OTHER SIMILAR INCIDENTS:
A ROADMAP TO VICTORY OR REVERSAL ON APPEAL

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OTHER SIMILAR INCIDENTS: A ROADMAP TO VICTORY OR REVERSAL ON APPEAL

I. INTRODUCTION

Other similar incidents – a powerful tool before the jury. Other similar incident evidence can be so compelling that the erroneous admittance or exclusion of it could lead to harmful error and reversal. This paper will navigate the seemingly simple rules regarding the admission or exclusion of other similar incidents and provide a guide on using these incidents at trial and supporting your position on appeal.

II. BACKGROUND

Other similar incident evidence can take an accident at issue in a case from being an isolated event to a reoccurring problem that could befall any member of the jury. Using other similar incident evidence can be so compelling for a jury, that the erroneous admittance or exclusion of the evidence could lead to harmful error and the rendition of a reversible judgment. The Texas Supreme Court recently warned "trial courts must carefully consider the bounds of similarity, prejudice, confusion, and sequence before admitting evidence of other accidents involving a product."[1]

There are many different forms of other similar incident evidence, which can lead to different considerations during discovery and at trial, including customer complaints, warranty claims, databases maintained by a party, testimony, or statistics.

Both plaintiffs and defendants can benefit from using other similar incidents in a variety of types cases.[2] Plaintiffs can use similar incidents to support multiple elements of their cause(s) of action or to support exemplary damage claims. For example, in a product liability case other similar incidents can be used to demonstrate that a product was unreasonably dangerous, a warning should have been given, a safer design was available, or a manufacturer was consciously indifferent toward accidents in a claim for exemplary damages. Defendants can likewise use other similar incidents to support their affirmative defenses or as rebuttal evidence, combatting a plaintiff's statistics with controverting statistics.

III. LEGAL REQUIREMENTS

A. Other Similar Incidents Must Be Reasonably or Substantially Similar

For other incidents to be admissible in a case, they do not need to be the same or nearly identical to the incident at issue in the case at hand.[3] They only must have occurred under reasonably similar conditions.[4] The degree of similarity required depends on the issue the evidence is offered to prove.[5] The proponent of such evidence has the burden to establish reasonable similarity.[6] Yet, there is no bright-line test for similarity, as can be seen by the cases below. As a result, both the proponent of the evidence and the opposing party should be familiar with the law and be prepared to argue about whether the incidents are "reasonably similar."

While there is an abundance of case law on when other similar incidents have and have not been found reasonably or substantially similar, there is no Texas case law on the similarity requirements when admitting the absence of similar incidents to support a finding that a party is not liable. The Texas Supreme Court recently touched on this subject, when discussing when other accidents may be relevant, stating that "a defendant may want to introduce evidence of . . . the *absence* of other accidents to rebut claims that a product was dangerous."[7] In the same context, the Court provided that "in exercising discretion regarding admissibility, trial courts must carefully consider the

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[1] *Nissan Motor Co. v. Armstrong*, 145 S.W.3d 131, 139 (Tex. 2004).

[2] The cases cited in this paper range from personal injury and wrongful death suits, to product liability suits, to medical malpractice suits.

[3] *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 341 (Tex. 1998).

[4] *Nissan Motor Co.*, 145 S.W.3d at 138; *Uniroyal Goodrich Tire Co.*, 977 S.W.2d at 341.

[5] *Nissan Motor Co.*, 145 S.W.3d at 138. While Texas cases have not explicitly provided what degree of similarity is required for different issues, the Fifth Circuit has developed jurisprudence in this area. *See, e.g.*, *Brazos River Auth. v. GE Ionics, Inc.*, 469 F.3d 416, 426 (5th Cir. 2006) ("[T]he law in this circuit with respect to cases . . . that are not product liability cases, is that the degree of similarity is a question that goes to the weight of the evidence, not the admissibility. As long as there are similarities . . ., the differences are for the jury to decide."); *Johnson v. Ford Motor Co.*, 988 F.2d 573, 579 (5th Cir. 1993) ("When evidence of other accidents or occurrences is offered for any purpose other than to show notice, the proponent of that evidence must show that the facts and circumstances of the other accidents or occurrences are 'closely similar' to the facts and circumstances at issue."); *Jackson v. Firestone Tire & Rubber Co.*, 788 F.2d 1070 (5th Cir. 1986) ("For purposes of proving other accidents in order to show defendant's awareness of a dangerous condition, the rule requiring substantial similarity of those accidents to the accident at issue should be relaxed.").

[6] *Huckaby v. A.G. Perry & Son, Inc.*, 20 S.W.3d 194, 202 (Tex. App.—Texarkana 2000, pet. denied).

