NO. 12-10-00274-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

GARDNER OIL, INC., APPELLANT	***§***	***APPEAL FROM THE 2ND***
V.	***§***	***JUDICIAL DISTRICT COURT***
ALVARO CHAVEZ, APPELLEE	***§***	***CHEROKEE COUNTY, TEXAS***

MEMORANDUM OPINION

Gardner Oil, Inc., appeals the trial court's judgment entered in favor of Appellee Alvaro Chavez related to personal injuries Chavez sustained as a result of a fire. Gardner Oil raises seven issues on appeal. We affirm.

BACKGROUND

Carl Rogers Logging (CRL) is a logging company. CRL purchased its entire supply of off road diesel fuel from Gardner Oil. On January 10, 2008, Gardner Oil delivered fuel to CRL and loaded it into a 1,000 gallon tank at CRL's headquarters. Thereafter, CRL dispensed the fuel from the 1,000 gallon tank into a 100 gallon mobile tank. CRL used the fuel from the 100 gallon mobile tank to supply its equipment at the worksite.

Chavez worked for CRL as a log loader operator. Early on the morning of January 11, 2008, Chavez fueled the log loader at the worksite with fuel from CRL's mobile tank. As fuel was pumped into the log loader's fuel tank, Chavez entered the cab of the log loader and used a lighter to illuminate the fuel gauge. Thereafter, he exited the cab with the lighter still burning. As he did so, the lighter ignited fuel vapors and a significant flash fire erupted. Chavez suffered severe injuries as a result of the fire.

Chavez underwent several surgeries and required extensive medical care to treat his injuries. The fire left scars and made Chavez extremely sensitive to sunlight. He also sustained hearing loss and suffered several permanent problems with his eyes. As a result of his injuries, Chavez no longer can work as an operator of a log loader.

Chavez's coworkers at CRL were surprised that the diesel fuel could be the source of such a violent flash fire. They had never seen diesel ignite so easily and suspected that something was amiss with the fuel that Chavez was pumping into the log loader at the time of the incident. The owner of CRL, Carl Rogers, took a sample of the fuel that Chavez was pumping into the log loader and sent it to a laboratory for analysis. The laboratory determined that the fuel was not pure diesel, but instead a mixture of gasoline and diesel.

Chavez filed suit against Gardner Oil based on theories of negligence and breach of warranty. Gardner Oil alleged that Chavez's injuries were caused by his own negligence or by CRL's actions. During trial, the trial court ruled that the allegations against CRL failed as a matter of law. Ultimately, the jury determined that the injuries were caused by Gardner Oil's conduct and not by Chavez's actions. The jury further determined that Chavez was entitled to money damages caused by Gardner Oil's conduct. The trial court rendered judgment in accordance with the jury's verdict, and this appeal followed.

GARDNER OIL'S NEGLIGENCE

In its second issue, Gardner Oil argues that the evidence is not legally or factually sufficient to support the jury's verdict that Gardner Oil was negligent and that its negligence was a proximate cause of Chavez's injuries.

Standard of Review

The test for legal sufficiency "must always be whether the evidence at trial would enable [a] reasonable and fair–minded [fact finder] to reach the [result] under review." ***City of Keller v. Wilson***, 168 S.W.3d 802, 827 (Tex. 2005). Legal sufficiency review must credit favorable evidence if a reasonable fact finder could and disregard contrary evidence unless a reasonable fact finder could not. ***Id.*** We sustain a legal sufficiency challenge when the record discloses one of the following situations: (1) there is a complete absence of evidence establishing a vital fact, (2) the court is barred by rules of law or of evidence from giving weight to the only evidence of a

vital fact, (3) the evidence offered to prove a vital fact is no more than a mere scintilla, or (4) the evidence conclusively establishes the opposite of a vital fact. ***Id.*** at 810. The fact finder is the sole judge of the credibility of the witnesses and the weight to be assigned to their testimony. ***Canal Ins. Co. v. Hopkins***, 238 S.W.3d 549, 557 (Tex. App.–Tyler 2007, pet. denied) (citing ***City of Keller***, 168 S.W.3d at 819). The fact finder is free to believe one witness and disbelieve another, and reviewing courts may not impose their own opinions to the contrary. *See* ***Hopkins***, 238 S.W.3d at 557. Accordingly, reviewing courts must assume that the fact finder decided all credibility questions in favor of the verdict if a reasonable person could do so. ***Id.*** If a reasonable fact finder could have done so, we must assume that the fact finder chose what testimony to disregard in a way that was in favor of the verdict. ***Id.*** A fact finder "may disregard even uncontradicted and unimpeached testimony from disinterested witnesses" where reasonable. ***Id.***

