No. 05-11-01510-CV

In The

Court of Appeals

FIFTH DISTRICT OF TEXAS

Dallas, Texas

NGUYEN, TRACY K.,

Appellant,

v.

MYERS, RODOLFO J.,

Appellee.

Appealed from the 14th Judicial District Court of
Dallas County, Texas, the Honorable Eric Moyé, Presiding

BRIEF OF APPELLEE RODOLFO J. MYERS

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STATEMENT OF THE CASE

Plaintiff/Appellee filed suit against Defendant/Appellant on August 11, 2010. [CR 8]. The District Clerk assigned the case to the 14th Judicial District Court, the Honorable Eric Moyé presiding. [CR 8]. The District Clerk assigned this case Cause Number: DC-10-09853-A. [CR 1]. In his Original Petition, Appellee alleged common law negligence against Appellant arising out of a motor vehicle collision that occurred on October 7, 2009. [CR 8–9]. Although a written stipulation to Appellant's negligence is not in the appellate record, Appellant concedes that the parties stipulated to liability before trial. [Appellant's Brief, 1]. Trial commenced on August 2, 2011. [1 RR 1]. The Court's charge to the jury included only one question, and that question related exclusively to damages. [CR 150–55]. [1 RR 1]. On August 3, 2011, a twelve person jury returned a verdict in favor of Appellee and awarded him $42,622.28. [CR 150–55]. On August 11, 2011, the Trial Court entered final judgment. [CR 160–61]. Eighteen days later, on August 29, 2011, Appellant filed "Defendant's Motion for New Trial" contending she was entitled to a new trial based on an alleged violation of "three limine provisions" relating to "comment[s], statement[s], argument[s], or testimony" pertaining to insurance coverage and the denial of her Motion for Mistrial following the "injection of auto insurance during it's [*sic.*] case in chief."[1] [CR 167–74]. Appellant asserted no other basis to support her request for a new trial. [CR 167–74]. Appellee responded on August 25,

[1] Appellant served "Defendant's Motion for New Trial" on Appellee on August 23, 2011 but did not file it with the Trial Court until August 29, 2011. [CR 167 and 170]. Appellee served Appellant with his Response and filed his Response with the Trial Court on August 25, 2011. [CR 162 and 164]. Thus Appellee's Response appears in the Clerk's Record before the Appellant's Motion for New Trial.

2011, contending that Appellant had not alleged any specific harm from the alleged incident. [CR 162–66]. The Trial Court denied this Motion for New Trial on September 16, 2011 without a hearing. [CR 196]. Appellant filed her "Notice of Appeal" on November 03, 2011. [CR 196].

ORAL ARGUMENT

Appellant requested oral argument. Appellee believes that this appeal can be adjudicated without oral argument, as Appellee does not believe that the decisional process will be significantly aided by oral argument. However, if the Court grant Appellant's request for oral argument, then Appellee requests to participate in the oral argument.

CITATIONS TO THE RECORD

The record on appeal consists of a four volume Reporter's Record and a single volume Clerk's Record. The Reporter's Record will be cited to by the volume number, the abbreviation "RR," and a page number, as follows: [2 RR 84]. Accordingly, this citation is to page eighty-four (84) in volume two of the Reporter's Record. The Clerk's Record will be referred to by the abbreviation "CR" followed by the page number, as follows: [CR 150]. Accordingly, this reference is to page one hundred fifty of the Clerk's Record. In the interest of clarity, Appellee has not used "*Id*." in citations to the appellate record. Any such citations are, instead, to legal authority.

APPELLEE'S REPLY TO APPELLANT'S ISSUES PRESENTED FOR APPEAL

Appellee's Reply to Issue 1:

Appellant waived this issue by failing to provide proper citations to the record or to legal authority. Alternatively, the two isolated references to "insurance companies" did not violate Rule 411 of the Texas Rules of Evidence because: 1) Rule 411's exclusionary rule applies only when attempting to establish liability and the parties stipulated to liability before the trial; 2) the two isolated references to insurance companies were made to show prejudice; 3) the objected to comment was "insurance companies" and Appellant did not establish that the objected to comment violated Rule 411; and, 4) alternatively, even if Rule 411 was violated, there was no harm.

Appellee's Reply to Issue 2:

Appellant waived this issue by failing to provide proper citations to the record or to legal authority. Appellant has waived her argument by failing to timely object at trial or to obtain a running objection. Appellant has waived her argument by failing to address incurable jury argument in her Motion for New Trial. Alternatively, the comments that Appellant objected to did not constitute incurable jury argument.

STATEMENT OF FACTS

This case arose from a motor vehicle collision that occurred on October 7, 2009. [CR 15]. The collision occurred when the Honda Accord driven by Appellant collided with the Honda Civic driven by Appellee. [CR 15]. Appellant admitted responsibility for the accident. [2 RR 51 & 63; CR 150–55]. Both Appellant and Appellee were injured in the collision. [2 RR 58–59; 3 RR 7].

Appellee filed suit against Defendant on August 11, 2010. [CR 8]. The District Clerk assigned the case to the 14th Judicial District Court, the Honorable Eric Moyé presiding. [CR 8]. In his Original Petition, Appellee alleged common law negligence against Appellant. [CR 8–9]. The case was tried on Appellee's Original Petition. Trial commenced on August 2, 2011. [2 RR 1]. Appellee was represented by Lucas Lafitte and Brandon Lavery. [2 RR 22]. Appellant was represented by Page Lewiecki and Drew Crownover. [2 RR 22]. Appellee called the following witnesses in this order: Tracy Nguyen (Appellant); Dr. Brian Richard Starry (Appellee's treating doctor); Dr. Bill Wayne Timberlake (Appellant's expert); and, Rodolfo Myers (Appellee). [2 RR 49, 65, 136; 3 RR 6]. Appellant did not call any witnesses or offer any evidence. [3 RR 54].

As his first witness, Appellee called Appellant. [2 RR 49]. In the direct and cross-examination of Appellant, Appellant conceded that she caused the collision. [2 RR 51, 63]. Appellant also testified that as a result of this motor vehicle collision that she was injured and that her injuries included back pain. [2 RR 58, 63]. Appellant also conceded that, "[a]t the moment–At the moment of the accident I was not injured but when I went home and later on, several days later, several days

later I had to seek medical attention." [2 RR 58]. Appellant further testified that she treated with a chiropractor for six weeks for the injuries she had suffered in this collision, and by the conclusion of that six week regimen of treatment her injuries had resolved. [2 RR 62]. During Appellee's direct examination of Appellant, Appellant was asked, "[d]o you understand that you have hired a chiropractor by the name of Bill Timberlake here today to make comments about my client's treatment?" [2 RR 61]. Appellant responded stating, "I don't know." [2 RR 61]. On cross-examination, counsel for Appellant asked Appellant, "[w]ith regard to Dr. Timberlake you let my office take care of the legal decisions with regard to the suit filed against you; is that correct?" [2 RR 63–64].

Appellee next called Dr. Brian Starry, the chiropractor who, among other medical providers, treated Appellee for the injuries he sustained in this motor vehicle collision. [2 RR 65]. Appellee asked Dr. Starry about his background, education, and employment. [2 RR 72]. Appellee then examined Dr. Starry concerning the medical treatment that Appellee had received from other medical providers. [2 RR 80–95]. Appellee also questioned Dr. Starry concerning Plaintiff's injuries and treatments. [2 RR 72–84]. During this examination, Dr. Starry described Appellee's injuries [2 RR 73], explained and detailed the specific tests that he had used to establish Appellee's injuries [2 RR 73–75], explained the different capabilities and limitations of a CT scan and a MRI scan [2 RR 75, 84], and testified that Appellee had a protruding disk that, in all medical probability, was a consequence of this collision. [2 RR 77].

During his direct examination, Mr. Lucas Lafitte (trial counsel for Appellee) asked Dr. Starry if he had been paid to be present at trial. [2 RR 70]. Dr. Starry said that he had not, and then Mr. Lafitte asked Dr. Starry, "You do want your bills paid for, correct?" [2 RR 70]. Dr. Starry answered,

"Well, the owners of the clinic want their bills paid obviously." [2 RR 71].

