

NO. 12-16-00208-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

*YULMA MOLINA,
APPELLANT*

§ *APPEAL FROM THE 96TH*

V.

§ *JUDICIAL DISTRICT COURT*

*HURRICANE HARBOR, L.P.,
APPELLEE*

§ *TARRANT COUNTY, TEXAS*

MEMORANDUM OPINION

Yulma “Janet” Molina appeals from a take nothing judgment in her lawsuit against Hurricane Harbor, L.P. for negligence. In two issues, Janet challenges the admission of certain evidence and the sufficiency of the evidence. We affirm.

BACKGROUND

Janet sued Hurricane Harbor for negligence arising out of injuries she sustained while on the “Mega Wedgie,” a water slide located at Hurricane Harbor’s water park. At trial, Janet testified that she and her husband, Carlos, received an inner tube from the attendant at the bottom of the slide. Janet testified that, after being dispatched onto the slide, she felt the tube “missing air” and beginning to flip. She was ejected from the tube, her head and shoulder struck the slide, and she lost consciousness.

The jury found Janet sixty percent negligent and Hurricane Harbor forty percent negligent. The jury did not award any damages to Janet. The trial court signed a take nothing judgment in accordance with the jury’s verdict. This appeal followed.

EXCLUSION OF EVIDENCE

In issue one, Janet challenges the trial court's exclusion of evidence regarding similar accidents that occurred on the Mega Wedgie.

Standard of Review

We review a trial court's exclusion of evidence under an abuse of discretion standard. *Caffe Ribs, Inc. v. State*, 487 S.W.3d 137, 142 (Tex. 2016). A trial court abuses its discretion when it acts without regard for any guiding rules. *Id.* The erroneous exclusion of evidence is reversible only if it probably resulted in an improper judgment. *JLG Trucking v. Garza*, 466 S.W.3d 157, 161 (Tex. 2015); TEX. R. APP. P. 44.1(a)(1).

Facts

During trial, Janet sought to admit a document, dated July 22, 2010, that memorialized a telephone conversation between a park employee and the Mega Wedgie's manufacturer, Scott Getschel from Water Fun Products. The document states as follows:

I called Scott and told him that we had been having a rash of injuries at the Mega Wedgie due to either whiplash or guests striking their heads on the slide. I verified that we were using the correct tube (a figure 8 double tube), and that the rider position was correct (sitting up, facing forward, chin tucked, heavier rider in back). He mentioned a tube with a backrest on it. I told him that we had gotten some tubes from Zebec. He told me that that was the tube he was referring to. I asked about rider position and he told me that the heavier rider should be in the back.

Hurricane Harbor objected that the exhibit was irrelevant, did not involve substantially similar incidents, is more prejudicial than probative, and lacked a predicate. The trial court sustained the objections.

Analysis

On appeal, Janet maintains that the excluded July 2010 document was relevant to show the park knew that the ride "presented a dangerous condition to its customers and that this dangerous condition was connected to the inner tubes" and failed to warn or make safe. She further contends that the prior incidents described in the document are sufficiently similar to her accident because the accidents likely occurred less than two years apart, on the same ride, and at the same park, involved the same types of injuries, i.e., "whiplash" and guests "striking their heads on the slide," and the rider instructions and riding positions were virtually identical.

Relevant evidence is generally admissible. TEX. R. EVID. 402. "Evidence of other accidents, near accidents or related similar events has long been recognized as probative

evidence in Texas courts, provided an adequate predicate is established.” *Henry v. Mrs. Baird’s Bakeries, Inc.*, 475 S.W.2d 288, 294 (Tex. App.—Fort Worth 1971, writ ref’d n.r.e.). Such evidence is admissible when the plaintiff shows that the incidents “occurred under reasonably similar but not necessarily identical circumstances.” *Missouri Pac. R. Co. v. Cooper*, 563 S.W.2d 233, 236 (Tex. 1978). “An unrelated incident may be relevant and admissible if it and the incident involved in the lawsuit occurred under reasonably similar circumstances, the two incidents are connected in a special way, or the incidents occurred by means of the same instrumentality.” *Columbia Med. Ctr. Subsidiary, L.P. v. Meier*, 198 S.W.3d 408, 411-12 (Tex. App.—Dallas 2006, pet. denied). “‘Reasonably similar’ generally means the same type of occurrence.” *Id.* The degree of similarity required depends on the issue the evidence is offered to prove. *Nissan Motor Co. Ltd. v. Armstrong*, 145 S.W.3d 131, 138 (Tex. 2004). The proponent of the evidence bears the burden of showing the incidents are reasonably similar. *Meier*, 198 S.W.3d at 412.

