jIn The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00035-CV

JEFFERIE ANN CARTWRIGHT, Appellant

V.

PINNACLE ENTERTAINMENT, INC., Appellee

On Appeal from the 163rd District Court
Orange County, Texas
Trial Cause No. B-070455-C

MEMORANDUM OPINION

Pinnacle Entertainment, Inc. operates the L'auberge du Lac Hotel & Casino in Lake Charles, Louisiana. After sustaining a fall at L'auberge, Jefferie Ann Cartwright sued Pinnacle for negligence and premises liability. A jury rendered a verdict in Pinnacle's favor and the trial court entered a take-nothing final judgment against Cartwright. Cartwright filed a motion for new trial, which the trial court denied by operation of law. *See* Tex. R. Civ. P. 329b(c). On appeal, Cartwright challenges the denial of her motion for new trial. We affirm the trial court's judgment.

Factual Background

In December 2006, Cartwright, Oscar Shadell, Gertha Shadell, Patricia Edwards, and Melvin Edwards went to L'auberge to celebrate the New Year. When leaving, Oscar and Gertha walked out first. As Patricia followed the Shadells, she saw the mat in front of the door "ruffle[d] up" and assumed that this happened when the doorman opened the door. She had not seen the "rug move under the doorway," but she saw that the mat was crumpled and she stepped over the mat.

Oscar did not notice the mat on his way out of L'auberge. He and Gertha heard Cartwright fall behind them and they turned to see the mat "puckled up." After falling, Cartwright noticed that the mat was crumpled. She testified that the mat had caught on the front door and "buckled." After the accident, a doorman told Cartwright, "It's good for them. I told them about that rug and people be tripping on it."

Melvin, who was behind Cartwright when she fell, testified that no one noticed the mat when the doorman opened the door. Several people walked out, but Melvin did not see anyone step over the mat and he could not see the "rug or anything puckled up." Although Melvin did not see what caused the mat to crumple, he knew it was the door. He testified that when the doorman opened the door, the door would not slide across the mat, the mat caught in the door, the mat "puckled up," Cartwright's foot caught in the mat, and Cartwright fell. After Cartwright fell, Melvin first noticed that the "door had kicked that rug up." Melvin concluded that the most likely explanation for what caused

the mat to pucker is that the door is not high enough to clear the mat. Melvin testified that the doorman should have known about the crumpled mat.

After the accident, Melvin saw the doorman try to free the mat, but the mat was jammed under the door and the door would not close easily. Patricia testified the mat was still crumpled and wedged under the door after the accident. She thought Melvin said something to L'auberge employees after the accident, but no one fixed the mat.

Cartwright testified that she had not seen any unsafe conditions or crumpling of the mats when she first entered L'auberge. She testified that there was traffic between the doorman and the crumpled mat. She did not know what the doorman saw before the accident, how long the mat had been crumpled, or whether anyone reported the condition.

Oscar and Gertha had seen the mat "puckled up" on other occasions. Oscar had never tripped on the mat, but he testified that the mat will "puckle" when the front doors at L'auberge open. Gertha, Patricia, and Melvin heard that other people had also tripped on the mats.

Gertha understood that Cartwright fell because she tripped on the mat. Patricia and Melvin testified that the mat was the only condition that could have caused Cartwright's fall. Melvin testified that, had Cartwright kicked the mat, it would have moved and would not have thrown her with such force. L'Auberge's incident report, Cartwright's voluntary statement, and an employee statement all reiterate Cartwright's claim that she tripped on a mat in the valet area.

Marty May, L'auberge's risk manager, and Jim McBroom, L'auberge's lead security officer, both testified that patron safety is a top priority. They testified that employees, including doormen, are trained and expected to immediately identify hazards, such as a crumpled rug, and rectify them.

May explained that L'auberge has five sets of heavy, twelve-foot-tall double doors. In front of the double doors are heavy-weight, stiff, commercial grade, four-by-five-foot mats with carpet tops and rubber bases. May testified that most patrons enter L'auberge through the front doors and that slip and fall accidents are the most common accidents that occur in that area. He testified that if the mat is too close to the threshold and the door opens, the mat could flip up and could create a trip hazard. McBroom testified that a high traffic area, like the entryway, needs to be clear of trip, slip, and fall hazards. He assumed that if a mat were crumpled, it would be the most common hazard in the valet area.

