2015

Lisa Penunuri and Barry Siegwart, Plaintiffs/ Appellants, vs. Sundance Partners, Ltd; Sundance Holdings, LLC; Sundance Develop11ent Corp; Robertredford;redford 1970 Trust; Rock Mountain Outfitters, l.c.; And Does I-X. Defendants and Appellees.

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

LISA PENUNURI and BARRY SIEGWART, Plaintiffs/Appellants, vs. SUNDANCE PARTNERS, LTD; SUNDANCE HOLDINGS, LLC; SUNDANCE DEVELOPMENT CORP; ROBERT REDFORD; REDFORD 1970 TRUST; ROCKY MOUNTAIN OUTFITTERS, L.C.; and Does I-X. Defendants/Appellees.	APPELLANTS' REPLY BRIEF Case No. 20140854 Trial Case No: 08040019

REPLY BRIEF OF THE APPELLANT

ON APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH
The Honorable CLAUDIA LAYCOCK, Presiding

H. BURT RINGWOOD
A. JOSEPH SANO
STRONG & HANNI
102 South 200 East, Suite 800
Salt Lake City, UT 84111
Telephone: (801) 532-7080
Facsimile: (801) 531-9747
Attorneys for Appellees

ROBERT D. STRIEPER (10145)
STRIEPER LAW FIRM
2366 Logan Way
Salt Lake City, UT 84108
Telephone: (801) 631-6421
Facsimile: (801) 416-3616
robert@strieperlaw.com
Attorney for Appellants

Oral Argument and Published Decision Requested

IN THE UTAH COURT OF APPEALS

LISA PENUNURI and BARRY SIEGWART, Plaintiffs/Appellants, vs. SUNDANCE PARTNERS, LTD; SUNDANCE HOLDINGS, LLC; SUNDANCE DEVELOPMENT CORP; ROBERT REDFORD; REDFORD 1970 TRUST; ROCKY MOUNTAIN OUTFITTERS, L.C.; and Does I-X. Defendants/Appellees.	APPELLANTS' REPLY BRIEF Case No. 20140854 Trial Case No: 08040019

REPLY BRIEF OF THE APPELLANT

ON APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH
The Honorable CLAUDIA LAYCOCK, Presiding

H. BURT RINGWOOD
A. JOSEPH SANO
STRONG & HANNI
102 South 200 East, Suite 800
Salt Lake City, UT 84111
Telephone: (801) 532-7080
Facsimile: (801) 531-9747
Attorneys for Appellees

ROBERT D. STRIEPER (10145)
STRIEPER LAW FIRM
2366 Logan Way
Salt Lake City, UT 84108
Telephone: (801) 631-6421
Facsimile: (801) 416-3616
robert@strieperlaw.com
Attorney for Appellants

Oral Argument and Published Decision Requested

TABLE OF CONTENTS

* * *

TABLE OF AUTHORITIES

ARGUMENT

On August 1, 2007 Rocky Mountain Outfitter's ("RMO") guide Ashley Wright (guide Ashley) took Ms. Penunuri and five other riders on a guided horseback ride at Sundance, Utah (Record at 607). Ms. Penunuri was thrown from her horse when it suddenly accelerated after it had climbed a steep incline and rounded a bend; at the bend there were hikers (R. 589, and 597). Prior to the sudden acceleration, the guide Ashley had permitted large gaps to develop between the horses in her group, which violated the internal guidelines of RMO. (R. 590, 1252-1253, 1261 and 1575, p. 39).

It is undisputed that RMO and its employee/guides had a duty to keep Ms. Penunuri safe while they guided her on a horse ride at Sundance (R. 590, 898). Part of that duty was to ensure that large gaps did not form between the horses in the group and to ensure that there were absolutely no large gaps when the train of horses came upon known hazards such as, bends in the trail, steep climbs, hikers or other obstacles (Id). It is undisputed that large gaps will cause a horse to accelerate unexpectedly, especially when that horse comes upon what a horse could perceive as a hazard, such as hikers, hills or sharp bends in the trail (R. 590). It is the testimony of Plaintiffs' expert that if there are no gaps in the train of horses the horse is unlikely to accelerate when it comes upon the perceived danger (R. 588, 949-950 and 966-967). RMO's guide's manual states that the guide must keep the

ride under control and the guide is to prevent large gaps from forming as the gaps will cause a horse to suddenly accelerate. (R. 898).

