Opinion issued January 25, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00045-CV

ANGELINA GUERRERO, Appellant

V.

BERTHA G. CARDENAS, Appellee

On Appeal from the 270th District Court
Harris County, Texas
Trial Court Case No. 2017-11430

MEMORANDUM OPINION

Appellant Angelina Guerrero appeals an adverse jury verdict on her claims against appellee Bertha G. Cardenas arising from an automobile collision. In her opening brief, Guerrero raises seven issues: (1) whether the trial court made

improper comments to the venire panel during voir dire that caused an erroneous verdict; (2) whether the trial court erred by not enforcing a witness subpoena; (3) and (4) whether the trial court erred by excluding evidence; (5) whether the trial court's plenary power expired after it granted Guerrero's motion for new trial but before it vacated the new trial order and reinstated the judgment; (6) whether the trial court erred by denying the motion for new trial; and (7) whether factually sufficient evidence supports the jury's verdict. In her reply brief, Guerrero questions the Court's appellate jurisdiction based on the plenary power issue that she raised in the fifth issue of her opening brief.

We conclude that we have jurisdiction to review the merits of this appeal, and we affirm.

Background

Guerrero and Cardenas were involved in an automobile collision at Antoine Street and North Sam Houston Parkway in Houston in August 2016. Guerrero was driving southbound on Antoine, while Cardenas was driving eastbound on the frontage road of North Sam Houston Parkway. One party proceeded through a green light while the other party ran a red light, and their vehicles collided. The parties dispute who ran the red light and caused the collision.

According to Guerrero, after exiting the Sam Houston Parkway, she turned left on Antoine, drove under the overpass, and stopped at a red light while in the far-

right lane. She waited about five seconds for the light to turn green. When her light turned green, Guerrero checked for oncoming traffic and, seeing none, drove straight through the light. As she drove through the light, Cardenas's car t-boned Guerrero's car as Cardenas was attempting to turn right onto Antoine.

According to Cardenas, she was driving home from work on a road she travels about two or three times a week. As she approached the intersection of Antoine, she stopped at a red light at the intersection. Cardenas was in the far-right lane of the frontage road. But Cardenas denied that she was trying to turn right onto Antoine. When her light turned green, she drove straight ahead and "suddenly felt an impact, a very, very strong impact." She denied seeing Guerrero stopped at the intersection. She also denied looking for traffic before going through the intersection because her light was green.

Harris County Sheriff's Deputy William Zermeno responded to the scene of the collision and completed a Texas Peace Officer's Crash Report. The crash report included the parties' identifying and insurance information, a narrative account of the collision, and a diagram showing the relative locations of the parties' vehicles in the intersection when Zermeno arrived on the scene. The report describes the incident as follows:

> Unit 1 was traveling south on Antoine in the number 2 lane and said that she entered the intersection on a green light and that Unit 2 ran the red light and struck her vehicle in the right front quarter with the front of Unit 2.

> Unit 2 was traveling east on the N Sam Houston Parkway Frontage Road in the number 3 lane and said that Unit 1 ran the red light and struck her vehicle.
>
> There were no witnesses on the scene.
>
> Due to conflicting stories no citations were issued.

Guerrero sued Cardenas, asserting causes of action for negligence and negligence per se. Guerrero alleged that Cardenas was negligent per se "[s]pecifically" because Cardenas violated Transportation Code section 544.004(a), which requires a vehicle's operator to "comply with an applicable official traffic-control device" with exceptions for police and emergency vehicles not applicable here. *See* TEX. TRANSP. CODE § 544.004(a). Cardenas filed a counterclaim against Guerrero asserting similar causes of action for negligence and negligence per se.

At a pretrial hearing in July 2018, the trial court issued rulings on the admissibility of the parties' evidence prior to an impending trial setting that was subsequently reset. The trial court admitted the crash report into evidence but required certain redactions on Cardenas's objection. The court ordered Guerrero to redact references to insurance and to Zermeno's statement, "Due to conflicting stories no citations were issued."

Trial occurred in October 2019. A new judge had been elected and presided over trial. On the first morning of trial, the court held a hearing at which it ruled on the admissibility of the parties' evidence. During this hearing, Guerrero's counsel complained that an eyewitness to the collision, Frederick Benton, had not appeared

to testify at trial and his absence prejudiced her case. Guerrero's counsel said that he was unable to subpoena Benton because he was notified "after 5 o'clock about today's [trial] setting." But counsel also said that Guerrero was "prepared to proceed today but with that objection lodged." Because Benton did not appear at trial, Cardenas's counsel objected to the admissibility of a written statement by Benton in a supplement to the crash report, which Guerrero had provided to Cardenas that morning. This statement is not included in the record on appeal.[1] The trial court sustained the objection and ordered Guerrero to redact Benton's statement from the crash report exhibit. The trial court also sustained Cardenas's objection to the admissibility of her driver's license and excluded it from evidence.

At trial, both parties testified. As discussed above, they offered conflicting testimony about who ran the red light and caused the collision. Guerrero called two witnesses. She called an expert witness to testify about her injuries. She also called Officer Zermeno, who testified that he did not witness the collision and his knowledge of the collision was limited to the crash report. He confirmed that,

[1] As record support for this statement, Guerrero cites to Plaintiff's Exhibit No. 14 in volume 4 of the reporter's record. However, that exhibit does not mention Benton or contain any statement by him. The record indicates that Guerrero initially asked the court to include this statement in the record for appellate review during a bench conference, but the trial court postponed ruling on the request. Later, when given an opportunity to make an offer of proof, Guerrero's counsel declined to enter the statement into the record, stating, "I think that my objection on the record satisfies my appellate remedies."

according to the report, the parties told him "conflicting stories" about the collision. Guerrero's documentary evidence included maps and photographs of the intersection where the collision occurred, photographs of damage to Guerrero's vehicle, photographs of Guerrero lying in a hospital bed, and voluminous medical records.

After the parties rested, the jury returned a verdict in Cardenas's favor. The jury found that Guerrero's negligence, if any—and not Cardenas's negligence, if any—caused the collision. The trial court entered a take-nothing judgment on the jury's verdict. The judgment stated that "[a]ll other relief not expressly granted is denied," effectively denying Cardenas's counterclaims.[2]

Guerrero filed a motion for new trial. In five issues, she argued that: (1) Cardenas violated rulings on motions in limine by testifying that she was a maid; (2) Guerrero did not receive adequate notice of the trial setting to subpoena Benton; (3) the trial court erred in excluding Cardenas's driver's license from evidence because it was expired at the time of the collision and established negligence per se; (4) the trial court's comments during voir dire prejudiced her case; and (5) the evidence was factually insufficient to support the verdict. The motion was overruled by operation of law. *See* TEX. R. CIV. P. 329b(c). However, within 30 days after the

[2] Neither party raises any issues on appeal regarding Cardenas's counterclaims.

motion for new trial was overruled by operation of law, the trial court entered an order granting the motion for new trial ("new trial order"). *See* TEX. R. CIV. P. 329b(e) ("If a motion for new trial is timely filed by any party, the trial court . . . has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment until thirty days after all such timely-filed motions are overruled, either by a written and signed order or by operation of law, whichever occurs first.").

Cardenas filed a motion to reconsider the new trial order, arguing that Guerrero failed to establish good cause for a new trial. Cardenas's motion requested that the court both reconsider the new trial order and deny Guerrero's motion for new trial. The trial court granted Cardenas's motion for reconsideration ("reconsideration order"). The order stated that, after considering the law and the parties' arguments, "the Court concludes the motion should be GRANTED."

Guerrero filed a motion to reconsider the reconsideration order, complaining generally about "the Court's inflammatory remarks during voir dire." She attached a partial transcript of the voir dire proceeding to support her motion. The trial court subsequently entered an order denying Guerrero's motion for new trial because "[Guerrero] failed to present evidence and/or good cause to grant a Motion for New Trial." This order expressly replaced the prior new trial order. Guerrero appeals.

Appellate Jurisdiction

We first address Guerrero's challenge to our appellate jurisdiction, which also resolves Guerrero's fifth issue concerning the trial court's plenary power. After entering judgment, the trial court entered the new trial order, granting Guerrero's motion for new trial. Neither party disputes that the trial court had plenary power to enter the new trial order, and therefore the new trial order is valid.[3] Subsequently, however, the trial court entered two additional orders: (1) the reconsideration order granting Cardenas's motion for reconsideration of the new trial order, and (2) an order denying Guerrero's motion for new trial. In the fifth issue of her opening brief, Guerrero argues that the trial court lacked plenary power to enter these two orders and, therefore, she concludes that the new trial order is the last valid order entered by the trial court.

