



MISSOURI COURT OF APPEALS JOINS MAJORITY OF FEDERAL COURTS IN HOLDING THE PROHIBITION AGAINST EVIDENCE OF SUBSEQUENT REMEDIAL MEASURES DOES NOT EXTEND TO MEASURES TAKEN BY NON-PARTIES

JUNE EMERSON V. THE GARVIN GROUP, LLC, --- S.W.3D ---, 2013 WL 1739723 (MO.APP. E.D. APRIL 23, 2013)

In a matter of first impression, the Missouri Court of Appeals for the Eastern District has held the exclusionary rule barring evidence of subsequent remedial measures does not apply when the remedial measure was implemented by a non-party. According to the Court, because evidence of remedial measures taken by a non-party will not expose that party to liability, the non-party will not be discouraged from taking the remedial measure and the public policy in favor of safety improvements – which is the policy driving the subsequent remedial measures exclusionary rule – will be satisfied.

Plaintiff June Emerson worked for Raven Industries at its electronics manufacturing plant. Raven Industries contracted with The Garvin Group to strip, wax, and buffer designated areas of the plant floor. On the night of the accident, Plaintiff slipped on a portion of the floor being treated by Garvin. Garvin had not marked the area with warning signs, cones, or tape. At trial, Plaintiff sought to introduce evidence that, subsequent to her fall, Raven Industries directed Garvin to begin marking the areas of the floor to be treated with caution signs or tape. The trial court excluded the evidence as a subsequent remedial measure. The jury assessed Garvin's fault at 20% and Plaintiff's at 80%.

On appeal, Plaintiff argued, as a matter of first impression in Missouri, that because evidence of remedial measures taken by a non-party cannot expose that person or entity to liability, the non-party will not be deterred from implementing the remedial measure. Thus, the prohibition on evidence of subsequent remedial measures should be limited to the exclusion of evidence relating to measures taken by the *defendant*.

The Court of Appeals, noting that all federal circuits to have addressed the issue have concluded the prohibition on evidence of subsequent remedial measures does not apply to measures taken by non-parties, agreed with Plaintiff and reversed and remanded for a new trial. "The principal reason for the prohibition lies in the public policy favoring safety improvements and the fear that if safety improvements could be used as evidence of previous improper conditions, no one, after an accident, would make improvements." This public policy is satisfied when admitting evidence of remedial measures taken by a non-party since admitting such evidence will not act to discourage non-parties from taking the remedial measure for fear of exposure to liability.

Interestingly, the dissent focused on the fact that the remedial measure at issue in the case – the placing of caution signs or tape – was performed by defendant Garvin itself (though at the request of Raven Industries), while in the federal cases relied upon by the majority opinion, the remedial measures were actually performed by the non-parties. According to the dissent, because Raven Industries directed Garvin to use the caution tape, such evidence is arguably even more prejudicial to Garvin than if he had corrected his practice voluntarily. "As such, the public policy rationale supporting the general rule is equally compelling here," and the dissent would have affirmed the judgment.

SUBMITTED BY

LISA A. LARKIN, PARTNER
llarkin@wvslaw.com
(314) 345-5014

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