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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

TERI SEE and DARREL SEE, husbandm and wife, Plaintiffs, v. REMINGTON ARMS COMPANY, INC., A Delaware corporation, Defendant.	No. 81-886-LE MOTION TO EXCLUDE EVIDENCE

Defendant in the above-captioned matter moves the court for an order preventing the presentation at the time of trial by the plaintiff of other incidences involving Remington rifles.

The evidence should be excluded on three grounds.

First, such evidence would be in the form of hearsay statements made by declarents whose interests were adverse to those of the defendant.

Second, evidence of other incidents is not probative of the condition or reliability of design of the gun involved in this case. Further, the evidence should not be allowed to establish

the defendant's state of knowledge, since that issue is not of consequence to the determination of this suit.

Third, even should the court find the offered evidence to be relevant, it should be excluded as unfairly prejudicial to the defendant because it would suggest to the trier of fact an improper basis upon which to decide this case.

Fourth, the court should exclude the proposed evidence on the grounds that it will open collateral issues and compel the defendant to fairly meet the prejudice of the evidence by lengthy rebuttal.

Since the proposed evidence has little or no probative value, but possesses the danger of hearsay, prejudice, delay and confusion, it should be excluded.

ARGUMENT

1. The Proposed Evidence is Hearsay.

Hearsay evidence is excluded by Federal Rule of Evidence 802. The Federal Rules define hearsay as follows:

> "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FRE 801(c).

Evidence of the 49 other incidents involving Remington Rifles constitutes hearsay since the evidence consists of out of court statements made by declarants with personal interests adverse to those of the defendant herein. Further, these statements would be offered for the truth of the matter asserted: that the Remington 700 is defectively designed. In products liability

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cases, courts have consistently found this type of evidence to be inadmissible as hearsay. *See Melville v. American Home Assurance Co.*, 584 F.2d 1306, 1315 (3d Cir. 1978); *John McShain, Inc. v. Cessna Aircraft Co.*, 563 F.2d 632, 636 (3d Cir. 1977); *Uitts v. General Motors Corp.*, 411 F. Supp. 1380, 1381 (E.D. Pa. 1974), *aff'd* 513 F.2d 626 (3d Cir. 1975).

This hearsay evidence should not be made admissible by an allegation that it would prove notice or knowledge on the part of the defendant. As discussed below, evidence on that point is not relevant to this case.

2. The Proposed Evidence is Irrelevant: It Lacks Probative Value on any Material Issue.

A. Standard of Probative Value.

Only relevant evidence is admissible in this court. FRE 402. Relevancy is defined in the immediately preceding rule.

> "'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." FRE 401.

The Advisory Committee Note to Rule 401 makes clear that the relevancy of an item of evidence hinges on the contents of the substantive law which governs the case; relevancy "exists only as a relation between an item of evidence and a matter properly provable in the case." The substantive law of Oregon governs this diversity action. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 74-7, 58

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S. Ct. 817, 82 L. Ed. 1188 (1938); *Forsyth v. Cessna Aircraft Co.*, 520 F.2d 608 (9th Cir. 1975).

The trial court enjoys substantial discretion when determining whether a given item of evidence has probative value on a material issue. *United States v. Brannon*, 616 F.2d 413, 418 (9th Cir. 1980); *Hill v. Rolleri*, 615 F.2d 886, 891 (9th Cir. 1980).

When a party offers evidence of "similar incidents", as the plaintiff does in the instant case, the trial court receives general guidance from Federal Rule 404(b), though the court retains its discretion.

> "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." FRE 404(b).

Thus, relevancy should be determined in the court's discretion, by reference to the materiality of the issue sought to be proven and the probative value of the offered evidence on that issue.

B. The Offered Evidence is not Probative on Any Material Issue.

Conceivably, the plaintiff offers this evidence of other incidents involving Remington Rifles to establish two points: the

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rifle involved in this case was defective or designed defectively; or Remington had notice of a defect in this model of rifle. The evidence should be found irrelevant on both points.

Evidence of other incidents does not make it more probable that the particular rifle in this case was defective or designed defectively. Before evidence of other incidents is probative of this point, the plaintiff must show that the other incidents occurred under circumstances very similar to those involved in this case. The age, the care taken, the number of uses, the expertise of the user, and many other factors contribute to the performance of a rifle. Only by showing that the 49 incidents occurred in a similar confluence of factors can the plaintiff establish the value of the offered evidence. When the plaintiff attempts use of this evidence to show a defect in a product, "[t]he requirement of similarity of conditions is probably at its strictest * * *." McCormick, Law of Evidence (1972) § 200.

Federal appellate courts have consistently held that "other incident" evidence lacks probative value in the absence of a showing of highly similar circumstances. In the leading products case of *Prashker v. Beech Aircraft Corp.*, 258 F.2d 602 (3d Cir.) *cert. denied* 358 U.S. 910, 79 S. Ct. 236, 3 L. Ed. 2d 230 (1958), the Third Circuit held inadmissible 45 reports of other accidents involving the defendant's aircraft. The panel noted that many factors can cause accidents and that admitting this evidence to show defect or causation would be tantamount to

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holding the plane responsible for adverse weather and "the factor of *human fallibility known inevitably to occur* in such circumstances * * *." *Id.* at 258 F.2d 608-9 [emphasis added].

