NO. 12-19-00040-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

FTS INTERNATIONAL SERVICES, LLC AND BILL HERBERT ACKER, APPELLANTS	***§***	***APPEAL FROM THE 115TH***
	§	***JUDICIAL DISTRICT COURT***
V.		
JOSHUA PATTERSON, APPELLEE	***§***	***UPSHUR COUNTY, TEXAS***

MEMORANDUM OPINION

FTS International Services, LLC and Bill Herbert Acker appeal the trial court's judgment awarding Joshua Patterson $26,311,337.09 in actual damages and exemplary damages in the amount of $5,371,674.18 against FTS and $50,000 against Acker. FTS and Acker raise seven issues on appeal. We reverse the trial court's judgment and remand for a new trial.

BACKGROUND

At approximately 1:05 p.m. on September 15, 2013, Patterson drove his pickup truck through Ore City, Texas, on his way to a luncheon for a member of his church. He noticed an FTS semi-truck, later determined to be driven by Acker, speeding up and slowing down in a somewhat erratic pattern. As they entered the city limits, Acker's truck drifted into Patterson's lane, colliding with his vehicle. The collision was recorded on a dashcam inside Acker's truck, which showed that he took his hands off the wheel, resulting in the truck drifting into Patterson's lane impacting his vehicle on his right rear bumper and fender area. At the time of the collision, Patterson traveled at approximately forty miles per hour, and according to Acker's dashcam, his truck traveled at forty-four miles per hour.

They pulled over and Acker apologized for causing the collision. Ore City Police Department Officer Tashia Wilson responded to the call for assistance. Patterson indicated that

he was unhurt, felt fine, and he had no cuts, abrasions, or other visible injuries. Officer Wilson did not observe any signs of impairment on Acker's part. The officer cited Acker for failure to control his speed, to which he later pleaded "guilty." Determining that neither Acker nor Patterson were injured, Officer Wilson released the parties. Because Patterson's vehicle was still drivable and he did not believe he had been injured, he drove his truck to the luncheon.

Although not required by federal regulations, just a few hours after the collision, FTS required Acker to take a drug test. Prior to receiving the results, FTS terminated Acker's employment because the collision occurred while on FTS instituted probation for a prior incident he had while operating his FTS truck. A few days after terminating Acker, FTS received Acker's drug test results, which were positive for marijuana, along with amphetamine and methamphetamine metabolites.

Meanwhile, Patterson began to experience soreness on the right side of his neck on the evening of the collision and sought treatment at Good Shepherd Medical Center in Longview the following day. The treating health care providers performed an examination and conducted an X-ray, which was "negative." His pain was described at worst as "moderate." The physician diagnosed Patterson with a cervical strain, provided medications for the pain and inflammation, and cleared him for work two days later. On Patterson's way home, he spoke with his father, who told him to protect himself and consult with a chiropractor and an attorney. Accordingly, he consulted with counsel.

After retaining counsel, Patterson saw Dr. Barry Pilcher in Gilmer for traditional chiropractic treatment for approximately three months. According to Dr. Pilcher and Patterson, his condition improved but did not fully resolve. Therefore, Dr. Pilcher referred Patterson to Dr. Aaron Calodney, a pain specialist who ultimately performed seven cervical epidural injections on Patterson between January 2014 and June 2016. Those injections brought relief from the pain and inflammation Patterson suffered, but with each successive injection, Patterson claimed they were less effective. Dr. Calodney's office performed two neurotomies, a procedure where the doctor surgically burns or cuts a nerve to produce sensory loss and pain relief, which provided Patterson relief for approximately five months per procedure. In August 2016, because Patterson's pain did not fully resolve, Dr. Calodney referred Patterson to Dr. Charles Gordon, a surgeon who works with Dr. Calodney.

Dr. Gordon ultimately performed a disc replacement three years after the accident in October 2016. During this entire three-year time period, Patterson continued to perform his job as a crane operator at Nucor Steel. Approximately four months after the surgery, investigators hired by FTS captured surveillance of Patterson performing normal life activities, including picking up his then fifty-pound daughter and carrying her to his truck. Nevertheless, despite an offer for lighter duty work by his employer, Patterson believed he was incapable of working in the future. His physicians agreed. His employer requested documentation from his doctors showing his inability to work, but Patterson never provided it. Instead, he ultimately resigned.

In Patterson's petition, he alleged not only that FTS was vicariously liable for Acker's negligence while in the course and scope of his employment, but that FTS was directly liable for its negligence in hiring, training, supervising, and retaining Acker. Patterson also alleged a negligent entrustment theory against FTS. The matter ultimately proceeded to a jury trial. After a seven-day trial, which included a bifurcated trial on exemplary damages, the jury returned a verdict award to Patterson totaling $101,361,337.09. The jury found that Acker and FTS were both negligent and apportioned responsibility seventy percent to Acker and thirty percent to FTS.

The jury awarded damages to Patterson as follows: (1) $131,191.96 and $612,578.80 in respective past and future medical expenses; (2) $67,066.33 and $1,500,000 in past and future lost earning capacity; (3) $2,000,000 and $8,000,000 in past and future physical pain; (4) $2,000,000 and $4,000,000 in past and future mental anguish; (5) $3,000,000 and $5,000,000 in past and future physical impairment; and (6) $500.00 in past disfigurement. The jury also found that the harm to Patterson resulted from the gross negligence of Acker and FTS and assessed $75,000,000 and $50,000 in exemplary damages respectively against FTS and Acker.

The trial court applied the exemplary damages cap calculation, which reduced the amount of recoverable exemplary damages against FTS to $5,371,674.18. Accordingly, on November 12, 2018, the trial court signed a judgment against Acker and FTS jointly and severally, awarding Patterson $26,311,337.09, plus prejudgment interest in the amount of $1,661,631.19.[1] The trial court also awarded Patterson exemplary damages in the amount of $5,371,674.18 against FTS and $50,000 against Acker.

[1] The trial court also awarded additional prejudgment interest in the amount of $986.13 per day from October 30, 2018 through November 11, 2018. The trial court assessed $40,202.24 in court costs against Acker and FTS.

FTS and Acker filed a motion for new trial, alleging in pertinent part that the jury awarded excessive damages. They also alleged that FTS received an anonymous letter after the trial stating that Patterson was not actually injured in the accident but at his prior place of employment, and that he bragged to the author that he was "gonna squeeze a bunch of money out of this fender bender," that counsel told him not to return to work to increase the value of the case, and that counsel continues to pay all of Patterson's bills. As part of its motion, FTS and Acker sought posttrial discovery pertaining to the letter. The trial court denied the motion for new trial. This appeal followed.

DIRECT NEGLIGENCE CLAIMS AGAINST FTS[2]

In FTS's fourth issue, it contends that the evidence is insufficient to support the jury verdict on the direct negligence theories of liability because the Texas Supreme Court has not adopted these claims as viable theories under Texas law, and that Patterson failed to provide sufficient evidence proving them.

Standard of Review

An appellate court conducting a legal sufficiency review considers the evidence in the light most favorable to the verdict, indulging every inference that would support it. ***City of Keller v. Wilson***, 168 S.W.3d 802, 824 (Tex. 2005). A party attacking the legal sufficiency of the evidence to support an adverse finding on an issue for which it did not have the burden of proof at trial must show that no evidence supports the adverse finding. ***Exxon Corp. v. Emerald Oil & Gas Co., L.C.***, 348 S.W.3d 194, 215 (Tex. 2011).

The appellate court must credit favorable evidence if a reasonable fact finder could, and disregard contrary evidence unless a reasonable fact finder could not. ***City of Keller***, 168 S.W.3d at 823. A "no evidence" challenge must be sustained when (1) the record discloses a complete absence of a vital fact, (2) the court is barred by the rules of law and evidence from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a scintilla, or (4) the evidence conclusively establishes the opposite of a vital fact. ***Id.*** at 810. The record contains more than a mere scintilla of evidence if reasonable minds

[2] We address FTS's issue concerning the sufficiency of the evidence to support Patterson's direct negligence claims against FTS, the related evidentiary issues discussed below, and the parties' causation issues, because they would afford the greatest relief if successful—rendition of judgment in their favor. *See* TEX. R. APP. P. 43.3; ***Bradleys' Elec., Inc. v. Cigna Lloyds Ins. Co.***, 995 S.W.2d 675, 677 (Tex. 1999) (per curiam).

could form differing conclusions about a vital fact's existence. ***Kindred v. Con/Chem, Inc.***, 650 S.W.2d 61, 63 (Tex. 1983). Conversely, the record is insufficient when the evidence offered to prove a vital fact is so weak as to do no more than create a mere surmise or suspicion of its existence. ***Id.***

An appellate court reviews the factual sufficiency of the evidence supporting a finding by considering and weighing all the evidence in a neutral light. ***Cain v. Bain***, 709 S.W.2d 175, 176 (Tex. 1986). The reviewing court will set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. ***Id.***

Applicable Law

Negligent hiring, training, supervision, and retention claims are all simple negligence causes of action based on an employer's direct negligence rather than on vicarious liability. *See* ***Dangerfield v. Ormsby***, 264 S.W.3d 904, 912 (Tex. App.—Fort Worth 2008, no pet.). Generally, a cause of action for simple negligence arises when a person breaches a legal duty and that breach proximately causes damages. ***Id.***

The Texas Supreme Court has not ruled definitively on the existence, elements, and scope of torts such as negligent screening, training, supervision, and retention. *See* ***JBS Carriers, Inc. v. Washington***, 564 S.W.3d 830, 842 (Tex. 2018). However, even though the Texas Supreme Court has "never expressly set out what duty an employer has in hiring employees," it has recognized "there is a broad consensus among Texas courts" that these claims require "the plaintiff suffer some damages from the foreseeable misconduct of an employee hired pursuant to the defendant's negligent practices." ***Wansey v. Hole***, 379 S.W.3d 246, 247 (Tex. 2012). This court is one of the courts that has recognized these direct negligence claims such as negligent hiring, screening, training, supervision, and retention. *See* ***Douglas v. Hardy***, 600 S.W.3d 358, 367-68 (Tex. App.—Tyler 2019, no pet.).

In the context of these claims, Texas courts have recognized that an employer may owe a duty to the public to ascertain the qualifications and competence of the employees it hires, particularly when those employees are engaged in occupations that require skill and experience, and that could be hazardous to the safety of others. *See* ***id.*** (citing ***Morris v. JTM Materials, Inc.***, 78 S.W.3d 28, 49 (Tex. App.—Fort Worth 2002, no pet.)). Therefore, to impose liability on an employer under the theory of negligent hiring or retention, a plaintiff must show the employer's failure to investigate, screen, or supervise its employees proximately caused the

injuries incurred by the plaintiff. ***Fifth Club, Inc. v. Ramirez***, 196 S.W.3d 788, 796 (Tex. 2006). To establish breach in a negligent hiring claim, the plaintiff must show that the defendant created an unreasonable risk of harm to others by hiring someone it knew, or by the exercise of reasonable care should have known, was incompetent or unfit. ***Dangerfield***, 264 S.W.3d at 912. Similarly, for negligent retention, the plaintiff must show that the employer retains an incompetent or unfit employee and knows, or by the exercise of reasonable care should have known, was incompetent or unfit, thereby creating an unreasonable risk of harm to others. *See* ***CoTemp, Inc. v. Hous. W. Corp.***, 222 S.W.3d 487, 492 (Tex. App.–Houston [14th Dist.] 2007, no pet.). To impose liability on an employer for negligent supervision, a plaintiff must show that an employer's failure to supervise its employees proximately caused his injuries. ***Dangerfield***, 264 S.W.3d at 913. "To establish a claim for negligent training, a plaintiff must prove that a reasonably prudent employer would have provided training beyond that which was given and that failure to do so caused his injuries." ***Id.*** at 912–13.

