UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

PATRICK RICE, AND HIS WIFE, KATHY ANN RICE,	**:**	**CIVIL ACTION NO. 3:00-2243**
Plaintiffs	**:**	**(MANNION, M.J.)**
V.	**:**	
SKYTOP LODGE CORPORATION, AND POCONO HOTELS CORPORATION t/d/b/a SKYTOP LODGE,	**:**	
Defendants	:	

MEMORANDUM AND ORDER

As part of the defendant's pretrial memorandum (Doc. No. 26), the defendant notes that it intends to submit motions *in limine* concerning: (1)prior incidents; (2)subsequent remedial measures; and, (3) untimely supplementation of plaintiffs' expert John Hanst's report. (Doc. No. 25, Subsection K) At the final pretrial conference, the defendant submitted a written motion *in limine* to preclude evidence of the prior incidents (Doc. No. 26), together with a brief in support. (Doc. No. 27) Although the motion and brief had been mailed on April 17, 2002, it had not arrived at plaintiffs' counsel's office prior to the pretrial conference. As such, because the court does not want to delay the trial, this order is made after argument by counsel but without the benefit of plaintiffs' responsive brief.

The general facts in this case are not in dispute. On December 30, 1998, the plaintiff was sledding at Skytop Lodge when he ran into an orange plastic fence which had been placed at the bottom of the hill by Skytop to keep sledders from traveling out onto a lake at the bottom of the sledding hill. On his third run, the plaintiff came in contact with the fence causing him to break his right leg between the ankle and the knee.

As part of discovery in the case, the plaintiffs became aware of three (3)

other accidents which have occurred at Skytop Lodge on the same sledding hill. Two of those accidents involved a sledder who came in contact with bales of hay placed at the bottom of the hill and incurred an injury. The third involved a doctor who, while sledding, came in contact with the orange plastic fencing and broke her leg.

The defendant argues that all of these prior accidents must be excluded as they are not similar in nature and highly prejudicial.

The district courts have broad discretion to make determinations of relevant evidence pursuant to Rule 403. See e.g. Hamlin v. United States, 418 U.S. 87, 124-125 (1974). In the United States v. Long, the Third Circuit stated "it is manifest that the draftsmen intended that the trial judge be given a very substantial discretion in balancing probative value on the one hand and an unfair prejudice on the other. . ." United States v. Long, 574 F.2d 761, 767 (3d Cir.) cert. denied, 439 U.S. 985 (1978). It is has long been held that evidence of prior similar accidents is a proper and significant means of proving both the existence and knowledge of dangerous conditions. Many years ago, the Third Circuit stated "knowledge of the likelihood of injury is imparted by information of like occurrences under similar circumstances, and is a fact to be considered by a jury in determining whether prior precautions were taken. DeFrischia v. New York Central Railroad Co. , 307 F.2d 473, 476 (1962).

The Pennsylvania Supreme Court, however, has limited the admissibility of evidence of prior accidents to those situations in which the prior incidents "occurred at substantially the same place and under the same or similar circumstances." Stormer v. Albert's Construction Co., 401 Pa. 461 (1960). Generally speaking, the courts have almost uniformly held that there must be a basic similarity of conditions and facts between the prior accidents and the accident in question. See 1 J.Weinstein and M.Burgur, Weinstein's Evidence, PAR. 401 (10) at 401-66-67 (1988). If the facts are not sufficiently similar, then

the probative value of such prior accidents, in most circumstances, is outweighed by the prejudicial effect. See e.g. Evans v. Pennsylvania Railroad Co., 255 F.2d 205, 210 (3d Cir. 1958).

As can be seen by the cases cited above, this is not new law, but rather law that has been existing for years. In the instant case, the two (2) prior accidents that involved collisions with bales of hay are not sufficiently similar, in the court's opinion, to allow them to be admitted in this case. As argued by counsel for the defendant during the course of the final pretrial conference, depending on the moisture content, the frozen nature of the bale of hay and its placement, it is not in any substantial way similar to the plastic netting that is the subject of this action.

