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APPELLATE COURT 2nd DISTRICT

No. 2--07--1271

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

SONDRA BACKES and BARRY BACKES, Administrators of the Estate of AMANDA MARIE BACKES, deceased,	)	Appeal from the Circuit Court of Winnebago County.
Plaintiffs-Appellants,	)	
v.	)	No. 02--L--52
BOMBARDIER, INC., a Quebec corporation, and JOSEPH GIBSON,	)	Honorable Ronald L. Pirrello,
Defendants-Appellees.	)	Judge, Presiding.

RULE 23 ORDER

On June 30, 2001, Amanda Backes, a nine-year old girl, died after a 1994 Sea-Doo XP being operated by Joseph Gibson collided with her as she was being towed on a tube on a small lake in Wisconsin. Her parents brought suit against Gibson and also against Bombardier, Inc., the manufacturer of the Sea-Doo, alleging that the Sea-Doo was defectively designed so that steering was lost when the throttle was released. Gibson did not file an answer and a default judgment was entered against him. Bombardier contested liability. On May 25, 2007, after a trial lasting most of two weeks, a jury found that both of these defendants contributed to the death of Amanda, and allocated 95% of the liability to Gibson and 5% to Bombardier. The plaintiffs appealed, contending that trial court errors in ruling on the admissibility of certain evidence prejudiced them and resulted in too low an allocation of liability to Bombardier. We reverse and remand.

On February 1, 2002, Amanda's parents filed suit against Gibson and Bombardier. They subsequently amended the complaint, culminating in a second amended complaint filed on August 21, 2003, sounding in negligence and product liability. As noted, Gibson did not answer any of the complaints, and the trial court eventually entered a default judgment against him on liability. Bombardier answered and denied liability. Bombardier also filed a third-party complaint against Sonnie Smith (the driver of the boat that had been towing Amanda on the tube), and Jeffrey and Yvette Oliver (the owners of the boat that had towed Amanda). Yvette Oliver had also been serving as the "spotter" assigned to watch Amanda while she was tubing. Jeffrey Oliver was voluntarily dismissed from the lawsuit before trial began, and Yvette Oliver was voluntarily dismissed from the suit before the end of the trial.

One of the key issues at trial concerned the extent to which early designs of PWCs, including the 1994 Sea-Doo XP that struck Amanda, demonstrated a lack of "off-throttle steering": that is, their ability to maneuver was compromised when the throttle was released. On May 4, 2007, with the trial approaching, Bombardier and the plaintiffs filed various motions in limine. Among other things, Bombardier sought to bar any reference to a 1996 Safety Study by the National Transportation Safety Board (NTSB) of accidents involving personal watercraft (PWCs) such as the Sea-Doo, while the plaintiffs moved to allow the admission of the NTSB study. The NTSB study noted that "PWC have unique operating characteristics, such as the loss of control during off-throttle steering," and "concluded that some of the operator control problems may be attributed to the operating design of PWC." The trial court ultimately permitted experts to discuss the study, but did not admit the study itself into evidence.

The plaintiffs moved to bar any references to an opinion contained in a 2002 letter from the United States Coast Guard to Fernando Garcia, a Bombardier employee, stating that the Coast Guard had "consistently held that the steering designs of existing personal watercraft [were] not defective." The plaintiffs argued that the Coast Guard opinion was hearsay, and had not been identified as being an opinion relied upon by any of the expert witnesses. Bombardier argued that if the plaintiffs were allowed to talk about the NTSB study, it should be allowed to talk about the Coast Guard opinion. The trial court granted the motion in limine to the extent that it barred any mention of the Coast Guard opinion unless its permission had first been secured, thus postponing its ruling until the matter arose at trial. During trial, Bombardier was successful in questioning various witnesses about the Coast Guard opinion, and the trial court overruled the plaintiffs' objections to the questioning.

