COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.	SUPERIOR COURT DEPARTMENT CIVIL DOCKET #SUCV []
JOHN JONES, M.D., Plaintiff, v. ABC FURNITURE, INC., and OFFICE WORLD, INC. Defendants.	Plaintiff opposition to Defendants' Motion in Limine Re: Subsequent Remedial Measures and Memorandum in Support Opposition.

Opposition.

Plaintiff John Jones, M.D. ("Dr. Jones" or "Plaintiff") opposes the motion, in limine, of defendants ABC Furniture, Inc. ("ABC Furniture") and Office World, Inc. ("Office World") (collectively "Defendants"), to prohibit Dr. Jones from "offering evidence of subsequent remedial measures and/or from eliciting any testimony relating to said measures from lay or expert witnesses."

The grounds for this opposition are set forth in the following memorandum.

Memorandum.

Dr. Jones submits this memorandum of law in support of his opposition to Defendants' motion in limine. As more fully set forth below, the motion should be denied because Dr. Jones seeks to introduce evidence as to remedial measures undertaken after his injury not to prove that Defendants' were negligent or that the chair in question was defective, but, instead, to show that safety

improvements to the chair, which in fact remedied the defect which caused injury to Jones, were feasible and practical at the time the chair in question was manufactured and sold. It is well established under Massachusetts law that evidence of remedial measures may be admitted for this limited purposes, among others.

1. Facts.

This is a products liability case, in which Jones claims that the ABC Furniture, its agents, servants and employees, or others for whom it is legally responsible, negligently designed, manufactured, distributed, assembled, sold or conveyed an ABC Furniture chair, causing it to be unreasonably dangerous and defective; that ABC Furniture failed to warn customers of this defect; that ABC Furniture impliedly warranted that the chair was of merchantable quality and fit for all ordinary and reasonably foreseeable purposes; that ABC Furniture breached its warranties; and that Jones was severely injured as a result. Jones has also sued Office World as the seller and distributor of the chair.

Specifically, Dr. Jones alleges, and expects the evidence at trial to establish, that his employer, Energy Optics, provided him one of five office chairs manufactured by ABC Furniture and shipped to Energy Optics on February 1, 2001. He further expects the evidence to establish that on February 6, 2001, Dr. Jones was injured when he sat in the ABC Furniture office chair for the first time. After Dr. Jones utilized the chair's control

mechanism to lock the backrest in the upright position, the backrest nevertheless suddenly and unexpectedly gave way when he started to lean against it, causing Dr. Jones to fall rapidly backwards. In an instinctive, reflexive response, Dr. Jones snapped his body forward to avoid hitting his desk, being injured in the process.

Dr. Jones expects the evidence at trial to establish that the chair's malfunction (in reclining even after the back rest had been set in locked position) was caused by a defect which allowed a metal so-called "back lock rod" to become disconnected from the control mechanism which a user of the chair operates to lock the backrest. As manufactured, the back lock rod for the chair in question was inserted into the control mechanism knob and held in place only by a small pivoting plastic latch. However, the plastic latch could, and in this case did, become dislodged, allowing the connecting rod to separate from the control knob. This in turn allowed backrest to fall free even after the occupant had used the control knob to lock the backrest.

Dr. Jones intends to introduce at trial evidence that, after receiving hundreds of complaints about the defective back rest locking mechanism, and after an earlier unsuccessful attempt to remedy the same problem, defendant ABC Furniture, after Jones' injury, in or about 2003, for the first time started using an ordinary plastic "wire tie" to positively secure the back lock rod

to the control mechanism. This completely resolved the problem of the back lock rod failures.

Jones will offer this evidence solely to establish that, at the time the chair was manufactured, it was both practical and mechanically feasible for Steel case to have used an alternate design (involving the wire tie) which would have eliminated the defect.

This wire tie is, and was, readily available for pennies and completely resolved the problem. It is this evidence of subsequent remedial measures which Defendants seek to exclude.

2. Argument.

Because Plaintiff's claims are based in part on an alleged design defect, material issues in this case include "the mechanical feasibility of a safer alternative design...." Torre v. Harris-Seybold Co., 9 Mass. App. Ct. 660, 676 (1980).

While Dr. Jones concedes that evidence of subsequent remedial measures is inadmissible to prove the Defendants' negligence, it is well established that such evidence is admissible, in the judge's discretion, for various other purposes, including to prove the feasibility of safer alternative designs. In doCanto v. Ametek, Inc., 367 Mass. 776, 781 (1975), the Supreme Judicial Court stated:

> This court has permitted the introduction of evidence of post-accident safety improvements for several purposes. For example, evidence of such a change is admissible to prove the

> practical possibility of making a safety improvement. See Beverley v. Boston Elev. Ry., 194 Mass. 450, 458, 80 N.E. 507 (1907); Coy v. Boston Elev. Ry., 212 Mass. 307, 309-310, 98 N.E. 1041 (1912). Likewise, evidence of such a safety improvement may be admissible on the issue whether the defendant knew or should have known of the danger at the time of the plaintiff's injury. See Reardon v. Country Club at Coonamessett, Inc., 353 Mass. 702, 704-705, 234 N.E.2d 881 (1968). It is clear, therefore, that on the issues of feasibility and knowledge of the risk, two of the three grounds on which the judge admitted evidence of pre-accident safety improvements, post-accident evidence would have been admissible in his discretion.

