

No. 07-117

IN THE
SUPREME COURT OF THE UNITED STATES

STUART SLOPE, by and through his parents
and legal guardians
Stacy and Serina Slope,
Petitioner.

v.

UNDER THE SEA TOYS, Inc.,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

BRIEF FOR PETITIONER

ISSUES PRESENTED

- I.A. Whether a contextually reliable, non-custodial statement collateral to a declaration against pecuniary interest is admissible under *Williamson*.
- I.B. Whether the creation of a per se rule excluding all statements made before suicide is erroneous because it requires the exclusion of statements that are otherwise contextually reliable.
- II. Whether Federal Rule of Evidence 803(3) incorporates the *Hillmon* doctrine where the scholarly and judicial history and the plain meaning of the statute supports such an interpretation.
- IIIA. Whether factual information in a post-injury report prepared by a distributor of a product is admissible where it functions as evidence of the distributor's analysis of its product rather than evidence of subsequent measures taken.
- IIIB. Whether measures undertaken at the direction of a governmental agency are admissible where the measures were not voluntarily initiated but rather were prompted by the government agency-issued statement directing an appropriate investigation and necessary remedial action

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Boerum is reproduced in the Record at pages 19-23. The opinion of the United States Court of Appeals for the Fourteenth Circuit is reproduced in the Record at pages 30-47.

STATUTORY PROVISIONS INVOLVED

The statutes referenced in this brief are set forth, in pertinent part, in the attached Appendices.

STATEMENT OF FACTS

In or about March 2005, Defendant Under the Sea Toys, Inc. (“Sea Toys”) and BFP Tattel, Inc. (“Tattel”) created the “Finn E. Shark” stuffed toy, based on a character in the hit movie Shark Attack. (R. at 2.) Beginning in May 2005, Tattel manufactured and distributed the toy in Legolia, and Sea Toys distributed the toy in the United States. (R. at 2.)

Plaintiff Stuart Slope (“Stuart”), who is currently five years old, is a resident of Park Slope Boerum. (R. at 2.) In the summer of 2005, Stuart, four years old at the time, saw the movie Shark

Attack. (R. at 2.) Because Stuart loved the movie, his parents purchased a Finn E. Shark for him from a Boreum toy store in December 2005. (R. at 2.) Stuart loved the toy so much he carried it with him everywhere and was often seen licking its eyes. (R. at 2.)

By the end of December 2005, Stuart's parents began to notice that Stuart was displaying alarming symptoms, including brief periods of unconsciousness, headaches, dizziness, confusion, mood changes, and memory problems. (R. at 2.) They sought medical attention in early January 2006. (R. at 3.) Blood tests, brain scans and other diagnostic procedures performed on Stuart established conclusively that Stuart's symptoms were caused by being exposed to a rare toxin called "rH-12." (R. at 3.)

By September 2005, a record number of Legolian children had been diagnosed with brain damage from exposure to rH-12. (R. at 3.) On September 30, 2005, the Legolian government reportedly launched an investigation to determine the source of the rH-12. (R. at 3.)

It was determined that the toxin rH-12 was present in the glue or adhesive used to attach the eyes to the Finn E. Shark toy. (R. at 30.) It is believed that Sea Toys learned that the Finn E. Shark toy contained rH-12 in October 2005, but did not warn of the danger or begin a recall until April 1, 2006. (R. at 3.) The manufacturer of the toy, Tattel, was dissolved in January 2006. (R. at 3.)

Stuart's exposure to rH-12 has caused irreversible brain damage and he now suffers from many symptoms, including: headaches, repeated vomiting and nausea, convulsions and seizures, slurred speech, numbness in the extremities, loss of coordination, confusion, agitation, inconsistent sleep patterns and inability to waken from sleep, and loss of interest in favorite things. (R. 1-2.)

PROCEDURAL HISTORY

On April 14, 2006, Petitioner Slope's parents, Stacy and Serina Slope, brought the present action against Sea Toys on behalf of their son. (R. at 1.) The Slopes brought the cause of action pursuant to §204 of the Boerum Tort Reform Act, claiming that a reasonable distributor with Sea Toy's knowledge should have issued a warning and recalled the toy by October 2005. (R. at 3.)

During discovery, it was determined that Tattel and Tattel CEO, Mimi Jussel, knew that the Finn E. Shark toy contained rH-12 no later than September 30, 2005. (R. at 30.) At the completion of discovery, Sea Toys filed for summary judgment, alleging that Petitioner Slope could not prove the knowledge element of § 204 because no admissible evidence established that Sea Toys knew of the presence of rH-12 in the toy prior to the time the Slopes purchased it. (R. at 30.)

At a summary judgment hearing before Chief Justice Ritter of the Southern District of Boerum, Petitioner Slope argued that four different pieces of evidence could establish that Sea Toys knew of the presence of rH-12 before December 2005. (R. at 6-16.)

The first piece of evidence was an entry from Tattel CEO Mimi Jussel's personal business journal, dated October 10, 2005, in which Jussel stated that she told the Legolian Undersecretary of Commerce that "everybody here and in America knew – that there was rH-12 in that toy..." (R. at 22.) The District Court held that the statement was an inadmissible collateral statement. (R. at 19.)

The second piece of evidence was a personal letter written by Jussel to her daughter, dated October 11, 2005, in which Jussel stated that she "went to California and told Sea Toys that there was rH-12 in the shark toys and that rH-12 had dangerous effects on children." (R. at 23.) The District Court held that the entire letter was unreliable, and therefore inadmissible, because it was written shortly before Jussel committed suicide. (R. at 19.)

The third piece of evidence was a statement from a deposition of Jussel's secretary, Jaffe Peetz, in which Peetz stated that Jussel had said to him on September 30, 2005, "Book me a plane ticket to California right away. Something terrible has happened and I am going to meet with Troy Ledbetter to tell him what is going on." (R. at 24.) The District Court held that the statement was inadmissible under Federal Rule of Evidence 803(3). (R. at 20.)

The fourth piece of evidence was a post-injury report prepared by Sea Toys on January 16, 2006, which contained informational findings regarding the rH-12 in the toy, and recommendations that sales be suspended and an immediate recall issued. (R. at 25.) The District Court held that both the informational findings and the recommendations were inadmissible as subsequent remedial measures. (R. at 20.)

On appeal, the Circuit Court for the United States Courts of Appeals Fourteenth Circuit affirmed the holding of the District Court and agreed that all four pieces of evidence were inadmissible. (R. at 28-45.)