Finally, to establish liability under a negligent entrustment theory for injuries arising from a vehicle collision, the plaintiff must show that: (1) the defendant entrusted the vehicle to the driver; (2) the driver was unlicensed, incompetent, or reckless; (3) at the time of the entrustment, the defendant knew or should have known that the driver was an unlicensed, incompetent, or reckless driver; (4) the driver was negligent on the occasion in question; and (5) the driver's negligence proximately caused the accident. ***Goodyear Tire & Rubber Co. v. Mayes***, 236 S.W.3d 754, 758 (Tex. 2007). Because negligent entrustment "requires a showing of more than just general negligence," it is not enough to show, for example, that a driver might have a momentary lapse in judgment or otherwise act negligently. ***4Front Engineered Sols., Inc. v. Rosales***, 505 S.W.3d 905, 910-11 (Tex. 2016).

Negligent Hiring, Training, Supervision, and Retention are Valid Claims in Texas

FTS argues that the Texas Supreme Court has never expressly adopted direct negligence theories of liability where the employer is liable, not for vicarious liability for the negligence of its employees while in the course and scope of their employment, but for the employer's own independent negligence on such theories as negligent hiring, training, supervision, and retention. As we explained above in describing the applicable law, we have adopted these theories as cognizable causes of action, and the Texas Supreme Court recognizes that Texas courts have

broad consensus in applying these direct negligence claims as viable theories of liability. *See* ***Wansey***, 379 S.W.3d at 247; ***Douglas***, 600 S.W.3d at 367-68.

FTS also argues that it stipulated to liability for Acker's negligence under the respondeat superior doctrine, and consequently, the direct liability claims became irrelevant. Some Texas courts, including this court, have underscored that, in cases involving only ordinary negligence, any direct liability claim for negligence and a claim for vicarious liability under a theory of respondeat superior are generally "mutually exclusive modes of recovery." *See, e.g.,* ***Rosell v. Cent. W. Motor Stages, Inc.***, 89 S.W.3d 643, 654 (Tex. App.—Dallas 2002, pet. denied) ("Where only ordinary negligence is alleged, the case law supports . . . that negligent hiring or negligent entrustment and respondeat superior are mutually exclusive modes of recovery."); ***Estate of Arrington v. Fields***, 578 S.W.2d 173, 178 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.). Accordingly, these courts have refused to permit the plaintiff to proceed with a direct liability theory like negligent hiring against the employer where the derivative liability of the owner has already been established by a stipulation that its employee was negligent while in the course and scope of his employment. ***Estate of Arrington***, 578 S.W.2d at 178. In ***Arrington***, this court reasoned that "[o]nce the applicability of the respondeat superior doctrine is established, the competence or incompetence of the servant and the care which was exercised in his employment are immaterial issues." ***Id.***

However, if a plaintiff alleges gross negligence and seeks exemplary damages against the employer or employee, a stipulation of vicarious liability does not preclude proof of such direct liability theories, as an employer may be guilty of gross negligence in hiring or retaining an incompetent employee. *See* ***id.*** at 179. Patterson alleged that FTS acted with gross negligence in its hiring, training, supervision, and retention of Acker, along with its entrustment of its truck to him. It also alleged that Acker was grossly negligent. Accordingly, it was proper to submit these direct liability claims to the jury. *See* ***Rosell***, 89 S.W.3d at 654; ***Estate of Arrington***, 578 S.W.2d at 178-79.

Negligent Hiring

Acker applied to FTS in 2009. The company has a policy that a prospective employee cannot have three convictions for moving violations in the thirty-six months preceding the date that FTS requests the employee's motor vehicle record (MVR). When Acker applied to FTS, he

listed only one ticket in the past thirty-six months, a speeding violation in August 2009. Moreover, he did not answer the question concerning whether he ever had a suspended license.

FTS has a policy to obtain an applicant's driving record, and FTS used a third-party provider to retrieve Acker's driving record, which revealed Acker had a conviction for a 2007 speeding ticket within the thirty-six-month period. Therefore, FTS was on notice that Acker was not truthful on his application. Instead of further investigating, FTS hired Acker. Karen Thornton, FTS's Chief Administrative Officer and corporate representative at trial, admitted that had the company obtained the actual driving record from the State as opposed to a third party private vendor, it would have shown that Acker had a third conviction within the thirty-six month period and that his license had previously been suspended, rendering him ineligible for FTS employment as a driver.

Furthermore, after FTS employed Acker as a driver, it later obtained another MVR for Acker that correctly showed his three convictions and that he was ineligible for employment when it hired him. Of course, by that time, the earliest violation was outside the thirty-six-month period.

FTS's official policy allowed for a written exception to its requirements, but there is no evidence that FTS drafted a written exception authorizing Acker's employment even though he did not satisfy FTS's employment requirements. For example, after it discovered that he should not have been hired, FTS could have followed that process and drafted a written exception to his ineligibility because he safely operated the truck without any incidents at that time. Thornton admitted that Acker should not have been hired or retained due to these facts. Nicholas Hubert, FTS's former "Director of Sand Supply Chain," and David Hedgepeth, FTS's trucking expert who was a former Texas state trooper, testified similarly. Hubert admitted that it appeared that FTS negligently placed Acker on Texas highways in violation of the company's policies. Hedgepeth admitted that FTS "overlooked" these discrepancies and allowed them to "slide through the cracks." Accordingly, the jury could have reasonably concluded that FTS was negligent when it hired Acker.

Negligent Training

With respect to Patterson's negligent training claim, Acker testified that the company had no formal driver training program other than an informal orientation when he was first hired. He explained that the training program was that an FTS supervisor named "Purple" told Acker to

follow his father-in-law, who had helped him get the driver position at FTS. He testified that his father-in-law taught him how to load and unload the trailers, which was the extent of his training.[3] Moreover, he stated that he never really received any formal training thereafter, including in drug policies and safety procedures, such as proper hand positioning while driving. He also stated that there were no visits from personnel at the corporate offices to provide any training. Rather, he testified that he was presented with forms reciting that he received training in "accident prevention" and "defensive driving" even though he had not received it, and he was told to simply sign the forms. Acker also admitted that he did not receive any training on substance abuse or testing. Accordingly, the jury could have reasonably concluded that FTS was negligent when it failed to provide a sufficient training program.

Negligent Supervision and Retention

Next, the jury could have also reasonably determined that FTS was negligent in supervising and retaining Acker. While employed as an FTS driver, Acker had four incidents in his FTS truck while on duty, three of which required that he be suspended without pay. Furthermore, Acker was on FTS probation at the time of his collision with Patterson. The first incident occurred in 2011 and involved Acker flipping his truck on its side when a private oilfield service road gave way as he moved to the side of the road to avoid an oncoming vehicle. Acker believed that this incident was not his fault. Nevertheless, FTS assigned this accident as a "Level 3" incident, requiring that he be suspended for seven days without pay.[4] The second incident, which occurred in 2012, arose when Acker was warned for speeding. The third incident, also in 2012, occurred when Acker "clipped" another FTS truck in a Walmart parking lot causing damage to the truck. This was also a Level 3 violation, resulting in a seven-day suspension and probation for sixty days. The fourth incident occurred in 2013 at a weigh station causing damage to the truck. Acker failed to report the damage. As a result, FTS suspended Acker without pay for three days and placed him on probation for sixty days. In fact, Acker was on FTS probation for this fourth incident at the time of the collision with Patterson. Yet, despite this knowledge, FTS continued to employ Acker.

[3] Acker also explained that he had experience driving trucks, attended truck driving school, and had driven for other companies in the past.

[4] The only higher level for any incident is "Level 4," which results in mandatory termination of FTS employment.

Thornton admitted that FTS knew or should have known that Acker was a risky driver and that he should not have been employed at the time of the collision. Despite this knowledge, Patterson presented evidence from Acker's employment evaluation that the company recommended him as a new hire trainer approximately four months before the accident. Based on this evidence, a jury could reasonably conclude that FTS knew or should have known that it was unreasonable in its supervision of Acker and that it should not have retained Acker as a driver at the time of the collision.

Negligent Entrustment

With regard to liability for negligent entrustment, FTS contends that the evidence is insufficient on the second and third elements—that Acker was unlicensed, incompetent or reckless, and that FTS knew or should have known that Acker was an unlicensed, incompetent, or reckless driver. Furthermore, FTS argues that the evidence shows that the accident was caused when Acker momentarily removed his hands from the steering wheel, and it is not enough to show that this momentary lapse in judgment caused the accident. *See* ***4Front Engineered Sols.***, 505 S.W.3d at 910-11.

FTS points out that Acker's commercial driver's license has never been suspended, he drove commercial vehicles "a couple hundred thousand miles" without receiving a ticket prior to his employment with FTS, that he received his last ticket while in his personal automobile more than four years prior to the accident, and that he had never been in an accident on a public road or in an accident that resulted in personal injury prior to this incident. But this ignores the four incidents he had while working for FTS, including being on company instituted probation at the time of the collision with Patterson. Moreover, Thornton admitted that FTS had the opportunity to review his employment status after these incidents, yet it continued to employ him, and that it should not have hired or retained him. In fact, Thornton admitted that "we should have known," certainly by the third incident where they suspended him for seven days and placed him on probation for sixty days that Acker was a "risky driver" and that he could "seriously injure" the motoring public. She further acknowledged that there were several instances in which FTS had the opportunity to discover that Acker should not have been hired or retained as an FTS employee.

The jury could have reasonably concluded that Acker was an incompetent or reckless driver, that FTS knew or reasonably should have known this fact, and that there was evidence to

support FTS's actual awareness of this fact. Moreover, these four incidents show a pattern of risky driving, which the jury could reasonably conclude amounted to more than a momentary lapse in judgment. Accordingly, the evidence is legally and factually sufficient to support the jury's finding supporting that FTS negligently entrusted its tractor trailer to Acker.

In conclusion, viewing the evidence both in the light most favorable to the verdict, as well as in a neutral light, we hold that the evidence is legally and factually sufficient to support the jury's conclusion that FTS was independently negligent under the direct liability theories of negligent hiring, training, supervision, retention, and entrustment. Therefore, FTS's fourth issue is overruled.

ADMISSIBILITY OF EVIDENCE

As part of issue one, FTS and Acker contend that the trial court abused its discretion when it admitted evidence of Acker's post-accident drug test results, along with evidence of a 2011 DOT governmental audit documenting failings in FTS's employment screening procedures and randomized drug test program on its drivers.[5]

Standard of Review and Applicable Law

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. ***Bay Area Healthcare Grp., Ltd. v. McShane***, 239 S.W.3d 231, 234 (Tex. 2007). A trial court abuses its discretion if it rules arbitrarily or unreasonably or without reference to guiding rules or principles. ***Bowie Mem'l Hosp. v. Wright***, 79 S.W.3d 48, 52 (Tex. 2002). We will not reverse an erroneous evidentiary ruling unless the error probably caused the rendition of an improper judgment or prevented a proper presentation of the appeal. *See* TEX. R. APP. P. 44.1(a); ***Sw. Elec. Power Co. v. Burlington N. R.R. Co.***, 966 S.W.2d 467, 474 (Tex. 1998). A successful challenge to a trial court's evidentiary rulings typically requires the complaining party to demonstrate that the judgment turns on the particular evidence excluded or admitted. ***Interstate Northborough P'ship v. State***, 66 S.W.3d 213, 220 (Tex. 2001).

Relevant evidence is presumed to be admissible. *See* TEX. R. EVID. 402. Evidence is relevant if "(a) it has any tendency to make a fact more or less probable than it would be without

[5] In FTS's brief, it argued in its first issue that admissibility of the post-accident drug test and 2011 governmental audit was part of the inflammatory evidence admitted that should require a new trial, but we believe these issues pertain more to its fourth issue regarding its liability for Patterson's direct negligence theories.

the evidence; and (b) the fact is of consequence in determining the action." TEX. R. EVID. 401. However, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. TEX. R. EVID. 403; *see* ***Diamond Offshore Servs. Ltd. v. Williams***, 542 S.W.3d 539, 544 (Tex. 2018).