In this case, Janet claimed that the tube was underinflated, which led to her injury. While the July 2010 document addresses injuries on the slide and Hurricane Harbor’s desire to ensure that proper tubes and procedures were being used to prevent injuries, it does not speak to the same type of occurrence as Janet’s accident. For instance, the record indicates that a different brand of tube was used in 2010 and that those tubes had no backrest. At the time of Janet’s accident, in June 2012, the Mega Wedgie used the Sidewinder figure eight tubes with back rests. Most importantly, the document does not mention any concerns or problems with the tubes themselves, including underinflation, or indicate any knowledge by Hurricane Harbor of any danger related to underinflation. Nor does the document explain the circumstances of the “rash of injuries,” such as whether those injuries were caused by a potentially underinflated tube. Additionally, the document predates Janet’s accident by nearly two years. Under these circumstances, the trial court could conclude that the 2010 document did not represent evidence of circumstances reasonably similar to Janet’s accident. *See Cooper*, 563 S.W.2d at 236.

Accordingly, we conclude that Janet failed to satisfy her burden of proving admissibility of the evidence, and the trial court did not abuse its discretion by excluding the July 2010 document. *See Caffè Ribs, Inc.*, 487 S.W.3d at 142. We overrule issue one.

SUFFICIENCY OF THE EVIDENCE

In issue two, Janet challenges the legal and factual sufficiency of the evidence to support the jury's verdict. She contends that the record does not establish contributory negligence.

Preservation

To preserve a complaint of factual insufficiency of the evidence to support a jury finding, a party must raise the issue in a motion for new trial. *See* TEX. R. CIV. P. 324(b)(2). The record in this case does not indicate that Janet presented her factual sufficiency challenge in a motion for new trial. Accordingly, her factual sufficiency complaint is waived. *See id.*; *see also Ihnfeldt v. Reagan*, No. 02-14-00220-CV, 2016 WL 7010922, at *11 (Tex. App.—Fort Worth Dec. 1, 2016, pet. denied) (mem. op.). However, because Janet sought a partial motion for directed verdict on the issue of contributory negligence, her legal sufficiency challenge is preserved for appellate review. *See Hutchison v. Pharris*, 158 S.W.3d 554, 562 (Tex. App.—Fort Worth 2005, no pet.).

Standard of Review and Applicable Law

When reviewing the legal sufficiency of the evidence, we consider the evidence in the light most favorable to the verdict. *City of Keller v. Wilson*, 168 S.W.3d 802, 807 (Tex. 2005). We credit favorable evidence if a reasonable juror could, and disregard contrary evidence unless a reasonable juror could not. *Id.* “The final test for legal sufficiency must always be whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review.” *Id.* at 827. Jurors are the sole judges of the witnesses' credibility and the weight to give their testimony. *Id.* at 819. They are entitled to believe one witness and disbelieve another. *Id.* We are not permitted to impose our own opinions to the contrary. *Id.*

To establish negligence, a plaintiff must prove (1) a legal duty owed by the defendant to the plaintiff, (2) a breach of that duty, and (3) damages proximately caused by the breach. *Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 782 (Tex. 2001). “Contributory negligence contemplates an injured person's failure to use ordinary care in regard to his or her own safety.” *Kroger Co. v. Keng*, 23 S.W.3d 347, 351 (Tex. 2000). “This affirmative defense requires proof that the plaintiff was negligent and that the plaintiff's negligence proximately caused his or her injuries.” *Id.* Proximate cause is comprised of cause-in-fact and foreseeability. *Harrison*, 70 S.W.3d at 784. “The test for cause-in-fact is whether the act or omission was a substantial factor in causing the injury ‘without which the harm would not have occurred.’” *Id.* (quoting *Doe v.*

Boys Clubs of Greater Dallas, Inc., 907 S.W.2d 472, 477 (Tex.1995)). Foreseeability means that a person of ordinary intelligence should have anticipated the dangers that his negligence created. *Id.* at 785.

