IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

JESSICA CHAVEZ,	)	
	)	
Respondent,	)	
	)	
v.	)	WD75373
	)	
CEDAR FAIR, LP,	)	Opinion filed: July 16, 2013
	)	
Appellant.	)	

APPEAL FROM THE CIRCUIT COURT OF CLAY COUNTY, MISSOURI
The Honorable Anthony Rex Gabbert, Judge

Before Division Three: Joseph M. Ellis, Presiding Judge,
Lisa White Hardwick, Judge and Cynthia L. Martin, Judge

Appellant Cedar Fair, LP ("Cedar Fair") appeals from a judgment entered by the Circuit Court of Clay County following a jury verdict in favor of Respondent Jessica Chavez. This litigation arose out of a petition filed by Respondent seeking damages for the injuries she sustained on a ride at Oceans of Fun Water Park, which is owned and operated by Cedar Fair. For the following reasons, the judgment is affirmed.

In 2000, Respondent, who was twelve years old at the time, visited Oceans of Fun Water Park in Kansas City, Missouri, with her family. Shortly after arriving, Respondent, her aunt, Angela Boyles, and her cousins, Amy Cooper and Candace Kelly, proceeded to the Hurricane Falls raft ride. Hurricane Falls is a water slide in

which riders use a circular, multi-person raft to descend down an open fiberglass flume consisting of several twists and turns.[1] At the top of the ride, four to five passengers are seated in each raft and instructed to sit cross-legged and hold on to the nylon straps running along the edge of the raft. Signs placed along the staircase leading up to the ride inform passengers to hold on to the straps at all times.

At the instruction of the ride attendant, Respondent sat directly across from Cooper on the circular raft. As the raft reached the splash wall on the ride's final turn, Respondent and Cooper collided, and Cooper's head struck Respondent in the mouth. As a result of the impact, Respondent, who had braces at the time, sustained several injuries to the mouth, including the loss of a tooth. Following the accident, Respondent underwent a significant amount of dental work, including the removal of additional teeth and the implementation of dentures.

In 2005, Respondent filed a petition for damages against Cedar Fair[2] alleging Cedar Fair was negligent in that it failed to adequately warn its patron about the risks of the raft ride. The petition further alleged that Cedar Fair was negligent in that Hurricane Falls was unsafe when operated as intended because it lacked adequate safety devices for the protection and safety of passengers.[3] In 2012, the case proceeded to trial.

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[1] At the time Respondent sustained her injuries, all rides at Oceans of Fun and Worlds of Fun were assigned a rating that correlated to the ride's expected "thrill factor." The grading system rated rides on a scale of 1 to 5. Hurricane Falls was rated a "5"; thus, it was categorized as an "aggressive thrill ride" that could involve "high speeds," "heights," "aggressive and unexpected forces," and "rapid directional changes."

[2] Respondent also named Cedar Fair Management Company and Magnum Management Corporation Ohio as defendants. These companies were dismissed before the case was submitted to the jury.

[3] Also in her petition, Respondent alleged that Cedar Fair was negligent in that it failed to adequately train its employees operating and attending the Hurricane Falls ride. This claim was not pursued at trial.

At trial, Respondent presented the expert testimony of William Avery, a safety consultant in the amusement park industry. Avery testified that Cedar Fair failed to adequately warn passengers about the potential for passenger-to-passenger contact on the ride and could have minimized or prevented such body-to-body contact by adding friction devices, such as baffles, to the rafts. Conversely, Cedar Fair's expert Douglas Ferrell, a civil engineer, testified that the safety measures in place on the Hurricane Falls ride were adequate and that no such friction devices were currently being used in the industry.

