



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



**KRISTEN JOHNSON v. STATE ex rel. DEPT OF
TRANSPORTATION
CV-09-0267-PR**

PARTIES AND COUNSEL:

Petitioners: Kristen Johnson *et al.*

Respondents: State of Arizona *ex rel.* Arizona Department of Transportation

FACTS:

In December, 2003, Mark Johnson (“Decedent”) was driving westbound in the right-hand lane of U.S. 60 early in the morning when he collided with the back of a dump truck and was killed. The dump truck had exited a mining pit at the Peckary Road intersection, where the dump truck driver had a stop sign. The accident report stated that the dump truck driver “looked for on-coming traffic numerous times then proceeded onto the highway” and that “after traveling approximately 713 feet West bound on U.S. 60 from the stop sign, [the dump truck] was struck from behind by [Decedent’s van].”

The Johnsons (“petitioners”) filed a wrongful death action against the State, alleging that it negligently designed the Peckary Road intersection and failed to take reasonable measures to eliminate the dangerous conditions there. Petitioners also sued other parties who were not subject to this appeal; namely, the truck driver, the trucking companies and the operator of the mining pit from which the truck was driving.

In response to the wrongful death action, the State claimed that Decedent was comparatively negligent and that it was not liable for petitioners’ damages because the claims at issue arose out of a “plan or design for construction or maintenance of or improvement to highways... [that] was prepared in conformance with generally accepted engineering or design standards.”

After Decedent’s accident, the State installed a truck-crossing sign and variable message board to warn drivers that trucks would be crossing or entering at the Peckary Road intersection. Prior to trial, a factual dispute arose over whether ADOT knew of Decedent’s death when it decided to erect the warning signs. State employees testified that they did not know about the Decedent’s death. However, one witness testified that, before the decision was made, the State received phone calls from residents near the intersection who expressed general safety concerns about trucks pulling out of the intersection.

Prior to trial, petitioners filed motions arguing that the placement of the signs did not qualify as “subsequent measures” required to be excluded from evidence under Evidence Rule 407, because

ADOT placed the warning signs without any knowledge of the accident at issue. *See* Evidence Rule 407 (first sentence) (“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....”)

Petitioners also requested, in the alternative, that they be permitted to introduce evidence of the sign placements under the “another purpose” exception set forth in the second sentence of Rule 407 (“.... 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.”). The other purposes alleged by petitioners were: (1) to rebut the State’s defense that Decedent was comparatively negligent, (2) to rebut the State’s alleged defense that any danger was “open and obvious,” and (3) to impeach the State’s witnesses regarding their knowledge of the alleged danger.

The trial court denied these motions and precluded petitioners from introducing evidence of the sign placements pursuant to both Evidence Rule 407 and Evidence Rule 403 (“Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time”).

Following trial, the jury returned a unanimous verdict in favor of all defendants. Petitioners filed a motion for new trial, challenging the exclusion of the subsequent measures. The trial court denied the motion, stating:

It is not necessary that the State have known about the specific collision involving [Decedent]. If it acted based on the realization that the intersection was unsafe, that falls within the public policy rationale for excluding evidence of subsequent remedial measures.

Petitioners appealed.

The Appeals Court affirmed, disposing of the issues related to Evidence Rule 407 in an Opinion and disposing of the remaining issues in a Memorandum Decision.

ISSUE ACCEPTED FOR REVIEW:

Rule 407 bars admission of a defendant’s remedial measures taken after an accident to correct a hazard in order to prevent a future similar accident. Here, the State installed traffic signs after an accident. However, the installation was unrelated and not in response to the accident, and the signs were neither remedial nor made the area safer. Does Rule 407 apply to this situation?

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