AFFIRM; and Opinion Filed August 28, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-01517-CV

JUAN GARZA DE LEON, Appellant
V.
RED WING BRANDS OF AMERICA, INC., Appellee

On Appeal from the 162nd Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-13-08768-I

MEMORANDUM OPINION

Before Justices Bridges, Myers, and Brown
Opinion by Justice Brown

Juan Garza de Leon sued Red Wing Brands of America, Inc., his former employer, for wrongfully discharging him in retaliation for filing a workers' compensation claim and for breach of contract. Following a jury trial, Garza appeals a take-nothing judgment in Red Wing's favor. In five issues, he contends (1) the trial court erred in refusing to instruct the jury on actual, implied, or apparent authority; (2) the trial court erred in excluding evidence supporting his damage model; (3) the trial court erred in granting Red Wing's motion to exclude illegally obtained evidence; (4) the jury's verdict on his retaliation claim was against the great weight and preponderance of the evidence; and (5) the trial court erred by not granting a new trial due to Red Wing's improper jury argument. We affirm.

BACKGROUND

Red Wing sells shoes, both in retail stores and via trucks that serve as mobile shoe stores at work sites. In January 2013, Red Wing hired Garza as a sales associate in its Dallas store at $12 per hour. Garza's duties included assisting the senior mobile sales representative. On March 14, 2013, Garza injured his back on the job. He missed a few days of work and returned to work on light duty. Two weeks after the injury, Red Wing terminated Garza's employment. Regional Operations Manager Gregory Bell told Garza he was terminated because of vulgar language.

After he was fired, Garza sued Red Wing. He alleged Red Wing discharged him in retaliation for filing a workers' compensation claim in good faith. *See* TEX. LAB. CODE ANN. § 451.001 (West 2015). Garza also alleged Red Wing breached a contract between them in two respects: (1) Red Wing promoted him and agreed to increase his pay to $15 per hour, but he was never paid the increased rate, and (2) Red Wing failed to pay him sales commissions he was owed. At trial, Red Wing stipulated that Garza sustained an injury in the course and scope of his employment and that he instituted a workers' compensation claim in good faith. Garza and Red Wing presented conflicting versions of the circumstances surrounding Garza's employment and termination.

Garza testified that when he started working for Red Wing his pay was $12 per hour plus commissions. Garza stated that the store manager, David Burris, told him the commissions varied depending on the type of shoe and could be as much as 10%. About two weeks after Garza started the job, the position of senior mobile sales representative became available and Garza applied for it. The position paid $15 per hour. Garza testified he believed he was promoted to the senior mobile sales position. He indicated both Burris and Bell told him his position had changed. They told him he was the best candidate for the job. Garza testified he

started doing the job of senior mobile sales representative, but Red Wing never paid him at the increased rate of $15 per hour.

Garza testified that after he was injured, he returned to work on light duty, which included training for the mobile sales representative position on the store computer. One day, he left his email open on the computer and stepped away. When he returned to the computer, he found that Burris's email was open and saw his own name. Garza saw an email written by Burris in which Burris stated he did not believe there was really an injury. Garza printed some of the emails. Bell later talked to Garza about a disciplinary action based on the emails.

On March 27, 2013, Garza met with Bell and Michele Lommel, a regional director for Red Wing, at a restaurant near the store. Garza said the meeting was about his injury. Lommel indicated management had posted Garza's job position because they needed a healthy work pool. On cross-examination, Garza testified he remembered Lommel speaking with him about getting paperwork related to his medical restrictions turned in on time and about making sure he arrived at job sites on time. After the meeting, Garza returned to the store, but told Bell or Burris his back was hurting again and left to see a doctor. Garza denied making any statements as he walked out the door. The next morning when he returned to work, he met with Bell and Burris. They had been informed Garza made a statement the day before. Garza testified he was not told what the statement was. Bell told Garza his employment was terminated immediately because of vulgar language. Garza denied using any vulgar words.

Bell testified for Red Wing. He hired Garza as a full-time retail associate. Garza's duties included being a backup driver for the mobile truck, which meant he would sometimes drive the truck on his own. When the senior mobile salesperson resigned, Bell encouraged Garza to apply for the position and Garza did. But, according to Bell, Garza later told him he did not want to be considered for the new position, and Red Wing hired someone else. Bell testified he never

promoted Garza to senior mobile sales representative and never told him he was getting a pay raise. Bell also testified that employees who work on the truck are paid a flat 3% commission on items sold off the truck and he never promised Garza that he would make more than a 3% commission.