Petitioner's writ of certiorari was granted on October 1, 2007. (R. at 46.)

SUMMARY OF THE ARGUMENT

The Court of Appeals erred by excluding Petitioner Slope's first piece of evidence because contextually reliable non-custodial statements collateral to declarations against pecuniary interest are admissible under *Williamson*. In *Williamson*, the Supreme Court held that statements collateral to Federal Rule of Evidence 803(3) declarations against interest were inadmissible. However, *Williamson* is limited in scope and does not exclude non-custodial statements collateral to declarations against pecuniary interest which are contextually reliable. There is a vast difference between penal and pecuniary interests. Also, with custodial statements collateral to penal interest, such as those in *Williamson*, the concern exists that the declarant may

attempt to curry favor with the police or sow doubt in the mind of the jury. These are not concerns with non-custodial statements because the incentive to lie or mislead would be greatly diminished and the statements would have greater reliability. Additionally, courts always consider context when determining if a declaration against interest is admissible. Courts should also have the opportunity to consider the context of collateral statements, and where the statement is contextually reliable, such as the one presented here, it should be admissible.

The Court of Appeals erred by creating a per se rule excluding all suicide notes, letters, and statements made shortly before suicide because courts should be able to analyze the context of the statements to make individualized reliability determinations. Individualized review will prevent otherwise reliable declarations against interest from being excluded under a blanket rule. Not all statements made before suicide are made for the purpose of rewriting history; in fact, statements made before suicide could be made for any number of purposes, so it is vitally important that courts be given the opportunity to examine the unique circumstance which may indicate reliability in a particular case. If the Court of Appeals' per se exclusion of Jussel's letter is reversed, several collateral statements contained in the letter are properly admissible as contextually reliable non-custodial collateral statements.

The Court of Appeals erred in finding that 803(3) does not incorporate the *Hillmon* doctrine. The Court of Appeals should not have relied on the Notes of the House Committee on the Judiciary because the plain meaning of 803(3) establishes that the *Hillmon* doctrine was meant to be incorporated into Rule. Additionally, the *Hillmon* doctrine has a long history of academic and judicial support, which lends credence to its use as a workable hearsay exception.

ARGUMENT

I. THIS COURT SHOULD REVERSE THE JUDGMENT OF THE COURT OF APPEALS BECAUSE EXCLUDED STATEMENTS CONTAINED WITHIN A BUSINESS JOURNAL ENTRY AND PERSONAL LETTER ARE ADMISSIBLE COLLATERAL STATEMENTS UNDER HEARSAY EXCEPTION 804(b)(3).

Although Federal Rule of Evidence 802 generally prohibits the admission of hearsay statements, there are several exceptions which allow a hearsay statement to be admitted into evidence. One exception, codified in Fed. R. Evid. 804(b)(3), permits the admission of declarations against interest. Rule 804(b)(3) provides, in pertinent part, that a statement is admissible when

at the time of its making [the statement is] so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability.. .that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

In the present case, the Court of Appeals incorrectly excluded two pieces of evidence which were properly admissible under Rule 804(b)(3). First, a statement contained within Tattel CEO Mimi Jussel's business journal is admissible under Rule 804(b)(3) because the statement is collateral to a declaration against pecuniary interest, made in a non-custodial setting, and contextually reliable. Second, statements Jussel made in a letter to her daughter are reliable non-custodial collateral statements and therefore also admissible under hearsay exception 804(b)(3). Because both pieces of evidence are admissible hearsay under the Federal Rules of Evidence and therefore properly admitted into evidence, the judgment of the Court of Appeals should be reversed.

A. A Statement Implicating Seas Toys, Inc. Contained Within Jussel’s Business Journal is Admissible Under Rule 804(b)(3) Because the Statement is a Contextually Reliable, Non-Custodial Statement Collateral to a Declaration against Jussel’s Pecuniary Interest and Therefore Properly Admissible Under Williamson.

The first piece of evidence deemed inadmissible under Rule 804(b)(3) by both the District Court and the Court of Appeals was the statement “I knew – everybody here and in America knew – that there was rH-12 in that toy but we kept selling it anyway and we just sent a shipment to the U.S.,” which was written by Tattel CEO Mimi Jussel in her business journal shortly before she committed suicide. (R. at 8.)

A hearsay statement is generally admissible under Federal Rule of Evidence 804(b)(3) if the declarant is unavailable as a witness and the statement is a type which is so far contrary to the declarant’s interest that a reasonable person in the declarant’s position would not have uttered it unless he believed it was true. However, in *Williamson v. United States*, 512 U.S. 594, 599 (1994), this honorable Court narrowly construed the definition of ‘statement’ and held that Rule 804(b)(3) covers “only those declarations within the confession that are individually self-inculpatory.” Therefore, “collateral” statements, those statements which are not individually self-inculpatory but which are contained within the longer narrative, were deemed unreliable and therefore inadmissible under Rule 804(b)(3). *Id.*

At issue presently is the Court of Appeals’ finding that the statement “everybody here and in America knew” was an impermissible collateral statement under *Williamson v. United States*, 512 U.S. 594 (1994), and therefore could not be admitted into evidence to implicate Sea Toys, Inc. However, in the present case, the Court of Appeals improperly relied on *Williamson* when excluding the statement “everybody here and in America knew” to implicate Sea Toys because the statement is collateral to a declaration against pecuniary interest, made in a non-

custodial context, and is reliable based on its context; therefore *Williamson* does not bar its admission.

1. *Williamson* does not preclude statements collateral to non-custodial declarations against pecuniary interest because such statements have a higher degree of reliability.

The Court of Appeals erred by excluding the statements collateral to Jussel's declaration because *Williamson* applies only to statements collateral to declarations against penal interest made in a non-custodial context.

First, in *Williamson*, this Court clearly limited itself to determining the “scope of the hearsay exception for statements against *penal* interest.” *Id.* at 596 (emphasis added). It is true that there are limited examples of courts extending the holding in *Williamson* to exclude collateral statements in civil trials. *See Silverstein v. Chase*, 260 F.3d 142 (2d Cir. 2001). However, this is an improper result. As noted by Court of Appeals Justice Marjorie K. Julio in her dissenting opinion, there is a “vast difference between declarations against penal interest and declarations against pecuniary interest.” (R. at 42.) A defendant in a criminal case may believe that inculpating another may completely free him of criminal charges, thereby increasing his incentive to lie and decreasing the reliability of any collateral statement he would make. A defendant in a civil case, on the other hand, is much less likely to believe that blaming another would free him from liability; he would still face significant civil penalties based on his involvement, no matter how many others were involved. Therefore, without a high motivation to shift the blame, the incentive to lie is diminished and the reliability of the statement, which is what Rule 804(3)(b) is ultimately concerned with, is greatly increased.

