SUGGESTED STRATEGIES for ADMISSION of OTHER SIMILAR INCIDENT EVIDENCE

by David G. Wirtes, Jr., and George M. Dent, III

Evidence of other "similar incidents" occurring before or after the incident in question provides compelling evidence of many issues often disputed at trial. Other similar incidents may be admissible: (1) to show the existence of a dangerous condition or a defect(s); (2) to show that the defendant was on notice of the dangerous condition of the thing or place or of the defect(s) that make its product(s) unreasonably dangerous; (3) to show the magnitude of the risk of harm from the danger or defect(s); (4) to show that the risk of harm was foreseeable; (5) to show causation and proximate cause; (6) to show why the defendant's conduct was and is unreasonable; (7) to show the need for adequate warnings; (8) to show defendant's state of mind and indifference to the safety of invitees, licensees, and users or consumers of products; (9) to show that the product(s) in issue do not meet the reasonable expectations of ordinary consumers; (10) to demonstrate why the defendant needs to be punished and why the defendant and other similar defendants need to be deterred from engaging in similar misconduct in the future; (11) to rebut the defendant's contentions about causation and proximate cause; and (12) to refute testimony from the defendant's expert witness(es).

This article suggests strategies for admission of evidence of other similar incidents in the above and other contexts.

I. ALABAMA LAW CONCERNING ADMISSIBILITY OF OTHER SIMILAR INCIDENTS

A. Treatises on Alabama Evidence Summarize the Relevant Principles

There are numerous Alabama cases regarding the admission of evidence of other incidents, some regarding the condition of places and others regarding the condition of things, i.e., products. The commentators treat both groups of cases as relevant in either circumstance.

For example, Dean Gamble, in McElroy's Alabama Evidence, treats cases involving "a place or thing" in a single section discussing the admissibility of evidence of other incidents:

> On an issue of whether a place or thing was safe or dangerous at the time of the accident in question, evidence of the occurrence or nonoccurrence of accidents to others at other times, in the use of such place or thing, is admissible if the condition of the place or thing at such other times was substantially the same as the condition existing at the time of the accident in suit. Such evidence may likewise take the form of near-accidents. Accidents, non-accidents, or near-accidents may be offered under this rule, to prove the condition of the place or thing even if arising subsequent to the accident in question. The key to admissibility lies in whether the condition of the place or thing is material or of consequence in the litigation and whether the offered evidence is relevant to show such condition.

Charles W. Gamble, McElroy's Alabama Evidence, ' 83.01(1) (5th Ed. 1996) (footnotes omitted). The Supreme Court of Alabama quoted this passage in General Motors Corp. v. Van Marter, 447 So.2d 1291 (Ala. 1984), a product liability action, approving the statement of the rule as applying equally to "a place or thing":

> "On an issue of whether a place or thing was safe or dangerous at the time of the accident in question, evidence of the occurrence or nonoccurrence of accidents to others at other times, in the use of such place or thing, is admissible if the condition of the place or thing at such other times was substantially the same as the condition existing at the time of the accident in suit." (Footnote omitted.)

C. Gamble, McElroy's Alabama Evidence ' 83.01 (3rd ed. 1977); see also Southern Ry. Co. v. Lefan, 195 Ala. 295, 70 So. 249 (1915) [evidence of other experiences with defective switch or track properly admitted]. Each ruling under this standard must be considered on a casebycase basis. That being the case, admissibility of such evidence is within the trial court's discretion. Birmingham Electric Co. v. Woodward, 33 Ala. App. 526, 35 So. 2d 369 (1948) [evidence of defective trolley doors on different model trolley properly admitted] ....

Id., 447 So.2d at 1293 (holding that evidence of fire in 1980 Buick was properly admitted to prove cause of fire in plaintiff's 1978 Oldsmobile).