RMO's owner, RMO's expert, RMO's employee and guide Brandon Whitely, and Ms. Penunuri's expert each agree that a large dangerous gap between horses is somewhere between 2 to 4 horse lengths apart. (R. 590, 645, 1009, and 1034,). A horse length is eight feet long (R. 1009). Guide Brandon Whitely further testified that gaps of ten horse lengths will cause a horse to suddenly accelerate (R. 632, 644, and 1262). (In contrast to everyone else's testimony, Ms. Penunuri's guide, Ashley Wright, testified that there is no problem with having a ten horse length gap in her guided train of horses (R. 683)). It is also recognized that large gaps become more dangerous when the horse perceives a danger, such as hikers, hills and sharp bends, and when a guide comes upon those dangers the distance between horses should be decreased to somewhere between one and two horse lengths (R. 590, 1254 and 949-950).

The largest gap permitted therefore should be less than thirty-two (32) feet if there were no hikers, hills or steep climbs (R. 590). In the present case the gap should not have been over sixteen feet, because of the steep incline, sharp curve, and hikers standing hidden in the woods, which the guide Ashley saw and passed (R. 590, 1254 and 949-950). It is undisputed that at the time Ms. Penunuri's horse

came upon the hikers, that there were gaps in the train of horses of 125 feet or fifteen and a half horse lengths (R. 597 and 1261).

According to Ms. Penunuri's expert Scott Earl, the guide Ashley breached her duty when she failed to STOP the moment she came upon the hikers (R. 949-959 pp. 57-59). Ms. Wright was required to close the gaps down to two horse lengths before the other horses reached the hikers hidden in the woods after the blind curve (Id). Mr. Earl testified, but for the gaps, Ms. Penunuri's horse would not have accelerated when it climbed up around the bend and came upon the hikers (R. 956, 966-967). On August 1, 2007, Ms. Penunuri's horse, suddenly and unexpectedly to her, accelerated and she was thrown to the ground suffering a C3-C4 subluxation fracture of her neck with resulting spinal cord syndrome (R. 589).

I. Gross Negligence.

The trial court incorrectly determined that Ms. Penunuri could not demonstrate any set of facts with which a jury could reasonably determine that RMO was grossly negligent, and the trial court created its own set of undisputed facts and disregarded every fact favoring Ms. Penunuri's gross negligence claims (R. 1547-1555, and 1540-1543). The trial court determined that a jury should not determine the extent to which RMO deviated from the standard of care (R. 1545-1547). The Supreme Court of Utah and the 10th Circuit have reiterated that it is the jury's ultimate decision to determine the degree that a defendant deviated from the

standard of care in negligence and it is for the jury to determine if the defendants' culpable breach deviated to a degree that reached the level of gross negligence.[1]

RMO relied solely upon *Blaisdel v. Dentrix Dental Systems, Inc.* [2] for their proposition that this trial court was correct in removing from the jury the issue of gross negligence. In *Blaisdell,* the defendant was accused of being grossly negligent when it lost all of a dentists' computers records while working on the dentists computers.[3] The undisputed fact in *Blaisdell* was that the dentist was asked to back up all his files before the defendant started to work on the computers, as there was a risk that the files could be lost.[4] Regardless, the dentist did not back up the files and the files were lost.[5] The Court determined that in *Blaisdell*, no reasonable jury could determine that the Defendants acted with gross negligence.[6] In Ms. Penunuri's case Ashley never informed Ms. Penunuri to not allow large gaps to form between the horses, in fact the guide Ashley testified that she herself did not find that large gaps were even a danger to the riders (R. 983-984, 632). There is also no evidence that Ms. Penunuri had any ability to control the gaps as she was riding behind an eight year old child who had no control over