The plaintiffs also moved to bar Bombardier from presenting Fernando Garcia as a witness on the basis that he was likely to offer expert opinions and testimony, and Bombardier's answers to interrogatories did not meet the requirements of Supreme Court Rule 213(f) (210 Ill. 2d R. 213(f)) for the disclosure of opinions held by controlled expert witnesses. The trial court ruled that Garcia could testify, but only as a "fact witness" and not as an expert. The plaintiffs also sought to bar the viewing and admission of an animated video created by Bombardier's expert witness, Robert Taylor, which showed several scenarios in which the collision purportedly could have been avoided despite the Sea-Doo's off-throttle steering characteristics. The trial court reserved the issue and ultimately allowed the video to be shown to the jury during Taylor's testimony.

On May 25, 2007, the jury returned a verdict finding Bombardier and Gibson, but not Sonnie Smith, liable for Amanda's death. The jury awarded damages totaling $2 million. The jury determined that Gibson was 95% at fault, resulting in a judgment of $1.9 million against him, and

Bombardier was 5% at fault, resulting in a $100,000 judgment against it. The plaintiffs filed a posttrial motion and then, when that was denied, a timely notice of appeal.

Although the plaintiffs raise several issues on appeal relating to the trial court's decisions on the use and admissibility of various items of evidence, we begin with the issue that we believe requires a new trial: the use of the animated video created by Bombardier. The plaintiffs filed a motion in limine to bar the use of the video, arguing that the scenarios presented in the animation were not supported by the testimony given at trial and that they represented a one-sided view of Bombardier's theory of the case. Bombardier argued that the animation was based on the same information included in their charts, the plaintiffs had not objected to the use of the charts, and the animation was no different. The trial court agreed with Bombardier and permitted Bombardier's expert witness Taylor to use the animation during his testimony to support his opinions that Smith and Gibson were solely at fault for the accident. The trial court did not view the animation before allowing its use. On appeal, the plaintiffs argue that the trial court erred in permitting the use of the animation, and that its use prejudiced them unfairly, requiring a new trial on the allocation of liability.

"Demonstrative evidence has no probative value in itself. It serves, rather, as a visual aid to the jury in comprehending the verbal testimony of a witness." Cisarik v. Palos Community Hospital, 144 Ill. 2d 339, 341 (1991). Before a video may be admitted or used as demonstrative evidence, (1) someone having knowledge of its creation must lay a foundation showing that the video "is an accurate portrayal of what it purports to show," and (2) its probative value must not be substantially outweighed by the danger of unfair prejudice. Cisarik, 144 Ill. 2d at 342. The admission or use at trial of a video as demonstrative evidence is a matter within the sound discretion of the trial court, and will not be disturbed absent an abuse of that discretion. Spyrka v. County of Cook, 366 Ill. App.

3d 156, 167 (2006). A trial court abuses its discretion when its ruling is arbitrary, fanciful or unreasonable, so that no reasonable person would take the same view, or when it applies impermissible legal criteria. Spyrka, 366 Ill. App. 3d at 167.

In French v. City of Springfield, 65 Ill. 2d 74, 82 (1976), the supreme court held that the admission and use of a video purporting to show how a motor vehicle accident occurred was reversible error, where the video (1) contained important differences from witnesses' trial testimony regarding the conditions at the scene of the accident and (2) reflected one party's view of the case. A video containing these flaws does not meet the Cisarik two-part test to lay a foundation for the use of the video. First, if the video differs from witnesses' testimony regarding the conditions at the scene, it is not "an accurate portrayal of what it purports to show" (Cisarik, 144 Ill. 2d at 342), and therefore fails the first prong. Second, when a video presents only one party's view of the manner in which an event occurred, it is unduly prejudicial because it "precondition[s] the minds of the jurors to accept [that party's] theory because the film depict[s] what [that party] claims occurred." French, 65 Ill. 2d at 82. Under these circumstances, the admission or use of a video is reversible error. French, 65 Ill. 2d at 82. Similarly, in Spyrka, a video that purported to show, "in a step-by-step fashion," the plaintiff's theory as to how a patient died, and which made no attempt to account for contrary testimony and opinions voiced by the defendant's expert witnesses, was deemed sufficiently prejudicial that its use during the plaintiff's expert's testimony at trial required reversal and remand for a new trial. Spyrka, 366 Ill. App. 3d at 169.

