# STATE OF MICHIGAN

# COURT OF APPEALS

ANTHONY BERTUCA and MICHAEL BERTUCA,

Plaintiffs-Appellants,

v

GENERAL MOTORS CORPORATION/ CHEVROLET MOTOR DIVISION, and FRANK PASTRICK CHEVROLET,

Defendants-Appellees.

UNPUBLISHED
September 4, 2003

No. 235476
Berrien Circuit Court
LC No. 1998-003561-NI

Before: Smolenski, P.J., and Cooper and Fort Hood, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a jury verdict of no cause of action on plaintiffs' claim of negligence and breach of express or implied warranty. We affirm.

Plaintiffs were injured in a vehicle manufactured by GM. They claim that the accident was caused by a defect in the design or manufacturing process of the tie rod assembly. In this appeal, we are asked to determine whether the trial court properly excluded defendant GM's test incident reports (TIRs),[1] completed prior to plaintiffs' accident, as substantive evidence that GM had notice of the claimed defects in its tie rod assemblies. We must also decide whether the post-accident TIRs were properly excluded as evidence of subsequent remedial measures or if they were admissible for purposes of impeachment. A review of the record reveals that the jury was apprised of the existence of the TIRs and the information contained therein. Therefore, regardless of whether the documents were physically introduced at trial any evidentiary error would be harmless.

On February 15, 1995, plaintiffs were involved in a single-car accident. Plaintiff Anthony was driving his 1994 Chevrolet Blazer, manufactured by defendant GM. His brother Michael was in the passenger seat. In the two years preceding the accident, plaintiff Anthony brought his Blazer in for service at defendant Pastrick's dealership on three separate occasions. Each time, plaintiff Anthony complained that the clamp bolts on the tie rod assemblies were

[1] TIRs are the reports that GM generates during the development and testing of its vehicles.

loose or falling off. During the third repair, defendant Pastrick's mechanics replaced the entire left tie rod assembly.

Plaintiffs alleged that there was a defect in the design and/or manufacturing process that caused the threads on the tie rod or the threads of the sleeve to wear down and become loose. According to plaintiffs, this defect caused the tie rod assembly to pull-apart and resulted in plaintiff Anthony losing control of his vehicle. Conversely, defendants suggested that the accident resulted from the speed at which plaintiff was driving and the poor weather and road conditions. The jury returned a verdict of no cause of action.

Plaintiffs subsequently filed a motion for judgment notwithstanding the verdict and/or a new trial, arguing in part that the TIRs were improperly excluded. The trial court denied the motion, finding that defendants failed to meet the "substantial similarity test" and that the post-accident TIRs contained evidence of subsequent remedial measures. The trial court also noted that any error was harmless because the jury heard extensive testimony regarding the substance of the information contained in the TIRs.

On appeal, plaintiffs argue that they are entitled to a new trial because the trial court erroneously prevented them from presenting the pre-accident TIRs as substantive evidence. We disagree. A trial court's evidentiary decisions are reviewed for an abuse of discretion. *Barrett v Kirtland Community College*, 245 Mich App 306, 325; 628 NW2d 63 (2001). An abuse of discretion is found where a result "is so palpably and grossly violative of fact and logic that it evidences perversity of will or the exercise of passion or bias rather than the exercise of discretion." *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000). A jury's verdict will not be disturbed on the basis of evidentiary error unless refusal to take such action would be inconsistent with substantial justice. *Krohn v Sedgwick James of Michigan, Inc*, 244 Mich App 289, 295; 624 NW2d 212 (2001); see also MRE 103; MCR 2.613(A).

Our Supreme Court established the rule for admitting demonstrative evidence in *Smith v Grange Mut Fire Ins Co of Michigan*, 234 Mich 119; 208 NW2d 145 (1926). According to *Smith*, *supra* at 126, demonstrative evidence is admissible when the testing conditions are substantially similar to the conditions in existence at the time of the event in question.[2] *Smith* provided that the conditions need only be reasonably similar and that "'the lack of exact identity affects only the weight and not the competency of the evidence . . . .'" *Id.*, quoting 22 CJ, p 759. We note that the substantial similarity test focuses on the conditions under which the "test observations" were made and not on what those observations revealed. See *Smith, supra* at 125. This Court reaffirmed the viability of the *Smith* substantial similarity test in *Lopez v General*

[2] We note that the test for demonstrative evidence differs from the test for admission of "re-creation evidence." When a party attempts to present "re-creation evidence," they have the burden of establishing "that the evidence reasonably and faithfully reproduces the conditions that existed at the time in question." *Lopez v General Motors Corp,* 224 Mich App 618, 628, n13; 569 NW2d 861 (1997). The standard for "re-creation evidence" essentially mandates a "virtual identity" between the proffered evidence and the incident it purports to re-create. *Id*. The test for admitting re-creation evidence is more stringent than the requirements for the admission of demonstrative evidence. Indeed, a party could never meet the standard to admit demonstrative evidence if the testing conditions had to be identical to the incident in question.

*Motors Corp*, 224 Mich App 618; 569 NW2d 861 (1997) (holding that videotapes of test crashes were properly admitted into evidence because the out-of-court testing conditions were substantially similar to the conditions in existence at the time of the plaintiff's accident).

The issue presented in this case is whether the conditions under which GM tested its vehicles were sufficiently similar to the conditions plaintiffs experienced at the time of their accident. We need not address this issue as the record shows, and plaintiffs admit, that they were expressly permitted to cross-examine GM witnesses regarding the substance of the information contained in the pre-accident TIRs to show "notice" of the alleged defect. In fact, the jury heard extensive testimony covering the substance of the information in these TIRs. There was specific testimony that GM test drivers had experienced tie rod looseness while test-driving 1994-1995 GM trucks. Accordingly, any error in this matter would be deemed harmless.

Similarly, we need not address plaintiffs' argument that the trial court improperly excluded the post-accident TIRs as subsequent remedial measures. Plaintiffs offer no explanation to show how these additional reports of looseness would have affected the jury's decision.

Plaintiffs further contend that the trial court improperly prevented plaintiffs from admitting the TIRs for impeachment purposes. However, the record indicates that the trial court specifically held that plaintiffs could use the contents of the TIRs for impeachment purposes if they established a proper foundation. While plaintiffs allege that a proper foundation for impeachment was laid, they fail to cite any portion of the record in support of this claim. "A party may not leave it to this Court to search for a factual basis to sustain or reject its position." *Great Lakes Div of Nat'l Steel Corp v City of Ecorse*, 227 Mich App 379, 424; 576 NW2d 667 (1998). To the extent plaintiffs purport that defense counsel opened the door for impeachment evidence during opening statements by commenting that GM's engineers took the allegations of an alleged defect "personally," we note that the comments of counsel are not evidence. *Zantop Int'l Airlines, Inc v Eastern Airlines*, 200 Mich App 344, 364; 503 NW2d 915 (1993).

Accordingly, because plaintiffs were able to present the substance of the TIRs to the jury, we find that any error in the exclusion of the documents themselves was harmless. See *Kent Concrete, Inc v Hospital Bldg & Equipment Co*, 150 Mich App 91, 96; 388 NW2d 257 (1986).

Affirmed.

/s/ Michael R. Smolenski
/s/ Jessica R. Cooper
/s/ Karen M. Fort Hood