Admissibility in Products Liability Cases of Data Published by the Consumer Products Safety Commission's National Electronic Injury Surveillance System

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I. Introduction

In several recent product liability actions,[1] plaintiffs have sought to introduce evidence of data that the Consumer Product Safety Commission ("CPSC") had compiled, including CPSC statistical extrapolations that estimate the total number of accidents occurring each year involving a

particular class of consumer product. This "other accident" statistical evidence is derived from information that the CPSC gathers from representative hospitals regarding accidents involving consumer products, as part of the CPSC's National Electronic Injury Surveillance System ("NEISS") program.

Most of these recent product liability suits involved injuries associated with the plaintiffs' use of table saws. The plaintiffs sought to use NEISS's extrapolated estimates of the total number of injuries involving table saws each year in the United States. The plaintiffs argued that this evidence was relevant to show that the defendant manufacturers had notice of the dangerousness of table saws in general and of the specific models of table saws at issue. The plaintiffs also claimed that the evidence was relevant to show that the saws were unreasonably dangerous. The plaintiffs argued that the manufacturers should have redesigned their saws or refused entirely to sell the saws. This article discusses evidentiary issues associated with NEISS data and CPSC's statistical extrapolations of reported injuries involving particular classes of consumer products. This article uses table saws as an example of the real-world concerns caused by admitting such evidence into a products liability case.

Most courts considering this issue have concluded that the evidence is inadmissible, although one court recently admitted some NEISS data in a products liability case. As discussed below, there are several compelling arguments that support the exclusion of evidence from the NEISS database in products liability cases. First, the information contained in the NEISS database, the statistical conclusions derived from this data, and the "societal costs" of injuries involving consumer products are all hearsay for which no exception applies. Second, this evidence is irrelevant because the plaintiffs cannot show that the other accidents referenced in the NEISS database are substantially similar to their own accidents. Third, even if the evidence is relevant, its probative value is substantially outweighed by its prejudicial effect and the likelihood that the data will confuse and mislead the jury. Finally, this evidence is inadmissible as a basis for expert opinions under O.C.G.A. § 24-7-703 because it is not the type of evidence reasonably relied upon by designers of the products. Although the case law does not uniformly exclude such evidence, the weight of authority

indicates that this evidence is inadmissible.

A. CPSC Data and NEISS Background and Methodology

NEISS is a data-collection system operated by the CPSC that records emergency room visits for injuries which are associated with consumer products.[2] The NEISS system monitors less than two percent of emergency rooms throughout the United States, or only about 100 hospitals out of over 5,300 nationwide.[3] The CPSC relies on this small sample to estimate, through extrapolation, the total number of consumer-product-related injuries in the United States during a given period of time for a particular class of consumer product. The degree of extrapolation is significant. For example, the most recent NEISS data infers that there were 32,251 "bench or table saw" injuries in 2011, based on 694 actual injuries reported as involving table saws in that year.[4] The CPSC substantially increases its estimate, based on its assumption that only about a half of all injured people are treated in hospital emergency rooms.[5] The distinction between injuries that are treated in NEISS hospital emergency rooms and those that are not is critical in estimating the number of medically attended injuries and the social costs attributable to those injuries.[6] The CPSC injury estimates cover all products within a given classification, regardless of which company manufactured the product.

NEISS's data collection process begins when a patient informs a clerk, nurse, or physician at one of the sampled hospitals how his injury allegedly occurred, which information is then noted in the patient's medical record. The hospital's NEISS coordinator reviews the emergency room records and determines whether there were injuries allegedly involving consumer products. The NEISS coordinator collects basic information from the medical records, including a brief description of the incident, and assigns one of approximately 900 product codes to the case.

NEISS data and estimates are based solely on injuries treated in hospital emergency rooms that patients report are ***related to*** consumer products. This does not always mean that the injury was ***caused by*** a consumer product. For example, if a patient says he strained his back while lifting a table saw, that injury would be reported in the NEISS database as a "table saw injury."[7] For this reason, the CPSC expressly

provides the following warning concerning its NEISS data:

NEISS Data and estimates are based on injuries treated in hospital emergency rooms that patients say are *related to* products. Therefore, it is incorrect, when using NEISS data, to say the injuries were *caused by* the product.[8]

Further, the NEISS database contains a highly abbreviated description of the accidents. The sparse description makes it impossible to determine which, if any, of the other incidents are similar to plaintiff's accident in a particular case. Oftentimes, it is impossible to determine even what specific product was involved or what the person was doing when he was injured.

In most product liability actions involving table saws, for example, the plaintiffs claim hand or finger injuries from contact with a spinning saw blade. Many of the accidents reported in the NEISS data, however, are facially irrelevant because, even based on the limited information that is available in the NEISS reports, it is immediately apparent that the reported injuries do not involve contact with a saw blade.[9] Therefore, to the extent a plaintiff contends that the defendant manufacturer should have designed the saw's blade guard to make it safer (which is often the case), a redesigned blade guard would not have prevented the reported injury and is irrelevant. Thus, although the NEISS database may be a useful monitoring tool for the CPSC for regulatory purposes, its statistical conclusions and evidence derived from those conclusions should not be admitted to demonstrate notice, negligence, defect, causation, or for any other purpose in a suit involving a table saw manufacturer.

B. "Societal Costs" Estimates Based on Extrapolated NEISS Data

The plaintiffs in recent products liability cases involving table saws also have sought to introduce expert testimony of the annual "societal costs" of injuries related to table saws based on NEISS's extrapolated data, in an effort to establish the unreasonably dangerous design of table saws. According to the CPSC, the "societal cost" amount is derived from the NEISS data and is based on four categories of costs: (1) medical costs of the injuries; (2) work losses caused by the injuries; (3) the pain and suffering experienced by the victim; and (4) the product liability costs associated with the accidents. Plaintiffs have attempted to use the

CSPC's NEISS accident data to make the blanket assertion that there are "x number" of accidents in the United States annually involving table saws, and that those accidents result in "x dollars" in annual "societal costs," to establish that such costs outweigh the benefits of the particular table saw at issue.

Similar "costs to society" arguments can be made about injuries involving any of the consumer products for which the CPSC gathers NEISS data, to show that those products are unreasonably dangerous under a "societal" cost-benefit analysis. Plaintiffs' experts may use NEISS data to measure the costs associated with injuries involving a particular category of consumer product and to estimate the benefits of regulations designed to reduce those costs.

