IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

SAMUEL E. POWERS, a married man, Plaintiff-Appellant, v. TASER INTERNATIONAL, INC., a Delaware corporation, Defendant-Appellee.	)	1 CA-CV 06-0545 DEPARTMENT B **MEMORANDUM DECISION** (Not for publication – Rule 28, Arizona Rules of Civil Appellate Procedure) **FILED 12-31-07**

Appeal from the Superior Court in Maricopa County

Cause No. CV 2003-013457

The Honorable Paul A. Katz, Judge

AFFIRMED

Dillingham & Reynolds LLP	Phoenix
By John L. Dillingham	
And	
Thomas C. Wilmer, PC	Phoenix
By Thomas C. Wilmer	
Attorneys for Plaintiff-Appellant	
Paul G. Ulrich PC	Phoenix
By Paul G. Ulrich	
Pamela B. Petersen	
And	
Renaud Cook Drury & Mesaros PA	Phoenix
By Charles A. Struble	
Christina J. Reid-Moore	
William W. Drury, Jr.	
Attorneys for Defendant-Appellee	

B A R K E R, Judge

¶1 Plaintiff-Appellant Samuel E. Powers appeals a jury verdict in favor of Defendant-Appellee Taser International, Inc.

("Taser") on Powers' claim for strict products liability arising out of the alleged injury he suffered when shocked by the Advanced Taser M-26 ("M-26").

¶2 This Memorandum Decision addresses the arguments raised on appeal that were not addressed in the Opinion filed this date. Powers argues the trial court made erroneous evidentiary rulings at trial and improperly instructed the jury. For the reasons discussed below, and in the Opinion filed this date, we affirm the judgment and the trial court's denial of Powers' motion for new trial.

¶3 We incorporate, but do not restate, the facts and procedural background set forth in paragraphs two through ten of the Opinion. In addition, we note Powers also alleged that Taser distributed the M-26 with a conscious disregard of the substantial risk of harm posed by the weapon and sought punitive damages.[1] The trial court stated for the record that if the jury had found in favor of Powers, it would have granted Taser's motion for directed verdict regarding Powers' punitive damages claim.

1. The Misrepresentation Instruction

¶4 Powers argues the trial court erred by refusing to instruct the jury regarding the theory that a manufacturer may be

[1] Prior to trial, the court granted Taser's motion to bifurcate the proceedings, ruling that the jury would only hear evidence regarding, and decide the issue of, punitive damages if it returned a verdict in favor of Powers.

held strictly liable for misrepresentation of material facts about its product, as requested by Powers in his proposed Non-Standard Jury Instructions Nos. 2 and 3.

¶5 Arizona follows the Restatement (Second) of Torts' ("Restatement Second") § 402B (1965) articulation of a strict liability misrepresentation claim:

> One engaged in the business of selling chattels who, by advertising, labels, or otherwise, makes to the public a misrepresentation of a material fact concerning the character or quality of a chattel sold by him is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the misrepresentation, even though
>
> (a) it is not made fraudulently or negligently, and
>
> (b) the consumer has not bought the chattel from or entered into any contractual relation with the seller.

Restatement Second § 402(B); *superseded by* Restatement Third § 9. *See also Baroldy v. Ortho Pharmaceutical Corp.*, 157 Ariz. 574, 577, 760 P.2d 574, 577 (App. 1988). A prima facie case for such a claim requires proof of three main elements: (1) a misrepresentation of material fact concerning the character or quality of the chattel; (2) the misrepresentation must be made to the public; and (3) physical harm to the consumer resulting from his justifiable reliance on the misrepresentation. Restatement Second § 402B cmts. g & j; Restatement Third § 9 cmt. c. *See also Am. Safety Equip. Corp. v. Winkler*, 640 P.2d 216, 222 (Colo. 1982).

¶6 Rule 26.1(a)(2), Arizona Rules of Civil Procedure, requires a party to disclose in writing the "legal theory upon

which each claim or defense is based including, where necessary for reasonable understanding of the claim or defense, citations of pertinent legal or case authorities." The court ruled that Powers did not meet this requirement because he did not timely disclose his misrepresentation theory. A trial court has broad discretion in ruling on discovery and disclosure matters, and we will not disturb its rulings absent a clear abuse of its discretion. *Zuern v. Ford Motor Co.*, 188 Ariz. 486, 488, 937 P.2d 676, 678 (App. 1996).

¶7 Powers did not plead a claim for strict liability misrepresentation or disclose such a theory until immediately prior to trial. Powers' first amended complaint alleged only a claim for strict products liability based on "informational defects including inadequate instructions and warning." Powers sought punitive damages, describing Taser's alleged punitive conduct as including "implement[ing] a marketing plan based on misinformation, overstatements, inaccuracies, half-truths, and false statements."[2] These allegations do not comprise a strict liability misrepresentation claim, as they do not set forth the elements required to sustain such a claim. *See* Restatement Second § 402B cmts. g & j; Restatement Third § 9 cmt. c.

[2] We agree with the trial court that Powers' allegations regarding concealment related to his claim for punitive damages, and not a new theory of liability.