Here, the animated video created by Bombardier failed both prongs of this two-part test. The video contained five scenarios. The first was a recreation of the collision and the 8.5 seconds immediately before the collision, based on the assumptions that (1) the Sea-Doo was traveling at 20

miles per hour (2) in a straight course perpendicular to the course of the boat towing Amanda; (3) the Sea-Doo maintained a straight course throughout; (4) the throttle of the Sea-Doo was released four seconds before the Sea-Doo struck Amanda; and that (5) the boat was also traveling at a constant 20 miles per hour in a straight line. This first scenario was depicted three different ways: from directly overhead, showing simple representations of the Sea-Doo and the boat (and Amanda's tube) heading toward each other across a flat blue grid; from a "seagull's-eye view" as if the viewer were standing behind and slightly above the driver of the boat; and from a "seagull's-eye view" behind the driver of the Sea-Doo. In none of the depictions were any other boats, PWCs, swimmers, manmade obstructions such as docks, or the borders of the lake shown.

The remaining four scenarios were Taylor's projections of what would have happened if Smith or Gibson had acted differently than he did. One projection purported to show that there would have been no collision if Gibson had released the throttle four seconds before impact, and at the same time Smith had steered the boat to the right as hard as possible for the next several seconds, with all of the other variables remaining the same. Another showed that there would have been no impact if Smith had pulled the boat's throttle back to neutral at the same time that Gibson released the throttle of the Sea-Doo (four seconds before the impact). Yet a third alternative purported to show that the collision between the Sea-Doo and Amanda's tube still would have occurred, but with less force, if Smith had pulled the boat's throttle back to neutral only after Gibson's Sea-Doo missed the back of the boat. The last scenario purported to show that Gibson could have avoided the collision if he had continuously steered the Sea-Doo hard to the left as soon as he saw the boat ahead of him. Each of these scenarios were depicted in the same three ways (directly overhead, "seagull's-eye view" behind

the boat, and "seagull's-eye view" behind the Sea-Doo), and none of them showed any other watercraft, swimmers, the edges of the lake, or manmade obstructions such as docks.

Taylor created the animated scenarios by conducting actual tests using a 1994 Sea-Doo XP and a boat similar although not identical to the boat that had been towing Amanda. The tests were not done at the lake where the collision occurred; in fact, Taylor had never visited that lake. The boat and the Sea-Doo had sensors attached to them which allowed their speed, GPS position, steering inputs and throttle position to be recorded while they performed the maneuvers described above. The data collected was recorded on charts, which in turn were used to generate the computerized animations. Thus, the animated scenarios appear to have been accurate representations of the data collected. The question is whether the data collected accurately reflected the conditions at the time of the accident.

The plaintiffs argue that the animation varied from the conditions at the scene of the accident, as described by witnesses, in a number of ways. To begin with, the animations did not reflect the true condition of the lake, including its dimensions or the presence of other watercraft, docks, or swimmers. James Bosben, Captain of the Rock River Safety Patrol, testified that Clear Lake (where the accident occurred) was a small lake with one state-run campground on its shores, and a state-run boat landing. The lake was about one-half mile wide, and one-quarter to one-third mile long. Smith testified that a local ordinance required all watercraft wishing to go "faster than slow in a wake" to stay at least 200 feet from the shore, with the result that all of those vessels ended up in the center portion of the lake. By local custom, all craft proceeded around the lake counterclockwise. Gibson testified that the lake was very crowded with a lot of boats on it. He thought that there were two pontoon boats, a couple of power boats, paddle boats, a sailboat, and five to ten PWCs. Other

observers believed there were a handful of PWCs, and a few boats including at least one pontoon boat. There was a beach and a swimming area along one edge of the lake. None of Bombardier's animated scenarios included any information about the size of the lake relative to the course of the two vessels shown in the scenarios, nor did any of them show any watercraft besides the Sea-Doo and the boat towing Amanda. Thus, the scenarios gave a false impression of unlimited space around those two craft, and therefore unlimited room for maneuverability.