However, a sound argument can be made that a prediction of the total societal costs of injuries caused by all consumer products in a given category is not probative of the risks and benefits inherent in the particular design of the particular product in a given case. In other words, the societal costs of a class of consumer products are irrelevant in determining the reasonableness of the design of a single product within that class, as is required by most products liability statutes.[10]

In fact, as with the general NEISS data, the CPSC offers "societal cost" estimates with a specific caveat related even to the class of products analyzed:

> The estimates are indices, not actual estimates of expected injury costs reduction. This is because injury cost estimates are based on 2001 emergency room-treated injury estimates. . . . The cost figures and the table do not represent an actual estimate of the cost associated with any of the product groups for a specific year. They were developed, using the data available, to provide indices for the purpose of comparison.[11]

The same statement is even stronger when comparing a product group cost to those associated with a particular product. As such, an expert's testimony regarding "cost to society" is subject to the same shortcomings and reliability concerns that plague evidence which is based on

or derived from NEISS data generally. In short, although NEISS injury estimates may be relevant to the CPSC in evaluating the federal regulatory scheme governing a class of consumer products, they have no relevance to a jury's determination as to the sufficiency of particular product's design.

II. Grounds for the Exclusion of NEISS Data and Statistical Extrapolations

There are several arguments that a products liability defendant can make to exclude evidence of CPSC statistics or conclusions that are derived from NEISS data. First, this type of "other accident" evidence consists of unverified and unreliable hearsay accounts of accidents which plaintiffs cannot prove are substantially similar to their accidents. Plaintiffs usually seek to introduce this evidence in documentary form, without first-hand testimony and without having conducted discovery concerning the facts and circumstances of any of the other accidents referenced in the database.

Second, the NEISS data is irrelevant because it does not identify any specific make or model of the particular consumer product involved, does not provide any specifics on how each accident occurred, and does not provide any confirmation of patients' reports of the circumstances of their injuries. In fact, it is impossible to determine whether a particular manufacturer's products even were involved in any of the other accidents, because NEISS identified only the class of product, *i.e.*, a table or a bench saw.

Third, admitting such evidence at trial is unfairly prejudicial to the defendant and causes an avalanche of collateral issues that will confuse the issues and waste the jury's time.

Fourth, to the extent that plaintiffs attempt to "back door" this otherwise inadmissible evidence at trial by submitting it as a foundation for their experts' opinion testimony, the evidence is prohibited by O.C.G.A. § 24-7-703 because the evidence is not of a type reasonably relied upon by experts in the field and is also highly prejudicial to defendants.

A. The NEISS Data and Statistical Conclusions Derived from It Are Hearsay

The principal argument to exclude this evidence is that the NEISS data is inadmissible hearsay. Plaintiffs will

likely attempt to introduce the other accident evidence (or the statistical conclusions drawn from it) to show that the other accidents actually happened as reported in the NEISS database. Otherwise, there would be no purpose in introducing the evidence at trial. However, none of the other injured persons reflected in the NEISS database will be present at trial to testify concerning their particular accidents. NEISS does not even identify these people by name. The NEISS data evidence is classic hearsay.[12]

The NEISS data actually contains four layers of hearsay. Before the information gets to the NEISS database, a patient reports an account of his injury to a medical provider in a hospital's emergency room. The medical provider then records his or her interpretation of the patient's statement in the patient's medical record. Some time later, the hospital's NEISS coordinator reviews the hospital's daily medical records to determine which cases should be reported to the NEISS. This information is then published in the NEISS database that plaintiffs will seek to offer at trial to show that the reported accidents in fact happened as reported. For such multi-layer hearsay evidence to be admissible, each layer must satisfy an exception to the hearsay rule.[13]

The only two exceptions potentially applicable to the NEISS data are the public records exception and the business records exception.[14] The primary emphasis of both exceptions is on the reliability and trustworthiness of the records sought to be introduced, and the trial judge exercises broad discretion in determining admissibility.[15] However, courts should be alert to records that are the "mere accumulations of hearsay or uninformed opinion."[16]

1. The NEISS Data and Statistical Conclusions Derived from It Do Not Satisfy the Public Records Exception

Under the public records exception, records from a public agency are admissible in a civil action if they set forth "the activities of the public office" or "matters observed pursuant to duty imposed by law as to which matters there was a duty to report."[17] It is clear that the proffered data are not records of the CPSC's own activities, nor are they matters that any CPSC officials observed.

The public records exception further states that public records are admissible if they set forth "factual

findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness."[18] The Advisory Committee Note to Federal Rule of Evidence 803(8), upon which O.C.G.A. § 24-8-803(8) is based, refers to this type of public record as an "evaluative report."[19] Factors relevant to determining admissibility under this exception include the timeliness of the investigation, the special skill or experience of the official conducting the investigation, and whether a hearing was held and the level at which it was conducted.[20]

In each of the incidents contained in the NEISS data, there is no "factual finding resulting from an investigation."[21] The NEISS system is simply an accumulation of patient statements to healthcare providers and healthcare provider statements to the CPSC. In the absence of factual findings resulting from investigation, the data does not fall within the scope of the exception of O.C.G.A. § 24-8-803(8)(C).

In *Wielgus v. Ryobi Technologies, Inc.*,[22] however, the federal district court reached a different conclusion. *Wielgus* held that evidence derived from the NEISS database satisfies the public records exception of Federal Rule of Evidence 803(8), because it set out "factual findings from a legally authorized investigation." The *Wielgus* court relied on the Seventh Circuit's decision in *In re Oil Spill by Amoco Cadiz Off Coast of France*[23] in ruling that the fact "that a public document contains multiple levels of hearsay does not make it automatically unreliable and therefore untrustworthy for purposes of Rule 803(8)," and that government agencies, when preparing reports, "necessarily must gather data from other sources, among them the NEISS database, since the occurrence that forms the basis for the statistics did not occur firsthand to the agency preparing the report."[24]

Cases from federal circuit courts across the country have addressed the circumstances under which "factual findings from a legally authorized investigation" satisfy the hearsay exception of Rule 803(8), and they suggest that the *Wielgus* court's reliance on *Amoco Cadiz* to admit the NEISS reports in that case was erroneous. As one leading treatise states, for hearsay evidence to be admissible under Rule 803(8):

> all persons furnishing and recording information must be

> under an official duty to do so. If the supplier of the information is not under such a duty, an essential link is broken; the assurance of accuracy does not extend to the information itself, and the fact that it may be recorded with scrupulous accuracy is of no avail. An illustration is the report of a police officer incorporating information obtained from a bystander: the police officer qualifies as acting pursuant to an official duty but the bystander does not.[25]