In addition, it is within the fact finder's province to resolve conflicts in the evidence. ***Id.*** Consequently, we must assume that, where reasonable, the fact finder resolved all conflicts in the evidence in a manner consistent with the verdict. ***Id.*** Where a reasonable fact finder could resolve conflicting evidence either way, we must presume the fact finder did so in favor of the verdict. ***Id.*** Where conflicting inferences can be drawn from the evidence, it is within the province of the fact finder to choose which inference to draw, so long as more than one inference can reasonably be drawn. ***Id.*** Therefore, we must assume the fact finder made all inferences in favor of the verdict if a reasonable person could do so. ***Id.***

The burden of proof may be satisfied by direct or circumstantial evidence. *See* ***Havner v. E-Z Mart Stores, Inc.***, 825 S.W.2d 456, 459 (Tex. 1992). But the plaintiff's evidence must be more than "mere conjecture, guess, or speculation." ***Doe v. Boys Clubs of Greater Dallas, Inc.***, 907 S.W.2d 472, 477 (Tex. 1995). Where circumstances give rise to more than one inference, none more probable than the other, those circumstances are the equivalent of no evidence. ***Marathon Corp. v. Pitzner***, 106 S.W.3d 724, 729 (Tex. 2003).

With regard to factual sufficiency challenges, where a party who did not have the burden of proof on an issue asserts that the fact finder's verdict is contrary to the evidence, we must overrule the complaint unless, considering all the evidence, the finding is clearly wrong and manifestly unjust. ***Santa Fe Petroleum, L.L.C. v. Star Canyon Corp.***, 156 S.W.3d 630, 637

(Tex. App.–Tyler 2004, no pet.) (citing ***Garza v. Alviar***, 395 S.W.2d 821, 823, (Tex. 1965)). In conducting our review, we must consider, weigh, and compare all of the evidence that supports and that which is contrary to the finding. *See* ***Sosa v. City of Balch Springs***, 772 S.W.2d 71, 72 (Tex. 1989). "Reversal [can] occur because the finding [is] based on weak or insufficient evidence or because the proponent's proof, although adequate if taken alone, is overwhelmed by the opponent's contrary proof." ***Santa Fe Petroleum***, 156 S.W.3d at 637.

When reviewing factual sufficiency issues, we are mindful that the fact finder is the sole judge of the credibility of the witnesses. *See* ***Hopkins***, 238 S.W.3d at 557 (citing ***Santa Fe Petroleum***, 156 S.W.3d at 638). The fact finder may take into consideration all of the facts and surrounding circumstances in connection with the testimony of each witness and accept or reject all or any part of that testimony. ***Hopkins***, 238 S.W.3d at 557–58. Where enough evidence is before the fact finder so that reasonable minds could differ on the meaning of the evidence or the inferences and conclusions to be drawn from the evidence, we may not substitute our judgment for that of the trial court. ***Hopkins***, 238 S.W.3d at 558.

Governing Law

To establish negligence, the plaintiff must produce evidence that the defendant owed the plaintiff a legal duty, that duty was breached, and the breach proximately caused the plaintiff's damages. *See* ***Lee Lewis Constr., Inc. v. Harrison***, 70 S.W.3d 778, 782 (Tex. 2001). Generally, the existence of a duty is a question of law for the court to decide based on the facts surrounding the occurrence in question. *See* ***Van Horn v. Chambers***¸ 970 S.W.2d 542, 544 (Tex. 1998); ***Block v. Mora***, 314 S.W.3d 440, 444 (Tex. App.–Amarillo 2009, pet. dism'd).