Moreover, *Williamson* was specifically concerned with custodial statements, wherein a criminal defendant in custody may make statements in an effort to shift the blame. In

Williamson, the declarant was in police custody and facing impending criminal charges when he made statements implicating others. *Id.* at 597. With custodial statements such as those in *Williamson*, “there is a non-trivial concern that the defense may have induced the declarant to fabricate the statement in an effort to sow doubt about the defendant's guilt in the mind of the jury.” Richard A. Nagareda, *Reconceiving the Right to Present Witnesses*, 97 Mich. L. Rev. 1063, 1143 (1999) (citing 5 *Weinstein’s Federal Evidence* § 804.06[a], at 804-60 (“Since the statements are made by someone subject to criminal prosecution, the possibility exists, especially when the statement is made while the declarant is in police custody, that the declarant sought immunity or hoped to be allowed to plead to a lesser crime in return for providing help to the prosecution in obtaining a conviction.”)). These are not concerns in a case like the present one, where a non-criminal declarant who is not in custody makes a statement implicating another.

In the present case, Sea Toys concedes that Jussel’s statement that she “knew,” there was rH-12 in the toy was a declaration against her pecuniary, and not penal, interest. (R. at 33.) Additionally, the statements collateral to Jussel’s declaration against interest were not made in a custodial setting but instead recorded in a personal business journal. A declarant in the position of someone like Jussel, who was neither facing criminal charges nor in custody, and who was in fact simply recording information in a business journal, would not be concerned with currying favor with police or convincing a jury of her innocence, as would a declarant in custody. Therefore, the incentive to lie or misled would be greatly diminished and the statements would have greater reliability; thus, the reasoning in *Williamson* would be inapplicable.

2. Contextually reliable collateral statements should be admissible under *Williamson*.

Fashioning a more flexible rule under *Williamson* would give courts the opportunity to examine context when determining the ultimate reliability of a collateral statement. Context has always been one of the most important considerations courts look at when determining whether a statement qualifies as a declaration against interest. *See, e.g., Williamson*, 512 U.S. at 603 (“Moreover, whether a statement is self-inculpatory or not can only be determined by viewing it in context. Even statements that are on their face neutral may actually be against the declarant’s interest.”); *see also United States v. Williams*, 506 F.3d 151, 155 (2d Cir. 2007); *United States v. Moses*, 148 F.3d 227, 280 (3d Cir. 1998). Courts should also be given the same opportunity to use context to analyze collateral statements to make individualized reliability determinations.

The context in which the relevant statements were made in the present case indicates their reliability. The statement “everybody here and in America knew” was recorded by Jussel in her personal business journal. It was not made to another person, nor is there any indication that it was made with the idea or intention that anyone else would read it, thereby eliminating concerns that the statement was made in an attempt to intentionally inculcate another. Additionally, Jussel’s involvement, as CEO of Tattel, was inextricably tied to that of the company. The two entities she refers to in her statement “everybody here and in America knew” were intimately tied to her: Tattel, the manufacturer of the toys, and Sea Toys, the company that distributed the toys in America. Therefore, her admission that the manufacturer and the distributor knew about the rH-12 in the toy wasn’t an attempt to pass the blame off on some unrelated third person; if anything, the statement was closely related to her own admission of guilt because her own liability would be inextricably tied to the companies who manufactured and distributed the toys. When the circumstances surrounding Jussel’s statement are examined, it is clear that nothing

about how the statement was made raises reliability concerns. Allowing courts the opportunity to examine context of collateral statements would prevent instances, like the one presented here, where a collateral statement is automatically excluded although circumstances show nothing to signify that the statement is at all unreliable.

Because *Williamson* does not bar the admission of non-custodial statements collateral to a declaration against a pecuniary interest, and the context of the statement establishes its ultimate reliability, the Court of Appeals judgment that the statement “everybody here and in America knew” was inadmissible under Rule 804(b)(3) should be reversed.

B. Statements Made in a Personal Letter Written by Jussel Before She Committed Suicide are Admissible Because the Letter is Contextually Reliable and the Statements are Admissible Under *Williamson* as Non-Custodial Collateral Statements

The second piece of evidence improperly excluded under Fed. R. Evid. 804(b)(3) by both the District Court and the Court of Appeals was a personal letter written by Jussel to her daughter, which contained the statement “I went to California and told Sea Toys rH- 12 had dangerous effects on children. I told them as soon as I knew.” (R. at 25.)

The District Court and the United States Court of Appeals held that Jussel’s entire letter was unreliable, and therefore inadmissible under Rule 804(b)(3), because it was written shortly before Jussel committed suicide. However, Jussel’s letter to her daughter is contextually reliable and therefore properly admissible under Rule 804(b)(3). Additionally, although the District Court and Court of Appeals made no findings on this matter, the statement implicating Sea Toys contained within the letter is admissible under *Williamson* because it is a non-custodial collateral statement. Therefore, the Court of Appeals ruling that Jussel’s personal letter and the statements contained within were inadmissible should be reversed.

1. Declarations against interest made before a declarant commits suicide should be admissible under Rule 804(b)(3) when the statements are contextually reliable

The Court of Appeals held that all suicide letters and notes and statements made a short time before suicide are inadmissible. However, the Court of Appeals erred in creating a per se rule because courts should not be prohibited from examining the context in which a relevant statement is made to determine its reliability.

As previously stated herein, context is an essential tool used by courts in determining when a statement qualifies as a declaration against interest under Rule 804(b)(3). *See, e.g., Williamson*, 512 U.S. at 603. Creating a per se rule excluding a suicide notes and statements made before suicide, as proposed by the Court of Appeals, would prevent courts from using this tool to make individualized reliability determinations. Individualized review will prevent otherwise reliable declarations against interest from being excluded under a blanket rule. Some courts have already adopted this view and determine the admissibility of suicide notes on a case-by-case basis. *See Atlas Metals Product Co. v. Lumbermans Mut. Casualty Co.*, 2003 WL 22699925 (Mass. Super. July 31, 2003); *State v. Satterfield*, 457 S.E.2d 440 (W.Va. 1995); *United States v. Layton*, 720 F.2d 548 (9th Cir.1983). As context is already used by courts to analyze all other declarations against interest, asking courts to do the same for statements in suicide notes would not be an undue burden on the judicial system.