It concludes that the *Amoco Cadiz* case is "incorrectly decided" and suggests that the court misapplied the public records exception.[26] In short, the public records exception does not apply where information in the record was supplied by an outsider who was under no official or public duty to supply it. Instead, the public records exception:

> embraces material that reflects multiple layers of what we might call "internal hearsay," meaning statements by one agent or employee of a government department or agency that is repeated or becomes the basis for a statement by another agent or employee of a government department or agency, as information is passed among public officials before being finally recorded in what is offered at trial.[27]

Specifically as to factual findings resulting from an investigation, "the public records exception embraces findings by the office or agency, and is not a basis for offering simply the conclusions, opinions, or statements of people who communicate with the office or agency."[28]

For example, in *John McShain, Inc. v. Cessna Aircraft Co.*,[29] a suit alleging that landing gear defects caused a Cessna plane to crash, the plaintiff sought to introduce into evidence thirty accident reports submitted to the National Transportation Safety Board regarding previous accidents in which the landing gear of Cessna aircraft gave way.[30] The accident reports

included statements filed by pilots, the reports of government investigators, and statements by witnesses to those accidents.[31] The court excluded the accident reports, finding that they included inadmissible hearsay.[32] "To the extent that the NTSB reports consist of the statements of pilots or other witnesses regarding the accidents, they constitute inadmissible hearsay evidence."[33] Rule 803(8) allows only reports by officials; the pilots and other witnesses whose statements were included within the reports were not NTSB officials for this purpose.[34]

In *U.S. v. Gonzalez*,[35] the defendant, appealing his conviction for cocaine trafficking, challenged the exclusion of an Ecuadorian police officer's report, arguing that it was admissible under Rule 803(8).[36] The court affirmed, finding that "[a]though the excluded statement in the police report is contained in a section of the report labeled 'Conclusions,' it appears that the 'conclusion' was nothing more than a reiteration of a report and statement of another person. The report expresses no finding; it just transcribes what a third party said. We cannot say that the district court abused its discretion in classifying this evidence as hearsay and not as 'factual findings resulting from an investigation' admissible under" Rule 803(8).[37]

In *Hickson Corp. v. Norfolk Southern Ry. Co.*,[38] the defendant sought to exclude reports prepared by the Tennessee Department of Environment and Conservation and the Tennessee Emergency Management Authority concerning a spill of hazardous chemicals.[39] The initial source of the information concerning the spill was a Norfolk Southern employee whose duties included notifying and providing information to the appropriate governmental authorities regarding the release of any hazardous materials.[40] That employee had received his information from another a Norfolk Southern employee stationed at the train yard.[41] The defendant argued that the reports should be excluded because they contained multiple levels of hearsay.[42] The court recognized that Rule 803(8) allows for the admission of reports from these governmental entities, because they regularly prepare reports of hazardous environmental situations.[43] The court held that the district court should have excluded the reports, though, finding that "although the exhibits were compiled by a public agency and included 'factual findings resulting from an investigation made pursuant to authority granted by law,'

the original information recorded on the documents did not originate with a government official and the multiple levels of hearsay result in a lack of the necessary indicia of reliability to make the documents trustworthy and hence admissible ...."[44]

Finally, in *In re Oil Spill by Amoco Cadiz Off Coast of France*,[45] the defendant sought to exclude reports of clean-up expenses incurred by local communities in France that were impacted by an oil spill.[46] The reports detailed the costs of the communities' employees, requisitioned staff, food, and other costs involved in the cleanup.[47] Most of these expense records appeared on official forms bearing the community's seal and were accompanied by time sheets, bills, receipts, or similar documentation.[48] The court held that these documents satisfied Rule 803(8) because they were official expense reports that were filled out by government employees using raw data that was supplied by other government employees.[49] As such, they set forth (A) the activities of the office or agency and/or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report.[50] The court did *not* hold, however, that the evidence was admissible because it set out "factual findings from a legally authorized investigation," which was the basis for the *Wielgus* court's reliance on *Amoco Cadiz* to admit the NEISS data.

Accordingly, *Amoco Cadiz* is not relevant with regard to the admissibility of data from NEISS reports. All of the information contained in the documents sought to be excluded in *Amoco Cadiz* originated with agents or employees of the local governmental entities seeking reimbursement for their clean-up expenses, and constituted records of the local governments' activities and/or matters as to which they had an official duty to report. There is no indication in *Amoco Cadiz* that any of the information contained in the communities' expense reports was supplied by third persons (outside the governmental entities) who were under no official public duty to report. Thus, *Amoco Cadiz* involved documents that contained the multiple layers of the "internal hearsay" that Rule 803(8) allows. The case is distinguishable from the facts of *Wielgus*, because the information contained in the NEISS reports originates with and is transmitted through at least two levels of "outsider" third parties before reaching a public official whose duty it is to record the information.

Fifteen years after *Amoco Cadiz*, the Seventh Circuit issued its opinion in *Boim v. Holy Land Foundation for Relief and Development*,[51] a wrongful death case seeking damages for the killing of an American citizen in Israel. The court excluded from evidence a memorandum written by the assistant director of counterterrorism in the FBI, because the memorandum repeated statements from "informants and other individuals" who, in contrast to the assistant director, were under no official duty to report the matters addressed in the statements. Thus, the Seventh Circuit's ruling in *Boim* is entirely consistent with the manner in which other federal circuit courts have applied the public records exception to factual findings resulting from a government agency's investigation; information in the records which originates from a third party who is under no public duty to report it is hearsay and must be excluded.[52] For that reason, *Amoco Cadiz* should not have controlled the *Wielgus* case.

The initial source of the information which is contained in NEISS reports is the injured patients in hospital emergency rooms. The second source of information is the health care providers who transcribe in their medical records what the patients said about how their injuries occurred. Before the information reaches the hospital NEISS coordinators, it has already gone through two layers of "outsider" hearsay. The accuracy and trustworthiness of the information that eventually reaches the NEISS coordinators are substantially more suspect than would be reports that record merely raw data transmitted between government employees, even if the NEISS coordinators enter the information into the NEISS database accurately. The NEISS reports consist, at a minimum, of triple hearsay – the report itself, the healthcare providers' statements contained in the report, and the patients' statements to the healthcare providers. If a traumatized patient is unable to communicate with his healthcare providers, someone else likely would convey what the patient had said about his injury, thereby creating a fourth layer of hearsay.

