

A woman sued a homeowner, alleging that, while the woman was on her morning walk, a limb fell from a tree on the homeowner's property and hit her. The woman further alleged that the tree had started to rot, causing the limb to fall, and that the homeowner was negligent in failing to maintain the tree. The homeowner denied responsibility, claiming that the tree sits on city property. Over a year later, the case went to trial. The woman failed to produce a plat map that would have accurately indicated the boundaries of the homeowner's property. Instead, while testifying, the woman offered a video that had been taken the week prior and showed the homeowner cutting down the tree, which had entirely rotted by that time.

Should the court admit the video?

- A. No, because it constitutes evidence of a subsequent remedial measure.
- B. No, because it is not the best evidence of the tree's location.
- C. Yes, because it helps establish ownership of the tree.
- D. Yes, provided that the woman can show that she was the maker of the video.

Explanation:

Evidence of subsequent remedial measures

(FRE 407)

Inadmissible

Such measures *cannot* be used to:

- prove negligence or other culpable conduct
- prove defect in product or product design
- prove need for product warning or instruction

Admissible

Such measures *can* be used to:

- prove feasibility of precautionary measures
- impeach witness
- prove ownership or control

FRE = Federal Rule of Evidence.

A **subsequent remedial measure** is a precaution taken after an injury has occurred that—if taken earlier—might have prevented the injury. Because social policy encourages remedial measures to protect the public, evidence of such measures is **inadmissible to prove negligence or other culpable conduct**. But a **court may allow** evidence of subsequent remedial measures for **other limited purposes** such as:

resolving a dispute about the feasibility of precautionary measures

impeaching a witness *or*

proving ownership or control.

Here, the woman offered video evidence of the homeowner's subsequent remedial measure of cutting down the tree, which had entirely rotted by the time of trial. That evidence is *not* admissible to prove the homeowner's negligence in failing to maintain the tree. However, it *is* admissible to prove ownership of the tree **(Choice A)**. And the video is relevant to ownership since it is unlikely that the homeowner would have cut down the tree if the homeowner truly believed that it sat on city property.

(Choice B) The **best evidence rule** applies when a witness relies on a recording, writing, or photograph's contents while testifying or when the contents of the item are at issue (not seen here). Additionally, this rule does not require that a party introduce the most definitive evidence of a fact that the party seeks to prove.

(Choice D) A video is authenticated by having a witness with personal knowledge of the thing depicted (here, the tree) testify that the video fairly and accurately depicts that thing. Therefore, the video need not be authenticated by the person who made it.

Educational objective:

Evidence of subsequent remedial measures is inadmissible to prove negligence or other culpable conduct. But such evidence is admissible to (1) resolve a dispute about the feasibility of precautionary measures, (2) impeach a witness, or (3) prove ownership or control.

References

Fed. R. Evid. 407 (subsequent remedial measures).

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