STATE OF MICHIGAN

COURT OF APPEALS

PATRICIA MAZAITIS, Personal Representative of the ESTATE OF KEVIN MAZAITIS, Deceased, and ANTHONY MAZAITIS, Individually,

Plaintiff-Appellants,

v

INTEX CORPORATION, d/b/a INTEX RECREATION CORPORATION, d/b/a INTEX PLASTICS CORPORATION,

Defendant-Appellee.

UNPUBLISHED
July 30, 1996

No. 171561; 173390
LC No. 91-117635-NP

Before: Michael J. Kelly, P.J., and Young and N.O. Holowka,* JJ.

PER CURIAM.

Plaintiffs appeal as of right from a judgment of no cause of action rendered by the trial court on December 20, 1993, and from a partial directed verdict in favor of defendant on February 10, 1994. This wrongful death product liability case arose out of the death of plaintiffs' decedent, Kevin Mazaitis, while using a "tube" manufactured and sold by defendant Intex Corporation for the recreational water sport known as "tubing". While being towed on the tube in Ford Lake, Kevin fell and became separated from the tube. He waited in the lake for the towing boat to return and pick him up. A second boat entered the area and struck Kevin. He died several hours later from the injuries.

Plaintiffs claimed that Intex failed to use reasonable care in the design of the tube and failed to provide proper warnings of the dangers of the product. At the conclusion of plaintiffs' case-in-chief, the trial court directed a verdict for defendant on plaintiffs' failure to warn claim and denied a directed verdict on plaintiffs' claim of design negligence. During defendant's proofs and after the court denied plaintiffs' motion for a mistrial, the trial court *sua sponte* directed a verdict for defendant on the design negligence claim.

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* Circuit judge, sitting on the Court of Appeals by assignment.

Plaintiff claims the trial court erred by denying mistrial and, in retaliation for plaintiffs having made such a motion, *sua sponte* granting directed verdict in the middle of defendant's case.

The grant or denial of a mistrial is within the sound discretion of the trial court. A trial court's ruling must be so grossly in error as to deprive a party a fair trial or to amount to a miscarriage of justice to be reversible. *People v McAllister*, 203 Mich App 495, 503; 513 NW2d 431 (1994). Where circumstances impair a trial judge's ability to impartially preside over a trial, there is manifest necessity for the court to declare a mistrial. In the absence of any actual bias or partiality, however, the mere appearance of partiality is generally held insufficient to establish manifest necessity. *People v Hicks*, 201 Mich App 197, 201; 406 NW2d 269 (1993), rev'd on other grounds, 447 Mich 819 (1994).

A judge's comments and conduct can indicate a possible bias. *In re Forfeiture of $1,159,420*, 194 Mich App 134, 153; 486 NW2d 326 (1992). The issue of bias or prejudice should command this Court's attention only when a litigant can show that the trial judge's views controlled his decision-making process. *Id*. The party who challenges a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality. *Id*., 151. While a trial court's criticism of counsel may be grounds for reversal, the appropriate test is whether the court's participation denied a party a fair and impartial trial by unduly influencing the jury. *King v Taylor Chrysler-Plymouth Inc.*, 184 Mich App 204, 216; 457 NW2d 42 (1990). Judicial courtesy is the ideal, not the requirement. *In re Forfeiture of $1,159,420, supra*.

A party has a right to be represented by an attorney who is treated with the consideration due an officer of the court. *People v Ross*, 181 Mich App 89; 449 NW2d 107 (1989). Belittling observations aimed at counsel are necessarily injurious to the one he represents. Trial judges who berate, scold, and demean an attorney, so as to hold him up to contempt in the eyes of the jury destroy the balance of impartiality necessary for a fair hearing. *Id*, 91. Although unfair criticism of counsel in front of the jury is always improper, reversal is necessary only where the court's conduct denied the party a fair and impartial trial by unduly influencing the jury. *Id*.

The record shows that throughout the trial the atmosphere was rather tense as a result of the bickering between the parties' attorneys and the trial court. It is apparent the trial court was agitated by the tactics of counsel, such as what appeared in its eyes to be attempts to create appellate parachutes and "trial by ambush." As a result, the trial court became frustrated, lost patience and did not display "the utmost courtesy." *In re Forfeiture of $1,159,420, supra*.

Much of the unpleasantness which the jury was forced to witness and the trial court's own frustration could have been avoided had the court better controlled the trial, and, firmly but fairly and consistently, the attorneys. Although there were instances where the trial court did overstep the bounds of impartiality and was not merely responding to the actions of the attorneys, the attorneys clearly contributed to the situation.