[7] *Nissan Motor Co.*, 145 S.W.3d at 138–39 (emphasis added).

bounds of similarity, prejudice, confusion, and sequence before admitting evidence of other accidents involving a product."[8] Therefore, it can be seen that the admitting the absence of similar incidents is subject to the same constraints as admitting the presence of similar incidents. The Third Circuit provided a helpful analysis of the federal requirement for introducing such an absence:

> Testimony concerning an alleged absence of prior accidents will usually satisfy the relevance threshold established by Rule 402. Such testimony, however, by its very nature, raises significant concerns regarding unfair prejudice to the plaintiff . . . . In an effort to ascertain probative value and minimize undue prejudice, other courts considering such evidence have consistently insisted that the offering party lay a proper foundation. In most cases the required foundation has involved three elements: (a) *similarity* – the defendant must show that the proffered testimony relates to substantially identical products used in similar circumstances; (b) *breadth* – the defendant must provide the court with information concerning the number of prior units sold and the extent of prior use; and (c) *awareness* – the defendant must show that it would likely have known of prior accidents had they occurred.[9]

The following provides a non-exhaustive summary of Texas cases where courts have looked at whether other incidents were reasonably or substantially similar.

Cases Finding Reasonable or Substantial Similarity

Nissan Motor Co. v. Armstrong, 145 S.W.3d 131, 142 (Tex. 2004).

In *Nissan Motor Co. v. Armstrong*, the plaintiff was injured by the unintended rapid acceleration of her 1986 Nissan 300ZX, where the alleged defect was a stuck throttle. The Texas Supreme Court found that eight reports collected by Nissan, including reports created by NHTSA, of incidents involving defective throttle cables were reasonably similar enough to rebut Nissan's claim that the plaintiff's theory of causation was extremely unlikely.

Uniroyal Goodrich Tire Co. v. Martinez, 977 S.W.2d 328, 340–41 (Tex. 1998).

In *Uniroyal Goodrich Tire Co. v. Martinez*, one of the plaintiffs was injured when he was struck by an exploding 16" Goodrich tire that he was mounting on a 16.5" rim. Attached to the tire was a prominent pictograph warning label that conspicuously stated "NEVER MOUNT A 16" SIZE DIAMETER TIRE ON A 16.5" RIM." The plaintiffs offered 34 other lawsuits into evidence, which all involved mounting a 16" Goodrich tire on a 16.5" rim. Uniroyal Goodrich objected because 33 of the other incidents did not involve a pictograph warning, unlike the subject tire. The Texas Supreme Court upheld the admission of the 34 incidents, stating "[t]he absence of pictographic warnings on the tires does not render the accidents so dissimilar as to preclude their admission, but merely goes to the weight of the evidence."

Brazos River Auth. v. GE Ionics, Inc., 469 F.3d 416, 426 (5th Cir. 2006).

In *Brazos River Authority v. GE Ionics, Inc.* the river development authority brought suit against Ionic for problems experienced with a retrofitted plant that culminated in fires. On appeal, the appellate court found the trial court erred in excluding evidence of fires at other plants. Although all of the fires did not involve the unique retrofitted part, the court found the other fires were similar enough because they all involved high voltage retrofitted systems and shrink-wrapped cable bar assemblies and stack sidings with a propensity to ignite.

Sears, Roebuck & Co. v. Kunze, 996 S.W.2d 416, 426–27 (Tex. App.—Beaumont 1999, pet. denied).

In *Sears, Roebuck & Co. v. Kunze*, the purchaser of a used 10-inch radial saw amputated four fingers while using the saw. He brought a product liability suit against the saw manufacturer and retailer, for not having a lower blade guard on the saw and marketing the saw without the guard. The manufacturer and retailer argued on appeal that the trial court erred in admitting into evidence a portion of the manufacturer's database of accidents containing records of injury claims involving the 10-inch radial arm saw and summaries of those records, because the other accidents did not occur under reasonably similar circumstances. The appellate court found that the other accidents occurred under similar

[8] *Id.* at 139.
[9] *Forrest v. Beloit Corp.*, 424 F.3d 344, 355–63 (3d Cir. 2005).

circumstances because the other accidents generally involved claims of amputations or lacerations due to the user's hand coming in contact with the saw blade, which reflected that the injuries were caused by the saw not having a lower blade guard, just like the injury at issue.

Fredericksburg Indus., Inc. v. Franklin Intern. Inc., 911 S.W.2d 518, 522–23 (Tex. App.—San Antonio 1995, writ denied).

In *Fredericksburg Industries, Inc. v. Franklin International, Inc.*, the plaintiffs purchased two barrels of allegedly defective laminating glue from the defendant, which resulted in the delamination of its furniture. The appellate court found that the trial court erred in excluding two other similar incidents, by requiring a higher standard of similarity – that the incidents occurred under the same or substantially similar conditions – than that required by law – that occurrences occur under merely reasonably similar circumstances. While there was no indication that the same materials were glued together or that the same assembly process was used, the first incident was similar enough because the same glue type was used, the glue was manufactured the same month, the test results showed similar deviations in pH, percentage of solids, viscosity, and speed of set, the defendant showed the product likely separated in the drum in both cases, and good results were achieved with a heavier spread in both cases. Meanwhile, the court found that the second incident was similar enough merely because they both involved the same glue and the same damaging occurrence (delamination on hardwood cores subjected to some heat).

