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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

TERI SEE & DARREL SEE, wife and husband, Plaintiffs, v. REMINGTON ARMES COMPANY, INC., a Delaware corporation, Defendant.	No. Civil No. 81-886 LE MEMORANDUM IN SUPPORT OF MOTION TO EXCLUDE EVIDENCE

I.

BACKGROUND

On October 27, 1979, Mrs. See was accidentally shot through both legs by Mr. Boudreau as he attempted to unload his Model 700 Remington rifle (hereafter "the gun") inside his house with the muzzle pointed at Mrs. See and with his finger possibly on the trigger.

The design of the safety mechanism on the gun was intended to accomplish several "risk reduction" functions, one of which was to lock the bolt in the closed position. Remington had arrived at this design choice after carefully reviewing various

alternatives and considering the safety trade-offs of each. Therefore, in order to open the bolt so as to unload the gun, it was necessary for Mr. Boudreau to release the bolt lock by flipping the safety mechanism from the "on safe" position to the "fire" position.

Several years after the original design of the gun was made, the Remington designers again considered the question of whether or not to continue to offer the "bolt lock" feature on the Model 700 Remington rifle. The decision was made by Remington designers to eliminate the "bolt lock" feature, and the design change was implemented after the accident in this case.

Plaintiffs have indicated that they intend to offer evidence of this design change. The defendant manufacturer has moved to exclude this evidence of a subsequent design change pursuant to Federal Rule of Evidence 407.

II.

ARGUMENT

(A)The Rule.

Rule 407 of the Federal Rules of Evidence states as follows:

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

The two bases for this general exclusionary rule are as follows:

(1) The prejudicial effect of such evidence overweighs the relevance of that proof; and

(2) The exclusionary rule encourages the reduction of risks and promotes product improvements.

Defendant contends that the rule requires the exclusion of evidence regarding the design change.

(B) *The Rule Applies in a Strict Liability Design Case.*

Undoubtedly, the plaintiffs will argue that, although the rule would apply in a negligence case, it does not apply to a strict liability in tort case since the issue is the condition of the product and not the conduct of the manufacturer. There is a split of authority on this issue, and the various cases on both sides are collected in the annotation "Admissibility of Evidence of Subsequent Remedial Measures Under Rule 407 of Federal Rules of Evidence", 50 ALR Fed 935 (1980) and the annotation "Admissibility of Evidence of Subsequent Repairs or Other Remedial Measures in Products Liability cases", 74 ALR 3d 1001 (1976).

The principal case holding that Rule 407 does not apply to strict liability in tort is *Farner v. Paccar, Inc.* 562 F2d 518 (8th Cir. 1977). The principal cases which hold that Rule 407 does apply to strict liability in tort are *Werner v. Upjohn Co.*, 628 F.2d 848 (4th Cir. 1980), cert denied 449 U.S. 1080 (1981); *Cann v. Ford Motor Co.*, 658 F.2d 54 (2nd Cir. 1981); and *Oberst v. International Harvester Co.*, 640 F.2d 863 (7th Cir. 1980).

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Since Rule 407 is essentially a codification of the common law general exclusionary rule which has long been followed in virtually every state in the union, the principal cases which apply the common law general exclusionary rule are also of interest. In *Caprara v. Chrysler Corp.*, 417 N.E.2d 545 (N.Y. 1981), the court concluded that the general exclusionary rule does not apply to a strict liability in tort action. However, in *Rainbow v. Albert Elia Building Co., Inc.*, 436 N.Y.S.2d 480 (1981), the court concluded that the rule does apply to strict liability in tort.

Despite the fact that the courts are in general disagreement on this issue, we are fortunate that there is one common thread in the various cases on both sides of this issue that applies with full force to the instant case. Even the cases which hold that the general exclusionary rule (or Rule 407) does not apply to a strict liability in tort action based on a defect in manufacturing theory recognize that a different problem exists when the plaintiff is contending that the product was defectively designed. *Comprara v. Chrysler Corp., supra.* The rationale for this distinctive treatment of a strict liability in tort claim for defective design or for failure to warn is discussed in *Werner v. Upjohn Co., supra,* and in *Rainbow v. Elia Building Co., supra.*

In the *Werner* case, the Fourth Circuit explicitly responded as follows to the argument that the exclusionary rule should not apply to strict liability in tort cases since those cases focus on the condition of the product and not on the conduct

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of the manufacturer:

> "The reasoning behind this asserted distinction we believe to be hypertechnical, for the suit is against the manufacturer, not against the product." *Werner, supra*, at 857.

The *Werner* court also noted that the application of the exclusionary rule to a strict liability in tort case was supported by the close similarity between negligence and strict liability. Id at 8158. The similarity is even stronger in a defective design case or a failure to warn case. *Id.*

In our brief in the *Callaham v. Chrysler Motors Corp.* action in the Ninth Circuit, another attorney in this firm argued that the rule should not apply in a strict liability in tort case. The basis for that argument was the case of *Roach v. Kononen/Ford Motor Co.*, 269 Or. 457, 525 P.2d 125 (1974) and the balancing test advocated by Professor Wade in "Products Liability and Evidence of Subsequent Repairs", 1972 Duke L.J. 837.

However, Professor Wade's seven criteria (*see Meyer v. G.M. Corp.*, unpublished, 9th Cir. 1982) and *Roach v. Kononen, supra*, are no longer the Oregon law of strict liability in tort. The Oregon legislature has now codified Section 402A of the Restatement (Second) of Torts, together with Comment a through m, and those standards must be applied to measure plaintiff's contentions - not Professor Wade's critera. ORS 30.920. Therefore, the arguments advanced by the court in *Werner* apply since the language of the Restatement itself is the law.

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IV.

CONCLUSION

Defendant's motion to exclude plaintiff's evidence of a design change should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 15, 1983, I served the within MEMORANDUM IN SUPPORT OF MOTION TO EXCLUDE EVIDENCE on:

PETER R. CHAMBERLAIN
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Portland, OR 97204

Attorney for Plaintiffs

by leaving a true copy thereof at said attorney's office with his clerk therein, or with a person apparently in charge thereof, at the above address.

DATED this 15th day of February, 1983.

W. A. JERRY NORTH
Of Attorneys for Defendant