After additional testimony, Mr. Lafitte asked Dr. Starry, "[d]o you know who Dr. Bill Timberlake is?" [2 RR 84]. The following exchange then occurred:

Starry:	Yes.
Counsel Lafitte:	What do you know about him?
Starry:	I know he's hired by insurance companies and—
Counsel Lewiecki:	Objection. Can we approach?
Trial Court:	No. Objection is overruled.
Starry:	He's hired by insurance companies to make judgments on patients that he's never seen before and—I'd like to know what he gets paid. He basically is paid just to say everything's unnecessary and unwarranted.
Counsel Lafitte:	Permission to approach, Your Honor.
Trial Court:	You may approach.

[2 RR 84–85].

The attorneys approached the bench and held a conference off of the record. [2 RR 85]. Apparently, during this conference, counsel for Appellant asked the Court to allow her to make an immediate motion for mistrial and to permit her to do so outside of the presence of the jury. [3 RR 4]. Evidently, the Court asked counsel for Appellant to wait for a break in the proceedings, and apparently Appellant's trial counsel agreed. [3 RR 4]. Inadvertently, the Court did not grant Appellant time to assert her motion until the following day. [3 RR 4]. The Court then heard Appellant's Motion for Mistrial which asserted, as its basis, that, "Dr. Starry's assertion of insurance in that he testified his understanding was Dr. Timberlake is hired by insurance companies to

controvert medical bills . . ." [3 RR 4]. The Court stated that the Motion for Mistrial was timely and then denied it. [3 RR 4].

In her cross-examination of Dr. Starry, counsel for Appellant raised the issue of Dr. Timberlake's employment. [2 RR 119]. Counsel for Appellant asked Dr. Starry, "[y]ou said Dr. Timberlake is paid to say everything is unreasonable. That's not what his report says, it actually says part of the treatment was [reasonable], doesn't it?" [2 RR 119].

Appellee next called Dr. Billy Wayne Timberlake as an adverse witness. [2 RR 136]. The Reporter's Record identifies this witness as Billy Wayne Timberlake, M.D, but based on the contents of the record, Appellee believes that Dr. Timberlake is a chiropractor and not a medical doctor. [2 RR 153; 3 RR 66]. At the beginning of Appellee's examination of Dr. Timberlake, the Court interrupted Appellee with the admonishment,

Trial Court: Counsel don't lead the witness, please.

Counsel Lafitte: He's an adverse–

Trial Court: Forgive me. You are exactly right. You called him adversely. I beg your pardon. I'm sorry. Lead away. Lead him on.

Counsel Lafitte: I will.

Trial Court: Anywhere you want to go. I'm sorry. Proceed.

[2 RR 137].

During cross-examination, counsel for Appellee objected to Appellant's leading questions of Dr. Timberlake, and the Court overruled Appellee's objection and permitted counsel for Appellant to lead Dr. Timberlake, stating, "Overruled. Let's move on." [2 RR 175].

Appellee examined Dr. Timberlake thoroughly. [2 RR 136]. In thirty-seven (37) pages of direct

examination, counsel for Appellant objected only three times—the Court sustained all three of these objections. The first of these objections occurred after counsel for Appellee asked Dr. Timberlake, "[w]ere you paid anything to conjure up this report against our doctor?" Counsel for Appellant objected stating, "Objection, character–" The Court sustained this objection stating, "Sustained. Let's be a little bit less hyperbolic in our use of terms." [2 RR 140]. Later, following apparent confusion between a result from a CT scan and a MRI scan, counsel for Appellant objected stating, "Objection, it was actually an MRI of the low [*sic*.] back." The Court did not have to rule because Appellee promptly corrected the question. [2 RR 152]. Counsel for Appellant made her last objection in the direct examination of Dr. Timberlake, when, after the Court sustained Appellee's objection to one of Dr. Timberlake's answers as non-responsive, counsel for Appellee instructed Dr. Timberlake, "[i]f you'll just answer my question Doctor, it will go a lot quicker, ok" counsel for Appellant objected stating "object to the side-bar." [2 RR 154]. On re-direct, counsel for Appellant again made several objections, but none of these objections were to character. [2 RR 190, 192, and 197].

As his final witness, Appellee called Rodolfo Myers (Appellee). On direct exam, Mr. Lafitte asked Mr. Myers about his background and the fact that Mr. Myers had sustained a prior injury to his lower back. [3 RR 6–8]. Mr. Myers testified that he had injured his lower back approximately two years ago, but at the time of this collision his lower back was asymptomatic. [3 RR 6–7]. Then Mr. Myers answered questions concerning responsibility for the collision and questions concerning his injuries and treatment. At the end of his direct testimony, Mr. Myers stated that his recovery from the injuries he had sustained in this collision was nearly complete. [3 RR 21–22].

During Appellee's closing argument, counsel for Appellee referenced, without objection, the fact

that Dr. Timberlake had been hired by Appellant. Specifically, counsel for Appellee argued, without objection, that Dr. Timberlake was "paid by them," "their hired gun,"[2] and "getting reimbursed for his time," and "simply paid to be here to tell you that this bulge was not caused by the accident." [3 RR 58, 60, 62, and 63].

During Appellant's closing statement, her counsel admitted, "[a]s far as Dr. Timberlake, yeah, I took a chiropractor who's been doing this for 45 years and I said look at these records for me." [3 RR 66]. She continued, and then argued, "[t]hat's why I said Dr. Timberlake, look at these [records] for me." [3 RR 67]. Counsel for Appellant argued further:

> [d]o you know why [Dr. Timberlake] was here being compensated for his time, 'for his time,' not for his opinion, there's a difference. I asked him, look at these records and give me your opinion. I didn't say, Look at these records and say it is not valid. I said, Look at these records and give me your opinion. And he gave me a date. He gave me a date when nothing changed.

[3 RR 69].

The Court then submitted the case to the jury and charged the jury with just one question. [CR 150–55; 3 RR 55–57]. This question concerned damages and this question allowed the jury to award damages for: 1) medical expenses incurred in the past; 2) physical impairment sustained in the past; and, 3) physical pain and suffering in the past. [CR 153]. On that same day, August, 3, 2011, the jury returned its verdict. [CR 150–55; 3 RR 76]. The jury awarded Appellant $34,622.28 for medical expenses incurred in the past, $8000.00 for physical pain and suffering sustained in the past, and nothing for Plaintiff's physical impairment in the past. [CR 153; 3 RR 78]. Twelve people served on the jury, and, of these, eleven jurors agreed on all aspects of the verdict. [CR 155; 3 RR

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[2] The reference to "them" or "their" is ambiguous. Appellant had two attorneys present, Ms. Lewiecki and Mr. Crownover, as well as a person identified as Steve Crowson. Ms. Lewiecki introduced Mr. Crowson as someone "from [her] office." [2 RR 22].

78, 80]. One juror disagreed with the damages awarded for physical pain and suffering sustained in the past. [CR 155; 3 RR 78, 80]. The record is silent as to why the one dissenting juror disagreed with the award of $8000.00 for physical pain and suffering sustained in the past, and whether that juror wanted to award more in damages or less. [CR 153; 3 RR 78, 80]. Appellant filed her Motion for New Trial, asserting that Appellee's trial counsel violated liminie, on August 29, 2011. [CR 167–70]. Appellant filed her "Notice of Appeal" on November 03, 2011. [CR 196].

APPELLEE'S RESPONSE TO APPELLANT'S FIRST ARGUMENT

APPELLEE'S RESPONSE TO APPELLANT'S FIRST ARGUMENT

In her first issue, Appellant contends that Appellee's trial counsel made an incurably harmful jury argument by interjecting the issue of liability insurance into the trial via direct examination of Dr. Brian Starry, Appellee's expert medical witness. [Appellant's Brief, 2].

I. BY FAILING TO PROVIDE CITATIONS TO LEGAL AUTHORITY AND CITATIONS TO THE RECORD, APPELLANT HAS WAIVED THIS ARGUMENT UNDER RULE 38.1(i)

A. Law

Rule 38.1(i) requires a brief to "contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." TEX. R. APP. P. 38.1(i).

"Issues on appeal are waived if an appellant fails to support his contention by citations to appropriate [legal and factual] authority or cites only to a single non-controlling case. [Rule 38.1(i)] does not prohibit an appellant from making a novel argument for which there is no authority 'directly on point.' However, a novel contention must be grounded in analogous case law or provide a relevant jurisprudential framework for evaluating the claim." *Abdelnour v. Mid Nat'l Holdings, Inc.*, 190 S.W.3d 237, 241–42 (Tex. App.—Houston [1st Dist.] 2006, no pet.);[3] *see also Cmtys. Helping Cmtys., Inc. v. City of Lancaster*, 316 S.W.3d 782, 786 (Tex. App.—Dallas 2010, no pet.).