In response, Cardenas argues that if the new trial order is the last valid order, then this Court would lack appellate jurisdiction because there is no final, appealable judgment. However, Cardenas argues that the new trial order is not the last valid order entered by the trial court. She contends that the new trial order "essentially re-started the case from the point right before trial," and thus the trial court had plenary

---

[3] In addition, Cardenas does not dispute that Guerrero filed her notice of appeal within 90 days after the judgment was signed and, therefore, that Guerrero timely perfected her appeal. *See* TEX. R. APP. P. 26.1(a)(1). Cardenas also does not dispute that a party may file a notice of appeal while a motion for new trial is pending in the trial court. *See* TEX. R. APP. P. 27.3.

power when it entered the reconsideration order and the order denying the motion for new trial. Cardenas contends that either or both of these orders reinstated the final judgment, thus allowing this Court to exercise appellate jurisdiction.

In her reply brief, Guerrero questions the Court's jurisdiction over the appeal based on her plenary power argument. That is, she argues that the trial court lacked plenary power to enter the reconsideration order and the order denying her motion for new trial, and therefore the new trial order is the last valid order. She further argues that the reconsideration order was ambiguous and did not "outright deny" her motion for new trial, although she also argues that the parties and the trial court "were already treating [the reconsideration] order as denying Guerrero's Motion for New Trial." She also argues that the subsequent order denying her motion for new trial was an attempt to clarify the reconsideration order, but Cardenas's motion for reconsideration was not pending before the court because the court had already decided the motion. Guerrero therefore concludes that the "only reasonable conclusion" is that the new trial order is the operative order and should be reinstated.

A. Standard of Review and Governing Law

Courts must have jurisdiction to lawfully act in a case. *See Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443–44 (Tex. 1993) ("Subject matter jurisdiction is essential to the authority of a court to decide a case," and it is "never presumed."). "Unless specifically authorized by statute, Texas appellate courts only

have jurisdiction to review final judgments." *Bison Bldg. Materials, Ltd. v. Aldridge*, 422 S.W.3d 582, 585 (Tex. 2012). Whether this Court may exercise jurisdiction over an appeal is an issue of law that we review de novo. *Caress v. Fortier*, 576 S.W.3d 778, 781 (Tex. App.—Houston [1st Dist.] 2019, pet. denied).

A trial court retains jurisdiction over a case for 30 days after it signs a final judgment. TEX. R. CIV. P. 329b(d); *see Martin v. Tex. Dep't of Family & Protective Servs.*, 176 S.W.3d 390, 392 (Tex. App.—Houston [1st Dist.] 2004, no pet.). If a party files a timely motion for new trial, the trial court's plenary power is extended up to 105 days after judgment is signed. TEX. R. CIV. P. 329b(a), (c), (e); *see Martin*, 176 S.W.3d at 392, 394 n.3. If the trial court does not rule on the motion for new trial within 75 days after judgment is signed, the motion is considered overruled by operation of law. TEX. R. CIV. P. 329b(c); *see Martin*, 176 S.W.3d at 392. The trial court retains jurisdiction over the case for an additional 30 days after the motion for new trial is overruled, either by written and signed order or by operation of law, whichever occurs first. TEX. R. CIV. P. 329b(e); *see Martin*, 176 S.W.3d at 392.

When a court's plenary power expires, the court loses jurisdiction to act. *Akinwamide v. Transp. Ins. Co.*, 499 S.W.3d 511, 520 (Tex. App.—Houston [1st Dist.] 2016, pet. denied); *see* TEX. R. CIV. P. 329b(d). An order entered by a court without plenary power, and thus without jurisdiction to act, is void. *Akinwamide*, 499 S.W.3d at 520.

"When a new trial is granted, the case stands on the trial court's docket 'the same as though no trial had been had.'" *Jackson v. Williams Bros. Constr. Co.*, 364 S.W.3d 317, 324 (Tex. App.—Houston [1st Dist.] 2011, pet. denied) (quoting *In re Baylor Med. Ctr. at Garland*, 280 S.W.3d 227, 230–31 (Tex. 2008) (orig. proceeding)). "[A] trial court has the power to set aside an order granting a new trial and to reinstate the prior judgment 'any time before a final judgment is entered.'" *Id.* (quoting *Fruehauf Corp. v. Carrillo*, 848 S.W.2d 83, 84 (Tex. 1993) (per curiam)).

B. Analysis

The trial court signed the judgment on October 31, 2019. Guerrero timely filed a motion for new trial within 30 days. *See* TEX. R. CIV. P. 329b(a). The trial court did not rule on the motion for new trial within 75 days after it signed the judgment, or by January 14, 2020, so it was overruled by operation of law on that day. *See* TEX. R. CIV. P. 329b(c); *Martin*, 176 S.W.3d at 392. The trial court retained plenary power to act in the case until February 13, 2020. *See* TEX. R. CIV. P. 329b(e); *Martin*, 176 S.W.3d at 392.

On January 21, 2020—after the motion for new trial was overruled by operation of law but before the trial court's plenary power expired—the trial court entered the new trial order. *See* TEX. R. CIV. P. 329b(e). Neither party disputes that the trial court had plenary power to enter the new trial order.

Cardenas filed a motion for reconsideration of the new trial order, specifically asking the trial court to reconsider the new trial order and to deny Guerrero's motion for new trial. The court granted Cardenas's motion on February 17, 2020, in an order stating that "the Court concludes the motion should be GRANTED." The order did not expressly state that it vacated the new trial order or denied the motion for new trial.

Guerrero filed a motion to reconsider the reconsideration order. On March 6, 2020, the trial court entered an order "denying [Guerrero's] Motion for New Trial as [Guerrero] failed to present evidence and/or good cause to grant a Motion for New Trial. The order entered on January 21, 2020 [the new trial order] is hereby replaced by this order."

Guerrero argues that the new trial order is the last order entered by the trial court while it retained plenary power, and both the reconsideration order and the order denying her motion for new trial were entered after the trial court's plenary power expired on February 13, 2020. If Guerrero is correct, then the two challenged orders would be void and would not have reinstated the final judgment, thereby depriving this Court of appellate jurisdiction. *See Bison Bldg. Materials*, 422 S.W.3d at 585 (stating that appellate courts generally have jurisdiction only to review final judgments); *Akinwamide*, 499 S.W.3d at 520 (stating that orders issued by court without jurisdiction to act are void).

Both the Texas Supreme Court and this Court have spoken on this issue. In *In re Baylor Medical Center*, the Texas Supreme Court held that a trial court can reconsider a new trial order while a case is still pending, that is, at "any time before a final judgment is entered." 280 S.W.3d at 228, 231 (quoting *Fruehauf Corp.*, 848 S.W.2d at 84). There, a jury found for Baylor on the plaintiffs' claims against it, and the trial court entered a take-nothing judgment. *Id.* at 228. But the trial court granted a new trial 82 days after signing the judgment. *Id.* Baylor sought mandamus relief, but because a new presiding judge had succeeded to the trial court, the appellate court abated the proceeding to allow the successor judge to reconsider the new trial order. *Id.* (citing TEX. R. APP. P. 7.2(b) (requiring court to abate original proceeding under Rule 52 to allow successor to reconsider original judge's decision)). Two months later, the trial court vacated the new trial order and reinstated the judgment on the jury verdict. *Id.* The plaintiffs filed a motion to reconsider, which the trial court granted, thus reinstating the new trial order. *Id.* at 228–29.

Under the rule in effect at the time, an order granting a new trial could not be set aside—or "ungranted"—after the deadline for ruling on motions for new trial. *Id.* at 229–30. This rule arose from the court's interpretation of a prior version of Rule 329b, which required that all motions for new trial "must be determined" within 45 days. *Id.* at 230 (quoting prior version of Rule 329b(3)). Because the court had previously determined that reinstating an original judgment was the same as

overruling a motion for new trial, it had "held the 45-day deadline imposed an absolute limit" on the trial court's ability to vacate a new trial order and to reinstate a judgment. *Id.*

The court noted, however, that Rule 329b was amended in 1981: "Now, the rule terminates the trial court's plenary power 30 days after all timely motions for new trial are *overruled*, but there is no provision limiting its plenary power if such motions are *granted*." *Id.* (citing TEX. R. CIV. P. 329b(e)). "Under the current rules, if no judgment is signed, no plenary-power clock is ticking." *Id.* "When a new trial is granted, the case stands on the trial court's docket 'the same as though no trial had been had.'" *Id.* at 230–31 (quoting *Wilkins v. Methodist Health Care Sys.*, 160 S.W.3d 559, 563 (Tex. 2005)). Thus, "the trial court should then have the power to set aside a new trial order 'any time before a final judgment is rendered.'" *Id.* at 231 (quoting *Fruehauf Corp.*, 848 S.W.2d at 84). The court therefore held that a trial court can reconsider a new trial order as long as the case is still pending. *Id.* at 228.

