

POLITZ, Circuit Judge.

The sole issue presented on this appeal is whether the trial court erred in excluding, under Rule 407 of the Federal Rules of Evidence, evidence of a subsequent design change to a rifle. In this diversity jurisdiction strict liability case, Dawn Muzyka seeks recovery from Remington Arms Co., Inc., for injuries sustained as a consequence of an accidental firing of a Remington 700 ADL, .22-250 calibre, magazine-fed bolt-action rifle. In her state court complaint, removed by Remington to federal court, Muzyka contended that the two-position, bolt-lock safety on the rifle was defectively designed and unreasonably dangerous. The jury returned a verdict in favor of Remington. Muzyka appeals the denial of her motion for new trial. We vacate and remand.

#### FACTS

On August 16, 1981, a few days after the death of her husband, Mrs. Muzyka was packing, preparatory to moving with her three small children to live with her grandparents. The packing was being assisted by other family members, including her stepfather, David Melton. Melton first removed and packed two guns from a gun cabinet and then reached the rifle in question. Not knowing if the rifle was loaded, Melton partially opened the bolt to examine the chamber and magazine. Seeing one or more rounds, Melton fully opened the bolt in order to unload the weapon. On this particular Remington rifle, which then employed a two-position, bolt-lock safety, it was necessary to place the safety in the "fire" position in order to work the bolt. Since this model did not have a floor-plate, which would have permitted the emptying of the magazine from underneath without

only be unloaded by working the bolt, with the safety off, thereby ejecting the shells. Melton testified that he first ejected three shells and, believing the rifle empty, pushed the bolt forward and began to turn the bolt down, toward the locked position, when the rifle fired. The bullet ricocheted and struck Dawn Muzyka.

Muzyka claimed that the rifle was unreasonably dangerous because the bolt-action design required that the rifle be placed in the "fire" position, i.e., the safety-off position, before it could be unloaded. A few months after the subject accident, Remington adopted a new design for its Model 700 series which now permits the working of the bolt to unload the weapon with the safety on. It is no longer necessary to put this rifle in the ready-to-fire position in order to unload it.

The jury received evidence of the rifle's bolt-action design but the court excluded evidence of the new design. By an *in limine* motion, Remington secured this exclusion of evidence under Fed.R.Evid. 407.<sup>1</sup> We find no error in that exclusion.

The excellence of the safety features of the Remington Model 700 rifle constituted the core of the defense. In the opening statement, defense counsel informed the jury of Remington's defense, stating: "We contend under the evidence that we expect you to hear that the Remington Model 700 rifle is one of the most popular, best, strongest, safest rifles that has been manufactured on the market." Remington offered testimony that the two-position, bolt-lock safety was the best safety available—indeed, that it was the best and the safest rifle on the market. As this evidence was offered by Remington, counsel for Muzyka sought to introduce evidence of the subsequent design change to impeach the asser-

1. Fed.R.Evid. 407 provides:

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subse-

quent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

We have held that this rule applies in strict liability cases. *Grenada Steel Industries v. Alabama Oxygen Co.*, 695 F.2d 883 (5th Cir.1983).