At the close of evidence, the trial court instructed the jury that its verdict must be for Respondent if it believed Cedar Fair "failed to provide friction devices reasonably sufficient to prevent a raft rider from colliding with another rider, or [Cedar Fair] failed to adequately warn of the risk of harm from colliding with other rafters" and was thereby negligent. The instructions further provided that "[t]he term 'negligent' or 'negligence' . . . means the failure to use the highest degree of care. The phrase 'highest degree of care' means that degree of care that a very careful person would use under the same or similar circumstances." Cedar Fair objected to the jury being instructed that it owed the highest duty of care. It also sought to submit a comparative fault instruction on the basis that Respondent was partially at fault for letting go of the straps on the raft.[4] The trial court overruled Cedar Fair's objection regarding the standard of care and refused to submit the proposed comparative fault instruction to the jury.

[4] As explained *infra*, witnesses offered conflicting testimony regarding whether Respondent, Cooper, or anyone let go of the raft's straps going into the ride's final turn.

Ultimately, the jury returned a $225,000 verdict in favor of Respondent. The trial court entered its judgment accordingly and subsequently denied Cedar Fair's motion for judgment notwithstanding the verdict and motion for new trial. Cedar Fair now raises four points on appeal.

In its first point, Cedar Fair contends that the circuit court erroneously instructed the jury that the definition of negligence was the failure to use the highest degree of care because Cedar Fair is not a common carrier and, under Missouri law, amusement park operators owe only a duty of ordinary care to their patrons. Whether the jury was properly instructed as to the appropriate standard of care is a question of law that we review *de novo*. *See* ***Stronger ex rel. Stronger v. Riggs***, 85 S.W.3d 703, 704 (Mo. App. W.D. 2002); *see also* ***Syn, Inc. v. Beebe***, 200 S.W.3d 122, 132 (Mo. App. W.D. 2006).

In support of its contention that it owes only an ordinary degree of care, Cedar Fair relies upon ***McCollum v. Winnwood Amusement Co.***, 59 S.W.2d 693 (Mo. 1933). In *McCollum*, the plaintiff broke her leg while attempting to slide down defendant's water slide when her leg became caught in an open balustrade at the top of the slide. ***Id.*** at 694. The plaintiff alleged that the defendant amusement park was liable for negligent construction and maintenance of the slide in that the top of the slide was not of a sufficient length and size for her body and because the top of the slide was surrounded by an open railing in which a person's limbs could get caught. ***Id.*** On appeal, the main issue was whether the instructions actually required the jury to find the defendant amusement park's construction of the slide constituted negligence. ***Id.*** at 697. In

analyzing the negligence instruction, the Court stated that the jury was properly instructed that the defendant "owed the patrons the duty of using ordinary or reasonable care for their safety." ***Id.*** No further discussion or explanation as to the proper standard of care is given. Rather, the Court merely cited ***Berberet v. Electric Park Amusement Co.***, 3 S.W.2d 1025 (Mo. 1928), for the proposition that the ordinary or reasonable care standard given in the instruction "was a correct declaration of law in the abstract."[5] ***McCollum***, 59 S.W.2d at 697.

Respondent, on the other hand, asserts the trial court did not err by instructing the jury on the highest degree of care. In support, Respondent relies on a trio of this Court's decisions, ***Brown v. Winnwood Amusement Co.***, 34 S.W.2d 149 (Mo. App. K.C. 1931), ***Cooper v. Winnwood Amusement Co.***, 55 S.W.2d 737 (Mo. App. K.C. 1932), and ***Gromowsky v. Ingersol***, 241 S.W.2d 60 (Mo. App. K.C. 1951).

In the first of those cases, ***Brown***, 34 S.W.2d at 150, the plaintiff was injured on one of the defendant's rollercoaster rides. In discussing whether the plaintiff could proceed under a theory of *res ipsa loquitur*, the Court stated:

> There have been several cases before the higher courts of this country involving devices similar to the one in the case at bar and, while the courts have been slow in holding that the operator of such devices is technically a common carrier and that all the rules governing such carriers are applicable to him, they do hold that the rule in reference to the degree of care required of a common carrier applies to the operation of such devices; that the apparatus is under the control and management of the operator thereof and where the accident is such as does not happen

[5] The Court also cited to ***Steinke v. Palladium Amusement Co.***, 28 S.W.2d 440 (Mo. App. 1930), for the proposition that ordinary care was a proper declaration of the law. *See* ***McCollum***, 59 S.W.2d at 696. *Steinke* is a premises liability case in which the plaintiff was injured while roller skating and alleged the defendant's faulty construction of the roller rink resulted in his injuries. 28 S.W.2d at 441.