Farr v. Wright, 833 S.W.2d 597, 601–03 (Tex. App.—Corpus Christi 1992, writ denied).

In *Farr v. Wright*, the plaintiff brought a medical malpractice action against her doctor for severe pain and an infection (discitis) that resulted from a procedure performed by her doctor. The appellate court reversed the trial court's judgment in favor of the doctor because the trial court improperly excluded evidence of three or four other cases of discitis experienced by the doctor's patients in the two-month period that the plaintiff was treated. Even though the infectious organisms in the other cases were not identified, the incidents were separated in time by only two months, the discitis cases were all traced to the doctor, he performed the same procedure in the same room, and the evidence showed that discitis is extremely rare without breach of sterile techniques.

John Deere Co. v. May, 773 S.W.2d 369, 372–73 (Tex. App.—Waco 1989, writ denied).

In *John Deere Co. v. May*, a product liability and wrongful death suit was brought for an allegedly defective John Deere 450C bulldozer that backed over May and killed him when the dozer shifted into gear after it was left in neutral with the engine running. The court held that 34 other incidents were admissible, because a video of one of the incidents showed a dozer moving even though its gear-shift lever was locked in neutral and because John Deere *admitted* that the 34 incidents all involved dozers which allegedly moved after being left in neutral with the engine running. "Identical circumstances are not required. May's death and the other incidents occurred under reasonably similar circumstances if they involved *the same type of occurrence*, i.e., the circumstances would be reasonably similar if the dozers moved after being left in neutral with the engine running." *Id.* at 372–73 (internal citations omitted).

Cases Finding Other Similar Incidents Are Not Similar Enough

U-Haul Intern., Inc. v. Waldrip, 380 S.W.3d 118, 134 (Tex. 2012).

In *U-Haul International, Inc. v. Waldrip*, the plaintiff was injured when the U-Haul truck he was renting rolled over him after the parking brake and transmission failed. He brought negligence and gross negligence claims for U-Haul's failure to discover the problems with the parking break and transmission. The Texas Supreme Court found that the testimony concerning 1,400 inspections occurring in Canada was not admissible as similar incident evidence regarding the maintenance and inspection of the Texas truck at issue, as there was no evidence that the trucks tested in Canada had issues with their parking brakes or transmission, if they were of the same type or size as the subject truck, if their parking brake and transmission systems were the same or similar as the subject truck, or if they were subject to the same or similar inspection and maintenance requirements as the subject truck.

Nissan Motor Co. v. Armstrong, 145 S.W.3d 131, 141 (Tex. 2004).

In *Nissan Motor Co. v. Armstrong*, the plaintiff was injured by the unintended acceleration of her 1986 Nissan 300ZX, where the alleged defect was a stuck throttle. The Texas Supreme Court found that 757 incidents in Nissan's database involving unintended acceleration were not similar enough to be admissible, because there was no evidence that any of the incidents resulted from the defects alleged in the case. "[U]ninted acceleration can have many causes, and we have always required competent evidence of a specific defect. There is nothing in the database to suggest that the defect, if any, causing those 757 incidents was similar to any of the defects alleged here. This is not similar enough." *Id.* at 141.

General Motors Corp. v. Burry, 203 S.W.3d 514, 544–45 (Tex. App.—Fort Worth 2006, pet. denied).

In *General Motors Corp. v. Burry*, Stacy Burry suffered severe brain damage and was in a coma for ten weeks after her head struck the B-pillar of the 2001 GM suburban in which she was a passenger when hit by an eighteen-wheeler. The plaintiffs alleged GM was liable for a design defect because the side airbag failed to deploy. GM appealed the jury's finding of a design defect in part because the trial court excluded statistical evidence in the form of a risk analysis performed by its expert which compared the 2001 suburban to other vehicles, regardless of differences in design or accident circumstances. The appellate court found that the trial court did not err in excluding the evidence because the statistics did not compare reasonably similar vehicles and events. It was not admissible to rebut the background statistics admitted by plaintiffs concerning side impacts and head injuries.

Huckaby v. A.G. Perry & Son, Inc. 20 S.W.3d 194, 202, 206 (Tex. App.—Texarkana 2000, pet. denied).

In *Huckaby v. A.G. Perry & Son, Inc.*, the plaintiffs' son was killed when the car he was riding in collided with a tractor-trailer rig that was waiting in a divided highway crossover. The appellate court held that it was harmful error for the trial court to admit defendant's evidence of prior and subsequent accidents on the divided highway without the defense laying the proper predicate of similarities of conditions or circumstances. "Similarity cannot be based on a generalized statement that this was a dangerous stretch of highway. The proponent must establish with more specificity that the prior accidents occurred in a similar manner and could be attributed to a similar causation." *Id.* at 206.

Johnson v. Ford Motor Co., 988 F.2d 573, 579–80 (5th Cir. 1993).