More recent cases have also refused admission of "other incident" evidence. Of particular note is *McKinnon v. Skil Corp.*, 638 F.2d 270 (3d Cir. 1981). The appellate panel upheld the exclusion of the defendant's answers to interrogatories which identified six other complaints it had received from power saw customers. The panel reasoned:

> "Evidence of prior accidents is admissible on the first four issues [knowledge, defect, causation and negligent design] only if the proponent of the evidence shows that the accidents occurred under circumstances substantially similar to those at issue in the case at bar." *Id.* at 638 F.2d 277.

The appellate panel went further -- *reversing a trial court ruling* which had admitted evidence of other accidents -- in *Julander v. Ford Motor Co.*, 488 F.2d 839 (10th Cir. 1973). The disputed exhibit consisted of seven complaints filed against the defendant, all of which alleged steering failures in Ford Broncos. This was also the gravaman of the case under consideration. The panel held squarely that admission of this evidence was error.

> "Counsel also suggests that exhibit 32 is itself probative evidence of negligent design on the part of Ford in its design of the 1968 Bronco. Evidence of 'other accidents' is sometimes admissible to prove primary negligence, but such evidence should be carefully examined before being received to the end that the circumstances of the 'other accidents' bear similarity to the circumstances surrounding the accident which is the subject matter on trial. Such evidence in the instant case

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is singularly lacking." *Id.* at 488 F.2d 846-7.

These cases establish the proposition that a plaintiff cannot simply offer evidence that similar occurrences have taken place in the hope of persuading the trier of fact that a product was defective or dangerous. Especially where age, maintenance and "human fallibility" are involved, the plaintiff has been required to show a strong identity of circumstances; absent that showing, the offered evidence lacks probative value on this issue.

Nor is the offered evidence relevant on an issue of notice. The evidence is not probative of a fact "that is of consequence." FRE 401. The state of mind of this defendant, and the state of its knowledge of other complaints, is not of consequence to the determination of this suit. The substantive Oregon law is clear: notice or knowledge is irrelevant in a strict liability products case. The Oregon Supreme Court has *defined* this cause of action *in terms of presumed or constructive knowledge*.

> "A test for unreasonable danger is therefor vital. A dangerously defective article would be one which a reasonable person would not put into the stream of commerce *if he had knowledge of its harmful character*. The test, therefor, is whether the seller would be negligent if he sold the article *knowing of the risk involved*. Strict liability imposes what amounts to constructive knowledge of the condition of the product." *Phillips v. Kimwood Machine Co.*, 269 Or. 485, 492, 525 P.2d 1033 (1974) [emphasis added].

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The Oregon Supreme Court reached this conclusion after having drawn a clear distinction between products liability cases and negligence actions:

> "* * * it is generally recognized that *the basic difference* between negligence on the one hand and strict liability for a design defect on the other is that *in strict liability* we are talking about the condition (dangerousness) of an article which is designed in a particular way, while in negligence we are talking about the reasonableness of the manufacturer's actions in designing and selling the article as he did * * * the law *assumes he [the manufacturer] has knowledge* of the article's dangerous propensity * * *." *Roach v. Kononen, Ford Motor Co.*, 269 Or. 457, 465, 525 P.2d 125 (1974) [emphasis added].

The Oregon Supreme Court has consistently cited these two cases and quoted from them, establishing and applying the principle that a defendant in a products liability case is presumed to be on notice of the dangers of his product. *See Baccelleri v. Hyster Co.*, 287 Or. 3, 5-6, 597 P.2d 351 (1979); *Newman v. Utility Trailer & Equipment Co., Inc.*, 278 Or. 395, 397-9, 564 P.2d 674 *reh. den.* (1977); *Johnson v. Clark Equipment Co.*, 274 Or. 403, 416-7, 547 P.2d 132 (1976).

The offered evidence, if intended to show the defendant's state of mind or knowledge, lacks relevancy. Plaintiffs have not pled an intentional tort nor do they pray for punitive damages.

The offered evidence is not relevant either to show defect or to show notice.

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3. The Proposed Evidence is Unfairly Prejudicial.

The Federal Rules of Evidence make clear that evidence, even evidence which may possess some probative value, should be excluded nonetheless "if its probative value is substantially outweighed by the danger of unfair prejudice * * *." FRE 403. The Advisory Committee stressed the importance of this rule in its definition of unfair prejudice:

> "'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."