Admissibility of Acker's Post-Accident Drug Test Results

Acker admitted using methamphetamine and marijuana since his twenties but discontinued using drugs when he began working for FTS.[6] He stated that he wanted to clean up his life after he became married. In fact, it was his father-in-law, an FTS employee at the time, who assisted him in obtaining employment at FTS. However, after developing marital problems, he began using drugs again approximately two weeks prior to the collision with Patterson. Acker claimed that he used drugs only on his days off, including the night before the accident. During trial, Patterson's counsel characterized this as a "three-day binge," because Acker did not work on the three-day period prior to the accident and admitted using drugs on those days. During Acker's deposition, he initially admitted to using methamphetamine and marijuana the night before the accident. After a short break, Acker changed his testimony and stated that he used only marijuana the night before the accident. This change in testimony was presented to the jury at trial. The jury also heard evidence from trucking expert David Hedgepeth, a former state trooper, who testified that based on his review of the records, he believed Acker was under the influence of drugs at the time of the collision. The trial court admitted Acker's post-accident drug test results over objections by FTS and Acker.

Generally, drug use, without further evidence of negligence, is inadmissible. *See* ***Bedford v. Moore***, 166 S.W.3d 454, 465 (Tex. App.—Fort Worth 2005, no pet.). ***Bedford*** involved a driver who tested positive for methamphetamine after an accident. *See* ***id.*** at 464. The reviewing court upheld the exclusion of evidence by holding that "evidence of drug usage must provide some explanation for the negligence and improper conduct." ***Id.*** at 465. ***Bedford*** is distinguishable from the facts in this case. Acker testified that he did not believe he was under the influence of drugs at the time of the collision. Rather, he stated that he was thinking of his wife and kids, who recently left him, which is why he momentarily lost concentration, removed his hands from the wheel, and drifted into Patterson's lane, thereby causing the collision. The

[6] Patterson's counsel repeatedly attempted to characterize Acker's drug use, particularly with marijuana, as continuous since his twenties, including throughout his employment at FTS.

post-accident drug test results provide alternative evidence to explain Acker's negligence in losing concentration and removing his hands from the wheel: he could have been under the influence of drugs he admitted taking the evening before the collision. Under these circumstances, we cannot conclude that the trial court abused its discretion in admitting the post-accident drug test results. *See* ***id.***

Admissibility of 2011 Drug Test Program Audit

Also as part of issue one, FTS contends that the trial court abused its discretion in admitting evidence of a 2011 government regulatory compliance audit, in which the Department of Transportation (DOT) concluded that FTS failed to comply with regulatory randomized drug testing standards on its drivers. Because of the violations, the DOT downgraded FTS to a "conditional" compliance status. FTS attempted to make improvements in its program, and on October 20, 2011, applied for a status upgrade, which the DOT denied on February 3, 2012. FTS made further improvements and on June 27, 2012, the DOT reinstated FTS's status to "satisfactory," which is the highest rating.

FTS argues that the audit and findings predated the accident by nearly two years, and was not relevant or the probative value was substantially outweighed by the prejudicial effect it would have on the jury. However, FTS opened the door to this evidence. *See* ***Comm'n for Lawyer Discipline v. Cantu***, 587 S.W.3d 779, 787 (Tex. 2019) (stating that otherwise inadmissible evidence may become admissible when party opens the door by leaving false impression with jury that invites other side to respond). FTS's counsel elicited testimony from Thornton that FTS performed the post-accident drug test even though it was not required to do so under applicable governmental regulations. Moreover, in response to defense counsel's questioning, Thornton testified that "[t]o our knowledge our safety rating is leading edge. It's about three or four times better than the industry average, depending on the source that you use." This testimony was congruent with defense counsel's opening statement that FTS has the strictest policies in the industry and the highest safety rating.

It was after this testimony that Patterson's counsel offered evidence related to the audit. Since the audit occurred approximately two years prior to the collision, and FTS was in compliance with DOT drug testing procedures at the time of the collision, the audit was arguably inadmissible under Texas Rules of Evidence 401 through 403. However, we cannot say it was an abuse of discretion when the trial court admitted the evidence to correct the impression left

with the jury that FTS was an industry leader in safety. Once FTS went beyond establishing that it had drug tested Acker four months before the accident and attempted to show that it was the industry leader in safety, this opened the door to the evidence to correct the impression left with the jury.

Additionally, even if the trial court abused its discretion by admitting the evidence, it would not have been harmful because other sufficient evidence established liability for the relevant associated claims of negligent supervision and retention. For example, as we earlier discussed, Acker had four prior incidents in his FTS truck while on duty, was subject to FTS instituted probation for two of those incidents, and was on FTS probation at the time of his collision with Patterson. Three of the incidents were Level 3, and he was suspended without pay for them. Yet, despite this knowledge, FTS continued to employ Acker. A jury could reasonably conclude, even without the 2011 audit, that FTS knew or should have known that it was unreasonable in its supervision and retention of Acker. Therefore, we cannot conclude that the admission of this evidence is reversible error, especially in light of the fact that FTS opened the door to its admission. We overrule this portion of issue one.

CAUSATION

In issue two, FTS and Acker contest the legal and factual sufficiency of the evidence to support the conclusion that Patterson failed to establish proximate cause, and that Patterson's treating chiropractor and physician experts offered conclusory testimony.

Applicable Law

Establishing causation in a personal injury case requires a plaintiff to prove that the conduct of the defendant caused an event and that this event caused the plaintiff to suffer compensable injuries. ***JLG Trucking, LLC v. Garza***, 466 S.W.3d 157, 162 (Tex. 2015). Further, expert testimony is necessary to establish causation as to medical conditions outside the common knowledge and experience of jurors. ***Guevara v. Ferrer***, 247 S.W.3d 662, 665 (Tex. 2007). The expert must, to a reasonable degree of medical probability, explain how and why the negligence caused the injury. ***Jelinek v. Casas***, 328 S.W.3d 526, 536 (Tex. 2010). The ultimate question is whether the negligent act or omission is shown to be a substantial factor in bringing about the harm and without which the harm would not have occurred. ***Windrum v. Kareh***, 581 S.W.3d 761, 778–79 (Tex. 2019).

If evidence presents other plausible causes of the injury or condition that could be negated, the proponent of the testimony must offer evidence excluding those causes with reasonable certainty. ***Transcontinental Ins. Co. v. Crump***, 330 S.W.3d 211, 218 (Tex. 2010). However, a plaintiff is not required to establish causation in terms of medical certainty. ***Hospadales v. McCoy***, 513 S.W.3d 724, 737 (Tex. App.—Houston [1st Dist.] 2017, no pet.). Finally, the medical expert's testimony can be sufficient evidence of causation when it is based on his physical examination of the plaintiff, his review of the MRI, and the plaintiff's description of the accident. *See* ***id.*** at 738.

Discussion

FTS and Acker contend that the evidence is insufficient to support causation because Patterson's treating physicians failed to rule out Patterson's preexisting pathologies and that there is no evidence to support that he suffered from a thoracic injury resulting from the collision, as opposed to a cervical injury.

Patterson presented to Good Shepherd Medical Center in Longview the day after the accident. The reason for the visit was "neck pain and shoulder pain" resulting from the accident. The physician noted that Patterson sustained neck and trapezius pain and injury to the neck and paraspinous muscles, and that "at worst the symptoms were moderate" with "no apparent associated signs or symptoms." The records also show that Patterson felt fine the day of the accident, began getting a little stiff before bed, and woke with increased pain. The physician noted that Patterson related that he has not experienced similar episodes in the past and denied a history of neck or shoulder injuries. Patterson denied numbness or tingling in the arms or weakness in his upper extremities. The physician interpreted the X-ray and found no evidence of a fracture or significant subluxation, and no signs of significant disc disease, and concluded that the cervical spine was "unremarkable."

At trial, Dr. Pilcher testified that the X-ray would not reveal soft tissue injuries. Also at trial, FTS and Acker stipulated that steel is harder than bone, and that force from the collision travels through the vehicle and its occupants. All of Patterson's treating physicians, along with Dr. William Blair who was FTS's expert, testified that the amount of property damage to the vehicle is not necessarily directly proportional to the severity of the personal injury suffered in a collision. They testified that they have all seen minor collisions resulting in serious injuries and major collisions causing no or minimal injuries. Dr. Calodney did admit though that generally

the higher the velocity of the vehicle, the higher the likelihood one would expect for serious injury.

Patterson performed heavy equipment work in the past, including up until his surgery in 2016 as a crane operator. His job required him to wear a heavy helmet and turn his head repetitively. Dr. Gordon stated that it is possible that this work could have led to a cervical injury. However, he did not believe that to be the case, because based on Patterson's MRIs, the injury appeared to be an acute traumatic injury from a single event, and not related to chronic degenerative issues or repetitive movements. Dr. Pilcher and Dr. Calodney testified that acute traumatic injury to the disc between the fifth and sixth cervical vertebrae (C5-C6), the injury that Patterson developed, is the most common soft tissue injury suffered in automobile collisions. Dr. Pilcher, Dr. Calodney, and Dr. Gordon all testified that the collision proximately caused Patterson's injuries to his cervical spine to a reasonable degree of medical probability.

Dr. Blair, who testifies almost exclusively for defendants in personal injury cases, reviewed Patterson's prior medical records, and stated that "in all probability" the pathologies noted on his MRIs predated the accident with Acker, Patterson did not suffer from the conditions determined by his treating physicians, the epidural injections would not treat Patterson's ailments, and the disc replacement surgery was unnecessary. However, he admitted that he never examined Patterson, there was no evidence suggesting to him that Patterson was malingering, and he acknowledged that it was possible that Patterson could suffer pain for the remainder of his life.

Dr. Pilcher, the chiropractor who first treated Patterson after he hired counsel, diagnosed Patterson with a "hyper flexion-hyperextension injury to the cervical spine," and cervical radiculopathy, a disorder causing nerve root impingement. He testified that the 2013 MRI revealed a "profound" disc protrusion at the C5-C6 disc that in reasonable chiropractic probability was caused by the collision.

Pilcher noted that Patterson's injuries continued to improve throughout his care, but the pain persisted enough that he referred Patterson to Dr. Calodney, a pain management doctor. Dr. Calodney conducted a physical exam on Patterson, reviewed the MRI, and concluded that Patterson suffered from disc herniation, radicular pain, and back pain and that this resulted from the collision in reasonable medical probability. Dr. Calodney provided epidural injections to numb the pain and relieve his inflammation. Patterson stated that the injections initially provided

near complete relief, but each successive injection provided less relief. Accordingly, Dr. Calodney referred Patterson to Dr. Gordon, a surgeon.

Dr. Gordon examined Patterson, who explained that he had his symptoms since the collision in 2013. A second MRI was performed in 2016 after Patterson felt a "pop" in his neck, and Dr. Gordon explained that the disc injury at C5-C6 remained unchanged when compared to the 2013 MRI. After discussing his options, Dr. Gordon recommended, and Patterson agreed, that he should undergo a disc replacement. Dr. Gordon performed the surgery, which he said went well and Patterson recovered from it. Dr. Calodney also reviewed the post-surgery imaging, and opined that the placement of the replacement disc is "good," remains in a good position, the imaging "looks great," and the alignment "looks perfect" and "very well placed."

Dr. Calodney testified that prior to the surgery, the MRIs show that the disc was herniated, but it was deflected, meaning that it did not compress the cord or cause distinct cord edema. Dr. Calodney admitted that a patient is more likely to have symptoms on a compressed cord, but the patient will still likely present symptoms with a herniation like Patterson's that deflects the cord. In contrast, Dr. Gordon testified that when he performed the surgery, he learned that the "posterior longitudinal ligament was opened and a very large disc herniation [was] identified compressing the nerve roots and the ventral spinal cord." He explained that the herniation was "very impressive, the size of the disc[,] and the compression on the nerves," and he observed "substantial disc herniation compressing on the nerves. It was dramatic." Dr. Gordon explained that the MRIs do not always reveal the full extent of the injury, which he observed when he performed the surgery.

Dr. Gordon stated though that unfortunately, even though the surgery went well, it did not provide complete relief. He concluded that Patterson would feel pain for the rest of his life and not be able to work. Dr. Gordon did not explain how he reached this conclusion, such as whether further healing would not occur or how Patterson would never be able to perform any type of work for the rest of his life. Patterson's employer offered a light duty position that he ultimately refused, and he failed to provide any documentation from his health care providers, as required by his employer, to show his inability to work. Instead, he ultimately voluntarily resigned. Dr. Gordon testified to being unaware of any of this information.

