IN THE COURT OF APPEALS OF IOWA

No. 6-068 / 05-0241
Filed May 10, 2006

MARY SUSAN GERISCHER, Individually and As Injured Parent of JACOB PAUL GERISCHER and RYAN PAUL GERISCHER,
Plaintiffs-Appellants,

vs.

SNOWSTAR CORP., d/b/a SKI SNOWSTAR WINTER SPORTS PARK,
Defendant-Appellee.

Appeal from the Iowa District Court for Jackson County, Nancy S. Tabor, Judge.

The plaintiffs appeal following an adverse jury verdict on their lawsuit seeking damages for personal injury and loss of spousal and parental consortium. **REVERSED AND REMANDED.**

James H. Cook of Dutton, Braun, Staack & Hellman, P.L.C., Waterloo, for appellants.

Stephen J. Juergens and Danita L. Grant of Fuerste, Carew, Coyle, Juergens & Sudmeier, P.C., Dubuque, for appellee.

Heard by Zimmer, P.J., and Miller and Hecht, JJ.

MILLER, J.

The plaintiffs appeal following an adverse jury verdict on their lawsuit seeking damages for personal injury and loss of spousal and parental consortium. They claim the trial court erred in excluding proposed testimony of an expert witness and by instructing the jury on primary assumption of the risk. We reverse and remand.

I. BACKGROUND FACTS AND PROCEEDINGS.

The incident at issue occurred on December 31, 2001, at the Ski Snowstar Winter Sports Park near Andalusia, Illinois. Snowstar Corporation (Snowstar), an Iowa corporation, owns the park. Mary Susan Gerischer (Gerischer), her husband Ryan, and their friend Stacy Manning went to the park on this date and purchased snow tubing passes for 6:00 p.m. to 8:00 p.m. After approximately ten to fifteen runs on the hill it was nearly 8:00 p.m. and the group got back in line to be towed up the hill for what was to be their last run.

As they had done all evening, all three waited at the bottom of the hill at the tow line to be taken back up the hill. At Snowstar, each tube is connected to the cable tow by a forty-two inch lanyard or "leash" and an eight inch flexible rubber "D" ring that fits into a rigid "J" hook that is attached to the cable. A Snowstar employee called the "tube hooker" would manually insert the lanyard's D ring into the J hook on the tow line to begin the process of towing the tuber up the hill. For this final run Gerischer's husband was first to get hooked onto and go up the tow line, followed by Manning, and then Gerischer. The tubing admission ticket stated

> The user of this ticket, as a condition of being permitted to use the facilities of **SNOWSTAR** agrees to assume all risk of personal

> injury or loss or damage to property. The purchaser/user of this ticket agrees and understands that skiing/boarding/tubing can be hazardous. Trail conditions vary constantly due to weather changes and skier use. Ice; variations in terrain; obstacles and hazards, including other skiers/boarders/tubers may exist throughout the area. Be aware that snowmaking/grooming may be in progress at any time. Always be in control and stay clear of this equipment. . . .

Gerischer testified she could have read the language on the ticket but that she had not read it on the day of the accident. In addition, Snowstar posted signs. Gerischer stated she remembered seeing a sign that stated:

> The purchaser and user of a tubing ticket agrees & understands that tubing can be hazardous. Trail conditions vary constantly because of weather changes and tubing use. Ice: variations in terrain: debris: lifts and other obstacles: hazards. Including other tubers may exist throughout the area!

There was also a sign which instructed on loading and unloading procedures for the tubing run, but Gerischer testified she did not see any of the other posted warnings or instructions regarding tubing.

There is no dispute that Gerischer's tube somehow became disconnected from the tow line during her ascent of the hill, she slid down the hill, and at the bottom she collided with two different poles or pipes. The main factual dispute concerns how she managed to become disconnected and how she ended up where she did at the bottom of the hill.

