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“Sufficiently in Conflict”: The Reservation of Illinois Rule of Evidence 407, 53 UIC J. Marshall L. Rev. 403 (2020)

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"SUFFICIENTLY IN CONFLICT"[1]: THE RESERVATION OF ILLINOIS RULE OF EVIDENCE 407

JACLYN WILCOX

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Abstract

This comment addresses the failed codification of Illinois Rule of Evidence 407 on Subsequent Remedial Measures. This comment traces the case law leading to the attempted codification in 2011, which ultimately could not reconcile the differing Illinois Appellate Court opinions on the issue of the feasibility exception. This comment argues that the differing opinions resulted from the courts' various interpretations of the relevant time period of feasibility of an alternative design. Ultimately, tracing the divisive Illinois Appellate Court opinion in Jablonski v. Ford Motor Co., this comment proposes a balancing test to address each exception to the Subsequent Remedial Measures rule and the time periods within the feasibility exception.

I. INTRODUCTION

Very rarely will the lawyers and the judge in a courtroom agree that a piece of evidence is relevant yet not admissible.[2] Looking at

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[1] *Committee Commentary*, ILL. RULES OF EVID., www.illinoiscourts. gov/SupremeCourt/Evidence/Evidence.htm#commentary (last visited Nov. 16, 2018) (stating "[t]he Committee reserved Rule 407, related to subsequent remedial measures, because Appellate Court opinions are sufficiently in conflict concerning a core issue that is now under review by the Supreme Court").

2. *See* M.C. Slough, *Relevancy Unraveled, Part III*, 5 U. KAN. L. REV. 675, 705-09 (1957) (explaining the general concepts underlying subsequent remedial measures evidence).

civil litigation specifically, this exact scenario occurs when plaintiffs seek to introduce evidence of subsequent remedial measures. In these cases, courts must decide whether it is proper for a jury to hear about what a defendant fixed *after* an accident occurred.[3]

To illustrate the issue, picture a plaintiff who files a lawsuit against a car manufacturer after her husband dies in a rear end collision.[4] The husband's death was not caused by the collision, but by a raging fire that developed from a dangerous condition in the car's design. As discovery unfolds, evidence emerges that the car manufacturer knew about the defect and made changes to the design of the car's body only *after* the accident. In this hypothetical the plaintiff, defendant, and judge will all likely agree that the knowledge of the defect and the design changes made after the accident are entirely relevant. Yet, a jury will never hear this evidence—or so an experienced attorney would think.

This is the web that subsequent remedial measures evidence weaves into civil litigation. The underlying rules and policies, however, only tangle this web. In Illinois, the common law surrounding subsequent remedial measures is currently in disrepair. Nevertheless, there is still no shortage of these cases. For example, medical malpractice defense attorneys managed to introduce evidence of a catheter's subsequent design changes to point the finger at the catheter's manufacturer rather than their client.[5] On the other hand, in a garden-variety negligence case, a

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3. *See* Mark G. Boyko & Ryan G. Vacca, *Who Knew? The Admissibility of Subsequent Remedial Measures When Defendants Are Without Knowledge of the Injuries*, 38 MCGEORGE L. REV. 653, 655-677 (2007) (discussing how Federal Rule of Evidence 407 should be applied to defendants who are without knowledge of the plaintiff's injury).

4. Jablonski v. Ford Motor Co., 923 N.E.2d 347 (Ill. App. Ct. 2010) (upholding trial court's admission of pre- and post-accident designs to show feasibility of an alternative design); Jablonski v. Ford Motor Co., 955 N.E.2d 1138 (Ill. 2011) (reversing appellate court's admission of subsequent remedial design because plaintiffs failed to produce sufficient evidence of unreasonableness at the time the accident occurred). The issue does not only present itself in car manufacturer cases. In fact, feasibility of an alternative design may be used to prove a plaintiff's case in most products liability cases. *See also* Calles v. Scripto-Tokai Corp., 864 N.E.2d 249, 260 (Ill. 2007) (setting forth that "under the risk-utility test, a court may take into consideration numerous factors. In past decisions, this court has held that a plaintiff may prove a design defect by presenting evidence of 'the availability and feasibility of alternate designs at the time of its manufacture, or that the design used did not conform with the design . . ..'") (quoting Anderson v. Hyster Co., 385 N.E.2d 690, 692 (Ill. 1979) (allowing expert testimony about unsafe condition when defendant's forklift truck clearly did not meet safety standards)). Therefore, evidence of alternative design and post-accident remedial measures is most common in a products liability context as reasonableness, feasibility, and foreseeability are difficult to separate. Jablonski, 923 N.E.2d at 383.

5. McLaughlin v. Rush-Presbyterian St. Luke's Med. Ctr., 386 N.E.2d 334 (Ill. App. Ct. 1979) (finding the admission of subsequent remedial measures not prejudicial when the manufacturer of the defective catheter was not a defendant in the case).

defendant-owner excluded evidence of the owner's post-accident step repair.[6] Although the evidentiary issues of these two cases match, their outcomes were opposite.

A well-defined path exists to navigate these disputes in other jurisdictions, as well as in federal courts.[7] In Illinois, however, one must be prepared to untangle the web. In addition to conflicting case law, Illinois Rule of Evidence 407: Subsequent Remedial Measures stands *reserved*.[8] Therefore, Illinois can only rely on this inconsistent common law to determine the admissibility of subsequent remedial measures.[9] This comment works to dissect the inconsistencies and propose a new draft of Illinois Rule of Evidence 407.

Part II of this comment discusses the definition of subsequent remedial measures. More importantly, this section breaks down the underlying policies and three exceptions to subsequent remedial measures. Before heading to an in-depth analysis, this section brings readers up to date with recent developments in Illinois history, including the failed codification of Rule 407 in 2011.

Part III pinpoints the seminal cases leading up to the failed codification of Rule 407. This section discusses the shift in court rulings that led to *Jablonski v. Ford Motor Company*, the Illinois appellate court case that resulted in reserving Rule 407. Then, this section examines *Jablonski*, and explains how this decision derailed the previously quasi-consistent court rulings. Finally, this section details *Jablonski*'s long-lasting effect on Illinois subsequent remedial measures law.

Part IV concludes by proposing a three-part balancing test as a rule to encapsulate the holdings of seminal Illinois cases.

II. BACKGROUND

A subsequent remedial measure is a change, repair, or precaution the defendant makes after an event or injury has occurred to prevent it from happening in the future.[10] The generally accepted rule states: "evidence of subsequent remedial measures is generally inadmissible to show negligence because it would discourage people from fixing dangerous situations."[11] Like most

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6. *See e.g.*, Coshenet v. Holub, 399 N.E.2d 1022 (Ill. App. Ct. 1980) (affirming trial court's decision to exclude subsequent repairs when control was undisputed based on lease terms); Schultz v. Richie, 499 N.E.2d 1069 (Ill. App. Ct. 1986) (deciding when control is undisputed, evidence of subsequent remedial measures is inadmissible under the control exception).

7. FED. R. EVID. 407 (2011).

8. ILL. R. EVID. 407 (2011).

9. *Id.*

10. Herzog v. Lexington Twp., 657 N.E.2d 926 (Ill. 1995) (holding subsequent remedial measures are inadmissible unless defendant makes exaggerated claims of a safe or adequate condition).

11. Lew R.C. Bricker, *State of Illinois Compendium of Law,* U.S. LAW

rules of evidence, a state's subsequent remedial measures rule is commonly derived from the Federal Rules of Evidence.[12] Federal Rule of Evidence 407 reads:

> When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not 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. 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.[13]

Three notable and essential exceptions to the rule currently exist:[14] "the court may admit this evidence for another purpose, such as impeachment or — if disputed — proving ownership, control, or the feasibility of precautionary measures."[15] These exceptions tend to "swallow the rule"[16] and create the very problem Illinois courts currently face.[17] Rather than rubber-stamping subsequent remedial measures as inadmissible with minor exceptions, it is essential to understand the facets of the three exceptions and their application in Illinois jurisprudence.

A. *The Three Exceptions to Allow Evidence of Subsequent Remedial Measures*

The first exception, control or ownership, is usually triggered when a defendant disputes responsibility for the condition of a property.[18] Evidence of subsequent remedial measures may be admitted to prove that the defendant did in fact control or own the property and is therefore liable for its condition.[19] One key part of the control/ownership exception, however, is that control or

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NETWORK 26 (2015), www.uslaw.org/files/Compendiums2015/National/National%20Compendium_Illinois_2015.pdf.