Most of the court's comments were made before the jury. Thus, the question is whether the court's conduct and comments destroyed the balance of impartiality necessary for a fair hearing so as to warrant a mistrial. There has been no showing of actual bias or partiality. The court's comments to counsel were in response to counsel's improper questions and procedure. The fact that the trial court "may not have displayed the utmost courtesy" is not sufficient to establish bias. *In re Forfeiture of $1,159,420, supra*, 153-154. The record reflects the court was impatient with both counsel. The court instructed the jury, on the fifth day of trial, that none of what it said or the manner in which it said it was personal against either a witness or the attorneys but was a result of the court's frustration in presenting the case to the jury in the most timely and expeditious manner. The bickering between counsel and the argumentative response to the court's every ruling by counsel created an equally unfavorable impression upon the jury. The court's "deviation from the ideal" did not clearly deprive plaintiff of a fair and impartial trial. This Court cannot conclude that the trial court erred in denying plaintiffs' motion for a mistrial.

Plaintiff next claims the trial court's decision granting directed verdict was erroneous on its merits. A motion for directed verdict tests whether or not the plaintiff has made a prima facie case. In reviewing the trial court's decision on a motion for directed verdict, this Court will consider the plaintiff's proofs and any reasonable inferences therefrom in the light most favorable to the plaintiff. If the evidence establishes a prima facie case, the motion must be denied. *Petto v The Raymond Corp.*, 171 Mich App 688, 693; 431 NW2d 44 (1988). If the evidence presents material issues of fact upon which reasonable minds can differ, those issues are to be decided by the trier of fact, thereby precluding a directed verdict. A directed verdict for the defendant is properly granted only when the evidence, viewed in this manner, fails to establish a prima facie case. *Reeves v Cincinnati Inc.*, 176 Mich App 181, 183-184; 434 NW2d 326 (1989). A trial court's decision to admit expert testimony under MRE 702 or to exclude it as speculative is reviewed for an abuse of discretion. *Phillips v Mazda Mfg.*, 204 Mich App 401, 412; 516 NW2d 502 (1994).

There is no duty to warn or protect against dangers obvious to all. *Fisher v Johnson Milk Co Inc.*, 383 Mich 158, 160; 174 NW2d 752 (1970). Obvious risks may be unreasonable risks. The obviousness of the risks that inhere in some simple tools or products is a factor contributing to the conclusion that such products are not unreasonably dangerous. The test, however, is not whether the risks are obvious, but whether the risks were unreasonable in light of the foreseeable injuries. *Owens v Allis-Chalmers Corp.*, 414 Mich 413, 425; 326 NW2d 372 (1982). A prima facie case requires sufficient evidence concerning both the magnitude of the risks involved and the reasonableness of the proposed alternative design. *Id*., 429. In a case where the magnitude of the risks is quite uncertain because it is dependent upon the unknown incidence of injuries, an examination of the effects of any proposed alternative design must bear a heavy burden in determining whether the chosen design was unreasonably dangerous. *Id*.,. 430.

A product may be rendered unreasonably dangerous by the omission of a safety device. Furthermore, where an injury is reasonably foreseeable, the trier of fact must determine whether a safety

device should have been put on the product by the manufacturer. *Reeves v Cincinnati Inc*., 176 Mich App 181, 185; 439 NW2d 326 (1989).

In determining whether a defect exists, the trier of fact must balance the risk of harm occasioned by the design against the design's utility. *Haberkorn v Chrysler Corp.*, 210 Mich App 354, 364; 533 NW2d 373 (1995). A plaintiff has the burden of producing evidence of the magnitude of the risk posed by the design, alternatives to the design, or other factors concerning the unreasonableness of a design's risk. The information must be contemporaneous with the design. *Id*.

MRE 702 provides:

> If the court determines that recognized 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.

MRE 703 provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. The court may require that underlying facts or data essential to an opinion or inference be in evidence.

Where the testimony of an expert is purely speculative, it should be excluded or stricken pursuant to MRE 403. *Phillips v Mazda Motor Mfg.*, 204 Mich App 401, 412; 516 NW2d 502 (1994).

