COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

PRESS ENERGY SERVICES, LLC and CHRISTOPHER JAMES NISSLEY,	§	No. 08-19-00179-CV
Appellants,	§	Appeal from the
v.	§	143rd District Court
JAVIER BUSTILLOS RUIZ,	§	of Reeves County, Texas
Appellee.	§	(TC#18-01-22264-CVR)

O P I N I O N

Following a collision on a two-lane highway, Appellee Javier Bustillos Ruiz (Bustillos) filed suit for negligence and gross negligence against Appellants, Christopher James Nissley (Nissley) and Press Energy Services, LLC (Press Energy). The jury returned a verdict in favor of Bustillos and awarded substantial damages. On appeal, Appellants Nissley and Press Energy challenge the trial court's rulings pertaining to voir dire, admission of evidence, and closing arguments. Additionally, Appellants challenge the sufficiency of the evidence to support the jury's award of compensatory and punitive damages. Finding no error, we affirm.

I. BACKGROUND

Bustillos and Nissley both worked as commercial truck drivers. On December 6, 2017, Bustillos was driving his 18-wheeler-tractor-trailer southbound on a stretch of US-285 when he

and Nissley, who was similarly driving an 18-wheeler-tractor-trailer but heading northbound, collided in the southbound lane of traffic. At the time of the collision, Nissley worked as a water hauler for Press Energy.

The impact of the collision knocked Bustillos' cab off the frame of his tractor-trailer. Bustillos was left unconscious and, when his vehicle caught on fire, rescuers extracted him from his cab. He was taken to an emergency room where he was treated and released after several hours but later sought additional treatment to include surgeries performed on his hands and shoulder. He sustained injuries to his knee, shoulder, head, face, and both hands; with some injuries projected as being permanent. At trial, Bustillos testified he experienced ongoing headaches, bodily pains, and emotional harm stemming from his injuries.

Bustillos filed suit alleging negligent acts of Nissley proximately caused the collision and his resulting injuries and damages; that Press Energy was vicariously liable for Nissley's negligence; that Press Energy was liable for its own negligent entrustment, hiring, training, supervision, and retention; and that Press Energy was liable for its own negligent maintenance of its commercial vehicles. He further alleged Appellants' acts of negligence were of such character as to make each defendant guilty of gross negligence. Bustillos sought recovery for past and future damages to include lost wages, medical care expenses, physical pain, mental anguish, physical impairment, and disfigurement. Later, however, he amended his claims such that his live petition only sought recovery of damages related to physical pain, mental anguish, physical impairment, and disfigurement; in other words, he no longer sought claims for lost wages or medical expenses.

At trial, the jury heard testimony from the two drivers, Bustillos and Nissley, and nine other witnesses. Bustillos described he saw Nissley's truck come into his lane of traffic. Nissley,

however, testified Bustillos' truck migrated toward the center line of the two-lane road, eventually entered his lane of traffic, which forced him to swerve defensively to avoid a collision. The swerve, he claimed, caused the wheels of his truck to come into contact with the shoulder of the road. As he attempted to return the rig to the paved roadway, the trailer of the truck jackknifed and crashed into Bustillos' vehicle. Traveling directly behind Nissley, an eyewitness testified he saw the brakes of Nissley's truck lock-up, causing the rig to cross the road and collide with oncoming traffic.

Experts hired by each side jointly conducted a post-accident inspection of Nissley's vehicle—Will Miller for Bustillos and Nicholas Kasner for Press Energy. Miller testified at trial that he had made observations about conditions observed on Nissley's vehicle which supported his findings. He also disclosed that he spoke with Kasner during their joint inspection and they had both agreed there were defects on Nissley's truck that pre-existed the collision. Because Kasner had been designated as a consulting-only expert and his status remained unchanged throughout discovery, the trial court did not permit him to personally testify, even as rebuttal to Miller's description of their joint inspection.

The jury returned a unanimous verdict wherein it assigned negligence to Nissley and Press Energy and none to Bustillos. The jury also found that Bustillos' damages resulted from gross negligence attributable to each Appellant. The total award of compensatory damages amounted to $3 million.[1] Also, exemplary damages were assessed against each Appellant, $2 million against Press Energy and $300,000 against Nissley. Based on a statutory cap, the trial court reduced the exemplary damages against Press Energy to $750,000.

[1] The award was comprised of $500,000 for past physical pain and mental anguish, $250,000 for future physical pain and mental anguish, $750,000 for past physical impairment, $1 million for future physical impairment, $250,000 for past disfigurement, and $250,000 for future disfigurement.

Following the jury's verdict, Bustillos filed a motion for judgment while Appellants filed a motion for judgment notwithstanding the verdict. The trial court entered judgment according to the jury's verdict and the exemplary damages cap; awarding Bustillos $3 million in compensatory damages, as well as $300,000 in exemplary damages from Nissley, and $750,000 from Press Energy. Appellants then filed a motion for new trial, which was denied. This appeal followed.

II. DISCUSSION

A. Evidentiary rulings

In Issue One, Appellants argue several sub-issues asserting the trial court made multiple, harmful evidentiary errors. Appellants assert the trial court erred: (1) in excluding proof of Bustillos' medical bills; (2) in preventing Appellants from rebutting the hearsay testimony of Bustillos' expert; and (3) in admitting character evidence in the form of DOT inspection violations. Appellants argue these errors—whether viewed singularly or cumulatively—warrant a new trial.

1. Standard of Review

"Evidentiary rulings are committed to the trial court's sound discretion." *U-Haul Intern., Inc. v. Waldrip*, 380 S.W.3d 118, 132 (Tex. 2012); *DeAnder & Felhaber, LP v. Montgomery*, 615 S.W.3d 352, 356 (Tex. App.—El Paso 2020, pet. denied). "A trial court abuses this discretion when it acts without regard for guiding rules or principles." *Waldrip*, 380 S.W.3d at 132 (citing *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 43 (Tex. 1998)). But even if a trial court's evidentiary ruling is an abuse of discretion, reversal is appropriate only if the error was harmful. *Id.*; TEX. R. APP. P. 44.1.

2. Analysis

a. Exclusion of Bustillos' medical bills

In the first sub-issue, Appellants argue the trial court erred in excluding Bustillos' medical bills, which they had tried to admit as evidence.[2] Over three months before trial, Bustillos amended his pleadings to exclude a request for recovery of his medical expenses. His live petition merely pleaded for damages for physical pain, mental anguish, physical impairment, and disfigurement. After Bustillos abandoned his claim to recover medical expenses, he argued his treatment bills were irrelevant because he no longer sought recovery of those damages. Citing to the Texas Supreme Court's decision in *Haygood*,[3] he argued that "only evidence of recoverable medical expenses" are admissible at trial. Distinguishing *Haygood* from the facts at hand, Appellants argued that Bustillos' economic damages were tethered to his claims of noneconomic damages; and they urged the bills were admissible as a guidepost for the jury's determination of noneconomic damages.

As they did below, Appellants argue here that Bustillos' medical bills are relevant to the jury's consideration of noneconomic damages. Appellants argue the award of noneconomic damages would be made randomly and without merit absent the records tendered by their bill of exception. Bustillos responds that Appellants waived admissibility of such evidence by failing to plead a defense based on his medical expenses; and, during discovery, they failed to disclose the relevance of his medical bills as a basis for contesting noneconomic damages. And, even if not

[2] Appellants sought to admit the medical bills of Bustillos which appear in our record as a bill of exception. Appellants' Exhibit 13 includes more than 500 pages of medical billing records. In briefing, Appellants contend the records amount to $57,000 in medical billings but no summary is included or identified. In responsive briefing, Bustillos argues the medical bills offered by Appellants were incomplete and failed to include all treatment received. He thus argues the figure of $57,000 is not an established fact, but rather fictional, as he had opted not to seek recovery of his medical expenses and the actual amount is unknown on the present record.

[3] *Haygood v. De Escabedo*, 356 S.W.3d 390, 399 (Tex. 2011).

waived, Bustillos argues the Supreme Court of Texas has held that the prejudicial impact of such evidence, when not recoverable to an asserted claim, outweighs any possible relevance to plaintiff's noneconomic damages.

We first address Bustillos' two waiver arguments. First, Bustillos argues Appellants, in effect, waived their evidentiary argument by failing to timely plead an affirmative defense to noneconomic damages based on the extent of Bustillos' medical charges. Responding, Appellants deny they raised an affirmative defense by seeking admission of the excluded records. We agree that no affirmative defense was asserted by Appellants' argument.

By its very nature, an affirmative defense is a defense of confession and avoidance. *Tex. Beef Cattle Co. v. Green*, 921 S.W.2d 203, 212 (Tex. 1996). "An affirmative defense does not seek to defend by merely denying the plaintiff's claims, but rather seeks to establish 'an independent reason why the plaintiff should not recover.'" *Id.* (quoting 2 ROY W. MCDONALD, TEXAS CIVIL PRACTICE § 9:44, at 378 (1992)). "An affirmative defense must be pleaded in a responsive pleading, or the defense will be waived." *Roth v. JPMorgan Chase Bank*, 439 S.W.3d 508, 513 (Tex. App.—El Paso 2014, no pet.). Here, the medical bills were offered to refute noneconomic damages, not as an "independent reason why the plaintiff should not recover." *Tex. Beef Cattle Co.*, 921 S.W.2d at 212. We conclude that Appellants did not waive their evidentiary argument by not pleading an affirmative defense.

Bustillos next argues, pursuant to Rule 194.2 of the Texas Rules of Civil Procedure, the trial court properly excluded the contested records based on Appellants' failure to disclose the use of these medical charges as a guidepost for noneconomic damages. Appellants respond that Rule 194.2's disclosure requirement is limited to claims of economic damages. Said differently,

Appellants argue they had no duty to marshal all evidence they intended to introduce to refute Bustillos' noneconomic damage claims under Rule 194.2. We agree that Rule 194.2 was not implicated.

Texas Rule of Civil Procedure 194.2 instructs that "[a] party may request disclosure of . . . the amount and any method of calculating *economic* damages." TEX. R. CIV. P. 194.2(d) (emphasis added) (rule effective for cases filed before January 1, 2021). Bustillos himself only sought recovery of noneconomic damages. Because the disclosure of economic damages is not at issue, Rule 194.2 is not directly applicable. In short, Appellants had no obligation under that rule to disclose their intended reliance on Bustillos' medical bills to refute his claim of noneconomic damages. *See id.* We agree that Appellants did not waive their evidentiary argument on this ground either.