Facts

Janet testified that at the top of the Mega Wedgie, the attendant instructed them to sit down, hold on, and put their chins down. No one warned her that the tube might flip. She saw nothing wrong with the tube and she followed the attendant's instructions. Janet testified that she and Carlos faced each other in the tube. Carlos testified that he held the handles, lifted his bottom, and tucked his chin. Janet testified that she continued following instructions even after the tube began losing air. Carlos also felt the tube flip, but he could not recall if the tube was inflated or underinflated. He did not know why the tube flipped. Janet testified that she trusted that the tube and ride had been inspected and that everything was working in the correct manner. She would not have rode the Mega Wedgie had she been told the tube might flip.

Mike Davis, Hurricane Harbor's director of park operations, testified that the Mega Wedgie requires a specialized tube that is a figure eight shape and has handles for each rider. A warning attached to the tubes states that underinflation or defects should immediately be reported to park attendants. The tube also warns that it "may roll over in use." The tube's manufacturing warnings state to inspect its condition regularly, inspect for underinflation before each use, and keep properly inflated. Davis testified that park personnel are required to look for underinflation, verify proper inflation, and ensure that riders are in the proper positions before dispatch. He agreed that personnel should inspect each tube before use and an improperly inflated tube should be pulled from service. Davis explained that the park's signage and recordings advise customers of their responsibilities regarding the rides, including tucking their chin, lifting their bottoms off the slide surface, and holding on to handles, but does not instruct them to inspect the tubes.

Rickey Jacobs, the park's safety manager, testified that the park has a responsibility to (1) ensure that rides are properly maintained and safe for customer use, and (2) check the tubes to ensure that they are in operable condition, good working order, and safe for customer use. Alexis Geisel, Hurricane Harbor's retail and admissions supervisor, and Carlos Rodriguez, the park's maintenance technician at the time of the accident, testified that the Mega Wedgie is inspected daily and personnel test the ride before opening it. Geisel acknowledged that the park is responsible for inspecting and maintaining the tubes and rides. Jacobs explained that tubes

need to be properly inflated and free of leaks. Geisel agreed that it is important for employees to ensure that the tubes are properly inflated and in good repair before allowing them to be used by the customer. Rodriguez also agreed that the tubes need to be properly inspected and maintained to ensure customer safety. He and Geisel explained that there is an air compressor near the Mega Wedgie to allow employees to refill tubes if needed.

Tyler Rodriguez, the ride attendant at the time of the accident, testified that the Mega Wedgie's attendants are responsible for checking the tube inflation and that tubes are inflated throughout the day. He testified that tubes are not placed in service in the morning unless they are properly inflated. He agreed that normal use of the tubes can cause them to become underinflated, so it is important to check the tube before each use. Tyler testified that when he takes a tube from a guest, he squeezes it to ensure proper inflation. If a tube is underinflated, he would not allow the customer to use the tube. Jarid Parker, a Hurricane Harbor lifeguard at the time of the accident, testified that inflation is checked every morning, that a gauge measures the amount of air in the tube, and that air is added or released if needed. He testified that tubes are pulled from service and replaced if not in working order, such as if they are not holding air or have a puncture. He explained that if a tube is not properly inflated, the attendant notifies him and he inspects the tube and either adds air or pulls the tube depending on the problem. He testified that underinflated tubes are placed in a location where they will not be used. Parker testified that employees have to watch the Mega Wedgie's tubes, which are checked before the customer uses the tube on the ride and again at the end of the customer's ride. He explained that checking the gauge is the best way to determine inflation, and agreed that employees should be trained to check the gauges.

Davis testified that each morning, the park's aquatics department completes an inspection checklist. On the day of the accident, the Mega Wedgie cleared inspection, but the inspection failed to list a tube count. He agreed that inspecting the park rides includes ensuring that tubes are maintained and in good working order. Davis testified that tubes should be inspected before being placed into service to ensure that they are properly inflated and safe for customers, the handles are not loose, and the straps are connected. He testified that you can touch and view the tube to ensure proper inflation and that some tubes have a gauge that indicates the level of inflation.

Davis testified that, on the day of the accident, there were no issues with the slide's structure or water flow and levels. He testified that the accident report indicated that the tube flipped. He was unaware of the Molinas having complained of an underinflated tube or other problem before being dispatched onto the ride. The inspection report stated that the tubes appear in good condition and within operating guidelines. Although the attendant's statement did not indicate whether he checked the tube before dispatching the Molinas, the report stated that tube inflation was checked and dispatch was performed properly. The report did not identify any "causal factors."

