

Not Reported in S.W.3d

Not Reported in S.W.3d, 2002 WL 356743 (Tex.App.-Hous. (1 Dist.))

(Cite as: **Not Reported in S.W.3d**)

[Briefs and Other Related Documents](#)

Only the Westlaw citation is currently available.

NOTICE: NOT DESIGNATED FOR PUBLICATION. UNDER TX R RAP RULE 47.7, UNPUBLISHED OPINIONS HAVE NO PRECEDENTIAL VALUE BUT MAY BE CITED WITH THE NOTATION “(not designated for publication).”

Court of Appeals of Texas, Houston (1st Dist.).

TOYS “R” US, INC., Appellant,

v.

Kay **NGUYEN** and Quoc **Nguyen**, Individually, Appellee.

No. 01-01-00210-CV.

March 7, 2002.

Store patrons sued store for negligence in connection with an incident in which boxes from overstock shelves fell and hit one patron on the head. The 334th District Court, Harris County, entered judgment on a jury verdict which awarded \$81,000 in actual damages and \$500,000 in exemplary damages, which was subsequently reduced to \$200,000 because of an exemplary damage cap. Store appealed. The Court of Appeals, [Sam Nuchia](#), J., held that: (1) there was sufficient evidence to support a finding of malice on the part of the store; (2) there was sufficient evidence to find that employees were authorized by the store to stack boxes on overstock shelves to support imposition of corporate liability

Affirmed.

West Headnotes

[\[1\] Damages 115 ↪ 184](#)

[115](#) Damages

[115IX](#) Evidence

[115k183](#) Weight and Sufficiency

[115k184](#) k. In General. [Most Cited Cases](#)

There was sufficient evidence to support a finding of malice on the part of a store in a negligence suit brought by a patron injured when boxes from overstock shelves fell and hit her on the head; a safety engineering consultant testified that the store's overstock created an extreme risk, that the store's policy of stacking boxes as long as they were 18 inches below the fire sprinklers and not leaning was not

safe, and that the store had totaled over 316 claims arising out of incidents that had occurred in over 700 stores over a three-year period. [Tex. Civ. Prac. & Rem.Code Ann. § 41.001\(7\)\(B\)](#)

[\[2\] Corporations 101 ↪ 432\(12\)](#)

[101](#) Corporations

[101XI](#) Corporate Powers and Liabilities

[101XI\(B\)](#) Representation of Corporation by Officers and Agents

[101k432](#) Evidence as to Authority

[101k432\(12\)](#) k. Weight and Sufficiency. [Most Cited Cases](#)

There was sufficient evidence to find that employees were authorized by a store to stack boxes on overstock shelves to support imposition of corporate liability on the store in connection with injury to a patron which occurred when boxes from the shelves fell and hit her on the head

On Appeal from the 334th District Court, Harris County, Texas, Trial Court Cause No. 99-18667.

Panel consists of Justices [COHEN](#), [WILSON](#), and [NUCHIA](#).

OPINION

[SAM NUCHIA](#), Justice.

*1 Appellees, Quoc and Kay **Nguyen**, sued appellant, **Toys “R” Us**, for negligence. A jury found appellant negligent and also made a finding of malice. The jury awarded \$81,000 in actual damages and \$500,000 in exemplary damages, which was subsequently reduced to \$200,000 because of an exemplary damage cap. On appeal, appellant complains only about the malice finding.

BACKGROUND

On December 1, 1998, Quoc **Nguyen** met his wife, Kay **Nguyen**, and their grandson at **Toys “R” Us**. Marcia Hart and DeAnn Guzman, two **Toys “R” Us** associates, were climbing ladders to stack boxes on the shelves. Hart recognized Mr. **Nguyen** from his local pizza place, and the two began to talk. Mrs. **Nguyen** continued to shop. When Mr. **Nguyen** finished speaking with Hart, the **Nguyens** and their grandson went to the opposite side of the aisle from where Hart and Guzman were working. While Mrs. **Nguyen** was

shopping, she suddenly felt a blinding pain in her head. The boxes from the overstock shelves had fallen and hit her on the head.