In *Jackson v. Williams Brothers Construction Co.*, this Court reached a similar result in a case involving an automobile collision. *See* 364 S.W.3d at 318–20, 324. The trial court entered a take-nothing judgment after a jury trial but then granted the plaintiff's motion for new trial. *Id.* at 320. When trial was later called for the second time, the defendants moved to vacate the order granting a new trial and to reinstate the judgment. *Id.* The trial court granted the motion, set aside the new trial order,

and rendered judgment for the defendant. *Id.* The trial court denied the plaintiff's second motion for new trial. *Id.* The plaintiff complained on appeal that the trial court erred in setting aside the new trial order and reinstating the judgment, but this Court disagreed. *Id.* at 323–24. Relying on *Baylor Medical Center*, the Court stated that a new trial order places the case in "the same [position] as though no trial had been had," and therefore a trial court has the power to set aside a new trial order and to reinstate a prior judgment "any time before a final judgment is entered." *Id.* at 324 (quoting *Baylor Med. Ctr.*, 280 S.W.3d at 230–31). The Court therefore held that the trial court did not abuse its discretion in setting aside the new trial order. *Id.*

As in *Baylor Medical Center* and *Jackson*, the trial court in this case granted a new trial and then, after its plenary power would have expired had the final judgment remained effective, the court vacated the new trial order. *See Baylor Med. Ctr.*, 280 S.W.3d at 228–29; *Jackson*, 364 S.W.3d at 320. Once the trial court granted the new trial order, no provision limited the court's plenary power. *See Baylor Med. Ctr.*, 280 S.W.3d at 230; TEX. R. CIV. P. 329b(e) (limiting plenary power after motion for new trial is "overruled" but not when motion is granted). The case stood in the same position that it did before trial, with no judgment in effect and no pending expiration of the trial court's plenary power. *See Baylor Med. Ctr.*, 280 S.W.3d at 230. Therefore, the trial court had the authority to reconsider and vacate the new trial

order and to reinstate the final judgment at any time before judgment was entered. *See id.* at 230–31; *Jackson*, 364 S.W.3d at 324.

Guerrero attempts to distinguish *Baylor Medical Center* by arguing that her motion for new trial was overruled by operation of law on January 14, so the court's plenary power continued running and expired *after* the trial court entered the new trial order but *before* the court entered the reconsideration order and the order denying her motion for new trial. But in *Baylor Medical Center*, the trial court granted the motion for new trial 82 days after it signed the judgment, which means that the motion for new trial had been overruled by operation of law before the trial court signed the order granting a new trial. 280 S.W.3d at 228; *see* TEX. R. CIV. P. 329b(c), (e).

More importantly, however, the court stated that the new version of Rule 329b limits a trial court's plenary power only when a motion for new trial is overruled—not when one is granted. *Baylor Med. Ctr.*, 280 S.W.3d at 230. When a new trial is granted, the case is put in the same position it was in prior to trial, and if no judgment is signed, then no plenary-power clock is ticking. *Id.* The court held that a trial court can reconsider and vacate a new trial order so long as the case is still pending, that is, until it renders a final judgment. *Id.* at 228, 230–31. Furthermore, *Jackson* held that the trial court did not abuse its discretion in setting aside the new trial order on facts similar to the facts in this case. *See* 364 S.W.3d at 324. Guerrero's argument

erroneously relies on the prior rule based on a prior version of Rule 329b. Thus, we conclude that our appellate jurisdiction in this case is governed by *Baylor Medical Center* and *Jackson*.

Guerrero also argues that the reconsideration order did not expressly deny her motion for new trial or reinstate the final judgment, and it was therefore ambiguous. An ambiguous order generally may be construed in light of the motion upon which it was granted. *Lone Star Cement Corp. v. Fair*, 467 S.W.2d 402, 404 (Tex. 1971) (orig. proceeding). We apply the same rules of interpretation when construing court orders as we apply when construing other written instruments. *Id.* at 404–05. One such rule of interpretation "directs that courts follow a reasonable construction placed on the instrument by the parties involved." *Id.* at 405.

Here, the reconsideration order granted Cardenas's motion for reconsideration but did not expressly deny Guerrero's motion for new trial or reinstate the judgment. However, Cardenas's motion for reconsideration specifically requested that the trial court deny Guerrero's motion for new trial. *See id.* at 404 (stating that court order may be construed in light of motion which order granted). Guerrero also concedes that the parties and the court treated this reconsideration order as an order denying her motion for new trial. *See id.* at 405 (stating that courts must follow reasonable construction placed on court order by parties involved). Considering Cardenas's motion for reconsideration as well as Guerrero's argument about the parties' and the

court's interpretation of the reconsideration order, we conclude that the reconsideration order was not ambiguous, and it denied Guerrero's motion for new trial.

Guerrero finally argues that the trial court improperly denied her motion for new trial because no motion was pending at the time. Guerrero cites no legal authority supporting her argument. *See* TEX. R. APP. P. 38.1(i) (requiring argument to contain "appropriate citations to authorities and to the record"); *Guimaraes v. Brann*, 562 S.W.3d 521, 538 (Tex. App.—Houston [1st Dist.] 2018, pet. denied) ("Failure to cite to appropriate legal authority or to provide substantive analysis of the legal issues presented results in waiver of a complaint on appeal."); *Izen v. Comm'n for Lawyer Discipline*, 322 S.W.3d 308, 321 (Tex. App.—Houston [1st Dist.] 2010, pet. denied) (stating that appellant waives issue on appeal by not supporting contention with citation to appropriate authority). Thus, Guerrero has waived this argument. But even if she had not waived this argument, she is incorrect that no motion was pending at the time. Guerrero's motion for reconsideration of the reconsideration order was pending when the trial court denied her motion for new trial.

Because the trial court had plenary power to enter both the February 2020 reconsideration order and the March 2020 order denying Guerrero's motion for new trial, those orders were valid and reinstated the final judgment. *See Baylor Med. Ctr.*,

280 S.W.3d at 231 ("New trial orders are rare, and the long list of cases in footnote 8 shows that trial judges often think better of them."). This Court has jurisdiction to review final judgments. *See Bison Bldg. Materials*, 422 S.W.3d at 585. We therefore conclude that we have appellate jurisdiction to review the final judgment in this appeal. We also overrule Guerrero's fifth issue.

Judicial Comments During Voir Dire

In her first issue, Guerrero argues that the trial court demonstrated bias by improperly commenting on race during voir dire. Cardenas responds that Guerrero did not preserve this complaint for appellate review because she did not object to these comments. Alternatively, Cardenas argues that Guerrero mischaracterizes the trial court's comments, which Cardenas contends only "advocated for diversity, particularly on juries . . . ."

A. Relevant Facts

During voir dire, Guerrero's counsel asked the jury about their experiences with slip-and-fall and other personal injury accidents. As he called out various venire members by number, counsel told Juror 16, "You seem super excited to be here," to which the venireperson responded that he was "not excited to be here." Juror 16 explained that he would "never serve on a jury" because his nephew had been "convicted of a hundred years" for a gang-related crime and was still incarcerated

while "the dude that did it is out." The trial court then began speaking to the venireperson, and the following lengthy exchange occurred:

> VENIREPERSON: Everything was circumstantial. My nephew was there and—
>
> THE COURT: Well, then wait a minute. You should be the main one who wants to serve on a jury.
>
> VENIREPERSON: No. I don't want to do that. I don't want to do that.
>
> THE COURT: Because the people who are here, need a op—
>
> (Alarm ringing.)
>
> THE COURT: —need a opportunity to have someone who is fair, which you feel wasn't done—
>
> VENIREPERSON: No.
>
> THE COURT: —and impartial, which you feel wasn't done; have their voice heard, which you felt wasn't done; and the best way to do it is to be the person who does it.
>
> VENIREPERSON: Too much prejudice. My nephew is tattooed from here up, down, and it's too much prejudice with the long hair. He looks like a gang member.
>
> THE COURT: No, but I'm saying you're the main one who should—
>
> (Speaking simultaneously.)
>
> VENIREPERSON: And they just—it was just prejudice. The other guy came in clean cut. He was the one that pulled the trigger, but because he was dark skinned, the lady couldn't identify him. But she identified my nephew by the color of his hair, by the length of his hair.
>
> THE COURT: Right. But as a juror, right, as the person on the jury, you're to me the best one to be there because you're going to be fair. You're going to be impartial. You have experienced people being unfair. You should be jumping for joy that we called you because now you get a opportunity to do for someone else that wasn't done for you.
>
> VENIREPERSON: I don't feel like I'm going to be fair.

