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IN THE
COURT OF APPEALS OF INDIANA

MARK AUBERRY,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 49A02-0610-CV-873
	)	
SOUTHERN SALES, INC.,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable David Dreyer, Judge
Cause No. 49D10-0409-CT-1685

October 10, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Following the denial of his motion to correct error, Mark Auberry appeals the jury's verdict in favor of Southern Sales, Inc. ("SSI"), on Auberry's negligence claims. We affirm.

Issues

We restate the issues as follows:

I. Whether the trial court abused its discretion in making several rulings as to expert witness Jay Nogan;

II. Whether the trial court abused its discretion in excluding certain testimony of expert witness Vaughn Adams;

III. Whether the trial court abused its discretion in admitting Auberry's rental agreement with NationsRent, Inc.;

IV. Whether the trial court abused its discretion in excluding a warning label; and

V. Whether the trial court abused its discretion in instructing the jury on proximate cause, incurred risk, and misuse.

Facts and Procedural History

The relevant facts most favorable to the jury's verdict indicate that on May 14, 2003, Auberry rented a six-by-twelve-foot hydraulic dump trailer from NationsRent to haul several loads of fill dirt to his home. The trailer had been manufactured by SSI in 1999 and was designed by SSI's president, Billy Hawkins. The trailer's hydraulic lift was powered by a battery-driven motor, which was wired to and activated by a remote control box with an up/down button. The battery and a battery charger were located in holding boxes underneath the trailer's dump bed. The charger was connected to an extension cord that hung below the trailer frame; thus, the battery could be charged without lifting the dump bed. The trailer also

had a four-foot prop rod for bracing the bed while it was fully elevated for maintenance or repairs. When SSI sold the trailer to a predecessor of NationsRent in 1999, it was not equipped with either a battery or a charger, which were installed at a later date.

Auberry is a firefighter/EMT with the Brownsburg Fire Department. He had never used anything similar to a dump trailer before. Auberry did not ask for any instructions or an operator's manual, did not inspect the trailer or examine it for labels or warnings, and signed the rental agreement without reading it. Auberry told the NationsRent employees that he was in a hurry to "beat the rain[.]" Tr. at 965, 975.

When Auberry dumped the first load of dirt in his backyard, he noticed a hole in the remote control box casing. When Auberry attempted to dump the second load of dirt, the bed elevated only partially and stopped three feet above the frame. Auberry believed that the hydraulic lift motor's battery was dead. He did not notify NationsRent of the malfunction because he believed that it was "easier" to charge the battery himself. *Id*. at 911. Auberry brought his gasoline-powered generator into the backyard and connected it to the battery with jumper cables. At that point, he noticed the trailer's battery charger and extension cord. Auberry removed the jumper cables and plugged the extension cord into the generator. When Auberry pushed the remote control button, the bed elevated fully and dumped the dirt into the yard.

Auberry lowered the bed and retrieved a third load of dirt. A light rain began to fall. When Auberry attempted to dump the dirt, the bed raised only two feet above the frame and stopped. Once again, instead of calling NationsRent with the cell phone on his belt, Auberry

plugged the charger's extension cord into his generator. When Auberry moved the charger so that he could read its amp meter, the bed suddenly lowered on his arm, injuring him.

On June 16, 2004, Auberry and his wife filed a complaint against NationsRent, alleging negligence and strict liability claims regarding its maintenance and rental of the trailer. On October 7, 2004, the Auberrys filed an amended complaint adding SSI as a defendant, alleging negligence and strict liability claims regarding its design and manufacture of the trailer. Auberry settled with NationsRent, which the trial court dismissed from the case on May 1, 2006. SSI named NationsRent as a non-party. Auberry's strict liability claims were ultimately dismissed, as well as Auberry's wife's consortium claim, thereby leaving Auberry's negligence claims against SSI. On May 12, 2006, after a five-day trial, the jury returned a verdict in favor of SSI and against Auberry, finding Auberry seventy-three percent at fault, NationsRent twenty-seven percent at fault, and SSI zero percent at fault. Auberry filed a motion to correct error, which the trial court denied. This appeal ensued. Additional facts will be provided as necessary.