> under the ordinary course of things, if those who have the management of the apparatus use proper care, reasonable evidence is afforded, in the absence of explanation by the defendant, that the accident arose from want of such care. In other words under such circumstances the doctrine of res ipsa loquitur does apply.

Id. at 152. Thus, we held that amusement park operators must exercise the same degree of care as common carriers when operating amusement rides such as a rollercoaster.

Brown was followed less than two years later by ***Cooper***, 55 S.W.2d 737. In *Cooper*, the plaintiff was injured while riding one of the defendant's rollercoaster rides that lacked appropriate safety devices to hold passengers in their seats and protect them from jarring. ***Id.*** at 739. On appeal, the defendant amusement park contended that the trial court erred in instructing the jury that it was required to exercise the highest degree of care. ***Id.*** at 741. In support of its contention, the defendant amusement park relied upon the general rule mentioned in *Berberet* and the Missouri Supreme Court's earlier decision in ***Pointer v. Mt. Ry. Const. Co.***, 269 Mo. 104, 189 S.W. 805 (Mo. banc 1916). *See* ***Cooper***, 55 S.W.2d at 741. In rejecting the defendant amusement park's argument, the *Cooper* court noted that in *Brown*, we distinguished the *Pointer* case, observing that the *Pointer* "decision was by a divided court, and nothing therein was established except (1) that specific acts of negligence were pleaded, therefore the rule of *res ipsa loquitur* did not apply, and (2) the proof failed to show any unusual occurrence." ***Id.*** at 742. The court thus found that there was "no conflict in the rulings in the *Brown* and *Pointer* Cases." ***Id.*** (italics added). The *Cooper* court then went on to state that "[w]e hold to our ruling in the *Brown* Case . . . that the operators of such

devices as the 'Whirl Winn' [rollercoaster] are required to use the highest degree of care for the safety of their passengers." ***Id.*** (italics added).

Finally, in ***Gromowsky***, this Court again affirmed the holding in *Brown* that an amusement park operator owes a duty to operate its rides with the highest degree of care. 241 S.W.2d at 63. In *Gromowsky*, the plaintiff suffered injuries at defendant's amusement park after a cable broke off the airplane ride and struck the compartment in which the plaintiff was riding. ***Id.*** at 61. On appeal, the amusement park contended that the jury was erroneously instructed that "it was the duty of the defendants to manage and operate its said seaplane ride with the highest degree of care of a very prudent person engaged in like business, in view of all the facts and circumstances." ***Id.*** at 63. In determining that such an instruction was appropriate, we cited *Brown* for the proposition that "the degree of care required of a common carrier applies to the operation of [amusement] devices," ***id.*** (internal quotation omitted), and quoted ***Stauffer v. Metropolitan St. Ry. Co.***, 243 Mo. 305, 316, 147 S.W. 1032, 1035 (Mo. 1912), as describing that degree of care as:

> "A high degree of care"; "the utmost degree of care of very prudent persons"; "the greatest possible care and diligence"; "great care"; "such care as a very prudent person would exercise under similar circumstances"; "the highest degree of care that can be reasonably expected of prudent, skillful and experienced persons"; "the highest degree of care practicable among prudent and skillful men in that business."

Gromowsky, 241 S.W.2d at 63.

While acknowledging these decisions, Cedar Fair argues that *McCollum* was decided by the Missouri Supreme Court after the decisions in *Brown* and *Cooper*.