THE COURT: Because you should be furious about what happened to your nephew.

VENIREPERSON: I'm furious.

THE COURT: And you should be on a mission telling everyone that you know and everyone that you see and everyone who looks like you and looks like your nephew, they have to serve because if they don't serve, who is going to be there for us. That's why I'm judge—

VENIREPERSON: There was nobody on that jury—

THE COURT: —because I saw so much.

VENIREPERSON: —that looked like my nephew, that talked like my nephew—

THE COURT: But now get over there and be on the jury.

VENIREPERSON: —but they call them a jury of their peers.

THE COURT: Yeah. Well, get on the jury. These people, both of them, they're brown like—like us. And so if we don't come over here and at least be part of the jury, how do you feel—how do we think they're going to get fair shakes?

VENIREPERSON: Because we are different. They'll never see us the same. That's truly how I feel.

THE COURT: But you're the juror.

VENIREPERSON: And the jurors—because they see us in a certain light.

THE COURT: But you—you're the juror.

VENIREPERSON: I know. And I don't want to ever be a juror. I don't want to be here.

THE COURT: But that's—that's—you have it so backwards. The only way you can make a change is to be the change. Because for me as Judge, when I was in their position as the litigants and the lawyers and the things that I saw happening that the Judge was doing and at some point I had to say, you know what, if I want the change, I have to be the change. And now I am the change. You need to be the change. You're looking at it wrong. Because it will always be against you if you don't

take the time to be the change. So, yes, you're angry. I'm angry about some stuff, too. And I'm here. So you need to be there. If—if not today, sometime. And you need to tell your friends, and you need to tell your neighbors, and you need to let people know that we need you. They need you. We need you. And the only way your nephew or anyone is going to get a break is if we come and we serve. And because we don't want to serve and because we don't want to vote, no one cares. Well, we have to make people care. We have to. And so that's why I'm here. That's why you need to be there. Your nephew did deserve a chance. He deserved you and people like you to be on that jury in addition to everybody else. You can have another five minutes. I'm sorry.

[Guerrero's counsel]: Okay. Thank you. Y'all, she's a heck of a judge.

(Clapping.)

[Guerrero's counsel]: I just want to say she's a heck of a judge, but myself, I just want you to know I really—I feel bad about what happened to your nephew.

Shortly thereafter, still during voir dire, the trial court made the following comments to another venireperson who was also hesitant to serve on a jury:

THE COURT: But if you don't do it, then who does?

VENIREPERSON: Well, we had a chance—we didn't—we never had a chance, Judge. We never had a chance. How long did it take? I'm 69 years old. My father died when I was 2. So what chance did we have? We had none.

THE COURT: You had none then, but you have chance now, chances now. But the only chances you have are if you have a diverse group of people who are making these decisions, a diverse group of people who are looking and viewing, a diverse group of people on the jury, a diverse group of people on the judiciary. If we all just give up, then it is always who—like whose seat I took was white, male, here for 20 years. That's what you just always want to see? You—you won't vote, won't serve on a jury, won't do anything? You just tap out of the system and just let that person always be the one there? You can't do that. You have to step up, and you have to be seen, and you have to be heard. And the only way I'm here is by stepping up to be seen and to be heard. I was

having a great life without going public service, but at some point you have to be the change. So I hear you. I feel you. I didn't get black today. I've been my whole life. So I know the journey. I've had the journey. I've lived it. But you have to be the change. So yes, upset. But that's who should be on the jury along with everyone else, because let me tell you, if you have a jury with—with only one race and you have a minority group of people here in the audience, well, one has a translator. So you have people who think negative things about people who have a translator. Well, you might not think negative things or you've had a variety of experiences and you want to give people chances and this is America, the land of the free, and we all have a opportunity and we're all welcome. Everyone doesn't feel that way, but a lot of people do. So you need diversity. If you just tap out, you're—you're—you're doing a disservice to yourself, you're doing a disservice to the community. You can't tap out. You have to be actively engaged and actively involved. So I—I hear you. I definitely hear you. And I've lived some of your experiences, but—and my heart breaks for you. I mean, I'm sorry about your dad. But—and I'm really sorry also about her nephew, but you can't tap out. You can't just shut—put on blinders and not participate and don't do anything to make it better for the next person. You have to be there for the next person. You need to be a steward for the next person. And that—that's what I am, and I think that's what you need to be. So whether you're on this jury or not, that's what I'm saying. You need to talk to people and tell people. Don't just be at home, upset, angry, and not participating, because when you're just at home angry and not participating, no one cares. But when you're here, you're vocal. You're in the jury room. You're talking to people and fighting for people in the jury room. You might be the one to lock it up or make people understand something else or—I mean, you just have to participate. You—you have to participate for people to know that you're there and be interested in what you have to say. And we need you—the litigants need you. And like I said, whether you're on this one or not, no matter what, the jury system needs you. We all do. We look at television, and we're like oh, God. They had a whole jury. Nobody on that jury looked like me. And it's because people are tapping out. If you don't tap out and you go ahead and participate, maybe somebody will look like that—you on a jury. But if nobody wants to be on a jury, everybody is upset, so we just don't participate at all? That's not the solution. It's not. And that's not how things are going to change. You have to participate. So God bless you. I'm—I'm sorry that happened,

> but you have to—you have to participate on this level somewhere, sometime, participate. Thank you, sir.

Guerrero did not object to these comments after they were made or at any other time during trial.

B. Standard of Review and Governing Law

A fundamental component of a fair trial is a fair and neutral judge. *See Markowitz v. Markowitz*, 118 S.W.3d 82, 86 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). "To reverse a judgment on the ground of improper conduct or comments of the judge, we must find (1) that judicial impropriety was in fact committed, and (2) probable prejudice to the complaining party." *Metzger v. Sebek*, 892 S.W.2d 20, 39 (Tex. App.—Houston [1st Dist.] 1994, writ denied).

Trial courts have great discretion in conducting trials. *Haynes v. Union Pac. R.R. Co.*, 598 S.W.3d 335, 350 (Tex. App.—Houston [1st Dist.] 2020, pet. dism'd). To preserve a complaint that the trial court abused this discretion, a party must object to the trial court's alleged improper comment when it occurs, unless the comment cannot be rendered harmless by a proper curative instruction. *Id.*; *Exxon Mobil Corp. v. Kinder Morgan Operating L.P. "A"*, 192 S.W.3d 120, 129 (Tex. App.—Houston [14th Dist.] 2006, no pet.); *see Capellen v. Capellen*, 888 S.W.2d 539, 547 (Tex. App.—El Paso 1994, writ denied) ("Unless the comment by the judge is so blatantly and obviously prejudicial that it cannot be cured, an objection and request for instruction must be made in order to preserve error.").

C. Analysis

Guerrero argues that the trial court's comments prejudiced her case because her attorney was white, and the comments implied that her attorney "was tacitly implicated in the systematic racism the trial court was opining on," "was part of the problem with a racist judicial system," and "was not to be trusted."

There is no evidence in the record identifying the race of Guerrero's counsel. To the extent that the trial court was encouraging the venire members to exercise their right to serve on a jury, it was proper to do so. *Cf. Batson v. Kentucky*, 476 U.S. 79, 87 (1986) (recognizing that, "by denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror"). To the extent that the trial court's comments went beyond encouraging jury service, however, Guerrero's counsel did not object and provide the court an opportunity to cure the comments that she now challenges as extremely prejudicial. *See Haynes*, 598 S.W.3d at 350. Much the opposite, counsel lauded the trial court's comments, twice praising the trial judge as a "heck of a judge." On these facts, Guerrero has failed to demonstrate reversible error. *See id.*; *Exxon Mobil*, 192 S.W.3d at 129; *Capellen*, 888 S.W.2d at 547. We overrule Guerrero's first issue.

Compelling Witness Attendance at Trial

In her second issue, Guerrero contends that the trial court—on two occasions off-the-record—refused to enforce a witness subpoena by attaching Benton for

deposition and trial. Guerrero argues that Benton would have provided favorable testimony, but even if he "changed his account," his testimony "could have been used for impeachment purposes."[4] Thus, Guerrero contends that Benton's trial testimony would have benefitted her case and the trial court erred by not enforcing a subpoena for Benton.

Cardenas responds that Guerrero's contentions are not supported by the record on appeal because, as Guerrero concedes, the trial court's refusal to enforce the subpoena was not on the record. Cardenas further argues that the trial court did not prohibit the witness from testifying and did not abuse its discretion in refusing to enforce the subpoena because there were indications that the witness's testimony was biased.