Turning to the merits of the evidentiary dispute, Appellants assert the medical bills provide an indispensable, guiding benchmark for an award of noneconomic damages. They emphasize a high ratio of economic to noneconomic damages, which they contend was awarded in this instance, supports their assertion that the medical bills should have been admitted. Even without a pleaded claim for recovery of medical expenses, Appellants assert Bustillos' medical bills were relevant to his noneconomic claims. We disagree.

Pursuant to Rule 401 of the Texas Rules of Evidence, evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence[,]" and "the fact is of consequence in determining the action." TEX. R. EVID. 401. As a corollary to that rule, Rule 402 states that "[i]rrelevant evidence is not admissible." TEX. R. EVID. 402. Providing other limits, Rule 403 provides that a trial court has the discretion to exclude relevant evidence "if its

probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." TEX. R. EVID. 403.

We are guided here by the controlling authority of *Haygood v. De Escabedo*, 356 S.W.3d 390 (Tex. 2011). In that case, Haygood sued Escabedo for injuries he sustained in a motor vehicle collision. *Id.* at 392. Haygood's health care providers billed him a total of $110,069.12 for medical expenses. *Id.* As a subscriber of Medicare Part B, Haygood's obligation to pay for medical services was limited by law to reasonable and customary charges for similar services and prevailing rates in the same locality for similar services. *Id.* After Haygood's expenses were adjusted for what was deemed a reasonable charge, the outstanding balance amounted to $27,739.43. *Id.* At trial, Escabedo moved to exclude evidence of any medical expenses exceeding the adjusted amount of $27,739.43. *Id.* The trial court denied that motion and permitted Haygood to present the original charges billed by each health care provider. *Id.* In addition to other damages, a jury awarded $110,069.12 for past medical expenses. *Id.* The court of appeals reversed, holding that Haygood was prohibited from presenting evidence, and recovering expenses, that "neither the claimant nor anyone acting on his behalf will ultimately be liable for paying." *Id.*

The Supreme Court of Texas affirmed the court of appeals' judgment, holding Haygood was statutorily prohibited from recovering the full, unadjusted charges; and, therefore, he was prohibited from presenting "evidence of a claim of damages that are not compensable." *Id.* at 398. "Since a claimant is not entitled to recover medical charges that a provider is not entitled to be paid, evidence of such charges is irrelevant to the issue of damages." *Id.* Notably, the Supreme Court further addressed the probative value of the medical charges as related to a jury's ability to

gauge the seriousness of plaintiff's injuries for the purpose of awarding noneconomic damages. *See id.* The Court squarely rejected Haygood's argument that his medical bills were admissible as a benchmark for the jury's noneconomic damages, holding "that any relevance of such evidence is substantially outweighed by the confusion it is likely to generate, and therefore the evidence must be excluded." *Id.*

Here, there is no dispute that Bustillos himself was prohibited from recovering any economic damages for medical charges because he failed to plead for such claim. *See Gordon v. Redelsperger*, No. 02-17-00461-CV, 2019 WL 619186, at *8 (Tex. App.—Fort Worth Feb. 14, 2019, no pet.) (mem. op.) (affirming trial court's denial of plaintiff's medical bills as evidence in accordance with *Haygood* because plaintiff did not seek economic damages and his medical bills could confuse the jury). He could only pursue recovery for noneconomic damages. *See id.* Based on *Haygood*, any evidence of Bustillos' economic damages, including medical bills, remained irrelevant to his disputed claims. 356 S.W.3d at 398. And, as further instructed by *Haygood*, we reject Appellants' guidepost argument because it is "substantially outweighed by the confusion it [was] likely to generate . . . ." *Id.*[4] Accordingly, we conclude the trial court did not err in excluding Bustillos' medical bills. We overrule Appellants' first sub-issue of Issue One.

b. Expert Testimony

In the second sub-issue of Issue One, Appellants challenge rulings pertaining to two expert witnesses, Will Miller and Nicholas Kasner. Concord Energy Services hired Miller about three

[4] We also note that neither party has cited any statutory scheme adopted by the Texas Legislature, and we have found none in our own review, indicating there is an appropriate multiplier that must be used for calculating noneconomic damages as they relate to economic damages. We decline to create such a standard by holding economic damages *must* be an admissible anchor or guidepost for calculating noneconomic damages. *See Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 95 (Tex. 2015) (Willett, J., concurring) ("Judicial duty requires courts to act judicially by adjudicating, not politically by legislating.").

weeks after the crash to investigate the wrecked tractor-trailers; Press Energy similarly hired Kasner. The two experts personally conducted a joint inspection of Nissley's vehicle, which was also recorded on video. Bustillos eventually tendered Miller as a testifying expert for his case, but Appellants merely designated Kasner as a consulting-only expert.[5]

Appellants argue the trial court erred in permitting certain testimony from one expert (Miller) and excluding testimony from the other (Kasner). Appellants assert that Bustillos bolstered Miller's opinions by eliciting testimony from him in which he asserted that Kasner had agreed, at the time of the joint inspection, with all of his opinions. Appellants assert the trial court erred in permitting Miller to give hearsay testimony of Kasner, and then compounded the error by barring Kasner from rebutting Miller's testimony. They argue the rulings were harmful and warrant a new trial.

Responding, Bustillos argues Appellants failed to timely object to Miller's testimony, and even still, Miller's testimony was not hearsay, but rather, qualified as a present sense impression of Kasner. For three reasons, Bustillos further argues the trial court did not compound nor commit error in prohibiting Kasner from testifying as a rebuttal witness. First, Bustillos argues that given that Kasner and Miller conducted a joint inspection which was memorialized on video, Appellants were hard pressed to argue they were "ambushed" by Miller's trial testimony. Second, Bustillos asserts Appellants' failure to designate Kasner as a testifying expert barred their ability to subsequently call him during trial, and in that vein, he further argues Appellants had not met their

[5] When Bustillos sought to play the video recording of the joint inspection Appellants objected on the basis that Kasner had participated as a consulting-only expert. After viewing the video outside the presence of the jury, the trial court overruled Appellants' objection. The trial court found the video depicted a joint inspection where normal expectations of confidentiality and privacy were waived.

burden of showing either good cause or lack of surprise to Bustillos. Third, Bustillos urges the jury could have relied on Miller's testimony of his own impressions—without reference to Kasner's consensus—and therefore any error was harmless. In short, Bustillos asserts nothing in the record indicates Miller's testimony of his own conclusions was insufficient to support the jury's verdict and the trial court's ruling should be affirmed.

We begin with Bustillos' claim that Appellants waived their argument contending that Miller provided hearsay testimony when disclosing comments attributed to Kasner.

i. Hearsay

Hearsay is defined as a statement that "the declarant does not make while testifying at the current trial or hearing[,]" and the statement is offered "in evidence to prove the truth of the matter asserted in the statement." TEX. R. EVID. 801(d). An opposing party's statement is not hearsay if it is offered against the opposing party and "was made by the party's agent or employee on a matter within the scope of that relationship and while it existed . . . ." TEX. R. EVID. 801(e)(2)(D). Hearsay is not admissible unless otherwise provided by statute, the rules of evidence, or other rules. TEX. R. EVID. 802. Under the rules of evidence, hearsay testimony that is a "statement describing or explaining an event or condition, made while or immediately after the declarant perceived it[,]" is admissible as a present sense impression. TEX. R. EVID. 803(1).

To preserve error for appellate review, the complaining party must timely and specifically object to the evidence and obtain a ruling. TEX. R. APP. P. 33.1(a); *see also* TEX. R. EVID. 103(a). Error is waived if the complaining party allows the evidence to be introduced without objection. *Richardson v. Green*, 677 S.W.2d 497, 501 (Tex. 1984). Preservation of error in the admission of evidence also requires a timely objection. *Martinez Jardon v. Pfister*, 593 S.W.3d 810, 831 (Tex.

App.—El Paso 2019, no pet.). The trial court's ruling on a motion in limine is not a ruling that excludes or admits evidence. *Castaneda v. Tex. Dep't of Protective & Regulatory Services*, 148 S.W.3d 509, 520 (Tex. App.—El Paso 2004, pet. denied). A motion in limine is designed solely to require an offering party to approach the bench and inquire into the admissibility of the evidence at issue before introducing that evidence to the jury. *Id*. A party must timely object to hearsay testimony otherwise error is waived. *See Beall v. Ditmore*, 867 S.W.2d 791, 793 (Tex. App.—El Paso 1993, writ denied). Moreover, "[i]nadmissible hearsay admitted without objection may not be denied probative value merely because it is hearsay." TEX. R. EVID. 802.

We must first determine whether Appellants waived their objection to Miller's testimony about Kasner's comments. If the objection is waived, we need not address whether Miller's testimony qualified as hearsay or, alternatively, whether it fell under an exception to the rule against hearsay.

Before trial, Appellants filed a motion in limine seeking exclusion from evidence any testimony or references to statements allegedly made by defendants' consulting expert during the inspection of the vehicles involved in the collision. At a pretrial conference before trial, Appellants sought exclusion of testimony from Kasner on the basis of hearsay and that Kasner would not be testifying. Counsel further asserted that Kasner "wasn't a consulting expert of ours. It's overly prejudicial to allow those statements to come in." Bustillos responded the work was performed as a joint inspection; that comments made by Kasner were not hearsay as they were made as a present sense impression of what he was seeing at the time of the inspection; that Miller testified at his deposition that he relied on his inspection as well as the joint work of the other expert. Responding, the trial court denied the limine request.

At trial and before the jury, Bustillos questioned Miller about Exhibit 2, an exhibit of two photographs taken during the joint inspection which were admitted without a hearsay objection.