Gerischer testified at trial that the tube hooker did not hook her tube correctly or completely and as she ascended the hill the tube handle ("D" ring) slipped off the latch ("J" hook). She stated she slid back down the hill and bumped into the tube behind her and grabbed on to its latch. Gerischer testified she then looked at the tube hooker at the bottom of the hill and he said, "Yeah,

just hold on to that one."[1] Gerischer further testified that as she neared the top of the hill her tube began turning, she could not hold on to the other tuber's latch any longer, and had to let go. No one else who testified at trial saw her hanging on to the other tuber or heard the tube hooker's alleged statement to her, although several people saw her going down the hill.

Scott Meyer, who was twelve years of age at the time of the incident, testified he was a couple of tubes ahead of Gerischer, facing back down the hill, and saw her pulling on her lanyard in an apparent attempt to reposition herself on the tube. He stated that he turned back up toward the top of the hill to see when he needed to get off and when he turned back around Gerischer was already disconnected and headed down the hill. Gerischer denied ever pulling on the lanyard. Gerischer's friend, Manning, testified that Gerischer had commented to her at the bottom of the hill that Gerischer's lanyard was not fully seated in the hook, but that the tube hooker had told Gerischer she would be fine.

Gerischer testified that as her tube started going down the hill alongside the tow path she tried to use her boots to slow herself down but it was very icy and she had nothing to grab on to. She did not attempt to roll off the tube. Near the bottom of the hill she collided with a pole near the tube shed, hitting her back and side, and then ricocheted into another pole, hitting the back of her head and neck. Gerischer claims that as a result of this incident she suffered temperomandibular joint injuries, headaches, and exacerbation of a pre-existing cervical spine condition, the latter of which later necessitated cervical spine surgery.

---

[1] The tube hooker only worked at Snowstar for that one winter and could not be found to testify at trial.

Gerischer, her husband, and her children (the plaintiffs) filed an action against Snowstar alleging its negligence and seeking money damages for bodily injury, loss of spousal consortium, and loss of parental consortium. The case was tried to a jury and the jury returned a verdict in favor of Snowstar. The plaintiffs appeal, contending the district court erred in excluding the testimony of their expert witness and in instructing the jury on primary assumption of the risk.

II. MERITS.

A. Exclusion of Expert Testimony.

On the second day of trial the plaintiffs proffered James Wickersham as an expert witness in the areas of winter snow park safety in general and snow tubing in particular. Snowstar objected to Wickersham's qualifications as an expert and conducted a voir dire examination of him. After reviewing Wickersham's curriculum vitae (CV), his investigation report, and his proposed testimony, the trial court sustained Snowstar's objection to Wickersham as an expert witness and excluded his testimony. In doing so the court noted that Wickersham stated in the "Analysis" section of his report that the National Ski Areas Association's Tubing Operations Resource Guide (the Resource Guide) constituted industry standards for care of tubing facilities. After reviewing the Resource Guide the court concluded it "is not set out as the industry standard" and "to say that they are industry standards of care would be misleading to the jury." The court further concluded Wickersham was going to be testifying regarding the safety of the lift and "based on [Wickersham's] limited experience in the snow tubing and ski management industry" the court could not conclude he was an expert in that area and would not allow him to testify in that regard. The

plaintiffs contend on appeal the trial court erred in excluding Wickersham's testimony.[2]

In general, whether a witness may testify as an expert with reference to a particular topic is within the trial court's discretion. See *Hyler v. Garner*, 548 N.W.2d 864, 868 (Iowa 1996). Appellate courts accord much deference to a trial court's exercise of discretion in the matter. *Mensink v. Am. Grain,* 564 N.W.2d 376, 380 (Iowa 1997). "We are committed to a liberal rule on admission of opinion testimony, and only in clear cases of abuse would the admission of such evidence be found to be prejudicial." *Leaf v. Goodyear Tire & Rubber Co*., 590 N.W.2d 525, 531 (Iowa 1999) (citation omitted).