In *Johnson v. Ford Motor Co.*, Darlene Johnson's 1983 Ford Escort spun out of control and collided with a pickup truck, killing her instantly. Her father brought a product liability suit against Ford alleging that the subject vehicle's left inboard C.V. joint was defective, allowing debris to contaminate the joint and cause the steering mechanism to freeze up. The appellate court found that the trial court properly excluded evidence regarding other accidents and claims involving the loss of control of a Ford vehicle because none of the other incidents involved allegations that contamination of an inboard C.V. joint caused the steering mechanism to freeze up and the car to react as the subject vehicle did.

E-Z Mart Stores, Inc. v. Terry, 794 S.W.2d 63, 65 (Tex. App.—Texarkana 1990, writ. denied).

In *E-Z Mart Stores, Inc. v. Terry,* an employee sued his employer for injuring his back while attempting to pick up a box of magazines at work. The appellate court found the trial court erred in admitting evidence of other lawsuits against the employer where the employees also suffered from back injuries, because the plaintiff in the present case failed to lay a predicate showing the other accidents occurred under reasonably similar circumstances.

B. Other Similar Incidents Must Be Relevant

Other similar incidents must also be relevant in order to be admissible.[10] The relevance of the other incidents depends upon the purpose for offering them. For example, in the context of product liability suits, the Texas Supreme Court has held that other similar incidents cannot be proof of the defect at issue; however, they may be relevant to show whether a product was unreasonably dangerous, a warning should have been given, a safer design was available, or a manufacturer was consciously indifferent toward accidents in a claim for exemplary damages.[11] A defendant could conversely admit other similar incidents to support a state-of-the-art defense or use the

[10] TEX. R. EVID. 402.

[11] *Nissan Motor Co. v. Armstrong*, 145 S.W.3d 131, 138–39 (Tex. 2004).

absence of other accidents to rebut claims that its product was dangerous.[12]

As a practical consideration, if the other similar incidents are relevant for one purpose and not for another, both parties should make sure that it is clear the purpose for which it is being offered. The party offering the evidence for a limited purpose should state on the record the purpose for which it is offered, to protect itself on appeal from potential relevancy, hearsay, and prejudice arguments.[13] The party objecting to the evidence should request a limiting instruction, if the court overrules its objections and admits it for a limited purpose, to preserve its objections under Texas Rule of Evidence 105 and to prevent waiver of other objections regarding the evidence.[14]

Cases Finding Other Similar Incidents Are Relevant

Nissan Motor Co. v. Armstrong, 145 S.W.3d 131, 142 (Tex. 2004).

In *Nissan Motor Co. v. Armstrong*, the plaintiff was injured by the unintended rapid acceleration of her 1986 Nissan 300ZX, where the alleged defect was a stuck throttle. The Texas Supreme Court found that while reports of other incidents involving unintended acceleration that pointed to the defect at issue, but did not involve rapid acceleration, were generally not similar enough to be admissible, the evidence was admissible as rebuttal evidence because Nissan had presented evidence that the possibility that the particular defect occurring (that a deteriorated boot might jam the throttle cable) was about as likely as "being struck by lightening."

General Motors Corp. v. Sanchez, 997 S.W.2d 584, 587, 596 (Tex. 1999).

In *General Motors Corp. v. Sanchez*, Sanchez was killed when his 1990 Chevy pickup rolled backward with the driver's side door open, pinning him to a gate between the open door and the cab of the truck, causing him to bleed to death. His family and estate sued General Motors for a defect in the truck's transmission and transmission-control linkage. The plaintiffs' expert testified that he knew of about 500 mis-shift cases. The Texas Supreme Court concluded that the cases were legally sufficient to show the likelihood of a serious injury, with regards to the plaintiffs' gross negligence claim, although they were legally insufficient to prove General Motors was consciously indifferent.

General Chemical Corp. v. De La Lastra, 852 S.W.2d 916, 921–22 (Tex. 1993).

In *General Chemical Corp. v. De La Lastra*, two young men died from asphyxiation on a shrimp boat expedition after using a chemical preservative on their catch. Evidence of a prior incident in 1973 involving nearly identical facts, in addition to testimony that the chemical company knew of at least nine other incidents of death or injury involving the chemical preservative, was evidence of gross negligence for failure to place warnings on the chemical to inform users of the risk of death.

Boatland of Houston, Inc. v. Bailey, 609 S.W.2d 743, 747–49 (Tex. 1980).

In *Boatland of Houston, Inc. v. Bailey*, Bailey was killed in a boating accident. Bailey's wife and children brought suit against the boat's seller, alleging that the boat was defectively designed because, in part, the motor did not have a kill switch. The Texas Supreme Court found that plaintiffs' evidence of other incidents (cases where kill switches were used) was admissible to show feasibility, while defendant's evidence of other incidents (cases where kill switches were not used) was admissible as rebuttal, state-of-the-art evidence.