> Q. What is this a picture of?
>
> A. I took these pictures. These pictures are two separate pictures of the brake chamber located on the left front axle, so the steer axle of the incident Press Energy tractor.
>
> Q. All right. And where do these fall on this diagram you created in the picture?
>
> A. It would be the brake chamber and air lines, the ABS lines that are attached to this axle right there (Indicating). So the front left brake chamber and axle and wheel.
>
> Q. Okay. Now, what do we see in this picture?
>
> A. So these pictures, they represent some of the evidence or the findings *we* had. First of all, *we* find that the ABS lines -- this is the ABS sensor line for the axle (Indicating) -- was cut. We see that it was zip tied and protected, but yet, it was still cut where it goes around the chamber itself. This is a closeup of that cut on the other end, so this is this end over here (Indicating). We're also showing you this is a Type 20 chamber. So the size of the chamber and the shape of the chamber for this be the left front side of the tractor.
>
> Q. All right. And what is this (Indicating)?
>
> A. This is again the brake chamber on the left side (Indicating).
>
> Q. All right.
>
> A. And we're looking at the air line. Again, we got the ABS sensor line zip tied to this section, so it is out of way. Got a frayed air line. We got the brake chamber. We got the slack adjustor and the pushrod coming out of that.
>
> Q. Okay. When you said that "*we* found that the ABS lines were cut," what do you mean by "we"?
>
> A. This is a joint inspection; so, in other words, this was an inspection that was conducted by not only [me], but there was [sic] expert for the defendant that was present at the inspection. So[,] *we* went through the process of actually going over and we expected each chamber -- each different section of the tractor and the trailer together and when a violation was found, *we* would look at each

other's measurements, verify that we agreed what the measurements were and so that way there was no disagreement that there was a violation or it wasn't in violation.

Q. When you say the other expert, that's for Press Energy?

A. That's correct.

Q. So Press Energy hired another expert to go out there with you to look at all of this?

A. Yes.

[Counsel for Appellants] Objection. Leading.

Q. [By Counsel for Bustillos] Who hired this other expert?

THE COURT: The objection is sustained. If you will avoid leading the witness.

[Counsel for Bustillos] Sure.

Q. [By Counsel for Bustillos] Who [is] this other expert who went out there with you?

A. My understanding, it was Press Energy.

(Emphases added).

Miller described he knew Kasner as they had worked together quite often. He described, "There's not that many people that do this type of work and so we get to know the other experts in the field." Bustillos' counsel returned to his earlier line of questioning:

Q. Okay. All right. Now, you mentioned that y'all went through it together. Which ones of these violations that you have on Exhibit No. 1 did Press Energy's expert disagree with you on?

A. There were no violations were found that were discussed and found that are on the board that were not agreed upon. We searched, we looked, we investigated, we conducted a reconstruction. Part of the reconstruction is doing a DOT inspection and so this was done together. There was no disagreement on what we found.

Q. Okay. And at this time, was there any other expert there hired by Mr. Bustillos or any of these lawyers?

A. No.

Later, Bustillos again asked Miller what the pair of experts had concluded regarding the significance of having ABS lines, which were cut, on Nissley's truck. Again, Miller responded without objection about what he and Kasner observed together at the joint inspection. Miller testified, "Well, the important thing is that by just looking at this axle is we know that there's an ABS fault. So there's -- this tractor's date of manufacture, it is federally required to have ABS and it is also -- there's a warning light in the cab that should come on, if there's a fault with that. So we knew from looking at just this one violation, that the ABS light inside the cab showing the driver should be on at all times whenever the truck is on." He also explained both experts had concluded that the vehicle defects then observed had pre-existed the collision. Only after questions and answers were given about the pre-existing nature of the defects did Appellants insert an objection based on hearsay; and also ask for a running objection pursuant to the earlier ruling that the court made with respect to an expert that had not been retained and was not then present. Bustillos responded that Miller's testimony merely recounted a present sense impression offered by Kasner while both experts engaged in their joint inspection. The trial court overruled the hearsay objection and permitted the running objection.

In *Ditmore*, we recognized that a timely objection means one made "prior to the witness responding to the question where it is reasonably obvious that the question calls for inadmissible evidence." 867 S.W.2d at 794. Opposing counsel in *Ditmore* asked the plaintiff of a suit stemming from an automobile collision how he came up with the figure for damages alleged in his petition. *Id.* at 793. The witness's response mentioned his insurance policy coverage, which was a

prohibited topic of discussion before the jury. *Id.* The attorney asked an irrelevant follow-up question before raising the objection and moving for a mistrial. *Id.* The trial judge overruled the attorney's motion. *Id.* Although we ultimately held there was no harm, we also held the trial judge erred in denying the attorney's motion on the ground that the objection was not immediate. *Id.* at 795. Important to our analysis was the fact that the objecting attorney would have been required to object to her own question. *See id.* at 794. "Appellant's question propounded to the witness [did] not disclose, or in any manner suggest the character of the answer that was given." *Id.* "Therefore, it was not incumbent upon Appellant to make any objection until after the nonresponsive answer regarding 'policy' limits was made." *Id.*

Thus, we also noted in *Ditmore* that circumstances may arise where a question does not necessarily invite an answer that is nonetheless received. *Id*. Under such circumstance, it becomes incumbent upon a party to object as soon as practicable, and if made after an answer is received, to go further and move that the objectional testimony be stricken. *Id*. In context to lodging timely objections, we concluded "[t]imeliness" defies definition; and, generally, "the question of what is timely or otherwise must be left to the sound discretion of the trial judge, but such objection need not be immediate." *Id*. at 795. We concluded that counsel acted responsibly in asking one simple unrelated question and permitting its answer to pass prior to approaching the bench to interpose an objection. *Id*.

Nonetheless, our holding in *Ditmore* is factually distinguishable from the case at hand with regard to the timeliness of Appellants' hearsay objection. Unlike in *Ditmore,* Appellants here had an opportunity to timely object to Bustillos' questions and Miller's answers that called for repeated disclosures about Kasner's participation in the joint inspection and his confirmation along with

Miller of certain findings. *Cf. id.* Each question Bustillos propounded to Miller suggested the character of the answer that was given, which included disclosure of Kasner's agreement with Miller with regard to their inspection. Bustillos pointedly asked Miller about his joint conclusions and observations which he made along with Kasner. It was incumbent upon Appellants to object as soon as was practicable, and they failed to do so. *Cf id.*; *Martinez Jardon*, 593 S.W.3d at 831. Consequently, we conclude Appellants waived their hearsay objection.

Yet even if the hearsay objection had been made on a timely basis, we also conclude the testimony was not hearsay. *See* TEX. R. EVID. 801(e)(2)(D). The record shows the statements were offered against Appellants and were made by one of their agents on a matter within the scope of the relationship while it existed. *Id*. Appellants neither contest that Kasner was hired by Press Energy to conduct a joint inspection on Nissley's tractor-trailer, nor that he did so in the course of that relationship. *See Reid Rd. Mun. Util. Dist. No. 2 v. Speedy Stop Food Stores, Ltd*., 337 S.W.3d 846, 858 (Tex. 2011) (admissions by a party opponent or its agent are admissible against that party as non-hearsay).

ii. Rebuttal Testimony

We next address the trial court's exclusion of Kasner's rebuttal testimony in light of Miller's testimony describing their consensus at the joint inspection. Appellants attempted to call Kasner to rebut Miller's characterization of Kasner's findings. Bustillos objected based on two grounds: (1) that Kasner had not been listed as either a testifying witness or person with knowledge of relevant facts; and (2) Appellants had known of Miller's deposition testimony before trial yet declined to list Kasner as a rebuttal witness. Sustaining Bustillos' objection, the trial court prohibited Kasner from testifying because he had not been disclosed as a testifying expert or as a

person with knowledge of relevant facts. Appellants challenge that ruling. At minimum, Appellants argue Kasner should have been allowed to rebut the testimony offered by Bustillos' expert once the court admitted the out of court statements attributed to Kasner.

The Texas Rules of Civil Procedure set the scope of discovery for each case. TEX. R. CIV. P. 192.3. Parties may not inquire about "[t]he identity, mental impressions, and opinions of a consulting expert whose mental impressions and opinions have not been reviewed by a testifying expert . . . ." TEX. R. CIV. P. 192.3(e). If the consulting expert's mental impressions or opinions have been reviewed by a testifying expert, a party may discover certain details and documents enumerated in the Rules of Civil Procedure. TEX. R. CIV. P. 192.3(e)(1-7). For a testifying expert, the parties may request disclosure pertaining to the expert's general identifying information, and the substance of and documentation for his or her conclusions. TEX. R. CIV. P. 194.2(f) (rule effective for cases filed before January 1, 2021).

Typically, "[a] party who fails to make, amend, or supplement a discovery response . . . in a timely manner may not introduce in evidence the material or information that was not timely disclosed, or offer the testimony of a witness (other than a named party) who was not timely identified . . . ." TEX. R. CIV. P. 193.6(a). That is, unless a court finds "there was good cause for the failure to timely make, amend, or supplement the discovery response" or "the failure to timely make, amend, or supplement the discovery response will not unfairly surprise or unfairly prejudice the other parties." TEX. R. CIV. P. 193.6(a)(1-2). The burden for establishing either good cause or lack of unfair surprise or prejudice lies on the party seeking to introduce the evidence or call the witness. TEX. R. CIV. P. 193.6(b). In its discretion, the trial court may grant a continuance or temporarily postpone trial to allow the parties to conduct additional discovery regarding any new

information presented. TEX. R. CIV. P. 193.6(c).

We agree with Bustillos that irrespective of the *discoverability* of Kasner's mental impressions and observations, Appellants could not expect Miller to refrain from testifying about topics in which he had personal knowledge. Those topics include observations of his work with Kasner as a result of their joint inspection of the wrecked vehicles. Likewise, Appellants had deposed Miller prior to trial and from his testimony they knew he had referenced Kasner's agreement with his own findings. They had ample opportunity before trial to list Kasner as a rebuttal witness and provide Bustillos with notice and an opportunity to depose their expert.

The Texas Rules of Civil Procedure generally prohibit the testimony of a witness who was not timely identified. TEX. R. CIV. P. 193.6(a). Yet some exceptions may be made; as the rules place the onus on the party seeking to offer the undesignated witness to show the court either good cause for its failure to designate or that no unfair surprise or prejudice will result from permitting that witness to testify. TEX. R. CIV. P. 193.6(b-c). During argument at trial on whether Kasner should be allowed to testify, Appellants did not mention either good cause or lack of unfair surprise or prejudice. They asserted only that Kasner's rebuttal testimony was critical to their case and reminded the trial judge of their initial objection to Miller's testimony regarding Kasner's mutual observations and conclusions. We conclude that Appellants failed to meet their burden of establishing that an exception should be made despite their failure to designate Kasner as a testifying expert or person with knowledge of relevant facts. *See* TEX. R. CIV. P. 193.6(b).