After the boxes hit Mrs. Nguyen, her husband and Hart came running to her to see if she was badly hurt. Mrs. Nguyen thought she was having a stroke, and she did not realize that the boxes had fallen and hit her until Hart and her husband told her. Guzman, the other store associate, also came to check if Mrs. Nguyen was badly hurt. Kit Lorber, the store manager, came to Mrs. Nguyen as soon as she learned what had happened. Kit Lorber asked Mrs. Nguyen if she needed a doctor and asked her to fill out an accident report. Lorber also wanted Mrs. Nguyen to move back into the break room to recover. Following store policy, Lorber took Polaroid pictures of the accident scene.

Mrs. **Nguyen** filled out an accident report, which took about 15 to 20 minutes. Mrs. **Nguyen** told Lorber that she did not think she needed a doctor. Mrs. **Nguyen** then rested for a while in the break room, and, after a short rest, continued to shop.^{FN1} The **Nguyens** did not finish all their shopping. The **Nguyens** had driven separately to **Toys “R” Us** and, on the way home, Mrs. **Nguyen** had to stop driving because she was dizzy and could not see properly. The **Nguyens** left one of their cars in a parking lot and drove home together.

^{FN1} Mrs. Nguyen testified that she and her husband lived quite far from the store, and she wanted to see if she could finish all the shopping so that they would not have to make another trip.

The day after the incident, Mrs. Nguyen woke with lower back pain. Mrs. Nguyen sought medical treatment and was told that the boxes that fell on her head had caused a ricochet effect down her spine, which was causing her back pain. After a series of doctor visits and unsuccessful medications, Mrs. Nguyen had back surgery on April 16, 1999. After the back surgery, Mrs. Nguyen had to sleep in a hospital bed for two months, she was unable to drive for four months, and she was unable to resume her regular activities, such as gardening and volunteering at the church day care.

JURISDICTION

Appellant filed a motion for leave to amend notice of appeal and an amended notice of appeal. We grant the motion for leave to amend the notice of appeal and file the amended notice of appeal. See [Tex.R.App. P. 25.1\(f\)](#). Appellees' motion to dismiss is overruled.

DISCUSSION

*2 [\[1\]](#) In their first point of error, appellant claims that there was no evidence or factually insufficient evidence to support a finding of malice.

Standard of review

Under a legal sufficiency challenge, the challenge on appeal will be sustained only if, after considering the evidence and inferences in the light most favorable to the finding, there is not more than a scintilla of evidence supporting it. [Boroughs Wellcome Co. v. Crye](#), 907 S.W.2d 497, 499 (Tex.1995). More than a scintilla of evidence exists when the evidence supporting the finding, as a whole, rises to a level that would enable reasonable and fair-minded people to differ in their conclusions. *Id.* Under a factual sufficiency challenge, the challenge on appeal will be sustained only if, after viewing all the evidence, the evidence is so weak or the verdict so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. [Cain v. Bain](#), 709 S.W.2d 175, 176 (Tex.1986). The jury is the sole judge of a witness's credibility and the weight to be given his testimony. [Leyva v. Pacheco](#), 163 Tex. 638, 358 S.W.2d 547, 549 (Tex.1962).

Malice

In Texas, malice is defined as:

- (A) a specific intent by any of the defendants to cause substantial injury to the claimant; or
- (B) an act or omission:
 - (i) which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and
 - (ii) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

[Tex. Civ. Prac. & Rem.Code Ann. § 41.001\(7\)](#) (Vernon 1997).

Part one of 41.001(7)(B) describes what Texas courts refer to as the objective prong, and part two defines the subjective prong. *Eberle v. Adams*, No. 99-01010-CV, slip op. at 14, (Tex. App-Houston [1st Dist.] November 30, 2001, no pet. h.). Malice involves more culpable conduct than ordinary negligence with respect to both elements. [Wal-mart Stores, Inc. v. Alexander](#), 868 S.W.2d 322, 325-26 (Tex.1993). Under the first element, “extreme risk” is not a remote possibility of injury or even a high probability of minor harm, but rather the likelihood of serious injury to the plaintiff. [Mobil Oil Corp. v. Ellender](#), 968 S.W.2d 917, 921 (Tex.1998). Under the second element, actual awareness means that appellant knew about the peril, but its acts or omissions demonstrated that it did not care. *Id.* at 921. Circumstantial evidence is sufficient to prove either element of malice. *Id.* at 921.

