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**IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

JUAN M. SAN NICOLAS,
Plaintiff,

CIVIL ACTION NO. 97-1 107A

vs.

**ORDER ON DEFENDANTS'
MOTION *IN LIMINE*
REGARDING SUBSEQUENT
REMEDIAL MEASURES**

SAIPAN LAU LAU DEVELOPMENT, INC.,
SHIMIZU CORPORATION AND TOIUO
MARINE & FIRE INSURANCE CO.,
Defendants.

I. INTRODUCTION

This matter came before the court on December 1, 1999, on the defendants' Motion *in Limine* Regarding Subsequent Remedial Measures. Randall Todd Thompson, Esq., appeared on behalf of the defendants Saipan Lau Lau Development Inc. ("SLDI"), Shimizu Corporation ("Shimizu"), and Tokio Marine & Fire Insurance Company's ("Tokio Marine")(hereinafter collectively "Defendants"). Theodore R. Mitchell, Esq., appeared on behalf of the plaintiff, Juan M. San Nicolas ("Plaintiff "). The court, having heard the arguments of counsel and reviewed all the evidence presented, now renders its written decision.

II. FACTUAL BACKGROUND

On November 6, 1995, Plaintiff was playing golf with three other companions when he **fell** into a pit located at the edge of the white tee box at the fifth hole at the East Course of the Lao Lao Bay

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1 Resort. He sustained leg injuries as a result of his fall. He filed a complaint on November 6, 1997,
2 alleging that the Defendants were negligent for failing to place a guardrail at the edge of the subject
3 tee and to trim the overgrown vegetation which masked the pit that fringed the edge of the tee box.
4 (Compl. ¶ 133.) Plaintiff has also alleged that Defendants knew of the dangerous nature of the subject
5 tee because SLDI immediately after the accident, doubled the area behind the penalty markers and
6 built a high railing to prevent accidents similar to Plaintiffs. (Compl. ¶¶ 139-140.)

7 After Plaintiffs accident, Defendant SLDI cut and cleared all the vegetation located in the
8 back of the tee box which hid the pit from view. Around November 30, 1995, SLDI completed the
9 construction of a deck and a guardrail in the back of the tee box. Defendants had drawn up plans for
10 the deck and guardrail modifications prior to the accident, in order to afford players and observers
11 additional standing room on the tee box. (Kumasaka Decl. ¶ 4.) SLDI submitted those plans to the
12 Coastal Resources Management Office (“CRMO”) on June 9, 1994, for distribution to CNMI agencies.
13 (Pl.’s Opp’n to Mot. *in Limine* Re Subsequent Remedial Measures Exs. 1-4.) The CRMO and the
14 Division of Environmental Quality were to jointly monitor the project. (*Id.* Ex. 1.)

15 Nevertheless, the construction of the deck and guardrail hastened after the accident. SLDI’s
16 then general manager, Osamu Kumasaka (“Kumasaka”), contacted SLDI’s legal counsel, Vicente T.
17 Salas (“Salas”), regarding the legal consequences of erecting the deck and guardrail. (Kumasaka Decl.
18 ¶ 7.) Salas informed Kumasaka that it would be permissible to proceed with the planned modifications
19 because the Rules of Evidence expressly barred evidence of subsequent remedial measures for
20 purposes of establishing negligence. (Kumasaka Decl. ¶ 8.) On that basis, Kumasaka ordered that
21 the modifications proceed without delay.

22 23 III. ISSUE

24 Under Corn. R. Evid. 407, or in the alternative Rule 403, should evidence of the defendant’s
25 clearing or removal of vegetation and the construction of guardrails and a deck at the site of the
26 accident be excluded when the vegetation was removed right after the accident and when the
27 defendant had planned to make the modifications more than a year before the accident occurred?
28

1 IV. ANALYSIS

2 **A. Subsequent Remedial Measures: Corn. R. Evid. 407**

3 Defendants insist that the construction of guardrails and deck and the vegetation clearing at
4 the subject tee box are subsequent remedial measures which may not be admitted at trial under Corn.
5 R. Evid. 407.

6 1. The construction of guardrails and deck.