Iowa Rule of Evidence 5.702 provides

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

Thus, expert testimony is admissible if it is reliable and will assist the trier of fact in resolving an issue. *State v. Rodriquez,* 636 N.W.2d 234, 245 (Iowa 2001) (citing *State v. Rains,* 574 N.W.2d 904, 916 (Iowa 1998)). Wickersham stated in his investigation report that the Resource Guide sets forth industry standards for

---

[2] Snowstar argues the plaintiffs did not preserve error on this issue because their offer of proof with regard to Wickersham did not comply with Iowa Rule of Evidence 5.103(*a*)(2). We disagree. Not only was Wickersham's CV and investigation report provided to the court, he was examined at length in voir dire before the court about what his testimony would be and what it would be based on. Thus the substance of Wickersham's testimony was sufficiently apparent to the court from the offer of proof. Iowa R. Evid. 5.103(*a*)(2). The plaintiffs properly preserved this issue for our review. *See Am. Express Co. v. Des Moines Nat. Bank*, 177 Iowa 478, 494, 152 N.W. 625, 630 (1915) (stating that when it is apparent on the face of the questions asked the witness what the evidence sought to be introduced is, and that it is material, this is sufficient to preserve error).

care of tubing facilities. However, the Resource Guide specifically says at the beginning that it "should not be interpreted as being a standard for snow tubing facilities. This paper only contains 'informational' guidelines." Wickersham also testified during voir dire that the Resource Guide set forth the industry standards for snow tubing facilities, and the opinions he intended to offer and present to the jury in this case were based upon his interpretation and application of those standards. It is clear from his report that in fact his opinions relied heavily on what he asserted to be standards contained in the Resource Guide. On voir dire cross-examination he stated that although the Resource Guide stated it was not to be used as an industry standard, in his experience in actual practice its guidelines do set the standard of care in the tubing industry.

The contents of the Resource Guide itself support the trial court's determination that it does not establish industry standards. To allow Wickersham as an expert witness to express opinions relying heavily on the Resource Guide as having set forth established industry standards would at best not be helpful to the jurors in resolving the issues and would at worst be misleading to them. *See* Iowa Rs. of Evid. 5.403, 5.702.

In addition, the record shows Wickersham in fact had very limited experience, education, or training in the snow tubing industry. His CV indicated only one season of experience with a tubing run, and that run utilized a chair lift device. He had no actual experience with a cable tow. The only education he had with regard to the safety of tubing facilities was some general seminars which only dealt in small part with the subject of tubing. Wickersham had never before testified or been qualified as an expert by a court in any area. Although it

appears he has quite a bit of experience in the area of mechanical engineering, he was not to testify about the mechanics of the cable tow or any possible malfunction of the tow, handle, or hook in this case. He specifically stated he was not going to be testifying about those types of issues but instead about the "actions or inactions of the people operating that lift" at Snowstar.

> The exclusion or admission of certain expert testimony, based upon the court's determination of the qualification of the witness, was well within its discretion. The [trial] court can properly consider the experience and familiarity with the subject, or the lack thereof, in assessing the witness' qualifications.

Bingham v. Marshall & Huschart Mach. Co., 485 N.W.2d 78, 82 (Iowa 1992).

The trial court's decision to exclude Wickersham's proposed testimony was based on a combination of its determination that the proposed testimony relied heavily on "industry standards" that were in fact not shown to be industry standards, and its determination that Wickersham had very limited experience in the area of snow tubing. The first of these is supported by strong evidence, the contents of the Resource Guide itself. The second is supported by substantial evidence indicating Wickersham had very limited education, training, or experience related to snow tubing. We conclude excluding his proposed testimony did not constitute a clear abuse of the trial court's broad discretion.