---

[1] *See Milne v. USA Cycling Inc.* 575 F.3d 1120, 1126 (10th Cir, 2009), citing *Berry v. Greater Park City Co.*, 2007 UT 87 at ¶30, 171 P.3d 442, 449.
[2] *See Blaisdell v. Dentrix Dental Systems, Inc.* 2012 UT 37, 284 P.3d 616
[3] *See Id* at ¶ 3
[4] *See Id* at ¶ 4
[5] *See Id*
[6] *See Id* at ¶ 7

the pace her horse was traveling and Ms. Penunuri had difficulty keeping her own horse from grazing (R. 601). It would be inappropriate to shift the burden of keeping the gaps from forming onto the inexperienced riders, as the training manual provided to the guides by RMO each year stressed that it was the guides' duty to keep the ride safe and it was the guide who was responsible to keep gaps from forming (R. 898). The only person who could actually keep gaps from forming was the guide by continually looking back to ensure that all the participants were moving forward and to slow down or stop the ride completely when gaps started to form (Id).

In arguendo, even if the guide Ashley had told Ms. Penunuri not to allow gaps between her and the other horses and Ms. Penunuri had the skills to do so, when the guide Ashley came upon the hikers she was still the only person who could have closed the gaps at that moment by stopping and waiting until everyone came together before proceeding (R. 588, 949-950 and 966-967). The guide Ashley instead of stopping chose to ride up another 100 feet to a clearing (R. 599-560).

A jury certainly could determine that the guide Ashley deviated from the known standard of care to have acted where she "kn[ew] or ha[d] reason to know of facts [] which created a high degree of risk of physical harm to another, and

deliberately proceeded to act, or fail to act, in conscious disregard of, or indifference to, that risk."[7]

In this instance it is undisputed that the guide Ashley had been to RMO's yearly guide instruction classes on several occasions (R. 606-607). The classes went over safety of riders (Id). During the classes, the guide Ashley was instructed to take her "responsibility seriously" and was informed that "[g]uests trust you with their safety" including rely upon her "for experience, instruction, leadership, and knowledge" (R. 637, 898). The guide Ashley was instructed that it was her "responsibility to continually watch over and monitor the safety . . . of her guests" (Id). The guide Ashley was instructed to "[a]djust [her] pace so that large gaps do not form between horses in [her] string and informed [g]aps encourage horses to trot un-expectedly" (Id). The guide Ashley was taught to instruct the guests about "upcoming obstacles that may be difficult or intimidating," such as "up-hills" and "hikers" (Id). RMO's owner, Joseph Loverage testified that the most dangerous place in the train of horses was the front, because there was nothing to stop the horse from accelerating (R. 1007 p. 54).

According to the owner of RMO, Joseph Loverage, gaps of over two to three horse lengths was a large gap (R. 590). According to RMO's expert, Rex Walker, gaps should be kept between two to three horse lengths (Id). According to RMO's

---

[7] *See Daniels v. Gamma West Brachytherapy*, 2009 UT 66, ¶ 43, 221 P.3d 256.

guide Brandon Whitely, he testified that gaps should be kept at one to two horse lengths; he also testified that RMO's horses would accelerate unexpectedly if the gaps were ten horse lengths (80 feet) (R. 590, 632, 644). According to Plaintiffs' expert, Scott Earl,[8] gaps over four horse lengths is too large (R. 949). According to Mr. Earl, when a guide comes along a hazard such as an up-hill or comes across hikers, as in this case, the gaps should be no more than two horse lengths (R. 947 p. 68, 948 p. 63, 944 p. 80). Given the fact, that the guide permitted gaps of 125 feet, or 15.6 horse lengths at the same time she was passing hikers, a jury certainly can reasonably conclude that the guide knew her actions created a high degree of risk of physical harm, and yet she proceeded to act in indifference to the risk (R. 597, 1261). The trial court improperly removed the issue of the deviation of the breach of the standard of care from jury as they could have reasonably found that the guide Ashley was grossly negligent.

