

STATE OF MICHIGAN
COURT OF APPEALS

ALEXIS M. ERVIN,

UNPUBLISHED

Plaintiff-Appellant,

v

No. 185884

JAMES NORMAN BOMER,

Kalamazoo Circuit Court
LC No. 92-002126-NZ

Defendant-Appellee.

Before: Griffin, P.J., and Doctoroff, and Markman, JJ.

MARKMAN, J., (dissenting).

I concur with the majority with regard to each of the issues addressed with the exception of its affirmance of the trial court's decision to exclude evidence of defendant's preliminary breath test (PBT) results.¹ I respectfully dissent with regard to this matter. Further, because I believe that the court's decision was not harmless error, I would reverse and remand for a new trial.

The parties agree that, shortly after the automobile accident in this case occurred, defendant was administered a PBT and field sobriety tests by the police officers. Plaintiff asserts that the PBT indicated that defendant's blood alcohol level was 0.08 and defendant does not controvert this statement. However, on the first day of trial, the parties entered a stipulation to the effect that "defendant had drunk beer [on the evening of the accident] and that the results of the portable breath test will not be referred to, will not be mentioned and will not be addressed in this case."

On the following day, defense counsel in his opening statement referred to the fact that the investigating officer had given defendant "field sobriety tests," described the tests and asserted that defendant "passed all those." The next day, plaintiff's counsel requested a clarification of the stipulation stating, "We agreed not to introduce evidence or ask them about [the PBT] which I thought --just may be my own naiveté-- would encompass all the sobriety tests." When the court responded that it was unfamiliar with the basis for or the scope of the stipulation, plaintiff's counsel responded that the "scope of the stipulation was that the [PBT] would not be admitted . . . or I guess even that [the police] administered [PBT]." The court deferred ruling on the matter until later in the trial after a lengthy colloquy at which plaintiff's counsel continued to argue that evidence of the PBT was necessary in order

to "balance" defendant's evidence that defendant had passed the field sobriety tests. The court eventually ruled that it would permit "no references to PBT directly or indirectly." Subsequently, when plaintiff's counsel raised the issue again in plaintiff's motion for a new trial, the court stated, "When you stipulate that something isn't to be admitted, I think you best make reservation that you reserve the right to use it for impeachment purposes."

Although I do not share plaintiff's counsel's interpretation that field sobriety tests fell within the scope of the parties' stipulation,² I believe nevertheless that the trial court erred in denying plaintiff the opportunity to *respond* to the evidence of the field sobriety tests with evidence of the PBT.

In *City of Westland v Okopski*, 208 Mich App 66; 527 NW2d 780 (1994), this Court observed that a blood alcohol test administered pursuant to statutory law is not admissible in a criminal prosecution other than a prosecution for a drinking and driving offense. Still, it allowed the results of a PBT to be admitted for impeachment purposes and stated in support of its conclusion:

Evidence that is admissible for one purpose is not inadmissible because its use for a different purpose is precluded. *People v VanderVliet*, 444 Mich 52, 73; 508 NW2d 114 (1993). . . . In this case, defendants' testimony about not being intoxicated caused the prosecutor to present rebuttal evidence of defendants' blood alcohol content. The evidence was not used to prove substantively that defendants were intoxicated; rather, the test results were used to impeach defendants' testimony on that point. We find that this procedure was permissible. [*Id.* at 71.]

To the extent that such evidence was permitted as impeachment in a criminal case, although it could not have been used substantively, it reasonably follows that it should also be permitted for that purpose in a civil case. See also *Manko v Root*, 190 Mich App 702, 705; 476 NW2d 776 (1991).

In the instant case, plaintiff's counsel similarly sought to use the PBT evidence exclusively for impeachment purposes. I cannot agree with the majority that, because counsel did not use the word "impeachment" but indicated only that he sought to "balance" the field sobriety tests evidence with PBT evidence, he either sought to "use the evidence substantively" or else did not adequately communicate the limited use to which he proposed to put the PBT evidence.

Plaintiff's counsel's characterization of the purpose of the PBT evidence as being to "balance" the field sobriety tests, while perhaps awkward, is a satisfactory enough description of the purpose of impeachment evidence. Such evidence is designed to "vitate a witness' credibility." *People v Redman*, 17 Mich App 610, 613; 170 NW2d 254 (1969). The purpose of the field sobriety tests offered by defendant was to communicate to the jury that defendant was in the full possession of his faculties when his automobile collided with the automobile in which plaintiff was a passenger. In offering the PBT evidence in response, plaintiff's apparent purpose was to cast doubt upon this proposition by enabling the jury to draw a contrary inference from the high alcohol level in defendant's system at the time of the accident. Plaintiff did not offer the PBT evidence on direct examination but only to rebut defense

testimony communicating a contrary picture of defendant's command of his faculties at the time of the accident.