Patterson was again referred to Dr. Calodney for further treatment in 2016 or 2017, but Patterson did not see him again until a few weeks before trial in 2018 to treat a thoracic

condition. Approximately four months after the surgery, investigators hired by FTS recorded Patterson walking normally at his daughter's school and picking her up, holding her in his arms, and carrying her to his vehicle. Patterson's daughter weighed approximately fifty pounds at the time. Patterson simply explained that he has good days and bad days, and that the day of the recording was a good day. He also explained he had to pick her up from school because she was ill and the act of carrying her resulted in him being unable to move normally the following week. Dr. Pilcher, Dr. Calodney, and Dr. Gordon viewed the video and stated that they could not conclude that Patterson was uninjured merely by viewing the video.

Dr. Pilcher, Dr. Calodney, and Dr. Gordon testified that Patterson reported no prior neck injury during treatment, and they were unaware that he sought treatment for right-sided cervical pain in 2009 and prior chiropractic treatment for back pain. Specifically, Patterson sought treatment at the Jefferson Life Center in September 2009. On the intake form, he listed his chief complaint as back stiffness and pain in his lower back and right side of his hip that hurts "all the time." Upon examination, the healthcare provider at Jefferson Life Center noted that he complained of cervical pain on the right side of his C4-C5 disc with associated muscle spasms and the right and left sides of his L4-L5 with associated muscle spasms which are worse on the right side. X-rays of the cervical and lumbar areas were "negative." We note that the 2009 injury to his C4-C5 disc is at a different location than the C5-C6 disc alleged to be damaged by the collision with Acker. Despite the fact that they were unaware of this information, the treating doctors testified that it did not affect their opinion that the 2013 collision with Acker in reasonable medical probability caused Patterson's injuries.

Patterson continued to work as a crane operator at Nucor for three years following the accident until his surgery in 2016. Patterson also told a Nucor human resources employee that his treating doctors "fixed one thing and messed up something else." In Dr. Calodney's testimony, Patterson's counsel asked why Patterson walked abnormally in the courtroom, and Dr. Calodney testified that he was treating him for thoracic pain just prior to the trial. With regard to the thoracic injury, the 2016 MRI showed not only the herniation to Patterson's C5-C6 disc, but also a mild herniation in Patterson's thoracic spine. Dr. Calodney testified that the machine for the 2016 MRI at Texas Spine and Joint Hospital provides more clarity and detail than at Open Imaging where Patterson had his 2013 MRI. Although Patterson waivered in his testimony, he testified to experiencing some pain that comes and goes in his mid-back since the accident. As

early as his treatment with Dr. Pilcher, Patterson reported having frequent mid-back pain since the accident, including the thoracic region. Dr. Gordon and Dr. Calodney testified that the injury to Patterson's cervical spine can cause degradation of the spinal segments above and below the cervical spine, which would include his thoracic spine, even after the disc replacement. After the surgery, Patterson complained of thoracic pain to Dr. Gordon's staff, who again referred him to Dr. Calodney. Patterson did not visit Dr. Calodney until 2018 shortly before the trial, but Dr. Calodney testified that he provided thoracic epidural injections, opined that Patterson would need more injections in the future, and estimated their cost. Neither FTS nor Acker provided any evidence controverting these conclusions.

All of the conflicts in the testimony and evidence was for the jury to resolve. *See* ***Golden Eagle Archery, Inc. v. Jackson***, 116 S.W.3d 757, 761 (Tex. 2003). Accordingly, based on our review of the record, we hold that the jury could have reasonably concluded that the collision proximately caused Patterson's C5-C6 disc injury, ensuing disc replacement surgery, and resulting thoracic injury. Therefore, the evidence is sufficient to support causation. FTS's and Acker's second issue is overruled.

We have concluded that the evidence is legally and factually sufficient to establish that FTS and Acker were negligent, and that their negligence proximately caused some compensable injury to Patterson. The issue remains, however, whether the amounts awarded are reasonable compensation for actual damages suffered by Patterson, or conversely, excessive.

EXCESSIVE DAMAGES

FTS and Acker contend in their third issue, which we hold to be dispositive, that the jury awarded excessive damages against them, necessitating a new trial.[7]

Review of Excessive Damages

"The courts of appeals are authorized to determine whether damage awards are supported by insufficient evidence—that is, whether they are excessive or unreasonable." ***Bentley v. Bunton***, 94 S.W.3d 561, 606 (Tex. 2002). We review the evidence for factual sufficiency when determining whether damages are excessive. *See* ***Maritime Overseas Corp. v. Ellis***, 971 S.W.2d 402, 406 (Tex. 1998). In evaluating a factual sufficiency challenge, we consider and weigh all

[7] As part of the jury's noneconomic damages award, it awarded Patterson $500.00 for past disfigurement. This award represents compensation for Patterson's surgical scar from the disc replacement surgery. Neither FTS nor Acker challenge the reasonableness of the disfigurement award. Accordingly, when we discuss the jury's award of noneconomic damages in this opinion, we do not include this amount.

the evidence in a neutral light and will set aside the finding only if the evidence is so weak or the finding is so against the great weight and preponderance of the evidence that it is clearly wrong and unjust. *See* ***Pool v. Ford Motor Co.***, 715 S.W.2d 629, 635 (Tex. 1986).

Not only must there be evidence of the existence of compensable noneconomic damages such as pain and suffering, mental anguish, and physical impairment, there must also be evidence to justify the amount awarded. *See* ***Bentley***, 94 S.W.3d at 606. While the impossibility of any exact evaluation of noneconomic damages requires that juries be given a measure of discretion in finding damages, that discretion is limited. *See* ***Saenz v. Fid. & Guar. Ins. Underwriters***, 925 S.W.2d 607, 614 (Tex. 1996). Juries cannot simply pick a number and put it in the blank. ***Id.*** They must find an amount that, in the standard language of the jury charge, "would fairly and reasonably compensate" for the loss. ***Id.*** "There must be evidence that the *amount* found is fair and reasonable compensation, just as there must be evidence to support any other jury finding." ***Id.*** (emphasis added). Furthermore, we review amounts awarded for noneconomic damages to ensure that any recovery compensates the plaintiff only for actual injuries and is not a disguised disapproval of the defendant. ***Bentley***, 94 S.W.3d at 605. Finally, we will set aside the verdict only where the record clearly indicates that the award was based on passion, prejudice, or improper motive, or is so excessive so as to shock the conscience. ***Sanchez v. Balderrama***, 546 S.W.3d 230, 237 (Tex. App.—El Paso 2017, no pet.).

Applicable Law to Noneconomic Damages

Plaintiffs may recover damages for physical pain. *See* ***Figueroa v. Davis***, 318 S.W.3d 53, 62 (Tex. App.—Houston [1st Dist.] 2010, no pet.). The duration of the pain is an important consideration. ***Id.*** Damages for future physical pain are recoverable if a jury could reasonably infer that the plaintiff will feel physical pain in the future. *See* ***id.*** at 63–64.

Mental anguish is a "relatively high degree of mental pain and distress" that is "more than mere disappointment, anger, resentment or embarrassment, although it may include all of these." ***Parkway Co. v. Woodruff***, 901 S.W.2d 434, 444 (Tex. 1995). "Even when an occurrence is of the type for which mental anguish damages are recoverable, evidence of the nature, duration, and severity of the mental anguish is required." ***Serv. Corp. Int'l v. Guerra***, 348 S.W.3d 221, 231 (Tex. 2011). With a physical injury, a plaintiff must show either a substantial disruption of his daily routine or a high degree of mental pain and distress. *See* ***id.*** To support an award for future mental anguish, a plaintiff must demonstrate a reasonable

probability that he would suffer compensable mental anguish in the future. ***Adams v. YMCA of San Antonio***, 265 S.W.3d 915, 917 (Tex. 2008).

Physical impairment encompasses the loss of the injured party's former lifestyle. ***Golden Eagle Archery***, 116 S.W.3d at 772. If other elements such as pain, suffering, mental anguish, and disfigurement are submitted, there is little left for which to compensate under the category of physical impairment other than loss of enjoyment of life." ***Id.*** A plaintiff generally must show that his physical impairment damages are substantial and extend beyond any pain, suffering, mental anguish, lost wages or diminished earning capacity. ***Gen. Motors Corp. v. Burry***, 203 S.W.3d 514, 552 (Tex. App.—Fort Worth 2006, pet. denied).

Discussion

"Reasonable compensation is no easier to determine than reasonable behavior—often it may be harder—but the law requires factfinders to determine both." ***Bentley***, 94 S.W.3d at 606 (quoting ***Saenz***, 925 S.W.2d at 614). "And the law requires appellate courts to conduct a meaningful evidentiary review of those determinations." ***Id.*** Texas courts, in their effort to quantify the excessive damages analysis, sometimes look to the ratio of nonpecuniary damage awards to those for pecuniary losses. *See* ***id.*** at 607 ("But all of this is no evidence that Bentley suffered mental anguish damages in the amount of $7 million, more than forty times the amount awarded him for damage to his reputation. The amount is not merely excessive and unreasonable; it is far beyond any figure the evidence can support."); ***Lane***, 494 S.W.3d at 351 ("This large ratio of non-pecuniary damages to pecuniary damages, coupled with the large amount of non-pecuniary damages awarded in this case when compared to other reported cases, and the apparent act of the jury of simply picking a number and putting it in the blanks lead us to the conclusion that the jury's awards of non-pecuniary damages [are] not supported by factually sufficient evidence."). Here, the $2,310,837.09 in economic damages are only approximately two percent of the total verdict of $101,361,337.09, when including compensatory and exemplary damages awarded by the jury. Even after applying the exemplary damages cap, economic damages are approximately seven percent of the total judgment amount excluding interest. Additionally, the economic damages award is less than ten percent of the $24,000,000.00 award of noneconomic damages. Although only a factor used to assist in our analysis, these amounts certainly suggest that the jury's award of noneconomic damages is excessive.

Also in the search for a quantifiable standard to tether an objective analysis, Texas courts have looked to awards in similar cases for guidance on whether the award under review is excessive.[8] *See, e.g.,* ***Anderson v. Durant***, 550 S.W.3d 605, 620–21 (Tex. 2018) (examining other similar cases to facts presented and signaling that award appeared excessive; consequently, it remanded to court of appeals to determine whether remittitur or new trial was appropriate). FTS and Acker provide a sample of verdicts achieved in similar cases involving a cervical herniation for a person in Patterson's age group showing an average total verdict of $359,860.13.[9] A review of appellate decisions involving similar, albeit more serious cases, reveals much lower verdicts. *See, e.g.,* ***Lara Munoz v. Castillo***, No. 13-18-00451-CV, 2020 WL 1856476, at *2, 5, 7, 15-17 (Tex. App.—Corpus Christi Apr. 9, 2020, no pet.) (mem. op.) (affirming $1.675 million in noneconomic damages when eighteen wheeler caused "severe" impact and plaintiff's vehicle was underneath the trailer, plaintiff's head stuck glass, diesel fuel from tractor trailer's ruptured fuel tanks leaking into his vehicle, and police extricated him from vehicle resulting in, among other injuries, a "relatively large disc herniation at L5-S1" and a "small disc herniation at C5-6 in the neck."); ***Primoris Energy Services Corp. v. Myers***, 569 S.W.3d 745, 750, 754 (Tex. App.—Houston [1st Dist.] 2018, no pet.) (affirming $2.64 million in noneconomic damages in case where eighteen wheeler backed into plaintiff riding a four-wheeler, resulting in severe four-level cervical disc herniation that impinged on his spinal cord, requiring a four-level fusion surgery of the cervical spine); ***Simmons v. Bisland***, No. 03-08-00141-CV 2009 WL 961522, at *1-2, 8-9 (Tex. App.—Austin Apr. 9, 2009, pet. denied) (mem. op.) (affirming $2.165 million noneconomic damages award to plaintiff involved in "violent" 18-wheeler collision, resulting in a "hangman's fracture of the C-2 vertebra" and a "compression fracture of the C-5 vertebra" that required cervical fusion surgeries, as well as elbow and rib fractures). Some courts have upheld noneconomic damages awards that were many times more than the economic damages in personal injury cases, but the overall awards were far less than in this case. *See, e.g.,* ***PNS Stores, Inc. v. Munguia***, 484 S.W.3d 503, 517–18 (Tex. App.—

[8] Some Texas courts have also held that it is virtually impossible to evaluate and assess the propriety of a jury award of noneconomic damages, and whether the amount was reasonable in comparison to other cases. *See* ***Primoris Energy Services Corp. v. Myers***, 569 S.W.3d 745, 760 (Tex. App.—Houston [1st Dist.] 2018, no pet.). We review it as a factor in our analysis, although not dispositive in and of itself. We are mindful that each case must be judged on its own circumstances. *See* ***id.***

[9] This figure removes two outlier cases, but even when considering those cases, the average total verdict is $1,923,342.21.

