DIVISION ONE
FILED: 04/17/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

GARY CRISTION, a single man,	)	1 CA-CV 11-0223
	)	
Plaintiff/Appellee,	)	DEPARTMENT A
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
CRC CONTRACTING, INC., an Arizona corporation,	)	Rule 28, Arizona Rules of Civil Appellate Procedure)
	)	
Defendant/Appellant.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CV2007-000955

The Honorable George H. Foster, Judge

AFFIRMED

Allen Law Group, PLC — Phoenix
by Lynn M. Allen
Amanda J. Taylor
Attorneys for Defendant/Appellant

Law Office of Scott E. Boehm, P.C. — Phoenix
by Scott E. Boehm
and
The Herzog Law Firm, P.C. — Scottsdale
by Michael W. Herzog
Attorneys for Plaintiff/Appellee

P O R T L E Y, Judge

¶1 CRC Contracting, Inc. ("CRC") appeals the personal injury jury verdict and judgment in favor of Gary Cristion. CRC

raises three arguments: (1) the verdict was not supported by sufficient evidence; (2) the superior court erred when it admitted evidence of a subsequent accident; and (3) the verdict was excessive. For the following reasons, we affirm.

FACTUAL[1] AND PROCEDURAL HISTORY

¶2 Cristion was scheduled to deliver concrete to a custom home construction site on January 23, 2006, for his employer, Maricopa Ready Mix. Before he attempted to drive his 70,000-pound truck backwards up a narrow, inclined dirt access road with a sharp turn, he called Paul Chester, another Ready Mix driver who had already delivered concrete to the property, to determine the best way to access the job site. Chester told him to drive up the adjoining road and then back up the dirt access road to get to the property.

¶3 The access road had been cut into the mountain and was bordered on one side by a ravine. Cristion began to back up along existing tire tracks, but felt uneasy and started to pull forward to get back onto the paved road. When he began to move the truck forward, he saw the dirt road crumble under the rear tire, and the truck rolled off the road and landed in the ravine.

---

[1] "We view the . . . facts and all inferences in the light most favorable to sustaining the verdict." *Bradshaw v. State Farm Mut. Auto. Ins. Co.*, 157 Ariz. 411, 414, 758 P.2d 1313, 1316 (1988) (citing *Curlee v. Morris*, 72 Ariz. 125, 127, 231 P.2d 752, 753 (1951)).

¶4 Cristion sued CRC, the project's general contractor, and others for his injuries. He tried his claims against CRC, and the jury awarded him nearly $1.8 million, though he was found ten percent at fault. Judgment was subsequently entered, and CRC unsuccessfully moved for judgment notwithstanding the verdict or, alternatively, for a new trial.

DISCUSSION

A. Sufficiency of the Evidence

¶5 CRC first argues that the evidence presented at trial was insufficient to support the verdict. When reviewing a challenge based on the sufficiency of the evidence, we "resolve every conflict in the evidence and draw every reasonable inference in favor of the prevailing party." *St. Joseph's Hosp. & Med. Ctr. v. Reserve Life Ins. Co.*, 154 Ariz. 307, 312, 742 P.2d 808, 813 (1987) (citations omitted). Sufficient evidence is direct or circumstantial proof that can "lead reasonable persons to find the ultimate facts sufficient to support the verdict." *Gonzales v. City of Phoenix*, 203 Ariz. 152, 153, 52 P.3d 184, 185 (2002) (citation omitted); *see also Lohse v. Faultner*, 176 Ariz. 253, 259, 860 P.2d 1306, 1312 (App. 1992) (citing *State v. Harvill*, 106 Ariz. 386, 391, 476 P.2d 841, 846 (1970) ("It is now well-settled . . . that direct and circumstantial evidence have equal probative worth."); *Andrews v. Fry's Food Stores*, 160 Ariz. 93, 96, 770 P.2d 397, 400 (App.

1989) (citations omitted) (circumstantial evidence alone may support a verdict)).

¶6 Although CRC agrees that a general contractor has a duty to maintain a reasonably safe work site for its subcontractors' employees, it argues that Cristion failed to establish that a dangerous condition existed, that CRC had notice of the dangerous condition, and that it failed to take appropriate steps to remove or reduce the danger. *See Durnin v. Karber Air Conditioning Co.*, 161 Ariz. 416, 419, 778 P.2d 1312, 1315 (App. 1989) (citations omitted) (discussing general contractor's duties to a subcontractor's employees). We disagree.

¶7 Jeffrey Lange, a construction safety expert, testified that the dirt access road was unreasonably dangerous because the dirt above two drainage culverts, where the accident occurred, was improperly compacted.[2] He opined that CRC fell below the standard of care because the access road collapsed where another subcontractor, BZ's Excavating, Inc. ("BZ's"), had installed the culverts. Lange explained that the industry standard required the dirt to be ninety-five percent compacted, but a compaction

[2] The culverts were hollow metal pipes used to facilitate water drainage. Each culvert was eighteen inches in diameter and twenty inches in length and was embedded beneath the surface of the access road. The surface above the culverts was back-filled with dirt and compacted with a wheel loader until the surface was even.

test was not performed, even though it would have quickly and easily revealed whether the soil had been compacted in accordance with industry standards. He also testified that a retaining wall would have helped to support the weight of the concrete truck because the wall would "hold the soil back" and facilitate vertical and horizontal compaction. He indicated that a retaining wall on the embankment side of the access road "certainly would have supported the soil to some degree."