Bell testified that on the day after Garza's injury, Red Wing posted a job opening for a full-time sales associate/backup driver. Bell testified he requested the posting a couple of days before Garza injured himself and it was not an attempt to replace Garza. Garza did not want to work on the truck and Bell's intent was to get him back in the store where he wanted to work. Further, Bell testified, "The store was outgrowing us very quickly."

Bell also testified about disciplinary issues with Garza. Garza showed up late for a few "truck runs." Bell spoke to Garza, but in Bell's view, Garza did not "accept accountability" for being late. Bell further testified that Garza gained access to Burris's personal email and printed out some emails. Garza apologized to Bell, said he destroyed the copies, and told him it happened by mistake, explaining he thought it was his email. Bell doubted Garza's explanation because although Garza had access to two store computers, he could not have used them to access his personal email and Garza did not have a Red Wing email address.

Bell further testified about the meeting he had with Garza and Lommel, who was Bell's immediate supervisor. Bell testified Garza again was not accountable for his actions. He became aggravated, threatened legal action, and walked out of the meeting. Back at the store, Garza told him he needed to leave because his back was bothering him. Bell told him to go back to the doctor. Bell learned from Burris that as Garza was leaving the store, coworker Amelia Sanchez heard Garza make a comment that upset her. She was asked to write down what Garza said and she did so. Sanchez's note, dated March 27, 2013, was admitted into evidence. In it, she wrote Garza's comment, which was in Spanish. She also provided an English translation of

the comment, which was to "kiss his penis." Sanchez felt uncomfortable hearing the comment and was embarrassed to have to repeat it to Bell and Burris. After that, Lommel made the decision to terminate Garza's employment. Bell testified Lommel felt Garza's behavior was not conducive to a productive work environment and was concerned with how Sanchez would feel if she had to continue to work with Garza. Bell and Burris met with Garza at the store the next day. Bell told Garza Red Wing was terminating his employment immediately for making an inflammatory comment upon leaving the store, but Garza denied making the statement. Bell testified Garza was not terminated due to his on-the-job injury.

Burris was the Dallas store manager when Garza worked for Red Wing. He testified that Garza was hired as a full-time associate and backup driver at a rate of $12 per hour. Garza did not receive a promotion while working for Red Wing. Burris did not tell Garza he got a raise or would be making $15 per hour. After the senior mobile salesperson left, Burris or Garza handled those job duties. Garza did not assume the position of senior mobile salesperson. He acted interested in becoming the senior mobile salesperson, but later asked that he not be considered. Garza felt like the job was a little too hard. Burris passed the information on to Bell.

Burris learned from Sanchez that Garza had been on Burris's email account. Burris told Bell about the incident. Burris also said that when Garza returned to the store after his meeting with Lommel, Garza was upset. Sanchez later approached Burris about a remark Garza made. The following day, Bell told Burris that Garza was going to be terminated. Bell and Burris met with Garza, and Bell told Garza he was being terminated for the remark he made the previous day.

Other evidence at trial focused on the circumstances of Garza's injury. Following Garza's injury, Lois Nelson, Red Wing's workers' compensation specialist, and Burris exchanged several emails about Garza. On the morning after the injury, Friday, March 15,

Nelson asked Burris if he questioned the incident at all, noting Garza had only worked for Red Wing a short time. Burris's response to Nelson was to let her know he had left messages for Garza and had not gotten a response. Early on Monday, March 18, Nelson emailed Burris to ask if he had heard from Garza. Burris responded with information about Garza's doctor's appointments. He also informed Nelson that Garza had cited a "family emergency" when he left the job site after he was injured. In response, Nelson asked if Burris could explain "a little further on the family emergency." Nelson asked again if Burris questioned the injury. Burris responded that he had not talked to Garza about his "family emergency," but Burris believed Garza was "really not suited for the job." He stated Garza had told him many times the job is "too hard." Burris wrote that he believed Garza was not injured, and just "didn't want to work Friday." He also mentioned that he and the Regional Operations Manager were conducting interviews and had the job posted "to I believe replace him." Burris asked Nelson for her input on the language Burris should use to question Garza's injury, but Nelson advised just letting Garza fill out the accident investigation report without any coaching.