Moreover, the NEISS reports express no "factual findings resulting from an investigation" by a public agency but merely reiterate what a third party said another third party said. Because the initial and secondary sources of the information contained in the NEISS reports were under no official duty to report the information, the NEISS reports are not admissible under Rule 803(8) or

O.C.G.A. § 24-8-803(8)(C), unless each level of hearsay falls within an exception to the hearsay rule. Because the original information recorded in the NEISS reports did not originate with a government official, the multiple levels of hearsay result in a lack of the necessary indicia of reliability to make the reports trustworthy and admissible.

In a footnote, the *Wielgus* court stated that "[t]he defendants' comparison to investigative accident reports produced by CPSC" in other cases "is unavailing in light of" *Amoco Cadiz*, which "squarely rejects this [double hearsay] concern when applied to the public records exception."[53] As discussed above, the *Amoco Cadiz* court did not reject this double hearsay concern, because it was not presented with the admissibility of public records in which the sources of information contained in the records were outsiders. Further, the *Wielgus* defendants did not cite *Kloepfer v. Honda Motor Co., Ltd.*,[54] which addresses the admissibility under the public records exception of government documents about all-terrain vehicle accidents, injuries, and statistics (presumably contained in CPSC reports, although the *Kloepfer* opinion does not specify). In *Kloepfer*, the plaintiffs argued that such documents were admissible under the public records exception as factual findings from an investigation. The court of appeals rejected the argument, holding that the evidence did not satisfy Rule 803(8)'s standards for trustworthiness and reliability. "Inasmuch as the proffered reports were not limited to three-wheeled vehicles, did not relate to an investigation into this accident or to the Honda model involved herein, but rather accidents, injuries and statistics involving all all-terrain vehicles manufactured by over twenty manufacturers, we hold that the district court did not err in excluding the reports."[55] *Kloepfer* refutes *Wielgus's* conclusion and strongly supports exclusion of the CPSC's NEISS reports.

As the First Circuit said in upholding a trial court's exclusion of CPSC reports:

> The CPSC reports are untrustworthy because they contain double hearsay in many instances[:] the CPSC investigator at one level, and the accident victim interviewee at yet another level removed. Most of the data contained in the reports is simply a

> paraphrasing of versions of accidents given by the victims themselves who surely cannot be regarded as disinterested observers.[56]

The CPSC gathers the data, but it does not apply the experience, expertise or judgment of the agency in a way that would create the reliability that can result when a public agency is acting pursuant to its lawful duties.[57] Because the NEISS reports are not based on any CPSC official's or employee's personal knowledge or observation, but instead are based upon information supplied by outside sources (patients) who were under no legal duty to observe and report the information, the NEISS reports are inadmissible under O.C.G.A. § 24-8-803(8).[58]

2. The NEISS Data and Statistical Conclusions Derived from It Do Not Satisfy the Business Records Exception

The same lack of trustworthiness which prevents the applicability of the public records exception also bars the NEISS data evidence from admissibility under the business records exception. Under O.C.G.A. § 24-8-803(6), records of regularly conducted business activity are admissible if, as shown by the testimony of the records custodian: (A) the records were made at or near the time of the events they describe; (B) the records were made by a person with personal knowledge and a business duty to report; (C) the records were kept in the course of a regularly conducted business activity; and (D) it was the regular practice of that business activity to make the record.

In *Wilson v. Zapata Off-Shore Co.*,[59] the Fifth Circuit affirmed the trial court's exclusion of portions of the plaintiff's hospital records which reported a statement by the plaintiff's sister to a social worker, who recorded that "informant reports that the patient is a habitual liar and has been all of her life."[60] As the court explained:

> Double hearsay in the context of a business record exists when the record is prepared by an employee with information supplied by another person. If both the source and the recorder of the information, as well as every other participant in the chain producing

> the record, are acting in the regular course of business, the multiple hearsay is excused by Rule 803(6). However, if the source of the information is an outsider, … Rule 803(6) does not, by itself, permit the admission of the business record. The outsider's statement must fall within another hearsay exception to be admissible because it does not have the presumption of accuracy that statements made during the regular course of business have.[61]

As discussed above, all of the data in the NEISS database was provided by and collected from "outsiders," namely patients at hospitals. Such data thus possesses no indicia of reliability and trustworthiness and has no presumption of accuracy that admissible business records have.[62]

Thus, the NEISS data fails to meet the reliability and trustworthiness requirements of the business records and public records exceptions. It is impossible to verify from the face of the NEISS data essential information including: (1) who generated the reports; (2) who provided each patient's medical history and who took it down in the medical records; (3) the actual information in the medical records upon which the NEISS data relied; and (4) the procedures for entering this information and verifying the accuracy of each of the statements. Essentially, the reports are a conglomeration of highly abbreviated notes from a variety of unknown sources, which reports might or might not reflect accurate accounts of what actually happened.

The only way to overcome the hearsay nature of this other-accident evidence is for plaintiffs to present testimony from the injured parties in those other cases to explain what occurred in each case. Permitting documentary evidence from the NEISS database would be tantamount to allowing the persons who made the statements in those other cases to testify against the defendants without being under oath or subject to cross-examination. Because plaintiffs will be unable to show that the NEISS data is anything but unreliable hearsay, defendant manufacturers have a strong argument that courts should exclude this evidence.

B. The NEISS Data and Statistical Conclusions Derived from It Are Irrelevant

In addition to the issue of hearsay, the NEISS reports should be excluded because most of the information in them is irrelevant to the issues in the products liability suit. Georgia courts have imposed tight restrictions on plaintiffs' attempts to introduce evidence of other incidents in personal injury product liability cases. "[E]vidence of other incidents involving the product is admissible, and relevant to the issues of notice of a defect and punitive damages, provided there is a showing of substantial similarity."[63] "[B]ecause of the potential prejudicial impact of prior occurrences or accidents, such evidence is only admissible if conditions substantially similar to the occurrence caused the prior accidents, and the prior incidents were not too remote in time."[64] "Without a showing of substantial similarity, the evidence is irrelevant as a matter of law."[65]

"In products liability cases, the 'rule of substantial similarity' prohibits the admission into evidence of other transactions, occurrences, or claims unless the proponent first shows that there is a 'substantial similarity' between the other transactions, occurrences, or claims and the claim at issue in the litigation. The showing of substantial similarity must include a showing of similarity as to causation."[66]

To show substantial similarity, a plaintiff must present evidence "(1) that the products involved in the other incidents and the present incident shared a common design and manufacturing process; (2) that the products suffered from a common defect; and (3) that any common defects shared the same causation."[67]