In granting a directed verdict on plaintiffs' design defect claim, the trial court relied on *Daubert v Merrell Dow*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993) In *Daubert*, the Supreme Court held the "general acceptance" test of *Frye v United States*, 54 App D.C. 46; 293 F 1013 (1923), was superseded by the Federal Rules of Evidence (FRE) and thus general acceptance is not a necessary precondition to the admissibility of scientific evidence under FRE 702, testimony by experts. The Court held that under Rule 702, the federal trial judge must insure that any and all scientific testimony or evidence is not only relevant but reliable and, further, that in a Federal case involving scientific evidence, evidentiary reliability is based on scientific validity. 125 L Ed 2d at 480, 485. The Court stated that Rule 702's "helpfulness" standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility. 125 L Ed 2d at 482. The relaxation of the usual requirement of firsthand knowledge is premised on an assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline. *Id*. A key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested. *Id*. 482-483. The risk or hazard in this case is a tuber being stranded in the water and not visible to other boats, with the possibility of being run over by another boat. This is a danger which is obvious to everyone. It does not require an "expert" opinion. *Loeks Theaters v Kentwood*, 189 Mich App 603; 474 NW2d 140 (1991).

If Mazaitis had been in the water next to a large, brightly colored tube, the possibility that he would have been seen in time to avoid an accident would have been greatly increased. However, manufacturers are not insurers that in every instance and under all circumstances no injury will result from the use of their products. Plaintiffs must do more than demonstrate an obvious danger. Plaintiffs were required to show that the obvious risk was unreasonable in light of the foreseeable injuries. Plaintiffs were required to proffer sufficient evidence concerning both the magnitude of the risks involved and the reasonableness of the proposed alternative design. Plaintiffs did not proffer sufficient evidence of the magnitude of the risks involved. There was no evidence about the likelihood of the occurrence of this type of accident. Neither witnesses Bruton nor Burleson presented any evidence as to the frequency of tubing accidents which resulted from the tuber being stranded in the water.

Plaintiffs attempted to introduce what was alleged to be statistical evidence from the Michigan DNR. The court correctly precluded plaintiff from using this evidence because it could have been obtained and properly presented to defendant during discovery. Plaintiffs did not sustain their burden to present evidence of the magnitude or unreasonableness of the risk and thus, did not establish a prima facie case. *Petto, Reeves, supra*. The decision whether to admit or exclude evidence is within the trial court's discretion. This Court will find an abuse of discretion only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994).

Suit was filed in 1991 and trial commenced on June 14, 1993. The accidental death occurred in 1988. The record shows that the DNR reports were first presented to Bruton on June 15, 1993, and to defendant at trial on June 17, 1993. Further, these records were voluminous. Plaintiff admitted to having these records well in advance of trial. The court was well within its discretion to deny admittance because of counsel's blatant violation of discovery rules.

The DNR reports were originally excluded on the basis of non-compliance with the rules of discovery. Later in the trial, when plaintiff attempted to make a record concerning the accident reports, the court indicated it had "no interest in revisiting my ruling." During plaintiff's argument, the court opined that the records from the DNR were hearsay. The court did not respond to plaintiffs argument that the reports which predate the accident were not hearsay because they were "notice", or to the argument that the reports which post-date the accident were admissible under a hearsay exception. Instead the court permitted plaintiff to make a record and then tersely commented that it had already ruled on the admissibility of the records. The DNR reports were not excluded on the basis of hearsay, but on the basis that, in light of the fact that defendant had twice taken the expert's deposition and the witness had denied preparing any statistical information, plaintiff failed to provide defendant with timely notice of this evidence and, in fact, manipulated their disclosure to maximize the element of surprise.

The court's decision to grant sanctions will not be overturned on appeal absent an abuse of discretion. *Merit Mfg & Die Inc. v ITT Higbie Mfg Co*., 204 Mich App 16, 21; 514 NW2d 192 (1994). Before imposing a sanction, several factors should be considered, including whether the violation was wilful or accidental; the party's history of refusing to comply with discovery requests or

disclosure of witnesses; the prejudice to the party; the actual notice to the opposite party of the witness; and the attempt to make a timely cure. *Colovos v Dep't of Transportation*, 205 Mich App 524, 528; 517 NW2d 803 (1994).

The trial court did not abuse its discretion in precluding admission of the DNR reports. Plaintiff specifically advised the court that it had the reports "for some time" but, felt it did not need to inform defendant that it intended to use this evidence because the DNR reports were publicly available. This admission and the many additional instances of ""surprise" evidence was enough to lead the court to conclude that plaintiffs' repeated violations of discovery were not accidental. While it is true that this evidence may have been crucial to plaintiffs' prima facie case, plaintiff created this situation for itself by its violation of discovery. Accordingly, the court did not abuse its discretion by precluding plaintiff from entering the DNR documents and data into evidence.

Affirmed.

/s/ Michael J. Kelly
/s/ Nick O. Holowka

Concurring in the result only.

/s/ Robert P. Young