Tyler explained that, before dispatching customers onto the ride, he gives a "safety spiel," sets up the tube for the customers, ensures customers are in the proper riding position, and sends the customers down the slide once the ride attendant at the bottom of the slide gives a "thumbs-up." He testified that the Molinas were in the proper riding position and were dispatched correctly. He recalled that the Molinas followed instructions and he could not identify anything they did wrong. However, he acknowledged that he only watched the Molinas during the first portion of the ride, before turning to assist the next customers. He did not see the tube flip.

Janet and Carlos denied engaging in horseplay during the ride. Davis testified that nothing in the accident report indicated that the Molinas engaged in horseplay, were improperly positioned in the tube, or did anything to cause or contribute to the tube's flipping. Carlos testified that he followed instructions. Jacobs testified that he knew of nothing to indicate that the Molinas violated the instructions for riding the Mega Wedgie. Geisel also testified that she had no information indicating that the Molinas disregarded instructions or were involved in horseplay.

Parker testified that he conducted a test ride on the Mega Wedgie after the accident, using the tube he believed the Molinas had used, as it was the only tube at the bottom of the pool during the accident investigation. Because he did not have to add air to the tube, Parker believed that it was safe and ready to be used, or he would not have used the tube to test the ride. He testified that the inflation was proper for the tube that the Molinas had been using. Parker further testified that deflation or improper inflation is uncommon.

Tyler testified that he had never seen an accident on the Mega Wedgie. Chris Gallop, a paramedic at Hurricane Harbor at the time of the accident, testified that he was unaware of other incidents on the Mega Wedgie that involved a flipped tube. Davis testified that no tubes had

flipped before Janet's accident. Jacobs testified that he knew of other injuries on the Mega Wedgie, but not involving an overturned tube or an ejection from a tube.

William Avery, the Molinas' expert witness, testified that amusement park standards require that "[s]lide vehicles shall be maintained in operating condition, including, but not limited to, all handles or other holding devices, and conditions of vehicle surfaces in contact with the slide surface." He testified that an underinflated tube poses a danger because inflation helps keep the rider in the correct position and provides stability. He explained that pressure can be checked by using the visual and feel test or by looking at the tubes' gauges, but he believed that simply squeezing a tube is insufficient to determine proper inflation. He explained that it is normal for tubes to deflate during the day. Thus, he explained that it is critical to test the tube before dispatch. Because no evidence showed that the Molinas failed to follow instructions and because the park's inspection form said the slide's water level and structure were fine, "deflation at some level" is all that remained as the cause of the accident. He based this opinion on Janet's statement, and on a reasonable degree of probability.

Wallace James, Hurricane Harbor's expert witness, testified that he is familiar with the Mega Wedgie and has inspected several similar rides. He testified that the tubes used by Hurricane Harbor are recommended by the manufacturer for safe and proper use of the ride. He was unaware of a flip or rollover on a ride like the Mega Wedgie. James testified that squeezing the tube is an acceptable and common method in the industry for testing inflation.

James found it significant that Janet claimed the tube was underinflated at launch and continued to deflate during the first part of the ride, which lasted under four seconds, but yet Carlos did not notice the tube deflating. James testified that he tested one of the Mega Wedgie's tubes at different inflations and found that both riders would be sitting on the same cushion of air, thus, both riders should be feeling the same thing. His testing revealed that the tube's deflation rate is several minutes, but the accident happened within five seconds of launch. James opined that Carlos's account is more consistent with the facts because the tubes were tested before the ride opened, the Molinas' tube was used during the test ride after the accident, and proper inflation was found in both instances.

James admitted that "gross deflation of the tube would cause some undetermined action[.]" However, he testified that nothing indicated that the tube deflated during the ride. Nor

did he find that Hurricane Harbor did or did not do anything that caused the accident. He concluded that:

After having exhausted other possibilities for the cause of the incident, I concluded that Mrs. Molina's recollection of the incident is not accurate, simply because there's no other causative factor. Something had to happen while they were riding on the tube that caused it to roll over, and that something would have to be their activity; there's no other mechanism involved.

James believed the accident was likely due to rider error. Specifically, that the Molinas "did something to cause the center of gravity to shift from the center of the tube over the side of the tube." He explained that the tube will not roll over as long as riders are centered in the tube, and that "basic physics and mechanics, employing the angles of the slide, you can see that a shift in the weight could cause a rollover." He explained that:

If the tube is partially inflated, it still has a cushion under the riders. If the riders are centered in the tube, the force is going to be applied through the tube and it's going to be a stable ride.