¶8 Nevertheless, Powers argues that Taser could not have been surprised by his request that the jury be instructed regarding a strict liability misrepresentation claim because Powers asserted throughout the litigation that his claim was based on Taser's "multiple material misrepresentations." However, Powers did not include a misrepresentation claim as a distinct legal theory in his final disclosure statement, stating instead that his legal theory was "Taser is strictly liable to Powers for the failure to provide adequate warning or instruction." Indeed, Powers' counsel conceded to the trial court that Powers had never disclosed Restatement Second § 402B as a basis for Powers' claim against Taser. Accordingly, we find no error in the trial court's ruling that Powers did not timely disclose his strict liability misrepresentation claim. *Zuern*, 188 Ariz. at 489, 937 P.2d at 679 (upholding exclusion of new theory first disclosed one month before trial and three months after deadline for expert opinion disclosure); *Czarnecki v. Volkswagen of Am.*, 172 Ariz. 408, 418, 837 P.2d 1143, 1153 (App. 1991) (affirming trial court's grant of motion in limine precluding evidence on new liability theory offered after discovery deadline and only seven weeks before trial).

¶9 Similarly, we find no error in the trial court's refusal to allow Powers to amend the pleadings to conform to the evidence at trial and allow a claim for strict liability misrepresentation to go to the jury. Powers moved pursuant to Rule 15(b), Arizona

Rules of Civil Procedure, to amend the pleadings to conform to the evidence. Powers asserted that the amendment was warranted because he had proven all of the elements of a strict liability misrepresentation claim at trial. The court denied the motion because Powers had not timely disclosed the theory and because disclosure "could have tactically changed the approach . . . [Taser] may have taken in the hiring of experts and in the presentation of [its] . . . case[]." We will not overturn the trial court's ruling on a motion for leave to amend the pleadings to conform to the evidence absent an abuse of its discretion. *Bujanda v. Montgomery Ward & Co.*, 125 Ariz. 314, 315, 609 P.2d 584, 585 (App. 1980) (finding no abuse of discretion in trial court's denial of motion to amend during trial because amendment would present a different theory and would prejudice defendant); *Czarnecki*, 172 Ariz. at 418, 837 P.2d at 1153 (finding no abuse of discretion in trial court's denial of motion to amend after discovery because allowing amendment to add an "entirely new theory of liability at that late date would have required additional research and discovery, resulting in substantial delays").

¶10 Although generally amendments to conform to the evidence presented at trial are to be liberally allowed, *Bujanda*, 125 Ariz. at 316, 609 P.2d at 586, a court should not permit amendments to the pleadings at trial when one party will be surprised or prejudiced. *Id.*; *Eng v. Stein*, 123 Ariz. 343, 347, 599 P.2d 796, 800 (1979). Thus, pleadings may be amended if an issue was tried

by the express or implied consent of the parties. *City of Phoenix v. Linsenmeyer*, 86 Ariz. 328, 336, 346 P.2d 140, 145 (1959). Under certain circumstances, implied consent may be discerned by a party's failure to object to the relevant evidence at trial. *Elec. Adver., Inc. v. Sakato*, 94 Ariz. 68, 71, 381 P.2d 755, 756 (1963) (when evidence presents a new or different theory from that alleged in the pleadings and adverse party does not object to introduction thereof, the issue raised by such evidence is properly tried by implied consent). However, permitting evidence relevant to an existing issue to be admitted without objection does not constitute "implied consent" to trial of an issue that was not previously raised. *Magma Copper Co. v. Indus. Comm'n of Ariz.*, 139 Ariz. 38, 46-47, 676 P.2d 1096, 1104-05 (1983) (failure to object to evidence relevant to the issue raised in the pleadings did not constitute implied consent to trial of a new issue); *Dietz v. Waller*, 141 Ariz. 107, 112, 685 P.2d 744, 749 (1984) (although issue of negligence may have been inferable from the evidence, defendant was given no conceivable notice during trial that the question of its negligence was being put in issue, and thus, there was no trial of such issue by implied consent); *Bujanda*, 125 Ariz. at 316, 609 P.2d at 586 (introduction of evidence on issue of ownership of beauty shop was insufficient to show implied consent because such evidence was relevant to the issue within the pleadings, and defendant would have been prejudiced by amendment allowing a new theory of liability).

¶11 The evidence adduced at trial that Powers asserts supported his misrepresentation theory – Taser's alleged false safety assurances regarding the M-26 - was relevant to Powers' strict products liability claim based on Taser's failure to warn because it concerned the information Taser gave Powers before he agreed to be struck by the M-26. Taser's failure to object to such evidence did not constitute an implied consent to try Powers' new claim of strict liability misrepresentation. *See Bujanda*, 125 Ariz. at 315, 609 P.2d at 585.

¶12 Further, to have permitted Powers to amend the pleadings at trial would have changed the theory of the case and Taser, expecting to defend a suit for strict liability failure to warn, would have unexpectedly confronted the theory that it had made material misrepresentations regarding the character and/or quality of the M-26. *Id*. at 316, 609 P.2d at 586. The trial court observed the proceedings and was in the best position to know whether Taser would have been prejudiced by instructing the jury regarding a theory of liability that Powers had not disclosed prior to trial. *See Czarnecki*, 172 Ariz. at 418, 837 P.2d at 1153 (affirming denial of motion to amend pleadings because, among other reasons, allowing amendment would have been prejudicial to defendant). *Cf*. *Hutcherson v. City of Phoenix*, 192 Ariz. 51, 53, ¶ 12, 961 P.2d 449, 451 (1998) (A trial judge had broad discretion to set aside a jury verdict because "[t]he judge sees the witnesses, hears the testimony, and has a special perspective of

the relationship between the evidence and the verdict which cannot be recreated by a reviewing court from the printed record.") (citations omitted); *Colfer v. Ballantyne*, 89 Ariz. 408, 409, 363 P.2d 588, 589 (1961) ("The atmosphere or climate of the trial is peculiarly within the knowledge and experience of the trial court.").