May testified that the doorman could potentially see a flip in the mat, but the size and weight of the doors could prevent the doorman from feeling any resistance when opening the door, and the view of the mats can be obscured by the number of patrons walking through the doorway. If the doorman sees or knows of the dangerous condition, such as a flipped up mat, he should rectify the situation or report it and keep patrons away until the problem is resolved. May testified that L'auberge is at fault if the doorman has knowledge of the hazard and fails to take action to prevent it. McBroom testified that if

the condition, such as a crumpled mat, is happening routinely, L'auberge should address it and would be at fault for failing to do so. May testified that the dangerous condition must exist long enough for the person to notice it and react to it. He and McBroom testified that a person, such as a doorman, would have to know that the dangerous condition exists.

May testified that he has walked through the front doors numerous times a day, but has never observed a problem. He has seen the doors open and close, but the mats stayed in place. He has never seen the mats crumpled by the door, but in his deposition, he testified that he had seen the mats crumpled and could not recall if this was before the accident. He disagreed that every time the doors open, the mats catch in the door. He testified that thousands of people walk through the doors when the mats are in place.

When May arrived at the scene of Cartwright's accident, he did not see the mat caught in the doorway. If it had been caught, it would have been fixed before he arrived. May testified that if the witnesses are correct, the doorman should have known about the crumpled mat and recognized it as a trip and fall hazard. May did not see that the doorman took any action. When McBroom responded to Cartwright's accident, he did not see the mat crumpled. He admitted that, if the mat was crumpled, it would create a slip, trip, and fall hazard.

May was unaware of a March 2008 accident where another patron tripped on a mat, but he noted that the report did not say that the mat was caught in the doorway. No

one has ever informed May that the mats pose a risk of danger, that the mats should be changed or taken out of operation, that someone was injured in the doorway, that patrons complained about the mats, or that patrons have reported the mats crumpling. McBroom testified that no one has ever reported ongoing problems with the mats catching in the doorway, he has never responded to an incident where a mat caught in the doorway, and he has never seen a mat catch in the doorway.

Denial of Motion for New Trial

In her sole issue, Cartwright contends that the trial court improperly denied her motion for new trial because the evidence is legally insufficient or, in the alternative, factually insufficient to support the jury's verdict.

Denial of a motion for new trial is reviewed for abuse of discretion. *Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 813 (Tex. 2010). Under an abuse of discretion standard, legal and factual sufficiency of the evidence are relevant factors in assessing whether the trial court abused its discretion. *Lesikar v. Moon*, 237 S.W.3d 361, 375 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (citing *Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, 226 (Tex. 1991)); *see Carlin v. Carlin*, 92 S.W.3d 902, 905 (Tex. App.—Beaumont 2002, no pet.).

Under legal sufficiency review, we consider "whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review." *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). "We must view the evidence in the

light most favorable to the verdict and 'must credit favorable evidence if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not.'" *Del Lago Partners v. Smith*, 307 S.W.3d 762, 770 (Tex. 2010) (footnote omitted) (quoting *City of Keller*, 168 S.W.3d at 822, 827). Under factual sufficiency review of issues on which the appellant has the burden of proof, we consider whether the finding is "against the great weight and preponderance of the evidence." *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001). We "must consider and weigh all of the evidence, and can set aside a verdict only if the evidence is so weak or if the finding is so against the great weight and preponderance of the evidence that it is clearly wrong and unjust." *Id*.

Although Cartwright's alleged injury occurred in Louisiana, in addressing the duty owed by a premises' owner to invitees, all of the parties rely upon Texas law. In the absence of a request to take judicial notice or proof regarding the laws of another State, we assume that Louisiana's premises liability law is the same as that of Texas. *See Gevinson v. Manhattan Constr. Co. of Okla.*, 449 S.W.2d 458, 465 n.2 (Tex. 1969); *Tempel v. Dodge*, 89 Tex. 69, 33 S.W. 222 (1895); *Burns v. Resolution Trust Corp.*, 880 S.W.2d 149, 151 (Tex. App.—Houston [14th Dist.] 1994, no writ); *Milner v. Schaefer*, 211 S.W.2d 600, 603 (Tex. Civ. App.—San Antonio 1948, writ ref'd). To establish her premises liability claim, Cartwright was required to show that (1) Pinnacle had "actual or constructive knowledge of some condition on the premises," (2) "the condition posed an unreasonable risk of harm," (3) Pinnacle "did not exercise reasonable care to reduce or