Next, the defendant also argues that the accident involving the same type of plastic netting, on the same hill, should not be admitted because that accident occurred as a result of the cross country ski boots worn by the sledder, which became entangled with the netting, causing the injury. The defendant argues Mr. Rice was not wearing the same type of boots and therefore the accidents are dissimilar. The plaintiffs, on the other hand, argue that it is only the defendant's contention that the prior accident was caused by the cross country ski boots as opposed to the fencing. Plaintiff contends that the facts and circumstances of that case clearly establish that both injured parties were sledding down the hill and at some point, their foot came in contact with the same plastic fence, in the same location, and that the injury was caused by the fencing's placement and installation. The court is in agreement with the plaintiff. The accidents occurred on the same hill, involving the same fencing under, generally, the same conditions. The fencing in both instances was placed to keep people from sledding out onto the lake and the fact that the defendant was aware that prior contact with the fencing had resulted in a broken leg, under very similar circumstances, may be probative evidence of the defendant's knowledge of the

potential danger, long before this particular accident took place.

The defendant next moves, *in limine*, to prohibit the plaintiff from offering evidence of subsequent remedial measures taken to correct or change this situation. The parties, after discussion with the court, are in agreement that subsequent remedial measures are not generally admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design or a need for a warning or instruction. See Fed.R.Civ.P. 407. The Third Circuit has held, however, that subsequent remedial measures may sometimes be offered for purposes of impeachment. Petree v. Victor Fluid Power, Inc., 887 F.2d 34, 38 (3d Cir. 1989). In setting that rule, the Circuit has further indicated that the court must interpret the impeachment exception to Rule 407 circumspectly because "any evidence of subsequent remedial measures might be thought to contradict and so in a sense impeach (a party's) testimony. . ." Complaint of Consolidation Coal Co., 123 F.3d 126, 136 (3d Cir. 1997), cert. denied, 523 U.S. 1054 (1998). In the present case, the defendant has acted preemptively by filing this motion *in limine*. It may be that the plaintiff had no intention of offering any evidence of subsequent remedial measures, however, to the extent that they wish to offer subsequent remedial measures, they will be prohibited pursuant to Rule 407 for the reasons stated above. If, however, they claim some exception to Rule 407, the court will consider this exception at the time the testimony is developed.

Finally, the defendant moves to strike the one page, March 11, 2002, supplementation to plaintiffs' expert report. The supplementation results from the expert receiving a sample of the synthetic netting used by the defendant Skytop. Mr. Hanst, plaintiffs' expert, thereafter discussed the elasticity of the material and installation practices of Skytop with respect to this material. The court does not find that the supplementation of the expert report is of such a new and unexpected nature that it causes any surprises to the defendants.

Additionally, the supplementation itself is quite short and consistent with the expert's prior and more lengthy report of January 25, 2002. Finally, the court has allowed the defendants the opportunity to submit a supplementation by their expert responding to the one by Mr. Hanst.

In light of the foregoing, **IT IS ORDERED THAT:**

(1) the defendants' written motion *in limine* (Doc. No. 26) is GRANTED IN PART and DENIED IN PART. It is granted with respect to the incidents that occurred prior to December of 1998 at Skytop involving collisions with bales of hay and it is denied with respect to the single incident in which another individual broke her leg after coming into contact with the fencing at the bottom of the sledding hill;

(2) the defendant's oral motions *in limine* with respect to remedial measures, it is granted to the extent listed above; and,

(3) the defendant's oral motion *in limine* to exclude the supplemental report of John Hanst as untimely, is denied with the proviso that the defendant be given the opportunity to submit a supplementation as they deem appropriate.

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MALACHY E. MANNION
United States Magistrate Judge

Dated: April 23, 2002