

SUBSEQUENT REMEDIAL MEASURES EVIDENCE IS INADMISSIBLE EVEN IF NOT IN RESPONSE TO THE INCIDENT AT ISSUE

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Johnson v. State

Ct. Appeals, Div. One, June 18, 2009

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Decedent was driving his van westbound in the righthand lane of U.S. 60 when he collided with the back of a tractor trailer dump truck. The dump truck was exiting a mining pit at an intersection that had a stop sign. The dump truck pulled out after looking for traffic, but decedent rear-ended the truck. After the decedent's accident, the State installed a truck-crossing sign and a variable message board to warn drivers that trucks would be crossing or entering at the intersection.

Plaintiffs sued the State alleging negligent design of the intersection and failure to eliminate the dangerous condition of the intersection. The State claimed that decedent was comparatively negligent. The jury returned a defense verdict. Plaintiffs appealed, arguing that the subsequent remedial measures evidence should have been admitted for various reasons, but the court of appealed disagreed, affirming the defense verdict.

Plaintiffs first argued that placement of the signs could not be considered a subsequent remedial measure because ADOT placed the warning signs without any knowledge of the accident at issue. The court held that Rule 407 applies whenever measures are taken after an event. The rule does not require that the measures be remedial to a specific event, or taken in response to the event, or taken in connection with the event. The rule contemplates the exclusion of any measure that, if taken previously, would have made the event less likely to occur.

Plaintiffs then argued that even if placement of the signs was a subsequent remedial measure, the evidence was admissible for "other purposes" — to rebut the State's defense that Decedent was comparatively negligent, to rebut the State's defense that any danger was "open and obvious," and to impeach the State's witnesses regarding their knowledge of the alleged danger. The court again disagreed, holding that evidence of subsequent remedial measures offered to rebut a defense of comparative negligence is inadmissible because it constitutes direct proof of the defendant's alleged primary negligence. In addition, other proof was clearly available for Plaintiffs to rebut the State's assertions. Finally, the court held that to allow the Johnsons to offer the evidence to prove the State's "knowledge and recognition of the danger" would have allowed them to explicitly prove elements of negligence with evidence of subsequent remedial measures.