Legal sufficiency analysis

Kit Lorber and DeAnn Guzman, both employees at Toys “R” Us at the time of the incident, testified through videotaped depositions. Lorber, the store manager, testified that Toys “R” Us’s policy is that merchandise should not be stacked closer than 18 inches from the fire sprinklers. She further testified that Toys “R” Us does not have a specific height up to which the merchandise can be stacked, as long as it is not closer than 18 inches from the sprinklers, and the boxes are not leaning. Lorber also explained that Toys “R” Us’s policy and procedure required that employees should not have their waist above the top of a ladder. Lorber stated that, on the day of the incident, Guzman was violating company policy and procedure because she was standing on the top step of the ladder.

*3 DeAnn Guzman testified that on the day of Nguyen’s injury, she and another associate, Marcia Hart, were trying to take down some boxes. She stated that the boxes were stacked four to five boxes high. Guzman also testified that there were no barriers, such as ropes or rails, to keep the boxes in place. Furthermore, she admitted to standing on the top step of the ladder, and she recalled that she had the tallest ladder. During Guzman’s testimony, appellees asked,

“-[Y]ou told me Kit Lorber knew the boxes were stacked too high ... is that correct or not correct?” Guzman responded,

Common sense, anybody would have known they were too high. I mean you look at them and see four five boxes high. Any person would think, Okay, they are overstocked....

In addition, Guzman stated that Lorber told her that she was going to talk to the night crew because they were stacking the boxes too high.

Guzman stated that the day of the incident was her first time taking the boxes down from overstock. She testified that she had no idea what the policies and procedures were for stacking the boxes on the overstock shelves. Furthermore, she testified that nobody explained to her the proper way to do it. Finally, during her testimony, Guzman was shown a picture of the overstock shelves and was asked, “[the boxes] look like they are almost to the top of the roof, though, don’t they?” and “in the picture they look closer to the ceiling than they do to the bottom of the shelf?” Guzman answered affirmatively to both these questions.

William Purcell, a safety engineering consultant and appellees’ expert, testified that Toy “R” Us’s overstock created an extreme risk. Purcell estimated the Toy “R” Us ceiling was approximately 23 to 25 feet high. He further stated that Toys “R” Us’s policy of stacking boxes, as long as they were 18 inches below the fire sprinklers and not leaning, was not safe. Purcell also testified that the boxes could be stacked 21 feet high and they would still be below the fire sprinklers. Purcell stated that, in his opinion, the overstock created an “extreme degree of risk.” He also explained that the box that hit **Nguyen** was like a “4 pound brick falling from a 3 story ceiling or 4 story floor.” In addition, Purcell testified that Toy “R” Us had totaled over 316 claims arising out of incidents that had occurred in over 700 stores over a three year period. Purcell formulated his opinion based on reviewing the depositions of the employees, Toys “R” Us documents, and a physical inspection of the store.

Scott Yahnke, Toys “R” Us’s store designer, testified that, at the time of **Nguyen**’s injury, the overstock was stacked higher than the height of the light fixtures.^{FN2} He further stated that typically Toys “R” Us should not be stacking the

Not Reported in S.W.3d

Not Reported in S.W.3d, 2002 WL 356743 (Tex.App.-Hous. (1 Dist.))

(Cite as: **Not Reported in S.W.3d**)

overstock higher than the light fixtures, but, during the three busiest months, October, November, and December, it sometimes is necessary. When Yahnke was asked, “**Toys ‘R’ Us** stores knowingly stack merchandise higher than they do during the rest of the year, during October, November, and December to accommodate the flow of more merchandise and the flow of more customers?” Yahnke responded, “Correct.” Yahnke also described the shelf system at **Toys ‘R’ Us**. He explained that, at the store where **Nguyen** was injured, the shelves did not have any lips or dividers. Finally, Kay **Nguyen** testified about all her injuries. At trial, **Nguyen** reviewed the incident report Lorber had filled out after she was hurt. **Nguyen** stated the incident report was accurate, except for the statement stating she already had back problems. **Nguyen** also testified that, after she had been hit by the boxes, Marcia Hart told her, “she knew this was going to happen because they were stacking the boxes so high. They had knocked them off before, and that she was afraid they were going to hit a customer.”

[FN2](#). Yahnke was looking at pictures taken from the scene while he testified, and he said that one of the pictures definitely illustrated the boxes were that high.

*4 After reviewing the evidence, we find that the evidence supporting the finding, as a whole, rises to a level that would enable reasonable and fair-minded people to differ in their conclusions. Since the evidence was legally sufficient to fulfill the objective and subjective prong of [section 41.001\(7\)\(B\)](#), we need not consider whether **Toys ‘R’ Us** had the specific intent to substantially injure Kay **Nguyen** under [section 41.001\(7\)\(A\)](#).

