

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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MABEL SMITH, as Personal Representative of  
the Estate of LARRY VINCENT SMITH,  
deceased,

UNPUBLISHED  
October 4, 2002

Plaintiff-Appellant,

v

No. 223910  
Wayne Circuit Court  
LC No. 95-507689-NP

FORD MOTOR COMPANY,

Defendant-Appellee,

and

FRANK KISH,

Defendant.

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Before: White, P.J., and Neff and Jansen, JJ.

PER CURIAM.

Plaintiff appeals as on leave granted the judgment of no cause of action entered following a jury trial in this design-defect products liability action. At issue in this appeal is the admissibility of a sled test Ford introduced at trial. We affirm.

Late in the afternoon of June 25, 1994, plaintiff and her husband, decedent Larry Smith, were traveling east on US 10 near Midland in their 1991 Mercury Topaz. Plaintiff's decedent was driving. Defendant Kish,<sup>1</sup> driving a pickup truck and apparently asleep at the wheel, rear-ended the Smith Topaz at high speed. The collision caused the Topaz to turn clockwise, then counterclockwise, go off the road, and overturn. Plaintiff, who was in the front passenger seat wearing both shoulder and lap belts,<sup>2</sup> suffered minor injuries and remained in the car, her seat

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<sup>1</sup> Defendant Kish claimed he was asleep at the wheel and did not remember the event. The jury found against Kish.

<sup>2</sup> The 1991 Mercury Topaz was equipped with a shoulder harness that automatically engaged when the door closed, and a separate lap belt that had to be fastened by the passenger.

intact. Decedent was ejected from the car, suffered a broken neck, skull fracture and chest injuries, and died at the hospital.

Plaintiff's theory of the case was that the impact from Kish's pick-up truck hitting plaintiff's car caused the driver's seat-back to collapse, resulting in decedent being unable to steer, the Topaz going out of control, and that when the car rolled over, decedent slid from under the seat belt and was ejected through the rear window. Defendant's theory of the case was that the Topaz driver's seat-back remained intact after Kish rear-ended it, and that the seat went from a vertical to horizontal position only during the rollovers, forcing decedent against the seat-back and placing more strain on it than it is expected or required to withstand. Ford maintained that because decedent was not wearing a lap belt, he was thrown into the backseat and ejected.

The parties agreed that the Delta V (the velocity at which plaintiff's car increased when rear-ended by Kish's truck) was 9.5 m.p.h.--the equivalent of driving into a wall at 9.5 m.p.h. However, the parties' experts differed significantly on other aspects of the accident, including the speed at which Kish and decedent were driving, what caused the car to spin clockwise and then counterclockwise, the number of times the Topaz rolled over and how it rolled.<sup>3</sup> All agreed that decedent had on his shoulder harness, but defendant maintained, and some of the police officers called to the scene of the accident believed, that he was not wearing the lap belt. Plaintiff, however, testified that she was "99/44 percent" sure that he was.

Defendant Ford presented a videotape, the focus of this appeal, in which a Topaz "buck,"<sup>4</sup> was loaded on a sled, a dummy approximating decedent's size and weight was placed in the seat, and the sled was rammed into a rear barrier at 9.5 miles per hour. According to Ford, the videotaped test showed that the seat moved between eleven and twelve degrees backward, leaving a driver still able to steer the car.

## I

Plaintiff argues that the trial court abused its discretion in admitting the videotape of the sled test where it was clearly a re-creation of the accident giving rise to this action, without a showing that the test faithfully reproduced the accident. Plaintiff argues that, at the very least, the court erred in refusing to give a limiting instruction so no jury confusion would exist.

## A

We review the trial court's determination to admit evidence for abuse of discretion. *Lopez v General Motors Corp*, 224 Mich App 618, 634; 569 NW2d 861 (1997).

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<sup>3</sup> Plaintiff's accident reconstructionist opined that the car did a 2  $\frac{3}{4}$ -revolution keg roll. Defendant Ford's accident reconstructionist opined that the car did 4  $\frac{3}{4}$  revolutions, part being end over end. An eyewitness testified that the Topaz "was at least ten feet in the air, flipping side to side and end over end."

<sup>4</sup> A "buck" is a car with the front and rear cut off.

