STATE OF MICHIGAN

COURT OF APPEALS

BRENDA REBECCA NEAL POE, Personal Representative of the ESTATE OF BRAD NEAL POE, Deceased,

Plaintiff-Appellee,

v

INGHAM COUNTY BOARD OF ROAD COMMISSIONERS,

Defendant-Appellant.

UNPUBLISHED
June 28, 1996

No. 164691, 166795
LC No. 89-064444-CZ

Before: Wahls, P.J., and O'Connell and Smolenski, JJ.

PER CURIAM.

In docket number 164691, defendant appeals as of right a judgment entered on a jury verdict in favor of plaintiff Brenda Rebecca Neal Poe, the personal representative of the estate of Brad Neal Poe, her deceased son. In docket number 166795, defendant appeals as of right postjudgment orders awarding mediation sanctions and costs in favor of plaintiff. We reverse the judgment and remand for a new trial. We vacate the orders concerning mediation sanctions and costs.

In February 1988, plaintiff's decedent, while traveling northbound on Van Atta Road in Ingham County, was killed in an automobile accident near a bridge on that road. Plaintiff filed suit against defendant alleging that Van Atta Road at the site of the accident was not reasonably safe and convenient for public travel.[1] The jury found that plaintiff had sustained $500,000 in damages and apportioned forty-percent liability to defendant and sixty-percent liability to plaintiff based on the negligence of plaintiff's decedent.

On appeal, defendant argues that the trial court erred in admitting the evidence that following the accident it posted a sign reducing the speed on Van Atta Road to forty-five miles per hour and also

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* Circuit judge, sitting on the Court of Appeals by assignment.

posted a thirty-five-mile-per-hour advisory speed sign. Defendant argues that the admission of this evidence violated 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.

Plaintiff moved before trial for a ruling on the admissibility of this evidence. The court ruled that it would allow the admission of the disputed evidence at trial on two grounds. First, where plaintiff produced evidence that defendant's postaccident speed reduction was not a response to the accident itself but rather was a response both to preaccident speed studies done on Van Atta Road and a preaccident petition from residents in the Van Atta Road area requesting a reduction in speed on the road, the court concluded that the reduction in speed was not a subsequent remedial measure. Second, the court held that the evidence was admissible to impeach the testimony of David Sonnenberg, defendant's traffic engineer.

In support of the first ground of admission (that the reduction in speed was not a subsequent remedial measure), plaintiff relies on *Downie v Kent Products Inc*, 420 Mich 197; 362 NW2d 605 (1984). In *Downie*, our Supreme Court held that the admission of evidence of warning tags used by the defendant-manufacturer after the sale of the product that caused the plaintiff's injury but before the injury itself did not violate MRE 407. *Id*. at 206-213. However, in this case, defendant did not reduce the speed on Van Atta Road until after the accident that killed plaintiff's decedent. Thus, *Downie* is distinguishable from this case. In fact, *Downie* explicitly recognizes that MRE 407 "was written to apply only to the situation where such measures are taken after the accident or injury in question." *Id*. at 212.

Moreover, in *Palmiter v Monroe Co Bd of Rd Comm'rs*, 149 Mich App 678, 684-685; 387 NW2d 388 (1986), this Court rejected an argument similar to plaintiff's argument in this case. In *Palmiter*, the plaintiff was injured in an automobile accident. *Id*. at 681. The plaintiff filed suit against the defendant-road commission alleging that his accident had been caused by a slick road surface resulting from liquid calcium chloride deposits left on the road by the defendant's employee. *Id*. at 682. The defendant's foreman testified that there had been only small amounts of calcium chloride on the road and that no slippery condition had existed. The plaintiff sought to introduce evidence that the foreman had ordered that sand be spread on the road shortly after the accident. *Id*. The trial court excluded the evidence of the postaccident sand spreading pursuant to MRE 407. *Id*. at 683.

On appeal, the plaintiff argued that the sand spreading was not a subsequent remedial measure, and therefore MRE 407 was inapplicable, because the evidence indicated that the defendant would have spread the sand over the road in any event. *Id*. at 684-685. This Court rejected the plaintiff's argument

and concluded that MRE 407 was applicable. *Id*. at 684-686. This Court noted that the plaintiff intended to use the evidence of the sand spreading, in part, to impeach the defendant's foreman's testimony with the resulting inference that the foreman knew the road was slippery. *Id*. at 684. This Court also noted that MRE 407 "articulates a basic rule of Michigan common law that '[g]enerally, evidence or repairs, changes in conditions, or precautions taken after an incident is not admissible of proof of negligence or culpable conduct.'" *Id*. at 685 (quoting *Downie, supra* at 208). This Court concluded that it would not apply MRE 407 short of its intended meaning.