12. Boyko & Vacca, *supra* note 3, at 657.

13. FED. R. EVID. 407.

14. Courts have also allowed evidence of a subsequent remedial catheter design because the manufacturer was not a defendant in the case. *McLaughlin*, 386 N.E.2d at 335-38. In *McLaughlin*, plaintiffs argued medical negligence on the theory of *res ipsa loquitur*. *Id.* at 335. As a defense, Defendants introduced evidence that the catheter itself was defectively designed and, therefore, the doctor was not the cause of plaintiff's injury. *Id.* at 338. The court in *McLaughlin* admitted evidence of subsequent remedial design by the catheter manufacturer to substantiate their defense. *Id.* at 338-39.

15. FED. R. EVID. 407.

16. Davis v. Int'l Harvester Co., 521 N.E.2d 1282 (Ill. App. Ct. 1988).

17. Slough, *supra* note 2 at 709 (stating, "enfeebling exceptions are known to point up the invalidity of a general rule.").

18. *Herzog*, 657 N.E.2d at 932.

19. *Id.*

ownership must be *disputed*.[20] *Schultz v. Richie* illustrates the necessity of disputed control.[21] In *Schultz*, the plaintiff-police officer slipped and fell on defendant-homeowner's icy front porch step, which caused a career-ending injury.[22] Two years after the fall, the homeowner installed new gutters to divert water accumulation.[23] The police officer sought to introduce this evidence, arguing it was an admissible subsequent remedial measure under the control/ownership exception because it showed the homeowner had control over diverting the water.[24] The court properly excluded this evidence, however, as the homeowner conceded he had control of the property during trial.[25] Therefore, since no dispute of control existed, evidence of a subsequent remedial measure was inadmissible under the control/ownership exception.[26] If, in the *Schultz* case for example, the defendant homeowner disputed control and argued he only rented the home and was not responsible for gutters,[27] then this dispute may potentially admit subsequent remedial measures evidence.[28]

The second exception to allow evidence of subsequent remedial measures is the impeachment exception.[29] In *Herzog v. Lexington Township*, the Illinois Supreme Court noted that "the principles necessary for determining when the impeachment exception should apply have not been clearly articulated."[30] In that case, the injured party sought to introduce evidence that road signs were erected

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20. *Id*. (emphasis added).

21. *Schultz*, 499 N.E.2d at 1069.

22. *Id.* at 1069-70.

23. *Id.* at 1070. This is when the first exception lives up to its "straightforward" reputation. *See* Slough, *supra* note 2, at 708 (suggesting "[an] [owner] will not make repair upon property which he does not control, nor will a manufacturer or business promulgate regulations concerning an activity beyond his control. Therefore, if one repairs a stairway or sidewalk or a machine, it seems valid to infer the existence of control at the moment of injury or accident").

24. *Schultz*, 499 N.E.2d at 1073.

25. *Id.*

26. *Id.*

27. This scenario arose six years earlier in *Coshenet v. Holub*. *Coshenet v. Holub*, 399 N.E.2d 1022. In that case, a tenant sued the building owner after falling down the stairs. *Id.* at 1023-24. Like *Schultz*, the plaintiff-tenant in *Coshenet* wanted to introduce post-accident fixes under the control exception. *Id.* The court did not allow this evidence, however, as control was not disputed because the written lease specifically required the *tenant* to make repairs to the building. *Id.* (emphasis added). Therefore, like *Schultz*, no control dispute meant no subsequent remedial measures evidence.

28. For a case in which building ownership and control is disputed and the court allows evidence of subsequent remedial measures. *See* Kipping v. Ill. Dep't of Empl. Sec., 52 Ill. Ct. Cl. 211 (1999) (determining evidence of post-injury remedial measures is admissible when defendant-building owner disputed control over a slippery entryway).

29. *Herzog*, 657 N.E.2d at 932-33.

30. *Id*. at 933.

after an accident occurred on an unmarked back road.[31] There was evidence that the defendant City erected signs on the back road only after the accident.[32] The injured party argued they should be able to impeach the defendant City's witness testimony that the road was not unsafe at the time of accident.[33] The court in *Herzog* narrowed the impeachment exception to deter introduction of evidence under "the guise of impeachment," and set forth the exception that this evidence is only allowed for "attempts to make *exaggerated* claims."[34] In other words, subsequent remedial measures are only admissible if a defendant, like the City in *Herzog*, testifies that the roadway was in the "safest possible" condition.[35] Although *Herzog* provides the generally accepted stance in Illinois, the impeachment exception has also been allowed when a party "opens the door" or elicits a line of questioning on subsequent remedial measures.[36]

The third and most important exception to this comment is the feasibility exception. Feasibility of preventative measures, also commonly referred to as feasibility of alternative design, is not as straightforward as the first two exceptions. The feasibility exception may allow admission of subsequent remedial measures if a defendant disputes the ability to prevent or lessen the harm of the accident before it occurs.[37] Again, note that feasibility must be disputed for the exception to apply.[38] Courts have clarified that the standard for the feasibility exception is not "necessary under the circumstances."[39] Rather, feasible means "capable of being done, executed or effectuated; capable of being successfully

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31. *Id.* at 928.

32. *Id.* at 932.

33. *Id.*

34. *Id.* at 933. (emphasis added). An interesting twist to the seminal *Herzog v. Lexington Township* case is presented in the *Herzog* dissent. Justice Harrison notes that the exact roadway against the same township was previously litigated a couple years prior in *Johnson v. O'Neal*. Johnson v. O'Neal, 576 N.E.2d 486 (Ill. App. Ct. 1991). In that case, the plaintiffs won, and the defendant township did *not* appeal. *Herzog*, 657 N.E.2d at 934-35. (emphasis added). The dissenter in *Herzog* argued that if the defendant believed they were not negligent, they should have appealed the first case too, not just the second case. *Id.* The prior litigation not only presents another layer to subsequent remedial measures evidence, but also likely implicates Supreme Court Rule 404(3)(b).

35. *Herzog*, 657 N.E.2d at 933.

36. *See* Van Gelderen v. Hokin, 958 N.E.2d 1029, 1040 (Ill. App. Ct. 2011) (allowing subsequent remedial measures evidence when defendant inaccurately testified that he did nothing to remedy stairs after injury).

37. MICHAEL A. GRAHAM, GRAHAM'S HANDBOOK OF ILLINOIS EVIDENCE 340 (2016).

38. *Id*.

39. Lewis v. Cotton Belt Route-St. Louis Sw. Ry., 576 N.E.2d 918, 929-30 (Ill. App. Ct. 1991) (admitting evidence of subsequent remedial measures when defendant testified adding a spotter was not feasible).

accomplished."[40] With this, feasibility arguments often appear in jurisprudence when plaintiffs argue a defendant was capable of making a change before the injury and should have made the change before, rather than after an accident, in order to prevent injury.

Sutkowski v. Universal Marion Corp. illustrates the foundational concepts of this exception.[41] In *Sutkowski*, a stone crushed a mineworker as he exited a strip mining machine.[42] The decedent's wife sought to introduce expert testimony to establish the death could have been prevented if defendants installed the machine's protective barrier before, rather than after, the mineworker's death.[43] The appellate court granted a new trial on this issue and allowed this testimony because "the [expert] witness would have testified to design alternatives which *could and should have* been installed at the time of manufacture of the machine."[44] In so holding, the court in *Sutkowski* formulated the feasibility exception by stating "if the feasibility of alternative designs may be shown by the opinions of experts or by the existence of safety devices . . . we conclude that evidence of a post occurrence change is equally relevant and material in determining that a design alternative is feasible."[45] Therefore, *Sutkowski* opens the proverbial door to subsequent remedial measures in some ways, as the court mentions factors such as efficiency, economy, and practicality, but it does not articulate the feasibility exception.[46]

These three exceptions range from relatively benign to completely obscured in Illinois. There are a number of Illinois appellate court cases on subsequent remedial measures, but no one well-defined pathway exists to admit or exclude this evidence.[47] One certainty, however, is that navigating these exceptions is key. Often times, whether subsequent remedial measures evidence is allowed may come down to clever lawyering and judicial interpretation.[48]

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40. *Id*. at 930. (citing BRYAN A. GARNER, BLACK'S LAW DICTIONARY 739 (4th ed. 1951)).

41. Sutkowski v. Universal Marion Corp., 281 N.E.2d 749, 750 (Ill. App. Ct. 1972) (allowing evidence of post-accident changes to prove an alternative design was feasible and should have been installed at the time the defendant manufactured the machine).