In *Abdelnour*, the appellant contended that "the trial court erred in proceeding with the motion

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[3] *Abdelnour,* the opinion cites to Rule 38.1(h), but quotes Rule 38.1(i). Rule 38.1(h) pertains to the requirements for an appellant's "Summary of the Argument." The context of the *Abdelnour* opinion makes it clear that the Court was referring to Rule 38.1(i) instead of Rule 38.1(h). *Abdelnour v. Mid Nat'l Holdings, Inc.*, 190 S.W.3d 237, 241–42 (Tex. App.—Houston [1st Dist.] 2006, no pet.)

for summary judgment . . . and the pending motions to abate and/or continue the case." 190 S.W.3d 237, 241–42. However, "Abdelnour's brief on this issue contain[ed] no citations to [legal] authorities or [to] the record." *Id*. Thus, the court held, "Abdelnour's brief provides no citation to the record, nor any discussion of relevant or analogous authorities to assist the Court in evaluating [Abdelnor's] claim [in his first issue]. As such, [Abdelnor's first issue] on appeal is waived." *Id*.

In *City of Lancaster*, the appellant sought relief from this Court from a summary judgment granted to appellee. 316 S.W.3d at 783. The appellant argued that "the trial court erred in granting summary judgment on the issue of damages and that [appellant] had standing to assert its claim."*Id.* In its brief, however, the appellant provided only "a three sentence argument why the trial court erred in granting the [Appellees'] motion for summary judgment on the issue of damages." *Id.* at 786. These three sentences did not contain a legal citation. *Id.* Accordingly, this Court held that the appellant had "waived [this] issue by failing to support it with appropriate authority on appeal." *Id.*

i. Appellant's Purported Authority for Her First Argument

To support her first argument, Appellant cites to only three cases and to Rule 411 of the Rules of Evidence. Appellant cites to each of these three cases only once and exclusively for the proposition that they support the policy that underlies the exclusionary provision in Rule 411. Significantly, two of the cases cited by Appellant (*AccuBanc* and *Hinton*, discussed *infra*) ultimately hold the opposite of Appellant's argument.

The first case Appellant cites to is *Barrington v. Duncan*, a juror misconduct case decided by the supreme court in 1943. 169 S.W.2d 462, 465 (Tex. 1943). In relevant part, *Barrington* reads, "[t]his Court takes judicial knowledge of the fact that a jury is more apt to render a judgment against a defendant, and for a larger amount, if it knows that the defendant is protected by insurance." *Id.*

[Appellant's Brief, 11–12]. Appellant does not cite to this case for anything other than this proposition. [Appellant's Brief, 11–14]. Consequently, the case does not constitute legal authority that can support Appellant's argument that the introduction of liability insurance into a trial automatically results in an incurable jury argument.

In the relevant portion of Appellant's second case, *AccuBanc v. Drummonds*, the court wrote, "[t]he theory behind the rule of exclusion incorporated into Rule 411 is that a jury is more apt to render a judgment against a defendant and for a larger amount if it knows that the defendant is protected by insurance." 938 S.W.2d 135, 151 (Tex. App.—Fort Worth 1996, writ denied). [Appellant's Brief, 11–12]. Appellant does not cite to this case for anything other than this proposition. [Appellant's Brief, 11–14]. Significantly, however, in *AccuBanc,* the court ultimately held that after weighing all of the evidence presented at trial, that they did not believe that "the evidence of the indemnity agreement likely caused the rendition of an improper judgment." *Id.* Consequently, the case does not constitute legal authority that can support Appellant's argument that the introduction of liability insurance into a trial automatically results in an incurable jury argument.

In the relevant portions of Appellant's last case, *University of Texas v. Hinton*, the court wrote, "[t]he logic behind the rule excluding evidence of liability insurance is that a jury is more likely to find against a party who is insured." 822 S.W.2d 197, 201 (Tex. App.—Austin 1991, no writ). [Appellant's Brief, 12]. However, the *Hinton* court then found that "the trial court did not abuse its discretion by allowing Hinton's attorney to inform the panel of the relative rights of Hinton and her insurance company." *Id.* The court continued, stating, based on the totality of the evidence we "do not believe that the size of the damage award alone indicates harm." *Id.* Appellant does not cite to this case for anything other than the policy that underlies Rule 411. [Appellant's Brief, 11–14].

Consequently, this case does not constitute legal authority that can support Appellant's argument that the introduction of liability insurance into a trial automatically results in an incurable jury argument.

B. Facts

Here, Appellant alleges that, "[t]he argument of Myers constitut[ed] an incurable jury argument which led to or caused the rendition of an improper jury verdict." [Appellant's Brief, 11].

However, here, Appellant has provided citations to Rule 411of the Texas Rules of Evidence and to three cases, all of the latter are cited exclusively to provide the policy justification for the exclusionary provision in Rule 411. [Appellant's Brief, 11–14]. Indeed, after citing to these three cases one time, Appellant did not cite to them again. [Appellant's Brief, 11–14]. Further, this section of Appellant's brief refers the Court to only five lines on a single page of the trial record. [Appellant's Brief, 12–13]. This reference to the record directs the Court to the purportedly improper mention of "insurance companies." However, Appellant does not provide legal authority to support her proposition that these two brief references to "insurance companies" are improper under Rule 411.

C. Analysis

Appellant has not provided any legal authority to support her contention that two incidental references to "insurance companies" constitutes an incurable jury argument. TEX. R. APP. P. 38.1(i). The three cases Appellant cites to are cited exclusively to support the policy behind the exclusionary provision in Rule 411. [Appellant's Brief, 11–14]. None of the cases cited by Appellant refer to an incurable jury argument—nor does Rule 411. TEX. R. EVID. 411; *Barrington*, 169 S.W.2d at 465; *AccuBanc*, 938 S.W.2d at 151; *and, Hinton*, 822 S.W.2d at 201. Indeed, Rule 411 excludes evidence

of "liability insurance" only in a single specific circumstance, and specifically allows it, pending a showing that the evidence of liability insurance is otherwise admissible, in several other circumstances.[2] TEX. R. EVID. 411. Appellant has not provided any legal authority to support her contention that an incidental mention of "insurance companies" equates to an incurable jury argument. TEX. R. APP. P. 38.1(i).

Even if this Court disregards Appellant's "Issues Presented for Review"and instead determines that Appellant's first argument concerns an alleged violation of Rule 411, Appellant's brief remains in violation of Rule 38.1(i).[3] *Id.* Contrary to Appellant's characterization, a showing of an improper injection of insurance into a case is not sufficient to warrant an immediate mistrial or a grant of a new trial on appeal. *AccuBanc*, 938 S.W.2d at 152; *Hinton*, 822 S.W.2d at 201; and *Sears, Roebuck & Co. v. Abell*, 157 S.W.3d 886, 897 (Tex. App.—El Paso 2005, pet. denied) (holding "appellant still must show that the injection of insurance resulted in the rendition of an improper verdict."). Instead, providing that a violation of Rule 411 has been established, an appellate court must determine whether the violation of Rule 411 resulted in "the rendition of an improper verdict." *Abell*, 157 S.W.3d at 897; *AccuBanc*, 938 S.W.2d at 151–52.

In Appellant's first argument, Appellant has not directed the Court to any evidence in the appellate record that illustrates the alleged harm that Appellant suffered as a consequence of this

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[2] Rule 411 provides for the exclusion of liability insurance on relevance grounds when it is presented for the purpose of establishing negligence or other wrongful act but permits it, subject to the remaining rules of evidence, when making other determinations such as agency or to show prejudice. TEX. R. EVID. 411.

[3] Appellee treats Appellant's first argument as one concerning a purported violation of Rule 411 and Appellant's second argument as one addressing incurable jury argument.

alleged violation of Rule 411's exclusionary provision. *Id.* [Appellant's Brief, 11–14]. Instead, Appellant includes conclusory statements concerning the harm she allegedly suffered, but these statements are not substantiated with citations to the record on appeal. *Id.* [Appellant's Brief, 13].