Another treatise concerning Alabama evidence discusses the various grounds on which evidence of other incidents involving a place or thing is admissible:

> Evidence of other accidents or events which occurred under substantially similar conditions and circumstances may, in the discretion of the trial court, be admissible for a variety of purposes. First, evidence of other accidents or events involving the same or a similar place or thing may be admitted to show the existence of a particular defect or condition or to show that an injury was caused by a particular defect or condition. For such evidence to be admissible, the place or thing involved must have been in substantially the same condition on the other occasions as on the occasion in question, or the defect must have occurred under substantially similar conditions of use. Second, evidence of other accidents is often admitted to show the magnitude of the danger involved.[FN9] Third, evidence of similar accidents or events may be admissible to prove that a defendant knew or should have known of a particular danger. Here, the other happening must have occurred before the injury sued for and must not be too remote in time, and the conditions and circumstances under which it occurred must have been substantially the same as in the present case.

William A. Schroeder and Jerome A. Hoffman, Alabama Evidence (3d ed. current through Oct. 2009), ' 4:17.

B. City of Birmingham v. Levens Establishes Important Propositions on the Admissibility of Other-Incident Evidence

Footnote 9 in the passage just quoted, regarding evidence to show the magnitude of the danger involved, cites the early Alabama case of City of Birmingham v. Levens, 241 Ala. 47, 200 So. 888, 889-90 (1941), which cites earlier cases and establishes several important legal principles that often are relevant and persuasive in these situations:

1. Evidence of Other Incidents to Show angerousness

First, Levens establishes that evidence of other accidents and near accidents is admissible to show the dangerousness of the place (or the thing). Levens tripped on a piece of angle iron protruding from the sidewalk as she exited her car. 241 Ala. at 50, 200 So. at 889. Three witnesses who operated nearby businesses were allowed to testify that they had seen others trip on the obstruction, two of them testifying that they themselves had tripped. Ibid. The Court succinctly stated the two purposes for which such evidence is admissible:

> (1) That such evidence tends to show that the location was not reasonably safe for pedestrians in the exercise of due care, not knowing of its existence and not charged with a special duty to expect or look for something of the sort. (2) That it is a circumstance material to show that the city had notice of the defect and neglected to remove it as it should have done in the exercise of due diligence.

241 Ala. at 50, 200 So. at 889-90.

2. Evidence is Admissible Even if Other Incidents Caused Less Injury

The Levens Court addressed the lack of "controlling importance" of the fact that others affected by the defect were not injured as severely as the plaintiff:

> [T]he fact that the evidence does not show that any of the persons, who stumbled on the obstruction fell, should not be of controlling importance. For the fact of stumbling on such an obstruction without falling may have been due to the agility of the person rather than reasonable safety at the location. So that on this theory we will not give such importance to that circumstance.

249 Ala. at 50, 200 So. at 890.

3. Substantial Similarity is Not a Matter of "Exactitude"

In its discussion of an earlier case, Levens establishes that "the matter of similarity of conditions was held not to be one of exactitude, either as to time or circumstances, and that the similarity of conditions may be inferred from the circumstances." Levens, 241 Ala. at 50-51, citing Southern Ry. Co. v. Lefan, 195 Ala. 295, 70 So. 249 (1915).

The Alabama Court of Civil Appeals similarly relied in 1980 on Southern Ry. v. Lefan: "To allow proof of an occurrence similar to that claimed to have caused an injury, substantially similar conditions must be shown, but it is not necessary that there be direct proof of the similarity." M. C. West, Inc. v. Battaglia, 386 So. 2d 443, 448 (Ala. Civ. App.) (citing Lefan and affirming admission of evidence of two other incidents over a 7-year period), cert. den., 386 So. 2d 450 (Ala. 1980). GM v. Van Marter, quoted above, also cites Lefan.