¶8 Russell Reedy, BZ's safety director, testified that the edge of the road could not be compacted because there was no retaining wall to hold in the soil above the culvert. Reedy also testified that, prior to Cristion's accident, he told CRC's on-site superintendent, Kevin Gay, to build the retaining wall as soon as possible, and then took it upon himself to pound wooden stakes two feet from the edge of the road to mark where it was safe to drive even though it was not his or BZ's responsibility. Furthermore, Curtis Vratil, a concrete truck driver who had witnessed the accident, corroborated Cristion's version of the events in a statement recorded shortly after the rollover. He testified that the driver was trying to pull forward when the embankment "gave way" and the driver's-side rear wheel slid toward the ravine.

¶9 Although Alfred D. Horton, Jr., the safety consultant retained by CRC, testified that a retaining wall would have

resulted in a narrower access road, Ronald Brissette, the project's architect, testified that the subterranean portion of the retaining wall could have been installed independently of the cosmetic portion above the road's surface, and that CRC was responsible for deciding when to build the retaining wall. Based on the trial testimony and exhibits,[3] there was substantial evidence from which the jury could determine whether the road was dangerous, whether CRC knew it was dangerous, and whether CRC failed to address the dangerous condition. The jury had to evaluate the evidence and determine the facts, and it resolved the conflicting evidence in favor of Cristion. Consequently, there was sufficient evidence to support the conclusion that CRC breached its duty to maintain a reasonably safe job site.

B. Subsequent Accident

¶10 CRC next contends that the admission of evidence of a subsequent concrete truck accident constitutes reversible error. Mindful of the court's broad discretion to admit evidence, *Burgbacher v. Mellor*, 112 Ariz. 481, 483, 543 P.2d 1110, 1112 (1975) (citation omitted), we will affirm unless the ruling was clearly erroneous or based on a misapplication of the law. *See Gemstar Ltd. v. Ernst & Young*, 185 Ariz. 493, 506, 917 P.2d 222, 235 (1996) (citation omitted); *see also Grant v. Ariz. Pub.*

[3] The exhibits included a video of the accident scene recorded by CRC principal Allan Ray Combes shortly after Cristion's rollover.

Serv. Co., 133 Ariz. 434, 455-56, 652 P.2d 507, 528-29 (1982) (citations omitted) (a ruling that is contrary to the evidence or based on legal error constitutes an abuse of discretion).

¶11 Our supreme court has stated that "if the proper foundation is established, evidence of similar accidents at or near the same place at a time not too remote from the accident in question is admissible." *Burgbacher*, 112 Ariz. at 483, 543 P.2d at 1112 (citing *Slow Dev. Co. v. Coulter*, 88 Ariz. 122, 353 P.2d 890 (1960)). Although *Burgbacher* involves evidence of a prior accident, the plain language of the court's ruling does not preclude evidence of a similar subsequent accident that is not too remote in time or space. *Id.*

¶12 Other jurisdictions have specifically examined whether evidence of subsequent accidents can be admitted. Those jurisdictions have generally held that evidence of subsequent accidents is inadmissible to demonstrate notice or negligence. *E.g.*, *Niemann v. Luca*, 625 N.Y.S.2d 267, 268 (1995) (citation omitted) (subsequent accident evidence is "of no probative value regarding the question of notice"); *Burlington N. R.R. Co. v. Whitt*, 575 So. 2d 1011, 1019 (Ala. 1990) (citation omitted) ("[E]vidence of subsequent accidents and injuries is not admissible to prove that a defendant knew of the dangerous condition at the time of the accident that is the basis for the lawsuit."); *Genrich v. State*, 248 Cal. Rptr. 303, 310-11 (App.

1988) (citation omitted) ("subsequent accident . . . not relevant on the issue of knowledge or notice of a dangerous condition existing at the time of the injury"); *Johnson v. State*, 636 P.2d 47, 57 (Alaska 1981) (only prior accident evidence admissible for notice purposes). These jurisdictions, however, have found that subsequent accident evidence may be used to show the existence of a dangerous condition. *See, e.g.*, *Petrilli v. Federated Dep't Stores, Inc.*, 838 N.Y.S.2d 673, 675 (2007) (evidence of nine subsequent similar accidents admissible to establish that dangerous condition existed); *Niemann*, 625 N.Y.S.2d at 268 (citation omitted) (subsequent accident evidence "admissible to establish the existence of a dangerous condition, instrumentality, or place"); *Burlington*, 575 So. 2d at 1019 (citation omitted) (evidence of subsequent accident "admissible on the issue of whether a place was safe if the condition of the place of the accident in suit was substantially the same as it was at the time of the other incident"); *Johnson*, 636 P.2d at 57 ("[E]vidence of both prior and subsequent occurrences is admissible, so long as the conditions are similar.").