Further, Appellant has not cited to legal authority to illustrate harm from an alleged violation of Rule 411's exclusionary provision. [Appellant's Brief, 11–14]. As mentioned previously, in this section of her brief, Appellant cites to three cases and to Rule 411. In *Hinton* and *AccuBanc*, two of the cases cited by Appellant, the respective appellate courts found that, based on the totality of the evidence introduced at trial, that there was no showing of harm arising from the objected to references to insurance. *AccuBanc*, 938 S.W.2d at 151; *and, Hinton*, 822 S.W.2d at 201. In *Barrington*, there was a finding that the mention of insurance by one juror to the remaining members of the jury panel merited a new trial, but this is a case that was decided on the principles of juror misconduct rather than incurable jury argument. 169 S.W.2d at 465. Thus, two of the three cases cited to by Appellant hold the opposite of Appellant's argument that incidental references to "insurance" cause the rendition of an erroneous jury verdict. *AccuBanc*, 938 S.W.2d at 151; *and, Hinton*, 822 S.W.2d at 201. The last case cited by Appellant, *Barrington*, is a case decided on the principles of juror misconduct and is, thus, not legal authority for Appellant's position. 169 S.W.2d at 465. Accordingly, Appellant has not provided legal authority to substantiate her argument and thus has not complied with Rule 38.1(i). TEX. R. APP. P. 38.1(i).

Indeed, however the Court elects to interpret Appellant's first argument, Appellant's brief is analogous to the briefs filed in both *City of Lancaster* and *Abdelnour*. In those cases, the respective appellants failed to provide legal or factual (or both) authority to support their claims and the respective appellate courts found that the appellants had thus waived those claims. *City of*

Lancaster, 316 S.W.3d at 783; *Abdelnour*, 190 S.W.3d at 241–42. Here, Appellant suggests that a violation of Rule 411's exclusionary provision would result in a verdict that is improper because it is too large. However, Appellant does not direct the Court to anything in the record that would support this contention. [Appellant's Brief 11–14]. Nor does Appellant apply the facts of this case, with citations to the record, to the purported authority to which Appellant directs the Court. Indeed, Appellee was awarded his medical expenses in the past and $8000 for "physical pain and suffering in the past," which, on its face, does not appear to offend the policy justifications for the exclusionary provision in Rule 411. [CR 153]. Moreover, in Appellant's Motion for New Trial, Appellant did not claim that the damages were excessive or otherwise unsupported by the evidence. [CR 167–69].[4] Thus, as in *City of Lancaster* and *Abdelnour*, Appellant has failed to comply with Rule 38.1(i) and, accordingly, has waived this issue. TEX. R. APP. P. 38.1(i); *City of Lancaster*, 316 S.W.3d at 783; *Abdelnour*, 190 S.W.3d at 241–42.

Accordingly, whether the Court determines that Appellant's first argument concerns incurable jury argument or whether the Court determines that Appellant's first argument involves a purported violation of Rule 411, Appellant has not complied with Rule 38.1(i) because Appellant has not provided citations to legal authority or to the record to establish her argument. TEX. R. APP. P. 38.1(i). Therefore, Appellee contends that, under Rule 38.1(i), Appellant has waived her first issue by failing to provide "a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." *Id.* Thus, Appellee asks this Court to affirm the jury's verdict.

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[4] Because Appellant did not raise this in her Motion for New Trial, the issue is waived on appeal. TEX. R. CIV. P. 324(b)(2).

II. THE INCIDENTAL MENTION OF INSURANCE IN APPELLEE'S DIRECT EXAMINATION OF DR. RICHARD STARRY DID NOT VIOLATE RULE 411 OF THE TEXAS RULES OF EVIDENCE[5]

A. Standard of Review

"The admission and exclusion of evidence is committed to the trial court's sound discretion." *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 753 (Tex. 1995). To obtain reversal of a judgment based on error in the admission or exclusion of evidence, an appellant must show that the trial court's ruling was erroneous and that the error was calculated to cause, and probably did cause, rendition of an improper judgment. TEX. R. APP. P. 44.1(a)(1); *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 43, 41 (Tex. 1998). In making this determination, courts review the entire record. *Alvarado*, 897 S.W.2d at 754. Reversible error does not usually occur in connection with evidentiary rulings unless the appellant can demonstrate that the whole case turns on the particular evidence admitted or excluded. *Id.* at 753–54; *GT & MC, Inc. v. Tex. City Ref., Inc.*, 822 S.W.2d 252, 257 (Tex. App.—Houston [1st Dist.] 1991, writ denied); *Benavides v. Cushman, Inc.*, 189 S.W.3d 875, 879 (Tex. App. Houston—[1st Dist.] 2006, no pet.).

The erroneous injection of insurance into a trial must satisfy this same high burden. *See, e.g.*, *Abell*, 157 S.W.3d at 896–97 (stating, "[a]ssuming, without finding that Appellant Sprinkle's objections to the mention of insurance properly preserved the issue for review, *appellant still must show that the injection of insurance resulted in the rendition of an improper verdict*.") (Emphasis added.).

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[5] Appellant characterizes her first issue as one concerning incurable jury argument. However, section "A" of her brief concerns, principally, a violation of Rule 411. Appellee addresses this section as one concerned with Rule 411 and addresses the issue of incurable jury argument in Appellee's response to Appellant's second argument.

B. Law

Rule 411 of the Texas Rules of Evidence reads,

> Evidence that a person was or was not insured against liability *is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another issue*, such as proof of agency, ownership, or control, if disputed, *or prejudice of a witness*. (Emphasis added.).[6]

TEX. R. EVID. 411.

The plain language of Rule 411 limits the application of its exclusionary provision only to "insur[ance] against liability." *See, e.g., Thornhill v. Ronnie's I-45 Truck Stop*, 944 S.W.2d 780, 794 (Tex. App.—Beaumont 1997, pet. dism'd by agreement) (holding, "First, Rule 411 only prohibits the admission of 'liability insurance,' not 'property insurance.' Thus, appellants' evidence concerning 'property insurance' was admissible."). However, this exclusion is limited to circumstances in which the "insur[ance] against liability" is being used to establish that a person acted "negligently or otherwise wrongfully." TEX. R. EVID. 411. When evidence of liability insurance is raised for a purpose other than to establish negligence or other wrongful act of a person, it is not subject to Rule 411's exclusionionary provision. *Id.*

Even if Rule 411 is violated, a court can remedy the violation with an appropriate instruction. *See, e.g.*, *St. Louis S.W. Ry. Co. v. Gregory*, 387 S.W.2d 27, 33 (Tex. 1965) (holding, "[n]ot every mention of insurance requires the setting aside of a jury's verdict.").[7]

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[6] *See Meuth v. Hartgrove*, 811 S.W.2d 626, 628 (Tex. App.—Austin 1990, writ denied) (permitting admission of liability insurance to establish ownership).

[7] In Appellee's second issue, Appellee refers the Court to *Griffith v. Casteel*, 313S.W.2d 149 (Tex. Civ. App.—Houston 1958, writ ref'd n.r.e.). Appellee contends that this case holds

C. Facts

On appeal, Appellant objects to portions of Dr. Starry's testimony concerning Appellant's testifying expert, Dr. Bill Timberlake, in which Dr. Starry testified that Dr. Timberlake is, "hired by insurance companies to make judgments on patients he has never seen before and—I'd like to know what he gets paid. He basically is paid just to say everything's unnecessary and unwarranted." [CR 84 & 85]. At trial, the parties stipulated to Appellant's negligence and did not ask the Court to submit a question on negligence to the jury, instead the only question submitted to the jury was that of damages resulting from Appellant's stipulated negligence. [CR 150–55; 3 RR 76–77; Appellant's Brief, 1].