4. A Defendant's Dispute as to angerousness Renders the Evidence Admissible

The Levens Court held that a defendant's disputing dangerousness is a basis upon which evidence of other incidents is admissible. First, it noted City of Birmingham v. McKinnon, 200

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Ala. 111, 75 So. 487 (1917), as holding "that such evidence was admissible when experiences of the kind were an aid on a disputed issue of whether the location was dangerous, and when evidence of the experience of others aided in the solution of the issue." Levens, 241 Ala. at 51, 200 So. at 890. After discussing several such cases, the Levens Court stated the test for admissibility as follows:

> There seems to be unanimity of opinion at all events that when the issue contested in the case relates to the inherent dangerous character of the place, especially when it is not obviously dangerous to a person going over that particular location in the exercise of such care as the law imposes on him, it is competent to prove either that other persons were, or that no one else was, caused to sustain an accident under similar conditions at that location. See 45 Corpus Juris 1246; District of Columbia v. Armes, 107 U.S. 519, 2 S.Ct. 840, 27 L.Ed. 618.

Levens, 241 Ala. at 51, 200 So. at 890.

5. If the Danger is Not Obvious, Evidence of Multiple Other Incidents Is Admissible Even if Cumulative

Another important point established in Levens is that where the danger is obvious, evidence of other incidents may have less probative value, but where the danger is not obvious, the evidence is material on the issue of dangerousness:

> [W]here the danger is not so obvious or pronounced[, its] reasonable safety may be then illustrated by the experiences of other people at the location under similar conditions.
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> ....
>
> ... If not so certainly dangerous, we cannot say that any legal evidence which tends to show its dangerous condition is erroneously admitted, however cumulative it may be. We have reached the conclusion that no reversible error is here shown.

241 Ala. at 51, 200 So. at 890-91.

6. Evidence of Other Incidents is Admissible to Prove Notice to the Defendant

Noting that "[i]f evidence is relevant for one purpose, its admission is not error," 241 Ala. at 51, 200 So. at 891, the Levens Court did not dwell on the issue of notice. It did however, hold that the evidence of other incidents was admissible for this purpose: "The length of time that this condition existed in the sidewalk, its nature, and evidence that it was created in removing a traffic sign were sufficient to justify an inference of notice to the city, and negligence in not causing its removal." Ibid.

C. Recent Alabama Cases Applying The Levens Principles

1. Other Incidents as Proof of Defect and Causation

a. Product Liability Actions

In the recent Ex parte Cooper Tire & Rubber Co., 987 So. 2d 1090 (Ala. 2007), the Court affirmed most of an order requiring production of evidence of similar tire failures. Part of the circuit court's reasoning, approved by the Supreme Court, was that "In a product liability action such as this, the primary evidence of a defect is the fact that other people exposed to the same defect suffered injury. The greater the number of such incidents, the greater the likelihood that the defect, in fact, exists rather than some anecdotal explanation." 987 So. 2d at 1098 (quoting the circuit court's order).

General Motors Corp. v. Johnston, 592 So. 2d 1054 (Ala. 1992), was a wrongful death case based on an alleged defect in a GM truck. The Alabama Supreme Court found that the trial court properly admitted 251 GM customer reports regarding stalling problems in other vehicles with same engine (but not necessarily the same model vehicle) as that made the subject of the case, in order to prove defect.

In General Motors Corp. v. Van Marter, supra, the Court affirmed the admission into evidence of a fire in a 1980 Buick Regal "to prove a wiring defect or an unreasonably dangerous condition within the Van Marters' automobile," a 1978 Oldsmobile. 447 So.2d at 1292. GM contended that the two vehicles were "so substantially dissimilar as to preclude admission of evidence of a defect in one model in order to prove a defect in the other." 447 So. 2d at 1293. The Court rejected this argument, holding that the plaintiff's expert testimony that "the power accessory system in each [was] 'basically the same'" was sufficient to support the admission of the evidence, and that even though "the distinguishing features of each vehicle were brought out on cross-examination, [plaintiff's expert] considered these differences to be of no significant import." Ibid.

b. Premises Liability Actions

Kmart Corp. v. Peak, 757 So. 2d 1138 (Ala. 1999), was a premises liability action where a customer was physically injured by an automatic door. The circuit court admitted evidence of two other incidents involving the automatic door B one from before plaintiff's injury and one from after plaintiff's injury. The Alabama Supreme Court affirmed the trial court's admission of evidence of these other incidents.