Cedar Fair asserts, therefore, that *McCollum* overruled *Brown* and *Cooper sub silencio* and that *Gromowsky* was contrary to a controlling Missouri Supreme Court decision. We disagree.

A complete understanding of ***Berberet***, 3 S.W.2d at 1029-30, is critical to harmonizing the various decisions, as it provides a more in-depth explanation of the duty of care owed by amusement park proprietors than the simple statement in *McCollum* that the duty was "ordinary or reasonable safety." *See* ***McCollum***, 59 S.W.2d at 696. ***Berberet*** involved a situation in which the plaintiff fell and injured herself after stepping on a loose, unfastened board on defendant's boardwalk. 3 S.W.2d at 1028. The plaintiff sued the amusement park on the basis that it knew or should have known of the unsafe condition of the loose board. ***Id.***

In discussing the appropriate standard of care, the Court noted that "[t]he rule in this state, and generally, is that the proprietor of a place of public amusement owes to his patrons that duty which, under the particular circumstances, is ordinary care or reasonable care for their safety." ***Id.*** at 1029. The Court further explained:

> the care required of the proprietor of a place of public amusement is that which is reasonably adapted to the character of the exhibitions given, the amusements offered, the places which patrons resort, and also, in some cases, the customary conduct of spectators of such exhibitions. It is a care commensurate with the particular conditions and circumstances involved in the given case. In the case at bar, the particular place involved is a board walk, for the use of patrons visiting a merry-go-round and returning thence to a concrete walk. It is an instance under the general rule which charges an owner of property with a duty toward those he invites upon it. The nature of the use itself created the corresponding duty – a duty appropriate to the nature of the object, and of its use by the plaintiff – the duty to keep the walk in reasonably safe condition for persons walking thereon.

Id.

Thus, as explained by the Court in *Berberet*, several factors must be considered in determining the appropriate standard of care owed by amusement park proprietors, including the types of amusements offered and the places to which patrons resort. The applicable standard of care is "a care commensurate with the particular conditions and circumstances involved in the given case." ***Id.*** Therefore, the appropriate standard of care required of amusement park operators depends upon the facts and circumstances of a given case.

Accordingly, it follows that the fact that the amusement park in *McCollum* was held to a different standard of care than the amusement park operators in *Brown*, *Cooper*, and *Gromowsky* does not make the cases irreconcilable. Rather, the difference in applicable standards of care can be explained by examining the particular circumstances involved in each case. *Brown* and its progeny involved plaintiffs alleging liability on the basis of the amusement parks' negligent operation of an amusement ride or device, rollercoasters and an airplane ride. In each of those instances, to put it in the words of the ***Brown*** court, "the apparatus is under the control and management of the operator thereof," 34 S.W.2d at 152, and the patron, like a passenger on a common carrier, has turned their safety over to the care of the operator.[6]

[6] Cedar Fair also argues that it cannot be held to the higher standard of care because under no circumstances can it be considered a common carrier. However, as we explained in *Brown*, by applying the highest standard of care to the operation of amusement rides, the courts are not classifying amusement park operators as common carriers. Rather, the courts have simply found that the higher standard of care typically required of common carriers is also required of amusement park operators. ***Brown***, 34 S.W.2d at 152. The rationale behind holding amusement park operators to the same standard

McCollum, on the other hand, involved a plaintiff seeking to hold the defendant amusement park liable for negligent construction of the slide itself. 59 S.W.2d at 694. Therefore, despite the fact that *McCollum* involved a water slide, the amusement park's alleged liability was a matter of premises liability as to its negligent construction of the slide, not its negligent operation of the slide. Similarly, plaintiff's allegations in *Berberet* were based on premises liability for a loose or unfastened board on a boardwalk intended for use by patrons walking to a ride. 3 S.W.2d at 1028. Thus, contrary to Cedar Fair's argument, *McCollum* did not overrule *Brown* and *Cooper*, nor is it's holding inconsistent with those reached in the latter cases.