In this case, plaintiff argues that it intended to use the evidence of defendant's subsequent reduction in speed on Van Atta Road to contradict, and thus, impeach Sonnenberg's alleged testimony that four speed studies conducted on Van Atta Road in 1986 and 1987 did not justify a reduction in speed and that even after the accident he did not believe that the speed needed to be reduced. Like *Palmiter*, we believe that such impeachment would give rise to the implication that Sonnenberg knew that Van Atta Road should have had a speed limit lower than fifty-five miles per hour. Thus, like *Palmiter*, we apply MRE 407 pursuant to its intended meaning and conclude that it was applicable in this case.

We thus consider whether the trial court erred in admitting the evidence of defendant's subsequent reduction in speed on Van Atta Road for the purpose of impeaching Sonnenberg.

A subsequent remedial measure, although not admissible to prove negligence, may be admissible for some other purpose, such as impeachment. MRE 407; *Palmiter, supra* at 685-686. However, the general rule prohibiting evidence of subsequent remedial measures should be adhered to unless there is a clear foundation for an exception to the rule. *Palmiter, supra* at 686. "Such evidence is tantamount to an admission of negligence and is bound to prejudice a defendant who is charged with negligent conduct." *Grawey v Bd of Rd Comm'rs of Genessee Co*, 48 Mich App 742, 751; 211 NW2d 68 (1973). Evidence of a subsequent remedial repair may be admitted under MRE 407 to directly contradict, and thus impeach, a denial of the repair itself. *Palmiter, supra* at 690. However, as a general rule, a witness may be not contradicted regarding collateral, irrelevant, or immaterial matters. *People v Vasher*, 449 Mich 494, 504; 537 NW2d 168 (1995).

In *Palmiter*, as indicated previously, the trial court excluded evidence that the defendant spread sand on a road after the plaintiff's accident. *Id*. at 683. The trial court's ground, in part, for the exclusion of this evidence was that no witness had directly denied such conduct by the defendant. *Id*. at 683. This Court held that evidence of a subsequent remedial measure for the purpose of impeachment was not limited only to direct contradiction of a statement, but that the contradictory evidence could be either direct or circumstantial. *Id*. at 690. This Court stated that the trial court could have admitted the evidence of the sand spreading to impeach the testimony of the defendant's foreman that no slippery condition had existed on the road. *Id*. at 690. However, this Court concluded that the trial court's refusal to do so was harmless error.[2] This Court further noted that the trial court had been justified in proceeding with caution to guard against misuse of the evidence of sand spreading where "on the facts of this case, the parties' arguments would tend to be very similar to arguments on negligence, thus tending to prejudice

defendant contrary to the intent of MRE 407." *Id*. at 692.

In this case, as indicated previously, plaintiff contends that the evidence of defendant's postaccident speed reduction on Van Atta Road was admissible for the purpose of contradicting, and thus impeaching, Sonnenberg's alleged testimony that previous speed studies had not justified a reduction in speed and that even after the accident he did not believe that the speed need to be reduced. Even assuming, like *Palmiter, supra*, that such impeachment was relevant concerning Sonnenberg's belief in the condition of the road and his credibility concerning that belief, relevant evidence may nevertheless be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403;[3] *Palmiter, supra* at 687-688.

Plaintiff had substantial evidence from which could be argued that defendant knew or should have known before the accident that the speed on Van Atta Road should have been reduced, including exhibits indicating that an appropriate speed for the road was thirty-five, forty-four, forty-six, fifty-one, and fifty-one plus miles per hour, and a petition from forty-one area residents requesting a reduction in speed on the road to thirty-five miles per hour. Moreover, Sonnenberg testified at trial that he knew before the accident that a safe and reasonable speed on Van Atta Road at the site of the accident was less than fifty-five miles per hour. Thus, admitting the evidence of the postaccident speed reductions for the purpose of contradicting, and thus impeaching, Sonnenberg's testimony that the road's speed did not need to be reduced was somewhat cumulative.