Burlington Northern Railroad Co. v. Whitt, 575 So. 2d 1011 (Ala. 1990) was a wrongful death action involving a collision at a railroad grade crossing between plaintiff's vehicle and a train.

The trial court admitted evidence of both prior and subsequent accidents at the same site to show the dangerousness of the crossing.

2. Admission of Numerous Prior Events to Show Wantonness

Shiv-Ram, Inc. v. McCaleb, 892 So.2d 299 (Ala. 2003), holds that clear and convincing evidence of wantonness was presented in the failure of the defendants to conduct even a minimal inspection before purchasing the motel where the plaintiff was injured a day later by a protruding metal bedframe. Monica Smith, a management employee who worked for the motel before and after the transfer to Shiv-Ram, testified about prior incidents. The Supreme Court quoted the trial court's paraphrase of her testimony, as part of the Court's affirmance of a substantial punitive-damages verdict against Shiv-Ram:

> Prior to becoming an employee of Shiv-Ram, Smith was aware of a problem with metal bed frames protruding from the motel beds. Members of the housekeeping and maintenance staff told Smith about the problem after they, similar to Mrs. McCaleb, hit their ankles while walking alongside the beds. Smith was also aware of former motel guests who had been injured by the protruding metal in a manner exactly the same as Mrs. McCaleb. Some of the injured guests required emergency medical attention. Some of these incidents were documented on motel incident reports kept on file and on the premises.

892 So.2d at 307-08. Smith testified that no one from Shiv-Ram spoke with her before the transfer. Id. at 308. The Court held that this evidence, coupled with Shiv-Ram's failure to learn of the prior incidents through even a minimal inspection or review, as its purchase contract gave it the right to do, constituted clear and convincing evidence of wantonness.

In Harco Drugs, Inc. v. Holloway, 669 So. 2d 878 (Ala. 1995), the Court affirmed a punitive damages award based on an allegation that the defendant pharmacy wantonly dispensed the wrong medication to a cancer patient. The circuit court allowed in evidence 233 incident reports during the three years preceding the incident at issue, reasoning that this evidence was admissible to show wantonness, as well as the defendant's failure to initiate institutional controls.

Sears Roebuck & Co. v. Harris, 630 So. 2d 1018 (Ala. 1993), was a wrongful death action based on carbon monoxide poisoning caused by connecting a Sears Kenmore II gas water heater to an LP gas source. The Supreme Court found that the trial court properly allowed plaintiffs to admit evidence of other similar incidents in order to prove wantonness.

3. Admission to Show Notice

Both Harco Drugs v. Holloway and Sears Roebuck & Co. v. Harris affirm the admission of evidence of prior similar incidents to show notice. In Harco Drugs, the Court affirmed the admission into evidence of 233 incident reports, "the vast majority of [which] indicated that Harco employees had committed errors in filling prescriptions," together with evidence of "complaints filed with the State Board of Pharmacy and the evidence of lawsuits alleging that Harco employees had misfilled prescriptions," as being "relevant to show Harco's knowledge of problems within its pharmacies." 669 So. 2d at 881. The dissent in Harco shows that many of the incidents were highly dissimilar from the incident at issue, a pharmacist misreading a physician's prescription. Id. at 882-84 (Almon, J., dissenting). In Sears, one issue was "[w]hether the trial court erred to reversal in allowing testimony of similar accidents to prove notice of the risk of harm caused by defects in the water heater." 630 So. 2d at 1022. The Court found the objection at trial insufficient to preserve the issue, but added: "Moreover, even if in the circumstances of this case this testimony [by a particular witness about other incidents] was erroneously admitted without a proper predicate, the error would have been harmless, in light of the large amount of evidence introduced by the plaintiffs to prove notice and foreseeability." 630 So. 2d at 1031 (emphasis added). These cases support admission of evidence to show notice without any exacting proof of "substantial similarity."