The primary inquiry in the duty analysis revolves around whether a given course of conduct would subject others to an unreasonable, foreseeable risk of harm. *See* ***Tex. Home Mgmt., Inc. v. Peavy***, 89 S.W.3d 30, 39 (Tex. 2002); ***Otis Eng'g Corp. v. Clark***, 668 S.W.2d 307, 311 (Tex. 1984) (discussing unreasonable risk of harm as component of duty analysis). A reviewing court balances several related factors to determine whether a defendant owed a plaintiff a duty, including the risk, foreseeability, and likelihood of injury weighed against the social utility of the defendant's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant. ***Greater Houston Transp. Co. v. Phillips***, 801 S.W.2d 523, 525 (Tex. 1990).

Proximate cause requires cause in fact and foreseeability. ***Excel Corp. v. Apodaca***, 81 S.W.3d 817, 820 (Tex. 2002). Cause in fact requires the act or omission to be a substantial factor in causing the injury "without which the harm would not have occurred." ***Doe***, 907 S.W.2d at 477. To be a substantial factor, the act or omission must have "such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility," instead of simply the "so-called 'philosophic sense,' which includes every one of the great number of events without which any happening would not have occurred." ***Union Pump Co. v. Allbritton***, 898 S.W.2d 773 (Tex. 1995) (quoting RESTATEMENT (SECOND) OF TORTS § 431 cmt. a (1965)). Foreseeability requires that the negligent actor anticipated, or should have anticipated, the danger his or her negligence creates. *See* ***El Chico Corp. v. Poole***, 732 S.W.2d 306, 313 (Tex. 1987). The exact injury need not be foreseen, but instead, foreseeability is satisfied when the injury is of a general character that could reasonably be anticipated. *See* ***Lee Lewis Constr.***, 70 S.W.3d at 785.

Application

In its brief, Gardner Oil argues that the evidence is legally and factually insufficient to establish that (1) it owed a legal duty to Chavez, (2) it breached any duty, or (3) any breach proximately caused Chavez's injuries.

Duty

In considering Gardner Oil's duty, we are mindful of the stark differences in the volatility of gasoline as opposed to that of diesel. The testimony from both Chavez's witnesses and Gardner Oil's witnesses were in accord on this point—diesel is difficult to ignite while gasoline explodes near fire. The evidence further supports that a mixture of diesel and gasoline would also readily ignite. Understanding that diesel is difficult to ignite, Chavez and other CRL workers ordinarily lit lighters in close proximity to diesel fuel. The record reflects that this type of conduct is commonplace among workers in the logging business. Because Gardner Oil was supposed to deliver diesel to CRL, Chavez believed he was fueling the log loader with diesel fuel, not a mixture of diesel and gasoline. As a result, he was not concerned with having an open flame near the fuel. Thus, Gardner Oil had a duty to deliver diesel as it said it would. Gardner Oil agreed that a reasonable delivery driver would not deliver gasoline instead of diesel. By its

delivering a mixture of diesel and gasoline instead, Gardner Oil subjected Chavez to an unreasonable, foreseeable risk of harm. *See* ***Tex. Home Mgmt., Inc.***, 89 S.W.3d at 39.

Breach of Duty

Gardner Oil relies on the equal inference rule, arguing that the evidence is legally and factually insufficient to support that it breached its duty to Chavez. Specifically, Gardner Oil contends there is insufficient evidence that it delivered gasoline or a diesel and gasoline mixture to CRL instead of pure diesel. *See* ***Pitzner***, 106 S.W.3d at 729 (where circumstances give rise to more than one inference, none more probable than the other, those circumstances are the equivalent of no evidence.).

The record reflects that Gardner Oil provided all of the diesel fuel for CRL. That fuel was placed in CRL's 1,000 gallon tank at its headquarters. CRL transferred the fuel into a 100 gallon mobile tank to take to the worksite. CRL's workers testified that they did not add gasoline to the 100 gallon mobile tank and that all of the fuel in the mobile tank came from the 1,000 gallon tank. A fuel sample from the mobile tank was taken, and the laboratory analysis indicated that the 100 gallon mobile tank contained a diesel and gasoline fuel mixture. This evidence alone is sufficient to support that Gardner Oil delivered the fuel that was in the mobile tank and that the fuel it delivered was a combination of diesel and gasoline.