---

[8] Mr. Earl was hired to testify as to whether or not RMO's guide breached the standard of care and causation. In Utah it is for the jury to determine how far the defendant deviated from the standard of care and if that deviation reached the level of gross negligence. See *Davidson v. Prince*, 812 P.2d 1225, 1231 (Utah Ct. App. 1991)(finding "an expert generally cannot give an opinion as to whether an individual was 'negligent' because such an opinion would require a legal conclusion.") The rule prohibiting experts from providing their legal opinions or conclusions is "so well-established that it is often deemed a basic premise or assumption of evidence law—a kind of axiomatic principle." Thomas Baker, the Impropriety of Expert Witness Testimony on the Law, 40 U. Kan L. Rev. 325, 352 (1992) Finding that Ms. Ashley acted with "no care" at all or that she acted "intentionally" or in "willful disregard for the care" are all legal conclusions left for the court; legal conclusions that the trial court would instruct the jury on.

II. Causation

RMO continues to take Mr. Earl's testimony out of context. What he testified to is that it does not matter what spooked, startled or started Ms. Penunuri's horse' acceleration, whether it was the hikers, coming around the sharp curve, climbing the steep hill, or that the horse just determined that it was going to catch up, because as Mr. Earl testified that without the large gaps Ms. Penunuri's horse would not have suddenly accelerated (R. 948-949 p. 61-62, 944 p. 80). The horse would not have been as easily spooked or spooked at all, it would have had no reason to catch up, and it would not have had room to accelerate if the gaps were not present (Id). RMO warns the guide to prevent the gaps in the first place to prevent the combination of events that gives rise to the sudden unexpected and dangerous acceleration (R. 898).

III. Mr. Earl Is Qualified To Testify As an Expert

Rule 702(a) provides:

> Subject to the limitations in paragraph (b), a witness is qualified to testify as an expert by knowledge, skill, ***experience***, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or determine a fact in issue.[9]

Regardless of Mr. Earl's experience gained from the thousands of miles that he has spent on a horse riding in groups in Utah's mountains, the trial court agreed

[9] Utah R. Evid. Rule 702.

with RMO which contended that Mr. Earl was not qualified to testify because he was unaware of published regulations controlling the industry standards as to gaps (R. 952, 1067, 1540). Mr. Earl testified that his experience and knowledge regarding safe distances of gaps comes from his own "experience, [] in his years of riding" (Id). Ironically, RMO's expert Rex Walker confirmed that there are no regulations or published regulations controlling the industry standards of guided trail rides and that his knowledge was also gained from his experience in riding horses in groups (R. at 1034, p. 60, 1066).

The trial court relied upon *Milne v. USA Cycling*, a federal case where the expert was determined to be unqualified.[10] As RMO points out, the expert in *Milne* had plenty of experience in road bike races yet had only two experiences in participating in mountain bike races fifteen years ealier.[11] The Tenth Circuit determined the expert relied "almost exclusively on his experience in paved road racing—experience that the district court reasonably determined was inapplicable to the context of mountain bike racing."[12] Unlike *Milne*, Mr. Earl had participated as a guide in nearly a thousand paid trail rides thirty years ago,[13] and has continued

---

[10] *See* 575 F.3d 1120 (10th cir. 2009).
[11] *See Id* at 1133.
[12] *See Id* at 1133-1134.
[13] In RMO's brief at footnote no. 6, RMO claims Mr. Earls having guided 6,360 rides is a gross exaggeration and has no foundational support in the record. Ms. Penunuri inadvertently made a mathematical error, Mr. Earl testified that he worked for four to five months at Desert Springs Country Club and took riders out

to participate in trail rides over those thirty years, guiding family and friends through Utah's mountains. (R. 960, 967, and 1067) As pointed out, a horse does not know if it is in a hired guided ride or in a family guided ride, it does not care if the rider is highly experience or if it is a beginner, it will behave exactly the same if the gaps get too large or particularly when gaps have formed and it suddenly comes upon a horse perceived danger. Mr. Earl's forty some years' experience as to what a horse will likely do in regards to gaps and obstacles and when that horse will do it is all that he needs to be an expert in this case.