Rule 801(c), Ala. R. Evid., defines "hearsay" as "a statement ... offered in evidence to prove the truth of the matter asserted." Evidence offered to show the state of mind of the hearer, such as notice or knowledge, is by definition not hearsay. "Statements made to a product defendant have been admitted to show that the defendant knew that the product was defective or contained defective materials." Charles W. Gamble and Robert J. Goodwin, McElroy's Alabama Evidence, 242.01(1)(c)(4) (6th ed. 2009). The footnote to this sentence in McElroy's reads:

> Piper Aircraft Corp. v. Evans, 424 So. 2d 586 (ala. 1982) (government reports admitted to show state of manufacturer's knowledge with regard to alleged defective product). See Mead Coated Bd., Inc. v. Dempsey, 644 So. 2d 872 (Ala. 1994) (OSHA regulations admitted to show knowledge of defendant as to warrant wantonness for punitive damages); Benford v. Richards Medical Co., 792 F.2d 1537 (11th Cir. 1986) (consultant's statements cautioning product defendant not to use certain material in hip prosthesis).

McElroy's ' 242.01(1)(c)(4), n. 3. Again, these authorities show that

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an offer of other-incident evidence to show notice is not subject to an objection that the truth of the matters asserted in the statements cannot now be proved. Multiple complaints show notice of a problem. If the defendant contends that some of the complaints were groundless or irrelevant, that is a matter for weight of the evidence and cross-examination, not a matter of admissibility.

4. Impeachment

In Stauffer Chemical Co. v. Buckalew, 456 So. 2d 778 (Ala. 1984), the Court upheld, under the impeachment exception of the Asubsequent remedial measure@ rule, the admission of a report of an inspection conducted one week after the plaintiff's injury.[1] The Court noted that AFederal Rule of Evidence 407 permits evidence of subsequent remedial measures for the purpose of impeachment, ... and that under the federal rules, this exception has been applied quite liberally.@ Stauffer, at 782 (citations omitted). Of course, Alabama has now adopted, without change, F.R.Ev. 407 as Ala.R.Ev. 407, so the federal cases cited in Stauffer as applying the impeachment exception liberally should now apply. See, e.g., Warehouse Home Furnishing Distributors, Inc. v. Whitson, 709 So. 2d 1144 (Ala. 1997) (Federal cases construing federal rules that Alabama has adopted are persuasive authority for construction of the Alabama rule).

In Stauffer, Plaintiff was injured on a ladder supplied by the premises owner, Stauffer Chemical Company. Stauffer was aware that corrosive chemicals in its plant caused damage to the ladders it had on hand, so it instituted a program of monthly ladder inspections. One of the ladder inspectors gave testimony tending to show that they carefully conducted their inspections. The reports before and after the plaintiff's injury were admitted to impeach this evidence, and the Supreme Court held that the post-accident report was Aproperly admitted@ over Stauffer's Asubsequent remedial measure@ objection:

> The Buckalews called Robert Gardner as an adverse witness. He testified that both he and Nathanial Lucius were "safety mechanics" employed by Stauffer to conduct, among other things, monthly ladder inspections. On cross examination, he testified concerning ladder inspections conducted prior to the date of Buckalew's injury, and stated that "some months seems like all of them [ladders] will be bad," and that on many occasions "half" of the ladders inspected were bad. In effect, his testimony was that he and Lucius had carefully conducted inspections prior to Buckalew's injury. At this point, the February 28th report was offered and introduced, along with prior inspection reports. Those reports clearly showed that at no time were all, or even half, of the ladders inspected found to be bad. The reports not only contradicted Gardner's testimony, thereby impeaching his credibility as a witness, but also impeached Stauffer's claim that its ladder inspection program, prior to Buckalew's injury, was conducted in a reasonable manner. Therefore, the report was properly admitted for these purposes.