Further, Gardner Oil's records can be reasonably construed to support an inference that it delivered a combination of diesel and gasoline to CRL. To deliver its fuel, Gardner Oil used a truck with a 700 gallon compartment, a 600 gallon compartment, a 500 gallon compartment, a 400 gallon compartment and a 300 gallon compartment. Gardner Oil's records showed that it delivered 761 gallons of pure diesel to CRL the day before Chavez's accident. Its records further indicated that another customer, Steve Truss, received 261 gallons of gasoline from the 400 gallon compartment and 207 gallons of diesel from the 300 gallon compartment. But other Gardner Oil records showed that Truss was supposed to receive 261 gallons of gasoline from the 300 gallon compartment and 207 gallons of diesel from the 400 gallon compartment. Finally, Dewayne Rogers Logging received 1,111 gallons of diesel according to Gardner Oil's records. If Gardner Oil used only the 700, 600, and 500 gallon compartments to deliver diesel fuel to Dewayne Rogers Logging and CRL, Gardner Oil could only deliver a total of 1,800 gallons to those two entities. Instead, Gardner Oil delivered 1,872 gallons to Dewayne Rogers Logging

and CRL. From this evidence, the jury could reasonably conclude that Gardner Oil delivered fuel to CRL from one of the compartments used to previously deliver fuel to Steve Truss. And it likewise could infer that the fuel received by CRL was gasoline rather than diesel.

Moreover, there were other indicators supporting the inference that Gardner Oil delivered a diesel and gasoline mixture to CRL. The evidence indicates that after the fire, Chavez smelled of gasoline. Also, the record reflects that CRL's equipment ran rough and that CRL had to dilute the fuel delivered by Gardner with pure diesel from another source so the remaining fuel could be used. Accordingly, we conclude that the evidence is legally and factually sufficient to support the element of breach.

Causation

Once Chavez presented legally and factually sufficient evidence that Gardner Oil owed him a duty and breached that duty, the issue of causation became evident. Chavez presented expert testimony that diesel fuel would not have ignited as a result of his exiting the cab of the log loader with a burning lighter, but that a diesel and gasoline fuel mixture would have ignited. Chavez was fueling the log loader from this mobile tank when the fuel ignited. A coworker saw the fire coming from the fuel tank on the log loader and erupting several feet into the air. The fuel that Gardner Oil delivered to CRL ignited, and a jury could reasonably conclude that it did so because Gardner Oil failed to deliver pure diesel. Therefore, Gardner Oil's conduct was a cause in fact of Chavez's injuries.

Further, causing a fire is foreseeable when a company delivers a diesel and gasoline mixture to a logging company. The evidence at trial indicated that smoking is commonplace in the logging industry. Thus, when a company delivers a diesel and gasoline mixture instead of pure diesel, a flash fire triggered by the gasoline in the fuel is highly foreseeable.

Gardner Oil argues that Chavez's accident may have been caused by a person's tampering with CRL's 1,000 gallon tank. There is no evidence in the record to support this theory. Though there is evidence that someone stole diesel from CRL after Chavez's accident, there is no indication that anyone ever donated gasoline to CRL by surreptitiously placing it in CRL's 1,000 gallon tank. Based on the evidence before us, we conclude that Gardner Oil did not present an equally plausible inference.

Finally, Gardner Oil argues that Chavez should have used a flashlight rather than a lighter to check the fuel gauge because there was a warning sign against smoking around diesel. Had Chavez done so the accident would not have happened. Gardner Oil's suggestion is accurate. But this does not change the fact that Gardner Oil should have known that sparks and flames are common in logging operations. And while those sparks and flames do not ignite diesel, they can ignite a diesel and gasoline mixture.