D. Analysis

i. The Two Isolated References to "Insurance Companies" Did Not Violate Rule 411 Because Negligence Had Been Stipulated to Before Trial

Rule 411 pertains to the exclusion of liability insurance on the issue of whether one party was negligent or otherwise acted wrongly. TEX. R. EVID. 411. Here, Appellant's negligence (the only wrong alleged in Appellee's petition [CR 8–9]) was not at issue because the parties stipulated to it before trial commenced. [Appellant's Brief, 1; CR 150–55; 3 RR 76–77]. Indeed, the two incidental references to "insurance companies" that Appellant objects to on appeal were made in testimony concerned exclusively with Appellee's damages—not Appellant's negligence or other wrongdoing. [2 RR 84–85]. Specifically, Appellee's medical provider was responding to questions concerning Appellant's expert analysis of Appellee's medical records. [2 RR 84–85]. As further evidence that

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that "injection of insurance into trial did not require an objection to preserve error." This case has been superceded. *See, e.g.*, *Gregory*, 387 S.W.2d 27.

these two isolated references to "insurance companies" did not concern the liability of Appellant, the jury charge included just one question, and that question addressed only damages that would compensate Appellee for Appellant's negligence. [CR 150–55; 3 RR 76–77]. Accordingly, the two isolated references to "insurance companies" did not violate the plain language of the exclusionary provision in Rule 411 and, therefore, Appellee asks this Court to affirm the jury's verdict. *Id.*

ii. The Isolated References to "Insurance Companies" Were Made to Show Prejudice of Defendant's Expert

The plain language of Rule 411 does not automatically exclude "evidence of insurance against liability when offered for another issue, such as proof of agency, ownership, or control, if disputed, *or prejudice of a witness*." TEX. R. EVID. 411. (Emphasis added.). *See generally*, *Hartgrove*, 811 S.W.2d 628 (providing that Rule 411 does not apply when liability insurance is being used to establish ownership). Although Appellee lacks a basis to speculate on Dr. Starry's motivation in referencing "insurance companies," Appellant's brief contends that Dr. Starry's motivation was to expose Dr. Timberlake's bias or prejudice. [Appellant's Brief, 13]. Appellant's brief contends that Dr. Starry's "testimony directly associates insurance and Dr. Timberlake's seemingly biased opinions, unavoidably tainting Dr. Timberlake—and thereby Nguyen [Appellant]—in the minds of the jury." [Appellant's Brief, 13]. However, Rule 411 does not exclude the introduction of liability insurance for the purpose of exposing prejudice. TEX. R. EVID. 411. The plain language of Dr. Starry's testimony, as characterized by Appellant, suggests that Dr. Starry believed that Dr. Timberlake was biased or prejudiced. [2 RR 84–85]. *Id.* Accordingly, Dr. Starry's testimony would not have violated the exclusionary provision in Rule 411 and, therefore, Appellee asks this Court to affirm the jury's verdict.

iii. There Is No Evidence That the "Insurance Companies" that Dr. Starry Alluded to Were Prohibited By Rule 411

Lastly, Appellant has not established that Dr. Starry's two incidental references to "insurance companies" were references to the liability insurance prohibited by Rule 411. TEX. R. EVID. 411; *Thornhill*, 944 S.W.2d at 794 (holding, that Rule 411 "only prohibits the admission of 'liability insurance,' not 'property insurance.' Thus, appellants' evidence concerning 'property insurance' was admissible."). Here, Dr. Starry incidentally mentioned that Dr. Timberlake is "hired by insurance companies to make judgments on patients he has never seen. . . " [2 RR 84–85]. However, Appellant has not provided any legal authority, even analogous authority, that this reference to "insurance companies" referred to the "insur[ance] against liability" prohibited by Rule 411, as opposed to medical insurance, or some other third type of insurance, that would not be subject to Rule 411's exclusionary provision. TEX. R. EVID. 411; *Thornhill*, 944 S.W.2d at 794. Accordingly, Appellee asks this Court to affirm the jury's verdict.

III. EVEN IF DR. STARRY'S TWO INCIDENTAL REFERENCES TO "INSURANCE COMPANIES" VIOLATED RULE 411, APPELLANT HAS NOT SHOWN HARM

A. Law

"The [improper] mention of [liability] insurance before a jury is not always reversible error. *Dennis v. Hulse*, 362 S.W.2d 308, 309 (Tex. 1962). The party appealing must show: (1) that the reference to insurance probably caused the rendition of an improper judgment in the case; and, (2) that the probability that the mention of insurance caused harm exceeds the probability that the verdict was grounded on proper proceedings and evidence. *Id.; cf. Reviea v. Marine Drilling Co.*, 800 S.W.2d 252, 256 (Tex. App.—1990, writ denied) (holding that no harm was shown when a prospective juror spontaneously brought up the issue of party's insurance coverage);" *Hinton*, 822

S.W.2d at 201; and, *Abell*, 157 S.W.3d at 897 (holding "appellant still must show that the injection of insurance resulted in the rendition of an improper verdict.").

"Reversible error does not usually occur in connection with evidentiary rulings unless the appellant can demonstrate that the whole case turns on the particular evidence admitted or excluded." *Alvarado*, 897 S.W.2d at 753–54 (holding, "[r]eviewing the record as a whole, we conclude that the trial court did not abuse its discretion by excluding the challenged evidence.").

In *Abell*, the appellate court held,

> Appellant Sprinkle's Issue No. Four addresses the question of the harm caused by the injection of insurance into the case in chief by the testimony of the witness from one co-defendant. The subject of insurance was addressed in the motions in limine filed by the parties. A review of the record reflects that John Green, D/FW's owner made reference to insurance on more than one occasion. Sears and Sprinkle both moved for a mistrial during the charge conference. Assuming, without finding that Appellant Sprinkle's objections to the mention of insurance properly preserved the issue for review, *appellant still must show that the injection of insurance resulted in the rendition of an improper verdict*.

157 S.W.3d at 897. (Emphasis added.); *see also Hulse*, 362 S.W.2d at 309. The *Abell* court then held that, "after considering all the evidence as a whole," the reference to insurance did not result in the rendition of an improper verdict. *Abell*, 157 S.W.3d at 898. Accordingly, on that point, the appellate court affirmed the trial court's ruling. *Id.*

Similarly, in *Hinton*, the court held that "the record as a whole must show harm to the complaining party. From our view of the evidence, we cannot say the damages awarded in this case were excessive in light of Hinton's evidence."*Hinton*, 822 S.W.2d at 201. In *Hinton*, a light fixture fell and struck Hinton. *Id.* Hinton sued and produced evidence of continuous headaches, psychological trauma, a diminished level of concentration, and that she had suffered pain and

suffering. *Id.* Although insurance had been addressed in the presence of the jury, the court found that in considering the totality of the evidence that they could not "say the damages awarded in this case were excessive in light of Hinton's evidence."*Id.* Accordingly the appellate court affirmed the trial court's ruling on this point. *Id.*

Lastly, in *Alverado*, a negligence case originating out of a prison suicide,[8] the trial court excluded all of the following evidence:

> that one of the jailers had a practice of unnecessarily isolating inmates; that jail officials had not responded adequately to a 1986 suicide attempt; that the jailers received inadequate training in suicide identification and CPR; that the jail should have had video cameras in the detention areas of the jail; and that the jail failed to meet state jail standards regarding potentially suicidal inmates.

Alvarado, 897 S.W.2d at 753–54. However, the supreme court concluded that "after viewing the all [of] the evidence, admitted and excluded, we conclude that the Alvarados did not demonstrate that the trial court's evidentiary rulings probably caused the rendition of an improper judgment." *Id.* at 755.

B. Facts

Appellant objects to Dr. Starry's comment concerning Appellant's testifying expert that, "[h]e's hired by insurance companies to make judgments on patients he has never seen before and—I'd like to know what he gets paid. He basically is paid just to say everything's unnecessary and unwarranted." [2 RR 84 & 85]. The objected to term, "insurance companies," was made twice, both within the same minute. [2 RR 84 & 85].

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[8] The standard used to evaluate the wrongful admission or exclusion of evidence and the standard used to evaluate improper testimony concerning insurance in the presence of a jury both require a finding that the error likely resulted in an improper verdict. Discussed *supra*.

Appellant identifies, without citation to the record, two injuries that she suffered as a consequence of these incidental comments to "insurance companies."

Appellant first argues that she was harmed by these incidental references to "insurance companies" because, "[Dr. Starry's] testimony directly associates insurance and Dr. Timberlake's seemingly biased opinions, unavoidably tainting Dr. Timberlake—and thereby Nguyen [Appellant]—in the minds of the jury." [Appellant's Brief, 13]. Appellant continues, grandiosely stating, "[a]s a consequence Nguyen [Appellant] never stood a chance to present her defense to a fair and impartial jury." [Appellant's Brief, 13].

Appellant then argues, "[t]he harm is also evident when considering the jury verdict. In this regard, the jury awarded the exact amount of medical damages Myers sought. Clearly, Myers placing the existence of insurance in front of the jury improperly influenced them and prompted them to award a much higher amount than they would have without such testimony regarding insurance." [Appellant's Brief, 13].