Plaintiffs' expert Mr. Earl met the threshold requirements to be an expert. Mr. Earl has been on thousands of trail rides throughout Utah's mountains. Mr. Earl has gained his knowledge through his experience (R. 1066). According to RMO the only requirement to becoming a guide is to have experience with horses, and Mr. Earl has significant history of working with guided rides and riding horses on trails. (R. 1070). According to RMO the only safety issues on the ride itself, are to keep large gaps from forming, keep guests in sight at all times possible, advise the guests of upcoming obstacles, and reassess the tightness of saddles. (R.

---

three to four times a week; 4 weeks in each month or, 4 weeks x 5 months x 3 rides = 60 guided rides at Desert Springs. He worked for two years at Jeremy Ranch for five months seven days a week and took guided rides out three times a day. 30 days in a month on average; 30 days x 5 months x 2 years x 3 rides/day each = 900. Therefore, Mr. Earl was paid to guide a total of 960 horse rides. RMO inadvertently refers to Ms. Penunuri's ride as a four hour ride; it was 2 hours.

1069-1070). According to Mr. Earl these are the same requirements he has learned through his years of group trail riding. (R. 1066).

The requirements a rider needs to heed while on any group ride regardless if the ride is just a pleasure ride or a paid guided ride are exactly the same. (Id). Mr. Earl's experience has taught him that if horses get more than four horse lengths apart they will tend to run up and catch up with the herd. (R. 949). His experience has taught him that if a horse perceives a threat on the trail and there are gaps between the horses, the horse is all the more likely to speed up to catch up with the herd (R. 946, 949-950). His experience has taught him that when you are out on a trail ride with other riders and you come across hikers, you stop and wait for all the horses to come together and once all the horses are within one to two horse lengths only then does the leader proceed past the hikers to keep any of the straggling horses from suddenly accelerating (R. 945). The trial court erred when it disqualified Mr. Earl, because he did not know of a published standard of care, when no such published standard of care even exists, as RMO's expert confirmed. (R. 1034).

IV. Costs

In *Jensen v. Sawyer,* the Supreme Court of Utah determined that to award costs of depositions to the prevailing party, the "information provided by the depositions *could not have been* obtained through less expensive means of

discovery."[14] In this case, the trial court made no findings that the information could not be discovered through less expensive means, instead it just determined that the information obtained in the depositions were essential to the case and completely ignored the Supreme Court of Utah's mandate that the information which may be ever "so necessary" still requires a showing that it could not be obtained through less expensive means.[15] The trial court erred as every fact obtained and demonstrated in Exhibit D to Ms. Penunuri's Opening Brief, could certainly have been obtained through interrogatories.

CONCLUSION

For the foregoing reasons, Ms. Penunuri respectfully requests that this Appellate Court find in her favor and reverse the Summary Judgment Motions, allow her to keep her expert, and remand this case for trial. Additionally, Ms. Penunuri also requests that this Appellate Court find the costs were excessive and strike the costs awarded to RMO.

Respectfully submitted this 10th day of June 2014.

STRIEPER LAW FIRM

s/s Robert Strieper

ROBERT D. STRIEPER
Attorney for Plaintiffs/Appellants

[14] *See* 2005 UT 81 at ¶ 139.
[15] *See Id* at 141, FN 14.

Requirements

I hereby certify that this brief complies with the type volume limitations of Utah R. App. P 24(1)(A) because the brief contains 3,737 words excluding parts of the brief exempt by Utah Rules App. P. 24(f)(1)(B), This brief complies with the typeface requirements of Utah Rules Appellate Procedure 27(b) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2013 in 14 point Times New Roman font.

and

MAILING CERTIFICATE

I hereby certify that on this 10th day of June 2015, I caused to be delivered two true and correct hard copies and one CD of the Reply Brief of Appellants and to be served on Appellees via USPS first class mail:

A.J. Sano
Burt Ringwood
STRONG & HANNI
102 South 200 East, Suite 800
Salt Lake City, UT 84111

s/s Robert Strieper