It is true that some district courts have found suicide letters to be unreliable, and therefore inadmissible, based on the theory that statements before suicide may give a declarant an opportunity "to rewrite one's own history." *United States v. Angleton*, 269 F.Supp.2d 878, 890 (S.D. Tex. 2003); *see also State v. Hodge*, 655 S.W.2d 738, 743 (S.D. Mo. 1983). Petitioner concedes that there may instances where circumstances indicate that statements are unreliable

because the declarant was acting with this intention in mind. However, it is presumptuous of the Court of Appeals to create a per se rule on the belief that all statements made by every person who commits suicide are made for that purpose. Statements made before a declarant commits suicide could be made for any number of purposes. For example, it seems equally believable that a person contemplating suicide may use a suicide note to ‘clear the air’ and truthfully admit all past bad deeds, thereby increasing the reliability of any statements contained within. It is also entirely plausible that statements made shortly before suicide could be completely unrelated to the suicide itself, so no reliability concerns at all would be implicated. Therefore, it is vitally important that courts be given the opportunity to examine the unique circumstance which may indicate reliability in a particular case.

In the present case, the circumstances surrounding Jussel’s letter point to its reliability. What was considered to be Jussel’s “suicide letter” by the Court of Appeals is actually a personal letter written to Jussel’s daughter. (R. at 25.) It was written an entire week before Jussel’s suicide, and there is no proof that the statements made in the letter were in anyway connected to Jussel’s suicide. In fact, shortly after writing the letter, Jussel was diagnosed with a life-threatening illness; therefore, it could be reasonably concluded that it was her diagnosis and not her involvement in the rH-12 scandal that caused her suicide. Additionally, there is nothing in the letter to indicate either that Jussel was using the letter as an attempt to rewrite her own history. In fact, Jussel includes a very candid admission of her guilt in the matter, stating “I am behind these sick children. I am the cause.” (R. at 25.) If Jussel was using this letter as an effort to rewrite history, one might expect to see a declarant attempt to minimize her own role or shift the blame; there is no indication that either is present here.

Because an individualized reliability determination can only be made by allowing courts to examine the context surrounding statements made before suicide, and the circumstances in the present case point to reliability, the Court of Appeals per se exclusion of Jussel's letter should be reversed.

2. A statement implicating Sea Toys contained within Jussel's personal letter to her daughter is a non-custodial collateral statement and therefore admissible under *Williamson*

If the Court of Appeals' per se exclusion of Jussel's letter is reversed, several collateral statements contained in the letter are properly admissible under Fed. R. Evid. 804(b)(3). While it is conceded that statements implicating Jussel contained within the letter to her daughter were likely declarations against her penal interest, the collateral statements implicating Sea Toys were made in a non-custodial context. Therefore, the collateral statements "I went to California and told Sea Toys rH- 12 had dangerous effects on children. I told them as soon as I knew," contained within the letter, are admissible under *Williamson*.

As previously discussed herein, *Williamson* was specifically concerned with excluding collateral statements which arise in a custodial context because of the unusual reliability concerns that surround such statements. Defendants in custody are more likely to be interested in shifting the blame to another, currying favor with the police, or raising doubt in the mind of a jury. See Richard A. Nagareda, *Reconceiving the Right to Present Witnesses*, 97 Mich. L. Rev. at 1143; 5 *Weinstein's Federal Evidence* § 804.06[6][a], at 804-60. These unique motivations raise considerable reliability concerns regarding statements made in a custodial context.

However, in the present case, the relevant statements were not made in a custodial setting. To the contrary, the statements implicating Sea Toys were included in a personal letter written to the declarant's daughter. Whereas a statement made in a custodial context would

usually be made to a police officer, a jury, or someone else with similar control over the declarant's future, the audience in this case was Jussel's daughter. Jussel was unlikely to believe that anything she said in a personal letter to her daughter would in anyway impact the pending charges against her and there is no evidence indicating that Jussel believed anyone other than her daughter would read the letter. Therefore, the incentive to lie or misled would be greatly diminished, the statements would have greater reliability, and the reasoning in *Williamson* would be inapplicable.

Because both the declarations against interest and the collateral statements included in Jussel's letter to her daughter are properly admissible, the Court of Appeals exclusion of the letter and statements contained within should be reversed.

II. THIS COURT SHOULD REVERSE THE JUDGMENT OF THE COURT OF APPEALS BECAUSE STATEMENTS INDICATING JUSSEL MET WITH SEA TOYS' CEO ARE STATEMENTS OF FUTURE INTENT USED TO INFER THAT A THIRD PARTY ENGAGED IN PARTICULAR CONDUCT AND THEREFORE PROPERLY ADMISSIBLE UNDER 803(3).

Another hearsay exception, codified in Fed. R. Evid. 803(3), permits the admission of statements of a "declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)." While it is clear that statements of future intent are admissible under Rule 803(3) to prove that a declarant acted in particular way, courts disagree over whether statements of a declarant's future intent may also be introduced to infer that a third party engaged in particular conduct.

Before the codification of the Federal Rules of Evidence, the Supreme Court addressed this issue in *Mutual Life Ins. Co. of New York v. Hillmon*, 145 U.S. 285, 294-95 (1892). In *Hillmon*, in order to collect on a life insurance policy, the Plaintiff Mrs. Hillmon sought to prove that an unidentifiable corpse found at Crooked Creek was her missing husband. *Id.* at 294.

Mutual Life Insurance countered by offering letters written by a Mr. Walters, in which Walters expressed an intent to meet Hillmon at Crooked Creek, arguing that the letters might lead a jury to believe that the corpse was actually Walters. *Id.* at 294-95. The Court held that the letters were admissible to prove not only Walters' actions, but Hillmon's as well. *Id.* at 296. Thus, the so-called "*Hillmon* doctrine" permitted courts to admit declarations of future intent to infer the conduct of a third party. However, when the Federal Rules of Evidence were codified in 1975, a dispute arose over whether the codification of Rule 803(3) eliminated the *Hillmon* doctrine.