Factual sufficiency analysis

Kit Lorber testified at trial, and she said that the managers check the aisles and overstock regularly to be certain that there are not any safety problems. In regard to **Nguyen's** injury, Lorber stated that **Nguyen** was not dazed or confused and she was able to walk to the break room on her own. Lorber also testified that when she was filling out the incident report, **Nguyen** told her that “she had back problems before.” The incident report was admitted into evidence. Lorber stated that the boxes were stacked safely, but Guzman

was not following the store's procedures because she was standing too high on the ladder. Also, Lorber explained that each **Toys ‘R’ Us** store is penalized with a one-time fee of \$28,000 if their overstock falls. This **Toys ‘R’ Us** was penalized for the boxes that hit **Nguyen**.

Guzman testified that she was aware of Toys “R” Us's ladder policy. She testified that Lorber had told her that she was not supposed to step on the top two steps of the ladder. In addition, Guzman stated that she had watched a video, which also told Toy “R” Us employees the ladder safety policies.

Marcia Hart testified that she received extensive training during her first week at **Toys ‘R’ Us**. Her training included watching safety videos, and she received training regarding ladders. Hart also testified that, on the day **Nguyen** was injured, she remembered “people being very conscious and particular about the way things were stocked at eye level or at-the overstock.” Furthermore, Hart testified that she the proper way to stock merchandise to insure safety had been explained to her. Finally, contrary to **Nguyens'** testimony, Hart stated that she never told either of the **Nguyens** that she knew the boxes would fall eventually.

Robert Junio, director of general liability for Toys “R” Us, testified that the stores' directors and managers make frequent inspections of the overstock each day. He also stated that store associates are trained on how to stock merchandise, and each store has weekly meetings about safety. Finally, Junio explained that Toys “R” Us does not have a specific policy regarding the exact height to stock overstock because there are too many factors to consider, which prevent stating a specific height. Toys “R” Us did, however, require that the boxes be stacked safely.

During cross-examination of Purcell, Purcell testified that he did not remember any basic physics, and that he did not do any experiments with actual boxes to verify his conclusions. Furthermore, he testified that the cause of the fall was that two employees were stacking boxes on the other side of the aisle and lost control, causing the boxes on Nguyen's side to fall.

*5 Finally, Toys “R” Us has a safety video that was in evi-

Not Reported in S.W.3d

Not Reported in S.W.3d, 2002 WL 356743 (Tex.App.-Hous. (1 Dist.))

(Cite as: **Not Reported in S.W.3d**)

ence and referred to during trial. The video is shown to employees during training, and it emphasizes that, for every accident, there are 30 near misses and 300 unsafe conditions.

The jury is the sole judge of a witness's credibility and the weight to be given their testimony, and, after reviewing all the evidence, we find that the evidence is not so weak or the verdict so contrary to the overwhelming weight of the evidence as to be clearly unjust or wrong. [Levy, 163 Tex. 638, 358 S.W.2d 547, 549 \(Tex.1962\)](#); [Cain, 709 S.W.2d 175, 176 \(Tex.1986\)](#).

Corporate liability

[2] In part C, Toys “R” Us claims that it should not be held responsible for the malice of an employee because “there is no evidence or factually insufficient evidence that Toys “R” Us authorized “such act.” ^{FN3} On appeal, Toys “R” Us fails to specifically define “such act,” and it can only be assumed they are referring to the employees' act of stacking the boxes. We find that there is sufficient evidence to find that employees Guzman and Hart were authorized by Toys “R” Us to stack the boxes.

^{FN3}. Appellees frame appellant's argument as a failure to request a vice principal instruction. However, we find appellees have misinterpreted appellant's argument.

We find the evidence was legally and factually sufficient for a finding of malice and, accordingly, we overrule appellant's point of error. We affirm.

Tex.App.-Houston [1 Dist.],2002.

Toys R Us, Inc. v. Nguyen

Not Reported in S.W.3d, 2002 WL 356743
(Tex.App.-Hous. (1 Dist.))

Briefs and Other Related Documents ([Back to top](#))

- [01-01-00210-CV](#) (Docket) (Mar. 09, 2001)

END OF DOCUMENT