Houston [14th Dist.] 2016, no pet.) (affirming much lower awards of $150,000 for past pain and anguish and $520,000 for future pain and anguish where plaintiff had "terrible headaches and ringing in his ears for over two and one-half years, severe pain in his right eye upon exposure to light, and soreness and stiffness in his neck and shoulder," even though these damages were 58 times medical expenses).

While examining the ratio of economic damages and noneconomic damages and other similar cases is helpful in assessing whether the damages are excessive, we are mindful that each case is unique and must ultimately be measured on its own facts and record. *See* ***Primoris Energy Services Corp.***, 569 S.W.3d at 760. With these standards in mind, we assess the peculiar facts in this case that led to the jury's excessive damages award. And as we have stated, we review the entire record as part of this process. ***Maritime Overseas Corp.***, 971 S.W.2d at 406-07.

Change the Industry

Immediately after thanking the jury once it was empaneled, Patterson's counsel told it in his opening statement that this was the most important case that this court had seen in decades, and presented it with the opportunity to change the trucking industry. Specifically, he stated as follows:

> I want you to understand this is the single most important case that's been tried in this courtroom for decades. I told you in voir dire about a man by the name of Scotty Baldwin who tried a case in Marshall, Texas and he tried it to twelve jurors just like you and at the end of the case their verdict changed the world. It doesn't just change the world in America, it changed it all over and what it did is exposed asbestos and what it does to people. This case is important. The reason we know it's important, I promise you there's many people in this courtroom because they want to see what your verdict is. They want to see does this verdict change an industry.
>
> . . . .
>
> Why are we here? Because as history's told us, as Scott Baldwin proved, in this courtroom is Nelson Roach, his law firm in Daingerfield, Texas single handedly held the tobacco industry at bay, single handedly and that was over in Dangerfield. Now we're in Gilmer. At the end of this case it's my job to present the evidence to you so that you can look at their conduct, you can look at our conduct and you can say what's fair, is it time to stop it, or do we let it keep going on. I submit to you after you hear it all it's going to resonate that you got to stop it.
>
> . . . .
>
> Ladies and Gentlemen, I submit to you that by the end of this case when you've heard all the evidence there's one thing that's going to resonate and resonate, resonate, why are we here. It's because you have to stop them. Because I can't. Only through your diligence, only through your hard effort of listening to the evidence, seeing through what happens on the witness stand is justice going to be heard.

. . . .

> Ladies and Gentlemen, I submit to you that this is a single most important case. It's been in this courtroom years. You have an opportunity at the end of this case to change an industry. You have an opportunity to right a wrong that this company committed and to make the roads safer not just for Upshur County but for the rest of this nation. Thank you for your time.

Send a Message

According to Patterson's counsel, because it was the most important case in decades, he repeatedly told the jury that it should send a message not only to FTS and Acker, but the entire industry across the nation through its verdict. In essence, counsel told the jury to punish FTS and Acker, through the amount of its verdict, in the initial phase of trial where the purpose is to establish liability and the reasonable amount of damages caused by the defendants' negligence, not to punish them. For instance, as early in the trial as voir dire, counsel told the jury as follows:

> I know as you sit there and you listen today you'll listen just as hard when you sit on this -- in the panel here because this case is important. Years ago there was a case tried in Marshall, Texas. It was tried by a lawyer by the name of Scotty Baldwin. It was the first ever, the first ever asbestos case tried. That jury and that lawyer changed an industry. And I submit to each and every one of you this case is that important and that's why this many people are in this room because at the end of this case we're going to ask you for a verdict and we're going to ask you for a verdict that represents the evidence that's brought from that seat and I tell you that that verdict will send volumes, not just in the county of Upshur County, not just in Texas but all across this nation. This case is that important.
>
> . . . .
>
> I know the carnage that it causes and I take these cases very seriously and that's why I tell you this is one of those cases that the evidence and your verdict is going to change an industry.
>
> . . . .
>
> But at the end of this case based on the evidence that comes from that witness stand I'm going to look at you and I'm going to ask you to award up into the tens and millions of dollars, into the tens of millions of dollars because that's the only way to stop it. And as I said despite all these people in this room it takes a jury like it took them in Marshall, Texas to stop the asbestos industry to stop the trucking industry, say, guess what, start paying attention to your own rules, you got to police yourself and if you don't we're going to do it for you.

Moreover, counsel continued in his opening statement that the jury should send a message to FTS:

> The difference in this case we're talking about a corporation and unlike you and me it doesn't have a heart, it doesn't have a soul or a brain. The only way a corporation understands that they've done wrong is by a verdict and that verdict has to be such that they're going to remember it. There are people all the way from here to New York that are going to remember it. This company has over a thousand trucks up and down the roads all over this country and all over China. They need to know they did wrong, they need to hear your verdict.

Finally, Patterson's counsel also stated during his jury argument at the liability and compensatory damages phase of the trial that the jury should punish FTS. For example, he argued that

> [t]he federal government mandates you know better, but they haven't learned from it because . . . a corporation isn't like an individual, it doesn't have a heart, it doesn't have a brain. You can't punish it the way we punish children or the way we punish adults. The only way to punish a corporation is in their pocketbook.
>
> THE COURT: Three left.
>
> MR. GOUDARZI: And this corporation, only way to stop it I promise you if you just do a verdict for three, four, five, six million you're not going to stop it. They're going to pick up the phone, he's going to call [the CEO] Mr. Doss and, you know what, Mr. Doss is going to say we got away with it.
>
> MR. LONG: Your Honor, I'd like that stricken. That's not in any evidence.
>
> THE COURT: It's argument. Overruled. Did you hear me say three, now two and a half?
>
> . . . .
>
> MR. GOUDARZI: Send them a message. Let this jury be remembered. Thank you.

The Accident

When compared to counsel's arguments that this is the most important case in decades, and his assertions that the company should be punished for its conduct in the initial compensatory damages phase of the trial, the dashcam video shows what can only be objectively described at worst as a minor impact collision. Prior to the collision, Patterson drove his pickup truck in the inside lane at around forty miles per hour. Patterson testified that he wore his seatbelt, but he did not know that the collision would occur. Acker drifted into Patterson's lane while driving his truck only four miles per hour faster while traveling in the same direction as Patterson. Acker's left front bumper collided with Patterson's right rear bumper, causing damages to Patterson's pickup truck. Despite the fact that Acker's truck was a large 18-wheeler,

Patterson's truck was in a drivable condition after the collision. Acker immediately apologized to Patterson, admitted fault, and stated that he was not paying attention.

At trial, Patterson claimed that the collision pushed his vehicle down the road, and that his body "slammed in the seat and [his] head slammed against the headrest," but that no other part of his body hit anything inside his vehicle. However, he admitted at trial that he did not feel hurt, was not in pain, exhibited no subjective symptoms at the accident scene, and had exhibited no objective signs of physical injury Because he could drive his pickup truck, Patterson continued to his destination.

As we explained above, the evidence admitted at trial supports Acker's liability, as well as FTS's liability for Patterson's direct negligence liability claims of negligent hiring, training, supervision, retention, and entrustment. But the damages must reasonably compensate Patterson for the harm he actually suffered as a result of this relatively minor collision. *See* ***Saenz***, 925 S.W.2d at 614.

Patterson's Evidence of Noneconomic Damages

Patterson provided specific proof and dollar amounts for his economic damages, in the form of medical bills, his treating physician's testimony concerning costs for Patterson's past and future medical care, and an economist's testimony with specific calculations as to his past and future lost earning capacity. In contrast, Patterson's counsel argued for very large whole number dollar amount ranges to compensate Patterson for his noneconomic damages such as past and future mental anguish, past and future pain and suffering, and past and future physical impairment. Indeed, the jury awarded $24,000,000.00 in noneconomic damages, but the evidence supporting this award was relatively sparse and highly contested.

Patterson testified that before the surgery he was struggling at work, at home, and was in a lot of pain that he defined as excruciating. Patterson believed that he "could not handle it anymore," his work was suffering, and he suffered in every area of his life. He was not working but he wanted to return to work. He missed his crane operator job and classified it as the best job he ever had. He testified that operating a crane requires him to sit or stand all day and requires lots of head movement in different directions, which he could not perform properly because of his pain. Dr. Calodney and Dr. Gordon both concluded that Patterson would likely suffer pain for the rest of his life but did not explain their basis for this conclusion.

Despite describing his pain as constant, excruciating, and preventing him from performing his job, at other times in his testimony, Patterson stated that he experienced near complete relief, and that all of his treatments and the surgery helped him. Patterson testified that Dr. Calodney provided seven injections to treat the pain. Patterson said those injections relieved his pain, but while the first couple of injections provided complete relief for a substantial duration of time, the latter shots did not provide as much relief and lasted shorter durations. Each of the two neurotomies also provided relief for about five months. Patterson explained the surgery performed by Dr. Gordon helped but did not relieve all his pain. Patterson testified that he was in pain as he sat in the courtroom, that he has pain every day, and his pain rates from about a 3-4 out of 10 on a good day, and a 6-7 out of 10 on a bad day. He did not believe that the pain would ever fully resolve. Patterson was not always consistent in describing the source of his pain. He testified that his low back is "tight," but that he has also been having mid back pain the entire time. Later, he testified that his neck pain is constant, but that mid back pain "comes and goes."

Patterson testified that he used to do all the yard work for his parents and grandfather who lived near him. He also chopped firewood and performed his own basic mechanic work, which included "wrenching" on his vehicle and such activities as changing the alternator and oil, and other "basic stuff" like a tire fix or change. He explained that he could still engage in these activities after the accident to varying degrees, but that after the surgery, he could no longer perform any of them. Patterson testified that his injuries wake him up all the time, that he loses a lot of sleep, and sometimes he cannot even get to sleep. Despite his claim that he has difficulty sleeping, he acknowledged that he currently gets 6-6.5 hours of sleep each night. He testified that there are other life activities that he "sometimes" cannot complete such as playing with his daughters in the yard, taking nature walks with them, or playing softball with them, and it "kind of bothers him" that he cannot complete those activities. He testified that his parents help him out quite a bit, which bothers him as a thirty-eight-year-old man. He testified that he gets lonely, and that his mom and kids help with the cleaning, although he tries to do some of the cleaning. Dr. Calodney testified, in conclusory fashion, that Patterson's impairment and pain resulted in past and future mental anguish, because it made him "somewhat anxious."

However, Patterson admitted that he can walk 5-6 miles without being in pain, but stated that he has not actually walked that distance since the accident. Patterson acknowledged that

other records stated that he can run 2-3 miles, but according to him, he has not actually done so since the incident or the surgery. He explained that this evidence was merely in response to the anesthesiologist who asked him if he could perform those tasks to determine if his heart was strong enough for surgery. After the accident he unsuccessfully tried to play basketball by "shooting around." Other medical records show he can lift 50-60 pounds and Patterson admitted that the surveillance video shows that he can lift his daughter without apparent difficulty approximately four months after the surgery. He explained that he cannot repeatedly perform these tasks, and that doing so would result in him being "down on his back for a week or two." He also admitted that he had an exercise program after the accident, and that even two years after the accident, he performed a routine that included pushups and situps. He later explained that he "tried" to perform those activities, but could not perform that many pushups, and even though he could chop wood, he needed help.

Patterson also admitted that he "might have" exaggerated when he described the severity of the accident, in that he told the doctors that Acker's truck was traveling at approximately eighty mph at the time of the collision, but explained it could have been a typo. In virtually every instance containing an entry in a medical record that was damaging to Patterson, either Patterson and/or his treating doctors explained that it was simply a mistake or a transcription error.