Burris testified that he questioned Garza's injury because of the length of time he had been with Red Wing and the complaints he heard from Garza about the job being too hard. A text message from Garza on his company cell phone to Burris on the morning of Monday, March 18 was admitted into evidence. In it, Garza wrote, "I'm just tired david and my back has been hurting since wylie. I'm gonna look for another job. [Just] let me find a job and I'm out of here and I [sic] help you get situated with the new guy." Burris explained that Garza had been on a truck run in Wylie on Thursday, March 14 when he said he hurt his back. When asked about his statement in the email regarding replacing Garza, Burris stated he was not seeking to terminate Garza or replace him at Red Wing, but was referring to replacing him only as a backup driver. Garza never complained to Burris that he was not getting full wages or complained that he was

not getting the commissions to which he was entitled. Commission on sales was 3% no matter what level of shoe was sold.

Molly Bluhm worked in human resources for Red Wing at its corporate office in Minnesota. Bluhm testified Garza applied for the position of senior mobile salesperson. He was interviewed for the position, but was not offered the job. After Lommel met with Garza, Lommel emailed Bluhm and detailed the meeting, including Garza's leaving prematurely. Lommel stated that after the meeting Garza, speaking Spanish, "blurted out an expletive to the manager and staff in the store." Lommel informed Bluhm it was her strong recommendation that Garza be terminated immediately. Bluhm consulted with other "HR people" for Red Wing and they made the decision to terminate Garza's employment.

Michele Lommel testified that up until her retirement, she was Red Wing's region director for sales and operations for an eight-to-ten-state region. Bell worked for her and discussed the events that occurred at the store with her. Lommel met Garza for the first time on March 27, 2013, when she was in the Dallas store for reasons unrelated to Garza. Before that time, she knew he had been injured on the job. She also knew there were tardiness issues with Garza, understood there may have been some difficulty getting his "doctor release" paperwork back on time, and knew of the issue with the email breach. Lommel took the opportunity to introduce herself to Garza and share her concerns about things she had heard; she wanted to reinforce company policies, procedures, and expectations. She testified Garza did not acknowledge anything she said. She further testified that he repeatedly interrupted her and was disrespectful, arrogant, and unwilling to acknowledge he had been anything other than a good employee. She denied telling Garza that Red Wing only wanted "healthy people." Lommel learned of Garza's expletive in the store and recommended he be terminated.

Garza testified on rebuttal. He testified that he did not send the text message that he supposedly sent on March 18. Garza translated Sanchez's written statement about what he was alleged to have said. He testified it said, "Juan said that to go to the male genitalia area." Garza stated that was not something he would have said. He was not asked if he made this statement.

The jury found that Red Wing did not discharge Garza because he instituted a worker's compensation claim in good faith. It also found that Garza engaged in misconduct for which Red Wing legitimately discharged him. Regarding Garza's contract claim, the jury found that Garza and Red Wing did not have an enforceable contract that Garza would be paid $15 per hour. The jury further found that the parties did not have an enforceable contract that Garza would be paid different commission rates other than 3% for selling shoes on the truck. In accordance with the jury's verdict, the trial court's final judgment ordered that Garza take nothing.

JURY INSTRUCTION

In his first issue, Garza contends the trial court erred in refusing to instruct the jury on actual, implied, or apparent authority. He contends he was entitled to such an instruction because there was evidence Red Wing's agents, Bell and Burris, told him he had been promoted to a higher-paying position and offered him commissions of up to 10%, depending on the type of shoe.

On the last day of trial, prior to the close of testimony, the trial judge asked the parties if they had submitted proposed charges. Garza's counsel indicated he had, "just on matters that [he] was not in agreement with defendants." The judge asked if counsel had emailed the instructions to "Melinda." Garza's counsel had, but said since then he had worked on a revised version and said he could submit the revisions to the court. The record does not show whether counsel did so. At the charge conference, Garza requested "the inclusion of instructions

regarding authority of employees to act on behalf of the corporation" and stated "we're requesting jury pattern instruction 101.4." The judge asked what evidence warranted the instruction. Garza stated that Burris and Bell told Garza he was promoted to a different position and would receive different pay and stated he would receive different commissions depending on the merchandise sold. The trial court denied Garza's request.