In the present case, the Court of Appeals excluded statements from a deposition of Jussel's secretary Jaffe Peetz, in which Peetz stated that Jussel had told him "Book me a plane ticket to California right away. Something terrible has happened and I am going to meet with Troy Ledbetter to tell him what's going on." (R. at 26.) The Court of Appeals did so based on the finding that Fed. R. Evid. 803(3) does not incorporate the *Hillmon* doctrine and therefore this statement was inadmissible to prove that Ledbetter had in fact met with Jussel. However, the Court of Appeals erred because the *Hillmon* doctrine is incorporated in Rule 803(3) by the plain meaning of the statute and substantial judicial and scholarly support confirms its use as a workable legal doctrine.

A. The Plain Meaning of the Rule 803(3) Establishes that the *Hillmon* Doctrine Meant to be Incorporated

The Court of Appeals erroneously relied on the Notes of the House Committee on the Judiciary because the plain meaning of Rule 803(3) establishes that the *Hillmon* doctrine was meant to be incorporated into Rule. When interpreting the Federal Rules of Evidence, a court must begin by looking at the language of the statute. *United States v. Houlihan*, 871 F.Supp. 1495, 1500 (D. Mass. 1994) (citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993)). The text of Rule 803(3) is clear because it states "that statements of intent are admissible" and

“does not by its terms limit the class of persons against whom such statements of intent may be admitted.” *Houlihan*, 871 F.Supp. at 1500. Therefore, the plain meaning of the text indicates that the drafters intended to incorporate the *Hillmon* doctrine. This conclusion is also supported “by examining Rule 803(3) in the context of the rest of the Federal Rules of Evidence [which] are replete with examples of Congress' familiarity with the concept of limited admissibility.” *Id.*

Where the language of a statute is clear, courts generally may not look at legislative intent because that language must be regarded as conclusive. *See United States v. Turkette*, 452 U.S. 576, 580 (1981); *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). While one may argue that Rule 803(3) is ambiguous because it does not indicate whether *Hillmon* statements are permissible, this is a misunderstanding of the plain meaning rule because “legislative history may only be consulted when the *meaning of the words* is in dispute; questions regarding the *application* of a statute to the facts of a particular case do not render a statute ambiguous.” *Houlihan*, 871 F.Supp. at 1500 n.4. Therefore, the Court of Appeals erroneously relied on the Notes of the House Committee.

Even if the Court of Appeals had been permitted to examine legislative intent in interpreting Rule 803(3), the Notes of the House Committee are not conclusive evidence of the legislation's intent. As noted by Court of Appeals dissenting Justice Julio, “that report contradicts the report of the Supreme Court Advisory Committee (the Rule's drafters), and furthermore, the Senate, a co-equal branch, is absolutely silent on the issue. (R. at 45.) (citing *United States v. Pheaster*, 544 F.2d 353, 379-380 (9th Cir. 1976)). If Congress had intended to exclude *Hillmon* from Rule 803(3), it seems likely that either the Rule's drafters or the Senate would have so indicated. Therefore, the Court of Appeals was erroneous to rely on the Notes of the House Committee as its sole source of legislative intent.

B. *Hillmon's History of Academic and Judicial Support Sustains the Conclusion that the Doctrine is Incorporated into Rule 803(3)*

The Court of Appeals partially based its exclusion of the *Hillmon* doctrine on what it deemed the “the manifest illogic of inferring one person's conduct from another's intent” and cited to several law review articles and cases to support this proposition. (R. at 38.) However, while admittedly not universally praised, the *Hillmon* doctrine has a long history of academic and judicial support, which lends credence to its use as a workable hearsay exception.

Many legal scholars support the workability of the *Hillmon* doctrine. Some evidence scholars have supported the admissibility of *Hillmon* statements “because these statements possess circumstantial guarantees of trustworthiness that attend all internally referent statements.” Glen Weissenberger, *Hearsay Puzzles: An Essay on Federal Evidence Rule 803(3)*, 64 Temp. L. Rev. 145, 159 (1991). Others, while acknowledging the danger of a possible extension of the *Hillmon* doctrine, have still concluded “that in its ordinary, workaday application the principle leads to more good than evil.” John M. Maquire, *The Hillmon Case – Thirty-Three Years After*, 38 Harv. L. Rev. 709, 710 & nn.4-7 (1925).

Additionally, and perhaps more importantly, is the significant judicial support the *Hillmon* doctrine has received. First, “the Supreme Court has simply never held, nor even suggested, that state-of-mind declarations that [are used to show a nondeclarant's future conduct] do not fit within the firmly-rooted state-of-mind exception[.]” *Coy v. Renico*, 414 F.Supp.2d 744, 771 (E.D. Mich. 2006) (citing *Hayes v. York*, 311 F.3d 321, 325 (4th Cir. 2002)). In fact, “the Supreme Court itself established the *Hillmon* doctrine, and the Court has not since

questioned that doctrine with respect to state-of-mind declarations of intent to show either a declarant's or a nondeclarant's future conduct." *Coy*, 414 F.Supp.2d at 771.

Moreover, the *Hillmon* doctrine has also received the support of federal courts. Some federal courts interpreting Rule 803(3) have found that the drafters intended to incorporate *Hillmon* doctrine in full. See *Pheaster*, 544 F.2d at 379 (“[W]e read the note of the Advisory Committee as presuming that the *Hillmon* doctrine would be incorporated in full force...”); *Houlihan*, 871 F.Supp. at 500 (D. Mass. 1994) (“[T]his Court rules that Rule 803(3) codifies *Hillmon* as written and does not disturb its conclusion or its reasoning.”) Other federal courts have taken a narrower view, but have still permitted statements to be admitted to prove the conduct of third parties. See *United States v. Best*, 219 F.3d 192, 198 (*Hillmon* statements were admissible with “independent evidence that connected the declarant's statement with the non-declarant's activities.”)

Finally, state courts have almost uniformly adopted the *Hillmon* doctrine, either under common law or state rules analogous to 803(3). *Coy*, 414 F.Supp.2d at 769. In fact, of the state jurisdictions which have considered the issue, there are at least twenty-eight who have chosen to admit *Hillmon* statements to prove the conduct of a third party, while only three jurisdictions have declined to follow the doctrine. *Id.* (citing *People v. Chambers*, 512 N.Y.S.2d 89, 91 (N.Y. App. Div. 1984)).

In summation, the *Hillmon* doctrine has a long history of academic and judicial support, which contradicts the Court of Appeals cursory dismissal of the doctrine and instead supports the conclusion that the drafters intended the doctrine to be incorporated into Rule 803(3). Therefore, the Court of Appeals judgment should be reversed and Peetz’s statement should be admissible to infer Ledbetter’s future conduct.