With this understanding of the applicable case law, we next turn to whether the jury was instructed as to the appropriate standard of care in the present case. In her petition, Respondent alleged that Cedar Fair was negligent in that "the 'Hurricane Falls' attraction is unsafe when used as intended in that it lacks adequate restraints or other devices for the protection and safety of the passengers." Respondent, therefore,

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of care as common carriers is sound. The requirement that common carriers exercise the highest degree of care toward their passengers derives from the fact that "the passenger places himself or herself in the care of that common carrier and is unable to use his or her own faculties to prevent or avoid accidents and so is forced to rely on the common carrier to ensure that accidents are avoided." **14 Am. Jur. 2d *Carriers* § 814 (2009)**. Similarly, as explained by the Supreme Court of Colorado, passengers on an amusement ride "surrender[] themselves to the care and custody of [amusement park operators]; they ha[ve] given up their freedom of movement and actions; [and] there [is] nothing they [can] do to cause or prevent [an] accident." ***Lewis v. Buckskin Joe's, Inc.***, 396 P.2d 933, 939 (Col. 1964) (finding the trial court erroneously instructed the jury that the defendant amusement park owed a duty of ordinary care because the defendant had a duty "to exercise the highest degree of care commensurate with the practical operation of the stagecoach over the route prepared and maintained by the defendants for the carriage or amusement of those who pay the required fee") (emphasis omitted). Passengers on an amusement ride, therefore, place themselves in the care of amusement park operators just as common carrier passengers surrender themselves to the care and custody of a common carrier. Thus, it follows that amusement park operators should be required to exercise the same heightened degree of care with respect to their passengers that common carriers are expected to exercise with respect to their passengers. Accordingly, Cedar Fair's argument that it cannot be held to the same standard of care as common carriers is without merit.

alleged that Cedar Fair negligently operated Hurricane Falls by failing to provide adequate safety measures for its passengers. Respondent further alleged that the Hurricane Falls ride involved patrons entering into a circular, multi-person raft that then descends an open fiberglass flume. The raft and flume are under the complete control of the operator. Thus, like *Brown*, *Cooper*, and *Gromowsky*, this case involved a plaintiff (Respondent) alleging that her injuries resulted from an amusement park's (Cedar Fair's) negligent operation of an amusement ride (Hurricane Falls), over which the operator had complete control and its patrons were dependent upon the operator for their safety. Under such circumstances, Cedar Fair had a duty to operate Hurricane Falls with the highest degree of care, and the jury was properly instructed that negligence constituted the failure to use the highest degree of care. Point denied.

In its second point, Cedar Fair contends that the trial court erred in refusing to instruct the jury on comparative fault because there was sufficient evidence that Respondent's damages were caused by her own negligence in letting go of the straps. Generally, "a party is entitled to an instruction upon any theory supported by the evidence." ***Cluck v. Union Pac. R.R. Co.***, 367 S.W.3d 25, 33 (Mo. banc 2012). "When a party claims that the trial court erroneously refused to submit an instruction to which she claims she was entitled, we review the trial court's refusal to submit the instruction for abuse of discretion." ***McCullough v. Commerce Bank***, 349 S.W.3d 389, 396 (Mo. App. W.D. 2011) (internal quotation omitted). "A trial court will be found to have abused its discretion when a ruling is clearly against the logic of the circumstances then before

the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." ***Id.*** (internal quotation omitted).

A jury must be instructed as to comparative fault "[i]f there is evidence from which a jury could find that plaintiff's conduct contributed to cause some of the damages the plaintiff sustained." ***Walley v. La Plata Volunteer Fire Dep't***, 368 S.W.3d 224, 229 (Mo. App. W.D. 2012). Nevertheless, a comparative fault instruction "must be supported by substantial evidence and cannot be supported by mere speculation or conjecture." ***Benedict v. N. Pipeline Const.***, 44 S.W.3d 410, 423 (Mo. App. W.D. 2001). "Substantial evidence is evidence which, if true, is probative of the issues and from which the jury can decide the case." ***Rouse v. Cuvelier***, 363 S.W.3d 406, 411 (Mo. App. W.D. 2012) (internal quotation omitted).