Even so, the record does not support that Appellants could have successfully met that burden. Appellants do not offer arguments regarding good cause for their failure not to designate Kasner. They only focus on the second test, which is whether Bustillos would be unfairly surprised

or unfairly prejudiced by Kasner's testimony. On appeal, however, we must not ask whether we think Bustillos would be unfairly surprised or prejudiced, but rather, whether the trial court abused its discretion when ruling favorable to Bustillos. *See Aguilar*, 600 S.W.3d at 74. Bustillos notes he had no opportunity to depose Kasner, to discover possibly impeaching facts or lines of inquiry that could be pursued at trial, or otherwise to prepare for cross-examination. Appellants' response is twofold. First, they argue the rules permit a continuance for Bustillos to conduct discovery regarding any new information presented by Kasner. Second, they argue Bustillos could not be surprised or ambushed by Kasner's testimony because he knew of Kasner's relevant knowledge on the subject of the inspection and invited further rebuttal on Kasner's purported agreement to Miller's claim that brake defects on Nissley's tractor-trailer pre-existed the subject collision.

We are not persuaded by Appellants' arguments. First, Rule 193.6 instructs that a "court *may* grant a continuance or temporarily postpone the trial to allow . . . opposing parties to conduct discovery regarding any new information presented" by the undesignated witness. TEX. R. CIV. P. 193.6(c) (emphasis added). That decision to postpone trial or grant a continuance is within the trial court's discretion; it is not a mandatory requirement. *See id*. Based on the record at hand, we cannot say the trial court abused its discretion in declining to postpone a trial that, by Appellants' own admission, was about to end. Second, Miller's deposition included testimony regarding Kasner's mutual observations and conclusions about the pre-existing brake defects he identified on Nissley's truck. Regardless of whether Bustillos knew of Kasner's relevant knowledge or whether Miller's testimony during trial invited discussion of Kasner's observations and conclusions, Appellants could have designated Kasner as a rebuttal witness from the outset. We think their failure to do so despite being on notice of such testimony from Miller undermines their

argument here that Bustillos would not be unfairly surprised or prejudiced by testimony from Kasner, an otherwise undisclosed witness. The trial court did not err in prohibiting Kasner's rebuttal testimony due to Appellants' failure to timely designate him as a witness. We overrule the second sub-issue of Issue One.

c. Admission of inspection violations

In the third sub-issue of Issue One, Appellants argue the trial court erred in admitting unrelated inspection violations. At trial, Bustillos offered into evidence prior Department of Transportation (DOT) inspection violations issued against Press Energy. Press Energy and Nissley objected to the admission of those violations, arguing they were irrelevant, dissimilar to the current violations being alleged, and constituted prejudicial character evidence. The trial court overruled their objections and permitted Bustillos to introduce the prior DOT violations. The prior violations involved the same "pusher[6]" as Nissley's, the same year as the year of this 2017 collision, and similar truck defects involving at least in part the same brakes as those found on Nissley's truck.

Bustillos also offered a DOT letter into evidence. The Federal Motor Carrier Safety Administration of the DOT sent the letter to Press Energy only three weeks before Nissley's collision with Bustillos. The DOT letter informed Press Energy that the Administration had noticed a trend in violations identified during roadside inspections of Press Energy vehicles, Press Energy drivers, or both. The letter further specified the Administration's records showed significant noncompliance in the area of vehicle maintenance; and stated the Administration was bringing attention to the safety deficiencies so corrective action could be taken. Before trial, the judge had ruled the letter inadmissible; but, on the last day of trial, the court reversed course after Press

[6] Nissley testified a "pusher" is a truck driver's manager who directs truck driver's on the job.

Energy elicited certain testimony from Brian Ralston, the operations manager. When questioned about his confidence in the performance of the maintenance department, Ralston testified he was very confident. Bustillos argued the line of questioning and responses by Ralston permitted admission of the DOT letter. Over Appellants protesting, the trial court admitted the letter into evidence.

As it did below, Appellants now argue the prior DOT violations were irrelevant and constituted impermissible character evidence. They assert Bustillos used the prior inspection violations to show that Press Energy conformed to its prior bad acts—namely, the other violations—which is prohibited by the rules of evidence. Additionally, Appellants argue the trial court erred in subsequently admitting the irrelevant DOT letter on the basis that Appellants had opened the door to such evidence by eliciting testimony from Ralston asserting he was confident of Press Energy's maintenance department, stood by its program, and it had never been "put out of service for cutting ABS lines."

Bustillos responds the trial court did not err in admitting either the prior inspection violations or the DOT letter because Appellants opened the door to such rebuttal evidence when they elicited testimony from Ralston expressing his confidence in the quality of his maintenance department. He argues the prior violations had overlapping, similar facts indicating a pattern of Press Energy's failure to properly maintain its commercial vehicles. Likewise, he urges the DOT letter demonstrates Press Energy's subjective knowledge of such a pattern, which is a necessary element Bustillos must establish to succeed on his claim of gross negligence.

Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." TEX.

R. EVID. 401. "Irrelevant evidence is not admissible." TEX. R. EVID. 402. "Relevant evidence is admissible unless" another rule of evidence provides otherwise. TEX. R. EVID. 402. "Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait." TEX. R. EVID. 404(a)(1). Moreover, evidence of an act "is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." TEX. R. EVID. 404(b)(1). Character evidence may be admissible for another purpose, however, "such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." TEX. R. EVID. 404(b)(2). Additionally, "[e]vidence of . . . an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice." TEX. R. EVID. 406.

Under these parameters, we must decide whether the trial court abused its discretion in admitting Press Energy's two prior DOT inspection violations. Appellants claim these prior inspection violations are irrelevant because Nissley's collision is factually distinct and prior violations constitute impermissible character evidence. We disagree. Bustillos only offered two of twelve previous DOT inspection violations against Press Energy. Both of those violations involved Nissley's pusher and defective brakes, and both occurred in the same year as this collision. There are reasonably similar facts when comparing the previous violations to the circumstances presented here with regard to Nissley's 18-wheeler-tractor-trailer. Therefore, the previous violations tend to make Appellants' awareness of a defective maintenance program and defective brakes on Nissley's tractor-trailer more or less probable than it would be without that evidence. *See* TEX. R. EVID. 401. We cannot say the trial court abused its discretion in admitting two prior

DOT inspection violations considering Bustillos' claim of gross negligence required he prove subjective awareness of an extreme degree of risk. *See Zuniga*, 593 S.W.3d at 247.

We next decide whether the trial court abused its discretion in admitting the DOT letter sent to Press Energy only three weeks before the incident at issue. The Supreme Court of Texas recently discussed the concept of "open[ing] the door" to witness testimony that would otherwise be inadmissible. *See Cmm'n for Lawyer Discipline v. Cantu*, 587 S.W.3d 779, 787 (Tex. 2019) (per curiam). "Evidence that is otherwise inadmissible may become admissible when a party opens the door . . . by leaving a false impression with the jury that invites the other side to respond." *Id.* (quoting *Hayden v. State*, 296 S.W.3d 549, 554 (Tex. Crim. App. 2009)). "A party on appeal should not be heard to complain of the admission of improper evidence offered by the other side, when he . . . introduced the same evidence or evidence of a similar character." *Sw. Elec. Power Co. v. Burlington N. R.R.*, 966 S.W.2d 467, 473 (Tex. 1998) (quoting *McInnes v. Yamaha Motor Corp.*, 673 S.W.2d 185, 188 (Tex. 1984)).

In *Cantu*, which involved a disciplinary hearing against an attorney, the Supreme Court found no error with the admission of testimony from a bankruptcy judge who had presided over an attorney's personal bankruptcy proceeding. *Cantu*, 587 S.W.3d at 787. Although the court of appeals had reversed and remanded after finding error, the Supreme Court reversed that judgment. *Id.* The Court held that the testimony Cantu elicited at trial regarding the veracity of the misconduct claims against him opened the door to the bankruptcy judge's opinion because the opinion clearly outlined the many instances of Cantu's misconduct. *See id.* The Court reasoned that the admission of the opinion "was a fair response to Cantu's evidence and was properly admitted under the circumstances." *Id.*

Similarly, in this instance, Appellants elicited testimony from their maintenance manager that he had confidence in Press Energy's maintenance program. This testimony directly questioned the veracity of Bustillos' claims that Press Energy had acted with gross negligence with regard to its vehicle maintenance program. *See id.* Appellants cannot now complain of the admission of the DOT letter when they introduced evidence of a similar character. *See Sw. Elec.*, 966 S.W.2d at 473. We conclude that the trial court's ruling was not arbitrary, unreasonable, or without reference to any guiding principles, and there was a legitimate basis for admitting the DOT letter. *See Lerma*, 459 S.W.3d at 699; *Aguilar*, 600 S.W.3d at 74. Consequently, the trial court did not abuse its discretion. We overrule the third sub-issue of Issue One.

Having overruled all sub-issues presented there is no need to consider any issues collectively. Accordingly, we overrule Issue One.

B. Gross negligence

In Issues Three and Four, Appellants challenge the legal and factual sufficiency of the evidence to support the jury's gross negligence finding against each defendant, and the corresponding award of exemplary damages.

1. Standard of Review and Applicable Law

Exemplary damages may be awarded in cases where a claimant proves by clear and convincing evidence that the harm resulted from fraud, malice, or gross negligence. TEX. CIV. PRAC. & REM. CODE ANN. § 41.003. Proof by clear and convincing evidence means "the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." *Id.* § 41.001(2); *In re J.F.C.*, 96 S.W.3d 256, 264 (Tex. 2002). With this elevated standard of proof our standard of review on appeal is also

elevated. *Garza*, 164 S.W.3d at 627; *Vernon v. Perrien*, 390 S.W.3d 47, 62 (Tex. App.—El Paso 2012, pet. denied). Even with such a heightened burden at trial, however, we must view the evidence in a light favorable to the jury's findings. *Medina v. Zuniga*, 593 S.W.3d 238, 247 (Tex. 2019). In doing so, we credit favorable evidence if reasonable jurors could and disregard contrary evidence unless reasonable jurors could not. *Id.*

By his live petition, Bustillos lodged allegations of gross negligence against both Nissley and Press Energy as a basis for recovering exemplary damages. As defined by statute, gross negligence means an act or omission:

> (A) 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
>
> (B) 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(11). There is both an objective and subjective component that a plaintiff must prove to successfully raise a claim of gross negligence. *See id.*

For the objective component, the plaintiff must show "the act or omission complained of . . . involve[d] an extreme degree of risk, considering the probability and magnitude of the potential harm to others." *Zuniga*, 593 S.W.3d at 247 (quoting *Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 785 (Tex. 2001)). "[A]n 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.'" *Zuniga*, 593 S.W.3d at 247 (quoting *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 921 (Tex. 1998)). "An act or omission that is merely thoughtless, careless, or not inordinately risky cannot be grossly negligent." *Zuniga*, 593 S.W.3d at 249 (quoting *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 22

(Tex. 1994)).