In light of the fact that the force from the impact of the collision was not objectively severe, and this relatively sparse and equivocal testimony concerning Patterson's noneconomic damages, we can only conclude that the evidence is insufficient to justify such a massive $24,000,000.00 award in noneconomic damages. For instance, while the jury could have concluded that Patterson suffered some amount of pain, the evidence showed that Patterson has a high pain tolerance, and his testimony that he had substantial pain relief, along with his admissions that his pain substantially improved over time simply does not justify the total $10,000,000.00 in physical pain award in light of all the circumstances in the record before us. *Cf.* ***Rentech Steel, L.L.C. v. Teel***, 299 S.W.3d 155, 165-67 (Tex. App.—Eastland 2009, pet. dism'd) (affirming much smaller award of $3.5 million in physical pain and suffering in case where boy's hands were essentially ripped off, he had 19 surgeries, would need 10-15 more, and pain was 12 on a scale of 10, and would suffer pain forever).

Next, Patterson's testimony that "it kind of bothers him" that he needs assistance to perform tasks, and the fact that he still gets a relatively good amount of sleep and can often perform daily tasks does not satisfy the high standard for mental anguish to justify the $6,000,000.00 mental anguish award. *See* ***Anderson***, 550 S.W.3d at 620–21 (remanded case to court of appeals to review whether damages were excessive and suggest a remittitur or remand for new trial based on $400,000 award in light of testimony that statements "basically destroyed" claimant, suffered depression, anxiety, trouble sleeping, eating, and focusing showed that claimant suffered some compensable mental anguish, but the amount appeared excessive); ***Serv. Corp. Intern.***, 348 S.W.3d at 231-32; ***Bentley*** , 94 S.W.3d at 606-07 (holding that $7 million mental anguish award not merely excessive and unreasonable, but far beyond any figure the evidence can support when testimony was that conduct deprived him of sleep, caused him embarrassment in community, disrupted his family, distressed his children at school, and was worst experience of his life and he would never be the same).

Furthermore, once a party is compensated for their mental anguish and pain and suffering, there is little left to compensate for impairment other than the loss of enjoyment of life's activities. *See* ***Golden Eagle Archery***, 116 S.W.3d at 772. The evidence shows that Patterson can still conduct many of life's activities, including walking a substantial distance without pain, chopping wood, doing pushups and situps, carrying his daughter, and performing activities. Because he was already awarded substantial compensation for his physical pain and mental anguish, and the fact that he is still able to conduct many of life's activities, the evidence does not justify the additional $8,000,000.00 in compensation for physical impairment. *Cf.* ***Rentech Steel***, 299 S.W.3d at 166 (affirming smaller award of $3 million for impairment for plaintiff who lost use of both hands, making it impossible to perform even simplest tasks).

Jury Argument on Damages

Patterson's counsel spent a relatively short amount of time in his jury argument explaining the basis for his recommended noneconomic damages and how they were justified in light of the minor impact collision and the extent of Patterson's injuries. Specifically, the following represents the amounts and the bases for each of the categories of damages requested as compensation for Patterson's injuries:

> MR. GOUDARZI: Now we talk about reasonable and necessary medical expense. This is easy, uncontested, his medical expenses are in here. You'll flip to the page, that's $131,191,

> uncontested. In reasonable probability will be incurred in the future, that number, Ladies and Gentlemen, is Exhibit P-138, P-138, and that ranges from 587,000 to 612,000, 587 to 612. Lost earning capacity, y'all remember that was the gentleman Dr. Trapani who came in here. Did they bring an economist? Did they bring anybody who disagreed with him? Not one person. In the past $67,066. There's another exhibit that's going to be Exhibit . . .
>
> MR. HOOVER: 136.
>
> MR. GOUDARZI: 136. In the future, lost wages in the future $1,001,782, $1,001,782. Now physical pain, physical pain, and you remember at the beginning I said it's going to be my job, my duty to bring evidence to you on each one of these elements. Physical pain, I submit to you that there's a range I'm giving you because it's up to your discretion and what you think. On physical pain the first one was sustained in the past, sustained in the past. There's going to be no charts on this so there's going to be nothing for you to look at. You just have to remember. So if you want to remember one million to three million on the past. And reasonable probability will be sustained in the future five million to twelve million. The reason the number's bigger is because he has forty years to live. He has fifty years to live if he's lucky. Mental anguish, you remember specifically I asked each doctor let's talk about mental anguish, does Mr. Patterson suffer mental anguish from this. What did they say, yes, every one of them. Did they bring a doctor in your courtroom, this company who trades on NASDAQ? Did they bring a doctor that says, no, I was wrong. Mental anguish one million to two million in the past, one million to two million in the past. Mental anguish in the future, again, he's got forty to fifty years to live, three million to eight million, three million to eight million. Physical impairment, that's the things he enjoys to do. Remember we talked about that. He no longer can do those. He's never going to be able to do them. In the past one million to three million, one million to three million. Physical impairment in the past -- in the future, five million to twelve million, five million to twelve million. Now the next thing is disfigurement. Remember I talked to Dr. Gordon about the scar, he said he's got a little scar, that's, really that's really whatever y'all think. Disfigurement I think in the past should be 500 to $1,000, 500 to $1,000. Disfigurement in the future 2,000 to 5,000 dollars, 2,000 to 5,000 dollars, whatever you think.

Counsel explained there were no exhibits to discuss, told the jury to remember his suggestions, provided large ranges of damages in whole numbers when compared to the economic damages, accompanied by little to no explanation to justify the suggested amounts. Moreover, as we earlier discussed, he repeatedly told the jury that this was the most important case in decades, the jury should punish FTS when it was inappropriate to do so at that phase of the trial, and suggested a very large verdict well in excess of "three, four, five, six million," because anything less and "you're not going to stop it," and instead FTS's CEO will conclude that "we got away with it."

The jury deliberated for approximately 1.5 hours and awarded damages largely as Patterson's counsel had suggested. As we discuss below, Patterson's counsel spent more significant time in his jury argument, and indeed the trial itself, focusing on the alleged spoliation and misconduct of defense counsel, which also undoubtedly had an effect on the amount of damages awarded by the jury.

Impact of Counsel's Conduct on Damages Award

Texas courts sometimes also consider whether improper evidence or arguments took hold of the jury and whether the force of those arguments or evidence were given an impermissible sway in assessing noneconomic damages. *See* ***Bentley***, 94 S.W.3d at 605 (stating jury's award suggested that it disapproved of defendant's conduct more than it represented fair assessment of plaintiff's injury and holding that evidence did not support large award of noneconomic damages); ***Gordon v. Redelsperger***, No. 02-17-00461-CV, 2019 WL 619186, at *6, 8-15 (Tex. App.—Fort Worth Feb. 14, 2019, no pet.) (mem. op.) (considering claims that improper evidence or arguments impermissibly swayed jury's assessment of nonpecuniary damages); ***Lane***, 494 S.W.3d at 351 (same); *see also* ***Sanchez v. Balderrama***, 546 S.W.3d 230, 237 (Tex. App.—El Paso 2017, no pet.) (stating "we will set aside the verdict only where the record clearly indicates that the award was based on *passion, prejudice, or improper motive*, or is so excessive so as to shock the conscience."). Specific to this case, Texas courts have discussed that Patterson's trial counsel sometimes employs the tactic to discredit opposing counsel and the opposing party by referring to evidence of spoliation or other alleged misconduct, thereby turning the focus of the trial to the alleged misconduct rather than the merits of the case. *See, e.g.,* ***Enbridge Pipelines (N. Tex.) L.P. v. Sullivan***, No. 12-19-00147-CV, 2020 WL 2991499, at *6-19 (Tex. App.—Tyler May 29, 2020, no pet.) (op.); ***Smith v. Williams***, No. 06-14-00040-CV, 2015 WL 3526089, at *2-10 (Tex. App.—Texarkana May 29, 2015, no pet.) (mem. op.).

An allegation of spoliation includes (1) a party's deliberate destruction of relevant evidence, and (2) a party's failure to produce relevant evidence or explain its nonproduction. ***Brookshire Bros., Ltd. v. Aldridge***, 438 S.W.3d 9, 19 (Tex. 2014). "[P]resenting spoliation issues to the jury for resolution magnifies the concern that the focus of the trial will shift from the merits to a party's spoliating conduct." ***Id.*** at 20. Accordingly, the court, rather than the jury, must determine whether a party spoliated evidence and, if so, impose the appropriate remedy. ***Id.*** "Placing the responsibility on the trial court to make spoliation findings and to determine the proper remedy is a key mechanism in ensuring the jury's focus stays where it belongs—on the merits." ***Id.*** With regard to whether the jury may hear evidence of spoliation at trial, the Supreme Court explained that "evidence bearing solely on whether a party spoliated evidence or the party's degree of culpability in doing so" is a particularized class of inadmissible evidence under Texas Rules of Evidence 401 and 403. ***Id.*** at 26. The Court explained that "the

tendency of such evidence to skew the focus of the trial from the merits to the conduct of the spoliating party raises a significant risk of both prejudice and confusion of the issues." ***Id.***

However, the Court further explained that all references to missing evidence cannot be foreclosed in every instance. ***Id.*** "For example, to the extent permitted by the Texas Rules of Evidence, parties may present indirect evidence to attempt to prove the contents of missing evidence that is otherwise relevant to a claim or defense, such as a person's testimony about the content of a missing document, photo, or recording." ***Id.*** But "there is no basis on which to allow the jury to hear evidence that is unrelated to the merits of the case, but serves only to highlight the spoliating party's breach and culpability," and "[w]hile such evidence may be central to the trial court's spoliation findings, it has no bearing on the issues to be resolved by the jury." ***Id.*** at 26-27.

The Texas Supreme Court recognized that the precise contours of our spoliation jurisprudence remain a developing area of the common law.[10] One such area requiring further development is the preservation of the issue when evidence and argument alleging that the opposing party spoliated evidence is admitted. For example, since ***Brookshire Brothers***, the Texas Supreme Court held that the complaining party preserved its issue concerning a spoliation instruction submitted in the trial court's charge, even though the party did not object at the charge conference prior to the court's reading the charge to the jury, as is normally required to preserve a jury charge complaint. *See* ***Wackenhut Corp. v. Gutierrez***, 453 S.W.3d 917, 919-20, n.3 (Tex. 2015). This was because the complaining party made the trial court aware of the complaint when it argued that the instruction would be improper in its brief opposing a pretrial motion for sanctions, and the trial court ruled the instruction would be submitted to the jury. *See* ***id.*** at 920.

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[10] Specifically, the Court stated as follows:

> We note that this case highlights the need for guidelines and clarity in our spoliation jurisprudence, as the record reflects the significant effect that the spoliation allegations had on the course of this trial. Indeed, this case typifies the manner in which the focus of the trial can impermissibly shift from the merits of the case to the spoliating conduct when such guidance is missing. Because spoliation is not directly addressed in either our rules of evidence or our rules of procedure, courts must fill in the gaps to maintain the consistency and predictability that is basic to the rule of law in our society. The continued development of the State's common law, in which we engage today, is not only the province—but the responsibility—of this Court.

Id. at 29.

Here, FTS and Acker objected on some occasions when opposing counsel attempted to present evidence that FTS failed to produce evidence. For example, with respect to the allegation that FTS failed to produce all of Acker's drug tests, an allegation that is unfounded in the record, the following colloquy occurred during Thornton's testimony:

> A. Well, Mr. Acker was randomly drug tested before that accident, sir.
>
> Q. Well, if he did pass, now interesting enough would you agree with me that if a company doesn't give you all the random drug tests maybe the random drug test we didn't get he failed.
>
> A. I'm sorry, can you rephrase your question.
>
> Q. How do we know that the random drug test that you haven't given to my office Mr. Acker didn't fail, ma'am?
>
> MR. LONG: Your Honor, that suggests that we haven't provided documents. There's no -- there is nothing to support that. That's misleading the jury.
>
> THE COURT: Well, he's basing it I believe on testimony given by Mr. Acker so I'm going to overrule the objection.