We also agree that the evidence did not establish that Gibson was traveling at 20 miles per hour at the time that he saw the boat and released the throttle. When interviewed shortly after the accident, Gibson told James Bosben, Captain of the Rock River Safety Patrol, that he had been traveling about 20 miles per hour before he released the throttle. Gibson testified at trial, however, that just before he saw the boat he had been going close to the Sea-Doo's top speed, about 30 to 35 miles per hour, he thought. Smith testified that the Sea-Doo was traveling at "a high rate of speed" when he first saw it approaching, but he did not know how fast that was. Thus, the evidence did not establish whether the Sea-Doo was traveling 20 miles per hour, 35 miles per hour, or some other speed. Taylor testified that he conducted reenactments and collected data for scenarios in which the Sea-Doo was traveling at various rates of speed. However, he chose to testify at trial using animations only of those scenarios in which the Sea-Doo was traveling 20 miles per hour prior to the throttle being released, not scenarios involving other speeds.

Taylor's use of 20 miles per hour as the Sea-Doo's speed in all of the scenarios also affected other aspects of the scenarios. Taylor testified that he worked backwards from the point of impact, because all of the witnesses were fairly unanimous that the Sea-Doo missed the back of the boat by only a few feet, that the collision between the Sea-Doo and Amanda's tube occurred almost

immediately thereafter, and that the Sea-Doo was either stopped or more likely traveling at idle speed (two to three miles per hour) at the time of the collision. Taylor determined that Gibson released the throttle on the Sea-Doo approximately four seconds before the collision by assuming that the Sea-Doo had been traveling 20 miles per hour and using known deceleration formulas. If Gibson were actually traveling at some other rate of speed, that would affect the length of time it took to decelerate to idle speed and would therefore change the determination of when Gibson released the throttle. Similarly, Smith testified that the boat was traveling approximately 12 to 17 miles per hour, not 20 miles per hour, throughout the time leading up to the collision. Although Taylor opined that the slower speed of the boat would not materially change the scenarios depicted in the animations, he apparently did not obtain any data using a slower speed for the boat. We cannot see how differences in the boat's actual speed could fail to have an appreciable impact on the likelihood of collision as portrayed in the various animations.

Another serious set of discrepancies centers on Taylor's assumption that the Sea-Doo was traveling in a straight line perpendicular to the boat, which was also traveling in a straight line. Contrary to Taylor's assumption about the Sea-Doo's course, Gibson testified that he attempted to turn the Sea-Doo first to the left, and then to the right, so that the Sea-Doo "rocked to the left and then it rocked to the right" although it did not actually turn. However, the animated scenarios do not show any attempts by Gibson to turn the Sea-Doo (except for the last hypothetical scenario, which suggests that Gibson could have avoided the collision if he had continued to try to turn the Sea-Doo to the left), nor any of the resultant rocking back and forth. Moreover, it is questionable whether the boat towing Amanda was traveling in a straight line. Smith testified that he kept the boat on a straight course after seeing Gibson approaching, hoping that Gibson could avoid the boat and the tube

more easily if the boat maintained a constant heading and speed. (Under boating safety rules, the Sea-Doo had the obligation to avoid Smith's boat and the tube, both because the Sea-Doo was approaching from the boat's left and because the Sea-Doo was the smaller and presumably more maneuverable craft.) Nevertheless, Smith also testified that his overall course was a circular one counterclockwise around the central portion of the lake, and he had just turned west to go along the north edge of the lake. This testimony is ignored in the animated scenarios, all of which show the Sea-Doo and the boat traveling in mathematically straight lines at perfect right angles to one another.

In short, all of the five assumptions underlying the scenarios shown in the animations are contradicted by evidence presented at trial. Thus, Bombardier did not show that the video was an accurate portrayal of what it purported to show. Cisarik, 144 Ill. 2d at 342. Moreover, it is apparent that the purpose of the video was to present Bombardier's theory of the case--which was that despite the lack of off-throttle steering capability, the collision could easily have been avoided if Gibson and/or Smith had chosen to respond differently than they did. The video did not pass either prong of the Cisarik test, and thus Bombardier did not lay a proper foundation for the use of the video as demonstrative evidence. French, 65 Ill. 2d at 82. The trial court allowed the video to be used because the plaintiffs had not objected to the data charts on which the video was based, but this legal analysis is incorrect: no objection to the underlying data charts was required in order to object to a demonstrative video exhibit. Rather, each item of demonstrative evidence must independently pass the test for the use or admission of such evidence. A jury may far more easily grasp and be persuaded by a visual demonstration of the data in Taylor's charts that it would be by the printed charts themselves, thus magnifying the prejudicial effect of any discrepancies between the events depicted and the actual conditions faced by Gibson and Smith. Thus, the plaintiffs' failure to object

to the data charts, whose prejudicial impact may be minimal, does not foreclose any objection to a video based on the same data.