Cedar Fair contends that Respondent could be found partially at fault because there was evidence presented that Respondent let go of the straps. At trial, the jury heard conflicting testimony as to whom, if anyone, let go of the straps as the raft maneuvered the ride's final turn. Candace Kelly, who was in the raft when the accident occurred, testified that neither Respondent nor Cooper let go of the straps. She stated that the collision occurred because the raft "sandwiched a bit," causing Respondent and Cooper to collide. On cross-examination, however, Kelly admitted that she had previously testified in a deposition that Respondent let go of the straps. The testimony of Respondent and Angela Boyles, who was also in the raft, indicated that it was Cooper who let go of the straps. But on cross-examination, both witnesses were

questioned regarding incident reports from the date of the accident indicating that Respondent told Cedar Fair personnel that she let go of the straps.

Respondent concedes that there is evidence in the record indicating that she let go of the straps. Nevertheless, she contends that Cedar Fair was not entitled to a comparative fault instruction because there is no evidence in the record as to why she let go of the straps. Respondent avers that without such evidence, Cedar Fair cannot establish a reasonable inference of fault on her behalf.

Fault in the comparative fault context is generally defined to mean "'acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others' and also 'unreasonable failure to avoid an injury or to mitigate damages.'" ***Kramer v. Chase Resorts, Inc.***, 777 S.W.2d 647, 650 (Mo. App. E.D. 1989) (quoting Unif. Comparative Fault Act § 1(b)); *see also* ***Thompson v. Brown & Williamson Tobacco Corp.***, 207 S.W.3d 76, 121 (Mo. App. W.D. 2006); ***Love v. Park Lan Med. Ctr.***, 737 S.W.2d 720, 724 (Mo. banc 1987). Thus, to establish Respondent's fault, there must be evidence from which the jury could reasonably infer that Respondent either acted negligently in letting go of the straps or that her letting go of the straps constituted an unreasonable failure to avoid injury.

Even viewing the evidence in the light most favorable to the Cedar Fair, there is simply no evidence to suggest Respondent either negligently or unreasonably let go of the straps. In other words, while there was evidence that Respondent let go of the straps, there was no evidence whatsoever as to whether she did so in a way that would constitute negligence, for example, letting go to experience a greater thrill, as opposed

to non-negligently releasing the straps because of the force of the ride. Without such evidence, the jury could only speculate as to whether Respondent negligently let go of the straps. Accordingly, the trial court did not abuse its discretion in refusing to submit a comparative fault instruction to the jury. Point denied.

In its third point, Cedar Fair contends the trial court erred in excluding evidence of Hurricane Fall's ridership. "The admissibility of evidence lies within the sound discretion of the trial court and will not be disturbed absent abuse of discretion." ***McGuire v. Kenoma, LLC***, 375 S.W.3d 157, 183 (Mo. App. W.D. 2012) (internal quotation omitted). "When reviewing for abuse of discretion, we presume the trial court's finding is correct, and reverse only when the ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." ***Id.*** (internal quotation omitted). "For evidentiary error to cause reversal, prejudice must be demonstrated." ***Mitchell v. Kardesch***, 313 S.W.3d 667, 675 (Mo. banc 2010) (internal quotation omitted).