42. *Id.*

43. *Id*. at 750-51.

44. *Id.* at 751 (emphasis added).

45. *Id.* at 753.

46. *Id*.

47. Graham, *supra* note 37, at 338-44.

48. *See* Slough, *supra* note 2, at 708 (stating "[o]pportunities for circumventing the purpose of the rule are legion, an it is quite evident that admission or exclusion will be judged on the basis of subtle trial maneuvers").

B. Balancing Admissibility with Relevance and Prejudice

Although a subsequent remedial measure could be admissible under one of the three exceptions, the evidence may still be inadmissible using the ever-present Rule 401 versus 403 balancing test.[49] Every piece of potential evidence could be subjected to this test at trial.[50] Furthermore, any ruling on the admission of evidence is within the court's discretion.[51] The "any tendency" rule implicated by Federal Rule of Evidence 401 marks one end of the balancing test.[52] The "any tendency" test sets forth that evidence is relevant when it has "any tendency" to make a fact more likely to exist than it would have been without that evidence.[53] The equivalent in Illinois is Rule of Evidence 401.[54] Unlike the subsequent remedial measures rule, it mirrors the Federal rule.[55]

The second part of the balancing test, under Federal Rule of Evidence 403, considers relevant evidence with probative value and determines if the probative value is substantially outweighed by the risk of prejudice.[56] Again, Illinois' Rule of Evidence 403 mirrors the Federal rule.[57] Therefore, even if a plaintiff argues that a piece of subsequent remedial measures evidence is admissible due to a dispute of control, feasibility, or for impeachment, a court may still exercise its discretion to exclude that evidence as irrelevant or prejudicial.[58] The topic of relevance and admissibility of subsequent remedial measures will be largely implicated in the Analysis section of this comment, as Illinois courts depart greatly from federal courts with their idea of the relevant time period for remedial measures.[59]

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49. Boyko & Vacca, *supra* note 3, at 660.
50. *Id.*
51. ILL. R. EVID. 104(a).
52. FED. R. EVID. 401.
53. *Id.*
54. ILL. R. EVID. 401.
55. *Id.*
56. FED. R. EVID. 403.
57. ILL. R. EVID. 403.
58. *See e.g.,* Kwon v. M.T.D. Prods., 673 N.E.2d 408, 410-12 (Ill. App. Ct. 1996) (affirming that evidence of a post-accident safety measure was relevant and admissible under the feasibility exception). In *Kwon*, a child was injured after jumping on a reversing mower. *Id.* at 410. The child's father sued the mower manufacturer alleging numerous unreasonably dangerous conditions. *Id.* At trial, the *defendant* sought to introduce evidence of a safety feature implemented *after* the accident in order to argue infeasibility of an alternate design. *Id.* The plaintiff argued the subsequent remedial measures were irrelevant to the accident, and therefore inadmissible. *Id.* at 411-12. The court ultimately decided that the defendant's evidence helped establish a different design was not feasible. *Id.* at 414. In so holding, the appellate court affirmed the admission of subsequent remedial measures as relevant. *Id.*
59. Ralph Ruebner & Eugene Goryunov, *A Proposal to Amend Rule 407 of the Federal Rules of Evidence to Conform With the Underlying Relevancy Rationale for the Rule in Negligence and Strict Liability Actions*, 3 SETON HALL CIR. REV. 435, 455 (2007) (suggesting an amendment to the language of Rule

C. Public Policies Underlying Exclusion of Subsequent Remedial Measures

In addition to the principles underlying admissibility, the public policies used to exclude subsequent remedial measures cannot be ignored.[60] Three underlying policies work to exclude subsequent remedial measures.[61] In Illinois, the three policy considerations are:

> (1) a strong public policy favors encouraging improvements to enhance public safety, (2) subsequent remedial measures are not considered sufficiently probative of prior negligence, because later carefulness may simply be an attempt to exercise the highest standard of care, and (3) a general concern that a jury may view such conduct as an admission of negligence.[62]

Subsequent remedial measures jurisprudence is laced with lengthy policy discussions[63] because social policy underpins the exclusion of subsequent remedial measures evidence.[64] In 1890, the Illinois Supreme Court in *Hodges v. Percival* laid the foundation for using policy to exclude subsequent remedial measures.[65] In *Hodges*, plaintiffs filed suit after an elevator malfunctioned and plummeted, causing catastrophic injuries to the elevator riders.[66] The elevator riders introduced expert testimony to establish that an "air cushion" at the bottom of the shaft was commonly used to prevent injury in the event of an elevator fall.[67] The expert revealed that defendants implemented the commonly used air cushion only after the elevator riders were injured.[68] The Illinois Supreme Court in *Hodges* decided this evidence should have been excluded during trial.[69] The court explained:

> Evidence of precautions taken after an accident is apt to be

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407 to exclude remedial measures taken both before and after an injury).

60. Boyko & Vacca, *supra* note 3, at 658; *see also* Slough, *supra* note 2, at 705 (intertwining an analysis of subsequent remedial measures with three notable exceptions to admissibility).

61. Boyko & Vacca, *supra* note 3, at 658.

62. *Herzog*, 657 N.E.2d at 932 (citing Schaffner v. Chi. & Nw. Transp. Co., 541 N.E.2d 643, 647-48 (Ill. 1989) (declining to approve the admission of subsequent remedial measures on railroad even though admission was harmless)) (internal quotations omitted).

63. For an excellent example of a lengthy policy discussion, see *Jablonski,* 923 N.E.2d at 385.

64. Boyko & Vacca, *supra* note 3, at 658.

65. Hodges v. Percival, 23 N.E. 423 (Ill. 1890) (holding evidence of post-accident repairs should be excluded to promote defendants remedying dangerous conditions).

66. *Id.* at 424.

67. *Id.*

68. *Id.*

69. *Id.*

> interpreted by a jury as an admission of negligence. The question of negligence should be determined by what occurred before and at the time of the accident, and not by what is done after it . . . Persons, to whose negligence accidents may be attributed, will hesitate about adopting such changes as will prevent the recurrence of similar accident, if they are thereby to be charged with an admission of their responsibility for the past.[70]

The court in *Hodges* argued like most modern courts.[71] The court contended that allowing evidence of subsequent repairs or improvements would only deter defendants from fixing a dangerous problem.[72]

In the simplest terms, courts like *Hodges* motivate individuals to "take, or at least not discourage them from taking, steps in furtherance of added safety."[73] This deterrence policy has also been articulated as "encourag[ing] manufacturers to develop safer products without a fear of liability for past acts."[74] From a premise liability standpoint, "[i]f the evidence of the repair is allowed into evidence to show that the landowner was negligent in causing the fall, then no one would ever fix property that was dangerous."[75] This policy justification has been widely criticized nationally because some argue the policy shelters negligence rather than informs citizens about defects.[76] It appears that courts work to prevent fear of liability among manufacturers, without an equal safeguard to ensure defendant accountability.

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70. *Id.*

71. *See Herzog*, 657 N.E.2d at 932 (noting, "[t]hird is a general concern that a jury may view [subsequent remedial measures] as an admission of negligence") (*citing Hodges*, 23 N.E.2d at 423).

72. *Hodges*, 23 N.E.2d at 424.

73. FED. R. EVID. 407 (1975) (repealed 2011).

74. *Jablonski*, 923 N.E.2d at 386.

75. *Evidence of Repairs After Slip-and-Fall Accidents in Illinois*, LAW OFFICES OF BARRY G. DOYLE, P.C., www.accidentlawillinois.com/library/repairs-after-slipandfall-accidents-in-illinois/ (last visited Oct. 1, 2018) (explaining anecdotally to potential clients the reasoning for subsequent remedial measures evidence exclusion).