We question whether Garza has preserved this issue for appellate review. Regarding submission of jury instructions, rule of civil procedure 278 provides, "Failure to submit a question shall not be deemed a ground for reversal of the judgment, unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment." TEX. R. CIV. P. 278. Thus, in order to complain of the trial court's failure to submit an instruction, Garza was required to tender the requested instruction in writing in substantially correct form. *See Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 538 n.4 (Tex. 1981); *McIntyre v. Comm'n for Lawyer Discipline*, 247 S.W.3d 434, 445 (Tex. App.—Dallas 2008, pet. denied). There is no written request for an instruction on actual, implied, or apparent authority in the record. Further, without a written instruction in the record or even an oral dictation of a requested instruction, we cannot determine whether the requested instruction was submitted in substantially correct form. *See Medicus Ins. Co. v. Todd*, 400 S.W.3d 670, 680 (Tex. App.—Dallas 2013, no pet.) (no abuse of discretion when tendered instruction not substantially correct); *see also Woods v. Crane Carrier Co.*, 693 S.W.2d 377, 379 (Tex. 1985) (dictating requested language for omitted definition not sufficient to preserve error); *Gulf Oil Corp. v. Williams*, 642 S.W.2d 270, 273 (Tex. App.—Texarkana 1982, no writ) (since no requests appear in record these points cannot be reviewed). Under the plain terms of rule 278, the trial court's failure to submit the requested instruction is not grounds for reversal. *See* TEX.

R. CIV. P. 278; *see also Jarrin v. Sam White Oldsmobile Co.*, 929 S.W.2d 21, 25 (Tex. App.—Houston [1st Dist.] 1996, writ denied).

We recognize that the Supreme Court has stated in this context that a request can serve as an objection for preservation purposes as long as the trial court is aware of the complaint and issues a ruling. *See First Valley Bank of Los Fresnos v. Martin*, 144 S.W.3d 466, 474 (Tex. 2004) (citing *State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 241 (Tex. 1992) ("There should be but one test for determining if a party has preserved error in the jury charge, and that is whether the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling.")). Here, the record shows that, at most, the trial court understood that Garza was requesting an instruction on apparent authority. Neither actual nor implied authority was mentioned at the charge conference.

Jury instructions must be supported by the pleadings and the evidence. *See* TEX. R. CIV. P. 278 (court shall submit instructions which are raised by written pleadings and evidence); *Thota v. Young*, 366 S.W.3d 678, 693 (Tex. 2012); *Webb v. Glenbrook Owners Ass'n*, 298 S.W.3d 374, 380 (Tex. App.—Dallas 2009, no pet.). An instruction on apparent authority was not supported by the pleadings and the evidence in this case. An agent acting within the scope of his apparent authority binds a principal as though the principal himself had performed the action taken. *Biggs v. U.S. Fire Ins. Co.*, 611 S.W.2d 624, 629 (Tex. 1981). Apparent authority in Texas is based on estoppel, arising from either a principal knowingly permitting an agent to hold himself out as having authority or by a principal's actions which lack such ordinary care as to clothe an agent with the indicia of authority, thus leading a reasonably prudent person to believe that the agent has the authority he purports to exercise. *Gaines v. Kelly*, 235 S.W.3d 179, 182 (Tex. 2007). The principal's full knowledge of all material facts is essential to establish a claim of apparent authority based on estoppel and only the conduct of the principal is relevant. *Id.* To

determine an agent's apparent authority, we examine the conduct of the principal and the reasonableness of the third party's assumptions about authority. *Id.* at 183. A prerequisite to a proper finding of apparent authority is evidence of conduct by the principal, relied upon by the party asserting apparent authority, which would lead a reasonably prudent person to believe an agent possessed the asserted authority. *Morey v. Page*, 802 S.W.2d 779, 785 (Tex. App.—Dallas 1990, no writ).

Here, Garza's pleadings alleged that "management" told him if Red Wing promoted him he would receive a pay increase and that Red Wing subsequently promoted him. He then alleged that Red Wing *itself* made the promises he is suing on. It is apparent from Garza's pleadings he understood the distinction between management and Red Wing and further that he claimed only that Red Wing itself made an agreement with him. The trial court did not abuse its discretion in failing to include instructions on actual, implied, or apparent authority in the charge. We overrule Garza's first issue.