Discussion and Decision

I. Jay Nogan

On May 16, 2003, two days after Auberry was injured and while he was still in the hospital, his attorney and his wife accompanied forensic mechanical engineer Jay Nogan to the Auberrys' backyard, where Nogan inspected the trailer. When Nogan picked up the remote control box, water ran out of the hole in the casing. Nogan began to disassemble the box and tested the circuits, which indicated "very high" resistance where there should have

been none. Appellant's App. at 130.[1] Nogan flipped the box over and did not hear any rattling. As he began to loosen the switch assembly, however, a metal clamp fell out of the box. Nogan determined that the clamp had sufficient conductivity to create a short circuit. Nogan's inspection of the remote control box was videotaped, but the videotape does not show the original location of the clamp inside the box. Nogan later acknowledged that he would not know "exactly" where to put the clamp back in the box but "presume[d]" that he could figure out its orientation. *Id*. at 132.

Auberry designated Nogan as an expert trial witness and disclosed his expected testimony in a response to SSI's interrogatories dated September 14, 2005. At that time, Nogan's opinions were directed only against NationsRent.[2] On March 15, 2006, SSI noticed Nogan's deposition for March 24, 2006. On March 21, 2006, Auberry filed an amended expert witness list withdrawing Nogan as a trial witness. SSI would not withdraw its

[1] Indiana Appellate Rule 51(c) provides that all pages of an appendix "shall be numbered at the bottom consecutively, without obscuring the Transcript page numbers, regardless of the number of volumes the Appendix requires." Auberry's counsel numbered many of the pages of the three-volume appellant's appendix on the far inside corner, which made it unnecessarily difficult to find the pages cited in the parties' briefs.

[2] *See* Appellant's App. at 50 ("Plaintiffs reasonably anticipate that Mr. Nogan will testify regarding his inspection of the subject dump trailer on May 16, 2003 and his findings, including the presence of a leak in the hydraulic system; the low level of oil in the oil reservoir when the bed was elevated; the condition of the control box with the hole and the connecting cord with the kinked taped area and exposed wire; the presence of the loose metal piece in the control box when opened and preservation of the piece as placed in a plastic bag and attached to the box; and the erratic movement of the bed during operation. Based upon his background, training and education, his inspection and the facts and circumstances of the incident, Plaintiffs reasonably anticipate that Mr. Nogan will testify regarding the mechanisms of failure and injury including infiltrated air bleeding off in the hydraulic system leading to sudden descent of the partially raised bed; and/or the presence of moisture and/or the loose metal in the control box and/or the exposed wires on the connecting cord leading to unexpected activation of the hydraulic motor. Additionally, Plaintiffs anticipate that Mr. Nogan will testify that an adequate inspection, maintenance and repair program by NationsRent would have disclosed the dangerous conditions of this dump trailer as rented to Mr. Auberry, including the low oil, hydraulic leak, broken control box, exposed wire, and weakened or undercharged battery, and that these conditions should have been repaired prior to rental.").

deposition notice, so Auberry filed an emergency motion to quash on March 22, 2006. The trial court initially granted the motion but vacated it on March 23, 2006, finding that SSI had made "a showing of exceptional circumstances under which it is impracticable for [SSI] to obtain facts or opinions on the same subjects by other means." *Id.* at 80. The trial court denied Auberry's motion for reconsideration and issued an order defining the scope of the deposition, stating that SSI "is permitted to depose Jay Nogan only regarding already disclosed reports and opinions about the fault of any non-parties, as well as all NationsRent defendants" and "regarding all other non-opinion issues, factual or otherwise, subject to general scope provisions of [Indiana Trial] Rule 26." *Id*. at 81.

On March 27, 2006, SSI took Nogan's deposition, during which he offered unfavorable opinions regarding SSI's design of the trailer and its hydraulic system. On April 10, 2006, SSI filed an amended expert witness list adding Nogan as a fact witness regarding his inspection of the trailer. Previously, Auberry had filed a motion to strike SSI's expert witnesses "for failure to timely identify them pursuant to the court's scheduling orders or disclose their testimony under the discovery rules." Appellant's Br. at 4.[3] Auberry moved to strike Nogan as well. On April 18, 2006, the trial court granted Auberry's motion to strike as to two of SSI's expert witnesses but denied the motion as to Nogan.