76. *See e.g.*, D.L. v. Huebner, 329 N.W.2d 890, 902 (Wis. 1983) (criticizing the policy underlying exclusion of subsequent remedial measures because there is no evidence that defendants will work to correct defects and we must not expose public to similar injuries). Once again, *Jablonski* presents an interesting discussion on the matter from an Illinois standpoint. *Jablonski*, 923 N.E.2d at 385. Although *Jablonski* will be thoroughly dissected in the Analysis section, the court criticizes the policies underlying exclusion and states "we believe that policy is better advanced by requiring manufacturers to inform consumers of safety measures which will remedy defects that already exist in products." *Id.* at 386. In addition, the *Jablonski* court's view was "manufacturers are more likely to develop safer products if they are held accountable, on a continuing basis, for a failure to warn of hazards that they knew or should have known existed at the time the product was manufactured." *Id.*

D. Present Standstill of Admissibility

With this preliminary understanding of subsequent remedial measures, the analysis of this comment cogitates the conflicting decisions of Illinois appellate courts leading up to, and continuing after, the seminal case *Jablonski v. Ford Motor Co.*[77] The inconsistencies surrounding subsequent remedial measures exceptions and policies came to a head in 2011, when Illinois attempted to codify a subsequent remedial measures rule.[78] In anticipation of a codified rule, the Illinois Bar Association wrote "[b]efore codification, the rules of evidence in Illinois were dispersed throughout case law—that is, they were contained in the findings and rulings by the Illinois Supreme Court and the appellate courts; statutes; and other Illinois Supreme Court rules."[79] With the intention to simplify evidentiary practice across the state, the advisory committee presented the following draft of a subsequent remedial measures rule:

> When, (1) after an injury or harm allegedly caused by an event, or (2) after manufacture of a product but prior to an injury or harm allegedly caused by that product, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not 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. 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 or design, if controverted, or for purposes of impeachment.[80]

The draft, however, never came to fruition.[81] Illinois Rule of Evidence 407 stands reserved to this day.[82] This rule remains stalled because the Illinois appellate court decisions vary so greatly, especially in products liability cases.[83] Illinois stands in a place where "unless the [Illinois] supreme court decides to codify a rule on its own, the conflict that now exists on this issue will await

77. Chris Bonjean, *Supreme Court Approves Illinois Rules of Evidence*, ILL. ST. B. ASS'N (Sept. 27, 2010), www.isba.org/iln/2010/09/27/supreme-court-approves-illinois-rules-of-evidence.

78. Gino L. DiVito, *The Illinois Rules of Evidence: A Color-Coded Guide Containing the New Rules, The Committee's General and Specific Comments, A Comparison with the Federal Rules of Evidence, And Additional Commentary,* TABET DIVITO & ROTHSTEIN, LLC, 89-91 (2020), tdrlawfirm.com/assets/downloads/Illinois_Rules_of_Evidence_
Color-Coded_Guide.pdf.

79. Bonjean, *supra* note 77, at 1.

80. *Id.*

81. *Id.*

82. ILL. R. EVID. 407.

83. *See* DiVito, *supra* note 78 (commenting on the line-up of conflicting cases leading up to *Jablonski*).

resolution until a case in controversy is submitted to it."[84] This implicates the issue of this comment, which examines the appellate court split that occurred in *Jablonski v. Ford Motor Company* and proposes a resolution to the hindered progress of Illinois rules of evidence.

III. ANALYSIS

The reservation of Illinois Rule of Evidence 407 and the appellate courts split did not develop overnight. Going back in time allows for a more accurate interpretation of *Jablonski*'s holding.[85] This comment's analysis begins with Illinois' first seminal case on the issue of subsequent remedial measures: *Hodges v. Percival*.[86] Building upon this foundation, this analysis progresses to the seminal cases partially abrogated by *Jablonski*.[87] This analysis then dissects and investigates the court's holding in *Jablonski*.[88] *Jablonski* not only re-wrote the timeline for admission of subsequent remedial measures, but also completely inverted the policy considerations used to exclude subsequent remedial measures.[89] Finally, this analysis examines *Jablonski*'s effect on the admissibility of subsequent remedial measures.[90]

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84. *Id*.

85. *See* Graham, *supra* note 37, at 338 (starting with the *Hodges* case to illustrate case law on subsequent remedial measures).

86. *Hodges*, 23 N.E.2d at 424.

87. *See Davis*, 521 N.E.2d at 1284 (affirming the exclusion of subsequent design changes because this evidence should only be admitted to prove a feasible alternative design in products liability cases); Smith v. Black & Decker, 650 N.E.2d 1108 (Ill. App. Ct. 1995) (excluding post-manufacture but preinjury repairs unless to prove an alternative feasible design in products liability cases).

88. *Jablonski*, 923 N.E.2d at 355.

89. For an interesting case and example of the policy *Jablonski* flipped, *see Schaffner*, 541 N.E.2d at 645 (affirming the exclusion of post-injury repairs because there was no dispute as to control or feasibility). As an aside, if there was more dispute over the admission of subsequent remedial measures in this case, the facts of *Schaffner* could be utilized in numerous civil suits for case illustrations. In *Schaffner*, a young boy was severely injured and permanently disabled when he was crossing train tracks and his bike tire popped off. *Id.* at 645. The parents sued the City for failing to maintain a level crossing as well as the bike manufacturer for the defect in the bike wheel. *Id.* at 646. Therefore, *Schaffner* presents a products liability, negligence, and willful and wanton case wrapped into one. *Id.* Unfortunately for this comment, the issue of subsequent remedial measures evidence was easy to decide. The Court appropriately excluded evidence of the defendant City's post-injury crossing repair because there was no dispute as to control or feasibility. *Id.* at 649. In other words, the key feature necessary to admit the evidence- a dispute- was lacking, so the evidence could not be admitted. *Id.* If there was dispute and the court provided a more in-depth analysis of the subsequent remedial measures evidence, *Schaffner* could potentially be the case to draft a rule from based on the versatile nature of *Schaffner*'s facts and issues.

90. *See* Willis R. Tribler & Stephen S. Weiss, *Illinois Civil Trial Evidence*, ILL. INST. FOR CONTINUING LEGAL EDUC., 2-47 (2009), www.iicle.com (skirting around the holding in *Jablonski* and advising practicing attorneys of the

A. Seminal Cases Leading to Jablonski

In 1890, Illinois set the precedent for subsequent remedial measures analyses in *Hodges v. Percival*.[91] Examining the past is not a mundane exercise for this analysis, as *Jablonski* relied heavily on *Hodges* in 2010 to change Illinois' evidentiary precedent.[92] *Hodges* not only laid the foundation for a policy that encourages deterrence, but also set forth a few very important rules. First and foremost, *Hodges* established that "[t]he question of negligence should be determined by what occurred before and at the time of the accident, and not by what is done after it."[93] With this, the court in *Hodges* outlined that the *time period* in which repairs were made is a relevant fact that determines the admissibility of subsequent remedial measures.[94] According to *Hodges*, courts should look to what the defendant was capable of doing before and at the time of the accident, not look to what was fixed after the accident because this is improper.[95] Therefore, the court in *Hodges* articulated that the "subsequent" element is exactly what limits admissibility of remedial measures.[96]

This analysis of the relevant time period is essential to the conflict in present-day Illinois. [97] The relevant time period set forth in *Hodges* has greatly evolved over the past 100 years. For example, in *Davis v. International Harvester Co.*, the court applied the same policy in *Hodges*, but changed the scope of the time period for admissibility.[98] In *Davis*, plaintiff was injured during a tractor collision.[99] The tractor driver brought suit against the tractor manufacturer because a weak spot in the tractor's body dislodged and pierced the driver's leg.[100] The tractor driver appealed the jury's ultimate verdict in favor of the manufacturer and argued that the trial court erred in excluding evidence of the tractor's subsequent design change.[101] The court discussed the feasibility exception of

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holdings in *Schaffner* and *Herzog*).

91. *Hodges*, 23 N.E.2d at 424.

92. *Jablonski*, 923 N.E.2d at 385 (explaining "*Hodges* demonstrates that the rule barring postaccident remedial measures was never intended to apply to preinjury remedial measures. As early as 1890, the supreme court allowed evidence of what occurred 'before and at the time of the accident[.]'").

93. *Hodges*, 23 N.E.2d at 424.

94. *See generally* Graham, *supra* note 37 (explaining the variations in time periods of admissibility throughout Illinois seminal cases).

95. *Hodges*, 23 N.E.2d at 424.

96. *Id.* Although the court does not explicitly use the word subsequent, they are ordering that the jury should only consider what happens before and during the accident when making their decision. *Id*.

97. *See* Graham, *supra* note 37, at 340 (stating "[b]oth propositions [of the relevant time period], however, are disputed").

98. *Davis*, 521 N.E.2d at 1287-88.

99. *Id.* at 1284.