EXCLUSION OF DAMAGES EVIDENCE

In his second issue, Garza contends the trial court erred in refusing to allow certain testimony on damages. When testifying about his damages, Garza stated that he needed to refresh his memory with his notes. Red Wing objected to Garza's testimony about "the various numbers that he is reading from a card that he's been using to refresh his recollection." Red Wing indicated it had not seen the calculations before. Garza responded that the numbers were not a surprise to Red Wing because Garza had previously disclosed them in writing in his response to Red Wing's motion for summary judgment. Garza acknowledged he had not disclosed his methodology for calculating his damages in discovery. The court permitted Garza to present evidence of his commissions only up to a certain amount contained in his live pleading. Garza contends the court erred in excluding testimony on commissions above that

amount. But the jury found in Red Wing's favor on liability and thus did not reach the questions about Garza's damages. Any error in excluding evidence of damages did not result in the rendition of an improper judgment. *See* TEX. R. APP. P. 44.1(a)(1); *Tanner v. Karnavas*, 86 S.W.3d 737, 743 (Tex. App.—Dallas 2002, pet. denied); *Manon v. Solis*, 142 S.W.3d 380, 392–93 (Tex. App.—Houston [14th Dist.] 2004, pet. denied). We overrule Garza's second issue.

MOTION TO EXCLUDE ILLEGALLY OBTAINED EVIDENCE

In his third issue, Garza contends the trial court erred in granting Red Wing's motion to exclude illegally obtained evidence and allowing only evidence Red Wing produced. Shortly before trial, Red Wing filed a motion to exclude documents illegally obtained by Garza. Red Wing argued that Garza acted illegally in accessing Burris's private emails and that he should not be able to use the emails in the litigation. At a pretrial hearing, Garza argued that Red Wing's objection to the emails was waived because Red Wing produced the emails in discovery. Garza noted that Red Wing's version was "slightly different" because it included an additional email thread. He asked to be allowed to use Red Wing's version if the court excluded his. Red Wing responded that it produced the emails only because Garza provided them and they were "already out there." If the court ruled Garza's documents should be excluded, Red Wing stated it would withdraw its exhibits. After Garza's counsel was unable to definitively identify the specific request for production under which Red Wing produced the emails to Garza, the trial court sustained Red Wing's objection to the illegally obtained evidence. Garza identified the request for production and asked the court to reconsider its ruling. The court then ruled that if someone could identify the Bates numbers for the emails in question, it would allow those in. The emails were later identified by Bates number. Thus, although the trial court granted Red Wing's motion, it ruled that if Red Wing had produced the emails Garza printed, those emails were admissible. Red Wing had already produced them.

Garza asserts in his brief that it was apparent from the statements of Red Wing's counsel that Red Wing may have withheld relevant documents. Garza refers to Red Wing's argument at the pretrial hearing that it produced the emails because Garza already had them. Garza quotes Red Wing's statement that Garza "was not entitled to receive" the emails. In his motion for new trial, Garza asserted the implication was that there were other unfavorable documents withheld by Red Wing because they were not "illegally obtained" by Garza. As we understand Garza's complaint, he is not actually complaining about the granting of Red Wing's motion to exclude. Rather, he is complaining that Red Wing may have withheld relevant documents. That was a discovery issue for which Garza needed to file a motion to compel if that is what he believed. Pretrial discovery disputes are waived when not ruled on prior to trial. *Remington Arms Co. v. Caldwell*, 850 S.W.2d 167, 176 (Tex. 1993). Garza has not shown that the trial court erred in its ruling on the motion to exclude illegally obtained evidence. He has also not shown that Red Wing withheld any relevant documents, and even if he had, he waived any such complaint. Garza urges us to find fundamental error. But fundamental error is rare, and the facts of this case do not warrant such a finding. *See Texas Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336, 352 (Tex. 2010). We overrule Garza's third issue.

FACTUAL SUFFICIENCY OF THE EVIDENCE

In his fourth issue, Garza contends the jury answers to questions one and two regarding his retaliation claim are against the great weight and preponderance of the evidence. In response to question one, the jury found that Red Wing did not discharge Garza because he instituted a worker's compensation claim in good faith. In response to question two, the jury found that Garza engaged in misconduct for which Red Wing legitimately discharged him.