Federal courts addressing "other accident evidence" have held that the court "must be apprised of the specific facts of the previous incidents in order to make a reasoned determination as to whether the prior incidents are 'substantially similar.'"[68] The conditions surrounding the accidents will not be considered sufficiently similar if there is either a different sequence of events or if the accidents occurred in a different manner.[69] The "foundational requirement of establishing substantial similarity is especially important in cases where the evidence is proffered to show the existence of a design defect."[70]

The reasons for these restrictions are clear. A jury should focus on determining whether the product at issue is defective and whether such

defect caused the plaintiff's injury. This determination should be made based on the relevant evidence at trial, rather than on the fact that a similar product was involved in other incidents. It is improper for a jury to conclude that the specific product at issue was defective based on the fact that other people had been injured while somehow using somewhat similar products.[71]

Plaintiffs seeking to introduce NEISS data cannot demonstrate that any of the other incidents in the NEISS database occurred under similar, much less substantially similar, circumstances. Plaintiffs cannot conduct any meaningful discovery into the accidents that are reported in the NEISS database—which is a critical issue, because the database alone provides almost no information about the nature of the other accidents. Indeed, the NEISS data lacks sufficient information from which the parties could determine such critical information as: (1) the name of the injured party; (2) the manufacturer of the product involved; (3) the specific model of the product; (4) how the product was being used at the time of the incident; (5) the exact nature of the work being performed; (6) the experience of the product's user; (7) whether the product was being operated in accordance with its instructions; and (8) whether the product had been improperly altered or damaged.

The NEISS database's summaries of hearsay accounts of how an incident occurred are insufficient to demonstrate the required substantial similarity. The NEISS database generally provides only a brief accident description, often stating nothing more than the indication that a patient was, for instance, injured while using a table or bench saw.[72] Because plaintiffs cannot investigate how the accidents reported in the NEISS database happened, or even what type of product was involved in each of the other accidents, plaintiffs cannot demonstrate that those other accidents happened under conditions that were even remotely similar, much less substantially similar, to their accident. Moreover, because the NEISS database does not identify specific product manufacturers, it is impossible to identify which other accidents even involved a product made by the same manufacturer, much less that it was the specific product model at issue in the particular case. Thus, a plaintiff will be unable to establish that the products involved in the other incidents in the NEISS data and in his incident "shared a common design and manufacturing process; [and] suffered

from a common defect; and . . . that any common defects shared the same causation."[73]

With regard to table saw or bench saw data, for example, the limited information in the NEISS database reveals that many accidents did not even involve a blade contact injury and therefore did not occur under substantially similar circumstances.[74] As a result, many of the accidents are facially irrelevant and should not be admitted into evidence or included in statistical extrapolations that plaintiffs might offer at trial. Furthermore, the dissimilar accidents taint the extrapolated statistical conclusions which are drawn from the data, particularly given the large degree of extrapolation which is made from the limited number of actual incidents.

C. The NEISS Data and Statistical Conclusions Derived from It Are Unduly Prejudicial and Confusing

Even if a plaintiff were able to overcome the hearsay problems and prove that the other incidents contained in the NEISS data were substantially similar to the facts and circumstances of his case, courts should still exclude this evidence because there is a "danger of unfair prejudice, confusion of the issues, or misleading the jury."[75] Evidence of other incidents or accidents tends to inject collateral issues and to divert the jury's attention from the matter directly in controversy. Even if a substantial similarity of circumstances is established, a court still has broad discretion to "exclude otherwise relevant evidence when its probative value is substantially outweighed by the risk that its admission will create substantial danger of undue prejudice or of confusing the issues or misleading the jury."[76]

As federal courts across the country have observed, juries tend to consider evidence of other incidents as proof of product defect, negligence, or causation, rather than as notice of a potential defect.[77] Accordingly, to the extent that the jury considers evidence of other incidents contained in the NEISS data as proof of product defect, negligence, or causation, rather than as notice of a potential defect, such evidence gives rise to a particularly dangerous form of unfair prejudice against the defendant which could lead to an erroneous finding of liability. Plaintiffs may attempt to introduce the NEISS data and statistical conclusions drawn from that data to show that there are thousands of accidents in the United

States each year involving a particular class of consumer product and that, correspondingly, all similar products – including the ones involved in their accidents – must be defectively designed.

This unfair prejudice is compounded if plaintiffs are allowed to establish this premise solely through documentary evidence of other unrelated incidents that are set out in the NEISS data. Because the defendant would not be able to challenge the circumstances of the other incidents, the other, unknown injured parties essentially would be testifying against the defendant without being subject to cross-examination. It would be prejudicial to allow the jury to infer that the product at issue is defective simply because individuals who have not been called to testify at trial have asserted that, at some point, they had some type of incident involving some type of arguably similar product. In contrast, the probative value of the other-incident evidence from the NEISS database is negligible in light of the unreliability of the evidence and the lack of any proof as to the particular circumstances surrounding those other incidents.

Moreover, evidence of other incidents could confuse the jury by focusing their attention on collateral issues that are not relevant to the case. "[T]he danger [in allowing a plaintiff to introduce the NEISS data and conclusions] is that the parties will have to litigate the truth of the allegations in each of the [other] complaints, resulting in a multitude of mini-trials and diverting the focus from the incident at issue."[78] Establishing either similarity or dissimilarity of even one other incident could take much of the court's time. In short, any probative value of telling the jury through the NEISS data that other incidents occurred is substantially outweighed by the potential for unfair prejudice to the defendant, by the potential for confusing the jury, and by the waste of judicial time and resources.

D. "Societal Costs" Evidence Based on NEISS Data Is Also Irrelevant and Unduly Prejudicial

There is no support for admission of the "societal cost" calculations to which a plaintiff's expert may testify in weighing the costs associated with a particular product design against the design's usefulness. In recent products liability cases involving table saws, the plaintiffs sought to present expert testimony regarding the "societal costs" from table saw injuries, which the CSPC estimates to

be approximately $2 billion per year. Starting with this aggregate amount, the experts estimated that there are eight million table saws currently in use in the United States, and that each table saw thus generates on average $2,000 in "societal costs" over its lifetime, assuming a ten-year product life. The experts compared this "societal cost" to the typical price of a table saw, which they claimed ranges from $250 to $500, and concluded that each table saw costs society at least four times more in injury-related costs than the price of the saw itself.