¶13 We therefore find no abuse of discretion in the trial court's denial of Powers' motion to amend the pleadings to conform to the evidence.

2. Evidentiary Rulings

¶14 Powers challenges several of the trial court's evidentiary rulings. Generally, we review challenges to the court's admission or exclusion of evidence for an abuse of its discretion. *Yauch v. S. Pac. Transp. Co.*, 198 Ariz. 394, 399, ¶ 10, 10 P.3d 1181, 1186 (App. 2000). If the evidentiary ruling is predicated on a question of law, we review that ruling de novo. *Id*.

a. PowerPoint Presentation (Risk/Utility)

¶15 Powers contends the trial court erred by admitting the entirety of the PowerPoint Presentation shown him on July 16, 2002, because, he argues, portions of the presentation constituted the risk/utility evidence that the trial court had specifically excluded prior to trial.

¶16 Before trial, Powers moved in limine to exclude evidence that related solely to the M-26's utilitarian purpose and alleged

benefits, arguing that such information was not relevant to whether Taser provided adequate warnings and information to Powers before he agreed to take a hit from the M-26. The trial court granted Powers' motion, but cautioned that it would not require a redaction of the PowerPoint Presentation: "Whatever Mr. Powers was shown is something that you can argue he had knowledge of. . . . [W]hat was or wasn't disclosed to him by Taser, or by the agents of Taser are at issue, and I'm not keeping that out."

¶17 Despite the court's ruling that the materials Powers viewed before his exposure to the M-26 were admissible, Powers offered at trial a heavily redacted version of the PowerPoint Presentation and objected to Taser's use of the full PowerPoint Presentation. The court admitted Taser's exhibit, subject to "the understanding that there may be some slides redacted or removed from the presentation if they are not relevant to the safety or warning issues." The court informed the jury that the information contained in the PowerPoint Presentation was "not being offered for its truthfulness; it's just being offered to show you what was shared with this individual before he took the shock," and repeatedly instructed the jury that the benefits of the M-26 had no bearing on Taser's duty to warn.

¶18 The trial court's admission of the PowerPoint Presentation for the purpose of allowing the jury to evaluate the information Taser gave Powers, along with the limiting instruction that the jury was not to consider the information for the truth of

the matter asserted, was not error. The PowerPoint Presentation was directly relevant to Powers' claims that Taser's warnings were inadequate because it comprised the warnings and/or information Taser provided Powers regarding the M-26. The court repeatedly instructed the jury that it was not to accept any risk/utility information contained in the PowerPoint Presentation as true, but should only consider it for purposes of what Powers saw before his exposure to the M-26. *Baroldy*, 157 Ariz. at 585-86, 760 P.2d at 585-86 (stating court must presume jury heeded limiting instruction given by the trial court).

¶19 Further, we reject Powers' argument that the timing of the court's admission of the un-redacted PowerPoint Presentation, after closing arguments, was prejudicial to him. The trial court admitted the full presentation at the beginning of trial[3] and, consistent with this ruling, indicated throughout trial that the presentation viewed by Powers was relevant to the jury's inquiry regarding the sufficiency of Taser's warnings. Prior to closing arguments, the trial court informed the parties that it intended to allow the jury to see the majority of the PowerPoint Presentation; the court then proposed and conveyed to the jury a formal limiting instruction to address Powers' concerns regarding the risk/utility issue.

[3] Although the court indicated throughout the trial that it would consider Powers' requests for redaction of specific slides contained in the presentation, Powers did not make any such request until after closing arguments.

¶20 We find no abuse of discretion in the trial court's admission of the PowerPoint Presentation.

b. Evidence Regarding No Prior Injuries

¶21 Powers argues that the trial court erroneously allowed several Taser witnesses to testify that the M-26 had not caused any prior injuries, contrary to the Arizona Supreme Court's ruling in *Jones v. Pak-Mor Mfg. Co.*, 145 Ariz. 121, 700 P.2d 819 (1985), barring the admission of such evidence absent compliance with formidable foundational requirements. Our review of the record reveals that the trial court did not allow Taser to introduce evidence of the type about which Powers complains.

¶22 In *Pak-Mor*, the plaintiff was injured while working on a machine manufactured by defendant Pak-Mor and brought a product liability suit alleging that the machine was defectively designed. *Id*. at 122, 700 P.2d at 820. Before trial, the court granted the plaintiff's motion to exclude all evidence of the absence of prior, similar accidents. *Id*. at 123, 700 P.2d at 821. The Arizona Supreme Court reversed, ruling that such evidence is not *per se* inadmissible, but must be supported by the "formidable" evidentiary predicate of a showing that, if prior accidents had occurred, the witness probably would have known about them. *Id*. at 127, 700 P.2d at 825. The court proposed that such a showing could be made if the defendant had established procedures to check on the safety of its products or if such information had been compiled by the defendant, its insurer or relevant governmental agencies. *Id*. The

court cautioned that, absent such a foundational showing, evidence that the defendant had no knowledge of any prior injuries caused by its product should generally be rejected, as it has little probative value and risks being highly prejudicial. *Id*.[4]