Sears, Roebuck & Co. v. Kunze, 996 S.W.2d 416, 426–27 (Tex. App.—Beaumont 1999, pet. denied).

In *Sears, Roebuck & Co. v. Kunze*, the purchaser of a used 10-inch radial saw amputated four fingers while using the saw. He brought a product liability suit against the saw manufacturer and retailer, for not having a lower blade guard on the saw and marketing the saw without the guard.

[12] *Id.*

[13] *Sears, Roebuck & Co. v. Kunze*, 996 S.W.2d 416, 426–27 (Tex. App. —Beaumont 1999, pet. denied) ("We find the exhibits to be relevant to the limited issues for which they were admitted; therefore the trial court did not abuse its discretion in admitting them into evidence.").

[14] *Kia Motors Corp. v. Ruiz*, 348 S.W.3d 465, 483–85 (Tex. App.—Dallas 2011, pet. granted) ("[T]he portion of the spreadsheet reflecting the sixty-seven code 56 claims was admissible as an admission by a party-opponent under TEX. R. EVID. 801. Because Kia did not request a limiting instruction as to the statements from customers listed on the spreadsheet or the remainder of the warranty claims, the inclusion of these items is not ground for complaint on appeal.")

The manufacturer and retailer argued on appeal that the trial court erred in admitting into evidence a portion of the manufacturer's database of accidents containing records of injury claims involving the 10-inch radial arm saw and summaries of those records. The appellate court found that the exhibits were relevant to the limited issues of for which they were admitted – notice and conscious indifference on the part of the appellants in view of such notice.

John Deere Co. v. May, 773 S.W.2d 369, 373 (Tex. App.—Waco 1989, writ denied).

In *John Deere Co. v. May*, a product liability and wrongful death suit was brought for an allegedly defective John Deere 450C bulldozer that backed over May and killed him when the dozer shifted into gear after it was left in neutral with the engine running. The court held that 34 extraneous incidents were relevant to rebut the defendant's pled defense of unforeseeable misuse, being probative of what John Deere knew or should have known about the dozer shifting into gear after it was left in neutral with the engine running. In addition, the other incidents were relevant to issues on producing cause and relevant design.

Firestone Tire & Rubber Co. v. Battle, 745 S.W.2d 909, 911–12 (Tex. App.—Houston [1st Dist] 1988, writ denied).

In *Firestone Tire & Rubber Co. v. Battle*, the plaintiff was injured when a tire manufactured by Firestone exploded, as he was pushing a car onto a driveway from a culvert. The plaintiff called to the stand a witness who had a similar experience involving a Firestone tire that exploded when she was pushing a car. Firestone argued on appeal that the witness's testimony was unnecessary because the witness's incident was included in a list of five previous accidents known to Firestone and introduced into evidence. The appellate court overruled Firestone's objections, finding that the testimony was relevant to the question of whether the explosion that occurred would necessarily be preceded by loud noise and vibration and could only occur if the tire was spinning between 250 and 300 miles per hour (as the plaintiff claimed), to assess the seriousness of the danger in determining whether Firestone failed to issue an adequate warning of such danger, and to whether Firestone was guilty of conscious indifference in failing to issue warnings of known danger.

Cases Finding Other Similar Incidents Are Not Relevant

U-Haul Intern., Inc. v. Waldrip, 380 S.W.3d 118, 135 (Tex. 2012).

In *U-Haul International, Inc. v. Waldrip*, the plaintiff was injured when the U-Haul truck he was renting rolled over him after the parking brake and transmission failed. He brought negligence and gross negligence claims for U-Haul's failure to discover the problems with the parking break and transmission. The Texas Supreme Court found that testimony concerning 1,400 inspections occurring in Canada was not relevant evidence regarding the maintenance and inspection of a Texas truck: "Without evidence on what those Canadian regulations and standards were and how they relate to those of the United States or Texas, this evidence is not probative of U-Haul's adherence to or failure to adhere to appropriate standards in the United States."

Nissan Motor Co. v. Armstrong, 145 S.W.3d 131, 142 (Tex. 2004).

In *Nissan Motor Co. v. Armstrong*, the plaintiff was injured by the unintended rapid acceleration of her 1986 Nissan 300ZX, where the alleged defect was a stuck throttle. The Texas Supreme Court held that reports of unintended acceleration due to an unknown case or some cause other than a defect related to a throttle cable should have been excluded because they are irrelevant to the present case involving unintended acceleration.

