SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOHN J. KELLEY **PART** IAS MOTION 56EFM

Justice

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STEVEN MADSEN and REBECCA MADSEN, individually and as parents and natural guardians of C.M., an infant,

Plaintiffs,

- v -

CATAMOUNT DEVELOPMENT CORPORATIION,

Defendant.

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INDEX NO. 157038/2015

MOTION DATE 05/08/2019

MOTION SEQ. NO. 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 90, 91, 92, 93, 94, 95, 96, 97

were read on this motion to/for PRECLUDE.

The defendant moves in limine to preclude the plaintiffs' ski safety expert, Raul Guisado, from testifying as to proper ski-slope safety management. It also seeks to preclude the plaintiffs' medical experts---orthopedic surgeon Andrew Miller and plastic surgeon Paul S. Striker---from testifying that the injuries sustained by the plaintiffs' daughter would have been less severe had the snow-gun pole with which she collided been padded. The defendant also seeks to preclude the plaintiffs from admitting into evidence certain photographs of the accident scene on the ground that they are too blurry to assist the jury in understanding the layout of the scene shortly after the accident. The motion is denied.

"Expert testimony is properly admitted to assist lay persons to understand matters that are not ordinarily within their understanding" (*People v Brown*, 97 NY2d 500, 510 [2002]). "For a witness to be qualified as an expert, the witness must possess the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable" (*Schechter v. 3320 Holding LLC*, 64 AD3d 446, 449 [1st Dept 2009]). "[A]n expert may be qualified without specialized academic training through '[l]ong observation and actual

experience'" (*Price v New York City Hous. Auth.*, 92 NY2d 553, 559 [1998], quoting *Meiselman v Crown Hgts. Hosp.*, 285 NY 389, 398 [1941]). As the plaintiffs note, their ski-safety expert has been a World Cup and Olympic Alpine Ski coach and official since 1995, specifically, a United States Ski and Snowboarding Association (USSA) Alpine-Level 500 Coach, a level that is the highest possible ski coaching certification level. Moreover, he has participated in many USSA clinics, seminars, and summits addressing best practices for hazard protection, hill preparation, and the assurance of skier and snowboarder safety. This is sufficient to qualify him to testify as an expert on the issue of whether industry standards and best practices require a snow-gun pole situated on a ski trail, or where people are likely to be skiing, should or must be padded.

The court rejects the defendant's contention that Drs. Miller and Striker should be precluded at the outset from testifying that the plaintiffs' daughter's injuries would have been less severe if the snow-gun pole had been padded when she collided with it. Rather, as long as the plaintiffs lay a proper foundation for their testimony in this regard, it should not be precluded. At this stage of the litigation, the defendant has not shown that these physicians lack the requisite training, skill, or knowledge to ascertain and opine on that issue. If a proper foundation is laid, the physicians may testify, and the extent of their qualifications will only go to the weight to be given their testimony.

Grandeau v South Colonie Cent. School Dist. (63 AD3d 1484 [3d Dept 2009]), relied on by the defendant, is not to the contrary. *Grandeau* involved a summary judgment motion, not the preclusion of trial testimony. In *Grandeau,* the defendant established, prima facie, through the affidavit of a biomedical engineer, that the inclusion of extra cushioning on a playground surface would not have mitigated the severity of the injuries sustained by the infant plaintiff in a fall. The Court held that the plaintiffs there failed to raise a triable of fact in opposition with the affidavit of an emergency room physician, who, based only "upon his clinical experience and intuition," opined that it "was 'probable' that the child would have sustained less severe injuries if the apparatus had been lower and the cushioning had been deeper" (*id.* at 1486). As the Court

concluded, "[s]ince these experts' opinions are purely conclusory and fail to address the detailed physical analysis by defendant's expert, they have no probative force and are, therefore, insufficient to raise a question of fact as to proximate cause" (*id*).

The court notes, however, that inasmuch as Dr. Striker has already testified, and the plaintiffs were unable to lay a foundation for giving an opinion as to whether padding would have mitigated their daughter's injuries, the court sustained the defendant's objections to questions seeking to elicit such an opinion from him. Nonetheless, since the defendant's expert has yet to testify, and the plaintiffs have yet to be given an opportunity to establish a proper foundation for Dr. Miller's proposed testimony in connection with the issue of whether padding would have mitigated their daughter's injuries, the court declines to preclude him from testifying in this regard at this juncture. If the plaintiffs are unable to lay such a foundation through Dr. Miller's testimony, however, the court may sustain any timely objection to such testimony.

There is no merit to the defendant's contention that certain photographs sought to be admitted by the plaintiff are too blurry to assist the jury in understanding the physical layout of the accident scene. Hence, those photographs may be admitted into evidence, subject to the laying of a proper foundation and authentication (*see generally Batton v Elghanayan,* 43 NY2d 898, 899 [1978]; *Cubeta v York Intl. Corp.*, 30 AD3d 557, 561 [2d Dept 2006]).

Accordingly, it is

ORDERED that the defendant's motion is denied.

This constitutes the Decision and Order of the court.

5/23/2019
DATE

JOHN J. KELLEY, J.S.C.

HON. JOHN J. KELLEY
J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED	[X]	NON-FINAL DISPOSITION	[ ]	OTHER
APPLICATION:	[ ]	GRANTED	[X]	DENIED	[ ]	GRANTED IN PART		
	[ ]	SETTLE ORDER			[ ]	SUBMIT ORDER		

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