A. Standard of Review

We use an abuse-of-discretion standard to review a trial court's refusal to attach a witness who was subpoenaed for trial but failed to appear. *Wilkinson v. Moore*, 623 S.W.2d 662, 665–66 (Tex. App.—Houston [1st Dist.] 1981, writ

---

[4] Guerrero also speculates that Cardenas "paid off Benton in some manner" to ensure he would not cooperate with Guerrero. Guerrero's citations to the record do not support her allegations of witness tampering, and Cardenas adamantly denies the accusation. Furthermore, the trial court previously admonished Guerrero's counsel to refrain from making such accusations without support. We refuse to consider these allegations that are unsupported by the record on appeal. *See* TEX. R. APP. P. 38.1(g) (requiring statement of facts in appellate brief to be supported by record references), (i) (requiring argument in appellate brief to be supported by record references).

dism'd); *Dorsey v. Houston Hous. Auth.*, No. 14-10-00165-CV, 2011 WL 398022, at *2 (Tex. App.—Houston [14th Dist.] Feb. 8, 2011, no pet.) (mem. op.). A trial court abuses its discretion when it acts in an arbitrary or unreasonable manner or without reference to guiding rules and principles. *Walker v. Gutierrez*, 111 S.W.3d 56, 62 (Tex. 2003).

B. Governing Law

A party may issue a subpoena to a witness to attend and give testimony at deposition or trial. TEX. R. CIV. P. 176.2, 199.3. A subpoena may be issued by an attorney authorized to practice law in Texas, the clerk of court, or an officer authorized to take depositions. TEX. R. CIV. P. 176.4.

A witness who fails "without adequate excuse to obey a subpoena" may be found in contempt of court and punished by fine or confinement. TEX. R. CIV. P. 176.8(a). If a witness who has been subpoenaed fails to appear for trial, the trial court may issue a writ of attachment to compel the witness's attendance. *See* TEX. R. CIV. P. 176.8; *In re Z.A.T.*, 193 S.W.3d 197, 207 (Tex. App.—Waco 2006, pet. denied). However, the trial court may not impose a fine or attach a person for failure to comply with a subpoena unless the party or the party's attorney requesting the subpoena files an affidavit stating that "all fees due the witness by law were paid or tendered." TEX. R. CIV. P. 176.8(b).

C. Analysis

As stated above, Guerrero argues that the trial court erred by refusing to enforce subpoenas after Benton failed to appear for deposition and trial.

In June 2018, Guerrero's counsel served Benton with a subpoena to appear for trial scheduled for July 30, 2018. Benton did not appear for this setting, but the parties appeared for a pretrial conference. Guerrero's counsel requested that the trial court issue a bench warrant for Benton to appear at trial. The court appeared reluctant to issue a bench warrant, but the record does not show that the court ruled or refused to rule on the request. This trial setting was subsequently reset.

Guerrero argues that the court issued an off-the-record ruling denying her request for a bench warrant. She also argues that she renewed her request at a hearing in July 2019, but the trial court again "refused" off-the-record to issue a bench warrant. To preserve error concerning a trial court's ruling, the appellate record must show that the trial court made the challenged ruling. TEX. R. APP. P. 33.1(a)(2)(A); *see Guimaraes*, 562 S.W.3d at 545 (stating that appellate brief which does not contain citations to appropriate authorities and to record for given issue waives that issue). As Guerrero concedes, the record does not show that the trial court ever ruled or refused to rule on Guerrero's requests for a bench warrant compelling Benton's

attendance at deposition or trial. Therefore, Guerrero did not preserve any error in these off-the-record rulings.[5]

In June 2019, Guerrero filed a motion to compel Benton's deposition. In the motion, Guerrero stated that she had subpoenaed Benton to appear for deposition, but he did not appear. She stated that "Benton's testimony is central to [her] case," and she requested an order compelling his attendance. She further stated that Benton will ignore any such order, so "the only effective course" is for the trial court to order Benton to appear and show cause why he failed to comply with the subpoena. Guerrero pleaded this request to show cause in the alternative. The trial court signed an order compelling Benton's deposition but not requiring him to show cause.

---

[5] We note that, even if Guerrero did not waive these arguments, Rule of Civil Procedure 176.8(b) expressly prohibits a trial court from attaching a witness for failure to comply with a subpoena unless the party requesting the subpoena files proof by affidavit that all fees due the witness by law were paid or tendered. TEX. R. CIV. P. 176.8(b); *see Old Republic Ins. Co. v. Edwards*, No. 01-10-00150-CV, 2011 WL 2623994, at *12 (Tex. App.—Houston [1st Dist.] June 30, 2011, no pet) (mem. op.) (stating that prerequisite to request for enforcement of subpoena under Rule 176.8(b) is proof by subpoenaing party's affidavit that all fees due to witness by law were paid or tendered). Although she cites this provision in her brief, Guerrero does not argue—and the record does not show—that she filed the requisite affidavit proving that all fees due to Benton were paid or tendered to him. *See* TEX. R. CIV. P. 176.8(b); TEX. R. APP. P. 38.1(g). Thus, Guerrero has not established that the trial court had the authority to issue a writ of attachment compelling Benton's appearance at deposition or trial. *See Walker v. Gutierrez*, 111 S.W.3d 56, 62 (Tex. 2003) (stating that trial court abuses its discretion by acting without reference to guiding rules and principles).

Guerrero argues that the trial court erred by not ordering Benton to show cause. However, this request was pleaded only in the alternative. Although the trial court did not grant this alternative request, it did grant Guerrero's primary request: to compel Benton's attendance at his deposition. The record does not show that Guerrero objected to the trial court not granting her alternative relief. Nor does the record show that Guerrero sought additional relief concerning Benton's failure to comply with the order compelling his deposition attendance. *See* TEX. R. APP. P. 33.1(a). Therefore, Guerrero did not preserve any error concerning these rulings.

Trial was finally reset to October 2019. The record does not show that Guerrero issued a subpoena to Benton to appear at trial in October 2019. *See* TEX. R. APP. P. 38.1(g); *In re Z.A.T.*, 193 S.W.3d at 207 ("A subpoena is the proper means to secure the attendance of a witness for trial. If the witness fails to comply, then the trial court may issue a writ of attachment to compel the witness's attendance."); *see also Fritsch v. J.M. English Truck Line, Inc.*, 246 S.W.2d 856, 859 (Tex. 1952) (stating that parties who choose to forgo rights under Rules of Civil Procedure and instead resort to other less effective and less certain means of obtaining material witness testimony "must be held to do so at their own risk and with foreknowledge that they may be put to trial without the benefit of the testimony"). At trial, Guerrero's counsel objected that he only received notice of trial the prior afternoon and therefore lacked an opportunity to issue a subpoena to Benton. But counsel also

stated that Guerrero was "prepared to proceed today but with that objection lodged." Guerrero did not obtain a ruling on this objection, and she did not make any objection regarding enforcement of a subpoena. *See* TEX. R. APP. P. 33.1(a). Therefore, Guerrero did not preserve any error in the trial court's failure to enforce a trial subpoena for Benton.

We overrule Guerrero's second issue.

Exclusion of Evidence

Guerrero's third and fourth issues challenge the trial court's exclusion of evidence.

A. Standard of Review

We review a trial court's admission or exclusion of evidence for an abuse of discretion. *Badall v. Durgapersad*, 454 S.W.3d 626, 641 (Tex. App.—Houston [1st Dist.] 2014, pet. denied). A trial court abuses its discretion if it acts arbitrarily, unreasonably, or without reference to any guiding rules and principles. *Walker*, 111 S.W.3d at 62; *Badall*, 454 S.W.3d at 641. We must uphold the trial court's evidentiary ruling if there is any legitimate basis in the record to support it. *H2O Sols., Ltd. v. PM Realty Grp., LP*, 438 S.W.3d 606, 621 (Tex. App.—Houston [1st Dist.] 2014, pet. denied). We will not reverse a trial court's erroneous evidentiary ruling unless the error probably resulted in an improper judgment. TEX. R. APP. P. 44.1(a)(1); *Badall*, 454 S.W.3d at 641.

B. Redaction of Witness Statement from Crash Report

In her third issue, Guerrero contends that the trial court erred by requiring her to redact Benton's written statement contained in a supplement to the crash report. She argues that, at the July 2018 hearing, the trial court admitted the crash report into evidence without redacting Benton's statement, but a new presiding judge later reversed course and erroneously required the statement to be redacted at trial. Guerrero further argues that Cardenas did not object to the statement on hearsay grounds at the July 2018 hearing and thus waived this objection.

Cardenas responds that Guerrero waived this issue for appellate review by not citing any supporting legal authority. Cardenas alternatively argues that she did not waive her hearsay objection to Benton's statement because she repeatedly objected to the statement as hearsay before it was presented to the jury, and the trial court properly excluded the statement because it is inadmissible hearsay.

