STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1342

Barbara Nash,
Appellant,

vs.

MOAC Mall Holding, LLC, et al.,
Respondents.

Filed April 27, 2010
Affirmed
Randall, Judge[*]

Hennepin County District Court
File No. CV-08-10989

Michael A. Bryant, Nicole L. Bettendorf, Bradshaw & Bryant, PLLC, Waite Park, Minnesota (for appellant)

John P. Brendel, Julia A. Lines, Brendel and Zinn, Ltd., Lake Elmo, Minnesota (for respondents)

Considered and decided by Ross, Presiding Judge; Shumaker, Judge; and Randall, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

RANDALL, Judge

This is an appeal from summary judgment dismissing appellant's negligence claim arising out of injuries she sustained while a passenger on an amusement park ride. Appellant argues that the district court erred by (1) excluding the testimony of her expert on amusement-ride safety; and (2) determining that her claims could not be proven without expert testimony. We affirm.

FACTS

Respondents MOAC Mall Holding LLC and MOA Management Company Inc. own and operate an amusement park located at the Mall of America. One of the rides in this amusement park is the Paul Bunyan Log Chute, a water flume ride in which guests are seated in an artificial hollow log or boat astride a padded bench seat. The boat moves through a water-filled canal, propelled by the flow of water, until it reaches a mechanical lift that raises the boat up an incline. The culmination of the ride is the boat's descent into a body of water.

In June 2004, appellant Barbara Nash rode the log chute with her grandson and his friend. Although appellant had ridden the log chute at least three times before, she claims she was injured during the final descent of the June 2004 ride. Appellant alleged that she was lifted from her seat and came back down forcefully, causing injury to her coccyx. Appellant subsequently had surgery to remove her coccyx.

Appellant sued respondents alleging that she was "injured as a result of [respondents'] negligence in failing to operate, manage and equip a ride safe for

occupants." To support her claims, appellant hired William Avery, a safety consulting expert, who issued a report regarding respondents' alleged negligence. Appellant proffered Avery to "testify about the industrial safety standards for the safe operation of amusement park rides and to explain the American Society for Testing International (ASTM) on Amusement Rides and Devices standard to the jury." Avery's proffered testimony included his conclusions that (1) respondents violated the ASTM standards; (2) the violations of the standards were the direct cause of appellant's injuries; and (3) respondents were on notice that the ride was unsafe. Avery's opinions were based on (1) a review of incident reports for the subject log chute ride from 1997-2004; (2) a January 2009 telephone interview with appellant; (3) standards of the ASTM; (4) photographs of the log chute ride; (5) appellant's deposition; (6) the maintenance manual for the log chute ride; (7) the ride maintenance duty logs; and (8) safety-related Internet articles.

Respondents moved to exclude Avery's expert testimony and for summary judgment. The district court granted the motion to exclude Avery's testimony because (1) it would not be helpful to the jury; (2) it lacked reliable foundation; and (3) its probative value would be substantially outweighed by the danger of unfair prejudice. The court then noted that appellant "conceded that the Court must grant [respondents'] motion for summary judgment if it excluded Avery's testimony." Thus, the district court concluded that "because the Court finds Avery's report inadmissible, the Court grants summary judgment on the grounds that [appellant] has failed to provide evidence of the duty owed by [respondents] or a breach of that duty." This appeal followed.

D E C I S I O N

On appeal from summary judgment, this court reviews de novo whether a genuine issue of material fact exists and whether the district court erred in its application of the law. *Peterka v. Dennis*, 764 N.W.2d 829, 832 (Minn. 2009). "[T]he reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). "[S]ummary judgment should be affirmed if it can be sustained on any ground." *Winkler v. Magnuson*, 539 N.W.2d 821, 828 (Minn. App. 1995), *review denied* (Minn. Feb. 13, 1996).

I.

Appellant argues that the district court abused its discretion in excluding the testimony of her expert witness. Deciding whether to exclude expert-witness testimony is an evidentiary ruling that this court reviews for an error of law or an abuse of discretion. *Gross v. Victoria Station Farms, Inc.*, 578 N.W.2d 757, 760 (Minn. 1998). An appellant has the burden of proving that the district court abused its discretion. *Jerry's Enters., Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 691 N.W.2d 484, 494 (Minn. App. 2005), *aff'd as modified*, 711 N.W.2d 811 (Minn. 2006).

The rules of evidence provide that:

> 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. The opinion must have foundational reliability.

Minn. R. Evid. 702. If the expert testimony is acceptable under rule 702, the testimony could still be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Minn. R. Evid. 403.

Here, the district court concluded that (1) Avery's testimony would not be helpful to the jury; (2) Avery was not qualified to assess the log chute ride; and (3) Avery's testimony lacked foundational reliability. The district court concluded that Avery's testimony was inadmissible under Minn. R. Evid. 403.[1]

A. Helpfulness of Avery's testimony

Appellant claims that Avery would offer expert opinions as to the standards of care for safe operation of the log chute ride in accordance with the ASTM standards on amusement rides. Thus, appellant argues that Avery's testimony would be helpful to the jury because Avery would apply his knowledge and experience of amusement park industry safety standards to determine whether respondents failed to meet the required standards and were in fact negligent.