For the subjective component, "the plaintiff must show that the defendant knew about the peril, but his acts or omissions demonstrate that he did not care" and that "the dangerous condition existed at the time of the accident." *Suarez v. City of Texas City*, 465 S.W.3d 623, 634 (Tex. 2015) (quoting *Louisiana-Pac. Corp. v. Andrade*, 19 S.W.3d 245, 246-47 (Tex. 1999) and *City of Corsicana v. Stewart*, 249 S.W.3d 412, 414-15 (Tex. 2008)). "Circumstantial evidence can establish actual knowledge but such evidence must 'either directly or by reasonable inference' support that conclusion." *Id.* Moreover, "[a]n inference is not reasonable if it is susceptible to multiple, equally probable inferences, requiring the factfinder to guess in order to reach a conclusion." *Id.* "The defendant need not have anticipated the precise manner of harm or to whom the injury would befall to have had awareness of the extreme risk." *Zuniga*, 593 S.W.3d at 248. Here, Bustillos was required to establish that Appellants were aware that the pre-existing defects in Nissley's truck posed an extreme degree of risk and that both Appellants had actual, subjective awareness of the truck's defects, but continued to use it. *Waldrip*, 380 S.W.3d at 137.

Relevant to Bustillos' claims, the trial court gave the following instruction defining gross negligence for the jury:

> "Gross negligence" means an act or omission by [Press Energy managers/Nissley],
>
> 1. which when viewed objectively from the standpoint of [Press Energy managers/ Nissley] at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and
>
> 2. of which [Press Energy managers/Nissley] ha[d/s] actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

The trial court further instructed that Press Energy could only be grossly negligent if Brian Scott

Ralston, Gary Wayne Ralston, or both, were employed as a manager or acting in the managerial capacity at all times relevant, and further defined those terms. Lastly, the trial court also instructed that Press Energy may be grossly negligent for an act of Nissley, if Press Energy authorized the doing and the manner of the act, or Nissley was unfit, and Press Energy was reckless in hiring him. Neither Nissley nor Press Energy argue any objection against these instructions.

2. Analysis

a. Nissley

Contrary to Appellants' attempted re-characterization of the conduct of which Bustillos complains, Bustillos does not rest his claim of gross negligence on Nissley's driving alone. Rather, Bustillos complains that Press Energy and Nissley himself maintained Nissley's tractor-trailer in a grossly negligent manner. He argues they both knew of the extreme degree of risk associated with the pre-existing defects present on Nissley's truck yet both chose to operate the truck regardless.

Satisfying the objective component, Bustillos presented legally sufficient evidence demonstrating Nissley's conduct involved an extreme degree of risk. First, Nissley conceded he knew someone could be killed or seriously injured due to "any sort of violation with the [truck's] brakes, the ABS or otherwise . . . ." Second, Miller testified the date of manufacture of Nissley's tractor fell after federal law had required such vehicles to have ABS systems to improve traction during braking, to produce better braking, and to prevent vehicle jackknifing. Third, further testimony established that when there are mismatched brakes, the size differential may cause the vehicle to pull to the side with greater force due to it having a larger brake chamber. Fourth, and perhaps most importantly, the evidence established that defects on Nissley's truck were

intentionally created and existed prior to the subject collision. Miller testified not only that the ABS lines were cut and fastened to the truck before the collision, but also that the ABS warning lights inside the cab of the truck were disabled by the removal of the light fuse, while the warning lights on the exterior of the truck were removed, filled in, and painted over. Evidence of intentional manipulation of a truck's braking system amounts to more than mere thoughtlessness, carelessness, or ordinary risk. *Zuniga*, 593 S.W.3d at 249.

Meeting the subjective component, Nissley admitted he checked the truck's ABS system as part of his pre-trip inspection. Second, Nissley testified he had to check the brake chambers and brakes as a whole during such inspection. Third, evidence established that Nissley's truck had mismatched brake chambers along with an ABS system with its lines cut. Miller testified that an indicator light stays on to inform a driver when there is a fault with the trailer's ABS system and the vehicle should not be moved. Fourth, testimony established the identified defects predated the collision. Considering the evidence as a whole, the jury was permitted to reach a reasonable inference through circumstantial evidence that Nissley knew his brakes were defective and could cause serious harm or death, and nonetheless, he chose to drive the vehicle anyway.

b. Press Energy

To hold Press Energy liable for gross negligence, Bustillos had to prove by clear and convincing evidence that Press Energy either (1) specifically authorized a grossly negligent act by Nissley or (2) committed its own grossly negligent act through a manager or someone employed in a managerial capacity pursuant to the jury charge. *See Waldrip*, 380 S.W.3d at 138; *Hammerly Oaks, Inc. v. Edwards*, 958 S.W.2d 387, 391 (Tex. 1997). To be a manager or someone employed in a managerial capacity for a claim of gross negligence, the jury charge instructed that an

employee must be either an individual with "authority to employ, direct, and discharge an employee of Press Energy" or be an individual to whom Press Energy "confided . . . the management of the whole or a department or division of the business . . . ." Press Energy did not object to this jury charge.

To begin, Gary Ralston satisfied the jury charge's definition of either someone who is a manager or someone employed in a managerial capacity at Press Energy. He testified he worked for Press Energy as its shop foreman and lead mechanic. In that role, he hired and fired employees; and he supervised and directed a crew of nine mechanics. According to his own testimony, Press Energy gave Ralston the authority to employ, direct, and discharge employees. Press Energy also confided in Ralston the management of a department or division of the business, namely the maintenance department, as he was the shop foreman and lead mechanic. Therefore, according to the jury charge that Press Energy did not object to, Press Energy can be held liable for Ralston's grossly negligent conduct, if any such conduct occurred. The same objective and subjective standards apply for Ralston's conduct. His behavior must involve an extreme degree of risk, and Bustillos had to prove with clear and convincing evidence that Ralston knew of such risk but chose to proceed regardless.

Miller testified the defects on Nissley's truck predated the collision and were intentional. Not only were the ABS lines cut and zip tied to the truck, the internal and external warning lights were disabled as well. Despite the front of Nissley's truck sustaining no or minimal impact during the collision, and despite the fact that no other fuses were missing, the fuse for the internal warning light for the ABS was gone at the post-accident site inspection. Additionally, the external warning lights for the ABS were removed, filled in, and painted over.

Moreover, the record showed that Ralston was the last person to conduct an in-depth maintenance check on Nissley's truck. This occurred only months before Nissley's collision with Bustillos. In that maintenance check, Ralston was required to thoroughly inspect the brake chambers, the ABS, and the brakes, among other things. Ralston testified he understood that dangers increased with violations of federal safety guidelines, and thus, trucks in violation of those standards cannot, and should not, leave their shop. Although he contradicted himself at trial, Ralston's prior deposition testimony was read to the jury wherein he stated he personally disliked ABS braking systems believing they created more problems than they were worth. Because no one else worked on Nissley's truck prior to the collision, the jury could reasonably conclude—especially if it credited Miller's testimony that the defects predated the collision and the ABS lines were intentionally disabled—that Ralston either caused those defects on his own as a managerial employee or at least failed to maintain Nissley's tractor-trailer to correct those defects.

This conclusion is further supported when considered in conjunction with Press Energy's prior DOT violations for malfunctioning brakes and the DOT letter indicating Press Energy had a trend of noncompliance in the realm of vehicle maintenance. Because each of those pieces of evidence were admissible, the jury could have relied on them to infer Press Energy had knowledge of these defects but chose to utilize Nissley's truck regardless. Given Ralston's responsibility of thoroughly inspecting the truck, the nature of defects evident on the truck, Miller's testimony that such defects existed prior to the collision, and Ralston's role as the last individual to inspect the truck, we conclude there was clear and convincing evidence of both the objective and subjective components of Ralston's gross negligence. Moreover, Press Energy bestowed managerial powers on Ralston, allowing it to be held liable for his grossly negligent acts under the jury charge.

For these reasons, we find there was legally and factually sufficient evidence to support the jury findings of gross negligence against both Nissley and Press Energy.

c. *Casteel* error

"When a single broad-form liability question erroneously commingles valid and invalid liability theories and the appellant's objection is timely and specific, the error is harmful when it cannot be determined whether the improperly submitted theories formed the sole basis for the jury's finding." *Crown Life Ins. v. Casteel*, 22 S.W.3d 378, 389 (Tex. 2000). However, the Texas Supreme Court has expressly clarified that a *Casteel* issue cannot be raised on appeal if a *Casteel* objection is not raised at trial. *Burbage v. Burbage*, 447 S.W.3d 249, 256 (Tex. 2014).

Appellants failed to raise an objection to the jury charge as to gross negligence, therefore, they failed to preserve a *Casteel* objection on appeal. *Id*. Even without waiving the issue, there was no erroneous commingling of valid and invalid claims and the trial court did not err in submitting a charge of gross negligence against either Press Energy or Nissley. *Cf. Casteel*, 22 S.W.3d at 389. We overrule Appellants' *Casteel* error challenge.

For these reasons, we overrule Issues Three and Four.

C. Compensatory damages awarded to Bustillos

In Issue Two, Appellants challenge the legal and factual sufficiency of the evidence in support of the jury's award of compensatory damages. Appellants' second issue rests on two arguments. First, that factually-similar cases from other jurisdictions awarded much less for similar or worse injuries. Second, that there is insufficient evidence to justify the amounts awarded by the jury for each category of damages. They argue the high ratio of economic to noneconomic damages demonstrates the jury selected a random amount for each award, which is not permissible.

At the outset, Bustillos counters that despite Appellants making frequent reference to his medical bills, such billings are not relevant to the determination of his noneconomic damages. He argues the actual amounts incurred for treatment were not established or brought before the jury, and thus, they should have no impact on the evidentiary sufficiency of the compensatory damages. Although he acknowledges that certain caselaw indicates the jury's awards of damages are higher than some similarly-situated plaintiffs, he further notes that other caselaw shows the opposite indicating that such awards are appropriate under the circumstances. Bustillos argues there is sufficient evidence in the record to support each award from the jury.