¶23 Prior to trial, Powers moved in limine to preclude Taser from introducing in evidence at trial certain documents that Taser claimed compiled information regarding the lack of any injuries caused by the M-26 prior to July 16, 2002 (Taser's "Human Demo Reports" and human volunteer data spreadsheets) and the testimony of two Taser witnesses, Taser training coordinator Jami Hill and Taser warnings expert Dr. Christine Wood, concerning this data. Powers argued, *inter alia*, that this evidence must be excluded because Taser could not meet the necessary foundational requirement established in *Pak-Mor*. The trial court denied the motion, but stated that it would require proper foundation before admitting such evidence. Thereafter, at trial, Taser did not seek to introduce the challenged documents and they were never admitted in

[4] Taser argues that the foundational standard set forth in *Pak-Mor*, a design defect case, does not apply to Powers' claim that Taser failed to properly warn Powers about the M-26 because Taser's knowledge of prior accidents is directly relevant to its duty to warn of foreseeable risks. *Pak-Mor,* 145 Ariz. at 127 n.3, 700 P.2d at 825 n.3. Powers contends that the Arizona Supreme Court has applied the *Pak-Mor* foundational requirements outside the context of product liability design cases, *see Isbell v. State of Arizona*, 198 Ariz. 291, 293, 9 P.3d 322, 324 (2000) (negligence claim), and argues that there is no reason such standards would not apply in this case. We need not decide this issue, however, as Taser did not offer at trial evidence that the M-26 had not caused prior injuries.

evidence. Taser also did not call Ms. Hill or Dr. Wood to testify at trial.

¶24 Nevertheless, Powers complains that several Taser witnesses, Patrick Smith, Hans Marrero, and Steve Tuttle, testified at trial that they had never witnessed any injuries while observing volunteers exposed to the M-26. Powers contends that this testimony was the type discussed in *Pak-Mor* regarding a lack of prior injuries and requiring a heightened foundational showing. Our review of this testimony reveals that it does not constitute evidence of the absence of prior injuries as discussed in *Pak-Mor*, but rather, the direct observations of these witnesses. The witnesses did not testify that the M-26 had not caused any prior injuries; their testimony was limited to their direct observations of human exposure to the M-26. Such evidence was relevant to the issue of Taser's knowledge regarding the potential hazards of the M-26 and to rebut Powers' argument that Taser's assertion in the PowerPoint Presentation that none of the 3000 human volunteers who had been exposed to the M-26 were injured was unsupported.

¶25 Further, on cross-examination of Messrs. Marrero and Tuttle, Powers' counsel established that Taser did not follow up with the volunteers after the date of their exposure to the M-26 to determine whether they later suffered any injury or other long-term effects from the exposure. The court allowed Powers to argue that just because Taser's witnesses did not see injuries does not mean that they did not occur and reminded the jury that a product could

be unreasonably dangerous even if it had not previously caused an injury.

¶26 The trial court did not abuse its discretion by allowing Taser's witnesses to testify that they had not witnessed any injury to persons they observed being struck by the M-26.

c. Disciplinary Allegations

¶27 Powers argues that the trial court improperly admitted evidence of disciplinary proceedings pending against him at the time of his resignation from the MCSO. He contends that such evidence was irrelevant and prejudicial because the MCSO never disciplined him and because there was no evidence that his continued employment or rate of pay would have been affected by the disciplinary proceedings. Powers argues that the danger of undue prejudice from this evidence substantially outweighed its probative value and contends the court should have excluded it under Arizona Rule of Evidence 404(b).

¶28 Rule 404(b) provides that evidence of other crimes, wrongs, or acts is not admissible to provide the character of a person or show that he or she had acted in conformity therewith. *Lee v. Hodge*, 180 Ariz. 97, 102, 882 P.2d 408, 413 (1994) (holding trial court did not abuse its discretion by excluding evidence of dissimilar past acts because such evidence may have violated Rule 404(b) prohibition against using prior bad acts to prove character and conformity therewith). However, such evidence may be admissible for other purposes. *Id.*

¶29 In this case, Powers claimed that as a result of his exposure to the M-26, he sustained lost wages and benefits totaling almost $820,000. This damage calculation was based on the assumption that, absent his exposure to the M-26, Powers would have remained employed with the MCSO at a sergeant's pay grade until 2019. Capt. Robert Parrish testified that Powers had poor job performance throughout 2002 and that, as a result, Capt. Parrish had referred Powers for the disciplinary proceedings that were pending against Powers at the time of Powers' resignation. He testified that if the MCSO had disciplined Powers, one disciplinary option would have been to demote Powers, which would have resulted in an automatic reduction in Powers' pay grade.

¶30 We agree with Taser that this evidence is relevant to Powers' claim for damages. "'Relevant 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 evidence." Ariz. R. Evid. 401. The fact that Powers' supervisor reported numerous instances of Powers' misconduct, incompetence and insubordination during 2002 and that the MCSO had initiated disciplinary proceedings against Powers tends to controvert his claim for damages, which was based on the assumption that he would continue at his current pay grade until retirement from the MCSO. Accordingly, the trial court did not abuse its discretion by admitting such evidence at trial. *State v. Smith*, 136 Ariz. 273,

276, 665 P.2d 995, 998 (1983) (stating trial judge has considerable discretion in determining the relevance and admissibility of evidence).[5]

¶31 Moreover, the trial court appropriately limited this evidence to avoid undue prejudice to Powers by refusing to allow Taser to introduce many of the MCSO's disciplinary records and by restricting such evidence to testimony from Powers' supervisor, Capt. Parrish. In addition, the court instructed the jury that it could not consider Capt. Parrish's testimony in determining "the truthfulness of [Powers] or of [Powers'] good or bad character. We're here to determine whether or not the pending discipline may have impacted [Powers'] longevity with the sheriff's department or his rate of pay."

