STATE OF MICHIGAN

COURT OF APPEALS

ROBERT F. JAMES,

Plaintiff-Appellee,

v

GOOD SPORTS LTD, d/b/a ANN ARBOR ICE CUBE,

Defendant-Appellant.

UNPUBLISHED
February 16, 2001

No. 216023
Washtenaw Circuit Court
LC No. 96-002951-NO

Before: Kelly, P.J., and White and Wilder, JJ.

PER CURIAM.

This case arises out of an injury suffered by plaintiff when he was struck by an ice skater at defendant's ice rink in Ann Arbor. Defendant appeals as of right from three trial court orders: (1) the order denying defendant's motion for summary disposition; (2) the order granting judgment in favor of plaintiff; and (3) the order entitling plaintiff to an additional two percent interest on the judgment. We affirm.

Defendant argues that the trial court erred in denying its motion for summary disposition under MCR 2.116(C)(10) on the ground that there were genuine issues of material fact regarding whether defendant owed a duty of reasonable care to protect plaintiff from hazardous conditions at the ice rink. Defendant claims that "any risk of harm posed by the conditions present on defendant's premises was not unreasonable inasmuch as nothing unusual exists about the potential to be struck by another skater during a public skating session." We disagree.

We review a trial court's grant or denial of a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual basis underlying the plaintiff's claim. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). We review the pleadings, affidavits, and any other documentary evidence, as well as all reasonable inferences drawn therefrom, in a light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists to warrant a trial. *Id.*; MCR 2.116(G)(4).

Michigan law is clear that questions of fact regarding an unreasonable risk of harm may exist notwithstanding the open and obvious nature of the danger where there are special aspects

of the condition that make the risk of harm unreasonable. In *Bertrand v Alan Ford, Inc*, 449 Mich 606, 610-611; 537 NW2d 185 (1995), our Supreme Court stated:

> Where a condition is open and obvious, the scope of the possessor's duty may be limited. While there may be no obligation to warn of a fully obvious condition, the possessor still may have a duty to protect an invitee against foreseeably dangerous conditions. Thus, the open and obvious doctrine does not relieve the invitor of his general duty of reasonable care.

See *Singerman v Municipal Service Bureau, Inc*, 455 Mich 135, 142-143; 565 NW2d 383 (1997); *Abke v Vandenberg*, 239 Mich App 359, 363; ___ NW2d ___ (2000); *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 498-499; 595 NW2d 152 (1999); *Hughes v PMG Building, Inc*, 227 Mich App 1, 10; 574 NW2d 691 (1997).

In this case, the trial court properly concluded that although the risk of being hit by another skater during a public skating session was open and obvious, issues of fact existed regarding whether there were other aspects of the skating session and ice rink that nonetheless made the risk of harm unreasonable. In response to defendant's motion for summary disposition, plaintiff introduced defendant's "sales history report" for the day of the injury which suggested that the ice rink on which plaintiff was skating at the time of his injury was overcrowded.[1] There was also evidence that several young skaters were skating at unreasonably high speeds, chasing each other around the rink and cutting across the center ice. Further, deposition testimony revealed that there was inadequate supervision of the ice rink and skaters and, contrary to industry rules and regulations, there were no signs posted regarding improper behavior and no demarcation of center ice as a safe area at the time of plaintiff's injury. Thus, plaintiff's unrefuted documentary evidence, considered together, raised factual issues as to whether the conditions at defendant's ice rink were unusually hazardous at the time of plaintiff's injury, notwithstanding its open and obvious nature, sufficient to withstand a motion for summary disposition. Accordingly, the trial court did not err in denying defendant's motion for summary disposition.

Defendant next argues that the trial court improperly instructed the jury that defendant was insured for plaintiff's claim. We agree that the trial court's instruction was improper, but find that, on balance, the erroneous instruction was harmless and does not warrant reversal.

Claims of instructional error are reviewed on appeal for an abuse of discretion. *RCO Engineering v ACR Industries*, 235 Mich App 48, 66; 597 NW2d 534 (1999). Generally, a trial

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[1] Defendant's assistant general manager testified in her deposition that the two NHL ice rinks each had a capacity of 250 skaters and that the Olympic rink had a capacity of 300. Defendant's sales history report revealed that 659 skaters were admitted to the public rink that day. At the time of plaintiff's injury, only the two NHL rinks, with a total maximum capacity of 500 skaters, were being utilized. The Olympic rink, which was being used by the skaters at the beginning of the skating session, was cleared for resurfacing. There is no evidence in the record that the number of skaters on the NHL rinks was decreased when the Olympic rink closed, creating a reasonable inference that the NHL rink on which plaintiff was injured was overcrowded.

court may give an instruction not covered by the standard instructions as long as the instruction accurately states the law and is understandable, concise, and nonargumentative. *Central Cartage Co v Fewless*, 232 Mich App 517, 528; 591 NW2d 422 (1998). However, supplemental instructions need not be given if they would add nothing to an otherwise balanced and fair jury charge nor enhance the ability of the jury to decide the case intelligently, fairly and impartially. *Id.* Moreover, it is error to instruct a jury with regard to a matter not sustained by the evidence or the pleadings. *Id.* Jury instructions are reviewed in their entirety, and there is no error requiring reversal if, on balance, the parties' theories and the applicable law were adequately and fairly presented to the jury. *Id.*

The following exchange took place between plaintiff's counsel and defense witness James Brien, one of defendant's general partners:

> *Q*. And 659 people coming into a public skating session are going to buy a whole lot – are going to rent a whole lot more skates than hockey skaters or figure skaters, right?
>
> *A*. Correct, but the number of hours taken up by public skaters are so inconsequential compared to the hours we're open and renting to the other groups, it's not even a fair comparison.
>
> *Q*. Okay. But by the hour, public skating is –
>
> *A*. Oh, by the hour it's a wonderful business. If we could fill – if anyone could fill an ice rink 20 hours a day with 300 people, we wouldn't have lost a million dollars, we'd be making money. It, you know – the math is easy.