eliminate the unreasonable risk of harm," and (4) Pinnacle's "failure to use reasonable care to reduce or eliminate the unreasonable risk of harm proximately caused [Cartwright's] injuries." *LMB, Ltd. v. Moreno*, 201 S.W.3d 686, 688 (Tex. 2006). Because Cartwright was an "invitee," Pinnacle owed "a duty to use ordinary care to reduce or eliminate an unreasonable risk of harm created by a premises condition about which [it] knew or should have known." *Del Lago Partners*, 307 S.W.3d at 767; *see Rosas v. Buddies Food Store*, 518 S.W.2d 534, 536 (Tex. 1975) ("An invitee has been described as one who enters on another's land with the owner's knowledge and for the mutual benefit of both.").

The threshold question that we must answer is whether Pinnacle had actual or constructive knowledge of a dangerous condition on the premises. *See Motel 6 G.P. v. Lopez*, 929 S.W.2d 1, 3 (Tex. 1996). "Although there is no one test for determining actual knowledge that a condition presents an unreasonable risk of harm, courts generally consider whether the premises owner has received reports of prior injuries or reports of the potential danger presented by the condition." *Univ. of Texas-Pan Am. v. Aguilar*, 251 S.W.3d 511, 513 (Tex. 2008). "Actual knowledge requires knowledge that the dangerous condition existed at the time of the accident, as opposed to constructive knowledge which can be established by facts or inferences that a dangerous condition could develop over time." *City of Corsicana v. Stewart*, 249 S.W.3d 412, 414-15 (Tex. 2008). "[C]onstructive knowledge can be established by showing that the condition had existed

long enough for the owner or occupier to have discovered it upon reasonable inspection." *CMH Homes, Inc. v. Daenen*, 15 S.W.3d 97, 102-03 (Tex. 2000).

Pinnacle contends that Cartwright failed to present evidence showing that it had actual or constructive knowledge of a dangerous condition. Cartwright contends that the proper question is not "whether Pinnacle had knowledge that the carpet was buckled at the exact time that [she] tripped over it, or how long the carpet was buckled before [she] tripped[,]" but "whether Pinnacle knew the nature of the exit way created a risk that caused [her] to fall." In reliance on *Corbin v. Safeway Stores, Inc*., 648 S.W.2d 292 (Tex. 1983), Cartwright contends that the manner by which the mats were displayed created an unreasonably dangerous condition of which Pinnacle was aware.

In *Corbin*, Corbin slipped on a grape and fell in front of a self-service grape bin in a Safeway produce aisle. *See Corbin*, 648 S.W.2d at 294. Corbin saw several ruptured and discolored grapes lying on the floor, but no mat or other floor covering in the area. *Id*. Company policy required Safeway stores "to keep large non-skid, non-slip walk-off mats in front of the grape display" because "customers frequently either knock grapes off their stems or drop them, creating a great risk that someone will subsequently step on a slippery grape peel and fall on the linoleum floor." *Id*. Safeway "knew from experience that the grape bin was an unusually hazardous and continual source of slippery material on which customers may fall." *Id*. The mats were necessary "because store employees

were unable adequately to supervise the floor to ensure that it remained free of grapes." *Id*. at 294-95.

Corbin alleged three dangerous conditions. *Id*. at 296. First, he argued that "the presence on the floor of the specific grape on which he slipped posed an unreasonable risk of harm and that Safeway had constructive knowledge of that risk." *Id.* The Texas Supreme Court rejected this argument in part because "Corbin's testimony that the grapes lying around him were discolored and ruptured does not tend to prove that the grapes had been on the floor a sufficient time to impute knowledge of their location to Safeway." *Id.* Second, Corbin argued that "the floor was dangerous because it was excessively dirty and littered." *Id*. The Court rejected this argument because Corbin "testified that he slipped on a grape, not on dirt or other slippery matter." *Id*. Third, Corbin argued that "Safeway's chosen self-service method for displaying green grapes in an open, slanted bin above a green linoleum tile floor resulted in an unreasonable risk of customers falling on grapes that have fallen or been knocked to the floor." *Id*. The Court agreed:

> Safeway acknowledged its full awareness of every circumstance under which it operated the self-service grape display, but contended a walk-off mat was in place at the time Corbin fell. Because the placing of such a mat in front of the grape display was a function of general store maintenance, the jury reasonably could have inferred that Safeway, through its employees, had failed to put the mat in place. This inference would satisfy the requirement of notice to Safeway.