The rule, in practice, calls upon the trial court to weigh the probative value of evidence of prior incidents against its obvious prejudicial impact in products liability cases: the thought of different individuals receiving injuries from incidents involving the products of a large corporation. The substantive law requires more than just an incident or injury; the Oregon Supreme Court has made clear that the product must be proven "dangerously defective" lest strict liability be turned into "absolute liability." *Phillips v. Kimwood Machine Co., supra* at 269 Or. 491-2. To encourage the trier of fact to find liability based on other incidents without a primary showing of defect would be to allow undue prejudice. As one appellate panel struck the balance:

> "The most that these items [lists of similar complaints and lawsuits against the defendant] could have indicated was that absent third parties had made this claim to or against [defendant-manufacturer] from time to time. To exclude evidence of *such faint*

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> *probative value and high potential for unfair prejudice* was well within the trial court's discretion." *Yellow Bayou Plantation, Inc. v. Shell Chemical, Inc.*, 491 F.2d 1239, 42-3 (5th Cir. 1974).

The trial court in a products liability case should weight the slight *(or lack of)* probative value of this type of evidence against its prejudicial effects. FRE 403. In the instant case, this balance favors clearly exclusion of the evidence.

4. The Proposed Evidence is Confusing and Misleading, and will Cause Undue Delay.

Even should the trial court find that the proposed evidence has some probative value and that the probative value outweighs its prejudicial effects, the court should exclude the evidence on the ground that it will confuse and mislead the jury and necessitate lengthy attempts to prove various collateral issues. FRE 403. The trial court has broad discretion to exclude such collateral evidence. *Morita v. Southern California Permanente Medical Group*, 541 F.2d 217, 220 (9th Cir. 1976); *United States v. Manning*, 503 F.2d 1230, 1234 (9th Cir. 1974).

Evidence of other incidents has often been excluded on these grounds, including evidence where a much higher degree of similarity of circumstances has been present. *See, e.g., McKinnon v. Skil Corp, supra* at 638 F.2d 277; *Yoham v. Rosecliff Realty Co.*, 267 F.2d 9, 10 (3d Cir. 1959) (upholding exclusion of evidence of similar accidents *on same rollercoaster* as "diligent effort to keep the issues before the jury from being obfuscated);

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Uitts v. General Motors Corp., 411 F. Supp. 1380, 1383, *aff'd.* 513 F.2d 626 (3d Cir. 1975) (reports of prior, similar steering malfunctions in same model of car excluded to avoid "unfair prejudice, consumption of time and distraction of the jury to collateral matters").

The reason for excluding the evidence offered in the instant case is the same. These other incidents, though not probative, are highly prejudicial to defendant's case. Defendant would be forced to try not only the case at bar, but also each case suggested by each other incident admitted into evidence. It would be necessary, for example, to determine which of the other rifle owners soaked gun parts in diesel oil, and, more generally, the age and condition of each rifle. The credibility of each report would have to be questioned, in each instance requiring the defendant to point out the legal action, if any, that the gun owner took or is in the process of taking against the defendant.

One court has described this situation:

> "Defendant, in order to minimize the prejudicial effect of these reports, would have had to go through each one individually with the jury. The result would have been a mini-trial on each of the thirty-five reports offered by plaintiffs. This would lengthen the trial considerably and the minds of the jurors would be diverted from the claim of the plaintiffs to the claims contained in these reports." *Uitts v. General Motors Corp.*, *supra* at 411 F. Supp. 1383.

In effect, admission of the proposed evidence will require the defendant to try the instant case and 49 others. The

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issues at trial would thereby be confused and the rights of the defendant prejudiced.

CONCLUSION

For these reasons, the proposed evidence should be excluded.

Respectfully submitted,

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By: _____
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CERTIFICATE — TRUE COPY

I hereby certify that the foregoing copy of ..... *is a complete and exact copy of the original.*

Dated ....., *19*.....

.....

Attorney(s) for .....

ACCEPTANCE OF SERVICE

Due service of the within ..... *is hereby accepted on* ....., *19*....., *by receiving a true copy thereof.*

.....

Attorney(s) for .....

CERTIFICATES OF SERVICE

Personal

I certify that on February 14, *19*83, *I served the within* Motion to Exclude Evidence *on* Peter Chamberlain *attorney of record for* plaintiff *by personally handing to said attorney a true copy thereof.*

.....

Attorney(s) for defendant

At Office

I certify that on ....., *19*....., *I served the within* ..... *on* ..... *attorney of record for* ....., *by leaving a true copy thereof at said attorney's office with his/her clerk therein, or with a person apparently in charge thereof, at* ....., *Oregon.*

.....

Attorney(s) for .....

Mailing

I hereby certify that I served the foregoing ..... *on* .....

.....

.....

attorney(s) of record for .....

on ....., *19*....., *by mailing to said attorney(s) a true copy thereof, certified by me as such, contained in a sealed envelope, with postage paid, addressed to said attorney(s) at said attorney(s) last known address, to-wit:* .....

.....

.....

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and deposited in the post office at ....., *Oregon, on said day.*

Dated ....., *19*.....

.....

Attorney(s) for .....

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BACKING SHEET

1/1/80-B
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