Factors that Georgia courts consider in balancing the risks inherent in a product design against the utility or benefit derived from the product include:

> the usefulness of the product; the gravity and severity of the danger posed by the design; the likelihood of that danger; the avoidability of the danger, *i.e.*, the user's knowledge of the product, publicity surrounding the danger, or the efficacy of warnings, as well as common knowledge and the expectation of danger; the user's ability to avoid danger; the state of the art at the time the product is manufactured; the ability to eliminate danger without impairing the usefulness of the product or making it too expensive; and the feasibility of spreading the loss in the setting of the product's price or by purchasing insurance.[79]

Although courts have pointed out that these factors are not exclusive and will vary depending on the facts of each case, none of the cases from Georgia's state or federal courts look to the costs to society from injuries associated with a *particular class* of product in performing a risk-utility analysis of the product's design.

Besides the fact that the CPSC's $2 billion figure is based on NEISS data, which is unreliable and inadmissible, the CPSC itself acknowledges that the cost estimates are mere indices, not actual estimates of expected injury cost reduction, and are to be used for purposes of comparison only.[80] In addition, estimates of eight million saws in use and a ten-year product life are

speculative, particularly where such evidence cannot be shown to relate to the particular make and model of product at issue in a given case. Such evidence has no bearing on the determination of whether the defendant manufacturers designed a defective product or what damages, if any, plaintiffs sustained as a result of their accidents.

As at least one court has held specifically with regard to such evidence derived from *NEISS* data that there is no legal support for the admissibility of such "cost to society" testimony.[81] *Wielgus*, although holding that NEISS data is "arguably relevant to demonstrate that the defendants had notice of the risks involved in their products," nevertheless concluded that "it is a much bigger stretch to say that CPSC's extrapolation of the societal costs of injuries caused by all table saws – which it clarifies are not 'actual estimates' – are relevant to the question whether the design benefits of the [table saw at issue] outweigh its risks. . . . This court remains unconvinced that a prediction of the total societal costs of injuries caused by all table saws is probative of the risks and benefits inherent in the particular design of the" table saw at issue.[82]

The fact that the societal cost figure is based on *all types* of injuries related to an *entire clas*s of consumer product, regardless of model or manufacturer, is also likely to confuse the jury with respect to the cost of injuries related to the specific model of product involved in the plaintiff's injury, a figure that cannot be determined from NEISS data.

E. Evidence from the NEISS Database Is Not Admissible as a Foundation for Expert Opinions

In an attempt to circumvent these valid arguments against the admissibility of such evidence, plaintiffs have sought to introduce the NEISS data and the extrapolated statistics derived from the data as a foundation for their experts' opinions. An expert's testimony, however, may not be used merely as a conduit for the introduction of the otherwise inadmissible evidence on which the expert relied in forming his opinion.

O.C.G.A. § 24-7-703 states in part:

> The facts or data in the particular proceeding upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at

> or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, such facts or data need not be admissible in evidence in order for the opinion or inference to be admitted.

Thus, although an expert may base his testimony on material that is inadmissible, the proponent of such testimony must demonstrate that the otherwise inadmissible evidence is "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Plaintiffs cannot establish that experts in the field of, for instance, table saw design reasonably rely on the NEISS data and, more specifically, the extrapolated statistics of "related" incidents, in forming opinions on the subject of table saw design. Indeed, the CPSC itself advises *against* relying on the data as a basis for determining the number of accidents *caused* by a product – which is how plaintiffs' experts might be expected to rely on the evidence at trial.

The second prong of O.C.G.A. § 24-7-703 – that inadmissible evidence may be disclosed to the jury if its probative value substantially outweighs its prejudicial effect – also requires exclusion of such evidence. As discussed above, the NEISS data and the conclusions drawn from it are highly prejudicial to defendant manufacturers, and the probative value of such evidence is negligible in light of the unreliability of the evidence and the lack of any proof as to the particular circumstances surrounding the other incidents referenced in the NEISS data.

III. Conclusion

Evidence of other injuries involving consumer products that is gathered by the CPSC and published in its NEISS database should not be admitted into evidence in products liability cases. The NEISS data consists of multiple layers of hearsay, the initial sources of which were patients and healthcare providers who were under no official duty to report the skeletal amount of information that ultimately finds its way into the NEISS database. Although a federal court in Illinois ruled otherwise in the *Wielgus* case, that decision was based on a flawed reading of the Seventh Circuit's decision in *Amoco Cadiz* and

other cases. Thus, to the extent that courts might rely on the *Wielgus* decision as supporting the admission of NEISS data, defense counsel should urge the courts to look behind the *Wielgus* court's ultimate ruling – that the NEISS data satisfies the public records exception to the hearsay rule – to the unsound reasoning on which the ruling was based.

Evidence of or derived from the NEISS database is also irrelevant, due to the impossibility of showing any degree of similarity between the other incidents reflected in that data and the injury or accident at issue in a given products liability lawsuit. If courts were to allow such evidence, then defendant manufacturers would be unfairly prejudiced by the plaintiffs' arguments that the defendants' products must have been defectively designed simply based on the number of other accidents involving – although not caused by – an entire class of consumer products to which the defendants' products belong.

End Notes

[1] *See*, *e.g.*, *Santella v. Grizzly Indus., Inc.*, No. A-11-CV-181-LY (E.D. Tex.); *Stollings v. Ryobi Techs., Inc.*, No. 1:08-cv-04006 (N.D. Ill.); *Wielgus v. Ryobi Techs., Inc.*, No. 1:08-cv-1597 (N.D. Ill.); *Panosyan v. Black & Decker*, No. BC434992 (Cal. Super. Ct.).

[2] *See generally* http://www.cpsc.gov/library/neiss.html.

[3] *See* Schroeder & Ault, *The NEISS Sample (Design and Implementation) from 1997 to Present*, U.S. Consumer Product Safety Commission, June 2001, p. 18; Consumer Product Safety Commission, *NEISS, The National Electronic Injury Surveillance System: A Tool for Researchers*, March 2000.

[4] *See* https://www.cpsc.gov/cgibin/NEISSQuery/PerformEstimates.aspx.

[5] *See* Econometrica, Inc., *Table Saw Operator Blade Contact Injuries: Review and Analysis of Injury and Social Cost Estimates* (Feb. 28, 2012), pp. 7-8.

[6] *See id.* p. 6.

[7] *See* NEISS Table Saw Accident Data for 2011 (*e.g.*, CPSC Case No. 110252483, "34 yom has low back pain after lifting a table saw yesterday"; Case No. 110506696, "55 yof had a syncopal episode, slipped and fell, struck head on the corner of a table saw, concussion"; Case No. 110148012, "54 yom moving a table saw … weight of table saw came down on forearm/wrist … wrist strain").