On April 19, 2006, SSI filed a motion to exclude, *inter alia*, the videotape of Nogan's inspection of the trailer and any factual or opinion testimony by Nogan or Auberry's expert, Vaughn Adams, regarding the metal clamp that fell out of the remote control box during

[3] The motion to strike does not appear in the record. SSI does not dispute Auberry's characterization of the motion, however.

Nogan's inspection. Auberry filed an opposing motion. On April 28, 2006, SSI filed a motion to exclude any previously undisclosed factual or opinion testimony by Nogan regarding SSI's alleged negligence in the design or manufacture of the trailer. Auberry filed an opposing motion. On May 2, 2006, the trial court granted SSI's motions to exclude.

On May 3, 2006, Auberry filed a second amended expert witness list adding Nogan as a trial witness, to which SSI filed an objection. The trial court initially struck the list; after SSI withdrew its objection on the morning of trial, however, the court verbally ruled that Auberry could call Nogan as an expert witness at trial, subject to the abovementioned restrictions. Also on the morning of trial, Auberry filed a motion in limine to preclude Nogan from testifying about NationsRent's conduct in maintaining, repairing, or inspecting the trailer. The trial court verbally denied Auberry's motion.

During Auberry's case in chief, Nogan opined that there was no evidence of an electrical failure and that the cause of the bed falling on Auberry's arm was a hydraulic failure. On cross examination, Nogan acknowledged that he could not rule out an electrical failure. He further opined that the trailer had not been properly maintained and that NationsRent should not have rented the trailer to Auberry in the condition it was in.

On appeal, Auberry contends that the trial court erred in the following respects: (1) in excluding, via an order in limine, the videotape of Nogan's inspection of the trailer; (2) in allowing SSI to depose Nogan after Auberry withdrew him as a trial witness; (3) in allowing SSI to call Nogan as a trial witness; (4) in excluding any testimony from Nogan regarding SSI's alleged negligence in the design of the trailer and its hydraulic system; and (5) in

excluding any testimony from Nogan regarding alleged defects in SSI's design and manufacture of the trailer's remote control box.

> Our applicable standards of review are well settled.
>
> > The standard of review in discovery issues is an abuse of discretion. An abuse of discretion occurs when a trial court reaches a conclusion that is against the logic and natural inferences which can be drawn from the facts and the circumstances before the trial court. Moreover, an abuse of discretion occurs when the trial court misinterprets or misapplies the law.

Stuff v. Simmons, 838 N.E.2d 1096, 1099 (Ind. Ct. App. 2005) (citations omitted), *trans. denied* (2006). "Generally, we will not reverse a trial court's discovery order unless there has been a showing of prejudice." *Wright v. Mt. Auburn Daycare/Preschool*, 831 N.E.2d 158, 162 (Ind. Ct. App. 2005), *trans. denied*. Likewise, we review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Freese v. Burns*, 771 N.E.2d 697, 700 (Ind. Ct. App. 2002), *trans. denied* (2003). We will reverse for the improper admission or exclusion of evidence only if the complaining party can demonstrate prejudice. *See Anderson v. Scott*, 630 N.E.2d 226, 230 (Ind. Ct. App. 1994) (admission of evidence), *trans. denied*; *Stumpf v. Hagerman Constr. Corp.*, 863 N.E.2d 871, 879 (Ind. Ct. App. 2007) (exclusion of evidence), *trans. denied*. We address each of Auberry's arguments in turn.

1. Exclusion of Videotape

Auberry asserts that the trial court erred in excluding, via an order in limine, the videotape of Nogan's inspection of the trailer. SSI notes that Auberry never offered the videotape into evidence at trial and did not make an offer of proof as required by Indiana Evidence Rule 103. *See* Ind. Evidence Rule 103(a) ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected,