¶32 Powers also complains that the trial court failed to timely conduct a Rule 104 hearing, as Powers requested. However, prior to Capt. Parrish's testimony, the court did hear arguments from counsel and required Taser's counsel to submit an offer of proof regarding the expected substance of Capt. Parrish's testimony. Based on this argument and proffer, the court limited Capt. Parrish's testimony to his direct observations of Powers' job

[5] The balancing of factors under Rule 403, Arizona Rules of Evidence, is peculiarly a function of trial, not appellate courts. *Yauch*, 198 Ariz. at 403, ¶ 26, 10 P.3d at 1190. "The balancing process under Rule 403 . . . is left to the trial judge, who must determine whether the probativeness of the offered evidence is substantially outweighed by its unfair prejudice, confusion of the issues, etc." *English-Clark v. City of Tucson*, 142 Ariz. 522, 526, 690 P.2d 1235, 1239 (App. 1984).

performance, the discipline options available to the MCSO, and which options Capt. Parrish might have recommended. The court did not allow Capt. Parrish to testify that Powers would likely have been demoted as a result of the discipline.

¶33 In any event, Capt. Parrish's testimony regarding the MCSO's disciplinary proceedings was not prejudicial to Powers. The evidence was admitted solely to allow Taser to rebut Powers' claim for damages, and the trial court specifically instructed the jury not to consider the evidence in evaluating Powers' truthfulness or character. As the jury found in favor of Taser, it did not reach the issue whether Powers was entitled to the full amount of damages he sought and therefore did not consider this evidence. *Perkins v. Komarnyckyj,* 172 Ariz. 115, 119, 834 P.2d 1260, 1264 (1992) (citing 5 Am. Jur. 2d *Appeal and Error* § 890 (1962) for concept that court of appeals must presume jury heeded limiting instruction given by the trial court).

¶34 We find no abuse of discretion in the trial court's admission of evidence regarding the MCSO's disciplinary proceedings against Powers.

d. Farrow Testimony

¶35 Powers also complains that the trial court improperly allowed Taser's counsel to cross-examine him regarding Lieutenant David Farrow's expected testimony, which was never admitted at trial.

¶36 Two weeks before trial, Taser moved for leave to supplement its trial witness disclosure regarding the anticipated testimony of its previously disclosed witness, Lt. Farrow. Taser sought leave to include new information regarding a conversation between Lt. Farrow and Powers in which, Lt. Farrow claimed, Powers discussed several pre-existing medical conditions. Lt. Farrow claimed this conversation occurred on July 16, 2002, when he drove Powers home from work after the M-26 certification training class.

¶37 The trial court excluded Lt. Farrow's testimony for lack of disclosure. However, prior to that ruling, during Powers' case-in-chief, Powers testified that he drove himself home on July 16, 2002, and was helped into the house by his children. The court allowed Taser to cross-examine Powers by asking,

> If Lieutenant Farrow were to testify that he drove you home that day in his vehicle and that your vehicle remained at the MCSO parking lot and that when you got home you and he sat in your driveway and talked for a period of time and you got out of the car yourself, and he went back – and he then left, your testimony would be that that would be untrue; is that right?

Powers answered that such testimony would be untrue.

¶38 Powers now contends that because Lt. Farrow's testimony was excluded, the trial court erred by allowing Taser to cross-examine Powers about the substance of Lt. Farrow's testimony. Although counsel may not cross-examine a witness on the basis of a statement that is inadmissible, *see Sharman v. Skaggs Cos., Inc.*, 124 Ariz. 165, 169, 602 P.2d 833, 837 (App. 1979), because the trial court had not yet excluded Lt. Farrow's testimony, Taser's

counsel had a good faith basis for his question. *Ruth v. Rhodes*, 66 Ariz. 129, 136, 185 P.2d 304, 308 (1947) (stating court "will not countenance 'cross-examination by insinuation' the sole purpose of which is to leave an impression with the jury of a fact or state of affairs that is not proved, or to get before the jury by indirection that which would not be directly admissible.") (criticized on other grounds in *Shaw v. Greer*, 67 Ariz. 223, 225-26, 194 P.2d 430, 431-32 (1948)).

¶39 We find no error in the trial court's ruling.

e. AC / DC Evidence

¶40 Powers contends the trial court erroneously permitted Taser to introduce irrelevant, undisclosed and prejudicial evidence regarding the difference between Alternating Current ("AC") and Direct Current ("DC").

¶41 Prior to trial, Taser identified Dr. Leslie Geddes as an expert witness whose testimony would be offered to rebut the opinion of Powers' warnings expert, Dr. Carl Abraham, which was based in part on Dr. Abraham's interpretation of Dr. Geddes' textbook, *Medical and Bioengineering Aspects of Electrical Injuries*. Taser indicated that Dr. Geddes would testify at trial that the discussion in his textbook regarding electrical current and the potential for fractures related to electrical currents of a different "nature, duration, current and frequency than that of the [M-26]." Taser claimed that Dr. Geddes would further testify that "the electrical current emitted from the [M-26] has a much lower,

shorter duration current pulse than the scenarios referenced in his textbook, and that the [M-26] current is not likely to cause the types of muscle contractions that would result in injuries, such as bone fractures."