B. Jury Instructions.

The plaintiffs next claim the trial court erred by instructing the jury on primary assumption of the risk when no inherent risk was at issue. Alleged errors regarding jury instructions are reviewed for correction of errors at law. *Sleeth v. Louvar*, 659 N.W.2d 210, 213 (Iowa 2003). An erroneous instruction does not entitle the party claiming error to reversal unless the error was prejudicial. *Waits*

v. United Fire & Cas. Co., 572 N.W.2d 565, 569 (Iowa 1997). "Prejudice results when the trial court's instruction materially misstates the law, confuses or misleads the jury, or is unduly emphasized." *Anderson v. Webster City Cmty. Sch. Dist.*, 620 N.W.2d 263, 268 (Iowa 2000). "When giving instructions to the jury, 'the court must correctly state the law and confine it to [the facts].'" *Kurth v. Iowa Dep't of Transp.,* 628 N.W.2d 1, 8 (Iowa 2001) (quoting *Heldenbrand v. Executive Council*, 218 N.W.2d 628, 637 (Iowa 1974)). "The jury should not be informed of any matter which is not proper for it to consider in arriving at its verdict." *Id.* (citation omitted).

The plaintiffs objected to instruction number 22, contending that as a matter of law no inherent risk of the sport of snow tubing was involved in this particular case and thus to submit instruction number 22, which dealt with primary assumption of the risk and inherent risk, was potentially injecting error into the case. The court implicitly overruled their objection and submitted the instruction. Instruction number 22 provided:

> Defendant Snowstar Corp. may be found negligent only if it owed and breached a legal duty to protect Plaintiff Mary Susan Gerischer from the injuries she sustained. A winter sports facility as the owner of property at which snow tubing occurs cannot and does not guarantee that snow tubers will not sustain an injury while participating in the sport, or guarantee to protect a snow tuber against the risks inherent in the sport as explained in these instructions.
>
> Inherent risks of snow tubing means those dangers or conditions which remain despite proper discharge of duty by the defendant. A winter sports facility operator is not responsible for injury resulting from any of the inherent risks of snow tubing.
>
> Defendant Snowstar Corp., as the owner and operator of a recreational winter sports facility, does not ensure the safety of its patrons but rather must use reasonable care in the construction, maintenance, and management of the facility.
>
> A winter sports facility has a duty to exercise ordinary care under the circumstances to prevent injuries to patrons. A winter

> sports facility cannot be at fault unless it breaches this duty of care in some particular.
>
> Thus, in considering whether Snowstar Corp. was negligent, you should take into account that a winter sports facility area has a duty to use reasonable care to keep its tubing area in a reasonably safe and suitable condition for snow tubing, so that a snow tuber would not be unnecessarily or unreasonably exposed to danger beyond those risks inherent in the sport. If a hidden danger exists, known to Snowstar Corp. but not known or not reasonably apparent to the snow tuber, Snowstar Corp. has a duty to warn the snow tuber of such hidden danger.
>
> Thus, if you find that the injury to Plaintiff Mary Susan Gerischer resulted from a risk inherent in the sport or from a risk which was, or should have been visible or obvious to her, then you must return a verdict that Snowstar Corp. is not at fault.

Instruction number 16 was the marshalling instruction submitted to the jury. It stated the plaintiffs' particular specifications of alleged negligence. Instruction number 16 provided, in relevant part:

> To sustain her claim . . . against the Defendant, the Plaintiff Mary Susan Gerischer must prove all of the following propositions:
>
> 1. The Defendant was negligent in one or more of the following ways:
>
>   a. In failing to secure Plaintiff's snow tube to the tube lift properly; or
>   b. In advising Plaintiff to just hold on when the lift operator knew Plaintiff's snow tube was not properly secured to the lift; or
>   c. In failing to stop the tube lift when the lift operator knew Plaintiff's snow tube was not properly secured to the lift; or
>   d. In failing to instruct Plaintiff to roll out of her tube once she started sliding back down the tow path.
>
> 2. The negligence was a proximate cause of the Plaintiff's damage.
>
> 3. The amount of the Plaintiff's damage.
>
> If the Plaintiff has failed to prove any one or more of these propositions, the Plaintiff cannot recover and your verdict will be for Defendant. If the Plaintiff has proved all of these propositions, you

> will consider the defense of comparative fault as explained in Instruction No. 18.