III. THIS COURT SHOULD REVERSE THE JUDGMENT OF THE COURT OF APPEALS BECAUSE THE INFORMATIONAL FINDINGS IN SEA TOY'S POST-INJURY REPORT ARE NOT INADMISSIBLE AS SUBSEQUENT REMEDIAL MEASURES UNDER FEDERAL RULE OF EVIDENCE 407 AND BECAUSE THE SUGGESTED REMEDIAL MEASURES WERE PROMPTED BY THE ISSUANCE OF A GOVERNMENT AGENCY DIRECTIVE.

Federal Rule of Evidence 407 governs the admission of subsequent remedial measures.

Subsequent remedial measures are defined under Rule 407 as measures taken after an event causing harm or injury “that, if taken previously, would have made the injury or harm less likely to occur.” Rule 407 provides that evidence of these measures is inadmissible “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.” The Rule specifies, however, certain exceptions to the exclusion of subsequent remedial measures “when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.”

Courts have held that the informational sections of post-injury reports are investigatory rather than remedial in nature. *Brazos River Auth. v. GE Ionics, Inc.*, 469 F.3d 416, 430 (5th Cir. 2006); *Prentiss & Carlisle Co., Inc., v. Koehring-Waterous Div. of Timberjack, Inc.*, 972 F.2d 6, 9-10 (1st Cir. 1992); *Rocky Mtn. Helicopters, Inc., v. Bell Helicopters Textron*, 805 F.2d 907, 918 (10th Cir. 1986). This has been so even when the information in these reports has resulted in remedial measures being taken. *Prentiss & Carlisle Co., Inc.*, 972 F.2d at 10. This is because “[b]y its terms Rule 407 includes only the actual remedial measures themselves and not the initial steps toward ascertaining whether any remedial measures are called for. *Fasanaro v. Mooney Aircraft Corp.*, 687 F.Supp. 482, 487 (N.D. Cal. 1988).

Courts have also held that remedial measures which were prompted by the directive of a government agency do not fall within the scope of Rule 407. *O’Dell v. Hercules Inc.*, 904 F.2d

1194, 1204 (8th Cir. 1990); *Herndon v. Seven Bar Flying Serv., Inc.*, 716 F.2d 1322, 1331 (10th Cir. 1983); *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1343 (5th Cir. 1978); *Gilanian v. City of Boston*, 431 F.Supp.2d 172, 177 (D. Mass. 2006). The remedial measures instigated as the result of government direction are not voluntary, and thus, do not require the protective buffer of the social policy underlying Rule 407. *O'Dell*, 904 F.2d at 1204. As the Tenth Circuit Court of Appeals aptly stated, “a tort-feasor cannot be discouraged from voluntarily making repairs if he *must* make repairs in any case.” *Herndon*, 716 F.2d 1322, 1331 (10th Cir. 1983) (emphasis in original).

In this case, the Court of Appeals incorrectly excluded the informational findings found in Sea Toy’s internal investigatory report. The Court of Appeals also incorrectly found the remedial measures spurred by the prescription of a superior governmental authority to be inadmissible as voluntary remedial measures.

A. The Informational Findings in Sea Toy’s Post-injury Report are not Inadmissible as Subsequent Remedial Measures under Federal Rule of Evidence 407 Because the Rule Specifically Prohibits the Admission of Evidence of Actual Measures Taken, Not Evidence of Sea Toy’s Analysis of its Product.

The plain text of Rule 407 excludes evidence of subsequent remedial measures. Fed. R. Evid. 407 (“evidence of the subsequent measures is not admissible”). This “ground for exclusion rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety.” Fed. R. Evid. 407 advisory committee’s note. This policy, however, is not implicated by a company’s mere analysis of its product; an analysis does not contribute to the goal of “added safety” unless change is implemented as a result of that analysis. *Brazos River Auth.*, 469 F.3d at 430; *Rocky Mtn. Helicopters, Inc.*, 805 F.3d at 918. “[E]ven then, it is only evidence of those changes that is precluded by the rule.” *Brazos River Auth.*, 469 F.3d at 430 (quoting 2 *Weinstein’s Federal Evidence* § 407.06[1]).

In this case, the Court of Appeals erred by finding the informational section of the investigatory report, which was Sea Toy’s analysis of its own product, inadmissible.

1. Rule 407 specifically excludes the admission of evidence of actual subsequent remedial measures taken for the policy purpose of achieving the goal of added safety.

Rule 407 renders inadmissible the evidence of subsequent remedial measures actually taken. Fed. R. Evid. 407. Subsequent remedial measures are defined as “measures [] taken that, if taken previously, would have made the injury or harm less likely to occur.” *Id.* The Tenth Circuit has found that “remedial measures are those actions taken to remedy any flaws or failures indicated by the [post-injury] test.” *Rocky Mtn. Helicopters, Inc.*, 805 F.3d at 918.

The policy behind the exclusionary rule is to encourage the goal of added safety: for example, by shielding manufacturers from revealing post-injury actions taken to correct perceived defects in products, the worthy goal of preventing further harmful incidents has been achieved. The purpose of this policy is to avoid discouraging the socially responsible behavior of voluntary remedial *action*. For example, the Tenth Circuit found that post-injury tests or studies to determine the existence of flaws in a helicopter part were not remedial measures. *Rocky Mtn. Helicopters, Inc.*, 805 F.3d at 918. The informational portion of the study was found to be admissible, so long as any mention of redesign was redacted for purpose of the trial. *Id.* The court held that only references to subsequent *actions* taken to improve the safety of the product were inadmissible under Rule 407, in keeping with the Rule’s stated policy. *Id.*

The Fifth Circuit followed this reasoning, as well, in *Brazos River Authority*, where the court stated that “post-accident investigations would not make the event ‘less likely to occur:’ only the actual implemented changes make it so.” 469 F.3d at 430. In that case, the Fifth Circuit

found that a company's post-accident investigation into the causes of fires within its plant was admissible when no reference was made to any remedial actions taken to prevent future fires. *Id.*

In the instant case, the Court of Appeals erred in overextending the policy underlying Rule 407. Rather than limiting the exclusionary rule to actual evidence of subsequent measures taken by redacting the recommendations portion of the report, the court stretched the scope of the Rule to find informational findings inadmissible, as well. As shown *infra*, this approach is not solidly based on the "added safety" goal of Rule 407 or on relevant case law.

2. Rule 407 does not exclude evidence of Sea Toy's analysis of its product since such exclusion is neither based on the text of Rule 407 nor would it further the policy underlying the Rule.