¶42 Powers moved to exclude Dr. Geddes' testimony on the basis that Dr. Geddes was not timely disclosed as an expert witness. The court sustained Powers' objection, ruling that Dr. Geddes would not be permitted to testify regarding the "differences between the currents discussed in his text book versus the currents emitted from Taser devices." Dr. Geddes did not testify at trial.

¶43 To rebut Dr. Abraham's testimony at trial that prior to July 16, 2002, numerous scientific articles confirmed that electrical currents could produce muscle contractions strong enough to cause fractures, Taser presented evidence that those articles reported only three injuries from pulse DC, rather than AC. Taser also offered Rick Smith's testimony that the M-26 uses pulse DC, which emits a short duration pulse of between 15 and 22 pulses per second, resulting in repeated muscle "twitches" with slight relaxation rather that a sustained muscle contraction. In contrast, Smith testified, AC emits a continuous waveform with 120 pulses per second, producing a sustained muscle contraction. Taser contends that it presented this evidence to rebut Dr. Abraham's opinion that based on the scientific literature available before Taser manufactured the M-26, Taser's warnings and instructions relating to the M-26 were defective.

¶44 Powers argues the trial court erred by allowing this testimony because the nature of the current that causes a muscle contraction – AC or DC – was irrelevant as Taser acknowledged that the M-26 caused uncontrollable muscle contractions.[6] Powers also asserts that such evidence could only be relevant to the reasonableness of Taser's failure to investigate whether the muscle contractions caused by the M-26 could cause a fracture, which, Powers argues, is irrelevant to the issue of strict liability for failure to warn.

¶45 The court properly instructed the jury that it could determine that the M-26 was defective and unreasonably dangerous if Taser knew or should have known that a foreseeable use of the M-26 may be unreasonably dangerous and did not provide an adequate warning of the danger for reasonably safe use. The court instructed the jury that Taser was required to warn of a risk that was "known or knowable in light of the generally recognized and prevailing scientific and medical knowledge available at the time of its distribution." As the trial court acknowledged, the evidence Taser presented regarding the differences between AC and pulse-DC was relevant to the issue whether Taser should have recognized, based upon the prevailing scientific literature, the

[6] Although Powers also complains that the court allowed Taser's expert, Dr. Robert Stratbucker, to "extensively discuss the differences between AC and DC," Powers does not identify any such objectionable testimony by Dr. Stratbucker. We therefore confine our analysis to Smith's testimony.

risk of fracture associated with the involuntary muscle contractions caused by the M-26.

¶46 Powers also objects to the trial court's admission of this evidence on the basis that it was not properly disclosed prior to trial. Taser disclosed the substance of Smith's testimony regarding the difference between AC and DC in Taser's Twenty-Fourth Supplemental Disclosure Statement, stating:

> Mr. Smith will testify about the characteristics of the electrical current that is emitted from the [M-26] and will testify regarding the difference between the [M-26's] pulse Direct Current ("DC") waveform when compared to 60Hz Alternating Current ("AC") waveforms such as household types currents in the United States.

Taser also provided specific detail regarding the substance of Smith's expected testimony concerning the M-26's wattage, amperage and joules in comparison to AC. Based upon these disclosures, the trial court properly precluded Smith from opining that the M-26's pulse-DC could not cause fractures and confined his testimony to factual matters such as the thought process that went into the development of the M-26 and the selection of its specifications.[7]

¶47 We find no error in the trial court's admission of Smith's testimony regarding the difference between AC and DC.

f. Evidence That Currents Do Not Cause Stress Fractures In The Absence of Underlying Osteoporosis

[7] Moreover, the admission of Smith's testimony was not unfairly prejudicial to Powers, as Dr. Abraham specifically testified that the type of current, AC or DC, did not matter to the question whether an electrical shock that produces involuntary muscular contractions would result in injuries.

¶48 Powers next argues that the trial court erroneously allowed Taser to introduce evidence that the muscle contractions produced by the M-26 were insufficient to cause stress fractures in the absence of underlying osteoporosis.

¶49 Taser's expert, Dr. Steven Brown, testified during direct examination that it was not possible for muscle contractions alone to cause a T-7 fracture in normal, healthy bone. Although the trial court initially denied Powers' motion to strike this testimony, stating Dr. Brown was subject to cross-examination on that point, the court later granted the motion. Accordingly, the testimony was struck from the record and we cannot sustain Powers' assignment of error.

¶50 Powers complains, however, that Taser CEO Patrick Smith implied during his testimony that the results of Taser's 2002 and 2003 strain-gauge tests, which were designed to measure the force of the muscle contractions caused by the M-26, were favorable to Taser.

¶51 Before trial, the court granted Powers' motion in limine and precluded Taser from introducing the results of the strain-gauge tests performed in 2002 and 2003 because Taser did not timely disclose this evidence.[8] Despite this ruling, Powers questioned Smith about the 2003 strain-gauge tests at trial:

[8] Taser claims it never intended to offer such evidence at trial because the results of the testing were irrelevant to its knowledge prior to July 16, 2002 and because Taser never disputed that such testing was feasible prior to July 16, 2002.

Q: And, in fact, what you learned as a result of those experiments that you could have done in 1999 was that the level of contractions you would see in those animal experiments was strong enough to cause stress fractures; correct?

A: Absolutely and unequivocally no. We had not seen any stress fractures that were consistent with what we have observed in hundreds – I have observed in hundreds of human volunteers.