In sum, Chavez presented legally and factually sufficient evidence that the more probable inference was that Gardner Oil delivered a diesel and gasoline fuel mixture to CRL. Similarly, Chavez presented legally and factually sufficient evidence that this conduct by Gardner Oil was a breach of its duty to Chavez, and that this breach caused Chavez's injuries. Gardner Oil's second issue is overruled.[1]

CRL'S NEGLIGENCE

In its fourth issue, Gardner Oil argues that the trial court erred by refusing to submit a jury question regarding CRL's negligence.

Standard of Review and Applicable Law

A trial court is given broad discretion in submitting a charge to the jury so long as the charge is legally correct. ***Hyundai Motor Co. v. Rodriguez***, 995 S.W.2d 661, 664 (Tex. 1999). The goal is to submit to the jury the issues for decision logically, simply, clearly, fairly, correctly, and completely. ***Id***. Despite the discretion given it, a trial court must submit a jury question on all issues raised by the pleadings and the evidence. TEX. R. CIV. P. 278; ***Hyundai Motor Co.***, 995 S.W.2d at 663.

A defendant is entitled to designate a responsible third party that it alleges bears some responsibility for the plaintiff's injuries. TEX. CIV. PRAC. & REM. CODE ANN. § 33.004(a) (West Supp. 2011). The trial court should not allow the submission of a question to the jury regarding conduct of a responsible third party where there is not sufficient evidence to support the submission. *See* ***id.*** § 33.003(b) (West 2008). Evidence is insufficient to support submission of

[1] Because we overrule Gardner Oil's second issue, we do not address Gardner Oil's first issue, in which it argues that the evidence is legally and factually insufficient to support the jury's verdict that Gardner Oil failed to comply with a warranty and that such failure was a producing cause of Chavez's damages. *See* TEX. R. APP. P. 47.1.

a charge question when (1) there is a complete absence of evidence establishing a vital fact, (2) the court is barred by rules of law or of evidence from giving weight to the only evidence of a vital fact, (3) the evidence offered to prove a vital fact is no more than a mere scintilla, or (4) the evidence conclusively establishes the opposite of a vital fact. *See* ***City of Keller***, 168 S.W.3d at 810.

As set forth previously, negligence requires evidence that (1) there was a legal duty, (2) that duty was breached, and (3) the breach proximately caused the plaintiff's damages. *See* ***Harrison***, 70 S.W.3d at 782. An employer has a duty to warn employees "of the hazards of employment and provide needed safety equipment or assistance." ***Kroger Co. v. Elwood***, 197 S.W.3d 793, 794 (Tex. 2006). But an employer is not an insurer of its employees' safety. ***Id***. It owes no duty to warn of hazards known by the employee or to provide equipment or assistance that is unnecessary to the safe performance of the job by the employee. ***Id***.

Application

Gardner Oil argues that the trial court should have submitted a jury question regarding CRL's negligence because a fact issue was presented concerning whether CRL (1) properly trained and supervised Chavez regarding fueling of the log loader and (2) provided a safe workplace to Chavez because the log loader lacked working lights in the cab and no flashlight was available. Chavez responds that (1) CRL owed no duty to train and supervise him regarding fueling the log loader, (2) there is no evidence that CRL failed to properly train and supervise him, (3) there is no evidence that any failure to train and supervise was a cause of his injuries, and (4) Gardner Oil failed to plead that CRL failed to provide a safe workplace.

Having considered the evidence of record, we conclude that CRL owed no duty to Chavez to train him in how to fuel the log loader or to provide working lights in the cab or a flashlight. The evidence indicates that the log loader ran on pure diesel and it was only to have pure diesel pumped into it.[2] Moreover, the evidence conclusively established that diesel does not ignite when near an open flame. An employer's duty to an employee is that of ordinary care in providing a safe workplace, not in insuring against any possible accident. *See* ***Kroger Co.***, 197

[2] Gardner Oil asked Carl Rogers, the owner of CRL, if he or his employees had used 5% gasoline in the log loader to help it run on cold days. Rogers denied ever using gasoline in the log loader. Thus, there was no evidence that the log loader had ever intentionally been fueled with anything but pure diesel.