Guerrero correctly states that the trial court admitted the crash report into evidence at the July 2018 hearing before later requiring Benton's statement in a supplement to the crash report to be redacted at trial. However, the record on appeal shows that the version of the crash report admitted into evidence at the July 2018 hearing did not include the challenged statement. Although the court excluded another handwritten note by Benton at this hearing specifically because it was hearsay, neither the challenged statement nor the supplemental crash report was

mentioned at this hearing. Therefore, the record does not support Guerrero's argument that the trial court admitted Benton's challenged statement in unredacted form at the July 2018 hearing. Furthermore, because the record does not show that Guerrero attempted to admit this statement into evidence at the July 2018 hearing, Cardenas was not required to object to it at that time. *See Richards v. Tex. A&M Univ. Sys.*, 131 S.W.3d 550, 555 (Tex. App.—Waco 2004, pet. denied) (stating that objection is timely under Rule 33.1 if made as soon as ground of objection becomes apparent).

The first time that the challenged statement is mentioned in the record appears on the first morning of trial when Guerrero attempted to admit it into evidence as a supplement to the crash report. Cardenas's counsel stated that she had only received Guerrero's trial exhibits that morning. Because Benton did not appear to testify at trial, Cardenas objected that his statement in the supplemental crash report was inadmissible hearsay. *See* TEX. R. EVID. 801(d), 802. This objection was timely because it was made when Guerrero first attempted to admit the statement into evidence. *See Richards*, 131 S.W.3d at 555.

Although the trial court required the statement to be redacted, we disagree that the trial court was reversing course. As stated above, the record does not show that the trial court previously admitted the challenged statement into evidence. Furthermore, we are unable to review the statement to determine whether the trial

court erred in requiring its redaction because the statement is not included in the record on appeal. *See* TEX. R. APP. P. 38.1(g), (i); *Guimaraes*, 562 S.W.3d at 545 (stating that appellate brief which does not contain citations to appropriate authorities and to record for given issue waives that issue). Because there is nothing to review, Guerrero has waived any error in the trial court's exclusion of the evidence. We overrule Guerrero's third issue.

C. Exclusion of Cardenas's Expired Driver's License

In her fourth issue, Guerrero argues that the trial court erred by excluding evidence of Cardenas's expired driver's license. Guerrero argues that she asserted a cause of action against Cardenas for negligence per se based on violations of the Transportation Code, that driving with an expired driver's license violates section 521.021 of the Code, and that Cardenas's driver's license was expired at the time of the collision. *See* TEX. TRANSP. CODE § 521.021 (prohibiting non-exempt person from operating motor vehicle on highway unless person holds driver's license). Guerrero further argues that the trial court admitted Cardenas's driver's license at the July 2018 pretrial hearing but then delayed ruling on its admissibility.[6] She

[6] Guerrero argues that Cardenas waived her objection to admission of the driver's license because Cardenas did not present case law supporting her objection at the July 2018 pretrial hearing. At the hearing, Cardenas's counsel referenced "the TXI case" that she represented was cited in her motion in limine that was before the court at that time. This motion in limine is included in the record on appeal, and the motion cites to *TXI Transportation Co. v. Hughes*, 306 S.W.3d 230 (Tex. 2010). Guerrero does not cite any authority supporting her argument that, to preserve an objection to the admissibility of evidence, a party must provide a hard copy of case law published

argues that the new judge presiding at trial in October 2019 erroneously reversed course and excluded evidence of the driver's license.[7]

Cardenas concedes that Guerrero asserted a cause of action for negligence per se based on alleged violations of the Transportation Code. Cardenas disputes, however, that Guerrero alleged a violation of section 521.021 upon which she relies on appeal, which Cardenas argues is required to plead a cause of action for negligence per se based on a particular statute.

Texas employs a fair notice standard of pleading. TEX. R. CIV. P. 47(a); *see Montelongo v. Abrea*, 622 S.W.3d 290, 300 (Tex. 2021). This standard requires not just fair notice of factual allegations, but a "short statement of the *cause of action* sufficient to give fair notice of the *claim* involved." *Montelongo*, 622 S.W.3d at 300

---

in an official reporter rather than a citation to that case law. *See* TEX. R. APP. P. 38.1(i) (requiring arguments on appeal to be supported by citation to authority). We conclude that Cardenas did not waive her objection to the admissibility of her driver's license.

[7] For the first time in her reply brief, Guerrero argues that she "orally requested permission to file a trial amendment" on the morning of trial to allege a violation of section 521.021, but the trial court erroneously refused her amendment. *See* TEX. R. CIV. P. 63 (authorizing parties to amend pleadings without leave of court "at such time as not to operate as a surprise to the opposite party"). We do not consider arguments raised for the first time in a reply brief. *N.P. v. Methodist Hosp.*, 190 S.W.3d 217, 225 (Tex. App.—Houston [1st Dist.] 2006, pet. denied) ("An issue raised for the first time in a reply brief is ordinarily waived."). Furthermore, the record does not show that Guerrero requested a trial amendment of her pleadings to assert a cause of action based on a violation of section 521.021. *See* TEX. R. APP. P. 33.1(a)(1). Thus, Guerrero has waived this part of her issue for our review.

(quoting TEX. R. CIV. P. 47(a)). A party's pleading must give fair notice of alleged facts and "the claim and the relief sought such that the opposing party can prepare a defense" and "ascertain from the pleading the nature and basic issues of the controversy and what testimony will be relevant." *Id.* (quoting *In re Lipsky*, 460 S.W.3d 579, 590 (Tex. 2015) (orig. proceeding), and *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 896 (Tex. 2000)).

"Negligence per se is a common-law doctrine that allows courts to rely on a penal statute to define a reasonably prudent person's standard of care." *Reeder v. Daniel*, 61 S.W.3d 359, 361–62 (Tex. 2001). "Negligence per se is not a separate cause of action that exists independently of a common-law negligence cause of action," but it is merely one method of proving a breach of duty, a necessary element of any negligence claim. *Thomas v. Uzoka*, 290 S.W.3d 437, 445 (Tex. App.—Houston [14th Dist.] 2009, pet. denied).

A "party seeking to recover on the ground of negligence per se must plead a statutory violation." *Daugherty v. S. Pac. Transp. Co.*, 772 S.W.2d 81, 83 (Tex. 1989). Pleading general negligence alone ordinarily will not give an opposing party fair notice of a specific statutory violation. *See id.*; *Murray v. O&A Express, Inc.*, 630 S.W.2d 633, 636 (Tex. 1982). A party who relies upon a statutory violation "should plead this reliance if he is to recover on that basis" and "should reasonably

identify the statute relied upon." *Daugherty*, 772 S.W.2d at 83 (quoting *Murray*, 630 S.W.2d at 636).

In her first amended petition—the live petition at the time of trial—Guerrero asserted causes of action for both negligence and negligence per se. Guerrero alleged negligence per se based on violations of "various sections" of the Transportation Code, but the only section specified in her live petition is section 544.004, which requires drivers to comply with applicable traffic-control devices.[8] *See* TEX. TRANSP. CODE § 544.004(a).

She did not allege a violation of section 521.021, the provision concerning expired driver's licenses upon which she relies on appeal. *See id.* § 521.021; *Daugherty*, 772 S.W.2d at 83 (stating that party seeking to recover for negligence per se must plead statutory violation and should reasonably identify statute relied upon). Moreover, her petition did not mention driver's licenses, much less allege that Cardenas's license was expired at the time of the collision. *See Montelongo*, 622 S.W.3d at 300 (stating that pleading must provide fair notice of claim and relief sought so opposing party can prepare defense and ascertain nature and basic issues of controversy and what testimony will be relevant). Merely alleging a violation of

[8] Guerrero's original petition alleged that Cardenas violated other provisions of the Transportation Code not included in her live petition, but none of these provisions concerned driver's licenses.

"various sections" of a code in a negligence per se cause of action without specifying the particular section relied upon does not provide fair notice of a cause of action based on that particular section. *See* TEX. R. CIV. P. 47; *Montelongo*, 622 S.W.3d at 300; *Daugherty*, 772 S.W.2d at 83; *see also Air Prods. & Chems., Inc. v. Odfjell Seachem A/S*, 305 S.W.3d 87, 93 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (stating that trial court reasonably could have concluded that negligence per se theory based upon violation of specific regulation was distinct from other general negligence theories asserted in petition that would reshape negligence action and cause delay in trial proceedings). We therefore disagree with Guerrero that she asserted a cause of action for negligence per se based on a violation of section 521.021.