Following this testimony and a bench conference that was not transcribed in the record, the trial court, on its own initiative, inquired of counsel, "what do you want to do about the insurance issue?" Plaintiff's counsel requested that in order to neutralize the damage done by Mr. Brien's statement "implying to this jury . . . that they ought not to award much, if any, in this case because [defendant] won't have the ability to pay it," the trial court should tell the jury that defendant itself would not be paying the judgment or payment in this case because it had insurance. Defense counsel responded that because no motion to strike the testimony was made, and because the testimony was unresponsive to the question posed, a simple cautionary instruction to the jury that defendant's profitability or lack of profitability should not be considered was appropriate.

Thereafter, the trial court provided the following instruction during its charge to the jury:

> There was also a comment made in Mr. Brien's testimony about whether the Defendant Ice Cube has lost a million dollars from operations. In fact, the Defendant is insured for the Plaintiff's claim in this case. However, neither such insurance nor the financial status of the Defendant is to be considered by you for any purpose in your deliberation.

This Court has held that "it is not reversible error if the subject [of insurance] is only incidentally brought into the trial, is only casually mentioned, or is used in good faith for purposes other than to inflame the passions of the jury." *Cacavas v Bennet,* 37 Mich App 599, 604; 194 NW2d 924 (1972). A reference to the fact that the defendant was insured is not error warranting reversal where the reference was "an effort to rebut defense counsel's improper attempt to impress upon the jury the fact that his client was . . . unable to pay a judgment." *Cogo v Moore,* 119 Mich App 747, 756; 327 NW2d 345 (1982).

In the present case, we find that the trial court's instruction to the jury that defendant was insured for plaintiff's claim was intentionally and inappropriately interjected by the trial court. *Cacavas, supra* at 604. Although the record indicates that at the conclusion of Brien's testimony, a bench conference was held, because the bench conference was not transcribed in the record, we are unable to determine exactly what transpired. It appears, however, that the trial court's instruction to the jury that defendant was insured for plaintiff's claim was precipitously interjected by the trial court. There is no indication in the record that either party objected to Brien's testimony, moved to strike the testimony, or requested a curative/cautionary instruction to the jury at the time the testimony was given; nor is there any indication that either party deemed the testimony improper or prejudicial until after the trial court injected the issue. On this record, we are unable to conclude that the trial court's instruction advising the jury that defendant was insured for plaintiff's claim, while in the next breath instructing that such insurance was not to be considered during deliberations, was a good-faith effort to "quench the passions of the jury improperly inflamed." *Cacavas, supra.*

However, although the trial court's insurance instruction was improper, we are not convinced that the instruction was error requiring reversal. Brien's statement was unresponsive to any question asked by plaintiff during recross-examination. Plaintiff's questions related to the profitability of public skating sessions as compared to rental of the rink to hockey and figure-skating groups. There is no evidence that plaintiff sought to elicit testimony from Brien on defendant's financial condition. Rather, Brien's statement appears to have been a deliberate attempt to "paint a picture of abject destitution" in order to suggest to the jury that it would be unable to satisfy a judgment against it. *Cogo, supra* at 756. Thus, after reviewing the instructions in their entirety, we conclude that the theories of the parties and the applicable law were fairly and adequately presented to the jury and, on balance, the trial court's improper instruction on insurance was harmless error. MCR 2.613(A); *Central Cartage, supra*.

Lastly, defendant argues that the trial court erred by awarding an additional two percent interest on the judgment pursuant to MCL 600.6013(11); MSA 27A.6013(11). We disagree. We review de novo an award of prejudgment interest pursuant to MCL 600.6013(11); MSA 27A.6013(11). *Phinney v Perlmutter,* 222 Mich App 513, 540; 564 NW2d 532 (1997).

MCL 600.6013(11); MSA 27A.6013(11) provides in relevant part:

> [I]f a bona fide, reasonable written offer of settlement in a civil action based on tort is made by a plaintiff for whom the judgment is subsequently rendered and that offer is rejected and the offer is filed with the court, the court shall order that interest be calculated from the date of the rejection of the offer to the date of

> satisfaction of the judgment at a rate of interest equal to 2% plus the rate of interest computed under subsection (6).

Defendant's only argument on appeal is that because plaintiff's written offer of settlement was not filed with the court, plaintiff should not have been awarded the additional two percent interest pursuant to the statute. However, the record shows that plaintiff's letter of settlement was attached as an exhibit to plaintiff's motion to tax costs, have mediation sanctions assessed, and have interest determined, and was filed with the Washtenaw Circuit Court on November 25, 1998. See *Haberkorn v Chrysler Corp*, 210 Mich App 354, 372-373; 533 NW2d 373 (1995) (nothing in the prejudgment interest statute suggests that an offer of settlement made before the verdict may not be filed after the verdict). Defendant has failed to show that the trial court's award of an additional two percent interest on the judgment was erroneous.

Affirmed.

/s/ Michael J. Kelly
/s/ Helene N. White
/s/ Kurtis T. Wilder