This case is close. Much of the information in Avery's report focuses on the design of the ride. But this is not a design-defect lawsuit. Rather, the complaint alleges negligence in the operation and maintenance of the ride. The Avery report fails to establish the standard of care that applies to amusement park operators. Instead, the

[1] In addressing the admissibility of appellant's expert's testimony, the parties refer to the *Frye-Mack* standard. However, this case does not concern a novel or emerging scientific theory, and the district court did not consider the issue under *Frye-Mack*. Rather, the district court excluded the testimony as not helpful to the trier of fact. A *Frye-Mack* analysis is unnecessary.

report is filled with conclusory statements concerning the standard of care. For example, Avery asserts that the standard of care is to address "dangerous operating conditions" and to "recognize and appropriately respond to" prior injury reports. To inform a jury of the appropriate standard of care in the context of ASTM standards, Avery would have to identify the dangerous conditions and explain to the jury how a responsible amusement park would address the dangerous condition, and provide an appropriate response to prior injury reports. A review of Avery's report provides no such identification and explanation. The district court did not abuse its discretion in concluding that Avery's testimony would not be helpful to the jury.

B. Qualified as a witness

Appellant argues at length that Avery is qualified as a witness, citing his extensive experience in the amusement park industry. We agree. Only the abstraction of Avery's overly generalized opinion, not his lack of professional qualifications, allows the district court to exclude his testimony. A witness qualifies as an expert with requisite "knowledge, skill, experience, training, or education." Minn. R. Evid. 702. Avery's 14-page resume includes numerous entries that would support his qualifications to opine about the ride's safety under any one of these five alternative qualifying categories. It is packed with qualifying references, including Avery's certifications related to ride safety; his professional affiliation with associations devoted to ride safety; his attendance at seminars focused on amusement safety; his authorship of articles regarding amusement and entertainment safety; his presentations about amusement safety; his appearance in the

media discussing amusement ride safety; his service for notable amusement park clients from coast to coast; and even his receipt of awards for contributions to amusement safety.

The district court refers to Avery's qualifications only as generalities insufficient to establish Avery's qualifications specifically to assess the safety of the log chute ride. We acknowledge that the resume does not specifically list "log ride review," but appellant asserts without rebuttal that Avery's professional experience inspecting rides includes "amusement rides and devices and water rides." She similarly highlights without contradiction that Avery is involved in the organization that establishes standard practice for water slide systems and that he is certified to inspect amusement rides in multiple states. Appellant contends that this qualifies Avery to opine about the safety of the log chute. We agree that it would be hard to imagine what could pass the rule 702 qualifications test if Avery's background is insufficient. *See Christy v. Saliterman*, 288 Minn. 144, 167, 179 N.W.2d 288, 303 (1970) ("It is usually held that any person whose profession or vocation deals with the subject at hand is entitled to be heard as an expert, while the value of his evidence is to be tested by cross-examination and ultimately determined by the jury."). However, we conclude that the professional quality of Avery's background does not overcome the deficient qualities in the opinion which the district court focused on.

C. Foundational reliability

An expert opinion has sufficient foundation if it is based on readily ascertainable facts. *Whitney v. Buttrick*, 376 N.W.2d 274, 277 (Minn. App. 1985), *review denied* (Minn. Jan. 23, 1986). "[A]n opinion based on speculation and conjecture has no

evidentiary value." *Id.* The decision to exclude expert testimony for lack of foundation rests within the sound discretion of the district court. *Benson v. N. Gopher Enters., Inc.*, 455 N.W.2d 444, 445 (Minn. 1990).

Appellant argues that the foundational reliability for Avery's opinions rests upon his knowledge of the ASTM standards, his extensive experience as a safety consultant for amusement parks, and his extensive review of thousands of prior injuries that occurred on the log chute ride through data maintained by respondents. Avery's opinions were based in part on his review of incident reports for the log chute ride from 1997 to 2004. Avery determined that there were 138 incidents during this time that were substantially similar in nature to appellant's accident, which put respondents on notice of the dangerous condition, and that respondents failed to remedy the problem. After reviewing the reports in camera, the district court found that "[t]he vast majority of [the] reports made no mention of 'seat separation' or 'body slamming,' but described bumped heads, bloody noses, or twisted hands that occurred during the final drop of the ride." The court determined that whether respondents were on notice of a defect with the ride would need to be determined by the content of the reports, which is inadmissible hearsay. That ruling left less foundation for Avery's opinions. Accordingly, the district court did not abuse its discretion in excluding Avery's testimony.

D. Minn. R. Evid. 403

The district court also concluded that "even assuming for purposes of discussion that Avery's testimony was helpful, that he was qualified and his testimony had foundational reliability, it is properly excluded under [Minn. R. Evid. 403]." This rule

provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence." Minn. R. Evid. 403.

Here, as the district court found, Avery's testimony that appellant experienced a "body slamming" and "seat separation" is simply a restatement and corroboration of appellant's testimony. We do not find this ruling that relevant, but for the other stated reasons, we affirm.

II.

Appellant argues that even if the district court properly excluded Avery's testimony, the district court erred in granting summary judgment because appellant can establish a prima facia case of negligence notwithstanding the exclusion of Avery's testimony. A problem. Appellant admitted to the district court that if Avery's testimony was excluded, the district court must grant summary judgment in favor of respondents. Based on this admission, the district court granted summary judgment in favor of respondents. Because of the concession, appellant waived the issue. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (holding that appellate courts will generally not consider matters not argued and considered by the court below).

Affirmed.