[8] NEISS Data for 1997 (emphasis in original).

[9] *See*, *e.g.*, Case No. 111221948, "26 yof c/o traumatic butt pain, sitting on bench

when screw came out and patient fell, landing on buttock"; Case No. 110551801, "87 yom pt had a table saw fall out of the shopping cart onto his lt lower leg. sustained a deep cut"; Case No. 110752908, "39 yom hit a table saw with his hand because he was angry" and broke his hand.

[10] *See*, *e.g.*, *Banks v. ICI Americas, Inc.*, 264 Ga. 732, 736 n.6, 450 S.E.2d 671 (1994).

[11] Hazard Screening Report dated June 2003, p. 13 n.5; p. 16.

[12] *DI Unif. Servs., Inc. v. United Water Unlimited Atlanta LLC*, 254 Ga. App. 317, 323, 562 S.E.2d 260 (2002).

[13] *See United Techs. v. Mazer*, 556 F.3d 1260, 1278 (11th Cir. 2009); *Scott v. State*, 281 Ga. 373, 379, 637 S.E.2d 652 (2006).

[14] *See* O.C.G.A. §§ 24-8-803(6), (8).

[15] *See S. Co. v. Hamburg*, 233 Ga. App. 135, 136, 503 S.E.2d 383 (1998) (addressing § 24-8-803(6)); *Douglas v. State*, 312 Ga. App. 585, 590, 718 S.E.2d 908 (2011) (addressing Rule 803(8)); *Angel Bus. Catalysts, LLC v. Bank of the Ozarks*, 316 Ga. App. 253, 255, 728 S.E.2d 854 (2012).

[16] *U.S. v. Glasser*, 773 F.2d 1553, 1559 (11th Cir. 1985).

[17] O.C.G.A. § 24-8-803(8)(A), (B).

[18] O.C.G.A. § 24-8-803(8)(C).

[19] Adv. Comm. Note to Fed. R. Evid. 803(8).

[20] *See id.*

[21] O.C.G.A. § 24-8-803(8)(C).

[22] No. 08-CV-1597, 2012 WL 3614642 (N.D. Ill. Aug. 21, 2012).

[23] 954 F.2d 1279 (7th Cir. 1992).

[24] *Wielgus*, 2012 WL 3614642 at *3.

[25] 30C FED. PRAC. & PROC. EVID. § 7049 (collecting cases).

[26] *See id.* at n.9.

[27] 4 FEDERAL EVIDENCE § 8:86.

[28] *Id.* § 8:89; *see U.S. v. Pagan-Santini*, 451 F.3d 258, 264 (1st Cir. 2006) (excluding tape of interview involving defendant and government agent, offered by defense; investigative findings provision does not apply, because defendant's statement was not such a "finding"); *Parsons v. Honeywell, Inc.*, 929 F.2d 901, 907 (2nd Cir. 1991) (after explosion, injured plaintiff told neighbor he smelled gas and shouldn't have tried lighting water heater, and neighbor reported that statement to sheriff; sheriff's report fit the exception, and plaintiff's statement was excited utterance, but neighbor's statement should not have been admitted).

[29] 563 F.2d 632 (3rd Cir. 1977).

[30] *Id.* at 635.

[31] *Id.* at 636.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] 140 Fed. Appx. 170 (11th Cir. 2005).

[36] *See* 140 Fed. Appx. at 174 n.5.

[37] *Id.*; *see also U.S. v. Ortiz*, 125 F.3d 630, 632 (8th Cir. 1997) (DEA agent's report containing informant's statements was inadmissible double hearsay; report was "essentially a transcript of what the informant told the DEA agent" and did "not present 'factual findings'" for purposes of Rule 803(8)).

[38] 124 Fed. Appx. 336 (6th Cir. 2005).

[39] *See* 124 Fed. Appx. at 343.

[40] *Id.* at 344.

[41] *Id.*

[42] *Id.*

[43] *Id.* at 345.

[44] *Id.* at 345-46; *see also U.S. v. Mackey*, 117 F.3d 24, 28-29 (1st Cir. 1997) ("hearsay statements by third persons … are not admissible under [the public records] exception merely because they appear within public records").

[45] 954 F.2d 1279 (7th Cir. 1992).

[46] *Id.* at 1306.

[47] *Id.*

[48] *Id.*

[49] *Id.* at 1308.

[50] *Id.*

[51] 511 F.3d 707 (7th Cir. 2007), *vacated on rhrg. en banc*, 549 F.3d 685 (2008).

[52] On July 16, 2008, the Seventh Circuit vacated its decision in *Boim* when it agreed to hear the appeal en banc. The en banc opinion, 549 F.3d 685, does not address the FBI memorandum or its admissibility and primarily considers the elements of a cause of action under 18 U.S.C. § 2333 against financial supporters of terrorism. Although the opinion was vacated, *Boim* is the Seventh Circuit's latest word on this matter and suggests that, had the public records in *Amoco Cadiz* contained information or statements that originated with third parties, they would not have been admissible under Rule 803(8).

[53] 2012 WL 3614642 n.2.

[54] 898 F.2d 1452 (10th Cir. 1990).

[55] *Id.* at 1458.

[56] *McKinnon v. Skil Corp.*, 638 F.2d 270, 278 (1st Cir. 1981).

[57] *See also Kloepfer*, 898 F.2d at 1458 (finding CPSC reports failed to meet "trustworthy" standards of Rule 803(8)).

[58] Another case that ruled on the admissibility of NEISS data in a products liability claim is *Jenks v. N.H. Motor Speedway*, No. 09-CV-205-JD, 2012 WL 274348 (D.N.H. Jan. 31, 2012), which the *Wielgus* court cited. The court in *Jenks* held that evidence from NEISS of the number of accidents involving golf cars was admissible in a products liability case as a public record, because the Consumer Product Safety Act requires the CPSC to collect and disseminate injury data associated with consumer products, and NEISS is the mechanism through which the CPSC complies with that requirement. Based solely on that statutory requirement, the court concluded that "the NEISS database appears to satisfy the requirements for a public record within the meaning of Rule 803(8)." 2012 WL 274348 at *2. The *Jenks* opinion seems to have relied on simplistic reasoning and on a cursory application of Rule 803(8), as is made clear by a more careful analysis of the other cases and authorities cited above.

[59] 939 F.2d 260 (5th Cir. 1991).

[60] *Id.* at 271.

[61] *Id.* (internal citation omitted).