100. *Id.*

101. *Id.* at 1286.

subsequent remedial measures, but ultimately adopted what the *Davis* court called "the narrower view."[102] This "narrower view" engaged more recent cases that were generally allowing subsequent remedial measures evidence in strict liability cases whenever a post-accident change occurred.[103] The court in *Davis* did not approve of this sweeping admissibility, and rejected a ruling that would continue to allow the general admission of remedial evidence.[104] Instead, the *Davis* court excluded the subsequent design change because "we find evidence of a *post*-occurrence change to be admissible to prove *only* that an alternative design was feasible."[105]

The court in *Davis* attempted to carve out a rule for products liability cases by allowing evidence of post-accident fixes but *only* to prove an alternative design was feasible before the injury.[106] In some ways *Davis* tried to clarify how narrow the feasibility exception was supposed to be, as that exception had been slowly expanding.[107] Although the *Davis* court labelled its ruling the "narrower view," their decision still shifted the focus from the *preinjury* phase noted in *Hodges*, to a post-accident stage.[108] This shift to focusing on the post-accident stage cracked the door that *Jablonski* would eventually knock off the hinges.

Although *Davis'* shift from preinjury to post-accident caused ripples that greatly affected Illinois jurisprudence, the *Davis* case provided the "preferred position" for many years.[109] *Davis* eventually influenced the holding in another seminal case: *Smith v. Black & Decker*. *Smith* is an important case because it eventually went head-to-head with *Jablonski*.[110] It presented similar facts to both *Davis* and *Jablonski*. The case involved the feasibility of a tool's alternative design after a man nearly amputated his hand using the defendant-manufacturer's saw.[111] As mentioned, *Davis*

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102. *Id.* at 1287-88 (deciding "we therefore recognize only the narrower view[.]"). The court finds this "narrower view" in *Sutkowski v. Universal Marion Corp. Sutkowski v. Universal Marion Corp.* 281 N.E.2d 749 (Ill. App. Ct. 1972).

103. *See* Burke v. Ill. Power Co., 373 N.E.2d 1354 (Ill. App. Ct. 1978) (holding evidence of post-occurrence changes are generally admissible in strict liability cases).

104. *Davis*, 521 N.E.2d at 1287-88.

105. *Id.* at 1288 (emphasis added).

106. *Id.* (emphasis added).

107. *Id.* at 1287 (opining "[t]he *Sutkowski* holding was either misconstrued or summarily expanded by the Appellate Court for the First District in *Burke v. Illinois Power Co.* to make evidence of post-occurrence changes generally admissible in strict liability actions") (internal citations omitted).

108. *Id.*

109. Graham, *supra* note 37, at 340 (explaining "[*Davis*] states the preferred position of applying the doctrine of subsequent remedial measures to post-occurrence changes in products liability actions.").

110. *See Smith*, 650 N.E.2d at 1113 (finding "we note, however, as the court did in *Davis*, that the Illinois rule in this regard is comparable to Rule 407 of the Federal Rules of Evidence").

111. *Id.* at 1110-11.

implemented a narrow rule that allowed evidence of post-accident remedial measures in products liability cases.[112] *Smith* differed from *Davis*, however, as the *Smith* case involved the "post-manufacture, but preinjury" time period rather than merely the post-*accident* stage.[113] In *Smith*, the injured party sought to introduce evidence that after the saw was manufactured but before plaintiff's injury, new standards required the implementation of a blade guard to prevent injury.[114] This blade guard would have prevented the injured man's severe hand injury.[115] The focus on this particular time period signified a key departure from *Davis* because there was no argument of preventability in *Davis*. Therefore, *Smith* revolved around more than a feasible alternative design like *Davis*. *Smith* revolved around a safety feature that was not only feasible, but also was required after the original and unsafe tool was already in consumers' hands.[116] This set of facts is like failing to recall an exploding seatbelt to prevent injury (*Smith*) versus fixing a defective seatbelt after an injury occurs (*Davis*). Despite this key distinction, the court in *Smith* simply applied *Davis'* narrower view relating to *post-accident* changes.[117] Using this narrower view, the court in *Smith* ultimately excluded the preinjury safety requirement, and post-injury fixes to the tool.[118]

Hodges, *Davis*, and *Smith* illustrate the conflicting rules and applications leading to *Jablonski*. In *Hodges*, the court excluded evidence that did not occur before or during the time period when the injury occurred.[119] In *Davis*, the court decided that evidence of post-injury fixes were admissible *only* to show feasibility of an alternative design in products liability cases.[120] Then, *Smith* applied *Davis*' to post-manufacture but preinjury fixes.[121] In summation, before *Jablonski*, Illinois jurisprudence had three

112. *Davis*, 521 N.E.2d at 1288.

113. *Smith*, 650 N.E.2d at 1113 (considering "we are now asked to determine whether the exclusion of post-manufacture, but preinjury safety modifications for purposes other than evidence of feasibility of alternative design . . . should be apply to product liability actions as well as negligence actions")(emphasis added).

114. *Id.* at 1111-12.

115. *Id.*

116. *Id.*

117. *Id.* at 1113.

118. *Id.* at 1113-14.

119. *Hodges*, 23 N.E.2d at 424 (holding, "[t]he question of negligence should be determined by what occurred before and at the time of the accident and not by what is done after it").

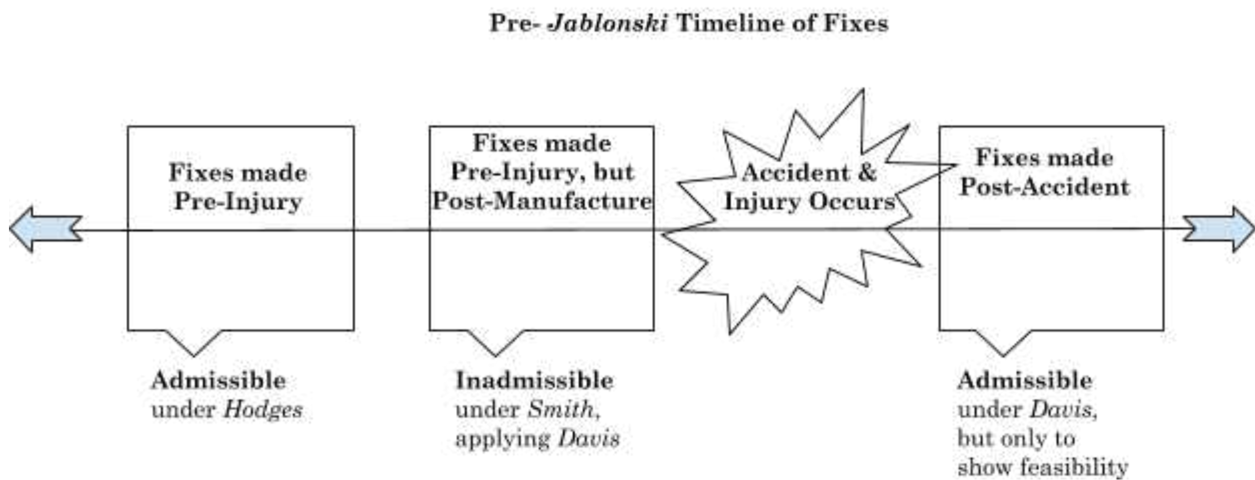
120. *Davis*, 521 N.E.2d at 1288 (reiterating, "[a]s stated above, however, we find evidence of post-occurrence change to be admissible to prove only that an alternative design was feasible").

121. *Smith*, 650 N.E.2d at 1113 (holding, "we find the same policy consideration, i.e. the potential chilling effect on safety improvements, present in product liability actions as in negligence actions regardless of whether the modifications were preinjury or post-injury").

different rules for three different time periods of when the subsequent remedial measures occurred (Figure A). This meant when a products liability case arose and feasibility of an alternative design was argued, the Illinois courts faced severe inconsistencies.

Figure A

While wading through this conflicting case law, Illinois then attempted to codify Illinois Rule of Evidence 407 in 2011.[122] Notice the proposed draft attempted to incorporate these decisions by splitting the rule into two relevant time periods: "(1) *after an injury* or harm allegedly caused by an event, or (2) *after manufacture of a product but prior to an injury* . . . evidence of the subsequent measures is *not* admissible[.]"[123] The draft appears to engage *Davis'* post-accident time period in part (1) and then *Smith*'s post-manufacture, but pre injury time period in part (2). To its credit, the rule attempts to follow the rulings in *Davis* and *Smith*, but the *Jablonski* court had more to say on the issue. Thus, the codification failed, and the rule was reserved pending the litigation in *Jablonski*.[124] The question now is: does *Jablonski* help or hinder this evidentiary issue?



