STATE OF MICHIGAN

COURT OF APPEALS

BRENDA REBECCA POE also known as BRENDA REBECCA POE NEAL, Personal Representative of the Estate of BRAD NEAL POE, Deceased,

Plaintiff-Appellee,

v

INGHAM COUNTY BOARD OF ROAD COMMISSIONERS,

Defendant-Appellant.

UNPUBLISHED
July 10, 1998

No. 198229
Ingham Circuit Court
LC No. 89-06444-CZ

Before: Hood, P.J., and Markman and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment in favor of plaintiff entered after a jury found defendant liable for twenty percent of a $1 million award of damages. This award was based on defendant's comparative negligence in the death of plaintiff's decedent. We reverse.

Plaintiff's decedent was killed in a February 15, 1988 car accident on Van Atta Road in Ingham County, a public roadway maintained by defendant. In 1993, this Court reversed a prior judgment in this matter by which defendant was held liable for forty percent of $500,000 in damages. *Poe v Ingham Co Bd of Road Comm'rs*, unpublished opinion per curiam of the Court of Appeals, issued June 18, 1996 (Docket Nos. 164691, 166795). This Court vacated the judgment based on its conclusion that the trial court abused its discretion in admitting for impeachment purposes evidence that, after the decedent's accident, defendant reduced the Van Atta Road speed limit to forty-five miles per hour and also posted a thirty-five-mile-per-hour advisory speed sign.[1]

Defendant argues in this appeal that, on retrial, the trial court erroneously admitted evidence of a ball bank indicator test performed by defendant on Van Atta Road after the decedent's accident. We agree. This Court reviews an evidentiary ruling for an abuse of discretion. *Gore v Rains & Block*, 189 Mich App 729, 737; 473 NW2d 813 (1991). In so doing, this Court will not assess the weight or value of the evidence, but will only determine whether the evidence was of a kind which properly could

be considered by a jury. *Id*. An error in the admission or exclusion of evidence is not ground for disturbing a judgment of the trial court, unless refusal to do so would be inconsistent with substantial justice. MCR 2.613(A); *Sackett v Atyeo*, 217 Mich App 676, 683; 552 NW2d 536 (1996).

Defendant first contends that testimony regarding the ball bank indicator test should have been excluded as evidence of a subsequent remedial measure. Plaintiff responds that the ball bank indicator test referred to at trial was neither subsequent nor remedial. The admissibility of subsequent remedial measures is governed by MRE 407, which provides:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. 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.

The exclusion of subsequent remedial measures "is primarily grounded in the policy that owners would be discouraged from attempting repairs that might prevent future injury if they feared that evidence of such acts could be introduced against them." *Denholf v Frank L Jursik Co*, 395 Mich 661, 667; 238 NW2d 1 (1976). Put somewhat differently, it "encourages persons to improve their products, property, services and customs without risk of prejudicing any court proceeding and consequently delaying implementation of improvements." *Smith v E R Squibb & Sons, Inc*, 405 Mich 79, 92; 273 NW2d 476 (1979).

Plaintiff asserts that nothing in the record suggests that the ball bank indicator test referred to at trial was the ball bank indicator test conducted after the accident. We disagree. Ingham County Road Commission traffic engineer David Sonnenberg testified in a prior proceeding that a ball bank indicator test was done before the accident, and that there was no recommended speed for the road as a result of that test. Sonnenberg also testified in a deposition that another ball bank indicator test was conducted some time after the accident, and that results of that test were "thirty-five miles per hour." At trial, Sonnenberg testified that the results of the ball bank indicator test revealed that a safe and reasonable speed through the curves on Van Atta Road would be thirty-five miles per hour. This result corresponds to the result revealed by the second ball bank indicator test, which was conducted after the accident. Accordingly, we conclude that the ball bank indicator test referred to at trial was the one conducted after the accident. We also note that, given the primary policy behind MRE 407, it is immaterial whether the jury was informed that the test was conducted after the accident.

The trial court ruled that Sonnenberg's testimony was not evidence of a subsequent remedial measure, because it was not remedial. In so ruling, it reasoned that the test merely provided information. Although it is true that the ball bank indicator test, taken alone, did nothing to make Van Atta Road safer, we conclude that it was remedial because it was a necessary prelude to defendant's posting of the thirty-five-mile-per-hour advisory speed sign – a measure that was decidedly remedial. Cf. *Skogman v Chippewa Co Rd Comm*, 221 Mich App 351, 357 (explaining that evidence of defendant's application for funds to upgrade a road was inadmissible under MRE 407). Sonnenberg

testified at trial that the speed revealed by the ball bank indicator test is "what you would put on the advisory speed panels." It would defy logic to encourage defendants to post advisory speed signs (by making such evidence inadmissible under MRE 407), while at the same time discouraging them from taking one of the steps necessary to do so. Therefore, because the post-accident ball bank indicator test performed by defendant constituted an action taken to facilitate a subsequent remedial measure, we hold that trial court abused its discretion when it allowed into evidence the results of the test. MRE 407.

In light of the conflicting expert testimony offered by the parties on the issue of defendant's negligence, the lack of other overwhelming evidence produced by plaintiff to establish defendant's negligence, and the fact that the erroneously admitted evidence addressed a central issue in the case, we conclude that the error resulted in prejudice to defendant and thus constituted error requiring reversal. See MCR 2.613(A); *People v Mateo*, 453 Mich 203, 214-215; 551 NW2d 891 (1996). Because we reverse on defendant's first argument, we need not address defendant's remaining allegations of error.

Reversed. We do not retain jurisdiction.

/s/ Harold Hood
/s/ Stephen J. Markman
/s/ Michael J. Talbot

[1] The Court ordered as follows:

> Upon retrial, this case should be tried on the facts as they existed before or at the time of the accident, and not on the basis of any evidence of defendant's subsequent reduction in the speed on Van Atta Road . . . .