and … [i]n case the ruling is one excluding evidence, the substance of the evidence was made known to the court by a proper offer of proof, or was apparent from the context within which questions were asked."). "The purpose of an offer of proof is to convey the point of the witness's testimony and provide the trial judge the opportunity to reconsider the evidentiary ruling." *State v. Wilson*, 836 N.E.2d 407, 409 (Ind. 2005). Auberry contends that he was not required to make an offer of proof to challenge the trial court's order in limine. On the contrary, our supreme court has stated that "[r]ulings on motions in limine are not final decisions and, therefore, do not preserve errors for appeal." *Swaynie v. State*, 762 N.E.2d 112, 113 (Ind. 2002); *see also Wilson*, 836 N.E.2d at 409 ("Equally important, [an offer of proof] preserves the issue for review by the appellate court."). As such, Auberry has waived this argument. *See Catt v. Skeans*, 867 N.E.2d 582, 586 (Ind. Ct. App. 2007) (finding that failure to make offer of proof resulted in waiver of appellant's argument), *trans. denied*.

2. Allowing SSI to Depose Nogan

Next, Auberry asserts that the trial court erred in allowing SSI to depose Nogan after Auberry withdrew him as a trial witness. Auberry's argument rests on Indiana Trial Rule 26(B)(4)(b), which states in pertinent part,

> A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only … upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

Auberry claims that the trial court abused its discretion in concluding that SSI made a showing of exceptional circumstances here.

We disagree. "Due to the fact-sensitive nature of such issues, discovery rulings are cloaked with a strong presumption of correctness on appeal." *Lucas v. Dorsey Corp.*, 609 N.E.2d 1191, 1197 (Ind. Ct. App. 1993), *trans. denied*. As SSI succinctly observes, during Nogan's inspection of the trailer, "when no representatives of any other interested parties were present, Nogan altered the condition of the control box in such a way that a portion of his observations and testing could not be duplicated by subsequent inspection and testing." Appellee's Br. at 17. This fact takes on special significance in view of Auberry's allegation in his amended complaint that SSI's design and manufacture of the trailer were defective, in part, because "the interior of the control box contained a loose piece of metal capable of bridging the activation contacts/circuits and activating movement of the bed without warning[.]" Appellant's App. at 43. Even Auberry concedes that "[u]nder the circumstances, at best, SSI *may* have been entitled to further discovery of Nogan's inspection findings." Appellant's Br. at 20. Based on the foregoing, we find no abuse of discretion.

3. Allowing SSI to Call Nogan as Witness

Next, Auberry claims that the trial court abused its discretion in allowing SSI to call Nogan as an expert witness at trial. Auberry does not allege that the trial court violated any trial rules or caselaw precepts in doing so; rather, Auberry merely alleges that the court's ruling resulted in several unfavorable "consequences." *Id*. at 22. This allegation falls far short of demonstrating prejudice. Given that Auberry had originally planned to call Nogan as an expert witness, and that the trial court did not abuse its discretion in allowing SSI to depose Nogan after Auberry decided not to do so, we cannot say that the trial court abused its discretion in allowing SSI to call Nogan as an expert witness. The fact that Auberry felt

compelled to call Nogan in his case in chief was purely a trial strategy decision on his part and is none of our concern on appeal.

4. Exclusion of Testimony Regarding SSI's Alleged Negligence

Auberry claims that the trial court erred in precluding him from presenting Nogan's "opinions directed to SSI's negligent design of the dump trailer." *Id*. at 14. He argues that the trial court's decision deprived him

> of the opportunity to put all of Nogan's factual and opinion testimony in context as it related to SSI's negligence in [the] design of the dump trailer and hydraulic system that failed, and foreseeability to SSI of maintenance or repair failures by others, such as NationsRent, that could be safeguarded or prevented by reasonable design measures.

Id. at 22.

First, we observe that Auberry did not make an offer of proof as to Nogan's opinions regarding SSI's alleged negligence and therefore has waived this argument. *See Catt*, 867 N.E.2d at 586. Moreover, we agree with SSI that any error in the trial court's ruling is harmless. Auberry elicited testimony from Nogan that although NationsRent should have maintained and inspected the trailer more diligently before renting it to Auberry, its failure to do so did not cause the hydraulic failure that Nogan believed to be the cause of the bed's collapse onto Auberry's arm. As such, we find no grounds for reversal.

5. Exclusion of Testimony as to Remote Control Box

Auberry failed to make an offer of proof as to Nogan's testimony regarding the trailer's remote control box (and the metal clamp found therein) and has therefore waived this argument. *See id*.