[62] *See T. Harris Young & Assocs., Inc. v. Marquette Elecs., Inc.*, 931 F.2d 816, 828 (11th Cir. 1991) ("For this exception to be available, all persons involved in the process must be acting in the regular course of business – otherwise an essential link in the trustworthiness chain is missing."); *U.S. v. Baker*, 693 F.2d 183, 188 (D.C. Cir. 1982) (if source of information is an outsider, Rule 803(6) does not permit admission of business record; outsider's statement must fall within another hearsay exception to be admissible "because it does not have the presumption of accuracy that statements made during the regular course of business have.").

[63] *GMC v. Moseley*, 213 Ga. App. 875, 877, 447 S.E.2d 302 (1994), *abrogated on other grounds by Webster v. Boyett*, 269 Ga. 191, 496 S.E.2d 459 (1998).

[64] *Hessen ex rel. Allstate Ins. Co. v. Jaguar Cars, Inc.*, 915 F.2d 641, 649 (11th Cir. 1990).

[65] *Moseley*, 213 Ga. App. at 877.

[66] *Cooper Tire & Rubber Co. v. Crosby*, 273 Ga. 454, 455-56, 543 S.E.2d 21 (2001).

[67] *Ford Motor Co. v. Reese*, 300 Ga. App. 82, 89-90, 684 S.E.2d 279 (2009); *see also Uniroyal Goodrich Tire Co. v. Ford*, 218 Ga. App. 248, 260, 461 S.E.2d 877 (1995) (it was reversible error to admit tire adjustment data in products liability case without a "showing of similarity of the tires, defects or the causes thereof"); *see also Stovall v. DaimlerChrysler Motors Corp.*, 270 Ga. App. 791, 793, 608 S.E.2d 245 (2004) (evidence of thirteen accidents involving sudden acceleration in other vehicles was not substantially similar to alleged sudden acceleration that caused motorist's accident, and thus was not relevant in motorist's products liability action against automobile manufacturer; motorist's own expert testified as to numerous possible causes for sudden acceleration and that cross-over circuit faults were probable cause of motorist's collision, but he could not identify what

caused sudden acceleration in other accidents).

[68] *Barker v. Deere & Co.*, 60 F.3d 158, 163 (3rd Cir. 1995).

[69] *See Peterson v. Auto Wash Mfg. Supply Co.*, 676 F.2d 949, 953 (8th Cir. 1982).

[70] *Barker*, 60 F.3d at 162; *see also Nachtsheim v. Beech Aircraft Corp.*, 847 F.2d 1261, 1268 (7th Cir. 1988) (noting the "foundational requirement ... is especially important in cases ... where the evidence is proffered to show the existence of a dangerous condition or causation").

[71] *See Kloepfer*, 898 F.2d at 1458 (affirming exclusion of CPSC report because it contained information on all types of all-terrain vehicles instead of just the three-wheelers at issue in that case, and because data was not limited to the make, model, year or manufacturer at issue in that case); *Kontz v. K-Mart Corp.*, 712 F.2d 1302, 1304 (8th Cir. 1983) (in case involving allegedly defective folding beach chair, trial court did not abuse its discretion in excluding CPSC study showing 8,000 injuries a year from folding beach chairs, "especially in the absence of proof of similarity of circumstances").

[72] *See*, *e.g.*, Case No. 110108639, "58 yr old male cut finger on table saw;" Case No. 110132847 "80 yom using table saw slipped, cut finger, finger laceration" ; Case No. 110147633, "17 yom cut lt thumb on table saw @ school." Proving the particular circumstances of the other accidents reported in the NEISS database is crucial to establishing substantial similarity.

[73] *Reese*, 300 Ga. App. at 89-90.

[74] *See*, *e.g.*, Case No. 110932907, "48 yom lifted a table saw onto truck … lumbar strain" ; Case No. 110400814, "26 y/o male using table saw and got something in eye; corneal abrasion" ; Case No. 110845990, "20 yom putting a tv set on a shelf in his garage and fell off the ladder onto a table saw, laceration lower arm."

[75] O.C.G.A. § 24-4-403.

[76] *First Bancorp Mortg. Corp. v. Giddens*, 251 Ga. App. 676, 678, 555 S.E.2d 53 (2001).

[77] *See Wolf v. Proctor & Gamble Co.*, 555 F. Supp. 613, 622 (D.N.J. 1982) ("There is also the danger that in considering these other complaints, the jury might confuse the issues in the case and lose sight of the actual injury being litigated."); *see also Crump v. Versa Prods., Inc.*, 400 F.3d 1104, 1109 (8th Cir. 2005) ("Although evidence of substantially similar incidents may be admitted in a product liability case, evidence of other injuries may also raise extraneous controversial points, lead to a confusion of issues, and present undue prejudice disproportionate to its usefulness."); *Heath v. Suzuki Motor Corp.*, 126 F.3d 1391, 1396 (11th Cir. 1997) (evidence that "is apt to confuse or mislead the jury" is inadmissible).

[78] *Knauff*, 2010 WL 114014 at *4.

[79] *Banks v. ICI Ams., Inc.*, 264 Ga. 732, 736 n.6, 450 S.E.2d 671 (1994); *see also Kersey v. Dolgencorp LLC*, No. 1:09-CV-898-RWS, 2011 WL 1670886, *3 (N.D. Ga. May 3, 2011); *Mascarenas v. Cooper Tire & Rubber Co.*, 643 F. Supp. 2d 1363, 1369

(S.D. Ga. 2009); *Mize v. HJC Corp.*, No. CIV-A-103CV2397-JEC, 2006 WL 2639477, *3 (N.D. Ga. Sept. 13, 2006); *Kelley v. Hedwin Corp.*, 308 Ga. App. 509, 512, 707 S.E.2d 895 (2011); *Bryant v. Hoffmann-La Roche, Inc.*, 262 Ga. App. 401, 409, 585 S.E.2d 723 (2003); *Moore v. ECI Mgmt.*, 246 Ga. App. 601, 605, 542 S.E.2d 115 (2000); *Dean v. Toyota Indus. Equip. Mfg., Inc.,* 246 Ga. App. 255, 259, 540 S.E.2d 233 (2000); *Bodymasters Sports Indus. v. Wimberley*, 232 Ga. App. 170, 172, 501 S.E.2d 556 (1998).

[80] *See* Hazard Screening Report dated June 2003, p. 13 n.5; p. 16.

[81] *See Wielgus v. Ryobi Techs., Inc.*, No. 08-CV-1597, 2012 WL 3643682, *15 (N.D. Ill. Aug. 23, 2012).

[82] 2012 WL 3643682 at *15.