CHARLES WENTZELL and LORI WENTZELL, his wife, Plaintiffs	:	IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA
vs.	:	NO. 96-01,305
ROBERT BENSON and BENSON AND SONS, INC., Defendant	:	CIVIL ACTION - LAW MOTION IN LIMINE

OPINION AND ORDER

Defendants Robert Benson and Benson and Sons, Inc. (hereinafter "Defendants") filed a Motion in Limine August 13, 1999, seeking to prohibit Plaintiffs Charles and Lori Wentzell (hereinafter "Plaintiffs") from introducing certain evidence at arbitration[1] of this case.

The case arises from an assault upon Mr. Wentzell August 24, 1996, as he attempted to enter a convenience store owned by Defendants. Amended Complaint paragraphs 4-8. Mrs. Wentzell witnessed the assault. Amended Complaint paragraph 15. Plaintiffs claim Defendants knew or should have known, prior to the assault, that gang members and other undesirables frequent the parking lot and premises of the convenience store and also that numerous other individuals have been attacked there. Amended Complaint paragraph 19. Plaintiffs cite six prior incidents in their Amended Complaint at paragraphs 20 through 25. Plaintiffs attached police reports for each incident to the Complaint.

Defendants object to introduction of these incidents during arbitration on the basis that the incidents did not occur at substantially the same time and did not involve the

[1] Previously listed for trial this case was removed from the trial list and deemed submitted to binding arbitration by Order of Court August 31, 1999, based upon stipulation of counsel.

same or similar circumstances. Motion in Limine paragraph 13. Further, Defendants anticipate Plaintiffs intend to introduce some of the incidents without calling anyone involved in the incidents, but rather by relying on police reports or testimony of police officers who did not witness the incidents. Motion in Limine paragraph 17. Defendants characterize this as inadmissible hearsay evidence, which must be excluded. ***Ibid.***

The following is a summary of incidents as described in the police reports, which Plaintiffs attached to their Complaint. The first incident to which Plaintiffs refer occurred April 3, 1993, approximately three (3) years and four (4) months prior to the assault involved in this litigation. The victim indicated he was at the C-Mart when someone threw a bottle at him, causing a laceration on the back of his head. The victim said he didn't see anyone in the area and had no idea who threw the bottle. The victim was treated and released.

The second incident occurred December 28, 1994 (approximately one (1) year and eight (8) months prior to the assault). A police officer responded to a fight in progress at the C-Mart. Upon his arrival, he observed two individuals, a male and a female, both of whom he believed to be intoxicated, arguing over food stamps. The male participant informed the officer that the female participant had stolen his food stamps; she replied she wanted to keep him from spending them on drugs. The argument continued; the female began to use profanities and when she did not stop cursing after being warned, she was cited for disorderly conduct and taken into custody. At that point, the other participant started to hug her and asked the officer to take him instead -- he had to be "pried" away from her so the officer could place her in his car for transport to City Hall.

The third incident involved a stabbing on June 21, 1995 (approximately one (1) year and two (2) months prior to the assault) at the C-Mart. Upon their arrival, police found a man lying on his back north of the gas pump area. The victim had been stabbed in his torso; he also had a superficial laceration to his left thigh. A large crowd was gathered around the area. Witnesses told police the victim had been stabbed by his girlfriend, although the victim claimed he did not know his attacker.

The fourth incident occurred August 25, 1995 (approximately one (1) year prior to the assault). Police were called to the C-Mart for a "disturbance in progress." A vehicle occupied by two white males was surrounded by several black males. The rear window of the vehicle was smashed. Police were unable to determine how the window had been broken. Both occupants were characterized as "uncooperative." The incident concluded when one of the occupants was arrested for disorderly conduct for using obscene language.

Incident number five, occurring August 31, 1996 (approximately one (1) week after the assault), concerned a problem which occurred inside the store. Police were told a black male came into the store and tried to start a fight with someone, no one person in particular. According to the reporting party, the man kept saying he hadn't had a fight in a long time. When the reporting party called the police, the man left and was gone before their arrival. Police checked the area but could not locate him.

The sixth incident occurred January 27, 1997 (approximately one (1) year and five (5) months after the assault). It was characterized as a domestic disturbance. When police arrived, they observed a man standing outside the store with blood on his face which appeared to be coming from his mouth. Police went inside and spoke with the other person involved.