The Court of Appeals improperly excluded Sea Toy's information findings, which was not evidence of subsequent remedial measures, but rather Sea Toy's analysis of its product. Rule 407 does not encompass Sea Toy's analysis of its product; bringing investigative post-accident reports under its purview has no basis in the text of Rule 407 nor would it follow the social policy underlying the Rule.

The text of Rule 407 only excludes "evidence of the subsequent measures." Fed. R. Evid. 407. In this case, the Court of Appeals made no claim that the informational findings fall within this statement. The court, instead, provided no reasoning or relevant case law for excluding the informational findings portion of the report, relying on its perception that using any portion of the report violated the "spirit of the policy underlying Rule 407" and to permit this practice "would be a dangerous precedent indeed." (R. at 37-38.) While one can certainly admire the court's desire to follow the spirit of the policy, case law does not support the court's interpretation of that policy.

In *Prentiss & Carlisle Co., Inc.*, the First Circuit affirmed the district court's ruling that redacted portions which discussed only the company's analysis of the problem, without including suggested remedial measures, were admissible since "an analysis of the problem was not a 'measure' within the meaning of the rule." 972 F.2d at 9-10. That case dealt with a timber harvesting machine which caught fire and was nearly destroyed, and the post-accident documents Timberjack sought to exclude included an interoffice memo which stated that "we found the throttle cable arced across starter terminals" and a "service letter" to customers warning "that the throttle cable could become bare of insulation and contact the battery terminal." *Id.* at 9. This service letter advised customers to "reroute the cable." *Id.*

In the present case, the statements found in the investigatory report are no more damning than those determined by the Fifth Circuit to be admissible as analysis rather than measures. As in *Prentiss & Carlisle Co.*, the report in this case included damaging statements, such as stating that a "scientific study has revealed that the glue used as adhesive for the eyes on the Finn E. Shark toy contains rH-12." (R. at 25.) It also stated that "[c]hildren who were so diagnosed were also found in possession of a Finn E. Shark toy with eyes that had fallen off." The policy behind Rule 407's exclusion of subsequent remedial measures is to avoid discouraging preventive or remedial action. Fed. R. Evid. 407 advisory committee's note. At the investigative stage, no such action has been taken. Redacting any reference to contemplation of such action should suffice to protect this goal.

Significantly, courts have held that excluding all portions of the report contravenes the important policy of allowing plaintiffs to utilize the most efficient and reliable means of evidence to prove their claims. *Westmoreland v. CBS Inc.*, 601 F.Supp. 66, 67 (S.D.N.Y. 1984).

The fact that subsequent remedial measures are excluded as admissions of fault does not mean that competent evidence resulting from an internal investigation of

a mishap must also be excluded. . . . The fault of the argument is not in its logic but in that it goes too far and fails to credit the social value of making available for trial what is often the best source of information.

Id.

The *Westmoreland* court went on to note that excluding informational findings containing the “smoking gun” is not only not based on sound policy, but is contrary to a time-honored line of cases involving railroad and industrial accident investigations, where the facts revealed by post-accident reports are customarily held admissible. *Id.*

Courts have also found that even if the post-accident informational findings are evidence of subsequent remedial measures, the findings are admissible as “proof of subsidiary issues in the case, such as knowledge of the dangerous condition.” *Rozier*, 573 F.2d at 1343; *Jumper v. Yellow Corp.*, 176 F.R.D. 282, 285 (N.D. Ill. 1997); *see also Underwriters at Lloyd’s London v. OSCA, Inc.*, No. 03-20398, 2006 WL 941794 (5th Cir. Apr. 12 2006) (upholding trial court’s admission of a post-accident “corrective action report,” even though issuance of the report was not strictly required because the court found the social policy behind Rule 407 to be applicable). In *Jumper*, the district court found “even if the grievance documents constitute evidence of subsequent remedial measures, Plaintiff may still admit those documents for purposes other than to prove negligence, e.g., to . . . demonstrate that Defendants had knowledge that Andreides was an unsafe driver and that the truck was defective.” *Jumper*, 176 F.R.D. at 285.

In the same manner, even if this Court should find the post-accident informational findings to be evidence of subsequent remedial measures, the findings should be admissible to prove the subsidiary issue of knowledge of the dangerous condition as required under § 204 of the Boerum Tort Reform Act. (R. at 29-30.) Statements made in the portion of the report’s

informational findings indicate that Sea Toy had the requisite knowledge to warn consumers and to recall the product. (R. at 25.)

Therefore, the Court of Appeals incorrectly excluded the informational findings, which was not evidence of subsequent remedial measures, but rather Sea Toy's analysis of its product. The court's action was contrary to both the text of the Rule and the relevant case law interpreting the policy underlying the Rule.

B. The Recommendations in Sea Toy's Post-injury Report are not Inadmissible as Subsequent Remedial Measures under Federal Rule of Evidence 407 Because the Issuance of a Government Agency Directive Prompted their Creation, Thus Invalidating the Social Policy Reasons Underlying their Exclusion.

The Eighth Circuit found that “[a]n exception to Rule 407 is recognized for evidence of remedial action mandated by superior governmental authority . . . because the policy goal of encouraging remediation would not necessarily be furthered by exclusion of such evidence.” *O'Dell*, 904 F.2d at 1204. The Fifth and Tenth Circuits have recognized this exception, as well. *Rozier*, 573 F.2d at 1343; *Herndon*, 716 F.2d at 1331.

The Court of Appeals erred in finding the recommendations in Sea Toy's post-injury report to be inadmissible as subsequent remedial measures since the measures fit into a recognized exception to Rule 407 for measures taken at the bidding of a superior governmental authority.

3. The recommendations in Sea Toy's post-injury report were not voluntarily initiated by Sea Toy but rather were prompted by a government agency-issued statement directing Sea Toy to conduct an appropriate investigation and take necessary remedial action.

The Fifth, Eighth, and Tenth Circuits have found an exception to Rule 407 exists where the subsequent remedial measure was not taken upon the company's initiative or sense of social responsibility, but rather in response to the requirements of a superior or governmental authority.

O'Dell, 904 F.2d at 1204; *Herndon*, 716 F.2d at 1331; *Rozier*, 573 F.2d at 1343. The Court of Appeals erred in not admitting evidence of the subsequent remedial measure in this case as falling within this recognized exception to Rule 407.