S.W.3d at 794. Here, CRL had no way of knowing that Chavez was pumping a diesel and gasoline mixture into the log loader rather than pure diesel. As a result, CRL had no duty to protect Chavez from an unforeseeable accident since the evidence indicates that if the proper fuel been delivered, Chavez's task of pumping fuel into the log loader was undertaken in a safe manner. Additionally, even though it had no duty to do so, CRL warned against smoking near diesel.

Finally, Chavez is correct that Gardner Oil's pleadings do not contain an allegation that CRL failed to provide a safe workplace for Chavez. Gardner Oil timely designated CRL as a responsible third party and alleged that CRL failed to properly train and supervise its employees. Chavez filed a motion to strike CRL as a responsible third party. Gardner Oil filed a response in which it again argued that CRL failed to train and supervise Chavez. But Gardner Oil did not plead, in its initial designation or in its response to Chavez's motion to strike, that CRL failed to provide a safe workplace for Chavez. Because Gardner Oil's pleading did not raise this issue, the trial court did not abuse its discretion by refusing to submit the question to the jury. *See* TEX. R. CIV. P. 278.

Gardner Oil's fourth issue is overruled.

CHAVEZ'S NEGLIGENCE

In its fifth issue, Gardner Oil argues that the jury's finding that Chavez was not contributorily negligent in causing his injuries is against the great weight and preponderance of the evidence.

When a party attacks the factual sufficiency of an adverse finding on an issue on which it has the burden of proof, it must establish that the adverse 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 consider and weigh all of the evidence and set aside the 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***.

Contributory negligence is an affirmative defense that involves an injured person's failure to use ordinary care in regard to his own safety. *See* ***Kroger Co. v. Keng***, 23 S.W.3d 347,

351 (Tex. 2000). To prove contributory negligence, the defendant must prove that the plaintiff was negligent and that the plaintiff's negligence proximately caused his injuries. *See* ***id***.

Gardner Oil argues that Chavez clearly was contributorily negligent because he lit a lighter while pumping fuel into the log loader. However, Gardner Oil ignores the evidence supporting that Chavez's conduct would not have caused a fire if the fuel Gardner Oil delivered was pure diesel as it should have been. We conclude that Gardner Oil failed to establish that Chavez acted improperly or that his actions proximately caused his injuries. Accordingly, the jury's finding that Chavez was not contributorily negligent is not clearly wrong and unjust. Gardner Oil's fifth issue is overruled.

ADMISSIBILITY OF EVIDENCE

In its sixth issue, Gardner Oil contends that the trial court erred by admitting demonstrative evidence that showed diesel is more volatile than gasoline. Specifically, Gardner Oil objected at trial to a video showing an experiment of an open flame's being introduced both near diesel fuel and gasoline.

Standard of Review and Applicable Law

We review a trial court's exclusion or admission of evidence for abuse of discretion. *See* ***Owens-Corning Fiberglas Corp. v. Malone***, 972 S.W.2d 35, 43 (Tex. 1998). A trial court does not abuse its discretion as long as its decision is within the zone of reasonable disagreement. ***Natural Gas Pipeline Co. of Am. v. Pool***, 30 S.W.3d 618, 632 (Tex. App.–Amarillo 2000), *rev'd on other grounds*, 124 S.W.3d 188 (Tex. 2003). A trial court abuses its discretion when its decision is unreasonable, arbitrary, or made without regard for any guiding rules or principles. *See* ***Lively v. Blackwell***, 51 S.W.3d 637, 641 (Tex. App.–Tyler 2001, pet. denied).

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. TEX. R. EVID. 401. If there is some logical connection, either directly or by inference, between the evidence and a fact to be proved, the evidence is relevant. *See* ***Pool***, 30 S.W.3d at 632. Evidence that is not relevant is inadmissible. TEX. R. EVID. 402.

The erroneous admission of evidence requires reversal only if the error probably caused the rendition of an improper judgment. TEX. R. APP. P. 44.1; *see also* ***Nissan Motor Co. v.***

Armstrong, 145 S.W.3d 131, 144 (Tex. 2004). We review the entire record and require the complaining party to demonstrate that the judgment turns on the particular evidence admitted. ***Armstrong***¸145 S.W.3d at 144. The erroneous admission of evidence is harmless if it is merely cumulative. ***Id***.; ***Crosby v. Minyard Food Stores, Inc.***, 122 S.W.3d 899, 904 (Tex. App.–Dallas 2003, no pet.) (error is harmless if other competent evidence of fact in question appears elsewhere in record).