In another instance, also concerning the number of drug tests, the following discussion took place:

> Q. Right. So we don't have that document and now we don't have either two to three random drug tests, correct?
>
> A. Again, sir, as I stated I think Mr. Acker was either confused or incorrect about the number of times he was drug tested from a random perspective.
>
> Q. So let me --
>
> MR. GOUDARZI: Can I approach, Your Honor?
>
> THE COURT: You may.
>
> Q. So in the deposition did anybody say are you confused, Mr. Acker, when you say three to four random tests, were -- you were there, did anybody say that?
>
> A. Not to my knowledge, no.
>
> Q. And you and you had a lawyer in the room Ms. Keefe and Clayton Devin, managing partner of one of the big law firms in Dallas on the 34th floor or 2nd floor of --
>
> MR. LONG: Objection, Your Honor. I don't believe that's relevant, what floor it is and --
>
> THE COURT: Is it --
>
> MR. LONG: -- the size of the firm is totally irrelevant.

THE COURT: Just move along.

Q. (By Mr. Goudarzi) But again there were two lawyers there representing FTS.

MR. LONG: Objection, how many lawyers are there is irrelevant.

THE COURT: Well, overruled.

A. Yes, there were two lawyers there representing FTS.

Q. (By Mr. Goudarzi) And did anybody in that time ever say, Mr. Acker, are you confused, Mr. Acker, you got it wrong, you only were random tested one time, do you recall that?

MR. LONG: Objection, Your Honor. That's misleading. That isn't the way deposition works. Lawyers don't intervene in the testimony. It's misleading to the jury.

THE COURT: Overruled.

However, there were other times when FTS's and Acker's respective counsel did not object to the same evidence elsewhere. Normally, absent a running objection, a party must object to all instances where the same evidence is offered to preserve the error in its admission on appeal. *See, e.g.,* ***Bay Area Healthcare Group, Ltd. v. McShane***, 239 S.W.3d 231, 235 (Tex. 2007). As to other allegations of spoliation that we discuss below, FTS and Acker made no objection at all or failed to provide a sufficient objection with enough detail to inform the trial court that they objected to improper allegations of spoliation.

Although we specifically do not reverse the judgment for the trial court's admission of improper spoliation evidence, in evaluating the excessiveness of the jury's damage award, we recognize that each case must stand on its own unique facts and circumstances and we are required to review the entire record as part of our review of this issue. *See* ***Maritime Overseas Corp.***, 971 S.W.2d at 406-07 (stating that we review entire record in excessive damages analysis); ***Primoris Energy Services Corp.***, 569 S.W.3d at 760 (noting that each case must be judged by own unique facts). And Patterson's counsel's conduct played no small part in attaining such a large verdict.

With respect to the allegation that FTS concealed or failed to produce Acker's drug tests, the record plainly does not support such an assertion. Acker testified that there were three or four drug tests. The record is clear that he could not remember. The record also shows that there were only three drug tests: (1) a random alcohol test approximately four months prior to the accident, (2) a random drug test taken that same day, and (3) the post-accident drug test. Counsel even suggested when he questioned Thornton that FTS destroyed the nonexistent test or

falsified the results: "How do we know that the random drug test that you haven't given to my office Mr. Acker didn't fail, ma'am?" Counsel repeatedly referenced the alleged missing drug test throughout the trial, even though the record does not support that allegation.

Second, Patterson's counsel referred to the fact that Thornton's original deposition change sheet that his firm received had no changes, but a corrected one was produced at trial in response to counsel's questioning. However, the record shows that defense counsel timely returned Thornton's correct change sheet to the court reporting company, but an e-filing mistake on the reporting company's part did not contain the correct sheet. The trial court allowed Patterson's counsel to comment on the failure to support the correct change sheet over defense counsel's objection, even though it was through no fault of defense counsel. Moreover, the changes made relate to trivial matters. For example, one of the changes pertained to a mistaken statement that a prospective employee must not have more than three tickets within the three months prior to the hire date. The correct policy, as we have stated, was three or more tickets within the previous thirty-six months. The other changes related to similar trivial corrections. But counsel repeatedly commented on the failure to produce the correct change sheet.

Third, James Senger, FTS's Vice President of Health, Safety, and Environmental recalled a document in his deposition showing that the root cause of the accident was "a lack of focus on the task of driving." Because Patterson's counsel could not locate a written document containing the exact words "lack of focus" at trial, he repeatedly charged the defense with failing to produce, and even destroy, the document. Thornton testified that Senger's reference was to the dashcam video data, not any missing document, and the record does not support such an allegation.

Finally, counsel commented on missing surveillance footage taken by FTS's investigators. While discussing the matter, counsel stated that "we're just going to put it before the jury." Counsel repeatedly commented on these matters to the jury throughout the trial, alleging that the company concealed or even destroyed the evidence.

Similarly, Patterson's counsel frequently attempted to bolster his own credibility by asking some variation of the following question to the witnesses about a particular fact or piece of evidence: "It was me, Brent Goudarzi, who brought this to your attention, correct?" For example, counsel elicited testimony from Officer Wilson comparing his credibility to one of the defense attorneys. Pursuant to counsel's questions, Wilson testified that she met with one of the

defense attorneys years after the accident, and he did not provide her with the post-accident drug test results or the dashcam video, and she felt that this was deceptive. On the other hand, in response to Patterson's counsel's direct questions, Officer Wilson went further and explained that Patterson's counsel disclosed that evidence to her. Patterson's counsel even asked, "Did you at any time feel that I was being deceptive with you like you felt that Mr. Frank Barat of Starr, Comte & McGuire was talking?" She replied, "No." Whether defense counsel provided those items of evidence to Officer Wilson was not relevant, because her involvement in the case ended when she released the parties years earlier at the scene of the accident.

In another instance, Patterson's counsel engaged in a similar technique, asking Dr. Pilcher on redirect that "[d]uring [defense counsel's] re-questioning of you did he ever apologize for not showing you all the records?" After the trial court sustained defense counsel's objection, Patterson's counsel continued, "As I've walked through these records have I shown you the good with the bad, Dr. Pilcher?" Dr. Pilcher replied, "Yes, you have." These types of tactics were pervasive throughout the trial.

Illustrative of this pattern is in counsel's jury argument explaining that he was more trustworthy than opposing counsel and that defense counsel and the defendants failed to present the complete picture of the evidence or spoliated evidence. This is especially true considering that he spent comparatively little time devoted to explaining the amounts to support the noneconomic damages as we described earlier in this opinion. For example, Patterson's counsel made the following arguments:

> How many times in your courtroom did I have to sit there, walk up there at the end of the conclusion of their testimony and show the witness including their own witness all of the document so you could see all of the evidence and not just some of the evidence. Why did I have to do that? Well, Mr. Long gets up here in a minute and gives his closing. He should answer that question for you, he should tell you why they didn't show all the documents and why they read one line and not the other line. He should tell you that.
>
> . . . .
>
> And you recall the part when we talked about the random drug test. And I asked him in Dallas when Clayton Devin was the lawyer and I said tell the jury how many times this company randomly drug tested you and he said three to four maybe, you remember that. When you retire to the deliberation room I want you to look at the evidence that was put before you and see how many there are. There's one. And if individuals make them do this I'm going to tell you I don't believe that one is true.
>
> . . . .

And then again, let's talk about the next thing, the next document I don't have. And I board it just so it's real clear. All right. Now did you go over the root cause for this accident. The report stated the employee did not maintain, did not stay in his lane. And another document that we have states that a lack of focus on the task of driving, another document states. And you heard from the corporate rep who gets in this courtroom who's picked by Mr. Doss because she wasn't around when any of this happens because she doesn't know anything about it, she said, let me tell you what that means, that really doesn't mean a document, what that means is a DashCam video, doesn't mean document. I said, ma'am, do you know what this states? Now talk about what I learned, you know, Mrs. Spencer's class in the sixth grade. No, Mr. Goudarzi, it means document. Well, show me one document in the policy and procedure manual that indicates that. It's not there. This is your courtroom. Mr. Long is right, that's the seat of justice. If it doesn't come from there and you don't see it, I can't bring it here.

. . . .

Remember the whole change sheet issue, remember the change sheet, I'm questioning Ms. Thornton, look, Ms. Thornton, I read your depo, I looked on there, all the answers that you gave me to support my case. Well, Mr. Goudarzi, I changed that. I go to my change sheet. Did I get a change sheet? No. Remember where we found out the change sheet was? In the trunk of her car. We had to take a break for her to go get it. And one of the questions specifically goes to Mr. Doss, the president.

. . . .

MR. GOUDARZI: Now Mr. Long is about to get up and when he gets up there's a couple questions he should answer for you. One, why they make him fill out the safety documents even though that he didn't attend one of the classes. And, Mr. Long, if you did that, if your company did that then why should we believe any of your documents. He should answer that for you. Where is James Senger's lack of focus document? Why didn't you give that to Mr. Goudarzi so we could look at it? Why didn't you give it to him? Where are the two to three random drug tests that Mr. Acker told us about? Why didn't he get those? I notice he's not writing now. Why did Pat Long's company have someone drive from Dallas to talk to Mr. Acker about signing things he didn't do? And then finally, why did you violate every policy Mr. Goudarzi put in front of us and why did it take Mr. Goudarzi to teach your company, the heads of your company what they do wrong. Now, Ladies and Gentlemen, I'm about to sit down and I want you to remember all the times in this courtroom that the lawyers in FTS got up and talked about the truth and talked about the seat of justice and as I told y'all in the beginning I want y'all to hold my side, my office accountable for any time we didn't tell you exactly what was in the documents and I want you to hold me accountable if after this thing if there was something I didn't do that I should have done. And if at any time y'all thought I was too aggressive or if I was too pushy, I apologize for it, but when you fight a case like this for five years it becomes personal and when you see a man's life change and you see people not caring and you see them tell me even before today you're not going to change us and you deal with that corporate arrogance I knew it was going to take y'all.

In Patterson's counsel's rebuttal, he continued:

At the end of my questioning I looked at Pat Long just like you are now, I said, Mr. Long when you get up, answer some questions for the jury, tell the jury where are the new hire safety documents that Mr. Acker said he never filled out that they claim when he was first hired he filled them out. Tell the jury why somebody came from Dallas and made him fill out safety documents that he never attended. Did he say one word about that? No. Crickets. Did Mr. Bush say one word about that? Crickets. Then I went on and I said show us the two to three random drug tests that y'all say happened before our accident. Did he bring that up? Crickets. Did he say a word about it? Crickets. Nothing. Then I asked him do you remember I had my board, I almost forgot

> it, the Main Street, the surveillance, you remember all the surveillance tapes that I should have been able to look at so I could have showed them to y'all? Bob Seeger, where are they? Do they explain why I didn't get them, why they didn't give them to me? Did they tell you the surveillance was so important to us we didn't even show it to Dr. Blair, the $65,000 doctor. The surveillance was so important we didn't show it to Calodney or Gordon. You know why they didn't? Because I'm telling y'all I've done this for decades and I know it doesn't mean anything but what they try to do is bring him before a jury and say look at him, he looks normal, he looks like somebody who drives down the road because you don't know, you're not supposed to know. The people who know are the doctors. They didn't ask them.
>
> . . . .
>
> Did he get up and tell you why Mr. Senger didn't deliver the lack of focus document to us? I submit to you there's probably a reason why he didn't and there's probably a reason why we didn't get the three to four random drug tests that Mr. Acker testified to. And you remember when I asked Ms. Thornton, I said, Ms. Thornton, should this jury rely on Mr. Acker and his truthfulness? Yes. That's what she said. So when he tells us he had three to four random drug tests, where are they? When you go in the jury room look at the random drug tests.
>
> . . . .
>
> And again, back to the documents, they have one random drug test which is mysterious, we don't have the other ones but if they don't give us documents, if we get change sheets out of trunks of cars, if we have documents that materialize do I, do I trust the validity of the one random drug test they have? No, sir. And I submit to you, you should not either.

These types of arguments were specifically made to impermissibly shift the focus of the trial from the accident and Patterson's injuries to the parties' alleged spoliating conduct, even in instances where no spoliation occurred. *See* ***Brookshire Bros.***, 438 S.W.3d at 26-27; ***Enbridge Pipelines***, 2020 WL 2991499 at *6-19. We have little difficulty in concluding that these types of improper techniques and arguments played no small role in the jury's massive verdict, particularly with respect to the $24,000,000.00 award in noneconomic damages.