She told police she and the victim were out together and had gone to the C-Mart to use the pay phone. She said the victim wouldn't leave her alone as she tried to use the phone, causing her to lose two quarters. She stated she finally had enough and turned around and punched the victim in the mouth. The victim did not wish to prosecute; he agreed to go home and the woman left with a relative.

Generally, all relevant evidence is admissible. Pa.R.E., Rule 402, 42 Pa.C.S. Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable. Pa.R.E., Rule 401, 42 Pa.C.S. However, relevant may be excluded if its probative value is outweighed by, *inter alia*, the danger of confusing the issue or misleading the jury. Pa.R.E., Rule 403, 42 Pa.C.S. A plaintiff is permitted to introduce evidence of similar incidents occurring at substantially the same place under the same or similar circumstances to show notice of a defective or dangerous condition and the likelihood of injury. ***Wright v. Commonwealth, Dept. of Transportation***, 596 A.2d 1241 (Pa.Cmwlth. 1991). However, allowing the introduction of such evidence must be "tempered" by the consideration that it may raise collateral issues which confuse both the real issue and the jury. *Id.* at 1246. Incidents occurring after the incident at issue may be introduced as evidence of a dangerous condition. ***Yoffee v. Pennsylvania Power and Light Co.***, 123 A.2d 636 (Pa. 1956).

Applying the Rules of Evidence and appellate decisions to the incidents at issue, the incidents occurring April 3, 1993 (the thrown bottle), August 25, 1995 (the car being surrounded) and August 31, 1996 (the challenge to fight) are deemed admissible. These three (3) incidents involve situations wherein patrons or others lawfully about Defendants' premises

were subject to violence or threats of violence by perpetrators unknown to them. Accordingly, these incidents may demonstrate to the finder of fact that a dangerous condition existed of which Defendants had or should have had notice. *See, e.g.,* ***Murphy v. Penn Fruit Co****.,* 418 A.2d 480 (Pa.Super. 1980) (if a jury finds that defendant store had actual or constructive notice of a danger to others, demonstrated through evidence of crimes occurring anywhere on the store's premises, it could impose a duty upon the store to take appropriate precautions). Of course, the weight to be given each incident will be a determination of the arbitration panel.

However, the incidents of December 28, 1994 (argument over food stamps), June 21, 1995 (stabbing) and January 27, 1997 (altercation at the pay phone) cannot reasonably be construed as demonstrating existence of a dangerous condition or providing actual or constructive notice to Defendants of such condition. The violence in each of these three incidents was the result of a dispute between two parties who apparently knew each other; the arguments just happened to occur at Defendants' premises. More likely than not these three (3) incidents would have occurred irrespective of where the parties were located. No violence was directed towards patrons or others at Plaintiffs' premises in these incidents. Accordingly, these incidents are deemed inadmissible.

Finally, Defendants' objections with respect to the manner in which the incidents are introduced, allegedly through the introduction of hearsay, must be denied as this issue is not determinable by the Court at this time. At argument, Plaintiffs' counsel stated that Plaintiffs were still in the process of locating certain witnesses. Depending upon the manner

in which Plaintiffs present the incidents which this Court has determined are admissible, Defendants' objections to this evidence may or may not be moot.[2]

ORDER

AND NOW, this 12th day of October 1999, consistent with the foregoing Opinion, Defendants' Motion in Limine is HEREBY GRANTED with respect to the incidents occurring December 28, 1994, June 21, 1995 and January 27, 1997. Defendant' Motion in Limine is DENIED with respect to the incidents occurring April 3, 1993, August 25, 1995 and August 31, 1996. Defendants' Motion with respect to allegations of inadmissible hearsay evidence is not determinable by the Court at this time and is therefore DENIED.

BY THE COURT,

William S. Kieser, Judge

cc: Court Administrator
G. Scott Gardner, Esquire
Sean Roman, Esquire
Judges
Nancy M. Snyder, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)

[2] Plaintiffs argue the evidence is not being offered for its truth, and is therefore admissible. We note further Defendants cite ***Holland v. Zelnick***, 478 A.2d 885 (Pa.Super. 1984), wherein the Court stated: "A police report prepared by an officer who is not a witness to the accident is inadmissible hearsay evidence and should not be admitted into evidence." However, the ***Holland*** Court relies on a 1956 case in support of this pronouncement; no mention is made in the Opinion of Rule 6108 of the Rules of Civil Procedure, 42 Pa.C.S., the "Uniform Business Records as Evidence Act."