II. Vaughn Adams

Auberry challenges the propriety of the trial court's order in limine excluding any testimony by Adams regarding the metal clamp. This argument is also waived due to Auberry's failure to make an offer of proof. *See id.*

III. Admission of Rental Agreement

Clause 1.10 of the rental agreement provided that if the equipment was damaged or malfunctioning "in any way, Customer shall immediately notify [NationsRent] of such damage or malfunction and immediately discontinue use of the Equipment." Def. Exh. L. In a December 2005 order denying NationsRent's motion for summary judgment, the trial court found "that the rental agreement for [the trailer] is unenforceable as unconscionable and not otherwise knowingly and willingly entered into by [Auberry.]" Appellant's App. at 54.

In its March 2006 supplemental answer to Auberry's interrogatories, SSI stated, "When the dump trailer failed to operate as expected, [Auberry] had a duty to call NationsRent and notify them of the situation. This duty arises from the rental agreement, as well as [Auberry's] common law duty to exercise reasonable care for himself and for the property of others." *Id*. at 66. Auberry filed a motion in limine to exclude any mention of the rental agreement or his contractual duties thereunder. The trial court denied Auberry's motion.

At trial, SSI announced its intention to offer the contract into evidence for the purpose of establishing Auberry's duty to call NationsRent in the event of damage or malfunction. Auberry offered to stipulate that NationsRent's phone number was on the rental agreement. When SSI indicated its intention to ask Auberry if he had read the portion of the agreement

requiring him to call NationsRent in the event of a malfunction, Auberry responded, "[S]ee here's the problem because part of the answer to that is that's the most ridiculous thing in the world to think that someone would have read, could read this off this contract[.]" Tr. at 733. For that reason, Auberry argued that if any portion of the agreement would be admitted, then the entire agreement should be admitted, over his objection, with an admonishment. *Id*. at 739-40. Both Auberry and SSI agreed to the trial court's wording of the admonishment. *Id*. at 747.

During SSI's cross examination of Auberry, the trial court admitted the rental agreement over Auberry's objection. *Id*. at 904-06. The trial court admonished the jury as follows:

> [T]he plaintiff Mark Auberry has stipulated that he rented the unit from Nations Rent on March 14th 2003 at the place and time indicated on the agreement and for the price indicated and that […] Nations Rent[']s phone number […] is on the front.[…] [T]he limited purpose for which the rental agreement is being admitted and which you may consider pertains to clause 1.10 on the back of the agreement, you're not to consider or concern yourself with any other portions or terms, or conditions of the rental agreement because the court has previously ruled that they are not enforceable to any issue in this case and are not admissible for your consideration.

Id. at 906.

On appeal, Auberry contends that the trial court erred in admitting the rental agreement. Auberry cites no applicable precedent, but simply claims that "[i]t is inherently illogical that on one hand the contract was not knowingly and willingly entered, while on the other hand one clause or one provision nonetheless may be enforced against Auberry without any evidence or proof that that one clause was knowingly or willingly agreed to or entered into." Appellant's Br. at 28.

It is well settled that "[w]hat might be inadmissible in one instance and for one purpose, might very well be admissible in another instance and for another purpose as the trial progresses." *Dale v. Trent*, 146 Ind. App. 412, 421, 256 N.E.2d 402, 408 (1970), *trans. denied*. Indiana Evidence Rule 105 provides, "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and admonish the jury accordingly." SSI argues that the rental agreement was admissible as evidence of Auberry's failure to exercise ordinary care. Auberry cites no authority to the contrary and agreed to the wording of the trial court's admonishment. As such, we conclude that Auberry has failed to establish that the trial court abused its discretion in admitting the rental agreement.

IV. Exclusion of Warning Label

The trailer that Auberry rented did not have a warning label. At trial, Auberry offered into evidence a warning label that SSI began affixing to its trailers in 2000, the year after it sold the trailer at issue. SSI objected based on lack of foundation and argued that the warning label was evidence of a subsequent remedial measure.[4] Auberry responded, "[I]t is our position that it is not a subsequent remedial measure, and it is relevant to whether or not a warning is needed." Tr. at 1123. The trial court ruled that the warning label was irrelevant and sustained SSI's objection.