The parties agree that *Lopez, supra*,<sup>5</sup> governs this case. *Lopez* reaffirmed the evidentiary rule of *Smith v Grange Mut Fire Ins Co*, 234 Mich 119, 126; 208 NW 145 (1926), that demonstrative evidence is admissible if it bears “substantial similarity” to an issue of fact involved in a trial, and also discussed admission of re-creation evidence under *Kaminski v Board of Wayne County Road Com'rs*, 370 Mich 389; 121 NW2d 830 (1963):

In *Kaminski* [], our Supreme Court first addressed the admission standard associated with “re-creation” evidence. There, the Court first announced an accuracy rule, requiring, as a precondition to admission of *re-creation* evidence, that there be a showing that the evidence reasonably and faithfully reproduces the conditions that existed at the time in question. *Id.* at 395-397. Neither in *Kaminski* nor in any other decision that we are aware of has the Supreme Court overruled the different principles it laid down in *Smith [v Grange Mut Fire Ins Co, supra]* for the admission of demonstrative evidence.

The *Kaminski* “faithful reproduction” standard has, in recent years, been described as requiring “virtual identity” between the proffered evidence and the event that evidence purports to re-create. See *Green v General Motors Corp*, 104 Mich App 447, 449-450; 304 NW2d 600 (1981). As described in *Green*, the distinction between demonstrative evidence and re-creation evidence, and the standards of admission associated with each, is important. *Id.* at 450. When evidence is offered to show how an event occurred, the focus is upon the conditions surrounding that event. *Id.* Consequently, it is appropriate that those conditions be faithfully replicated. *Id.* By contrast, when the evidence is being offered not to re-create a specific event, but as an aid to illustrate an expert’s

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<sup>5</sup> *Lopez* was a products liability action in which the plaintiff alleged that the restraint system in her 1987 Chevette failed on impact. In early morning hours, the plaintiff had driven her Chevette to an intersection with a stop sign, and then into the side of a freight train parked across another intersection. *Id.* at 624. Although wearing both seat and shoulder belts and traveling at only twenty to twenty-five miles per hour, she suffered serious upper-body and facial injuries. The trial court permitted the defendant to introduce two crash tests it had conducted on Chevettes, over several objections by the plaintiff, including that the tests were not relevant because they did not replicate the conditions of her collision. *Id.* The defendant asserted that the crash tests “were critical as necessary aids to the testimony of defendant’s experts concerning general principles of occupant kinematics in a frontal crash,” and acknowledged the tests were conducted before the plaintiff’s accident and were not intended as re-creations, but rather, were offered as demonstrative evidence that was “substantially similar” to the plaintiff’s accident. *Id.* The trial court concluded that because the videotapes were being offered as demonstrative rather than re-creation evidence, “the dissimilarities between the tests and the accident went not to the admissibility of the evidence, but to its weight.” *Id.* at 625. The jury returned a verdict of no cause of action. This Court initially reversed, *Lopez v General Motors Corp*, 219 Mich App 89, 209 Mich App 801; 555 NW2d 875 (1996), following *Sumner v General Motors Corp*, 212 Mich App 694; 538 NW2d 112 (1995) (“*Sumner I*”), vacated and remanded *Sumner v General Motors Corp*, 463 Mich 929; 619 NW2d 537 (2000) (“*Sumner II*”). However, a conflict panel was convened, and this Court’s initial opinion vacated. See *Lopez*, 224 Mich App at 620-621 (overruling *Sumner I* to the extent that it established an evidentiary rule regarding introduction of demonstrative evidence different from that set forth in *Smith v Grange, supra*.)

testimony concerning issues associated with the event, then there need not be as exacting a replication of the circumstances of the event. *Id.* [*Lopez*, 224 Mich App at 628 n 13.]

