FILED 371
MAR 24 1981
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

JEFFREY WADE KIRSTEIN, a minor, By **HAROLD KIRSTEIN**, his father and next friend, and **HAROLD KIRSTEIN**,	)	Filed March 24, 1981
Plaintiffs-Appellees,	)	
vs.	)	
CITY OF SPENCER, IOWA, Appellee, **MIRACLE RECREATION EQUIPMENT COMPANY, INC.**,	)	0-460 / 2-65218
Defendant-Appellant.	)	

Appeal from Clay District Court - James H. Andreasen, Judge.

Defendant appeals from the judgment entered on a jury verdict for plaintiffs in a products liability case involving a playground swing contending trial court erred in admitting into evidence a videotaped experiment. AFFIRMED.

Dick H. Montgomery of Greer, Nelson, Bertell, Montgomery, Barry & Bovee, Spencer, Iowa, for defendant-appellant Miracle Recreation Equipment Company, Inc.

James Hamilton of the Hamilton Law Firm, Storm Lake, Iowa, for appellee City of Spencer.

Stephen Avery of Cornwall, Avery, Bjornstad & Scott, Spencer, Iowa, for plaintiffs-appellees.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

Defendant, Miracle Recreation Equipment Company, Inc., appeals from the judgment entered on a jury verdict for plaintiffs in this products liability case arising from injuries sustained by minor plaintiff, Jeffrey Kirstein, while he was playing on a swing, known as the "Flying Gym," manufactured by defendant.[1] Defendant contends that trial court erred in admitting into evidence a videotaped experiment of the swing's operation to illustrate how the accident might have occurred. We affirm.

I. Scope of Review. Since this is an action at law, our review is on assigned error only. Iowa R. App. P. 4.

II. Experimental Evidence. Defendant argues that trial court erroneously admitted the videotaped experiment into evidence as the differences between the conditions under which the accident occurred and those portrayed in the experiment were so substantial that the videotape could only have misled and confused the jury. We disagree.

In general, ". . . experimental evidence is admissible if it is of such nature that it tends to aid the jury deliberations. . . ." Palleson v. Jewell Cooperative Elevator, 219 N.W.2d 8, 15-16 (Iowa 1974). Admissibility of experimental evidence, however, is a matter within trial court's discretion. Id. We will interfere with trial court's ruling only upon a clear showing of abuse of that discretion. Harrison v. Ulicki, 193 N.W.2d 533, 535-36 (Iowa 1972).

From our review, we conclude that the record establishes substantial similarity between conditions and circumstances leading to plaintiff's injury and those portrayed in the videotape. More than one-half of the short (less than five minute) film was a still-life view of the "Flying Gym." The other part of the film depicted plaintiffs' attorney propelling the empty unit. Although the evidence shows that plaintiff, on the day of the accident, occupied one of the swings as the unit was propelled by a one-hundred fifty pound, nine-year-old boy, the video, nonetheless, showed the motion of the swings in operation at a high speed, as was alleged to have been the situation on the day plaintiff was injured. The required foundation of similarity of conditions was supplied by testimony of plaintiffs' witness, Mr. Wandling, a consulting engineer, whose testimony was received without objection.

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[1] The City of Spencer also was a defendant in this action. Since the judgment in favor of the city was not appealed, no issues relating to the City of Spencer could be raised on this appeal.

We find that trial court's admission of the videotape into evidence was not an abuse of discretion since it could assist the jury in understanding the testimony of witnesses. The weight to be given the videotape was for the jury as finder of fact. We also note trial court indicated that cautionary statements or instructions would be considered but defendant submitted none.

We conclude no error occurred and affirm the judgment entered on the jury verdict for plaintiffs.

AFFIRMED.

All judges concur except Donielson, J., who specially concurs.

DONIELSON, J. (specially concurring)

It is with some reluctance that I concur in the result reached by the majority today. In my view, it is an extremely close question as to whether, as the court concludes, the record establishes substantial similarity between the circumstances surrounding plaintiff's injury and those portrayed in the videotape. I can only suspect that the videotape exaggerated the speed and the height of the swing's rotation since, as was not the case at the time of the injury, the swing was empty when the plaintiff's attorney made this experiment. However, since the weight to be given the videotape was a jury question and since the defendant submitted no cautionary instructions, I concur in the majority's decision.