[4] *See* Ind. Evidence Rule 407 ("When after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.").

On appeal, Auberry argues that the trial court "erroneously excluded admission of the SSI warning label as irrelevant to any issue in the case. SSI's failure to provide a warning on the dump trailer was a central element of Auberry's claims." Appellant's Br. at 29. Questions of relevancy aside,[5] we agree with SSI that Auberry has failed to establish that he was prejudiced by the trial court's exclusion of the warning label. Auberry elicited testimony from SSI's president, Billy Hawkins, that SSI did affix warning labels to trailers after it sold the trailer at issue, and Auberry's counsel read the label to the jury during closing argument without objection. As such, any error in the trial court's exclusion of the label can only be considered harmless.

V. Jury Instructions

Finally, Auberry asserts that the trial court erred in instructing the jury on proximate cause and SSI's affirmative defenses of incurred risk and misuse. "The purpose of a jury instruction is to inform the jury of the law applicable to the facts without misleading the jury and to enable it to comprehend the case clearly and arrive at a just, fair and correct verdict." *Lee v. Hamilton*, 841 N.E.2d 223, 229 (Ind. Ct. App. 2006).

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[5] At trial, Auberry made the curious argument that the warning label did not meet industry standards as to size, color, content, and other criteria. On appeal, Auberry argues,

> The patent violation of recognized industry standards and guidelines of this label bore directly on Auberry's claim that SSI failed to exercise reasonable care in design and went to the credibility of SSI's only witness, Hawkins, that he knew at any time what he was doing when he designed, manufactured, and continued to sell this product.

Appellant's Br. at 29. If Auberry was attempting to establish that SSI was negligent in failing to place a warning label on the trailer at issue, we fail to see how the adequacy of a warning label that was *not* placed on the trailer was relevant to any fact at issue in this case.

> The manner of instructing a jury lies largely within the discretion of the trial court, and we will reverse only for abuse of discretion. To constitute an abuse of discretion, the instruction given must be erroneous, and the instruction taken as a whole must misstate the law or otherwise mislead the jury. When determining whether a trial court erroneously gave or refused to give a tendered instruction, we consider the following: (1) whether the tendered instruction correctly states the law; (2) whether there was evidence presented at trial to support giving the instruction; and, (3) whether the substance of the instruction was covered by other instructions that were given.

Mayes v. State, 744 N.E.2d 390, 394 (Ind. 2001) (citations omitted).

1. Proximate Cause

Over Auberry's objection, the trial court gave the following preliminary instruction on proximate cause: "'Proximate cause' is that cause which produces the injury complained of and without which the result would not have occurred. That cause must lead in a natural and continuous sequence to the resulting injury, unbroken by any intervening cause." Appellant's App. at 311. Auberry objected on the basis that an intervening cause must also be a superceding cause, "and intervening cause is not a superceding cause; and for it to [break] off [proximate] cause under the law it has to be superceding." Tr. at 106.[6] Auberry requested that the trial court instead give Indiana Pattern Instruction Number 5.06, which states, "An act or omission is a proximate cause of an injury if the injury is a natural and probable consequence of the act or omission." The trial court refused the instruction.

At the final instruction conference, Auberry tendered Indiana Pattern Jury Instruction Number 5.09 on intervening cause, which states,

[6] We note that our supreme court has used these terms interchangeably. *See Paragon Family Rest. v. Bartolini*, 799 N.E.2d 1048, 1054 (Ind. 2003) ("The doctrine of superseding or intervening causation provides that when a negligent act or omission is followed by a subsequent negligent act or omission so remote in time that it breaks the chain of causation, the original wrongdoer is relieved of liability.").

> An intervening cause is an independent event, not reasonably foreseeable, which completely breaks the connection between the defendant's negligent act and the plaintiff's injury. An intervening cause breaks the chain of events so that the defendant's original negligent act is not a proximate cause of the plaintiff's injury in the slightest degree.

The trial court refused this instruction based on its determination that no evidence had been presented on intervening cause and SSI's acknowledgement that it would not argue intervening cause in its closing statement. Instead, the trial court gave Pattern Instruction Number 5.06 on proximate cause, which does not mention intervening cause.