Id. (internal citations omitted). The Court held that, "*even in the absence of evidence showing the store owner's actual or constructive knowledge* of the presence on the floor

of the specific object causing the fall," a store owner may be liable by failing to "use reasonable care to protect its customers from the known and unusually high risks accompanying customer usage of a self-service display of goods." *Id.* at 295 (emphasis added). The Court subsequently clarified that "As a matter of law . . . the mere fact that a store has a customer sampling display cannot, without more, be evidence of a condition on the premises that poses an unreasonable risk of harm." *H.E. Butt Grocery Co. v. Resendez*, 988 S.W.2d 218, 219 (Tex. 1999).

In *Crosby v. Minyard Food Stores, Inc.*, 122 S.W.3d 899 (Tex. App.—Dallas 2003, no pet.), the Dallas Court applied *Corbin* to a trip and fall case involving a wrinkled mat. Crosby "tripped because a mat at the entrance of the store was buckled and had a bump in it." *Crosby*, 122 S.W.3d at 900. Minyard argued that Crosby "presented no evidence the store knew or should have known about the bump in the entry mat that caused Crosby to fall." *Id.* The Dallas Court explained that "Minyard's focus on the bump in the mat as the dangerous condition is misplaced[.]" *Id.* Crosby presented evidence that "the mat frequently became buckled due to heavy foot traffic in and out of the store." *Id.* at 901. A store employee "testified he had to straighten the mat between 48 and 86 times during an eight hour shift." *Id.* Crosby "submitted accident reports signed by the store's managers showing that several people had tripped and fallen on the mat within a few weeks before Crosby's accident." *Id.* Citing *Corbin*, the Dallas Court held:

> Crosby presented evidence that Minyard was aware of the fact that the mat at the entry to the store was often buckled and caused customers to fall. Because Crosby presented evidence that the mat itself was a problem creating a frequent risk of injury, it was not necessary for her to show that Minyard was aware or should have been aware of the specific bump in the mat that caused her to fall.

Id. at 901. "All the evidence . . . showed that the mat at the entrance of the store had a tendency to buckle and required frequent straightening." *Id*. at 902. "The evidence also showed that Minyard was aware that the recurrent bumps in the mat were causing customers to fall." *Id*.

In *Bowman v. Brookshire Grocery Co.*, 317 S.W.3d 500 (Tex. App.—Tyler 2010, pet. filed), Bowman tripped on the ruffled edge of a mat and fell. *See Bowman*, 317 S.W.3d 501-02. Similar accidents had occurred in other Brookshire stores, but not in the store where Bowman fell. *Id*. at 502. The corporate representative "indicated that once or twice a month, someone would tell him that a floor mat was not lying flush with the floor." *Id*. Store employees remedied the situation immediately. *Id*. A store employee testified "that he was trained to immediately place the mat flush with the floor when he observed this problem or a customer brought this type of problem to his attention." *Id*.

The Tyler Court concluded that it was "the condition of the floor mat, i.e., the 'ruffled' edges, [and not the mat itself,] created the unreasonable risk of harm." *Id*. at 504. Based on evidence of similar injuries that occurred at other stores, the Bowmans relied, in part, on *Crosby* for the proposition that the "store owner may be liable if the invitee can show the store owner was aware of a high risk that the dangerous condition

would occur." *Id.* The Tyler Court declined to find actual knowledge, because there were no reported injuries regarding floor mats at the store where Bowman was injured, and the evidence did not show that the floor mats in that store "remained in a dangerous condition after such a condition was brought to the attention of the store by its employees." *Id*. at 505. The Tyler Court also declined to find constructive knowledge, noting that the evidence did not show that "Brookshire knew of the mat's 'ruffled' edges and had failed to take action" or that the "'ruffled' edges of the mat had existed long enough for Brookshire to have discovered it upon reasonable inspection." *Id.*

In light of *Corbin*, *Crosby*, and *Bowman*, the question we must answer is whether Cartwright presented evidence that the mat itself, *i.e.*, the manner of its display, was a problem creating a frequent risk of injury and, if not, whether Pinnacle was aware or should have been aware of the specific wrinkle in the mat that allegedly caused Cartwright to fall. *Crosby*, 122 S.W.3d at 901; *see Corbin*, 648 S.W.2d at 295; *see also Bowman*, 317 S.W.3d 504-05.