In *Rozier*, the Fifth Circuit found that an internal post-accident report generated after a gas tank exploded in a rear end collision was admissible “because the remedial measure was to be required in any event by a superior authority, the National Highway Traffic Safety Administration.” 573 F.2d at 1343. The report was prepared “in anticipation of a revised National Highway Traffic Safety Administration safety standard of 30 m.p.h. for rear end collisions” and showed “Ford planned to begin using a new fuel tank design sufficient to satisfy the 30 m.p.h. standard in its 1975 full-sized models.” *Id.*, at 1340. Ford’s response to the general government safety standard was found to be involuntary in bringing their standards in conformity with guidelines set forth by the government. *Id.*

Similarly, in the instant case, Sea Toy’s internal investigatory report was prepared in anticipation of further action likely to be taken by the Consumer Product Safety Commission in absence of Sea Toy’s compliance with the guidelines set forth. Sea Toy, as a toy distributor, was put on notice by the government of the need to conduct investigations and take remedial action if such investigation indicated a problem. This notice caused Sea Toy to be aware of the “numerous reports of toxic substances in children’s toys manufactured abroad.” (R. at 27.) The directive, then, targeted toy distributors dealing in children’s toys manufactured abroad. This knowledge created an affirmative duty in Sea Toy to further investigate the Finn E. Shark toy to be sure that the toy was not one of those contaminated toys, and Sea Toy should not be able to shield itself from liability by alleging voluntary ignorance. As in *Rozier*, Sea Toy’s internal

investigation was involuntary in bringing the company's standards to those set forth in the government's guidelines.

The Court of Appeals cited a Sixth Circuit case as limiting the exception for involuntary remedial measures to "situations where the action is in response to a 'mandatory request' by the government." *HDM Flugservice GmbH v. Parker Hannifin Corp.*, 332 F.3d 1025 (6th Cir. 2003). It is true that the court found that a service bulletin issued by a helicopter manufacturer indicating remedial measures was issued voluntarily and thus, inadmissible. *Id.* at 1034. However, in *HDM*, the defendant company actually generated the service bulletin without prompting and presented the bulletin to the FAA for its approval. *Id.* There is no indication that the service bulletin was issued in response to direction or guidelines from the FAA. *Id.*

In contrast, the investigatory report in this case was issued as a response to the Consumer Product Safety Commission's ("CPSC") directive to toy distributors to make appropriate investigations and take necessary remedial action. Thus, HDM is distinguishable from the instant case because Sea Toy did not initiate the investigation or measures of their own accord, but rather in compliance with a government directive.

The Court of Appeals incorrectly determined in this case that evidence of the subsequent remedial measure was inadmissible by rejecting the recognized exception to Rule 407 for measures taken, not because of the company's initiative or sense of social responsibility, but rather in response to the urgings of a superior or governmental authority.

4. The social policy underlying the exclusion of evidence of subsequent remedial measures under Rule 407 are invalidated in this case since Sea Toy could not have been discouraged from voluntarily performing an investigation and measures he was directed to undertake.

The Advisory Committee Notes to Rule 407 clarify that the protection of subsequent remedial measures stems from “a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety.” “It is altogether less clear, however, that the Rule requires exclusion of policy changes made not in response to a sense of social responsibility or a desire to remedy an injury, but rather in response to the dictates of a higher authority.” *Gilanian*, 431 F.Supp.2d at 177 (D. Mass. 2006) (change in prison policy regarding strip searches resulting from a change in case law was not a voluntary remedial measure and did not come within the ambit of the Rule’s underlying social policy).

Likewise, the Fifth and Tenth Circuits have held that the Rule’s exclusionary power does not surpass this underlying social policy. *Herndon*, 716 F.2d at 1331; *Rozier*, 573 F.2d at 1343. In *Rozier*, the Fifth Circuit refused to apply the Rule to exclude subsequent remedial measure evidence where a report suggesting design changes “was not prepared out of a sense of social responsibility but because the remedial measure was to be required in any event by a superior authority.” *Rozier*, 573 F.2d at 1343. Then, the Tenth Circuit, in *Herndon*, stated that the “policy of encouraging voluntary repairs which underlies Rule 407 has no force” where a “superior authority requires a tortfeasor to make post-accident repairs” since he “cannot be discouraged from making repairs if he *must* make repairs in any case.” *Herndon*, 716 F.2d at 1331.

In the instant case, the social policy of not discouraging voluntary remedial measures is similarly not implicated, as it was not in *Herndon* and *Rozier*. The CPSC’s directive to perform the investigation and measures invalidates the application of the policy since Sea Toy could not

likely have been discouraged from voluntarily performing an investigation and measures it was directed to undertake.

Therefore, the Court of Appeals overextended the social policy underlying Rule 407 by excluding measures made not in response to a sense of social responsibility or a desire to remedy an injury, but rather under the auspices of a higher authority.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court REVERSE the decision of the Fourteenth Circuit Court of Appeals.

February 29, 2008

Respectfully submitted,

Counsel for Petitioner

APPENDIX A: Boerum Tort Reform Act § 204

§ 204. Limitation on the Liability of the Distributor or Seller of a Toy for Harm Caused by the Failure to Warn or Recall.

A) Exclusive Remedy. Except as provided herein, no product liability action, including negligence, strict liability, breach of an implied warranty of merchantability, or any other claim based exclusively upon a manufacturing or design defect, may be brought against a distributor or commercial seller of a toy.

B) Failure to Warn. One engaged in the business of selling or otherwise distributing toys is subject to liability for harm to persons or property caused by the seller's or distributor's failure to provide a warning after the time of sale or distribution of a toy if a reasonable person in the seller's position, including one having the knowledge possessed by the distributor or seller, would provide such a warning.

C) Failure to Recall. One engaged in the business of selling or otherwise distributing products is subject to liability for harm to persons or property caused by the seller's or distributor's failure to recall a toy after the time of sale or distribution if:

- 1) a reasonable person in the situation, including one having the knowledge possessed by the distributor or seller, would recall the product; or
- 2) the seller or distributor undertakes to recall the toy but fails to act as a reasonable person in recalling the product.

D) No Punitive Damages. In any action based upon this section, punitive damages may neither be sought, nor awarded. (Added L. 2004, ch. 1 [Boerum Tort Reform Act]).

APPENDIX B: Federal Rules of Evidence

Federal Rule of Evidence 804(b)(3)

b) **Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(3) **Statement against interest.** A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Federal Rule of Evidence 803(3)

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(3) **Then existing mental, emotional, or physical condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

Federal Rule of Evidence 407

Subsequent Remedial Measures

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.