Conclusion

In conclusion, although the record supports that Patterson may have suffered from injuries proximately caused by Acker's and FTS's negligence, it does not support the amount awarded as reasonable compensation for actual damages Patterson suffered as a result of the accident. We have considered Patterson's counsel's unwarranted arguments that this is the most important case in decades and that the jury should punish FTS and send a message by awarding Patterson excessive damages far beyond reasonable compensation, the relatively equivocal, contested, and sparse evidence to support such a massive award, and counsel's improper accusations of spoliation and other misconduct. Upon repeatedly asserting those arguments, he

briefly suggested a range for each category of noneconomic damages. The amounts in these ranges suggested by counsel far exceed the awards in similar cases.

The record here clearly shows that the award is based upon the jury's disapproval of FTS rather than adequate and reasonable compensation for Patterson's actual injuries. *See* ***Bentley***, 94 S.W.3d at 605. Furthermore, the record here clearly indicates that the award was based on passion, prejudice, or improper motive, or is so excessive as to shock the conscience. *See* ***Sanchez***, 546 S.W.3d 237 (reciting standard to reverse excessive jury verdict). Accordingly, considering the entire record, we conclude that the evidence is factually insufficient to support the amount of damages awarded by the jury, and since the types of noneconomic damages are unsusceptible to precise calculation, the appropriate remedy is to remand for a new trial instead of suggesting a remittitur. *See* ***Lane***, 494 S.W.3d at 352. We sustain issue three.

GROSS NEGLIGENCE

In FTS's and Acker's fifth and sixth issues, they contend that the evidence is insufficient to support the jury's gross negligence finding to support exemplary damages.

Standard of Review and Applicable Law

Gross negligence consists of both objective and subjective elements. ***U-Haul Int'l, Inc. v. Waldrip***, 380 S.W.3d 118, 137 (Tex. 2012). Gross negligence requires a showing that (1) when viewed objectively from the actor's standpoint, the act or omission complained of involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others, and (2) the actor had actual, subjective awareness of the risk involved, but nevertheless proceeded in conscious indifference to the rights, safety, or welfare of others. TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(11) (West Supp. 2019); ***Boerjan v. Rodriguez***, 436 S.W.3d 307, 311 (Tex. 2014) (per curiam).

Under the objective component, "extreme risk" is not a remote possibility or even a high probability of minor harm, but rather the likelihood of the plaintiff's serious injury. ***U-Haul***, 380 S.W.3d at 137. Under the subjective element, actual awareness means the defendant knew about the peril, but its acts or omissions demonstrated that it did not care. ***Boerjan***, 436 S.W.3d at 311. However, awareness of an extreme risk does not require proof that the defendant anticipated the precise manner in which the injury would occur or the identity of the person who would be injured. *See* ***U-Haul***, 380 S.W.3d at 139. One of the ways a corporation may be liable for

exemplary damages is if, through its gross negligence, it recklessly hires or retains an unfit employee. *See* ***U-Haul***, 380 S.W.3d at 139–40; ***Mobil Oil Corp. v. Ellender***, 968 S.W.2d 917, 921 (Tex. 1998).

Both elements of gross negligence must be proven by clear and convincing evidence and may be proven by circumstantial evidence. ***Boerjan***, 436 S.W.3d at 311; ***U-Haul***, 380 S.W.3d at 137–38. In reviewing the legal sufficiency of the evidence supporting a finding that must be proven by clear and convincing evidence, we must consider "all the evidence in the light most favorable to the finding to determine whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true." ***Diamond Shamrock Ref. Co. v. Hall***, 168 S.W.3d 164, 170 (Tex. 2005).

Discussion

As we discussed above in greater detail, Thornton, FTS's corporate representative at trial, admitted that it had several opportunities throughout Acker's employment to review his fitness as an FTS driver. First, he identified only one ticket on his application, which was a different ticket than identified on his MVR. FTS was on notice that he was untruthful on his application but did not further investigate. Thornton testified that during the audit process when FTS's rating was downgraded, part of the reason was that FTS's MVR screening process was inadequate. After the downgrade, Thornton testified that it terminated its contract with the third-party company that provided MVR's of FTS's employees. Thornton also stated that FTS took the audit process seriously and made the changes. However, Patterson's counsel asked why, if they took the process so seriously, did FTS not reexamine the MVR for its drivers who were hired during the relevant period from the company who it fired for not properly checking the MVRs. She responded, "I don't know the answer to that question, sir."

Next, Acker had four incidents of unsafe driving, being suspended without pay for three of them, probation on two, including being placed on probation at the time of the collision with Patterson. Thornton admitted that FTS knew that Acker was a "risky driver" and that he could "seriously injure" the motoring public. Thornton admitted that with each incident of unsafe driving, FTS had the opportunity to revisit Acker's employment status and fitness as a driver. Instead of terminating his employment, it continued to employ him despite its knowledge of the four incidents of unsafe driving.

Moreover, Acker testified that he was provided training documents that recited he received formal training. However, he testified that he did not receive the training and was simply told to sign the documents. If true, a determination that the jury could reasonably make based on the evidence at trial, this fact shows that FTS had an actual awareness of an extreme degree of risk in instructing its employees to falsify training documents for training it failed to provide drivers such as Acker. *See* ***Martinez v. Kwas***, No. 01-18-01085-CV, 2020 WL 2988452, at *12 (Tex. App.—Houston [1st Dist.] June 4, 2020, pet. filed) (op.) (holding evidence supported gross negligence finding that company failed to provide training to drivers, but instead allowed employees sign paperwork reciting they received training without ensuring that they understood it).

In sum, the record supports that Thornton admitted that Acker did not qualify for employment at FTS, it should not have hired him, it failed to provide training, and it should have terminated him prior to the accident with Patterson. Yet, FTS continued to employ him. Based on this evidence, a jury could form a firm conviction and belief that FTS was grossly negligent in allowing Acker to operate one of its trucks, even without considering any of the evidence related to Acker's drug use. *See* ***Montgomery Ward & Co. v. Marvin Riggs Co.***, 584 S.W.2d 863, 866 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.) (holding gross negligence finding supported by evidence that employer did not obtain copy of employee's driving record, employee was inexperienced, and employer warned that employee should not be "turned loose" on the truck). That is, viewing the evidence in the light most favorable to the verdict, as well as in a neutral light, the jury could have formed a firm belief or conviction that FTS had actual awareness of an extreme degree of risk when it recklessly retained Acker, an unfit employee, but proceeded in conscious indifference to the rights, safety, or welfare of Patterson and the motoring public. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(11); ***Boerjan***, 436 S.W.3d at 311; ***U-Haul***, 380 S.W.3d at 137, 39-40

Finally, with respect to Acker's individual gross negligence, the evidence establishes that he admitted to using dangerous drugs on each of the three days prior to his collision with Patterson, including the night before his shift. Although he did not believe that he was under the influence at the time, he ultimately admitted he could have been. The accident occurred because he drifted into Patterson's lane. The jury could have formed a firm belief or conviction that the accident occurred because Acker was under the influence of dangerous drugs in his system. He

admitted that he was aware of the danger that his conduct posed to the motoring public, and that he was highly depressed because of his personal life issues, yet he continued to drive.

In contrast to Acker's assertions in his brief, these acts are unjustifiable, likely to cause serious harm, and are inordinately risky.[11] *See* ***Transp. Ins. Co. v. Moriel***, 879 S.W.2d 10, 21-22 (Tex. 1994). Based on all the evidence in the record, the jury could have reasonably formed a firm conviction or belief that Acker individually acted with gross negligence.

FTS's and Acker's fifth and sixth issues are overruled.

REMAINING ISSUES

FTS and Acker allege in their first issue that numerous instances of misconduct by Patterson's counsel throughout the trial and in jury argument, singularly or cumulatively, were harmful and warrant a new trial. We note that FTS and Acker (1) failed to object to each instance of misconduct; (2) the objection was not specific or failed to comport with the argument on appeal; (3) while there were objections to some of the instances, they failed to object to every instance; (4) when the trial court sustained their objections, they did not ask for a curative instruction; or (5) the arguments on appeal cannot be correctly categorized as incurable jury arguments sufficient to warrant a new trial in and of themselves without objection. FTS and Acker also argue as part of their first issue that FTS received an anonymous posttrial letter that Patterson concealed his earning capacity and physical capabilities before and during trial, that he was not actually injured in the accident, and that he bragged to the author that he was "gonna squeeze a bunch of money out of this fender bender." Both of these issues, if successful, would have resulted in a new trial, a disposition that we have granted in our review of their third issue on excessive damages. *See* ***Waffle House, Inc. v. Williams***, 313 S.W.3d 796, 813 (Tex. 2010) (remedy for posttrial newly discovered evidence is new trial); ***Living Centers of Tex., Inc. v. Penalver***, 256 S.W.3d 678, 682 (Tex. 2008) (remedy for improper argument is a new trial). Accordingly, we need not address them. *See* TEX. R. APP. P. 47.1.

In FTS's and Acker's seventh issue, they assert various errors in the court's submission of the jury charge. As with their first issue, because the jury charge issues would result in the same remedy we have already ordered, a new trial, and because we cannot predict exactly what

[11] Whether FTS's and Acker's actions *actually* caused serious injuries to Patterson are dealt with elsewhere in this opinion.

the evidence will be in the retrial and whether the charge will be submitted the same way, we need not address these issues. *See, e.g.,* ***Glenn v. Leal***, 596 S.W.3d 769, 772 (Tex. 2020) (holding proper remedy when charge has incorrect law or is defectively submitted is to remand for new trial); ***Smith***, 2015 WL 3526089, at *18 (stating that "[s]ince this case is being remanded for new trial, we cannot predict whether the trial court will submit these same instructions, or if the evidence at the new trial will support the same. Therefore, our remand of this case for a new trial renders this point of error moot.").

Finally, as part of FTS's fifth issue, it challenges the jury's assessment of exemplary damages as excessive. We note that exemplary damages should not be so grossly excessive as to further no legitimate purpose and constitute an arbitrary deprivation of property. ***Bennett v. Grant***, 525 S.W.3d 642, 650 (Tex. 2017). However, we need not examine this issue because the actual award of exemplary damages is subject to a cap calculation based on the amount of economic and noneconomic damages awarded by the jury. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 41.008(b) (West 2015). We have held that a new trial is necessary, and the amount of exemplary damages awarded at the retrial, if any, could be based on differing amounts of damages, thereby resulting in a different capped exemplary damages amount. Therefore, we need not address this issue. *See* TEX. R. APP. P. 47.1.

DISPOSITION

FTS and Acker contest liability, the damages are unliquidated, and we have held that the damages are excessive. Accordingly, Texas law requires that we may not reverse and remand for a new trial on only damages, and we must instead remand for a new trial on all issues. *See* TEX. R. APP. P. 44.1(b); ***Rancho La Valencia, Inc. v. Aquaplex, Inc.***, 383 S.W.3d 150, 151-52 (Tex. 2012) (per curiam). Having sustained FTS's and Acker's third issue that the damages were excessive, we ***reverse*** the trial court's judgment and ***remand*** for a new trial on both liability and damages. *See* ***id.***

GREG NEELEY
Justice

Opinion delivered August 26, 2020.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

AUGUST 26, 2020

NO. 12-19-00040-CV

FTS INTERNATIONAL SERVICES, LLC
AND BILL HERBERT ACKER,
Appellants
V.
JOSHUA PATTERSON,
Appellee

Appeal from the 115th District Court

of Upshur County, Texas (Tr.Ct.No. 356-15)

THIS CAUSE came to be heard on the oral arguments, appellate record and briefs filed herein, and the same being considered, it is the opinion of this Court that there was error in the judgment as entered by the trial court and that the same should be reversed and the cause remanded to the court below for a new trial.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below be **reversed** and the cause **remanded** for a **new trial** in accordance with the opinion of this Court; and that all costs of this appeal be, and the same are, adjudged against the Appellee, **JOSHUA PATTERSON**, for which let execution issue; and that this decision be certified to the court below for observance.

Greg Neeley, Justice.

Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.