On appeal, Auberry does not specifically contend that the trial court erred in refusing to give Pattern Instruction Number 5.09 as a final instruction. Rather, Auberry claims that the error lies in the discrepancy between the preliminary and final instructions on proximate cause, the former of which mentions intervening cause and the latter of which does not. He asserts that this discrepancy "left the jury to speculate, guess or otherwise determine on its own which definition of 'proximate cause' it would follow[.]" Appellant's Br. at 38. We agree with SSI that to the extent the phrase "intervening cause" in the preliminary instruction might have confused the jury, any confusion was cured by the trial court's final instructions. *See Lazarus Dep't Store v. Sutherlin*, 544 N.E.2d 513, 523-24 (Ind. Ct. App. 1989) (holding that any confusion from misleading preliminary instruction was cured by final instructions), *trans. denied* (1990); *see also Pendleton v. Aguilar*, 827 N.E.2d 614, 621 (Ind. Ct. App. 2005) ("It is well established that on appeal, we will presume the jury followed the law

contained within the trial court's instruction and applied that law to the evidence before it."), *trans. denied* (2006). We find no grounds for reversal here.[7]

2. Incurred Risk

Incurred risk is an affirmative defense that, as a component of the Indiana Comparative Fault Act's apportionment scheme, "reduces or eliminates the plaintiff's recovery depending on the degree of the plaintiff's fault." *Heck v. Robey*, 659 N.E.2d 498, 504 (Ind. 1995), *abrogated on other grounds by Control Techniques, Inc. v. Johnson*, 762 N.E.2d 104 (Ind. 2002). We have stated that

> incurred risk demands a subjective analysis with inquiry into the particular actor's knowledge, is concerned with the voluntariness of a risk, and is blind as to reasonableness of risk acceptance. Incurred risk also involves a mental state of "venturousness" and has been described as negating a duty and therefore precluding negligence.

Wallace v. Rosen, 765 N.E.2d 192, 200 (Ind. Ct. App. 2002) (citation omitted). "This defense contemplates acceptance of a specific risk of which the plaintiff has actual knowledge." *Perdue Farms, Inc. v. Pryor*, 683 N.E.2d 239, 242 (Ind. 1997) (citation and quotation marks omitted). "The plaintiff need not have foresight that the particular injury which in fact occurred was going to occur." *Meyers v. Furrow Bldg. Materials*, 659 N.E.2d 1147, 1149 (Ind. Ct. App. 1996), *trans. denied*. Generally, the existence of incurred risk is a question of fact for the jury. *Wallace*, 765 N.E.2d at 200. Nevertheless, "[t]he definition of

[7] In his reply brief, Auberry attempts to distinguish *Lazarus* on the grounds that the potential for prejudice in his case is "significantly greater due to Jury Rule 20[,]" which our supreme court adopted more than a decade after *Lazarus*. Appellant's Reply Br. at 22. Indiana Jury Rule 20(c) provides that "[t]he court shall provide each juror with the written [preliminary] instructions while the court reads them." Auberry did not mention Jury Rule 20 in his appellant's brief, and he may not raise a new argument based thereon for the first time in his reply brief. *See Bussing v. Ind. Dep't of Transp.*, 779 N.E.2d 98, 105 (Ind. Ct. App. 2002)

incurred risk includes the proposition that knowledge of a risk may be imputed where such a risk would have been readily discernable by a reasonable and prudent man under like or similar circumstances." *Id*. (citation and quotation marks omitted); *see also Meyers*, 659 N.E.2d at 1149 ("[I]ncurred risk may be found as a matter of law if the evidence is without conflict and the sole inference to be drawn is that the plaintiff knew and appreciated the risk, but nevertheless accepted it voluntarily.").

Over Auberry's objection, the trial court gave the jury the following final instruction on SSI's affirmative defense of incurred risk:

> The plaintiff incurs the risk of injury if he actually knew of a specific danger, understood the risk involved, and voluntarily exposed himself to that danger. Incurred risk requires much more than the general awareness of a potential for mishap. Determining whether the plaintiff has incurred the risk of injury requires a subjective analysis focusing upon:
>
> 1. The plaintiff's actual knowledge and appreciation of the specific risk, and
> 2. The plaintiff's voluntary acceptance of that risk.