Application

At trial, Gardner Oil argued that Chavez was negligent for igniting a lighter near the fuel that he was pumping into the log loader. Chavez responded that he was not negligent because, unlike gasoline, diesel does not ignite in the presence of an open flame. To illustrate the point, Chavez offered testimony from an expert witness and a video to explain and demonstrate how diesel reacts to an open flame. Gardner Oil objected to the admission of the video, but it did not object to the expert's testimony.

Based on our review of the record, we conclude that the evidence was relevant. The increased volatility of gasoline versus diesel was important to the jury's determination of several issues. While there is no evidence that the fuel being used was pure gasoline, the volatility of gasoline was still relevant, as was the lack of volatility of diesel fuel. Moreover, Gardner Oil failed to object to the expert's testimony concerning the differences in volatility between gasoline and diesel, which was cumulative of the evidence displayed by the demonstration in the video. *See* ***Crosby***, 122 S.W.3d at 904. Gardner Oil's sixth issue is overruled.

IMPROPER JURY ARGUMENT

In its third issue, Gardner Oil argues that Chavez's jury argument constituted reversible error.

Preservation of Error and Incurable Jury Argument

Improper jury argument must ordinarily be preserved by timely objection and request for an instruction that the jury disregard the improper remark. TEX. R. APP. P. 33.1; ***Phillips v. Bramlett***, 288 S.W.3d 876, 883 (Tex. 2009). Error is not preserved when the trial court's response indicates that it did not understand the objection, and counsel makes no further attempt

to clarify the court's understanding or obtain a ruling on his objection. ***Phillips***, 288 S.W.3d at 883.

In rare instances, no objection is required because the comment's prejudice could not have been cured by retraction of the argument and instruction. ***Id***. To establish incurable jury argument, the offended party must persuade the court that, based on the record as a whole, the offensive argument was so extreme that a "juror of ordinary intelligence could have been persuaded by that argument to agree to a verdict contrary to that to which he would have agreed but for such argument." ***Id.*** (quoting ***Goforth v. Alvey***, 153 Tex. 449, 271 S.W.2d 404, 404 (Tex. 1954)). Typically, incurable jury argument is limited to those situations that "involve unsubstantiated attacks on the integrity or veracity of a party or counsel, appeals to racial prejudice, or the like." *See* ***Phillips***, 288 S.W.3d at 883.

Application

Gardner Oil complains of the following portion of Chavez's closing argument:

> [Chavez's Counsel]: I have got to thinking about these damages for pain and suffering, mental anguish. I got to thinking how would you think about this? What is the best way to think about that? I have got to thinking what if I put an ad in the newspaper here in Rusk or down in Jacksonville, maybe over in my home of Henderson, or, you know, wherever. And I said, wanted, I want an able bodied man who is willing to be a victim in a flash fire explosion. Here's the requirements. He has got to barely survive a flash fire. He has got to have –
>
> [Gardner Oil's Counsel]: Your Honor, I object to this argument as being improper.
>
> The Court: What grounds?
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> [Gardner Oil's Counsel]: It's improper argument.
>
> The Court: Overrule.
>
> [Chavez's Counsel]: He has got to endure deep second degree burns to his face. Deep second degree burns to his hands. Deep second degree burns to his neck. He is going to have a fried cornea causing permanent blurred vision. I am looking for a willing able bodied man whose eyes will be permanently open for three to six months where he can't even sleep. He is going to have a surgical incision from ear to ear. Surgical incision from hip to hip. Painful dressing changes. A left eye sutured shut, completely closed shut for at least six days by the doctor on purpose. Multiple painful surgeries. Both eyelids replaced. Skin grafts to his face from his thigh. Skin grafts from his stomach. You saw the pictures up here to his neck. Post Traumatic Stress Disorder. Nightmares. Don't take this one lightly, Ladies and Gentlemen. When you feel like this man feels you think about killing yourself. You're so in despair and depression, life doesn't mean anything more, why should you keep living if this is the way you're going to have to live. Severe depression. Extreme anxiety. Can't sleep. Multiple debridements where they pick that stuff off your face with tweezers and brushes and gosh knows what. I can't imagine going through that. Extreme and unrelenting pain. Ear cartilages exposed. And you [lose] your job.