7 Defendants concede that it had contemplated installing the guardrails and deck at the
8 tee box before the date of Plaintiffs accident. They claim, however, that the accident served as the
9 impetus to hasten the construction of the deck and guardrails which was completed within a month
10 after the accident. Defendants also note that SLDI's former general manager, Osamu Kumasaka
11 ("Kumaska"), did not begin construction until he received the advice of its legal counsel, Vicente T.
12 Salas, that the rules of evidence would exclude the introduction of evidence on the modification at the
13 tee box in the event of a trial. (Kumasaka Decl. ¶ 7.) Finally, Defendant assert that none of the
14 exceptions to Rule 407 apply in the case, including the issue of the feasibility of the guardrails and
15 deck.

16 Plaintiff contends that Rule 407 does not apply because defendant SLDI had planned
17 on constructing guardrails prior to the accident to afford players and observers additional standing
18 room on the tee box. Finally, Plaintiff opposes the instant motion on the ground that the Defendants
19 seek a ruling which exceeds the scope of Rule 407. Rule 407, Plaintiff argues, does not require the
20 exclusion of subsequent remedial measures when offered for another purpose, i.e., proving ownership,
21 control or feasibility of precautionary measures, if controverted, or for impeachment purposes. See
22 Corn. R. Evid. 407. Plaintiff maintains that, although Defendants are willing to stipulate on the issue
23 of feasibility, feasibility is nonetheless a controverted issue in light of the depositions of SLDI
24 employees, Randall Hazelton and Takahisa Oguma.

25 The rule in question provides:

26 When, after an event, measures are taken which, if
27 taken previously, would have made the event less likely
28 to occur, evidence of the subsequent measures is not
admissible to prove negligence or culpable conduct in
connection with the event. This rule does not require

1 the exclusion of evidence of subsequent measures when
2 offered for another purpose, such as providing
3 ownership, control, or feasibility of precautionary
4 measures, if uncontroverted, or impeachment.

5 Corn. R. Evid. 407.

6 Rule 407's underlying purpose is to foster and encourage the reduction of risks,
7 promote safety, and prevent the reoccurrence of similar injuries so that prospective defendants will
8 not forego safety improvements because they fear that these improvements will be used against them
9 as evidence of their liability. *Guerrero v. L&T Int'l Corp.*, 2 CR 1070, 1077 (Comm. Trial Ct. 1987)
10 and *In re Aircrash in Bali, Indonesia*, 871 F.2d 812, 816 (9th Cir. 1989). The rule applies to the
11 installation of safety devices subsequent to an accident, including fences and railings. *See Spurr v. La*
12 *Salle Constr. Co.*, 385 F.2d 322,327 (7th Cir. 1967); and *Morehouse v. Taubman, Co.*, 85 Cal. Rptr.
13 308, 318 (Ct. App. 1970). Corn. R. Evid. 407 does not apply, however, if the proffered evidence can
14 be used for a purpose other than to constitute an admission or inference of negligence. admissible with
15 an instruction limiting its use. *McIntosh v. Best Western Steeplegate Inn*, 546 N.W.2d 595,597 (Iowa
16 1996), *rehearing denied*. The proffered evidence would be admitted with an instruction limiting its
17 use. *Id*

18 In the instant case, the court agrees with Plaintiff that the existence of plans concerning
19 the modifications and their submission to the CRMO and Division of Environmental Quality prior to
20 the accident does not implicate Rule 407. Those structures are not subsequent remedial measures
21 within the meaning of Rule 407, but are "antecedent" measures, which were planned long before the
22 accident occurred, and thus, do not trigger Rule 407's protective shield. *See Schmeck v. City of*
23 *Shawnee*, 651 P.2d 585, (Kan. 1982)(upholding the trial court's admission of evidence that a traffic
24 signal which had been planned for some time was installed at the scene of the accident after it had
25 occurred). When the defendant has merely completed something which had been started long before
26 the plaintiffs accident, the evidence may not be characterized as subsequent remedial conduct, *Id.*
27 at 600.

28 Defendants did more than just contemplate making modifications at the subject tee box.
SLDI had begun to plan installation of the guardrails and deck more than a year before Plaintiffs

1 accident. Plans were drawn up and submitted to the CRMO for joint monitoring with the Division
2 of Environmental Quality. Even though the accident may have forced the construction to be
3 undertaken earlier than expected, SLDI was nevertheless completing something that had been
4 predetermined many months before Plaintiff fell into the pit and injured his leg. Accordingly, as in
5 *Schmeck*, the guardrails and deck cannot be considered subsequent remedial measures within the
6 meaning and intent of Rule 407. Thus, evidence of the guardrails and deck may be admitted at trial.