(Emphasis added). See also Simmons v. Monarch Machine Tool, Inc., 413 Mass. 205, 214 (1992) (holding that evidence of remedial measures was admissible on issue of feasibility); Schaeffer v. General Motors Corp., 372 Mass. 171, 175 (1977) (holding that owner's manuals issued by defendant were admissible to prove the "practical possibility of giving cautionary warnings"); Fiorentino v. A. E. Staley Mfg. Co., 11 Mass. App. Ct. 428, 438 (1981) (evidence of change in warning label was admissible to show "the feasibility of eliminating [the] unclear warning of the earlier date); Torre, 9 Mass. App. Ct. at 676 ("Evidence concerning subsequent technological advances or safety improvements utilized by the same manufacturer either before or after the accident are similarly admissible in the discretion of the trial judge on the issues of feasibility and knowledge of the risk at the time of manufacture or the time of the accident.").

This Court should reject Defendants' suggestion that evidence of subsequent remedial measures in inadmissible on the issue of feasibility because that issue is not "genuinely controverted." See Defendants' Motion, ¶6. The mere fact that Defendants may not have expressly denied feasibility does not render inadmissible evidence of subsequent remedial measures. In fact, even a general concession by Defendants that design improvements were practical and feasible is not sufficient to bar admission of evidence as to feasibility. According to the Court in doCanto,

> The evidence of improved safety design did not become inadmissible on the question of feasibility merely because Ametek conceded in a general way that the design improvements were practical. In the judge's discretion, evidence, otherwise admissible, does not lose that status simply because of a general concession made by the party against whom that evidence is offered.

367 Mass. at 781. (Emphasis added). See also Simmons, 413 Mass. at 214 ("That the feasibility of the alternative design was not disputed by Monarch did not render the evidence inadmissible."); Schaeffer, 372 Mass. at 176 n.3 ("[D]efendant's general concession of the feasibility of safety precautions will not render this evidence inadmissible.").[1]

[1] Defendants' reliance on Cameron v. Otto Bock Orthopedic Industry, Inc., 43 F.3d 14 (1st Cir. 1994), is at best misplaced. That case was decided under federal law. The district court in the same case, 1994 WL 51630, *2 (D. Mass. 1/7/94), noted that Massachusetts and federal law differ concerning the admissibility of evidence of subsequent remedial measures on the issue of feasibility, with Massachusetts courts being more liberal in the allowance of such evidence.

Similarly, in Boeing Airplane Co. v. Brown, 291 F.2d 310 (9th Cir. 1961), the party seeking to exclude evidence of subsequent remedial measures on the issue of feasibility admitted in open court that changes would have been feasible, but declined to stipulate as to the feasibility of the specific changes that were made after the accident.

> As so limited, the offer came within the above-noted exception to the exclusionary rule. But counsel for appellant sought to render the exception inapplicable by admitting in open court that changes would have been feasible before the accident and were in fact made afterwards.
>
> Counsel for appellee was not satisfied with this admission, but indicated that the evidence as to subsequent changes would be withdrawn if counsel for appellant would admit just what changes were made after the accident. The trial court accepted this proposal as appropriate and inquired if counsel for appellant would enlarge his admission to specify the changes which were made. Counsel refused to do so, taking the position that his admission as to the feasibility and the subsequent making of unspecified changes was sufficient to eliminate the issue of feasibility and render the proffered evidence irrelevant. The evidence was therefore declared admissible and was received.
>
> In our opinion an admission that unspecified 'changes' would have been feasible and were actually made does not render irrelevant evidence as to specific changes subsequent to the accident when offered for the limited purpose of proving the feasibility of such changes to correct the specific defects in issue.

Id. at 315. (Emphasis added).

In the present case, Dr. Jones should be allowed to introduce evidence of the specific subsequent remedial measures taken by Defendants, for the purpose of establishing feasibility.

3. Conclusion.

For all of the foregoing reasons, this Court should deny Defendants' motion in limine.

THE PLAINTIFF
BY HIS ATTORNEYS
BARRON & STADFELD, P.C.

David Dwork
Barron & Stadfeld, P.C.
100 Cambridge Street, Suite 1310
Boston, MA 02114
(617) 723-9800
BBO# 139560

Dated: October __, 2007.

Certificate of Service

I, David Dwork, hereby certify that I have on this date served a copy of the within document, by hand, on all counsel of record, to wit:

[]

David Dwork

Dated: October __, 2007.