We also disagree with Guerrero that the trial court erroneously reversed course at trial and excluded the driver's license from evidence. Guerrero concedes that the trial court did not rule on the admissibility of the driver's license at the July 2018 pretrial hearing. Instead, the record shows that the trial court initially admitted the evidence before reconsidering and placing its ruling on hold. *See Fruehauf Corp.*, 848 S.W.2d at 84 (stating that trial court retains continuing control to set aside interlocutory orders any time before entering final judgment). The record does not support Guerrero's argument that the driver's license "had already been admitted" by the trial court at the July 2018 hearing. *See* TEX. R. APP. P. 33.1(a)(2)(A), 38.1(i).

Nor does the record show that the trial court refused to rule on Guerrero's request to admit the driver's license or Guerrero's objection to such a refusal. *See* TEX. R. APP. P. 33.1(a)(2)(B).

Rather, the record shows that the trial court's only ruling on the admissibility of the driver's license was at trial. On the first morning of trial, Guerrero first raised the issue of Cardenas's expired driver's license in connection with a negligence per se cause of action based on a violation of section 521.021. Cardenas objected to admission of her expired driver's license into evidence, arguing that it was irrelevant to the issue of negligence because driving with an expired driver's license does not necessarily equate to driving negligently. The court excluded evidence of the driver's license. Because the expired license was not relevant to Guerrero's claims in the lawsuit, we conclude that the trial court did not abuse its discretion in excluding the evidence at trial. *See* TEX. R. EVID. 401, 402.

We conclude that Guerrero did not provide fair notice of a negligence per se cause of action based on a violation of section 521.021 against Cardenas. *See* TEX. R. CIV. P. 47(a); *Montelongo*, 622 S.W.3d at 300; *Daugherty*, 772 S.W.2d at 83. We hold that the trial court did not abuse its discretion in excluding evidence of Cardenas's driver's license. *See Badall*, 454 S.W.3d at 641. We overrule Guerrero's fourth issue.

Motion for New Trial

In her sixth issue, Guerrero argues that the trial court erred by denying her motion for new trial because Cardenas violated rulings on a motion in limine and because Guerrero received inadequate notice of trial to allow her to subpoena Benton for trial.[9]

A. Standard of Review

We review a trial court's denial of a motion for new trial for an abuse of discretion. *Nguyen v. Kuljis*, 414 S.W.3d 236, 239 (Tex. App.—Houston [1st Dist.] 2013, pet. denied). As stated above, a trial court abuses its discretion when it acts in an arbitrary or unreasonable manner or without reference to guiding rules and principles. *Id.*

B. Violation of Ruling on Motion in Limine

Guerrero first argues that Cardenas violated rulings on a motion in limine "prohibiting references to [Cardenas's] ability to pay any judgment against her." Specifically, Guerrero challenges Cardenas's testimony that she was employed as a

---

[9] Guerrero also argues that the trial court erred by denying her motion for new trial because the jury did not hear evidence that Cardenas's driver's license was expired at the time of the collision and because the trial court made improper judicial comments to the venire panel during voir dire. We have already considered these issues above and determined that they do not present error requiring reversal. Therefore, we conclude that the trial court did not abuse its discretion in denying Guerrero's motion for new trial with respect to these issues. *See Nguyen v. Kuljis*, 414 S.W.3d 236, 239 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (stating that we review trial court's denial of motion for new trial for abuse of discretion).

maid and was on her way home from work when the collision occurred. Guerrero argues that this testimony was intended "to remind the jury [Cardenas] was not a person of means." Cardenas responds that Guerrero waived this issue in two ways: by failing to object to the specific trial testimony she complains about on appeal and by not objecting to prior testimony on the matter. Moreover, Cardenas argues that she did not violate a ruling on a motion in limine and that, if she did, the violation was curable by an instruction to the jury to disregard.

A trial court's ruling on a motion in limine is not a ruling that admits or excludes evidence; rather, it is a tentative ruling that requires a party to obtain the trial court's permission outside the jury's presence before admitting evidence subject to the limine ruling. *Schwartz v. Forest Pharm., Inc.*, 127 S.W.3d 118, 124 n.1 (Tex. App.—Houston [1st Dist.] 2003, pet. denied); *Westview Drive Invs., LLC v. Landmark Am. Ins. Co.*, 522 S.W.3d 583, 600 (Tex. App.—Houston [14th Dist.] 2017, pet. denied). If evidence is introduced in violation of a ruling on a motion in limine, the party that filed the motion must object immediately or waive any error in admission of the evidence. *Schwartz*, 127 S.W.3d at 124 n.1. Moreover, the "general rule is that error in the admission of testimony is deemed harmless if the objecting party subsequently permits the same or similar evidence to be introduced without objection." *Richardson v. Green*, 677 S.W.2d 497, 501 (Tex. 1984).

Guerrero argues that the trial court's rulings on the motion in limine prohibited references to Cardenas's "financial status or ability to satisfy a judgment, including [Cardenas's] individual net worth or assets," and prohibited the parties from mentioning "that any party is rich or poor, which is irrelevant and prejudicial." As support for the trial court's rulings, Guerrero cites the entire transcript of the July 2018 pretrial hearing. However, this transcript does not include these rulings or any mention of them. And although the record on appeal includes motions in limine filed by the parties, the record does not include any rulings on these motions. *See* TEX. R. APP. P. 33.1(a), 38.1(g), (i). Therefore, the record does not support Guerrero's contention that the challenged testimony was subject to limine rulings.

Furthermore, even if the challenged statements were subject to limine rulings, the record does not show that Guerrero immediately objected when the testimony was introduced as required to preserve error in admission of the testimony. *See* TEX. R. APP. P. 33.1(a)(1); *Schwartz*, 127 S.W.3d at 124 n.1. The record further shows that Guerrero did not object to other statements at trial about Cardenas cleaning houses for a living, which Guerrero does not challenge on appeal. *See Richardson*, 677 S.W.2d at 501 (stating that admission of testimony is deemed harmless if same or similar evidence is subsequently introduced without objection).

We therefore conclude that the trial court did not abuse its discretion in denying Guerrero's motion for new trial based on purported violations of the trial

court's rulings on motions in limine. Even if the challenged testimony was subject to a ruling on a motion in limine, which the record does not show, Guerrero's failure to object to the evidence at trial does not constitute good cause for granting a new trial. *See* TEX. R. CIV. P. 320 (authorizing trial courts to grant new trials and to set aside judgment for "good cause" shown); *In re City of Houston*, 418 S.W.3d 388, 397 (Tex. App.—Houston [1st Dist.] 2013, orig. proceeding) (holding that harmless error cannot constitute good cause for granting new trial under Rule 320).

C. Insufficient Notice of Trial to Serve Subpoena

Guerrero next argues that she was unable to subpoena Benton for trial because the trial court notified her of trial "at approximately 4:00 p.m." the day before trial began. Cardenas responds that Guerrero waived her argument by failing to cite any supporting authority. She further argues that Guerrero did not attempt to subpoena the witness, even with short notice, and therefore any error in noticing trial was harmless.

At trial, Guerrero's counsel represented to the trial court that he received "notice after 5 o'clock about today's [trial] setting" and therefore did not have an opportunity to serve Benton with a subpoena. Counsel objected "on those grounds because [Benton] is a key witness and he was a[n] eyewitness to this matter." "But," counsel continued, "we are prepared to proceed today with that objection lodged." The record does not show that the trial court ruled or refused to rule on Guerrero's

objection. Thus, this complaint has not been preserved for our review. *See* TEX. R. APP. P. 33.1(a)(2).

But even if Guerrero had preserved error, the record does not show an abuse of discretion in denying her motion for new trial on this ground. The record does not show that Guerrero's counsel—who is authorized to issue subpoenas as a licensed attorney and officer of the court—attempted to serve Benton despite receiving late notice of trial. *See* TEX. R. CIV. P. 176.4(b). Nor did Guerrero request a trial continuance so she could have an opportunity to attempt to serve the subpoena. She only lodged an objection on which she did not obtain a ruling. *See* TEX. R. APP. P. 33.1(a)(2). Guerrero offers no authority showing that she had good cause for a new trial or that the trial court abused its discretion by denying her a new trial based on these facts. *See* TEX. R. CIV. P. 320; TEX. R. APP. P. 38.1(i).

We also note that the record contains conflicting information regarding the testimony of this witness. While Benton apparently witnessed the collision, the record indicates that he was not present when Officer Zermeno arrived at the scene of the collision. Zermeno's crash report does not mention Benton; rather, it states that there "were no witnesses on the scene." Moreover, Guerrero's counsel represented to the trial court that Benton had since become "hostile" to Guerrero. Thus, there is no indication that Guerrero's inability to subpoena Benton probably

caused the rendition of an improper judgment. *See* TEX. R. APP. P. 44.1(a)(1); *In re City of Houston*, 418 S.W.3d at 397.