Under section 451.001 of the Texas Labor Code, a person may not discharge or in any other manner discriminate against an employee because that employee has filed a workers'

compensation claim in good faith. TEX. LAB. CODE ANN. § 451.001; *Kingsaire, Inc. v. Melendez*, 477 S.W.3d 309, 312 (Tex. 2015). An employer who violates this statute is subject to a retaliation claim. *Kingsaire*, 477 S.W.3d at 312. To prevail on such a claim, an employee must show that the discharge would not have occurred when it did if the employee had not instituted the workers' compensation claim in good faith. *Id.*

In a factual sufficiency review, we must consider and weigh all of the evidence, and can set aside a verdict only if the evidence is so weak or if the finding is so against the great weight and preponderance of the evidence that it is clearly wrong and unjust. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001). The jury is the exclusive judge of the credibility of the witnesses and the weight to be given their testimony. *Grant v. Cruz*, 406 S.W.3d 358, 363 (Tex. App.—Dallas 2013, no pet.).

In support of his claim that the evidence is factually insufficient, Garza relies on the Burris emails, discipline documentation forms allegedly showing he was disciplined "only after he reported his injury," and his own testimony that he did not use the improper language he was accused of using. He also notes that none of Red Wing's witnesses had personal knowledge of his alleged statement to Sanchez; they did not hear any comment. Garza argues the evidence is factually insufficient because he had written documents in support of his position, and "the only evidence presented at trial supporting [Red Wing's] purported reason for terminating [him] was the incredible word of a person who did not even testify at trial."

Red Wing's employees testified Garza was fired for the comment he made to Sanchez, not because of his injury. Although Sanchez did not testify, her handwritten statement about Garza's inappropriate comment was admitted into evidence. The jury heard Burris's explanation of the statements in his emails. Further, there was evidence Burris did not make the decision to terminate Garza. Lommel recommended his termination after learning of his statement to

Sanchez. Red Wing's human resources department ultimately made the decision. Giving proper deference to the jury's credibility determinations, its determination that Red Wing did not discharge Garza because he instituted a worker's compensation claim is not against the great weight and preponderance of the evidence. The same is true of the jury's finding that Garza engaged in misconduct for which he was legitimately discharged. The evidence is factually sufficient to support the jury's findings regarding the retaliation claim. We overrule Garza's fourth issue.

JURY ARGUMENT

In his fifth issue, Garza contends the trial court should have granted him a new trial due to improper jury argument by Red Wing. Garza complains of the following closing argument: "In the last four and a half years, Mr. Garza has worked two months. And those two months were at Red Wing." Garza asserts this argument was improper because it suggested he was lazy and had brought his lawsuit in bad faith. Garza did not object when this argument was made. He first raised the issue in his motion for new trial, asserting the argument was incurable. Garza's motion for new trial was overruled by operation of law.

A complaint of incurable argument may be asserted and preserved in a motion for new trial, even without an objection and ruling during the trial. *Phillips v. Bramlett*, 288 S.W.3d 876, 883 (Tex. 2009); *see* TEX. R. CIV. P. 324(b)(5). Incurable jury argument is rare, however, because typically retraction of the argument or instruction from the court can cure any probable harm. *Phillips*, 288 S.W.3d at 883. A party claiming incurable harm must persuade the court that, based on the record as a whole, the offensive argument was so extreme that a juror of ordinary intelligence could have been persuaded to agree to a verdict contrary to that to which she would have agreed to but for such argument. *Id.* Even if we assume the argument in question was improper, it did not rise to the level of incurable argument. The trial court did not

abuse its discretion in failing to grant Garza a new trial due to the jury argument. We overrule Garza's fifth issue.

We affirm the trial court's judgment.

/Ada Brown/
ADA BROWN
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

JUAN GARZA DE LEON, Appellant

No. 05-15-01517-CV V.

RED WING BRANDS OF AMERICA, INC., Appellee

On Appeal from the 162nd Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-13-08768-I.
Opinion delivered by Justice Brown, Justices Bridges and Myers participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee RED WING BRANDS OF AMERICA, INC. recover its costs of this appeal from appellant JUAN GARZA DE LEON.

Judgment entered this 28th day of August, 2017.