1. Standard of Review

When reviewing the sufficiency of the evidence, "[a] reviewing court cannot substitute its judgment for that of the trier-of-fact, so long as the evidence falls within [a] zone of reasonable disagreement." *City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005). The reviewing court must consider all evidence in the light most favorable to the verdict and indulge every reasonable inference that would support it. *Id.*; *Zuniga*, 593 S.W.3d at 247. "But if the evidence allows of only one inference, neither jurors nor the reviewing court may disregard it." *Wilson*, 168 S.W.3d at 822. "If the jury's failure to award damages or the amount of damages awarded is so against the great weight and preponderance of the evidence as to be manifestly unjust, shock the conscious, or clearly demonstrate bias, then a new trial would be required." *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 773 (Tex. 2003).

In this case, Appellants challenge the factual and legal sufficiency of what it deems to be excessive awards for damages for Bustillos' physical pain and mental anguish, physical impairment, and disfigurement. We must therefore "consider all the evidence that bear[] on [those]

categor[ies] of damages, even if the evidence also relates to another category of damages." *Id.* "To do otherwise would mean that evidence that reasonably could have supported the jury's award would not be considered, which would be improper." *Id.* Moreover, because more than one award is being challenged as excessive, we must "consider all the evidence that relates to the total amount awarded in all overlapping categories to determine if the total amount awarded was excessive. This likewise gives full effect to all the evidence without crediting any of the evidence more than once." *Id.* at 773-74.

2. Analysis

a. Physical pain and mental anguish

The jury awarded Bustillos $750,000 for his physical pain and mental anguish. It valued his past pain and mental anguish at $500,000, and his future pain and mental anguish at $250,000. A jury's award for physical pain and mental anguish will survive a legal-sufficiency challenge when the record contains "'direct evidence of the nature, duration, and severity of the plaintiff's mental anguish, thus establishing a substantial disruption in the plaintiff's daily routine,' or when the record demonstrates 'evidence of a high degree of mental pain and distress that is more than mere worry, anxiety, vexation, embarrassment, or anger.'" *Anderson v. Durant*, 550 S.W.3d 605, 618-19 (Tex. 2018) (quoting *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 444 (Tex. 1995)). "To recover damages for future mental anguish, the plaintiff must further demonstrate a reasonable probability that compensable mental anguish will persist." *Id.* at 619. "Generalized, conclusory descriptions of how an event affected a person are insufficient evidence on which to base mental anguish damages." *Id*. A plaintiff may prove pain and mental anguish with his testimony or other evidence, including circumstantial evidence. *See Sanchez v. Balderrama*, 546 S.W.3d 230, 238

(Tex. App.—El Paso 2017, no pet.). "In the absence of direct evidence of pain, the jury is permitted to infer the occurrence of pain from the nature of the injury." *Id.*

Addressing an award of noneconomic damages, the Supreme Court of Texas recently analyzed whether there was sufficient evidence to support a jury's award of past and future mental anguish damages arising from an actionable defamation claim. *Anderson*, 550 S.W.3d at 618-21. The plaintiff testified:

> The accusations that were made have affected me. They basically destroyed me. You get up every morning—I've never understood depression. My wife and daughter always called me Mr. Happy, Mr. Sunshine, and I was—they wouldn't berate me. They all thought that it was a joke. But since these accusations have come about, I'm paranoid about going outside. Have trouble focusing. Anxiety, anxious. It's been a two-year nightmare trying to get my life back and my reputation back and it's—it's been a two-year nightmare, like I say.
>
> . . .
>
> I had trouble sleeping. I had trouble eating. I had trouble focusing on things. I worried about my family's future. Worried about my 30–year career that had been slandered all over town.

Id. at 620. He also testified about the psychiatric assistance he sought, the anti-anxiety medicine he was prescribed, the impact on his familial relationships, the change in his demeanor, his inability to sleep, and his anxiety and depression. *Id.* The plaintiff's testimony alone was sufficient to support the jury's award for past mental anguish. *Id.* Due to the plaintiff's lack of testimony regarding future mental anguish damages, however, the Court affirmed the court of appeals' judgment that reversed the jury's award. *Id.* at 621.

Bustillos testified the headaches he experienced as a result of the collision caused so much sensitivity that he could not handle light or noise. Those headaches and sensitivity continued until trial and required Bustillos to regularly take medication to manage the pain. Prior to the collision,

Bustillos would play sports, runaround with his family, but no longer could. On his days off, he often walked around a park. His friends testified his demeanor changed after the collision, leaving him quiet and reserved, when before he was always happy and smiling.

The multiple surgeries required on his hands were very painful, and prior to the collision, Bustillos testified he had no pain in his hands, knees, shoulders, or head. Although the pain in his hands had decreased at the time of trial, Bustillos testified that it was still present and that he still felt pain in his shoulder as well. Following surgery, his wife and daughter had to tend to his every need, including feeding, bathing, and wiping him. Bustillos testified at trial that he was still ashamed to have needed aid in those areas of his life and the memories were very painful. In those moments, he described his despair and fears by stating, "I felt as if I was failing my family. I would think that if I was never what I used to be. I wasn't going to be able to survive. Survive or according to how we were used to living." As of trial, Bustillos had not been released for return to work. He further mentioned he continued to feel stress and he would "go over everything that went on from the day of the accident to today." He remembers the other driver coming into his lane of traffic. He described how he experienced the collision, "[a]s soon as I saw that truck drive very fast into it, I was driving and the only thing that went through my mind -- and I even said it out loud, 'Not a head collision. Not a head collision.' I thought that I was going to die that day."

Because Bustillos' testimony reflects a substantial disruption in his life and parallels many of the same factors discussed in *Anderson*, we hold there is sufficient evidence to support the jury's award for past physical pain and mental anguish. Additionally, because Bustillos' testimony also included testimony describing his ongoing pain and mental anguish, and its persistence over time,

there is also sufficient evidence to support the jury's award for future physical pain and mental anguish.

Although it commented that the awards seemed excessive compared to other cases involving similar or more egregious behavior, the *Anderson* Court did not address whether that award was excessive because the court of appeals had not yet addressed the amount of the award. *Id.* at 620-21. Because the jury's award in the instant case falls in line with other cases involving similar injuries and testimony, we do not view the awards as being excessive. For example, in *Gordon v. Redelsperger*, plaintiff Redelsperger was physically assaulted by Gordon. 2019 WL 619186, at *1. Redelsperger testified he sustained a gash above his eye that required stitches, a swollen eye for many weeks, a raspy voice for that same time due to being choked, and soreness and stiff muscles. *Id.*, at *2. He testified he suffered migraines, lingering issues like trouble swallowing and bruising, and he began clenching his teeth due to stress from the assault. *Id.* Redelsperger otherwise acknowledged his physical injuries resolved themselves relatively quickly, within the month. *Id.* He testified to other psychological injuries as well, like difficulty sleeping, a new fear of being in public that caused severe anxiety and tension, a decrease in his socialization, and decreased travel with his wife. *Id.*, at *3. The jury awarded Redelsperger $600,000 for past and future physical pain and mental anguish, *id.*, at *3, and our sister court of appeals held that award was not excessive and there was no clear indication that the jury's award of those damages resulted from passion or an improper motive. *Id.*, at *1.

The *Gordon* court recognized that "appellate courts accord respect to a jury's award of nonpecuniary damages when the record demonstrates careful consideration of what amount to assess." *Id.*, at *5. "A jury demonstrates this level of care when it awards different claimants

different amounts for different categories of nonpecuniary damages." *Id.* Unlike in *Gordon*, we do not have different claimants here, but we are able to discern "whether the jury showed care in how it awarded damages in different categories." *Id.* Likewise, the *Gordon* court did not have any pecuniary awards to use for a ratio comparison. *Id.*, at *6.

Here, the jury's level of care is demonstrated through its selection of different amounts for each category of damages. It awarded different quantities for not only each category of damages sought but also a different quantity within each category for past and future physical pain and mental anguish. *But cf. Critical Path Res. v. Cuevas*, 561 S.W.3d 523, 577 (Tex. App.—Houston [14th Dist.] 2018, pet. granted, judgm't vacated w.r.m.) (stating that jury did not show that it had carefully considered its award when it "picked a final amount of $10,000,000 for each parent's damages, divided that total by the number of damage blanks in the jury charge, and then filled in the same amount of damages in each blank"). This care is especially evident considering the jury awarded an amount different from what both Appellants and Appellee argued in closing.

Bustillos sought $14 million in total, which the jury did not award. Appellants urged the jury to award only $250,000, which the jury also did not award. Moreover, despite the quality of the injuries sustained in *Gordon* being somewhat less severe and long-lasting, the damages awarded for physical pain and mental anguish are close to those awarded to Bustillos. *See Gordon*, 2019 WL 619186, at *11 (comparing a similar case in which the plaintiff was only awarded $350,000, rather than the $600,000 sought in *Gordon*, and holding the difference does not shock the conscience). We find no clear indication that the jury's award of $750,000 for past and future physical pain and mental anguish, which are supported by evidence in the record, resulted from passion or improper motives. We therefore overrule Appellants' argument on this ground.

b. Physical impairment

The jury awarded Bustillos $1.75 million for his physical impairment. It valued his past physical impairment at $750,000, and his future physical impairment at $1 million. The role of physical impairment damages is to compensate the plaintiff for loss of enjoyment of life, which includes the loss of the plaintiff's former lifestyle. *Golden Eagle Archery*, 116 S.W.3d at 772 ("Indeed, if other elements such as pain, suffering, mental anguish, and disfigurement are submitted, there is little left for which to compensate under the category of physical impairment other than loss of enjoyment of life."). "To make these determinations, Texas courts have looked to whether (1) impediments to the plaintiff's non-work-related activities are obvious from the injury itself; or (2) the plaintiff produces some evidence of specific non-work-related tasks or activities he can no longer perform." *Patlyek v. Brittain*, 149 S.W.3d 781, 787 (Tex. App.—Austin 2004, pet. denied). Some examples of injuries or limitations that Texas courts have determined were sufficient evidence of physical impairment include:

> [D]ifficulty eating and communicating with others; continuing inability to sleep due to sharp pains, plus *inability to run*, bicycle, participate in triathlons, and *play with children*; past inability to walk and future difficulties in running, standing, and climbing; inability to ascend or descend stairs *or kneel* and difficulty in standing for long periods of time; *loss of seventy-five percent of strength in left arm*, which subsequently contributed to plaintiff's falling, breaking her leg, and being confined to a wheelchair; and *difficulties performing yard work, car maintenance, and playing racquetball*.

Id. (emphasis added) (internal citations omitted). "Thus, to state the matter in its most obvious way, physical impairment requires an impairment impacting a person's enjoyment of life, but that impairment must have a physical cause." *Gordon*, 2019 WL 619186, at *14.