In *Kaminski, supra*, the plaintiff, while driving with his daughter, ran into a motorized street sweeper on Grand River Avenue, at 12:30 a.m., resulting in severe injuries to his daughter. The thrust of the plaintiff's case at trial was that the street sweeper negligently created a dust hazard by throwing up dust behind it, "coupled with inadequate lighting to forewarn other users of the street of the presence, identity, and operation of the machine." 370 Mich at 394-395. The trial court allowed the defendant to admit photographs and motion pictures, depicting the exact scene of the accident, the same street sweeper and same driver, at night—but without the dust that the plaintiff claimed inhibited his vision. Defense counsel had referred to the photographs as "a re-enactment." The court instructed the jury that "any condition of dust resulting from the operation of the sweeper . . . must have created an unreasonable hazard or danger." *Id.* at 394. The jury found no cause of action. The Supreme Court reversed and remanded for a new trial, concluding that the evidence was erroneously admitted and that the error was not harmless:

[T]he composite effect of the photographic reconstruction, operation with same sweeper, the same operator, photographed in motion, the reference by defense counsel in his jury argument to the absence of dust in the pictures, the court's requirement that the jury find the presence of dust that "would have created an unreasonable hazard" – all these viewed from the impact of the stark blazing lights of the sweeper dominating the scene in the photographs could not fail to have created in the minds of the jurors the impression that exhibits 16 and 17 were a representation of what the minor's driver-father saw as he approached the point of impact the night of the collision. This all the more so by reason of the absence of any precautionary or limiting instruction by the court that the exhibits were not the usual "reasonable representation" of the actual conditions. . . .

\* \* \*

Under any interpretation of the "accuracy rule" relating to the admissibility of photographs, posed or otherwise, the exhibits did not meet the admissibility test of reasonable representation. Their admission was error and we cannot say that such error was not prejudicial. . . . [*Kaminski, supra* at 397, 399.]

In *Smith, supra*, buildings on the plaintiff's farm were destroyed by fire and she attempted to collect under her insurance policy. The defendant insurer's principal defense was that the plaintiff had set the fire. At trial, the defendant insurer presented testimony of a neighbor of the plaintiff's that he saw the plaintiff on the night of the fire near the buildings that burned, from a distance of about five rods (80 feet),<sup>6</sup> and that three hours later he was awakened by the fire. He testified that it was a bright night, with stars shining but no moon. In rebuttal, the plaintiff called four witnesses that testified that "they had made observation as to the distance at which a person could be observed and identified in the nighttime." Several of the plaintiff's

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<sup>6</sup> 1 rod = 16.5 feet.

witnesses testified that there was no moon shining, but another testified that it was “a moonlight night.” The observations were not made at the same place. The sum of their testimony was “that one might distinguish whether the object seen was a man or a woman at a distance of from 2 to 5 rods, but that a person could not be identified at a greater distance than one rod.” *Id.* at 124-125. The jury returned a verdict in the plaintiff’s favor, and the defendant appealed. The Supreme Court affirmed, noting:

The question is, Can there be identification of a person at a certain distance on such a night as defendant’s witness made his observation? It may be conceded that the atmospheric conditions on no two nights are exactly similar. The stars undoubtedly appear to be brighter on some occasions. This is also true as to the daytime. The rays of the sun and the absence of clouds may permit a person to observe objects or identify individuals at a much greater distance one day than the another. In our opinion, there was sufficient similarity in the conditions under which the experimental observations were made to support the discretionary ruling of the trial court in admitting such testimony. We cannot say, as a matter of law, that it would not aid rather than confuse the jury in determining whether the identification of the plaintiff by the witness was possible under the conditions stated by him. The great weight of authority supports this holding.

“It is not necessary, however, that the conditions should be exactly identical, but a reasonable or substantial similarity is sufficient, and the lack of exact identity affects only the weight and not the competency of the evidence, provided always that there is such a degree of similarity that evidence of the experiments made will accomplish the desideratum of assisting the jury to an intelligent consideration of the issues of fact presented.” 22 C.J. p. 759. [*Id.* at 126.]

## B

We conclude that the court did not abuse its discretion in admitting the sled test as demonstrative evidence. Unlike *Kaminski, supra*, the videotape did not purport to offer a faithful and accurate re-enactment of the material events and conditions of the actual accident. As in *Lopez, supra*, the sled test in the instant case was in a number of ways similar to and dissimilar to the Smith’s accident; and its purpose was to show how the seat was intended to perform in a 9.5 delta V rear-end collision, and how it performed in such a collision under circumstances that were similar, but not identical, to the circumstances of the Smiths’ collision.