Cedar Fair asserts that it should have been permitted to introduce evidence of ridership on the basis that it constituted evidence of the absence of prior accidents. Cedar Fair is correct that such evidence can be admissible. "Evidence of the absence of prior accidents is relevant to show: (1) absence of a defect or condition; (2) lack of a causal relationship between the injury and the defect or condition charged; (3) nonexistence of an unduly dangerous condition; or (4) lack of knowledge of or grounds to realize the danger." ***Heitman v. Heartland Reg'l Med. Ctr.***, 251 S.W.3d 372, 376

(Mo. App. W.D. 2008). "For such evidence to be admissible, the proponent of the evidence must show that no accidents occurred under conditions substantially similar to those faced by plaintiff and that an adequate number of those situations occurred to make the absence of accidents meaningful." ***Id.*** (internal quotation omitted).

The problem with Cedar Fair's argument, however, is that Cedar Fair made no attempt to introduce evidence of ridership, or related contextual evidence demonstrating that the ridership information tended to prove an absence of accidents, and, consequently, failed to preserve this point of error for appellate review.

Here, Respondent filed a motion *in limine* to prevent Cedar Fair from presenting any evidence regarding the absence of other injuries on Hurricane Falls or other rides. The trial court granted Respondent's motion *in limine* regarding evidence of ridership on Hurricane Falls. At trial, Bridget Bywater testified on behalf of Cedar Fair as its corporate representative. During her testimony, Cedar Fair attempted to introduce an exhibit to which Respondent objected on grounds that Cedar Fair was attempting to introduce evidence of ridership. The trial court sustained the objection and asked Cedar Fair if it would like to make an offer of proof. Cedar Fair never made an offer of proof regarding the exhibit[7] or any testimony that Bywater would have given regarding ridership.

"Generally, in order to preserve an issue of exclusion of evidence for appeal, a definite and specific offer of proof demonstrating why the evidence is relevant and

[7] The exhibit is not part of the record on appeal.

admissible must be made at trial."[8] ***Chamberlain v. Dir. of Revenue***, 342 S.W.3d 334, 339 (Mo. App. S.D. 2011) (internal quotation omitted). "[W]hen a motion *in limine* is granted, the proponent of the evidence, in order to preserve the issue for appellate review, must attempt to present the excluded evidence at trial and, if an objection to the proffered evidence is sustained, the proponent must then make an offer of proof." ***Henderson v. Fields***, 68 S.W.3d 455, 469 (Mo. App. W.D. 2001) (internal quotation omitted and italics added). At no point during the trial did Cedar Fair make an offer of proof regarding evidence of ridership. Without such an offer, Cedar Fair has failed to demonstrate why evidence of ridership is relevant and admissible.

Cedar Fair contends that it did not need to make an offer of proof regarding ridership because the issue of ridership was extensively briefed by the parties and it was clear from the record what evidence Cedar Fair was seeking to admit regarding ridership. It is true that a narrow exception to the rule requiring an offer of proof exists when "there is a complete understanding, based on the record, of the excluded testimony; the objection is to a category of evidence, rather than to specific testimony; and the record reveals the excluded evidence would have helped the proponent." ***Liszewski v. Union Elec. Co.***, 941 S.W.2d 748, 751 (Mo. App. E.D. 1997). However, that exception does not apply in this case.

From our review of the record, it is unclear as to what evidence or testimony regarding ridership Cedar Fair was seeking to introduce. Thus, in the absence of an

[8] "The offer must show three things: what the evidence will be; the purpose and object of the evidence; and each fact essential to establishing the admissibility of the evidence." ***State Farm Mut. Auto. Ins. Co. v. DeCaigney***, 927 S.W.2d 907, 911 (Mo. App. W.D. 1996).

offer of proof, we cannot determine what evidence Cedar Fair is contending the trial court erroneously excluded. Accordingly, the exclusion of evidence regarding ridership was not properly preserved for our review. Point denied.

In its fourth point, Cedar Fair contends the trial court erred in allowing Respondent's expert William Avery to testify because Missouri law requires an expert to rely upon the type of facts and data reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and Avery had no facts or data to support his opinions. Section 490.065 governs the admission and exclusion of expert testimony in civil cases in Missouri. ***Kivland v. Columbia Orthopaedic Grp., LLP***, 331 S.W.3d 299, 310 (Mo. banc 2011). Section § 490.065.3 provides that

> [t]he facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing and must be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable.