Bustillos testified to many of these physical injuries and limitations listed above. First, Bustillos testified that his hands were fine before the crash. Now his left hand only operates at

ninety percent, and his right hand is significantly worse. Two fingers on his right hand only bend 30 degrees instead of 90 degrees, which caused his grip strength to decrease from the normal 120 pounds to only 29 pounds. Second, Bustillos' stepdaughter testified that the injuries to Bustillos' knees and shoulder prevented him from playing soccer with his grandchildren, which was an activity he frequently participated in. Bustillos' previous coworker and friend testified Bustillos' injuries prevented him from working on cars and performing home maintenance, which are all tasks he completed before the crash. There was also testimony that although he used to be the life of the party, Bustillos no longer socializes, much less participates in or even starts the dancing during social events like he did before the collision. Bustillos described himself to the jury as once an active man, however, now he feels like he has the knee of someone in their nineties. He also struggles to kneel. We hold there is sufficient evidence to support the jury's award of both past and future physical impairment damages because the record demonstrates Bustillos experienced loss of enjoyment of life as a result of losing physical functions he had before the collision. *Cf. id.*

We now turn to whether the $1.75 million awarded for these damages are excessive. We begin by noting again the care demonstrated in the jury's verdict as evidenced by its varying quantities for each category of damages sought, and its varying quantities specifically within this category for physical impairment. *See id.*, at *13 ("The jury's awards of different amounts for each category of damages shows how carefully the jury exercised its discretion to assess damages."). Next, we recognize that many of our sister courts of appeals have upheld far greater jury awards for past and future physical impairment in similar situations. *E.g.*, *U-Haul Int'l, Inc. v. Waldrip*, 322 S.W.3d 821, 855-56 (Tex. App.—Dallas 2010), *rev'd in part on other grounds*, 380 S.W.3d 118 (Tex. 2012) (affirming $5 million award for future physical impairment); *Casas v. Paradez*,

267 S.W.3d 170, 189-90 (Tex. App.—San Antonio 2008, pet. denied) (affirming $7 million award for physical impairment); *Gen. Motors Corp. v. Burry*, 203 S.W.3d 514, 554-55 (Tex. App.—Fort Worth 2006, pet. denied) (affirming $3.5 million award for future physical impairment). Because the measure of damages for physical impairment "is not subject to precise mathematical calculation, each case must be measured by its own facts, and considerable latitude and discretion are vested in the jury." *Waldrip*, 322 S.W.3d at 855-56. After reviewing the record and similarly-situated cases affirming much higher damages, we conclude the jury's award for past and future physical impairment is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and manifestly unjust. We therefore overrule Appellants' argument on this ground.

c. Disfigurement

The jury awarded Bustillos $500,000 for his disfigurement. It valued his past disfigurement at $250,000, and his future disfigurement at $250,000. "Disfigurement has been defined as that which impairs the appearance of a person, or that which renders unsightly, misshapen or imperfect, or deforms in some manner." *Doctor v. Pardue*, 186 S.W.3d 4, 18 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). "The matter of future disfigurement is necessarily speculative and there is no mathematical yard stick by which one can measure damages for it." *Mauricio v. Cervantes*, No. 04-16-00260-CV, 2017 WL 2791324, at *3 (Tex. App.—San Antonio June 28, 2017, no pet.) (mem. op.) (quoting *Tri-State Motor Transit Co. v. Nicar*, 765 S.W.2d 486, 494 (Tex. App.—Houston [14th Dist.] 1989, no writ)). These injuries impair "the beauty, symmetry, or appearance of a person . . . ." *Marquette Transp. Co. Gulf-Inland, LLC v. Jackson*, No. 01-10-01025-CV, 2012 WL 1454476, at *14 (Tex. App.—Houston [1st Dist.] Apr. 26, 2012, no pet.) (mem. op.) (quoting *Goldman v. Torres*, 341 S.W.2d 154, 160 (Tex. 1960)). Texas courts have held that scarring

constitutes disfigurement even when it is small and can be covered by clothing. *See Marquette Transp.*, 2012 WL 1454476, at *14.

The crash permanently severed part of Bustillos' ear, and he showed the jury this injury by walking slowly in front of the jury box during trial. There was testimony that Bustillos' granddaughter cried when she saw him due to his appearance after the crash. Bustillos had to have multiple hand surgeries to correct the shattered bones caused by the crash. He described the scars on his hands and showed the jury that scarring as well. Lastly, the jury saw photographs of the scarring on Bustillos' shoulder as a result of the crash and subsequent surgeries. We think there is sufficient evidence of permanent injuries to support the jury's award for both past and future disfigurement.

For determining whether the awards for disfigurement are excessive, we again highlight the care demonstrated in the jury's verdict as evidenced by its varying quantities for each category of damages sought. *Gordon*, 2019 WL 619186, at *14. Likewise, the jury did not simply adopt one parties' request for the amount of damages to be awarded; instead, the jury thoughtfully awarded damages that fell somewhere in the middle. *See id.* Moreover, we recognize that our sister courts have affirmed much higher awards for past and future disfigurement in cases containing similar injuries. *See, e.g., Marquette Transp.*, 2012 WL 1454476, at *14-15 (affirming $1 million disfigurement award when injuries caused permanent scarring from surgeries involving skin and muscle grafts and asymmetry in plaintiff's legs). We therefore hold that the evidence was sufficient to support the trial court's award of damages for past and future disfigurement. And because Appellants have not shown that the judgment was contrary to the overwhelming weight of the evidence, we overrule their argument on this ground.

Because each of the jury's compensatory awards for Bustillos' noneconomic damages are supported by sufficient evidence and are not contrary to the great weight of the evidence, we overrule Issue Two.

D. Improper jury arguments

In Issue Five, Appellants raise challenges pertaining to comments made by Bustillos' trial counsel during voir dire and closing arguments. Appellants assert Bustillos' counsel made improper appeals to racial, ethnic, or regional prejudices by casting Appellants' counsel as "big-city attorneys who rolled their r's to sound like locals." Moreover, that Bustillos' counsel violated "the Golden Rule" by asking the jurors to place themselves in Bustillos' shoes, and by asking the jurors which of their family members would be next to succumb to this type of collision only to be blamed afterwards. Appellants allege these comments were so inflammatory and prejudicial that their harmful effect could not be cured by an instruction to the jury. Bustillos responds that any comments made during voir dire were proper; or, at minimum, were curable and Appellants' failure to timely object waived the arguments they now make on appeal.

1. Standard of Review

To obtain reversal of a judgment on the basis of improper jury argument, a complainant must prove (1) an error; (2) that was not invited or provoked; (3) that was preserved at trial by a proper objection, motion to instruct, or motion for mistrial; (4) that was not curable by an instruction, a prompt withdrawal of the statement, or a reprimand by the trial court; and that (5) the argument by its nature, extent, and degree constituted reversibly harmful error. *Standard Fire Ins. Co. v. Reese*, 584 S.W.2d 835, 839 (Tex. 1979). Moreover, "[h]ow long the argument continued, whether it was repeated or abandoned and whether there was cumulative error are

proper inquiries." *Id.* at 839-40. A reviewing court may reverse only upon a showing that "the probability that the improper argument caused harm is greater than the probability that the verdict was grounded on the proper proceedings and evidence." *Id*. at 840.

2. Analysis

a. Golden Rule

During voir dire, Appellants contend that Bustillos' counsel informed the jury they would set the value of cases belonging to the jurors' uncles, brothers, sisters, and mothers. And, during closing argument, Bustillos' counsel said to the jury, "[p]ut yourself in the position of being out there on the roadway in your own lane on 285 and you're jackknifed into and wrecked into and smashed into like that and then the trucking company -- bad oil field -- tells you it's your fault." Appellants assert that because counsel failed to confine his remarks to the evidence and arguments of opposing counsel, these "Golden Rule" arguments—asking jurors to put themselves in the shoes of the plaintiff—were made in violation of Rule 269(e) of the Texas Rules of Civil Procedure. *See* TEX. R. CIV. P. 269(e). Moreover, contending the comments were highly inflammatory and prejudicial, Appellants assert their harmful effect could not be cured by an instruction; and thus, a contemporaneous objection was not required. Instead, Appellants argue that counsel's arguments justify a new trial. We disagree.

Rule 269(e) provides that, when arguing to a jury, "[c]ounsel shall be required to confine the argument strictly to the evidence and to the arguments of opposing counsel." TEX. R. CIV. P. 269(e). Although certain types of "Golden Rule" arguments are improper, the harmful effects may be cured by a proper instruction to the jury to disregard the argument. *Fambrough v. Wagley*, 169 S.W.2d 478, 482 (Tex. 1943). The attorney in *Fambrough* argued to the jury: "Now, Gentlemen

of the Jury, when you return your verdict, we ask you to do so as you would have it done if Mr. Fambrough occupied the places that you occupy and you were on the outside, out here in the place that Mr. Fambrough occupies." *Id.* at 480. The Supreme Court held this type of argument "amount[ed] to a direct appeal to the jury to consider the case from an improper viewpoint" because it asked "the members of the jury to put themselves in the defendant's place, and answer the issues submitted to them in Fambrough's favor, if they would want Fambrough to answer such issues in their favor if positions were reversed . . . ." *Id.* at 482. Importantly, however, the Court also held that this type of argument "is not of such a nature that its harmful effect could not have been removed, had the trial court sustained the exception thereto offered at the time the argument was made, and properly instructed the jury not to consider it." *Id.*

We need not decide whether Bustillos' trial attorneys asked the jury to consider the case from an improper viewpoint because, even if they did, such error would be curable by proper instruction to the jury. Because Appellants failed to timely object and seek an instruction, we hold their argument on this ground has been waived. *Standard Fire Ins. Co*., 584 S.W.2d at 839, 840-41.

b. Appeal to regional solidarity

Appellants also complain that Bustillos' counsel's references to being from the local community, while highlighting that opposing counsel hailed from San Antonio, amounted to unfair, improper, and incurable attempts to prejudice the jury. During closing arguments, the record shows that Bustillos' attorney commented that Appellants "hired unbelievable lawyers, great lawyers from San Antonio . . . ." To be sure, though, this record also discloses that, during voir dire, Appellants' counsel introduced themselves as San Antonio lawyers. Moreover, when

questioning the panel, Appellants' counsel confirmed with potential jurors that they would not hold it against Appellants that their attorneys were not local. In a like manner but in opposite direction, Bustillos' counsel introduced himself as being a local attorney, and openly disclosed he grew up with some of the potential panelists.

