, 1977 (the date of Larry Hale's accident).<sup>56</sup> The

47. *Id.* at 1332.

48. *Id.*

49. *Id.*

50. *Id.* This holding seems in direct contradiction to *Kehm v. Proctor & Gamble Mfg. Co.*, 724 F.2d 613 (8th Cir. 1983), discussed *supra* notes 38-41 and accompanying text.

51. 756 F.2d at 1332.

52. *Id.*

53. The court stated:

The district court erred in admitting evidence of all RH5 explosive separation accidents and in shifting to Firestone and Budd the burden of showing dissimilarity after the evidence was admitted. Appellees admit that the circumstances of the accidents differ; the only similar circumstance indicated in the record is the explosive separation of the wheel rim. This is an insufficient showing of similarity.

*Id.*

54. *Id.* at 1337. The district court also was reversed on other points of error.

55. *Hale II*, 820 F.2d at 934.

56. *Id.* at 934. Defendant Budd attempted to introduce evidence that it had

magistrate further ruled that these thirteen other incidents could be used to show only that Budd had notice of the allegations and not as proof of any defect in the product.<sup>57</sup>

At trial on remand, the district court permitted plaintiffs' attorney to cross-examine defendant's expert witness regarding the excluded dissimilar incidents, some of which the expert had no knowledge. The plaintiffs claimed that the trial court properly admitted the evidence to question the expert's "qualifications, disprove his theories, and impeach his testimony."<sup>58</sup>

Throughout the lengthy expert testimony,<sup>59</sup> the witness remained unswayed in his defense of the RH5 as a safe design.<sup>60</sup> On appeal, defendant cited only seventeen pages of this cross-examination as improper. Plaintiffs referred only briefly to these other incidents on cross-examination (some of which Dr. Harold was familiar with). Against this background, the Eighth Circuit held that admission of the evidence was "proper for impeachment purposes . . . where this expert delivered vast and comprehensive testimony as to the safety of the RH5 design."<sup>61</sup>

The real meaning of *Hale v. Firestone Tire & Rubber Co.* is difficult to determine. By allowing plaintiffs to impeach opposing experts with evidence of similar incidents, the court has seemingly opened a back-door exception which may swallow the rule requiring a plaintiff to lay a foundation of substantial similarity to admit such evidence. This ruling is a great move away from earlier Eighth Circuit precedents holding such questioning improper.<sup>62</sup> Because *Hale II* is so contrary to previous decisions, its precedential value is questionable. The case's precedential value is further undercut by language used in the opinion<sup>63</sup> which indicates a narrow, fact-intensive decision that may be distinguished easily in the future.

Further, this was the third time the *Hale* case had gone to a jury trial<sup>64</sup> and the Eighth Circuit expressed its displeasure with the amount of time and

knowledge of only six of these thirteen claims, and that it (Budd) was never a defendant in five of those six cases, with the sixth case being dismissed. Additionally, of the five cases where Budd was not a defendant, four had gone to trial and resulted in jury verdicts for Firestone. Budd was precluded from admitting this evidence under FED. R. EVID. 403. *Id.* at 935.

57. *Id.* at 934.

58. *Id.*

59. There were 112 pages of direct testimony and 122 pages of cross-examination. *Id.*

60. Dr. Robert Harold stated: "My opinion is that the RH5 is a safe design. I've analyzed it, I've tested it extensively and I believe it is a safe design." *Id.*

61. *Id.* at 935.

62. See, e.g., *Peterson v. Auto Wash & Supply Co.*, 676 F.2d 949 (8th Cir. 1982) (impermissible to impeach a witness with evidence of a dissimilar accident).

63. The court stated: "This evidence was proper for impeachment purposes *under the facts of this case* where this expert delivered vast and comprehensive testimony as to the safety of the RH5 design." *Hale II*, 820 F.2d at 935 (emphasis added).

64. *Hale I*, 756 F.2d 1322; *Hale II*, 820 F.2d 928. A third trial occurring between *Hale I* and *Hale II* resulted in a hung jury.



energy consumed by the case.<sup>65</sup> This displeasure is even more apparent given that the Eighth Circuit granted a remittitur on the punitive damage award rather than ordering a new trial on the issue of damages.<sup>66</sup> Therefore, the holding may be attributed to the Eighth Circuit's desire to keep *Hale* off its docket in the future.

Nonetheless, if *Hale* represents a new trend in the Eighth Circuit, products liability defendants will face a seemingly no-win choice regarding the use of their expert witnesses. If the defendant chooses not to put the witness on the stand, there is a risk that the jury will not fully understand the technical aspects of the defendant's position. But by subjecting the witness to the type of cross-examination approved of in *Hale* the defendant may undermine its own product's safety record. Without further explanation by the court, the decision for defendants may ultimately hinge upon how many incidents involving the particular product have occurred, and more importantly, of how many the plaintiff is aware.

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65. *Hale II*, 820 F.2d at 936-37.

66. The court reduced the amount of the punitive damage award by one million dollars to a total award of five hundred thousand dollars. The court hoped this would avoid the need for a new trial. *Id.* at 936-37.