As his first witness, Appellee called Appellant. Appellant testified that as a result of this motor vehicle collision that she was injured and that she had back pain. [2 RR 58, 63]. Appellant also testified that, "[a]t the moment–At the moment of the accident I was not injured but when I went home and later on, several days later, several days later I had to seek medical attention." [2 RR 58]. Appellant further testified that she treated with a chiropractor for six weeks for the injuries she suffered in the collision, and, following the completion of that six week regimen of treatment, that her injuries had been resolved. [2 RR 62].

As Appellee's second witness, Appellee called Dr. Starry. During Dr. Starry's testimony,

Appellee introduced twenty-two (22) exhibits (exhibits two through twenty-three) which were the bills, records, and affidavits from the medical providers who treated Appellee for injuries resulting from this collision. [2 RR 80–95]. The affidavits attached to these exhibits state, "[t]he services provided were necessary and the amount charged for the service was reasonable at the time and place the service was provided, per doctor's orders." Further, Dr. Starry testified that the injuries Appellee suffered were a consequence of the collision with Appellant and that the treatment and costs were reasonable. [2 RR 72–95].

As his third witness, Appellee called Dr. Timberlake—an adverse witness. Dr. Timberlake testified that some of the treatments that Appellee received were reasonable [2 RR 190] and that he would have considered four weeks of treatment to have been appropriate for the injuries that Appellee suffered in this collision. [2 RR 162; 2 RR 199].

As his final witness, counsel for Appellee called Mr. Myers (Appellee) who testified that he had injured his lower back approximately two years ago but at the time of this collision his lower back was asymptomatic. [3 RR 6–7]. Then Mr. Myers answered questions concerning Appellant's liability for the collision and many detailed questions concerning his injuries and treatment. At the end of his direct testimony, Mr. Myers testified that he had recovered almost fully from the injuries he had sustained in this collision. [3 RR 21–22].

Appellant did not call any witnesses or offer any exhibits. [3 RR 54].

C. Analysis

Appellant's allegations supporting her assertion of harm are conclusory as they do not provide any link between the two incidental references to "insurance companies" and the harm alleged.

[Appellant's Brief, 13].

The four witnesses called by Appellee testified that: 1) Appellant was injured in this collision and that she received six weeks of chiropractic care as a consequence of the injuries she sustained in this collision [2 RR 58, 63]; 2) Appellee's treating doctor testified that the treatments Appellee received were necessary, further Appellee introduced twenty-two (22) exhibits each of which contained an affidavit stating that the treatments were necessary and that the costs incurred were reasonable [2 RR 80–95]; 3) Appellant's medical expert testified that some of the treatment Appellee received was reasonable [2 RR 162; 2 RR 199]; and, 4) through Mr. Myers (Appellee) that he had recovered almost fully from the injuries he sustained in this collision [3 RR 21–22]. Appellant did not call any witnesses or offer any exhibits. [3 RR 54].

When considering the totality of the evidence, Appellant has not demonstrated that this whole case turns on the two isolated references to "insurance companies." *Alvarado*, 897 S.W.2d at 753–54 (holding, "[r]eviewing the record as a whole, we conclude that the trial court did not abuse its discretion by excluding the challenged evidence."); *Hulse*, 362 S.W.2d at 309; *and*, *Abell*, 157 S.W.3d at 897 (holding "appellant still must show that the injection of insurance resulted in the rendition of an improper verdict."). Nor has Appellant shown that the two incidental references to "insurance companies" caused the rendition of an improper verdict. *Hulse*, 362 S.W.2d at 309; *and*, *Abell*, 157 S.W.3d at 897. Instead, Appellant provided a conclusory argument that, "[t]he harm is also evident when considering the jury verdict. In this regard, the jury awarded the exact amount of medical damages Myers sought. Clearly, Myers placing the existence of insurance in front of the jury improperly influenced them and prompted them to award a much higher amount than they would have without such testimony regarding insurance." [Appellant's Brief, 13]. This argument

does not provide any legal or factual basis for the connections and conclusions that Appellant asserts. Accordingly, Appellant has not carried her burden. *Id.*

Instead, Appellant's case is similar to that of *Hinton* and *Alvarado*. *Alvarado*, 897 S.W.2d at 753–55; *Hinton*, 822 S.W.2d at 201. In both of those cases, as in Appellant's case, the appellate courts determined that, outside of the evidentiary rulings complained of on appeal, there was sufficient evidence to determine that the evidentiary rulings were unlikely to have resulted in the rendition of an improper judgment. *Alvarado*, 897 S.W.2d at 753–55; *Hinton*, 822 S.W.2d at 201.

Accordingly, when the combined weight of Appellee's twenty-two (22) exhibits pertaining to Appellee's medical complaints and conditions and the testimony of the four witnesses called by Appellee is weighted against the two isolated references to "insurance companies," Appellant has not carried her burden to demonstrate that the two references to "insurance companies" resulted in the rendition of an improper verdict. *Abell*, 157 S.W.3d at 897 (holding "appellant still must show that the injection of insurance resulted in the rendition of an improper verdict."); *and*, *Alvarado*, 897 S.W.2d at 753–54 (holding, "[r]eviewing the record as a whole, we conclude that the trial court did not abuse its discretion by excluding the challenged evidence."). Accordingly, Appellee asks this Court to affirm the jury's verdict.

IV. CONCLUSION: APPELLEE ASKS THIS COURT TO REJECT APPELLANT'S FIRST ARGUMENT BECAUSE: 1) APPELLANT HAS WAIVED IT; 2) THE REFERENCE TO "INSURANCE COMPANIES" DID NOT VIOLATE RULE 411; 3) APPELLANT HAS NOT SHOWN THAT A REFERENCE TO "INSURANCE COMPANIES" VIOLATES RULE 411; AND, 4) APPELLANT HAS NOT SHOWN HARM

Because Appellant has not properly briefed this issue by providing appropriate citations to legal and factual authority, Appellant has waived this issue. TEX. R. APP. P. 38.1(i). However, even if the

Court finds that Appellant provided appropriate citations to legal and factual authority, Appellant has not shown that Dr. Starry's two isolated references to "insurance companies" violated Rule 411. First, Dr. Starry's comment did not violate Rule 411 because this rule applies only when evidence of "insur[ance] against liability" is being used to establish negligence or other wrongdoing, but here the parties had stipulated to liability before trial and the jury charge contained only a question concerning damages. Accordingly, Rule 411's exclusionary provision does not apply. Second, as Appellee's brief contends, Dr. Starry's mention of "insurance companies" was to show the prejudice of Appellee's medical expert. Finally, Rule 411's exclusionary provision only applies to "insur[ance] against liability" but it does not apply to all references to "insurance." For all of the above reasons, Appellee contends that Appellant has not carried her burden on appeal to show that Dr. Starry's two isolated comments adversely affected the outcome of this trial. Accordingly, Appellee asks this Court to affirm the jury's verdict.

APPELLEE'S RESPONSE TO APPELLANT'S SECOND ARGUMENT

APPELLEE'S RESPONSE TO APPELLANT'S SECOND ARGUMENT

In her second issue, Appellant contends that Appellee's trial counsel made an incurably harmful jury argument by conducting a premeditated assault on the character, reputation, credibility, and integrity of Appellant's medical expert witness through the testimony of Dr. Brian Starry, Appellee's medical expert witness.[9]

I. By Failing to Provide Citations to Legal Authority and Citations to the Record, Appellant Has Waived this Argument Under Rule 38.1(i)

A. Law

Rule 38.1(i) requires a brief to "contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." TEX. R. APP. P. 38.1(i).

B. Facts

In Appellant's second argument, Appellant makes only three citations to the record. On page eighteen (18) of Appellant's brief, the Court is directed to "2 RR 85;" on page twenty-one (21) of Appellant's brief, the court is directed to "2 RR 84–5;" and, on page twenty-three (23) in footnote one (1) the Court is directed to "2 RR 94." None of these citations directs the Court or Appellee to an outrageous or otherwise shocking statement.

[9] Appellant's "Table of Contents" and "Issues Presented on Appeal" identify two arguments (identified by Roman Numerals in the "Table of Contents" and Latin Numerals in the "Issues Presented on Appeal") but in Appellant's brief, Appellant possibly lists three arguments, designated "A," "B," and "C." Appellee addresses "B" and "C" in this section of Appellant's brief.