C. Other Similar Incidents Cannot Be Inadmissible Hearsay

A party has to be exceptionally sensitive to whether the other similar incident evidence is considered hearsay throughout the course of discovery and at trial. In *Nissan Motor Co. v. Armstrong*, the Texas Supreme Court found that the trial court erroneously admitted hundreds of reports of alleged accidents, almost all of which were hearsay, resulting in reversal and remand.[15]

If the other similar incident evidence is in the form of an out-of-court statement offered to prove the truth of the matter asserted, it will generally be considered hearsay.[16] But, if the incident is not offered for the truth of the matter asserted, then it is not

[15] *Nissan Motor Co. v. Armstrong*, 145 S.W.3d 131, 134 (Tex. 2004).
[16] TEX. R. EVID. 801(d).

hearsay.[17] Alternatively, the out-of-court statements may not be hearsay under Texas Rule of Evidence 801(e) or a hearsay exception may apply under Rule 803. In *Kia Motors Corp. v. Ruiz*, warranty complaints maintained in a Kia database were not hearsay, because they were admissions of the party opponent, Kia.[18] Kia had investigated all the warranty claims, its technicians confirmed the claims all involved defects, Kia ruled out any modification inconsistent with the warranty for each claim, paid the customers for their claims, and submitted the claims to other entities for reimbursement, thereby clearly manifesting that it had adopted the warranty claims as the truth.[19]

Other similar incidents come in a wide variety of forms, which will affect whether it is hearsay or not. If a party calls as a trial witness the person involved in a similar incident, then there is generally no out-of-court statement and thus no hearsay.[20] On the other hand, if an expert or a corporate representative is testifying about complaints of which he or she is aware, then those complaints may be considered hearsay. A compilation or database of complaints by a manufacturer may be a business record; however, unless the employee making the record had personal knowledge of each incident, the complaints are still non-admissible hearsay.[21] Data, findings, and reports from government agencies are generally not excludable as hearsay, under Texas Rule of Evidence 803(8).[22] But, if the government report is merely a compilation of complaints, then they are still hearsay within hearsay.[23] Be aware of the potential layers of hearsay prior to offering other similar incidents into evidence at trial or, conversely, objecting to the admission of such evidence.

Cases Finding No Hearsay or Admissible Hearsay

U-Haul Intern., Inc. v. Waldrip, 380 S.W.3d 118, 135 (Tex. 2012).

In *U-Haul International, Inc. v. Waldrip*, the plaintiff was injured when the U-Haul truck he was renting rolled over him after the parking brake and transmission failed. He brought negligence and gross negligence claims for U-Haul's failure to discover the problems with the parking break and transmission. The Texas Supreme Court found that a witness's testimony about the inspections he had personally observed, if the evidence had been relevant, with the proper foundation, could "conceivably surmount hearsay hurdles."

Uniroyal Goodrich Tire Co. v. Martinez, 977 S.W.2d 328, 340–41 (Tex. 1998).

In *Uniroyal Goodrich Tire Co. v. Martinez*, one of the plaintiffs was injured when he was struck by an exploding 16" Goodrich tire that he was mounting on a 16.5" rim. The plaintiffs offered 34 other lawsuits into evidence, which all involved mounting a 16" Goodrich tire on a 16.5" rim. The evidence of the other lawsuits was not hearsay because the other incidents were not being used to show that the subject tire was defective, but rather that the manufacturer knew users were not heeding its warnings. *Nissan Motor Co. v. Armstrong*, 145 S.W.3d 131, 140 (Tex. 2004) ("Though the manufacturer in [*Uniroyal*] denied the validity of those claims, it acknowledged that they resulted from mismatched tires and rims; as the truth of that part of each claim was admitted, they were not admitted for that purpose.").

Sears, Roebuck & Co. v. Kunze, 996 S.W.2d 416, 426–27 (Tex. App.—Beaumont 1999, pet. denied).

In *Sears, Roebuck & Co. v. Kunze*, the purchaser of a used 10-inch radial saw amputated four fingers while using the saw. He brought a product liability suit against the saw manufacturer and retailer, for not having a lower blade guard on the saw and marketing the saw without the guard. The manufacturer and retailer argued on appeal that the trial court erred in admitting into evidence a portion of the manufacturer's database of accidents containing records of injury claims involving 10-inch radial arm saws and summaries of those records, because the records were hearsay. The appellate court found that the database and summaries were not hearsay because they were not admitted to prove the truth of the matter asserted – "The evidence was not admitted for the purpose of showing that the accidents that were the subject of the claims had occurred or that they were caused by the absence of the lower blade guard." *Id.* at 427. Rather, they were introduced as evidence to the limited issues of notice and conscious indifference.

[17] *Id.*; *Nissan Motor Co.*, 145 S.W.3d at 141–42.
[18] *Kia Motors Corp. v. Ruiz*, 348 S.W.3d 465, 483–85 (Tex. App.—Dallas 2011, pet. granted); TEX. R. EVID. 803(e)(2)(B).
[19] *Id.*
[20] *See, e.g.*, *U-Haul Intern., Inc. v. Waldrip*, 380 S.W.3d 118, 135 (Tex. 2012) ("If shown to be relevant, with a proper foundation, Patterson could conceivably surmount hearsay hurdles for the truck inspections he personally observed.").
[21] *Nissan Motor Co.*, 145 S.W.3d at 139–40.
[22] *Id.* at 141.
[23] *Id.*

Kia Motors Corp. v. Ruiz, 348 S.W.3d 465, 483–85 (Tex. App.—Dallas 2011, pet. granted).