¶52 On redirect, Taser's counsel addressed the issue whether Taser had attempted to hide the strain-gauge test data:

Mr. Drury: Now you were asked about the test data from 2002 and 2003 that was produced a month after the disclosure deadline. Is there anything in that test data that you are – that you feel you need to hide or that would be of concern to you?

Mr. Dillingham: Objection, your Honor, Relevance, 403, beyond the scope as well.

Court: Overruled.

Witness: Absolutely not. As I said to Mr. Dillingham, I wish we were talking about the data rather than just complaining about the fact we were tardy.

Mr. Drury: Why do you wish you were talking about the data in 2002 and 2003 testing that you produced the data for a month after disclosure deadline?

Mr. Dillingham: Objection, your Honor, may we approach, please?

Court: I'm going to sustain the objection.

¶53 The trial court thus allowed Smith to testify that Taser's late disclosure was not an attempt to hide the 2002 and

2003 strain-gauge test data and, consistent with its prior ruling, sustained Powers' objection regarding the results of the testing. The trial court also instructed the jury that the results of the 2002 and 2003 strain-gauge tests were not relevant to the litigation and struck any references to those results. We find no error in the trial court's rulings regarding this testimony.[9]

g. Evidence of Subsequent Warnings

¶54 Finally, Powers alleges the trial court erred in excluding evidence of Taser's subsequent warnings regarding the risk of fracture from an M-26 exposure and the MCSO's prohibition on officers receiving M-26 hits during certification training. Specifically, Powers charges that the court erroneously excluded (1) Taser's Lesson Plan Version 12 containing a warning about fractures; (2) Chief David Hendershott's testimony; (3) Chief Hendershott's January 14, 2005 memorandum stating that no MCSO officers would be exposed to any electroshock device, including a Taser weapon, during training; and (4) Taser's October 1, 2005 warning that persons with pre-existing conditions, such as osteoporosis, may be more susceptible to injuries, including stress fractures, from the M-26. In addition, Powers contends the trial court erred by excluding Dr. Gary J. Ordog's deposition testimony,

[9] In addition, we reject Powers' argument that the trial court erred by precluding Powers' counsel from impeaching Smith at trial with Smith's deposition testimony regarding the test results, because Powers does not cite any testimony by Smith at trial that allegedly contradicts his deposition testimony.

wherein Dr. Ordog stated that he believed that other electric weapons were potentially lethal.

i. Lesson Plan Version 12, January 14, 2004 Memorandum and Chief Hendershott's Testimony

¶55 Powers argues that the trial court erroneously excluded warnings Taser issued subsequent to July 16, 2002, along with evidence that the MCSO had changed its policy requiring each officer to receive a shock when undergoing Taser training. Powers contends this evidence was relevant to establish that Taser's failure to warn caused Powers' damages and to rebut Taser's argument that it was not feasible to warn of the risk of stress fractures prior to July 16, 2002.

¶56 Evidence of a defendant's subsequent remedial measures is not admissible to show negligence or culpable conduct. Ariz. R. Evid. 407. *See also* Ariz. Rev. Stat. § 12-686 (2003) (precluding evidence of post-sale changes to prove product defect). Accordingly, the trial court granted Taser's motion in limine to preclude evidence of the changes Taser made to its warnings subsequent to July 16, 2002. However, Powers argues that the court should have admitted this evidence for other purposes, as specifically allowed under Arizona Rule of Evidence 407; namely, to establish that Taser's allegedly inadequate warnings caused Powers' injuries. Ariz. R. Evid. 407 (stating rule does not require exclusion of evidence of subsequent measures when offered for another purpose); *Baroldy*, 157 Ariz. at 585-86, 760 P.2d at 585-86

(holding evidence of subsequent revisions in patient warnings was admissible to impeach defendant's argument that its product could not have caused plaintiff's injury).

¶57 The trial court did not abuse its discretion in refusing to admit the proffered evidence to establish causation. MCSO Chief Hendershott testified at his deposition that the MCSO changed its policy requiring mandatory exposure to the Taser in response to Taser's requirement that all trainees sign a release, not in reaction to Taser's subsequent warnings about the risks associated with the device. The trial court recognized that allowing this evidence ostensibly for the purpose of showing causation might confuse the jury.

¶58 In addition, we find no abuse of discretion in the trial court's determination that Powers did not timely disclose that he intended to present Chief Hendershott's testimony regarding whether the MCSO would have changed its policy requiring mandatory exposure to the M-26 if Taser had issued different warnings. Although Chief Hendershott was disclosed as a witness, he was never asked in advance of trial whether the MCSO would have allowed officers to be exposed to the M-26 on July 16, 2002 if Taser had issued different warnings. Further, we determine that Powers suffered no prejudice as a result of the court's exclusion of this evidence, as Powers

testified at trial that if he had been given different warnings, he would have refused the M-26 exposure.[10]

¶59 Powers also argues that the trial court erred in excluding this evidence because it was relevant to establish that it was feasible for Taser to have warned about the risk of stress fracture before July 16, 2002. Ariz. R. Evid. 407 (identifying feasibility of precautionary measures as one of the "other purposes" for which evidence of subsequent measures may be offered). However, as Powers acknowledges, Taser never disputed that strain-gauge testing was feasible before July 16, 2002.