In sum, the video was unduly prejudicial and lacked an adequate foundation, and the trial court abused its discretion in permitting the video to be used as a demonstrative exhibit at trial. Cisarik, 144 Ill. 2d at 342; French, 65 Ill. 2d at 82. Having viewed the video ourselves, we think it quite likely that Bombardier's use of the video affected the outcome of the trial, leading the jury to assign Gibson a greater share of liability and Bombardier a lesser share. A new trial is therefore necessary. Tzystuck v. Chicago Transit Authority, 124 Ill. 2d 226, 243 (1988) (a new trial is appropriate when the "evidence improperly admitted appears to have affected the outcome of the trial"). As to liability, the jury found that defects in the Sea-Doo's design were a contributing cause of Amanda's death. Bombardier has not contested that determination, nor the jury's determination that Smith was not at fault, and thus liability need not be relitigated. Melecosky v. McCarthy Bros. Co., 115 Ill. 2d 209, 217 (1986). We therefore reverse that portion of the judgment allocating liability between Bombardier and Gibson and remand for a new trial on that issue only. French, 65 Ill. 2d at 82; Spyrka, 366 Ill. App. 3d at 169.

Bombardier argues that the plaintiffs' remaining arguments on appeal--regarding the admissibility of the Coast Guard opinion, certain opinion testimony allegedly offered by Garcia, and Plaintiffs' Exhibits 127 and 128--are irrelevant to the question of whether a new trial is warranted on the allocation of liability only, because all of this evidence is relevant only to the initial determination of whether Bombardier should be held liable at all, not to the proportion of blame that Bombardier and Gibson should each bear. In this case, we have determined that a new trial is necessary solely on the basis of the erroneous use at trial of Bombardier's animated video. However, "relevant

evidence" includes any evidence tending to establish a fact in controversy or render a matter at issue either more or less probable. In re A.W., Jr., 231 Ill. 2d 241, 256 (2008). Under this broad definition of relevant evidence, we cannot say that the evidence at issue in the plaintiffs' other arguments is irrelevant to any allocation of relative fault between Bombardier and Gibson. Accordingly, we briefly address the plaintiffs' remaining arguments so that potential problems may be avoided in the new trial. Spyrka, 366 Ill. App. 3d at 169.

The plaintiffs first argue that the trial court erred in allowing Bombardier to elicit testimony about the Coast Guard's opinion regarding the safety of PWC designs during the period in which the Sea-Doo at issue here was manufactured. Although the Coast Guard opinion was undisputed hearsay, the trial court initially allowed Bombardier to cross-examine one of the plaintiffs' expert witnesses regarding the opinion, and then allowed Bombardier to make increasingly substantial use of the opinion through their own witnesses' testimony. We review the trial court's determinations regarding the admissibility of evidence for abuse of discretion. Matthews v. Avalon Petroleum Co., 375 Ill. App. 3d 1, 9 (2007).

In Wilson v. Clark, 84 Ill. 2d 186 (1981), the Illinois supreme court adopted Federal Rule of Evidence 703, which permits expert witnesses to testify regarding facts and data upon which they have reasonably relied in formulating their opinions, even if the facts or data are not independently admissible. Wilson, 84 Ill. 2d at 195. However, the burden is on the party seeking to admit such evidence to establish that the facts or data "are of a type reasonably relied upon by experts in the particular field." City of Chicago v. Anthony, 136 Ill. 2d 169, 186 (1990). Once such a foundation has been laid, the trial court must still determine whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the

jury. Anthony, 136 Ill. 2d at 186. Further, if the expert witness seeks to testify regarding the opinions of others, the expert must demonstrate that he or she actually relied on the other opinions in forming his or her own opinion, and may not simply act as a conduit for the opinions of others. Kim v. Nazarian, 216 Ill App. 3d 818, 827 (1991).