> Oh, and in my ad, Ladies and Gentlemen, photos are available to show you how you will look the rest of your life. That's my want ad, that's the person I am looking for. How much would I have to pay you? How much would I have to pay you? If I said – if I put in my ad $2,000,000 would – say, I told them to come right up here to the Cherokee County Courthouse on Saturday morning, that's my ad. Do you think the sidewalk would be full of people? What about if I said $3,000,000? Do you think my phone would ring off the hook for my want ad? What if I said $4,000,000? Would I get some takers? Would I get some people willing to accept my want ad and to take the place of this man[?]
>
> That's how you determine what to write in, that is how you determine what to write in on these numbers about physical pain and anguish, mental anguish in the past and future. Disfigurement. Look at those and you determine, you decide, you're the jury. You decide what is fair, what it ought to be. But I submit to you that ad is a way for you to think about it, and it's a way for you to determine what you think is right.

In its brief, Gardner Oil contends that Chavez's jury argument, in effect, asked the "jury to put themselves into [Chavez's] shoes and to give [Chavez] what they would want if they were injured. . . ." Yet the objection Gardner Oil made to the trial court does not comport with this argument. Rather, Gardner Oil made only one objection near the outset of Chavez's jury argument—that the argument was improper. The trial court asked Gardner Oil to clarify its objection. But Gardner Oil simply iterated its general statement that the argument was "improper." Accordingly, we hold that Gardner Oil's objection preserved nothing. *See* ***id***. And Chavez's allegedly improper argument is not the type of argument that "strikes at the very core of the judicial process" so that any error is preserved without objection. *See* ***id***. Gardner Oil's third issue is overruled.

DAMAGES FOR FUTURE PHYSICAL PAIN AND MENTAL ANGUISH

In its seventh issue, Gardner Oil argues that the jury's award of $1,000,000 for future physical pain and mental anguish is excessive and should be reduced to $125,000.

When a party objects to a jury award as excessive, we construe the objection as a claim that the evidence is factually insufficient to justify the award. *See* ***Maritime Overseas Corp. v. Ellis***, 971 S.W.2d 402, 406 (Tex. 1998) ("The court of appeals should employ the same test for determining excessive damages as for any factual sufficiency question."). Accordingly, we review Gardner Oil's issue under the factual sufficiency standard set forth previously.

Generally, the amount of damages awarded is uniquely within the jury's discretion. ***Mo. Pac. R.R. Co. v. Roberson***, 25 S.W.3d 251, 257 (Tex. App.—Beaumont 2000, no pet.). "[I]t is

only when [a jury's] award of damages is 'flagrantly outrageous, extravagant, and so excessive as to shock the judicial conscience,' that it may be disturbed." ***Id***. at 257–58 (quoting ***Am. Bank of Waco v. Waco Airmotive, Inc***., 818 S.W.2d 163, 175 (Tex. App.—Waco 1991, writ denied)).

Here, the jury awarded Chavez $1,000,000 after considering evidence that Chavez almost burned to death and still suffers, and will permanently suffer, numerous negative effects from that injury. The evidence indicated that Chavez's future includes several surgeries, vision problems, sensitivity to sunlight, an inability to work as a logger, and bouts with post-traumatic stress disorder. The record further reflects that Chavez has nightmares resulting from the incident and battles severe depression. His skin is permanently damaged, and he still experiences pain as a result of his scarring. He also has permanent hearing loss. Having carefully considered the evidence of record, we hold that the jury's award is supported by factually sufficient evidence. Gardner Oil's seventh issue is overruled.

DISPOSITION

Having overruled Gardner Oil's seven issues, we ***affirm*** the trial court's judgment.

BRIAN HOYLE
Justice

Opinion delivered May 9, 2012.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.

(PUBLISH)