In Appellant's "Statement of Facts," Appellant refers the Court to the record, where Appellant alleges, "Myers solicited Dr. Starry's criticism as to Dr. Timberlake's report without explanation." [2 RR 86–88, Appellant's Brief, 6].

The remainder of this section of Appellant's brief contains unsubstantiated allegations such as, "[i]n the final stages, Myers's jury arguments once again impermissibly hammered the existence of liability insurance and the unsubstantiated notion that Dr. Timberlake could not be believed." [Appellant's Brief, 19]. However, such allegations do not refer the Court or Appellee to the record.

C. Analysis

Appellant's complaints in her brief are overly general and do not direct the Court or Appellee to relevant sections of the record. Because Appellant has not provided appropriate citations to the record, Appellant has waived this issue on appeal. TEX. R. APP. P. 38.1(i). Appellant makes general claims and apparently expects the Court and Appellee to comb through the three hundred plus page record searching for arguments that are or might be, by their "nature, degree, and extent," so prejudicial that no instruction from the trial court could cure them. The lack of citations to the appellate record requires Appellee to comb through the record and speculate as to which portions of the record to respond to. Accordingly, Appellant has not complied with the briefing requirements and has, therefore, waived this issue on appeal. TEX. R. APP. P. 38.1(i).

II. BY NOT RAISING THE ISSUE OF INCURABLE JURY ARGUMENT IN HER MOTION FOR NEW TRIAL, APPELLANT FAILED TO PRESERVE HER ARGUMENT FOR INCURABLE JURY ARGUMENT

A. Law

Rule 324(b)(5) of the Texas Rules of Civil Procedure provides that "[a] point in a motion for new

trial is a prerequisite to the following complaints on appeal: (5) Incurable jury argument if not otherwise ruled on by the trial court." TEX. R. CIV. P. 324(b)(5).

B. Facts

Appellant's Motion for New Trial concerns violations of limine, but does not address incurable jury arguments. [CR 166–70].

Appellant complains that Appellee's trial counsel's examination of Appellant's medical expert, Dr. Bill Timberlake, was so outrageous as to constitute incurable jury error. However, in reviewing Appellee's direct and re-direct examination of Dr. Timberlake, Appellee found only six instances in which Appellant's trial counsel objected. [2 RR: 140, 152, 154, 190, 192, and 197]. In reviewing Appellee's direct, re-direct, and further re-direct of Dr. Starry, Appellee found only four instances when Appellant's trial counsel objected. [2 RR 69, 79, 84, and 129]. None of these objections asserted incurable jury argument as their basis.

Appellant contends in her "Issues Presented on Appeal" that Appellee's trial counsel conducted "a premeditated assault on the character, reputation, credibility, and integrity of Nguyen's [Appellant] medical expert via the testimony of Myers' medical expert witness [Dr. Starry]." [Appellant's Brief, 2]. Therefore, Appellant's argument should relate only to the testimony elicited from Dr. Starry.

C. Analysis

Because Appellant did not raise the issue of incurable jury argument in her Motion for New Trial, Appellant has failed to preserve this issue for appeal. Alternatively, Appellant has preserved this argument only in the few circumstances in which Appellant's trial counsel registered an appropriate

objection and obtained a ruling from the trial court. TEX. R. CIV. P. 324(b)(5); TEX. R. APP. P. 33.1. [CR 166–70].

Appellant raised a combined ten objections during the testimony of Dr. Starry and Dr. Timberlake, most of which were technical objections (*e.g.*, "asked and answered" [2 RR 190]) and are thus unrelated to the issue of incurable jury argument that Appellant raises on appeal. Rule 324(b)(5) permits an allegation of incurable jury argument to be preserved, without addressing it in the Motion for New Trial, if it was objected to and ruled on by the trial court. TEX. R. CIV. P. 324(b)(5). Here, Appellant made ten objections during the testimony of Dr. Starry and Dr. Timberlake. None of these objections were for an incurable jury argument. Of these ten objections, only two related to the issues Appellant identified in her argument: character; and, the allegedly improper injection of insurance into the trial. [2 RR 84, 140]. Accordingly, Appellee contends that Appellant has failed to preserve her complaints concerning an improper jury argument. TEX. R. CIV. P. 324(b)(5). Alternatively, Appellant has failed to preserve this issue for appeal for all testimony or argument other than the testimony or argument to which Appellant's trial counsel objected and obtained a ruling from the trial court. *Id.*

Lastly, because Appellant limited her argument to the testimony of Dr. Starry [Appellant's Brief, 2], Appellee's medical expert, testimony by other witnesses should not be considered as having been part of the alleged "premeditated assault" on the "character" of Dr. Timberlake. TEX. R. APP. P. 38.1(f). [Appellant's Brief, 1].

III. THE ARGUMENTS AND QUESTIONS CITED TO BY APPELLANT DO NOT RISE TO THE LEVEL OF AN INCURABLE JURY ARGUMENT

Appellant contends that Appellee's trial counsel conducted "a premeditated assault on the

character, reputation, credibility, and integrity of Nguyen's [Appellant] medical expert via the testimony of Myers' medical expert witness." [Appellant's Brief, 2].

A. Law

i. Incurable Harm

"The party claiming incurable harm must persuade the court that, based on the record as a whole, the offensive argument was so extreme that 'a juror of ordinary intelligence could have been persuaded by that argument to agree to a verdict contrary to that to which he would have agreed but for such argument.'" *Benny P. Phillips, M.D. v. Dale Bramlett*, 288 S.W.3d 876, 883 (Tex. 2009) (quoting *Goforth v. Alvey*, 153 S.W.2d 404, 404 (Tex. 1954)).

Appellant directs the Court to *TXI*, a 2010 supreme court case that addresses the issue of unobjected to testimony in the context of repeated appeals to racial and ethnic stereotypes.[10] *TXI Transp. Co. v. Hughes*, 306 S.W.3d 230, 245 (Tex. 2010). In *TXI*, the supreme court held, in relevant part, "[t]he record indicates that Hughes sought to hedge his theory by calling attention to Rodriguez's illegal immigration status whenever he could. Such appeals to racial and ethnic prejudices, whether 'explicit and brazen' or 'veiled and subtle,' cannot be tolerated because they undermine the very basis of our judicial process." *Id.* Accordingly, and based on the appeal to racial or ethnic prejudices, the supreme court found "that the trial court erred by admitting evidence impugning Rodriguez's character on the basis of his immigration status" and, although these were not objected to at the time of trial, the supreme court remanded the case. *Id.*

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[10] This case does not specifically address incurable jury argument, but it does address the issue of erroneous, but unobjected to, admission of evidence.

The supreme court addressed the issue of incurable harm in 2009 in *Phillips*. 288 S.W.3d 883. In *Phillips*, a medical malpractice case, the petitioner appealed an appellate court's decision that his trial counsel failed to preserve error by objecting, obtaining a ruling on that objection, but not requesting a jury instruction as required by Rule 33.1. *Id.* TEX. R. APP. P. 33.1. The jury argument in question was as follows: "[f]or years, in this very conservative community, juries have been very liberal with the doctors, very liberal. What I mean is: Their verdicts didn't send much of a message at all." *Id.* at 882. The supreme court held, "[t]he [appellate] court concluded that counsel's plea to send a message to the doctors was not of this same class of impropriety, and, considering the record as a whole, not so extreme as to be incapable or [*sic.*] cure. We agree. As we recently observed, incurable argument is that which strikes at the very core of the judicial process." *Id.* at 883 (citing *Living Ctrs. of Texas, Inc. v. Penalver*, 256 S.W.3d 678, 680 (Tex. 2008)).[11] Accordingly, the supreme court found that this jury argument did not constitute an incurable jury argument and sustained the appellate court's decision. *Id.*

Additionally, in *Penalver*, the supreme court described an incurable jury argument as one "that strikes at the appearance of and the actual impartiality, equality, and fairness of justice rendered by courts is incurably harmful not only because of its harm to the litigants involved, but also because of its capacity to damage the judicial system." 256 S.W.3d 681. The supreme court continued, writing, "[i]ncurable argument is, however, rare. Not all personally critical comments concerning opposing counsel are incurable. But arguments that strike at the courts' impartiality, equality, and fairness inflict damage beyond the parties and the individual case under consideration if not

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[11]Appellant refers to this case as *Peñalver*, but the case is styled *Penalver* and in the text of the case the supreme court elected not to use the tilde.