In *Kia Motors Corp. v. Ruiz*, Ruiz was fatally injured when her 2002 Kia Spectra was hit head-on by a pick-up truck and her driver-side frontal airbag did not deploy. Her survivors sued Kia claiming that her airbag failed due to defective wiring harness connectors that created an open circuit in the driver's airbag circuit. Kia created and produced a spreadsheet summarizing warranty claims for a short or open circuit in the front airbag system, in response to a discovery request regarding warranty claim information. The spreadsheet listed 432 warranty claims, sixty-seven of which involved error code "56," like the subject vehicle. At trial, the spreadsheet was admitted into evidence over Kia's objection. The Dallas Court of Appeals concluded that the portion of the spreadsheet containing the 67 code-56 claims was admissible as an admission of a party-opponent, based on testimony by Kia's corporate representative that the 67 claims were all claims submitted to and paid by Kia, because Kia technicians had confirmed the claims all involved defects, and after payment, Kia would submit the claims to other entities for reimbursement. The admission of the remainder of the spreadsheet was not grounds for complaint on appeal, as Kia did not request a limiting instruction.

Cases Finding Inadmissible Hearsay

Nissan Motor Co. v. Armstrong, 145 S.W.3d 131, 141–42 (Tex. 2004).

In *Nissan Motor Co. v. Armstrong*, the plaintiff was injured by the unintended rapid acceleration of her 1986 Nissan 300ZX, where the alleged defect was a stuck throttle. The Texas Supreme Court found that Nissan's database of 757 incidents was still considered hearsay, where offered to show Nissan's knowledge of the dangerous condition in its vehicles, because it was effectively the same as offering the evidence to prove Nissan's knowledge of the truth of the matters asserted.

Williams v. Remington Arms Co., No. 3:05-CV-1383-D, 2008 WL 222496, at *8–10 (N.D. Tex. Jan. 28, 2008).

In *Williams v. Remington Arms Co.*, the plaintiff sought the pre-admission of other similar incident evidence in the form of the defendant's business records of its investigation of customer complaints, its response to the complaints, and its summaries and tabulations of the frequency of customer complaints, on the grounds that it was admissible as a party admission or under the business records exception. The court denied the plaintiff's request. The records did not contain any admissions of the defendant, as the defendant merely acknowledged that it received the complaints, investigated them, and was unable to verify whether they were true or not. The records did not fall under the business record exception, as the plaintiff had not demonstrated that the person making the complaint, not the record, was acting in the course of a regularly conducted business activity when he made the complaint.

Johnson v. Ford Motor Co., 988 F.2d 573, 579 (5th Cir. 1993).

In *Johnson v. Ford Motor Co.*, Darlene Johnson's 1983 Ford Escort spun out of control and collided with a pickup truck, killing her instantly. Her father brought a product liability suit against Ford alleging that the subject vehicle's left inboard C.V. joint was defective, allowing debris to contaminate the joint and cause the steering mechanism to freeze up. The appellate court found that the trial court properly excluded a brief summary of claims, lawsuits, and complaints against Ford, because the exhibit amounted to nothing more than a summary of allegations by others, which constituted hearsay.

D. Relevancy of the Other Similar Incidents Cannot Be Substantially Outweighed By Unfair Prejudice

Evidence of similar incidents is inadmissible if it creates undue prejudice, confusion, or delay.[24] Moreover, prolonged proof of what happened in other accidents cannot be used to distract a jury's attention from what happened in the present case.[25]

Cases Finding Probative Value of Other Similar Incidents Is Not Substantially Outweighed by Unfair Prejudice

John Deere Co. v. May, 773 S.W.2d 369, 374 (Tex. App.—Waco 1989, writ denied).

[24] *Nissan Motor Co. v. Armstrong*, 145 S.W.3d 131, 138; TEX. R. EVID. 403 ("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, or needless presentation of cumulative evidence.").

[25] *Nissan Motor Co.*, 145 S.W.3d at 138.

In *John Deere Co. v. May*, a product liability and wrongful death suit was brought for an allegedly defective John Deere 450C bulldozer that backed over May and killed him when the dozer shifted into gear after it was left in neutral with the engine running. The appellate court found that the trial court's limiting instruction that the jury could not consider references to an unidentified extraneous occurrence from another case to determine whether the subject dozer was defective, but could only consider such references on the issue of notice, effectively removed or substantially diluted any unfair prejudice that could have resulted from the references to the other incident. "Other incidents may be excluded only if their relevance is substantially outweighed by the 'danger of unfair prejudice.'" *Id.* at 374 (citing TEX. R. EVID. 403).

Firestone Tire & Rubber Co. v. Battle, 745 S.W.2d 909, 911–12 (Tex. App.—Houston [1st Dist] 1988, writ denied).