Here, Bombardier never sought to lay a foundation for the admission of the Coast Guard opinion, through either their own expert witnesses or cross-examination of the plaintiffs' expert witnesses. Simply put, Bombardier never questioned any expert witness about whether the witness reasonably relied on the Coast Guard opinion. In light of this failure, the Coast Guard opinion remained inadmissible hearsay, and it was an abuse of discretion for the trial court to permit a steadily increasing amount of questioning about the opinion over the course of the trial. Bombardier's argument that it should have been allowed to introduce the Coast Guard opinion if the plaintiffs were allowed to introduce evidence of the NTSB report is legally incorrect. Rather, the two inquiries are separate. If the plaintiffs wished to introduce evidence regarding the NTSB report, they bore the burden of laying a proper foundation for its admission. That the plaintiffs were able to lay such a foundation for the NTSB report did not, however, obviate the need for Bombardier to lay a proper foundation for any evidence it wished to elicit about the Coast Guard opinion.

If such a foundation is laid on retrial, the trial court must then consider the possible prejudicial impact of the Coast Guard opinion. The Coast Guard opinion appeared to place a powerful imprimatur on early PWC designs, stating that "The Coast Guard has consistently held that the steering designs of existing personal watercraft are not defective and has also determined that it would not be appropriate at this time to impose any requirement that existing personal watercraft be modified to provide additional steering capability." It appears, however, the Coast Guard had not

developed any set of safety requirements that it required PWC manufacturers to follow and, as Bombardier itself stated, had no authority to "impose any requirement that existing personal watercraft be modified" to provide better off-throttle steering. Thus, the opinion may create a false impression. In addition, although the Coast Guard opinion contained the statement that existing PWC steering designs were "not defective," there was no evidence that the Coast Guard was using that phrase as it is used in Illinois product liability law. Thus, the opinion posed the risk of misleading the jury. Under Anthony, a trial court must consider the possible prejudicial impact of admitting hearsay testimony through expert witnesses.

In light of these concerns, the trial court's rulings on this issue are puzzling. The trial court initially granted the plaintiffs' motion in limine on the Coast Guard opinion, stating that the opinion could not be referred to without prior permission of the court. However, it then overruled the plaintiffs' objection when Bombardier suddenly asked one of the plaintiffs' experts about the opinion during cross-examination (without obtaining the court's permission first). Although the court reversed itself a minute later, sustaining the objection, it did not order the question and the answer stricken, or instruct the jury to disregard them. Thereafter, the trial court permitted Bombardier to make increasing references to the Coast Guard opinion. These rulings were an abuse of discretion. On remand, should Bombardier wish to elicit testimony regarding the Coast Guard opinion, it must first show that it can lay a proper foundation. The trial court must then carefully consider whether the probative value of the opinion is substantially outweighed by any danger of unfair prejudice or confusion. Only if both of these tests are met may evidence regarding the Coast Guard opinion be introduced at trial.

The plaintiffs also contend that the trial court erred in permitting certain testimony by Bombardier's employee Fernando Garcia. Although the trial court barred Garcia from offering expert opinion testimony on the ground that any such testimony had not been adequately disclosed pursuant to Supreme Court Rule 213(f) (210 Ill. 2d R. 213(f)), the court permitted Garcia to testify as a "fact witness" regarding his role in overseeing the development of the 1994 Sea-Doo XP model, and as liaison for regulatory matters including his membership on industry bodies such as the Boating Safety Advisory Council, the National Association of State Boating Law Administrators, and the PWC committee of the Society of Automotive Engineers. During Garcia's testimony, he testified regarding the Coast Guard opinion and himself issued the opinion that although the Coast Guard has exempted PWCs from the regulations applicable to boat designs, the standards applied by the Coast Guard to PWCs were "higher" than those applicable to ordinary boats, because boat manufacturers may "self-certify" that their designs meet the Coast Guard's requirements, but PWC manufacturers must submit their designs and testing information to the Coast Guard prior to the Coast Guard issuing an exemption to the manufacturer. Although the plaintiffs objected to this testimony as undisclosed opinion testimony, the trial court overruled their objection, apparently in the belief that the testimony was not an opinion. We agree with the plaintiffs that Garcia's characterization of the standards applicable to PWCs as "higher" rather than "lesser" standards was an opinion. Prairie v. Snow Valley Health Resources, Inc., 324 Ill. App. 3d 568, 577 (2001) (opinion testimony consists of what the witness thinks or believes with respect to the facts at issue, as distinct from his or her personal knowledge of those facts). Moreover, as Garcia was not disclosed as an expert witness, he should not have been permitted to testify about the Coast Guard opinion, as Wilson v. Clark permits testimony regarding otherwise inadmissible facts and data only by expert witnesses. During the new