We agree that "the geographical distribution of the lawyers ha[s] nothing whatever to do with a just solution of the issues presented." *Smerke v. Office Equipment Co.*, 158 S.W.2d 302, 303-04 (Tex. [Comm'n Op.] 1941). "However, unlike an appeal to racial or religious prejudice, an appeal to local prejudice or unity usually is considered a curable impropriety for which an objection is required." *Ramsey v. Grizzle*, 313 S.W.3d 498, 512 (Tex. App.—Texarkana 2010, no pet.). In *Grizzle*, counsel explicitly stated, "I trust the testimony of these people down here in Red River County more so than I do a man that's sitting down in Houston[.]" *Id.* That same attorney made at least three other references to local bias, albeit not as explicit as the first, and the court still held that the other party's failure to object resulted in a waiver of that complaint on appeal. *See id.*

The comments Appellants complain of here are not nearly as explicit as those made in *Grizzle*. However, even if we assume that Bustillos' counsel's references to locality were improper, we otherwise hold that these references were curable upon timely objection and request for jury instruction. As Appellants failed to so object, we hold their appellate argument based on this ground has been waived. *Standard Fire Ins. Co.*, 584 S.W.2d at 839.

c. Improper and unwarranted attack on counsel

Appellants also complain that Bustillos' attorneys made unsupported, extreme, or personal attacks that warrant a new trial. For example, Appellants point to a moment during voir dire when

counsel struggled to pronounce one of the panelist's surnames. Instead of saying "Carrasco," counsel said "Cavaso." The panelist instructed the attorney to roll his "r's" in order to correctly pronounce her name. Later on, during closing arguments, Bustillos' attorney said, "You know, I grew up here. Okay? I can say 'Carrasco' or 'San Antonio.' Okay? They're playing on all that stuff, man. Okay?" Appellants rely on *American Petrofina, Inc. v. PPG Industries, Inc.*, 679 S.W.2d 740, 755 (Tex. App.—Fort Worth 1984, writ dism'd by agr.), to support their argument that counsel's comments constituted an unwarranted attack on opposing counsel, that were not curable through an objection and instruction from the trial court, and otherwise merit a new trial.

Two jury arguments were at issue in *American Petrofina,* which is a case involving a civil dispute. *Am. Petrofina,* 679 S.W.2d at 755. The first argument pertained to counsel's comments that analogized the case to criminal matters, including references to white collar crime, Huntsville, and theft. *Id.* at 754. The second, and more relevant argument, pertained to extreme and overt comments about the opponent's attorney's professional ethics and integrity. *Id.* at 755. In closing arguments, the offending attorney discussed respect with the jury and indicated they deserved intellectual honesty and something beyond an elementary approach. *Id.* He then accused his opposing counsel of disingenuously incorporating certain phrases such as, "ain't been no" and other colloquial terms, throughout his time with the jury. *Id.* Counsel then doubled down and said to the jury, "I apologize for that, because he's trying to talk down to you." *Id.* He then rhetorically asked, "What does he think we are in Wichita County? What is he trying to do? Does he think that somehow scores some points? Ain't been no." *Id.* Responding to his own remark, counsel remarked to the jury: "I would resent that if I served on a jury." *Id.*

Although Appellants rely on *American Petrofina* in support of their argument, we see material distinctions between the circumstances of that case and the challenged remarks. First, the comments from Bustillos' attorney are nowhere near the quantity or quality of the attacks from the offending attorney in *American Petrofina*. In fact, the record demonstrates here that counsel's comments were brief and infrequent. *Cf. id.* (listing at least five comments from the offending attorney that called into question opposing counsel's integrity). Moreover, Bustillos' attorney did not encourage the jury to feel resentment, nor did he imply that counsel for Appellants had questioned their intelligence. *Cf id.* Also, the remarks from Bustillos' attorney were not objected to and may have been provoked by other remarks made by Appellants' counsel. In *American Petrofina*, however, the record demonstrated that the offending attorney's comments were neither invited nor provoked. *Id.* Our record here demonstrates at least some provocation from Appellants' counsel who had remarked during voir dire, "I can't hide that I'm Mexican . . . ." That same attorney further demonstrated his Spanish-speaking knowledge multiple times throughout trial despite the court's instruction to counsel and parties to not speak Spanish in the courtroom. Moreover, *American Petrofina* also stated the harmful effects of the offending remarks could not be cured "by an instruction, a prompt withdrawal of the statement, or a reprimand by the judge[,]" because the trial court overruled the party's objection. *Id.* Here, Appellants did not offer an objection to the comments of which they now complain. Lastly, *American Petrofina* relied on the cumulative nature of improper remarks to support its holding that the harmful effect of the remarks amounted to reversible error. *Id.* We have found no other erroneous arguments from Bustillos' attorneys here that would render the same cumulative effect.

Because we disagree that *American Petrofina* is instructive for our analysis due to the

distinctions noted above, we hold that the comments from Bustillos' attorney do not amount to an unwarranted attack that merit a new trial. Alternatively, we hold that even if the comments amounted to such an attack, a new trial is not warranted for several reasons. First, Appellants failed to object. Second, there is no cumulative effect from multiple erroneous arguments in this case. Third, Appellants failed to show the argument "by its nature, degree, and extent constituted such error than an instruction from the court or retraction of the argument could not remove its effects." *Living Centers of Tex., Inc. v. Penalver*, 256 S.W.3d 678, 681 (Tex. 2008) (per curiam). Accordingly, we overrule Appellants' arguments on this ground.

d. Appeals for racial and ethnic solidarity

Appellants complain that references to Bustillos' ethnicity during closing argument was an impermissible tactic employed by Bustillos' attorneys to garner racial and ethnic solidarity with the predominately Hispanic jury. During closing arguments, while referring to Bustillos himself, his attorney said, "We got -- this is a Mexican man right here. Okay? And he has to sit there with an interpreter." Appellants argue this comment unquestionably warrants a new trial. Bustillos counters the comment was made in response to Appellants' counsel's closing argument questioning why Bustillos did not attend trial until the final day: Counsel had remarked, "[a]nd interestingly, very interestingly, the plaintiff, Mr. Bustillos, didn't show up [at trial] until the last day, the day that they have to ask for money." Bustillos argues the challenged remark was made to explain to the jury the reason Bustillos had not attended trial until the last day—because if present, an interpreter would have been required for all four days of trial.

"Appeals to racial prejudice are of course prohibited[;]" in fact, they are "universally condemned." *Tex. Employers' Ins. Ass'n v. Guerrero*, 800 S.W.2d 859, 862 (Tex. App.—San

Antonio 1990, writ denied). Appellants rely on *Guerrero* to support their proposition that the explicit references to Bustillos' ethnicity were an appeal for racial unity, which require a new trial. In *Guerrero*, the injured claimant, his attorney, eleven out of twelve jurors, and claimant's treating doctor all shared Spanish surnames. *Id.* During closing arguments, Guerrero's attorney made many comments about unity. *Id.* He said, "Things that unite us far exceed those things that divide us." *Id.* And he then implored the jurors to apply that sentiment to the evidence. *Id.* He said, "There is a time to be united. Right now is a time to be united." *Id.* Moreover, he said, "there comes a time when we have got to stick together as a community." *Id.* Finally, over opposing counsel's objection to those inflammatory comments, the offending attorney further remarked, "Because if one is united, one has hope[,]" as he closed out his argument. *Id.*

The *Guerrero* court held the challenged argument "was a request for ethnic solidarity that cannot be plausibly explained away as a suggestion that the jury simply remember the things that 'unite' Guerrero's case." *Id.* Instead, "[a] realistic assessment of the argument in context lead[ ] to the inescapable conclusion that an appeal for ethnic unity was made." *Id.* at 863. The court held this "appeal to racial prejudice—as opposed to the mere incidental mention of race—constitut[ed] reversible error even if no objection was made." *Id.* (footnote omitted). Important to our analysis is the *Guerrero* court's distinction of its case from *Dayton Hudson Corp. v. Altus*, 715 S.W.2d 670, 676 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.), *cert. dism'd*, 481 U.S. 1073 (1987).[7] In *Altus*, the plaintiff's attorney referred to the certain witnesses as "two black people" in front of the jury. *Id.* Nonetheless, the *Altus* court held that defense counsel had waived his

[7] We recognize the *Altus* court's analysis on this issue is extremely brief. *Altus*, 715 S.W.2d at 676. However, we agree with the *Guerrero* court's interpretation of it. *Guerrero*, 800 S.W.2d at 863 & n.3.

objection to those remarks because they were not an appeal to racial prejudice. *Id.* Instead, the court found the remarks were merely incidental. *See id.*; *Guerrero*, 800 S.W.2d at 863 n.3.

Unlike in *Guerrero*, Bustillos' ethnicity was mentioned only briefly. Additionally, when we consider the context of the challenged comments, which were made in response to Appellants' questioning of Bustillos' presence throughout trial, the comments can be plausibly explained as opposed to being seen as an appeal to ethnic unity or racial prejudice. The circumstances presented are aligned more closely to those in *Altus*; and the distinction between a mere incidental mention of race and a repeated plea for ethnic unity is clearly important regardless of the subtlety or overtness of the comments. *Altus*, 715 S.W.2d at 676. Indeed, in *Guerrero*, the plea was subtle; whereas the *Altus* remarks on race were strikingly overt. *Compare Guerrero*, 800 S.W.2d at 863 n.3 (finding counsel's request for unity as a community was not an explicit or brazen ethnic reference but constituted an appeal to racial prejudice), *with Altus*, 715 S.W.2d at 676 (holding counsel's mention of race, by describing witnesses as "two black people," was incidental and isolated and not an appeal to racial prejudice). Here, the comments were clearly overt; however, under *Altus* and *Guerrero*, that quality alone does not automatically trigger an incurable error. Because the nature of the remarks in this case are more similar to those made in *Altus* than *Guerrero*, we hold the comments were not made as a repeated appeal to racial prejudice or ethnic unity. Consequently, it still fell on Appellants in this instance to object and press for a jury instruction to disregard counsel's comments. Having failed to do so, Appellants waived complaint on appeal. *Standard Fire Ins. Co.*, 584 S.W.2d at 839, 840-41.

For these reasons, we overrule Issue Five.

III. CONCLUSION

Having overruled all of Appellants' issues, we affirm the trial court's judgment.

GINA M. PALAFOX, Justice

July 16, 2021

Before Rodriguez, C.J., Palafox, and Alley, JJ.