B. *Jablonski v. Ford Motor Co.*: The Controversy Continues

Jablonski appeared on the docket at a time when inconsistency reigned over Illinois jurisprudence on the issue of subsequent remedial measures and products liability cases. *Jablonski*, however, did more than just interpret or change the scope of the law.[125] *Jablonski* engaged and protested against the current precedent.[126] The almost codified rulings from *Davis* and *Smith* were called into question. In *Jablonski v. Ford Motor Company*, the

122. DiVito, *supra* note 78, at 90.
123. *Id.* (emphasis added).
124. *Id.*
125. *Jablonski*, 923 N.E.2d at 355.
126. *Id.*

Jablonski couple was driving their 1993 Lincoln Town car, when they were rear-ended and a wrench in their trunk punctured the rear-axel fuel tank causing a large fire.[127] The accident trapped the Jablonskis in the car, which caused the wife to suffer extreme burns and the husband to die.[128] The Jablonskis sued the manufacturer of the 1993 Lincoln, Ford Motor Company ("Ford").[129] An array of issues were raised on appeal in *Jablonski*, but for the purposes of this analysis, this discussion will focus only on the court's ruling regarding subsequent remedial measures.[130]

Discovery revealed that post-manufacture, but preinjury, Ford made many changes to their automobile models to prevent similar accidents with fuel tank fires.[131] First, by 1991, most Ford-manufactured vehicles had fuel tanks located in safer locations.[132] Next, two years *before* the Jablonskis' accident, Ford distributed Trunk Packs only for police vehicles (with the same defects as the Jablonskis' car) to prevent impact-related fuel tank fires.[133] Essentially, the Trunk Packs provided protection from the rear-axel fuel tank and limited the danger to police officers in collisions.[134] Ford never notified civilians of any rear-axel fires, or that Trunk Packs were available to prevent rear-axel fuel tank fires.[135] Finally, evidence revealed that as early as 1960, Ford knew that real-axel fuel tanks posed a danger in rear-end collisions.[136] This damning evidence implicated the issue on appeal as to whether the post-manufacture but preinjury remedial measures were admissible under the feasibility exception. These pieces demonstrated that an alternative design was not only feasible but was actually being implemented in other Ford models while citizens like the Jablonskis drove the unprotected models.[137] This triggered the *Smith* court's ruling, which applied the *Davis* narrow rule.[138] Therefore, according

127. *Id.*

128. *Id.*

129. *Id.*

130. The *Jablonski* appellate decision is a long 41 pages. The other issues the court decided included "Claim of Negligent Location of Fuel Tank, Failure to Guard, and Failure to Warn," and "Failure to Inform of Trunk Pack and Truck Pack Recommendations Claims." *Jablonski*, 923 N.E.2d at 367. The court also ruled on other evidentiary issues such as "Prior Similar Incidents" and the "2006 Federal Safety Standards." *Id.* at 386-87. Finally, the court also analyzed issues of Jury Instructions and Special Interrogatories, and Punitive Damages. *Id.* at 389-93.

131. *Jablonski*, 923 N.E.2d at 356-57.

132. *Id.* at 357 (explaining "[b]y 1991, a majority of all the new automobiles manufactured had fuel tanks forward of the axel").

133. *Id.* at 363-64 (emphasis added).

134. *Id.*

135. *Id.* at 361 (mentioning "[c]ivilian owners of Panther platform vehicles, including the Jablonskis, received no notice of the availability of the Upgrade Kit, Trunk Pack, or Trunk Packing Considerations").

136. *Id.* at 371.

137. *Id.* at 383.

138. *Smith*, 650 N.E.2d at 1113-14.

to the standard rules, the Jablonskis' evidence would only be admissible to prove the feasibility of an alternative design. The Jablonskis then argued that since Ford disputed feasibility of an alternative design, this allowed the remedial measures evidence at trial.[139]

The court used the overwhelming evidence presented by the Jablonskis as a leg to stand on for its position.[140] Before explaining the court's position, it is important to note that the *Jablonski* appellate court did not discuss the issue of whether or not feasibility was disputed.[141] Even though disputed feasibility is required to apply any of the subsequent remedial measures exceptions, the *Jablonski* court did not discuss this issue. Instead, the court in *Jablonski* commented on the overwhelming evidence presented by the Jablonskis:

> Thus, it seems clear that this evidence was at least admissible to show that an alternative feasible design was available at the time the 1993 Lincoln Town car left Ford's control and that it could have prevented the Jablonskis' injuries. *On this basis alone*, we believe that the trial court did not abuse its discretion in allowing the introduction of this evidence.[142]

This avoidance of a discussion about whether feasibility was disputed is erroneous. The precedent for subsequent remedial measures evidence does not examine the amount *or* quality of evidence plaintiff brings, but rather only focuses on what is in dispute.[143] Therefore, it is essential to preface the court's position with a potential counterargument that courts should disregard the ruling in *Jablonski*, because it erroneously applies the feasibility exception. Rather than engage the parties' arguments on disputed feasibility, however, the court relied on Ford's potential ability to prevent the Jablonskis' injuries as sufficient to allow the evidence.[144] This completely controverted the long-standing rule that a court may *only* admit the evidence if feasibility is disputed.[145]

In regard to what the court did do, in *Jablonski*, it partially abrogated the holding in *Smith v. Black & Decker*. The court made a serious move and argued that courts should remember back to *Hodges v. Percival* when courts emphasized "what occurred before

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139. *Jablonski*, 923 N.E.2d at 383.

140. *Id.*

141. *Id.* at 383-84.

142. *Id.* at 383 (emphasis added).

143. *See e.g., Smith*, 650 N.E.2d at 1114 (glazing over evidence of blade guard implementation and stating the injured man should have made an offer of proof on the issue).

144. *Jablonski*, 923 N.E.2d at 384.

145. *See Schaffner*, 541 N.E.2d at 649 (stating, "[n]or do we believe that the evidence presented here of the subsequent replacement of the Central Avenue railroad crossing may be justified on either of the other grounds suggested by the plaintiff. [Defendant] did not dispute that replacement of the crossing was feasible").

and at the time of the accident" as the relevant time period for remedial measures.[146] Therefore, *Jablonski* rejected that post-manufacture but preinjury changes are admissible *only* to prove feasibility of an alternative design.[147] The court opined that the policy that excludes subsequent remedial measures evidence should be flipped.[148] The court decided the long-standing deterrence policy "does not apply to measures of which the defendant was aware and could have implemented before the accident."[149] Instead, the court in *Jablonski* held "we decline to follow [cases like *Smith* and *Davis*][150] on this issue, because we do not agree that the same policy considerations that bar the admission of *postaccident* remedial measures apply equally to *preinjury*, *postsale* safety measures."[151]

With this, the *Jablonski* court suggested three things: (1) Illinois should shift its focus back to the preinjury phase like *Hodges*, (2) different policy should prevail with preinjury remedial measures, and (3) new policy should be implemented by courts to inform consumers when safety measures are available to remedy a potentially dangerous condition.[152] In summation, the court shifted the relevant time period back to the preinjury time period. To substantiate its position, the court in *Jablonski* boldly asserted "[i]n our view, manufacturers are more likely to develop safer products if they are held accountable, on a continuing basis, for a failure to warn of hazards they knew or should have known existed at the time the product was manufactured."[153] Consequentially, the court in *Jablonski* rejected the policy to encourage safety measures by censoring evidence of a manufacturer's repairs.[154] Instead, *Jablonski* proposed a new underlying policy: hold manufacturers accountable, which will motivate manufacturers to cure dangerous conditions.[155]

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146. *Jablonski*, 923 N.E.2d at 384 (declaring, "we quote the supreme court's [in *Hodges*] opinion at length because its analysis applies with equal force today").

147. *Id.* at 384.

148. *Id.* at 385.

149. *Id.*

150. The original text refers to the case Carrizales v. Rheem Mfg. Co., 589 N.E.2d 569 (Ill. App. Ct. 1991) (applying *Davis* and *Schaffner* to exclude evidence of subsequent remedial measures); *see also* William G. Beatty, *The Illinois Supreme Court and the Seventh Circuit of Appeals Examine the "Risk-Utility" and "Consumer Expectation" Tests in Design Defect* Cases, IDC QUARTERLY 22, 1 (2012) (mentioning the *Jablonski* court's decision to not follow *Carrizales*). *Carrizales* case cites to *Davis* and *Schaffner*, but is most pertinent to this analysis because *Smith* relied on *Carrizales.* Therefore, when *Jablonski* abrogates *Carrizales*, the court also abrogates *Smith v. Black & Decker.*

151. *Jablonski*, 923 N.E.2d at 385 (emphasis in the original).

152. *Id.* at 385-86.

153. *Id.* at 386.