Relying on the absence of an express reservation of the right to admit PBT evidence for impeachment purposes, the trial court interpreted the stipulation as precluding admission of such evidence for that purpose. Construction of a stipulation is a question of law; this court reviews legal questions de novo. See *Massachusetts Indemnity & Life Ins Co v Thomas*, 206 Mich App 265, 268; 520 NW2d 708 (1994); *Oakland Hills Development Corp v Lueders Drainage District*, 212 Mich App 284, 294; 537 NW2d 258 (1995). The language of a stipulation should not be construed to give effect to the waiver of a right not plainly intended to be relinquished. *Detroit Edison v Public Service Commission*, 155 Mich App 461, 467; 400 NW2d 644 (1986); *Wilson v Gauck*, 167 Mich App 90, 95; 421 NW2d 582 (1986). I believe that the court erred in placing the burden upon plaintiff to exclude impeachment use of evidence from the stipulation and in interpreting a stipulation that did not expressly address impeachment use to encompass such use.

Alternatively, I would find error in the court's refusal to allow the stipulation to be amended on the basis of mistake on plaintiff's counsel's part. Plaintiff's counsel requested a clarification of the stipulation and indicated that he thought the stipulation "would encompass all the sobriety tests." In my judgment, plaintiff's counsel clearly entered into the instant stipulation only because he believed that it would exclude *all* evidence relating to defendant's intoxicated status-- evidence that was mixed in terms of plaintiff's as well as defendant's interest. I can conceive of no purpose plaintiff could have intended to achieve by entering into a stipulation that excluded the PBT without also excluding the field sobriety tests. However, the stipulation, by its terms, excludes only evidence of the PBT, not the field sobriety tests. Therefore, plaintiff's counsel, in my judgment, mistakenly signed a stipulation that did not conform to his understanding of the agreement. In view of the critical importance of the evidence excluded to the liability issues involved in the lawsuit, the trial court should have taken action to modify the stipulation. While parties to proceedings are normally bound by their stipulations, the court should not permit a mistake to remain uncorrected when the opposite party would suffer no prejudice from the correction. *Basner v Defoe Shipbuilding*, 319 Mich 67, 72; 29 NW2d 140 (1947); *Wechsler v Zen*, 2 Mich App 438, 441; 140 NW2d 581 (1966).

Even more importantly, the court should not enforce a stipulation, particularly when there is evidence of a mistake, where such enforcement has the effect of presenting a false picture of events to the jury. *People v Sutton (After Remand)*, 436 Mich 575, 592; 464 NW2d 276 (1990), citing *Harris v New York*, 401 US 222; 91 643; 28 L Ed 2d 1 (1971). In the instant case, defendant was permitted to assert to the jury that he was in control of his faculties because he had passed a field sobriety test when, in truth, he may not have been in such control and when information casting doubt upon the truthfulness of this assertion could have been made available to the jury. Plaintiff was denied the opportunity to impeach or "balance" the accuracy of the inference raised by the field sobriety tests by demonstrating that defendant's PBT results indicated an extremely high, near unlawful blood alcohol level. The result was to distort the truth-finding process of the trial and to deny the jury the opportunity to make an intelligent determination, based upon the realities of what transpired, about defendant's accountability for the serious injuries which resulted to plaintiff.³ Therefore, even assuming that the

stipulation was broad enough to cover the use of the PBT as impeachment evidence, I would find an abuse of discretion on the trial court's part in not allowing amendment of the stipulation.

Because, in my judgment, the trial court's exclusion of the PBT evidence resulted in the jury being presented with a sharply distorted picture of events, I would find that plaintiff's substantial rights were affected by the court's error in denying plaintiff the opportunity to impeach the field sobriety evidence with the PBT evidence. As a result, I would reverse and remand. MRE 103(a); *People v Travis*, 443 Mich 668, 686; 505 NW2d 563 (1993).

/s/ Stephen J. Markman

¹ Although I believe that the trial court also erred in denying admission of an alleged "excited utterance" made at the accident scene by the driver of the car in which plaintiff was riding, *People v Straight*, 430 Mich 418, 424; 424 NW2d 257 (1988); *People v Kowalak (On Remand)*, 215 Mich App 554, 558; 546 NW2d 681 (1996), I agree with the majority that such error was harmless.

² It is unclear what reasons plaintiff's counsel would have for entering into the stipulation unless he thought that it covered field sobriety tests as well as the PBT.

³ Whatever inferences the jury might have drawn from defendant's admission to having drunk *some* beer the evening of the accident, such inferences almost certainly were far weaker than what the jury might have drawn had defendant's actual blood alcohol level been communicated.