trial on remand, Garcia may testify about the process of developing the 1994 Sea-Doo XP and obtaining an exemption for it from the Coast Guard, but may not testify regarding the comparative difficulty of obtaining such an exemption or offer other opinions not properly disclosed pursuant to Rule 213(f).

The plaintiffs' final argument is that the trial court improperly barred it from offering Plaintiffs' Exhibits 127 and 128 into evidence during its rebuttal case. Exhibit 127 is a four-page document titled "NTSB Press Conference August 24, 2001 Question and Answers Document: Possible Pitch Killer Questions From Media," consisting of sample questions and answers that appear to have been drafted by Bombardier on the occasion of an NTSB press conference to announce the issuance of an NTSB recommendation that PWC manufacturers develop an off-power assisted steering (OPAS) system. Exhibit 128 appears to be a printout of an email from Garcia to other Bombardier employees, accompanied by what appears to be a printout of the attached file "OPS Executive Presentation," a Power Point presentation of Bombardier's strategy for handling the introduction of an OPAS system into their model line. The presentation suggests that Bombardier wished to incorporate the OPAS system into their models "as quickly as feasible," but no earlier than a "Club Sea-Doo" event, "to Avoid Impacting 2001 Sales." The trial court barred the plaintiffs from introducing these exhibits on the ground that they lacked foundation. The plaintiffs did not thereafter make an offer of proof regarding the proffered exhibits.

Bombardier argues that we should not review this contention of error because the plaintiffs failed to properly preserve it. This contention is correct. In re Leona W., 228 Ill. 2d 439, 461 & n.5 (2008). We note the following principles only to assist the trial court in any new trial that occurs on remand, as the plaintiffs are of course free to seek the admission of these exhibits in that trial.

Plaintiffs' Exhibits 127 and 128 are hearsay unless they fall within an exception to hearsay, such as admissions by a party opponent or business records. Although the plaintiffs need not lay a foundation in order to have the documents admitted as admissions, they must still authenticate the documents, that is, make a prima facie showing that the documents are what they purport to be and contain statements by the party against whom they are to be used. Stewart v. DuPlessis, 42 Ill. App. 2d 192, 200 (1963); Ill. Law & Practice Evidence § 173 (West 2003).

Finally, Bombardier asserts that no new trial can be ordered unless it is probable that, absent the errors committed by the trial court, Bombardier would have been found at least 25% at fault. Bombardier's sole support for this argument is a footnote in Barton v. Chicago & Northwestern Transp. Co., 325 Ill. App. 3d 1005, 1041 n.16 (2001). We agree with the plaintiffs that the case law cited in the Barton footnote does not, in fact, support the proposition for which it is being cited here. Moreover, the proposition is contradicted by the supreme court's statement in Tzystuck v. Chicago Transit Authority, 124 Ill. 2d 226, 243 (1988), that a new trial is appropriate when the "evidence improperly admitted appears to have affected the outcome of the trial." Accordingly, we reject Bombardier's argument.

For all of the foregoing reasons, the judgment of the circuit court of Winnebago County is reversed and the cause is remanded for a new trial on the allocation of liability only.

Reversed and remanded.

SCHOSTOK, J., with McLAREN and JORGENSEN, JJ., concurring.