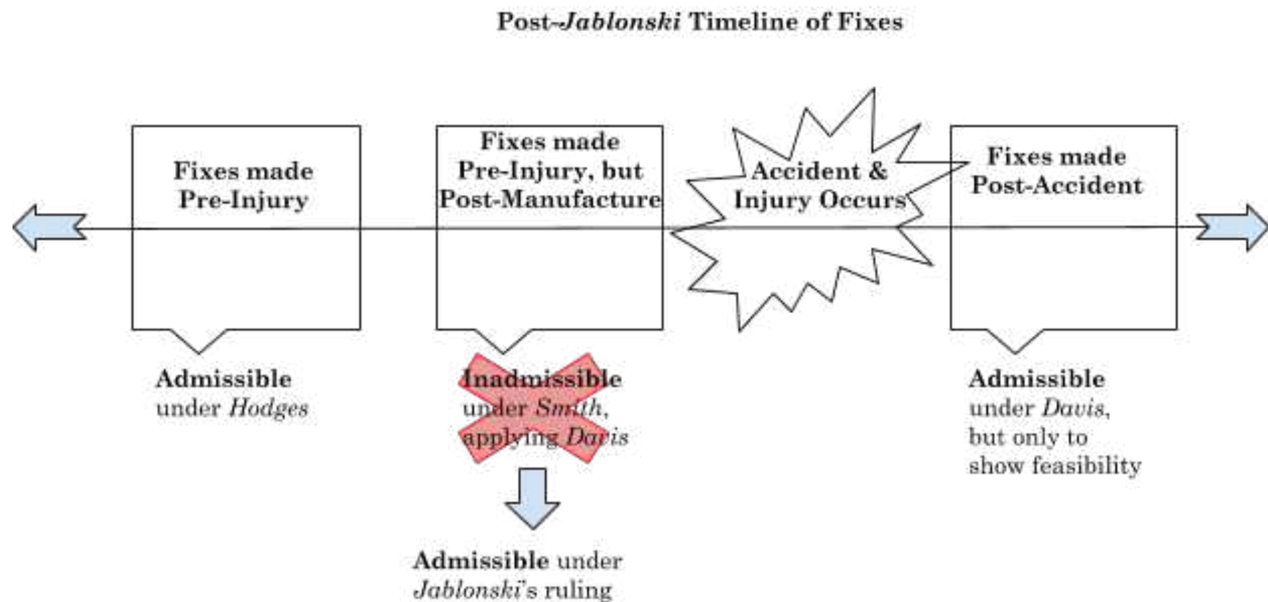
154. *Id.*

155. *Id.*

The holding in Jablonski directly contravenes Davis' and Smith's "preferred position."[156] (Figure B) Jablonski rejected a narrower view of the feasibility exception and rejected its application to only post-occurrence and/or, preinjury, but post-manufacture repairs.[157]

Figure B

The parties in *Jablonski* appealed to the Illinois Supreme Court,[158] but the Illinois Supreme Court's opinion did not clarify the questions posed in the appellate *Jablonski* decision.[159] Therefore, the move to reserve Illinois Rule of Evidence 407 while awaiting the outcome of *Jablonski* was in vain, as the litigation only left more questions without answers.[160]



156. *See* Graham, *supra* note 37, at 340 (comparing the holdings in *Davis* and *Jablonski* to illustrate conflicting positions in Illinois law).

157. *Jablonski*, 923 N.E.2d at 385-86.

158. The Illinois Supreme Court's decision can be found at *Jablonski v. Ford Motor Co.,* 955 N.E.2d 1138 (Ill. 2011).

159. *See* DiVito, *supra* note 78 at 90 (explaining that "the Supreme Court based its decision on the insufficiency of plaintiffs' evidence related to negligent design, the plaintiffs' reliance on a non-cognizable postsale duty to warn, and the plaintiffs' faulty theory concerning the defendant's alleged voluntary undertaking. The court therefore explicitly found it unnecessary to address various evidentiary rulings, 'including whether the trial court erred in admitting evidence related to postsale remedial measures'").

160. *Id.* (explaining, "[a]fter learning of the conflict caused by the *Jablonski* holding and after the supreme court granted review in that case, however, the Committee with drew its draft proposal, expecting the supreme court to address and resolve the conflicts").

C. Implications of Jablonski

To date, there has been no judicial clarification of *Jablonski* or its abrogations.[161] There also has not been a significant case that requires a products liability/subsequent remedial measures analysis.[162] As of 2019, Illinois still stands in conflict. Luckily, cases that implicate the other exceptions appear to be applying consistent rules.[163] An analysis that involves evidence of subsequent remedial measures under the feasibility exception, however, omits *Jablonski*'s precedent.[164] Therefore, Illinois needs a case that addresses the holdings in *Hodges*, *Davis*, *Smith*, and *Jablonski* and either reconciles their differences or chooses the correct analysis for subsequent remedial measures.

IV. Proposal

This comment shows how subsequent remedial measures evidence appears in a variety of contexts. Unfortunately, this only adds more inconsistency to the issue. Therefore, this proposal first agrees with the well-settled application of the other two exceptions. Then, combining the holdings in *Davis*, *Smith*, and *Jablonski*, this comment sets forth a balancing test for cases that involve remedial measures made in the post-manufacture, but preinjury time period. Finally, this proposal discusses the public policy dispute and its application to the proposed balancing test.

Although the bulk of the analysis section revolves around the feasibility exception, the control and impeachment exceptions still appear in Illinois law. With regard to these two exceptions, the *Herzog v. Lexington Township* Illinois Supreme Court case provides the rules most widely accepted by Illinois courts.[165] For the

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161. When shepardizing the *Jablonski* case on LexisNexis, there are no subsequent cases that cite to *Jablonski*'s holding and address this issue of pre-injury, but post-manufacture subsequent remedial measures.

162. There are no recent results for cases on LexisNexis when searching "products liability" + "subsequent remedial measures" that would engage the issues presented in *Jablonski*.

163. *See e.g.*, Carney v. Union Pac. R.R. Co., 77 N.E.3d 1 (Ill. 2016) (rejecting admission of subsequent remedial measures evidence under the control exception because there was no dispute that defendant did not have control over the railroad bridge); *see also* Garcia v. Goetz, 121 N.E.3d 950 (Ill App. Ct. 2018) (rejecting admission of subsequent remedial measures evidence under the control exception because there was no dispute of control or ownership).

164. *See* Tribler & Weiss, *supra* note 90 (mentioning *Jablonski* but relying on prior Illinois precedent to explain exclusion of subsequent remedial measures evidence). The Illinois Institute for Continuing Legal Education (commonly known as IICLE) provides resources for practicing attorneys to use. *Id.* With regard to the controversy presented in this analysis, these guides either explain what happens in *Jablonski* and does not apply it, or they do not mention *Jablonski*. *Id.*

165. *Herzog*, 657 N.E.2d at 933.

impeachment exception, a defendant may only be impeached with subsequent remedial measures evidence when they attempt to make exaggerated claims, such as stating a product is "the safest on the market."[166] Otherwise, if a party "opens the door" to subsequent remedial measures evidence, they may be impeached as well.[167] For the control/ownership exception, *Herzog* cites to *Schultz v. Richie* and *Coshenet v. Holub* for the general rule that subsequent remedial measures are only admissible to establish control or ownership , if said control or ownership is disputed.[168] This 1995 Illinois Supreme Court case is still considered good law.[169] Consequently, these two exceptions are simple to apply. Therefore, these rules should begin the structure of the codified Illinois Rule of Evidence 407.

With regard to the feasibility of an alternative design exception, particularly in products liability cases, Illinois needs to carve out specific rules. The two recurring and competing time periods are (1) strictly post-accident, like the repairs in *Davis*,[170] and (2) post-manufacture but preinjury repairs, discussed in *Smith* and *Jablonski*.[171] First, *Davis* was correct to exclude strictly post-accident repairs. The narrow rule that evidence of subsequent remedial measures is only admissible to prove the feasibility of an alternative design, if disputed, aligns with long-standing policy and precedent.[172] Therefore, as to the post-accident time period, Illinois should codify the narrow rule set forth in *Davis* as it is already followed and understood by many courts.

The proposal for the second time period at issue is far more intricate. Illinois courts should implement a balancing test using the narrow rule in *Davis* and *Smith*, and the controversial holding in *Jablonski*. For example, at a pre-trial hearing – in addition to using the court's discretion under Illinois Rule of Evidence 104,[173] and the relevancy rules of Illinois Rules of Evidence 401 and 403[174]—a court should weigh admissibility of post-manufacture but

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166. *Id.*

167. *See Van Gelderen*, 958 N.E.2d at 1040 (allowing subsequent remedial measures evidence when defendant inaccurately testified that he did nothing to remedy stairs after injury).