ii. October 1, 2005 Warning

¶60 Powers argues that the trial court improperly excluded Taser's October 1, 2005 warning stating that persons with pre-existing conditions, such as osteoporosis, may be more susceptible to injuries, including stress fractures, from the M-26 because such evidence was relevant to rebut Taser's claim that it was not required to warn about osteoporosis because it is a rare condition and Taser had no reason to expect that duty-ready police officers

[10] Powers contends the court's exclusion of this evidence was inconsistent with its earlier ruling that such evidence was relevant to the issue of causation. Taser argues that the trial court had previously allowed Smith to be questioned regarding his knowledge of the MCSO's change in policy based upon Powers' counsel's misrepresentation regarding Chief Hendershott's deposition testimony. Whether the court's initial ruling was correct or not, it did not oblige the court to later admit evidence it deemed improper. *Ofstedahl v. City of Phoenix*, 129 Ariz. 85, 88, 628 P.2d 968, 971 (App. 1981) (stating trial court is given considerable discretion in resolving evidentiary issues).

would have osteoporosis. Powers contends that this evidence rebuts Taser's "repeated" argument at trial that it was "entitled to presume that officers in a training environment were 'duty ready.'" We find no indication in the record, however, that Taser argued to the jury that it was not required to warn about the risk of injury to persons with osteoporosis.[11] Powers cites Rick Smith's testimony that Taser recommended medical supervision and a signed release from members of the media who received Taser training, but did not recommend these precautions for police officer training. Such evidence does not amount to, or support, an argument that Taser had no duty to warn about unusual or rare conditions.[12]

¶61 Accordingly, Powers' argument that Taser's October 1, 2005 warning was admissible to rebut such a position fails. We find no error in the trial court's exclusion of this evidence.

[11] Taser did argue to the court in its motion for judgment as a matter of law that its duty did not require it to warn of the possibility of rare and unusual injuries. The trial court denied this argument as a matter of law.

[12] In addition, we disagree with Powers' contention, first raised in his reply brief, that Taser attempted during cross-examination of Powers' expert, Dr. Abraham, to demonstrate that it was not feasible to warn of fracture risks from the M-26 because osteoporosis was a rare condition. Taser asked Dr. Abraham to confirm his earlier deposition testimony that, as a general proposition, he was unconcerned about requiring a manufacturer to warn about rare and unforeseeable risks, i.e., "freak accidents." Taser did not ask Dr. Abraham whether osteoporosis is such a rare and unique condition.

iii. Dr. Ordog Deposition Testimony

¶62 Finally, Powers argues that Dr. Ordog's deposition testimony that he believed other electric weapons were potentially lethal was relevant to rebut Taser's "false" characterization of Dr. Ordog's study during trial and to demonstrate that such information was reasonably available to Taser prior to July 16, 2002.

¶63 In 1987, Dr. Ordog published a study concerning the effect of electric weapons. Taser cited this study in its training materials, including the Lesson Plan Powers viewed on July 16, 2002. Prior to trial, Powers deposed Dr. Ordog, who opined that the electric weapons he studied were potentially lethal. Taser moved in limine for an order precluding Powers from introducing Dr. Ordog's expert opinions regarding the injuries that could result from being shocked by a Taser because Powers had not disclosed Dr. Ordog as an expert witness.[13]

¶64 At trial, the court excluded Dr. Ordog's deposition testimony on the basis that neither party had timely disclosed that Dr. Ordog might testify until after the deadline for designation of expert witnesses. The court ruled that either party could question Dr. Ordog regarding the foundation for and scope of his study, but

[13] Taser also moved to exclude Dr. Ordog's deposition testimony from unrelated litigation.

could not question him about his opinions regarding the lethality of electric devices.

¶65 Powers argues that the trial court abused its discretion by refusing to allow Powers to introduce this evidence to show that Taser misstated Dr. Ordog's conclusions and to demonstrate that Taser could have reasonably determined that Dr. Ordog believed electric weapons were potentially lethal if it had contacted Dr. Ordog prior to July 16, 2002. However, Taser stipulated to the admission of Dr. Ordog's study at trial and Powers relied on the study to challenge Taser's characterization of the study in its Lesson Plan and to cross-examine Smith regarding the study results. Smith also acknowledged that Taser did not contact Dr. Ordog regarding his study prior to July 16, 2002. The trial court did not abuse its discretion by refusing to allow Powers to introduce Dr. Ordog's untimely disclosed opinions for this same purpose. *See* Ariz. R. Evid. 403; *State ex rel. La Sota v. Ariz. Licensed Beverage Ass'n, Inc.*, 128 Ariz. 515, 523, 627 P.2d 666, 674 (1981) (refusing to reverse trial court's exclusion of deposition testimony when similar testimony was given at trial).

¶66 We find no error in the trial court's ruling.

3. Punitive Damages Claim

¶67 As we affirm the jury's verdict for Taser, we need not address Powers' contention that the trial court erred in ruling that the evidence offered by Powers did not support Powers' claim for punitive damages.

4. Motion for New Trial

¶68 Finally, Powers contends that the trial court erred in denying his motion for new trial, which was based on the legal and evidentiary errors Powers raises in this appeal. Because we find no error in the trial court's rulings, we affirm its denial of Powers' motion for new trial.

Conclusion

¶69 For the foregoing reasons, and those set forth in the Opinion filed this date, we affirm.

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DANIEL A. BARKER, Presiding Judge

CONCURRING:

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ANN A. SCOTT TIMMER, Judge

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SUSAN A. EHRLICH, Judge