Stauffer, 486 So. 2d at 782 (emphasis added; citations omitted). Significantly, the trial court had denied a motion in limine, and the plaintiff had referred to the post-accident report in their opening statement. Id., 456 So. 2d at 781. The Court commented that the report was admissible to impeach AStauffer's claim that its ladder inspection program, prior to Buckalew's injury, was conducted in a reasonable manner.@ Because the report was relevant to rebut the defense offered by Stauffer, it was admissible because it Aimpeached Stauffer's claim@ (i.e., its defense) that it conducted its ladder inspection program in a reasonable manner.

In Southern Energy Homes, Inc. v. Washington, 774 So. 2d 505 (2000), the Court held that the plaintiff was properly allowed to question the representative of the defendant manufacturer to impeach his testimony "that Southern did not let any customer complaints go unanswered." Id. at 516.

> In response, Washington questioned the representative about documents, filed with the Alabama Manufactured Housing Commission, that contained allegations from 113 other homeowners that Southern had not responded to their complaints. Southern now argues that this questioning was unduly prejudicial. All impeachment evidence is prejudicial to some extent. It is only when the probative value of the impeachment evidence is substantially outweighed by its prejudicial impact that it should be excluded. See Rule 403, Ala. R. Evid.

Id. at 516 (emphasis in original).

In Wilson v. Gray, 505 So. 2d 385 (Ala. 1987), the Court affirmed the admission into evidence of forty-two judgments against Wilson, who had sued the Grays for an alleged unpaid balance "due on a 1977 contract for the construction by Wilson of the Grays' residence." Id. at 386. The Court quoted and affirmed the trial court's order, which included the following:

> "While not admissible to contradict Wilson's statement elicited on cross-examination that he was a responsible contractor, the forty- two judgments are admissible to contradict Wilson's statement on direct examination that he was forced out of business because of the Grays' failure to pay him under their contract. ...
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> "The evidence that forty-two different persons or firms found it necessary to file suit against Wilson and obtain judgments against him for unpaid services and materials provided Wilson over a period of time beginning in 1968 and

> extending past the date of Wilson's transaction with the Grays is inconsistent with and contradicts Wilson's testimony that he was forced out of business because of his transaction with the Grays. The evidence is therefore admissible on that basis."

505 So. 2d at 387 (quoting trial court's order; emphasis added). The Supreme Court affirmed, holding that the evidence of the forty two judgments "was admissible for the purpose of contradicting the substantive evidence offered by Wilson to prove his allegation that the Grays alleged breach of the construction contract caused him to go out of business." Id. at 387.

In Bracy v. Sippial Electric Co., Inc., 379 So. 2d 582 (Ala. 1980), the Court affirmed the admission into evidence of judgments, executions, and liens as impeachment of the defendant, who had testified that his failure to pay the plaintiff was not because he was out of money and had denied knowledge of previous judgments and executions against him:

> On cross-examination, [defendant] Bracy was asked whether the reason he had not paid [plaintiff] Sippial was because he was broke and out of money. He answered negatively. In addition, Bracy had denied knowledge of previous judgments and executions against him. Sippial then introduced, over Bracy's objection, evidence that a Robert Ward had filed suit against Bracy in order to get paid for work he performed pursuant to a contract with Bracy; that there were numerous liens filed against Bracy; and, that the Sheriff's Department had six outstanding executions against Bracy.

Bracy contends that all of this evidence was inadmissible. However, once Bracy testified, he made himself subject to impeachment by Sippial by the introduction of evidence of conduct contradictory to his testimony, and by the introduction of evidence as to his general character.

379 So. 2d at 584-85.

II CONCLUSION

Other-incident evidence is a powerful and persuasive tool for proof of many contested issues at trial. Investigation and discovery should focus on unearthing all possible other incidents. Our Supreme Court has consistently and recently reaffirmed their discoverability and their admissibility.

1 A defendant's activities preceding an event are not "subsequent remedial measures." "When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event." Rule 407, Ala. R. Evid. (emphasis added).

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