168. *Schultz*, 499 N.E.2d at 1073; *Coshenet*, 399 N.E.2d at 1024.

169. *Herzog*, 657 N.E.2d at 933.

170. *Davis*, 521 N.E.2d at 1288.

171. *Smith*, 650 N.E.2d at 1114; *Jablonski*, 923 N.E.2d at 385-86.

172. *Davis*, 521 N.E.2d at 1288.

173. ILL. R. EVID. 104(a) (reading "[q]uestions of Admissibility Generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination, the court is not bound by the rules of evidence except those with respect to privileges").

174. *Id.* (stating "'[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the

preinjury subsequent remedial measures. The proposed balancing test would likely look close to the following: **(1) whether the availability of an alternative design was feasible at the time the product left the manufacturer's control,[175] (2) whether implementing the design could have prevented the injury,[176] and (3) whether the evidence is necessary only to prove a *disputed* feasible alternative design.[177]**

Breaking this down, factors (1) and (2) engage the court's troubling evidentiary discoveries in *Jablonski*. If an alternative design was available before the dangerous product reached consumers, courts should have the discretion to allow a jury to hear this evidence. Likewise, the jury should know whether a plaintiff's injury could have been prevented if a defendant disputes a feasible alternative design. The counterargument to this aspect, would be significant prejudice to defendants. Failing to prevent an injury when they were capable of doing so would arguably be the nail in a defendant-manufacturer's coffin. These two factors, however, do not contravene the long-standing deterrence policy set forth in *Hodges*. These factors do not strike fear that a post-injury fix will be used against a defendant. These two factors do not look at a defendant's post-injury acts, they instead look at preinjury failures. Therefore, the first two factors can elicit evidence that may be more probative than prejudicial.

Factor (3) forces a court to determine if the evidence would truly be used for the narrow purposes of establishing feasibility as the courts in *Davis* and *Smith* wanted. In other words, even if substantial evidence exists that an injury was preventable, the evidence must still fall within the parameters of subsequent remedial measures law. This third factor provides courts a leg to stand on if the evidence that the injury was preventable is weak. Furthermore, factor (3) ties in the necessary element of dispute that the court in *Jablonski* overlooked.

This test would solve a number of issues in Illinois jurisprudence because it would allow courts to include or exclude evidence that falls outside of the *Davis* court's narrow scope. At the

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evidence"); *see also Id.* (reading "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence").

175. *Jablonski*, 923 N.E.2d at 383 (reasoning "[t]hus, it seems clear that this evidence was at least admissible to show that an alterative feasible design was available at the time the 1993 Lincoln Town Car left Ford's control and that it could have prevented the Jablonskis' injuries").

[176] *Id.* at 385 (finding "[t]he same concern does not apply to measures of which the defendant was aware and could have implemented before the accident").

177. *Davis*, 521 N.E.2d at 1288 (holding "we find evidence of a post-occurrence change to be admissible to prove only that an alternative design was feasible").

same time, if a court is presented with clear and overwhelming evidence that a manufacturer could have prevented many injuries and deaths, but failed to do so, then the court may use its discretion to allow the evidence so long as feasibility is disputed. This ultimately incorporates *Jablonski*'s holding but addresses the counterargument that *Jablonski* should be thrown out for failing to address whether feasibility was disputed. For example, if the balancing test was utilized in *Jablonski*, the court may still express its disdain for Ford's failure to prevent the Jablonskis' accident. The court would then still need to address whether feasibility is disputed and whether the evidence is offered only to prove a feasible alternative design.[178]

A court's analysis should not conclude here by applying only the balancing test. Courts should still consider the policy that underpins the exclusion of subsequent remedial measures. *Jablonski* injected uncertainty into the previously well-settled deterrence policy that emerged from *Hodges v. Percival*.[179] Again, this policy limited evidence of subsequent remedial measures so that manufacturers were not deterred from fixing a dangerous condition after an accident occurs. Before *Jablonski*, courts argued that allowing subsequent remedial measures evidence would only deter manufacturers from curing dangerous defects.[180] *Jablonski*, however, looked at the substantial evidence against Ford and argued that manufacturers should be held accountable for blatantly dismissing the opportunity to cure a dangerous defect.[181] Personal

178. For cases to illustrate the balancing test, apply the interesting facts in *Schaffner*. *Schaffner*, 541 N.E.2d at 645; Tribler & Weiss, *supra* note 90. As mentioned, the court in *Schaffner* analyzed both the negligence claim and the products liability claim, but the issue of subsequent remedial measures was easy to decide because there was no feasibility dispute. If the facts of *Schaffner* changed and a dispute existed, however, the balancing test would work in that case too. If the City in Schaffner disputed the feasibility of a crossing repair even though there were numerous pieces of evidence to the contrary, a court could use this three-part balancing test. If the balancing test was applied the court would likely find the evidence of a subsequent remedial crossing repair admissible mainly because feasibility was disputed, but also based on the other factors. The court could opine on the preventability of the boy's injuries if the City had just completed the crossing repair plans. Therefore, the balancing test would work in a negligence claim such as the one in *Schaffner* too.

179. *Hodges*, 23 N.E.2d at 424.

180. *See e.g. Davis*, 521 N.E.2d at 1287 (finding "[t]he rationale for the rule is that defendants should not be deterred from making repairs or modifications which will increase safety by the concern that the plaintiff might use those measures as evidence of past negligence")*; see also Herzog*, 657 N.E.2d at 932 (reasoning "a strong public policy favors encouraging improvements to enhance public safety").

181. *Jablonski*, 923 N.E.2d at 385-86 (declaring "while a manufacturer may be hesitant to adopt postaccident remedial measures if those measures are admissible as evidence to prove negligence in the case involving that accident, other policy considerations prevail preinjury … In our view, manufacturers are more likely to develop safer products if they are held accountable, on a

injury attorneys, and most consumers for that matter, cannot ignore that both policies serve essential purposes. Illinois courts should consider both sides of the policy and use either to bolster their evidentiary ruling to admit or exclude evidence of subsequent remedial measures. With these dual policy considerations, both plaintiffs and defense have a policy argument on their side. Then, a judge may look at the individual facts of the case and use her discretion to decide which policy approach better serves the public. Therefore, the policy argument from pre-*Jablonski* or post-*Jablonski* may be used like a fourth factor in the balancing test depending on disputed feasibility and preventability of injury.

V. CONCLUSION

In summary, what often matters in a case with subsequent remedial measures evidence is not the rule, but the exceptions to the rule. Although other jurisdictions and federal courts rely on well-settled precedent to guide admissibility or exclusion, Illinois rules regarding subsequent remedial measures stand obscured. The state has managed to implement consistent rulings on two out of the three exceptions, but the third exception—feasibility—is riddled with confusion and error. Illinois courts should work to amalgamate these rulings by implementing a three-part balancing test to guide admissibility of subsequent remedial measures in the post-manufacture, but preinjury time period. This will allow courts the discretion to hear evidence and form an educated, well-adjusted decision about admissibility.

If there is one takeaway from this Comment, it should be that Illinois needs to embrace the inconsistent precedent and reconcile the conflicting cases. Opponents of the balancing test may argue there is no federal equivalent to the proposed balancing test,[182] but the cloudy conditions of Illinois common law require a creative solution. Rather than stand with a reserved evidentiary rule and inconsistent case law, the Illinois Supreme Court should hear a products liability subsequent remedial measures case and implement a balancing test that touches upon the conflicting precedent. Otherwise, products liability plaintiffs will continue to spend hours at pre-trial hearings arguing they are lawfully entitled to tell the jury about a car's new design after numerous people died. Medical malpractice attorneys will continue to argue the jury

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continuing basis, for a failure to warn of hazards that they knew or should have known existed at the time the product was manufactured").

182. FED. R. EVID. 407. The federal rule, however, does begin by stating "[w]hen measures are taken that would have made an earlier injury or harm less likely to occur . . ."; this *does* connect to the second factor of the proposed balancing test. *Id.* Although the federal rule does not have a rule pertaining to preventability, the text of the federal rule acknowledges that preventability connects to subsequent remedial measures. *Id.*

should hear about a medical instrument's non-party manufacturer. And in a garden-variety negligence case, plaintiff-tenant and defendant-owner will continue to argue about telling the jury about the owner's slippery stair repair. Illinois cases will go on, and without one codified and consistent rule, so will the arguments without clear answers. Therefore, it is time to create one rule to govern admissibility of subsequent remedial measures.