Analysis

On appeal, Janet argues that the record contains no evidence from which the jury could determine that she was contributorily negligent.

The record in this case presents two conflicting versions of Janet's accident. First, Janet testified that she felt the tube deflating. According to the record, the slide's structure and water levels were fine. The jury also heard evidence that the Molinas' received instructions on how to ride the Mega Wedgie. Tyler recalled that the Molinas' followed these instructions. Jacobs and Geisel were unaware of information suggesting the Molinas' did not follow instructions. Davis testified that the accident report indicates the tube flipped and does not suggest that the Molinas' caused the tube to flip. The jury heard Avery's opinion that because (1) no evidence showed that the Molinas' failed to follow instructions, and (2) the slide's water level and structure were fine, "deflation at some level" caused the accident. Even James admitted that "gross deflation of the tube would cause some undetermined action[.]"

Second, the jury heard evidence suggesting that the accident did not result from an underinflated tube, much less a grossly underinflated tube. For instance, based on James's testing, it takes several minutes for tubes to deflate, but the accident occurred only a few seconds after launch. Moreover, the accident report indicates that the tubes appeared in good condition

and within operating guidelines, and that tube inflation was checked and dispatch was performed properly. Additionally, the jury heard evidence that Carlos and Janet did not both feel the tube deflating. Yet, James testified that, based on his testing, both riders should feel the same thing during the ride.

Additionally, James testified that the Mega Wedgie's tubes are those recommended by the manufacturer. The jury heard testimony that tubes are not placed into service unless properly inflated and that, if tubes become underinflated, they are either refilled or removed from service. Tyler testified that he would not allow a customer to use an underinflated tube, and Parker testified that deflation is uncommon. Parker also testified that, before reopening the Mega Wedgie after Janet's accident, he conducted a test ride. He used the only tube that had been in the pool during the investigation of Janet's accident. He did not have to add air to the tube and he testified that the inflation was appropriate; otherwise he would not have used the tube during the test ride.

Davis, James, Gallop, and Jacobs were all unaware of flips or rollovers on the Mega Wedgie. According to James, "Something had to happen while [the Molinas] were riding on the tube that caused it to roll over, and that something would have to be their activity; there's no other mechanism involved." James believed the Molinas did something to cause a shift in the center of gravity because the tube will not roll over if riders are centered in the tube, even if the tube is partially inflated. He explained that "basic physics and mechanics, employing the angles of the slide, you can see that a shift in the weight could cause a rollover." However, if the riders remain "centered in the tube, the force is going to be applied through the tube and it's going to be a stable ride."

As sole judge of the weight and credibility of the evidence, the jury bore the responsibility of reconciling the conflicts in the evidence and choosing which version of the facts to believe. See *Wilson*, 168 S.W.3d at 819. The jury was permitted to draw reasonable inferences from the evidence and, in doing so, could reasonably conclude that Hurricane Harbor properly maintained and checked the tubes, and the Molinas' tube was checked and found to be properly inflated both before and after the accident. See *id.* at 821. The jury could also reasonably conclude that, even if the tube had lost air, (1) the tube contained a warning that it "may rollover[.]" (2) it was not so underinflated as to cause it to flip, (3) it would remain stable if riders stayed centered in the tube, and (4) only a shift in weight by the rider or riders could cause

a disturbance sufficient to flip the tube. Accordingly, the jury was entitled to conclude that Janet failed to use ordinary care with respect to her own safety and that this failure proximately caused her injuries. See *Keng*, 23 S.W.3d at 351. Viewing the evidence in the light most favorable to the jury's verdict, we conclude that reasonable and fair-minded people could determine that Janet was sixty percent contributorily negligent. See *Wilson*, 168 S.W.3d at 827. We overrule Janet's second issue.

DISPOSITION

Having overruled Janet's two issues, we *affirm* the trial court's judgment.

GREG NEELEY
Justice

Opinion delivered June 7, 2017.

Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(PUBLISH)



COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

JUNE 7, 2017

NO. 12-16-00208-CV

YULMA MOLINA,
Appellant
V.
HURRICANE HARBOR, L.P.,
Appellee

Appeal from the 96th District Court
of Tarrant County, Texas (Tr.Ct.No. 096-263952-13)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that all costs of this appeal are hereby adjudged against the appellant, **YULMA MOLINA**, for which execution may issue, and that this decision be certified to the court below for observance.

Greg Neeley, Justice.

Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.