Moreover, like *Palmiter, supra*, we believe that "on the facts of this case, the parties' arguments would tend to be very similar to arguments on negligence, thus tending to prejudice defendant contrary to the intent of MRE 407." *Palmiter, supra* at 692. Our belief in this regard is bolstered by the beginning of plaintiff's opening statement to the jury:

> May it please the Court, ladies and gentlemen of the jury. This is the opportunity we have to tell you something about the case as it's going to be presented to you to indicate to you what the evidence is going to show. This case is, as you know from what you've heard, arises out of the death of a youngster, 17 year-old child of David and Brenda Poe, which occurred in February of 1988. This lawsuit was started in August of 1989. It's been a long time coming to this day, which begins this time of decision.
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> Brad Poe's death was caused by the failure of the Ingham County Road Commission to take certain steps and procedures, which they should have done to safely maintain Van Atta Highway, Van Atta Road. *Those changes were made shortly after his death. Through a document, which you will see called a traffic control order, which recites in it that an unsafe condition has been found and certain changes are being made. And, the traffic control order served to reduce the speed limit from an unposted 55 miles per hour down to 45 miles per hour. And, another change was made to put up what is called advisory speed plates, which suggests to people on*

certain areas of the road that an appropriate speed is at 35 miles per hour. And, what you're going to learn is that all of the information, all of the data, which precipitated and which brought about these changes were in the possession of the Road Commission prior to Brad's death. [Emphasis supplied.]

We conclude that the probative value plaintiff's impeachment evidence in this case, if any, was "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . ." MRE 403. The trial court abused its discretion in admitting this evidence contrary to MRE 407. *Price v Long Realty, Inc*, 199 Mich App 461, 466; 502 NW2d 337 (1993). The erroneous admission of this evidence affected defendant's substantial rights. MRE 103(a); Accordingly, we reverse and remand for a new trial. *Chmielewski v Xermac,* Inc, ___ Mich App ___; ___ NW2d ___ (Docket Number 162698, issued 5/21/96), slip op p 2; *Grawey, supra*. 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, including such evidence, if any, contained in the traffic control order issued by defendant and the Michigan State Police reducing the speed to forty-five miles per hour (plaintiff's exhibit nine) or the traffic survey report conducted by defendant and the Michigan State Police after the accident (plaintiff's exhibit eight). *Muilenberg v The Upjohn Co*, 169 Mich App 636, 647; 426 NW2d 767 (1988); *Wincher v Detroit*, 144 Mich App 448, 455-456; 376 NW2d 125 (1985); *Grawey, supra*. In light of our disposition of this case, we decline to address the remaining issues raised by defendant.[4] Because an ultimate verdict had not yet been reached in this case in light of our reversal, we vacate the orders awarding mediation sanctions and taxable costs pursuant to MCR 2.403(O). *Severn v Sperry Corp*, 212 Mich App 406, 416-417; 538 NW2d 50 (1995); *Keiser v Allstate Ins, Co*, 195 Mich App 369, 374-375; 491 NW2d 581 (1992). We do not retain jurisdiction.

Reversed and remanded.

/s/ Myron H. Wahls
/s/ Peter D. O'Connell
/s/ Michael R. Smolenski

[1] See the highway exception, MCL 691.1402; MSA 3.996(102), to governmental immunity, MCL 691.1401 *et seq.*; MSA 3.996(101) *et seq*.

[2] The foreman had died before trial but his testimony was preserved by deposition. *Palmiter, supra* at 691. This Court noted that the jury would thus not have been afforded an opportunity to judge the foreman's credibility and concluded that that it did not find the foreman's deposition testimony incredible. *Id*.

[3] We note that in this case the trial court did not conduct any balancing of the relevant considerations under MRE 403 in deciding to admit the evidence of defendant's postaccident speed reductions on Van Atta Road.

[4] We do note, however, that *Pick v Gratiot Co Rd Comm*, 203 Mich App 138; 511 NW2d 694 (1993), which is the case relied on by defendant on appeal for its argument that claims of negligent signing do not fall within the highway exception to governmental immunity, was recently reversed by our Supreme Court. See *Pick v Szymczak*, ___ Mich ___; ___ NW2d ___; 1996 Mich LEXIS 1378 (Docket Number 98142, issued 6/5/96). On remand, defendant is free to raise whatever issues it deems necessary relevant to the question of negligent signing in the context of the highway exception to governmental immunity. We leave the assessment of such issues to the trial court pursuant to the standards enunciated by our Supreme Court in *Pick, supra*.