Defendant Ford met the sufficient-similarity test for the admission of demonstrative evidence. The sled test was of a 9.5 mile-per-hour impact—the same as in the accident; the dummy was of decedent’s approximate height and weight; and the seat was from a Mercury Topaz. Dissimilarities between the test and the accident also existed: the seat was not an exact replica of decedent’s; the precise position and angle of decedent’s seat at the time of the accident was not known,<sup>7</sup> and the test did not depict anything following the initial rear impact, including

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<sup>7</sup> Defendant’s expert testified, however, that she chose a seat angle and seat position that would  
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the rollovers. Given the nature and purpose of defendant Ford's sled test, the trial court did not abuse its discretion in admitting the test as demonstrative evidence.

Plaintiff argues that the sled test was in truth re-creation, rather than demonstrative, evidence because it was conducted after the instant suit was filed, unlike in *Lopez*, and was tailored to reflect the instant accident. However, in *Lopez, supra* at 632, this Court rejected the conclusion reached in *Sumner v General Motors Corp*, 212 Mich App 694; 538 NW2d 112 (1995) ("*Sumner I*"), vacated and remanded *Sumner v General Motors Corp*, 463 Mich 929; 619 NW2d 537 (2000) ("*Sumner II*"), that demonstrative evidence was inadmissible when "defendant's experts implicitly suggested the tests had been conducted under conditions similar to those of the accident." *Sumner I, supra* at 697.<sup>8</sup>

Plaintiff further argues that the unfairly prejudicial effect of admitting the sled test substantially outweighed its probative value. Plaintiff aggressively cross-examined defendant Ford's accident reconstructionist on the test, see *Lopez, supra*, at 632-633 n 20, and we conclude that plaintiff failed to establish unfair prejudice.

## C

Plaintiff further argues that the court erred in failing to give a limiting instruction to prevent the jury from perceiving the videotaped sled test as re-creation evidence and drawing unwarranted conclusions. This Court in *Lopez, supra*, noted that when there is "a concern for confusion on the part of the jury regarding the purpose for which the evidence was admitted, the proper remedy is a limiting instruction. . ." *Id.* at 866. In *Green, supra*, this Court concluded that no limiting instruction was needed because "[t]he movie [shown during trial documenting a test] did not create the impression of reenacting the accident, nor was there any potential for jury

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maximize the forces on the seat.

<sup>8</sup> In *Sumner I, supra*, the plaintiff claimed that injuries she sustained in a head-on collision with another vehicle were enhanced by her car's defective welds. The defendant was permitted to introduce videotaped crash tests to show general physical principles supporting its defense that the welds were not a significant factor in the plaintiff's injuries, and presented testimony that the tests were not conducted to simulate the accident. *Id.* at 696. The *Sumner I* Court concluded that "the defendant's application of the general principles to the particular facts of the accident at issue was improper." *Sumner I, supra* at 696-697. With this holding, the second *Lopez* decision, which is binding in the instant case, strongly disagreed:

Ironically, taken to its logical conclusion, the [*Sumner I*] rule would appear to render demonstrative evidence inadmissible because, if inferences drawn from that evidence cannot be applied to an issue in controversy, then it is hard to conceive how the demonstrative evidence can ever meet the materiality and relevance requirements of the Michigan Rules of Evidence. In sum, we conclude that the *Sumner I* panel, while not disavowing the theoretical concept of demonstrative evidence, has as a practical matter eliminated the use of demonstrative evidence. It has done so without a supporting rationale and contrary to controlling Supreme Court authority. [224 Mich App at 633-634.]

confusion as to the purpose of the movie.” *Green*, 104 Mich App at 452. We conclude that there was little potential for the jury viewing the sled test as a re-enactment. The sled test was of a “buck,” it was run indoors and depicted a rear end impact and its effect on the seat. Defendant Ford’s accident reconstructionist testified that the test was substantially similar to the accident, but did not claim it re-enacted it. Plaintiff vigorously cross-examined defendant’s expert and brought out the differences between the sled test and the actual accident. We find no reversible error.

Affirmed.

/s/ Helene N. White  
/s/ Janet T. Neff  
/s/ Kathleen Jansen