

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
Civil Action No.: 03:10CV00028**

SHAWN SMITH,

Plaintiff,

v.

WAVERLY PARTNERS, LLC, and
ALLIEDBARTON SECURITY SERVICES,
LLC d/b/a HRPLUS,

Defendants.

**PLAINTIFF'S RESPONSE TO
WAVERLY PARTNERS LLC'S
MOTION IN LIMINE TO EXCLUDE
EVIDENCE OF WAVERLY'S
SUBSEQUENT REMEDIAL
MEASURES**

NOW COMES Plaintiff, Shawn Smith ("Plaintiff"), through counsel, and hereby responds to Defendant Waverly Partners, LLC's ("Waverly") Motion *in Limine* to exclude evidence of Waverly's subsequent remedial measures, including Waverly's change in policies and procedures for obtaining background checks and changes to its consent form for background checks.

Federal Rule of Evidence 407 provides that evidence of subsequent remedial 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." Reading on, the Rule specifically states that such measures are admissible for any other relevant purpose, including "proving ownership, control, or feasibility of precautionary measures ..., or impeachment." Fed. R. Evid. 407; *Werner v. Upjohn Co., Inc.*, 628 F.2d 848, 857 (4th Cir. 1980).

A key issue in this contract dispute is the agency relationship between Waverly and its agent, VanElla. Waverly could preempt the need for Plaintiff to seek admission of its remedial measures by stipulating that Defendant generated, owned, and controlled the consent form signed by Plaintiff, and that it exercised control over the manner in which VanElla conducted its

background investigations. Given Waverly's refusal to stipulate to the admission of its subsequent remedial measures for any permissible purpose whatsoever, this evidence should not be excluded.

The public policy underlying the exclusionary purpose of Rule 407 does not apply here. This Rule is intended to apply to any post-accident change, repair, or precaution when it is offered as evidence of another party's liability. *See, e.g., HDM Flugservice GmbH v. Parker Hannifin Corp.*, 332 F.3d 1025, 1034 (6th Cir. 2003)(exclusion of evidence that defendant issued a warning after plaintiff's accident regarding the inspection method of its helicopter landing gear that was not mentioned in maintenance manual was proper). This is a breach of contract case, not a personal injury case. Accordingly, Plaintiff asks the Court to deny Waverly's Motion *in Limine* to exclude evidence of Waverly's subsequent remedial measures.

This the 7th day of September, 2012.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing **PLAINTIFF'S RESPONSE TO WAVERLY PARTNERS LLC'S MOTION IN LIMINE TO EXCLUDE EVIDENCE OF WAVERLY'S SUBSEQUENT REMEDIAL MEASURES** with the Clerk of Court using the CM/ECF system, which will send the notice of electronic filing to the following:

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This the 7th day of September, 2012.

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