In *Firestone Tire & Rubber Co. v. Battle*, the plaintiff was injured when a tire manufactured by Firestone exploded, as he was pushing a car onto a driveway from a culvert. The plaintiff called to the stand a witness who had a similar experience involving a Firestone tire that exploded when she was pushing a car. Firestone claimed on appeal that the trial court abused its discretion in admitting the testimony because the probative value of her testimony was substantially outweighed by the unfair prejudice and misleading nature of her testimony, claiming the testimony "so colored and clouded the jury's thinking that they were led to disregard the 'obvious flaws' in [the plaintiff's] theory of the case." *Id.* at 912. The appellate court found that the trial court did not abuse its discretion in deciding that the relevancy of the evidence was not substantially outweighed by the risk of unfair prejudice and confusion.

Cases Finding Other Similar Incidents Too Prejudicial

N. Am. Van Lines, Inc. v. Emmons, 50 S.W.3d 103, 125 (Tex. App.—2001, pet. denied).

In *North American Van Lines, Inc. v. Emmons*, the plaintiff was paralyzed from the chest down after being rear ended by a moving van owned by Defendant Lufkin Moving and Storage Company (Lufkin Moving), leased to Defendant North American Van Lines, Inc. (NAVL), and operated by a driver who had been refused his commercial driver's license. On appeal, NAVL argued that the trial court erred in admitting evidence offered by Lufkin of other accidents involving NAVL. One of the prior accidents involved a mother watching her children burn to death in a vehicle struck by a NAVL truck. The appellate court found that the trial court erred in admitting the evidence which was "calculated to stir the motions of the jurors," as any probative value was substantially outweighed by the danger of unfair prejudice to NAVL. "NAVL was put in the unfair position of either not responding to the evidence of other accidents or, in effect, re-litigating the facts or merits of its defense in each of the other cases." *Id.*

Allstate Tex. Lloyds v. Potter, 30 S.W.3d 658, 660–61 (Tex. App.—Texarkana 2000, no pet.).

In *Allstate Texas Lloyds v. Potter*, the plaintiff brought suit against Allstate to enforce an insurance claim after a house she owned as a rental property was destroyed in an arson fire. It was Allstate's position that the plaintiff had set the fire and offered into evidence three prior fires related to the plaintiff. Allstate had no evidence that any of those prior fires were the result of wrongdoing. The first fire was twenty years before the fire at issue and took place at the plaintiff's mother's home. There was no record of any insurance on the house. The other two fires were at homes owned by the plaintiff, which were not investigated and for which the plaintiff received insurance money. The appellate court affirmed the trial court's exclusion of the evidence because the prior fires would result in undue prejudice to the plaintiff. "Permitting the evidence of the prior fires to be introduced would have led to litigation of the previous fires, and there would have been unfair prejudice against [the plaintiff]."

IV. DISCOVERY CONSIDERATIONS

A party should start thinking about other similar incident evidence early in a case. Not only can it seek other similar incident evidence through discovery requests to the opposing party, but it can also carry out its own research. Thorough discovery of a wide range of other similar incident evidence can make a significant difference at trial.

Obtain discovery on the different forms of other similar incident evidence. Request discovery on customer complaints, warranty claims, internal databases recording similar incidents, and/or lists of other lawsuits against the opposing party involving similar incidents. Follow-up on similar incidents disclosed or discovered, such as by asking for the

depositions of the corporate representatives from lawsuits involving similar incidents. In addition, research statistics. For example, in an automotive products case where the alleged defect is the failure to have a side airbag system, look for statistics from the National Highway Traffic Safety Institution (NHTSA) and the Insurance Institute for Highway Safety (IIHS) concerning the number of side impacts, the number of side impact fatalities, the number of side impacts with fatal injuries, and the number of head injuries from side impacts due to impact with interior of car. These statistics may be relevant background information and relevant to a manufacturer's or retailer's notice of the defect.

When drafting discovery requests, be mindful of what a judge would consider a reasonable scope of discovery and be prepared to justify the requested scope. Requesting such evidence will likely result in objections. It is clear, based on the legal jurisprudence for other similar incidents, that a reasonable scope is more expansive than the exact same type of incident as in the present case. The other incidents only have to be reasonably or substantially similar. Therefore, limit the requests by the type of accident, incident, or product, the type of injury, and/or the time period.

If the requests lead to objections and/or withheld discovery, strongly consider moving to compel the discovery. In this way, the court can determine the scope for other similar incidents early in the case, which can lessen, if not avoid, battles over other similar incidents in the future. Once the court has ruled on the scope of similar incidents and the responsive discovery has been produced, the requesting party can follow-up with requests for admission, to see if the opposing party will admit to the similarity of the other incidents. If the opposing party admits to it, then there is one less factor to worry about in admitting the other similar incidents at trial.

V. CONCLUSION

Admitting or excluding other similar incidents is a great pathway to success at trial; however, marshal the facts and case law to support your position. Be cognizant of the ins-and-outs of the admissibility of other similar incidents and be prepared to address issues regarding similarity, relevancy, hearsay, and prejudice both at trial and on appeal. Taking a short cut could result in an unfavorable ruling on appeal.