We overrule Guerrero's sixth issue.

Factual Sufficiency of Evidence

Finally, in her seventh issue, Guerrero argues that the jury's verdict was against the great weight and preponderance of the evidence. This argument challenges the factual sufficiency of the evidence supporting the verdict. *See Ononiwu v. Eisenbach*, 624 S.W.3d 37, 44 (Tex. App.—Houston [1st Dist.] 2021, no pet.).

A. Standard of Review and Governing Law

"When a party attacks the factual sufficiency of an adverse finding on an issue on which she has the burden of proof, she must demonstrate on appeal that the adverse finding is against the great weight and preponderance of the evidence." *Benavente v. Granger*, 312 S.W.3d 745, 748 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (quoting *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001) (per curiam)). In reviewing a factual sufficiency challenge, we consider and weigh all the evidence and may set aside the verdict only if the challenged finding is so against the great weight and preponderance of the evidence that it is clearly wrong and unjust. *Id.* (citing *Dow Chem.*, 46 S.W.3d at 242, and *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986) (per curiam)).

Jurors are the sole judges of witness credibility and the weight to give witness testimony. *City of Keller v. Wilson*, 168 S.W.3d 802, 819 (Tex. 2005). Jurors may choose to believe one witness over another. *Id.* They may resolve inconsistencies in witness testimony, regardless of whether such inconsistencies result from contradictory accounts of multiple witnesses or from internal contradictions in the testimony of a single witness. *Guimaraes*, 562 S.W.3d at 549.

A plaintiff asserting a negligence action must prove that: (1) the defendant owed a legal duty to the plaintiff; (2) the defendant breached that duty; and (3) the breach proximately caused damages to the plaintiff. *Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 782 (Tex. 2001). Proximate cause is comprised of two elements: cause-in-fact and foreseeability. *Id.* at 784. A plaintiff establishes cause-in-fact by proving that the act or omission was a substantial factor in causing the injury without which the harm would not have occurred. *Id.* Foreseeability means that an "actor, as a person of ordinary intelligence, should have anticipated the dangers that his negligent act created for others." *Id.* at 785 (quoting *Travis v. City of Mesquite*, 830 S.W.2d 94, 98 (Tex. 1992)). More than one act may be the proximate cause of the same injury. *Id.* at 784.

B. Analysis

Guerrero argues that the undisputed evidence proved that Cardenas's negligence proximately caused the collision, and that Cardenas's testimony was

contradictory. Cardenas disputes that Guerrero proved her negligence, and she argues that the jury was entitled to believe her over Guerrero, particularly considering Guerrero's contradictory trial testimony.

At trial, Guerrero and Cardenas testified about their versions of the collision, which differed except for the location: the intersection of Antoine and the eastbound frontage road of the North Sam Houston Parkway. Guerrero testified that she was stopped at a red light in the far-right lane of Antoine for five seconds before the light turned green. When the light turned green, she looked for traffic before proceeding, saw that the intersection was clear, and drove through the intersection. She said that Cardenas was attempting to turn right onto Antoine from the far-right lane of the frontage road when she ran the red light and t-boned Guerrero's vehicle.

On cross-examination, Cardenas's counsel repeatedly impeached Guerrero with her deposition testimony. For example, Guerrero testified at her deposition that she took hydrocodone on the day of the collision, but she denied it at trial. She also testified at her deposition that she was stopped at the red light for five minutes, while she testified at trial that she was stopped at the light for only five seconds. And when Guerrero testified at trial that she lost consciousness for "[l]ike five seconds" during the incident, Cardenas impeached her testimony with medical records after the collision showing that Guerrero did not lose consciousness.

Cardenas also testified about a different version of the incident than the version to which Guerrero had testified. Cardenas stated that she was on her way home from work prior to the collision. She stopped in the far-right lane of the frontage road at a red light, which she drives through two or three times per week. She was not in a hurry or attempting or intending to turn right onto Antoine at the light. She testified that, when her light turned green, she drove straight through the intersection and Guerrero hit her vehicle. Cardenas did not look for traffic before driving through the intersection because she had a green light. On cross-examination, Guerrero attempted to impeach Cardenas by asking why, if her light was green and she was in the far-right lane, Guerrero's vehicle only hit Cardenas's vehicle but did not hit other cars in lanes to the left of Cardenas's vehicle. Cardenas responded that she remembered seeing no other cars to the left of her while stopped at the light.

Guerrero's and Cardenas's testimony was the only direct evidence of the collision. No other witnesses testified about observing the collision, and no other evidence showed the collision as it occurred. Guerrero and Cardenas testified inconsistently with each other, each stating that the other ran the red light and caused the collision. The jurors were the sole judges of the credibility of these two witnesses and the weight to give their testimony. *See City of Keller*, 168 S.W.3d at 819. The jury apparently resolved the inconsistencies in the testimony in favor of Cardenas

and against Guerrero, as it was entitled to do. *See id.*; *see also Guimaraes*, 562 S.W.3d at 549 (stating that jury can also resolve any internal contradictions in either party's testimony). We may not impose our opinion to the contrary. *City of Keller*, 168 S.W.3d at 819.

Guerrero also introduced other evidence. She called a doctor to provide expert medical testimony, and she admitted voluminous medical records into evidence. Dr. Ra'Kerry Rahman, an orthopedic spinal surgeon, testified that she examined Guerrero seven months after the incident and only that one time. Guerrero complained to Dr. Rahman about back and neck pain that extended into her arms and legs. Dr. Rahman opined that it was "possible" for people involved in an automobile accident to exhibit symptoms like Guerrero's symptoms. She recommended surgery for Guerrero's injuries but admitted that she had reviewed limited medical records prior to making her recommendation. She did not, for example, review medical records related to Guerrero's prior accidents or surgeries. Although Dr. Rahman's testimony and Guerrero's medical records may have established that Guerrero sustained injury as a result of the collision, this evidence did not establish that Cardenas's negligence was the cause of any such injury. *See Lee Lewis Constr.*, 70 S.W.3d at 784 (stating that test for cause-in-fact is whether act or omission was substantial factor in causing injury without which harm would

not have occurred). Guerrero could have been injured even if she caused the collision.

Officer Zermeno, who responded to the collision, also testified at trial. However, he arrived after the collision occurred and therefore did not witness it. He emphasized his lack of personal knowledge of the collision apart from reviewing his crash report. Guerrero's counsel asked Zermeno about an "island" at the light, which was apparently related to Guerrero's theory that Cardenas was making an illegal right turn, but Zermeno only testified that the purpose of the "island" was to "direct flow of traffic." Zermeno's testimony did not establish that either party's negligence was the cause of Guerrero's alleged injuries. *See id.*

The crash report, which was also admitted into evidence, recounted the parties' "conflicting stories" of the collision. Like the parties' trial testimony, the report recited that each party blamed the other party for running the red light and causing the collision. The report included a diagram, but the diagram does not indicate who was at fault for the accident. Guerrero also introduced into evidence maps and photographs of the intersection where the collision occurred, photographs of her vehicle after the collision showing damage to the front passenger side of the vehicle, and photographs showing Guerrero lying in a hospital bed. She argues that the physical evidence showing her bodily injury and vehicle damage support her version of the story. We disagree. Like the other evidence, this evidence proved only

that Guerrero was injured as a result of the collision, but it does not show that either party's negligence was the proximate cause of the collision. *See id.*

Thus, resolution of the parties' dispute depended upon their credibility. We will not disturb the jury's verdict that Guerrero's negligence, if any—and not Cardenas's negligence, if any—was the proximate cause of Guerrero's injuries. *See City of Keller*, 168 S.W.3d at 819. Guerrero argues that this Court "must consider whether it is more plausible that a doctor, a policeman, and [] Guerrero are all lying or whether Cardenas, facing all the negative downside to a litigation, is the one that lied." We disagree. It was for the jury—not this Court—to determine the credibility of the witnesses. *Id.*

Considering and weighing all of the evidence at trial, as we must in a factual sufficiency review, we conclude that the jury's verdict was not against the great weight and preponderance of the evidence such that it is clearly wrong and unjust. *See Benavente*, 312 S.W.3d at 748. The only evidence of causation was the parties' testimony, which was inconsistent with each other, and the jury resolved these inconsistencies in favor of Cardenas and against Guerrero. We therefore hold that the evidence is factually sufficient to support the jury's verdict. We overrule Guerrero's seventh issue.

Conclusion

We hold that we have jurisdiction over this appeal. We affirm the judgment of the trial court.

April L. Farris
Justice

Panel consists of Justices Kelly, Hightower, and Farris.