Unlike *Corbin* and *Crosby*, the record in this case does not show that Pinnacle failed to use reasonable care to protect patrons from a "known and unusually high risk[.]" *Corbin*, 648 S.W.2d at 295. Although May and McBroom both acknowledged a possible trip hazard, their testimony does not amount to an admission that, at the time of Cartwright's fall, Pinnacle was aware that the mats frequently wrinkled and recurrent wrinkles in the mats caused patrons to trip and fall. *Id*. at 294; *see Crosby*, 122 S.W.3d at

901-02. The jury heard evidence of other people's knowledge regarding wrinkles in the mats and similar accidents, but May and McBroom testified that no such complaints had been reported, they had never seen the doors cause the mats to wrinkle, and they were unaware of any dangers or injuries associated with the mats. Accordingly, the evidence does not establish that Pinnacle knew from experience that the mats were an "unusually hazardous and continual source" of wrinkled material on which patrons may fall. *See Corbin*, 648 S.W.2d at 294; *Crosby*, 122 S.W.3d at 901. The record does not show Pinnacle's full awareness of every circumstance under which it displayed the mats near the front doors at L'auberge. *See Corbin*, 648 S.W.2d at 296. Accordingly, the jury could reasonably conclude that the manner by which Pinnacle displayed the mats did not create a known and frequent risk of injury to patrons.

Nor does the record in this case show that Pinnacle knew or should have known of the specific wrinkle in the mat that allegedly caused Cartwright to fall. *See Crosby*, 122 S.W.3d at 901; *see also Bowman*, 317 S.W.3d at 504-05. According to the record, Pinnacle was unaware of any prior injuries or complaints involving a wrinkle in the mat. *Bowman*, 317 S.W.3d at 505. The record contains evidence that the doorman should have noticed the wrinkle in the mat, but failed to either notice it or remedy it. Nevertheless, the jury heard evidence that the doorman's view of the mat could have been obscured, that employees were required to remedy trip hazards immediately upon learning of the hazard, that the doorman attempted to remove the wrinkle in the mat

immediately after Cartwright's fall, and that the wrinkle in the mat was removed shortly after the accident. The evidence does not show that any L'auberge employee was aware of the wrinkle in the mat, but failed to act, or that the wrinkle in that mat had existed long enough for Pinnacle to have discovered it upon reasonable inspection. *Id.* Under these facts, the jury could reasonably conclude that Pinnacle had neither actual nor constructive knowledge of the specific wrinkle in the mat that allegedly caused Cartwright's injuries. *See Wal-Mart Stores v. Reece*, 81 S.W.3d 812, 816 (Tex. 2002) ("An employee's proximity to a hazard, with no evidence indicating how long the hazard was there, merely indicates that it was *possible* for the premises owner to discover the condition, not that the premises owner reasonably *should* have discovered it."); *see also Wal-Mart Stores v. Gonzalez*, 968 S.W.2d 934, 938 (Tex. 1998) (quoting *Henderson v. Pipkin Grocery Co.*, 268 S.W.2d 703, 705 (Tex. Civ. App.—El Paso 1954, writ dism'd w.o.j.)) ("[P]laintiffs must always discharge the burden of proving that the dangerous condition was either known to the defendant or had existed for such a length of time that he should have known it."); *Corbin*, 648 S.W.2d at 296; *Bowman*, 317 S.W.3d at 504-05.

As the sole judge of the weight and credibility of the evidence, the jury was entitled to resolve any conflicts in the evidence and choose who to believe. *See City of Keller*, 168 S.W.3d at 819; *see also Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003). In doing so, the jury could reasonably conclude that neither the manner by which the mats were displayed nor the specific wrinkle in the mat that

allegedly caused Cartwright's fall constituted an unreasonably dangerous condition of which Pinnacle was aware. *See Del Lago Partners*, 307 S.W.3d at 770; *see also City of Keller*, 168 S.W.3d at 822, 827. The evidence is not so weak, nor so against the great weight and preponderance of the evidence, as to render the verdict clearly wrong and unjust. *Dow Chem. Co.*, 46 S.W.3d at 242. Accordingly, the trial court did not abuse its discretion by denying Cartwright's motion for new trial. We overrule Cartwright's sole issue and affirm the trial court's judgment.

AFFIRMED.

_____

STEVE McKEITHEN
Chief Justice

Submitted on November 18, 2010
Opinion Delivered January 20, 2011

Before McKeithen, C.J., Gaultney and Horton, JJ.