Generally, "questions as to the sources and bases of the expert's opinion affect the weight, rather than the admissibility of the opinion, and are properly left to the jury." ***Glaize Creek Sewer Dist. of Jefferson City v. Gorham***, 335 S.W.3d 590, 593 (Mo. App. E.D. 2011) (internal quotation omitted). "Any weakness in the factual underpinnings of the expert's opinion or in the expert's knowledge goes to the weight that testimony should be given and not its admissibility." ***Mathes v. Sher Express, L.L.C.***, 200 S.W.3d 97, 111 (Mo. App. W.D. 2006) (internal quotation omitted). "In general, the expert's opinion will be admissible, unless the expert's information is so

slight as to render the opinion fundamentally unsupported." ***Id.*** (internal quotation omitted).

Cedar Fair takes issue with Avery's testimony because Avery did not point to any industry standard as to what constituted appropriate warning language for a ride such as Hurricane Falls. Cedar Fair further challenges the admission of Avery's testimony on the basis that Avery failed to cite any articles or other amusement ride operation to establish that the use of baffles in the raft would have prevented an accident like Respondent's from occurring. These alleged deficiencies, however, do not render Avery's expert opinion so fundamentally unsupported that it constitutes inadmissible expert testimony.

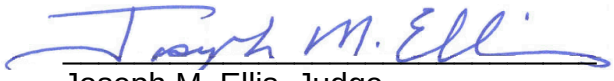
Avery testified that he has been a safety consultant in the amusement industry for over twenty years. He further testified that he has received various certifications in the field of safety and taught safety courses, trainings and seminars. With respect to Hurricane Falls, Avery testified that he performed the following evaluation:

> I observed the ride in operation. I walked up to the top. I looked. I watched it being used. I went down to the bottom of the ride. I watched the rafts as they exited the end of the ride. I was trying to get a sense of the operational feel. I reviewed the signs that were posted on [the] property. I read material that has been supplied to me and depositions of witnesses, people that were on the raft, the depositions of Ms. Bywater who has testified earlier, the deposition of Mr. Ferrell, the engineer that was hired by the defense. I looked at the manual from White Water. I believe I looked at the . . . standard operating procedures of Oceans of Fun. I looked at the incident reports from both Oceans of Fun and once they were produced in this matter, from Dorney Park, what I call a sister park and a part of the Cedar Fair group . . . and other documents that were supplied as part of discovery in this matter.

It was based upon this evaluation and his experience in the safety field that Avery opined that Cedar Fair failed to exercise the highest degree of care with respect to Hurricane Falls because it took no steps to prevent or limit passenger-to-passenger contact even though the manual for the ride warned of the potential for body-to-body collisions and the prior operating history of one of its sister parks indicated it was experiencing such problems. Avery then suggested that such dangers could be minimized by posting a sign regarding the potential for passenger-to-passenger contact and implementing friction devices on the rafts.

Given Avery's testimony regarding his expertise in the field and the sources he evaluated in forming his opinion, we cannot say that Avery's opinion was so fundamentally unsupported as to make his testimony inadmissible. While Cedar Fair criticizes Avery's opinion because he did not point to any industry standard or articles supporting his position, such matters were for the jury to weigh in accessing Avery's credibility. In fact, Cedar Fair thoroughly questioned Avery regarding the perceived deficiencies in his opinion on cross-examination.[9] Accordingly, the trial court did not err in admitting Avery's expert testimony. Point denied.

Judgment affirmed.



Joseph M. Ellis, Judge

All concur.

[9] On cross-examination, Avery admitted that no one in the industry was using baffling on the type of raft used on the Hurricane Falls ride. He further conceded that the manual for the Hurricane Falls ride did not recommend a warning sign regarding passenger-to-passenger contact.