7 2. Vegetation Clearing.

8 The clearing of vegetation, however, requires a different result. SLDI shortly after the
9 accident removed the vegetation making the pit more visible to SLDI's golfing patrons. The plant
10 clearing, which unmasked the presence of the pit, would have made Plaintiffs accident less likely to
11 occur. Thus, the clearing of vegetation would constitute a subsequent remedial measure and would
12 be subject to exclusion from trial under Rule 407. *See Holman v. Licking County*, 667 N.E.1239,
13 1243 (Ohio App. 1995)(upholding the exclusion of evidence that trees, brush and weeds were
14 removed from an intersection to improve visibility).

15 **B. Exclusion of Evidence if Danger of Unfair Prejudice Outweighs its Probative Value**

16 Defendants alternatively argue against the admission of the evidence of the guardrails and deck
17 under Corn. R. Evid. 403, because the probative value of such evidence is substantially outweighed
18 by their prejudicial effect. Defendants further contend that the modifications at the tee box will only
19 confuse the jury on the issue of SLDI's negligence and is of little probative value since the evidence
20 would only show SLDI's actions after Plaintiffs accident.

21 Corn. R. Evid. 403 provides that relevant "evidence may be excluded if its probative value is
22 substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the
23 jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative
24 evidence." The rule calls for balancing the probative value of the proffered evidence against the
25 danger of undue prejudice and the proffered evidence is excluded when the danger of unfair prejudice
26 is substantially greater than the probative value of the evidence. *Commonwealth v. Brel*, 4 N.M.I.
27 200,203 (1994); *Commonwealth v. Saimon*, 3 N.M.I. 365 (1992).

28 The court notes that the proffered evidence may be used by Plaintiff to prove Defendants

1 knowledge about the conditions of the tee box and to establish the condition of the tee box at the time
2 of the accident. These matters are essential to the Plaintiffs claim that defendants SLDI and Shimizu
3 failed to exercise due care in the design, construction and maintenance of the tee box. Plaintiff has
4 stated that the photographs taken during and after the construction of the guardrails and deck are the
5 only ones in existence with a clear depiction of the teebox area. (Pl.'s Opp'n to Mot. *in Limine*
6 Regarding Subsequent Remedial Measures at 8.) On that basis, the court finds that the proffered
7 evidence is highly probative.

8 The court must now assess whether the danger of unfair prejudice or the confusion of issues
9 outweighs the probative value of the evidence. The Ninth Circuit has defined "unfair prejudice" in the
10 context of the balancing test as "an undue tendency to suggest decision on an improper basis,
11 commonly, though not necessarily, an emotional one. The evidence is prejudicial when it appeals to
12 the jury's sympathies, arouses its sense of horror, provokes its instincts to punish, or triggers other
13 mainsprings of human action." *US. v. Blackstone*, 56 F.3d 1143, 1146 (9th Cir. 1995)(citing the
14 Notes of the Advisory Committee).

15 At the outset, the court notes that relevant evidence is inherently prejudicial and that the
16 prejudicial effect of the guardrails and deck may be the principal reason why Plaintiff may introduce
17 the evidence at trial. Rule 403, however, requires not just mere prejudice but the showing of the
18 danger of unfair prejudice or confusion of issues which must outweigh the evidence's probative value.
19 The court strains to find a basis to invoke Rule 403 to exclude this particular evidence. The evidence
20 in question is not of the type to arouse a jury's sympathy that would lead to improper determination
21 in this case. As to potential confusion of the issues, proper instructions to the jury at trial will address
22 that concern. Thus, in balancing the two competing factors, the probative value of the evidence in
23 question against its prejudicial effect, the court finds that the evidence's prejudicial effect does not
24 outweigh its probative value. Corn. R. Evid. 403 does not bar the admission of the guardrails and
25 deck at trial.

26 27 V. CONCLUSION

28 Based on the reasons stated above, the Defendants' Motion *in Limine* Regarding Subsequent

1 Remedial Measures is hereby **DENIED** in part. Evidence of the installation of guardrails and deck
2 at the tee box may be admitted at trial. Evidence of the clearing of vegetation is excluded under Rule
3 407 of the Commonwealth Rules of Evidence.

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SO ORDERED this MAR 16 2000.



JOHN A. MANGLONA, Associate Judge