Primary assumption of the risk "is an expression for the proposition that the defendant was not negligent, either because the defendant owed no duty or did not breach a duty." *Coker v. Abell-Howe Co.,* 491 N.W.2d 143, 146 (Iowa 1992).[3] This proposition is "based on the concept that a plaintiff may not complain of risks that inhere in a situation despite proper discharge of duty by the defendant." *Arnold v. City of Cedar Rapids,* 443 N.W.2d 332, 333 (Iowa 1989) (quoting *Nichols v. Westfield Indus., Ltd.,* 380 N.W.2d 392, 399 (Iowa 1985)). The key principle of primary assumption of the risk is that it involves risks that remain inherent in a certain activity or sport "despite proper discharge of duty by the defendant." *Id.* The doctrine of primary assumption of the risk does not, however, relieve management of its duty to safely supervise the operations of its facility or to maintain the premises in a safe condition. *Wagner v. Thomas J. Obert Enter.,* 396 N.W.2d 223, 226 (Minn. 1986). Negligent maintenance and supervision are "not inherent risks of the sport itself." *Id.; Larson v. Powder Ridge Ski Corp.,* 432 N.W.2d 774, 775 (Minn. Ct. App. 1988).

Here none of the types of risks that are mentioned in Gerischer's admission ticket and the sign noted in the evidence, or that inhere in the sport of snow tubing such as for example collisions with other objects or other tubers, falling out of the tube, or encountering unexpected or changed surface conditions, are implicated by or involved in the specifications of Snowstar's negligence alleged by the plaintiffs. None of these specifications of negligence

---

[3] We note that after the passage of Iowa's comparative fault statute secondary assumption of the risk is not available as a defense except in cases involving strict liability. *See Coker,* 491 N.W.2d at 147.

implicate or rely on the types of inherent risks that would remain despite Snowstar's proper discharge of duty. Instead, all of the plaintiffs' specifications of negligence relate to and rely upon alleged negligent operation of the snow tubing facility by Snowstar. Thus, the particular specifications of negligence here did not justify instructing the jury on the application of the doctrine of primary assumption of the risk and the inherent risks of the sport.

We conclude the jury should not have been given an instruction which would allow it to find Snowstar was not liable by reason of Gerischer's primary assumption of the risk. As noted above, the court must correctly state the law and confine it to the facts of the particular case. *Kurth,* 628 N.W.2d at 8. The jury should not be informed of any matter which is not proper for it to consider in arriving at its verdict. *Id.* The plaintiffs were prejudiced by the court's submission of an instruction on primary assumption of the risk and the inherent dangers of snow tubing when it was not proper for the jury to consider such principles in arriving at its verdict. *See, e.g., Anderson,* 620 N.W.2d at 268 ("Prejudice results when the trial court's instruction materially misstates the law, confuses or misleads the jury, or is unduly emphasized."). Thus, reversal is required. *See Waits* 572 N.W.2d at 569 (finding an erroneous instruction requires reversal if the error was prejudicial).

III. CONCLUSION.

We conclude the trial court did not err in excluding the proposed testimony of an expert witness for the plaintiffs.[4] We further conclude the court did err in

[4] Although we are reversing the judgment based on an improper jury instruction, we have also addressed the issue of the court's exclusion of the proposed testimony of an expert witness because it is likely to arise again on retrial. *See McElroy v. State,* 703

instructing the jury on primary assumption of the risk, because none of the plaintiffs' specifications of negligence implicate or rely on any inherent risks of snow tubing. Instruction number 22 was erroneous and prejudicial to the plaintiffs. Accordingly, the judgment in favor of Snowstar must be reversed and the case remanded for new trial not inconsistent with this opinion.

REVERSED AND REMANDED.

N.W.2d 385, 392 (Iowa 2005); *Gacke v. Pork Xtra, L.L.C.,* 685 N.W.2d 168, 184-85 (Iowa 2004).