Appellant's App. at 307. The court then instructed the jury on SSI's burden:

> The Defendant has the burden of proving by a preponderance of the evidence that Plaintiff incurred the risk. If you find that Defendant has failed to sustain that burden, the defense of incurred risk must fail. If, however, you find that Plaintiff did incur the risk of injury, you must then determine the extent to which the incurred risk will affect the Plaintiff's recovery by following the comparative fault instruction.

Id. at 308.

Auberry objected to the instructions on following grounds:

> [T]here is no evidence of [Auberry's] actual knowledge and appreciation of the specific risks, and [Auberry's] voluntary acceptance of that risk. This is a

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(stating that appellant, in responding to appellee's argument, could not present argument in reply brief based on statute not mentioned in appellant's brief), *trans. denied* (2003).

> subjective standard. It is a subjective standard, and the testimony is that [Auberry] did not incur the risk because he had no actual knowledge and appreciation of specific risks, which was that the hydraulic can fail, and then trap him within because his testimony is that; [the trailer bed] was up and then it stayed up. There is no evidence, and no one ever elicited any testimony from him that he understood that this thing could fail if there was a failure in the hydraulic system.

Tr. at 1048. Auberry makes the same argument on appeal.

> It is true, as Auberry observes, that
>
> > [t]he only testimony from [Auberry] on what he knew, understood and appreciated as a risk of injury from the … dump trailer, was that if he had known that the dump bed could unexpectedly fail or collapse upon his arm, he would have never reached under the bed to retrieve the battery charger.

Appellant's Br. at 33-34. That said, we believe that the evidence presented to the jury was sufficient to support a finding that the risk would have been readily discernable by a reasonable or prudent person under like or similar circumstances and therefore was sufficient to impute knowledge of the risk to Auberry. *Wallace*, 765 N.E.2d at 200. As SSI observes,

> Auberry noticed when he dumped the first load of dirt that there was a large hole in the electrical control box. When he attempted to dump his second load, the trailer failed to raise completely, thus requiring an electrical charge to the battery to complete the dumping of that load. When he attempted an additional load, the trailer failed again, this time raising an even smaller distance off of the frame. Auberry elected to charge the battery again with his own charger, despite the fact that it was then raining, and knowing that there was a hole in the control box. While he was in the process of attempting to charge the battery, Mr. Auberry voluntarily decided to place his arm underneath the raised trailer bed, despite his admission that he knew it was not propped by anything, [and] that the bed was suspended 24 inches above the frame was full with a large amount of dirt[.]

Appellee's Br. at 39-40. We find this evidence sufficient to support the trial court's instructions on incurred risk and therefore find no abuse of discretion.

3. Misuse

Over Auberry's objection, the trial court instructed the jury as follows on SSI's affirmative defense of misuse:

> [SSI] has raised the affirmative defense of misuse of product and has the burden of proving this defense. [SSI] must prove each of the following propositions by a preponderance of the evidence:
> 1. the plaintiff misused the product;
> 2. the misuse was not reasonably expected by the defendant at the time the defendant sold or otherwise conveyed the product; and
> 3. the misuse of the product was a proximate cause of the physical harm claimed by the plaintiff.
>
> If you find that [SSI] has proved each of these propositions, then such conduct constitutes fault to be assessed against the plaintiff who misused the product.

Appellant's App. at 309. Auberry objected to the instruction on the basis that it was unsupported by the evidence.[8]

We agree with SSI that the jury was "presented with a significant amount of evidence that would support the defense of misuse." Appellee's Br. at 40. The evidence was sufficient for the jury to find that Auberry misused the trailer by reaching under the dump bed—which had malfunctioned twice that day—while recharging the battery when he did not have to do so; that the misuse was not reasonably expected by SSI at the time it sold the trailer; and that Auberry's misuse was a proximate cause of his injuries. Accordingly, we find no abuse of discretion here. We affirm in all respects.

Affirmed.

BAKER, C. J., and FRIEDLANDER, J., concur.

[8] Auberry does not claim that the instruction is an incorrect statement of law. Indeed, Auberry cites no authority defining or explaining the affirmative defense of misuse. Consequently, we operate on the premise that the instruction is a correct statement of law.