¶13 Although Arizona has yet to address or adopt the distinction that would allow subsequent accident evidence to demonstrate a dangerous condition, we find the cited authorities persuasive. As a result, we conclude that the direction from our supreme court in *Burgbacher* applies to evidence of a

subsequent accident that is offered to prove the existence of a dangerous condition, if the subsequent accident is similar and occurred within a reasonable time after the accident giving rise to the lawsuit.

¶14 Here, the trial court denied CRC's motion in limine subject to the presentation of evidence that would establish that Richard Ludi's subsequent accident was sufficiently similar to Cristion's accident. The court ruled that the challenged evidence was inadmissible to establish CRC's knowledge, notice or negligence, but relevant to show that the road was dangerous. CRC argues that even if subsequent accident evidence is admissible for the limited purpose of showing the road was dangerous, the Ludi accident should have been excluded because it was not similar to Cristion's accident and occurred three months later. CRC also argues that the undue prejudice caused by the evidence outweighed its probative value. *See* Ariz. R. Evid. 403.

¶15 The trial court was not required to make, and CRC did not request, specific findings at the time the motion in limine was denied that the Ludi accident was similar to Cristion's accident. As a result, we will presume that the court found, subject to foundation being established, that the pleadings and attachments demonstrated that the accidents and the road condition were sufficiently similar despite the three-month

interval, and that the relevant evidence was not unduly prejudicial. *See State v. Haight-Gyuro*, 218 Ariz. 356, 360 n.5, ¶ 14, 186 P.3d 33, 37 n.5 (App. 2008) (citation omitted) (reviewing court presumes trial court found any facts necessary to support its ruling and must affirm if the ruling is reasonably based on the evidence). We find no abuse of discretion.

¶16 Even if the trial court had erred in denying the motion in limine, CRC opened the door to the admission of the contested evidence when it opted to cross-examine Lange about the Ludi accident before Cristion could factually establish any similarity between the accidents. *See Acheson v. Shafter*, 107 Ariz. 576, 579, 490 P.2d 832, 835 (1971) (citations omitted) ("[O]ne may not invite error at the trial and then assign it as error on appeal."). CRC nevertheless argues that its motion preserved its objection, despite the fact that it exposed the jury to the evidence. We disagree.

¶17 While a motion in limine preserves an issue even if a specific objection is not made at trial, *State v. Burton*, 144 Ariz. 248, 250, 697 P.2d 331, 333 (1985) (citation omitted), the moving party is not entitled to insert the allegedly inadmissible evidence into the case without forfeiting the motion's protection. *See Brown v. U.S. Fid. & Guar. Co.*, 194 Ariz. 85, 88, ¶ 11, 977 P.2d 807, 810 (App. 1998) (plaintiffs

who presented challenged testimony instead of objecting if and when defendant introduced it waived their objection even though court had denied their motion in limine as untimely); *State v. Lindsey*, 149 Ariz. 472, 477, 720 P.2d 73, 78 (1986) ("It is the general rule that when a party procures the admission of improper evidence, the 'door is open' and the opposing party may then respond or retaliate with evidence on the same subject."). Consequently, after CRC introduced the subsequent accident evidence, the court did not err when it permitted Cristion to use the Ludi accident to demonstrate the dangerous condition of the road.

C. Excessive Verdict

¶18 Finally, CRC argues that the verdict was excessive, and we should order a new trial. We defer to a court's assessment as to whether a verdict requires modification and will affirm unless we find a clear abuse of discretion. *Fridena v. Evans*, 127 Ariz. 516, 522, 622 P.2d 463, 469 (1980). "If the verdict is supported by adequate evidence it will not be disturbed, and great discretion is given to the trial judge to determine whether the evidence required an adjustment of the verdict." *Id.* (citation omitted).

¶19 Here, the jury had an opportunity to observe Cristion and listen to his testimony; the jurors heard that he was unable to work for two years after the accident and that, despite his

surgeries and medical treatments, he will continue to suffer a permanent disability that restricts his activities and employment prospects. He also presented evidence that he had incurred approximately $720,000 in special damages[4] and requested that amount and at least as much in general compensatory damages for his pain and suffering. The jury, after being properly instructed, awarded him his special damages and approximately twice that amount for his pain and suffering. Given the trial testimony of the accident and Cristion's resulting injuries, we do not find that the award was excessive or that the trial court erred when it refused to set it aside or grant CRC a new trial.

CONCLUSION

¶20 Based on the foregoing, we affirm the verdict and judgment. Cristion is entitled to his costs upon compliance with Arizona Rule of Civil Appellate Procedure 21.

/s/
_____
MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/
_____
ANN A. SCOTT TIMMER, Judge

/s/
_____
ANDREW W. GOULD, Judge

[4] "Special damages" refer to losses that are "specifically claimed and proved." Black's Law Dictionary 419 (8th ed. 2004).