corrected." *Id.* In this case, the supreme court determined that plaintiff's counsel's closing argument, which compared Defendant's nursing home with a "World War II German program in which elderly and infirm persons were used for medical experimentation and killed," was so extreme that it was incurable. *Id.*

This Court recently addressed incurable jury argument. *Ritchie v. Rupe*, 339 S.W.3d 275, 308 (Tex. App.—Dallas 2011, pet. denied). In *Rupe*, this Court considered whether Appellee's unobjected to jury argument constituted an incurable argument. *Id.* In *Rupe*, the allegedly incurable argument was "[w]e do not oppress people based on their race, on their religion, whether they believe in God, whether they don't believe in God, whether they're male, female. We don't let you oppress our children." *Id.* Appellant contended that this was "racially prejudicial in the context of evidence presented during the first day of testimony when . . . counsel questioned [a witness] about the disposition in [a] will of [an] interest in the 'Koon Kreek Klub.'" *Id.* This Court held, "appellants have not shown that [this] jury argument— alone or in conjunction with testimony early in the trial concerning . . . membership in the Koon Kreek Klub— injected accusations of racial prejudice that were incurable, thus obviating the need for an objection in order to preserve any error." *Id.* at 309. Thus, this Court held that this did not constitute incurable jury argument. *Id.*

ii. Impeaching an Opposing Party's Expert Witness

Evidence of bias may be offered to impeach the credibility of a witness. TEX. R. EVID. 613(b).

Generally, an expert witness may be questioned regarding payment received for his work as an expert witness. *See, e.g., Russell v. Young*, 452 S.W.2d 434, 436 (Tex. 1970).

B. Facts

Here, Appellant complains, without citation to the record, that Appellee's trial counsel's treatment of Dr. Timberlake was somehow so extreme and venomous that such behavior threatens the integrity of the entire judicial system. Indeed, Appellant specifically equates Appellee's examination of Dr. Starry to the *TXI* case. [Appellant's Brief, 17].

The only direct citation to the record in this section of Appellant's brief directs the Court to Dr. Starry's now familiar statements concerning "insurance companies." [2 RR 84, 85]. However, in this section of her brief, Appellant makes a general reference to the "final stages," but does not elaborate on this or provide a citation to the record. [Appellant's Brief, 19].

However, in considering Appellant's entire brief, there are three additional references to testimony concerning Dr. Timberlake. The first such testimony occurred in Appellant's "Statement of Facts." [Appellant's Brief, 8]. In this instance, counsel for Appellee argued during his closing and without objection, that Dr. Timberlake was "paid by them," "their hired gun,"[12] "getting reimbursed for his time," and "simply paid to be here to tell you that this bulge was not caused by the accident." [3 RR 58, 60, 62, and 63] [Appellant's Brief, 8]. The second such instance, also located in Appellant's "Statement of Facts," occurred after Appellee's trial counsel asked Dr. Starry to read a report written by Dr. Timberlake. After being asked, Dr. Starry stated, "yeah, I've seen his reports before and they all–it's like he copies and pastes . . . the same thing." [2 RR 85] [Appellant's Brief, 6]. The last such instance, also referenced in Appellant's "Statement of Facts," concerns the

[12] The reference to "them" or "their" is ambiguous. Appellant had two attorneys present, Ms. Lewiecki and Mr. Crownover, as well as a person identified as Steve Crowson. Ms. Lewiecki introduced Mr. Crowson as someone "from [her] office." [2 RR 22].

following exchange:

Counsel Lafitte:[13]	Dr. Timberlake speaks of these official disability guidelines and practice pattern parameters. Are you familiar with them?
Dr. Starry:	Yes.
Counsel Lafitte:	Okay. He says that his opinions are based on these. Would you say that's misrepresenting?
Dr. Starry:	Yes, I would.

[2 RR 88] [Appellant's Brief, 6].

Appellant has not directed the Court or Appellee to any other sections of the record in which Appellee's trial counsel questioned Dr. Starry and elicited testimony concerning Dr. Timberlake.

C. Analysis

i. Appellant's Reliance on TXI is Inappropriate

Appellant specifically equates Appellee's trial counsel's examination of Dr. Timberlake with *TXI*. 306 S.W.3d at 245.[14] In *TXI*, the supreme court found that the repeated, and unobjected to, references to the petitioner's status as an illegal immigrant in a case arising from a tragic motor vehicle collision were improper because, "[s]uch appeals to racial and ethnic prejudices, whether 'explicit and brazen' or 'veiled and subtle,' cannot be tolerated because they undermine the very

[13] Mr. Lafitte represented Appellee, Rodolfo Myers, at trial.

[14] This case does not specifically reference the concept of incurable jury arguments.

basis of our judicial process." *Id.*[15]

Appellant contends that *TXI* is "somewhat analogous" because "[w]hile Myers did not raise the race, ethnicity, or national origin of Dr. Timberlake, he solicited testimony from his own medical expert without any foundation in an attempt to inject liability insurance into the trial and impugn the character of Dr. Timberlake." [Appellant's Brief, 17]. Appellant also contends that:

> [t]he unfounded allegation that Dr. Timberlake is only hired by insurance companies and blindly testifies as his employers wish is evidence which [sic.] is so prejudicial it outweighs any probative value. Much like *TXI*, the testimony by Dr. Starry as to Dr. Timberlake constitutes impermissible impeachment testimony on an issue irrelevant to the claims Myers must prove to recover and directly affected the only contested issues—the resonableness and necessity of the medical treatment Myers underwent after the accident.

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[15] In her conclusion, Appellant directs the Court to *General Motors Corp. v. Iracheta*. 161 S.W.3d 462, 472 (Tex. 2005). In that case, a grandmother sued General Motors (GM) for a design defect that allowed the gas tank to leak after a collision. *Id.* at 463. At the beginning of closing argument, and without notice to the trial court or to Defendants, the plaintiff's attorney invited the grandmother to stand and address the jury directly. The grandmother did so, and, in Spanish to an entirely Hispanic jury, the grandmother said, "[t]hank you very much to the jury on the part of my grandchildren and my daughter and on my part." Defendants did not object until after the completion of all closing arguments. *Id.* at 472. The supreme court found "[a] party's personal expression of gratitude to the jury at the close of a case is an error that cannot be repaired and therefore need not be objected to." *Id.* The facts of the *GM* case bear no resemblance to the facts of this case. *Id.*

Appellant also directs the Court to *Otis Elevator Co. v. Wood*. 436, 324, 333 (Tex. 1968). In Wood, the court found that references that strongly linked breast cancer to falling on a escalator were curable by an instruction to the jury. *Id.*

Lastly, Appellant also contends that Dr. Starry's testimony went to "the credibility of a particular witness or the amount of weight to give certain testimony–a core function of the jury, which is its sole province." [Appellant's brief, 21]. To support this proposition, Appellant cites to *City of Keller*. *City of Keller v. Wilson*, 168 S.W.3d 802, 818 (Tex. 2005). *City of Keller* is an oft cited case and it stands for many things, but it does not stand for the proposition that a party may not examine the bias or prejudice of an adverse witness. *Id.* Appellee concedes that it is the sole province of the jury to evaluate the credibility of witnesses, but contends that for the jury to do that properly, the attorneys must examine witnesses and among the things to be examined is the bias or prejudice of the witness. TEX. R. EVID. 611(b); *Young*, 452 S.W.2d at 436.

[Appellant's Brief, 18].

Finally, Appellant concludes, stating "Myers [*sic*.] decision to have his own expert testify [that Dr. Timberlake is allegedly hired by insurance companies] on direct examination—without any foundation or factual support—raises to the level of an incurably harmful jury argument which no instruction, admonishment, or retraction could cure." [Appellant's Brief, 18].

Appellant has relied on an entirely inappropriate case. Appellant characterizes *TXI* properly, in that it stands for the proposition that a party may not "hedge its theory by calling attention to the race, ethnicity, or national origin of a party." [Appellant's Brief, 17]. Indeed, *TXI* turned on the respondent's use of the petitioner's "illegal immigration status whenever [respondant] could" in order to obtain leverage in a "hotly contested case," which the supreme court found to be irrevocably harmful. *Id.* However, *TXI* did not specifically address the concept of an incurable jury argument. *Id.*

Here, Appellant concedes that Appellee did not use Dr. Timberlake's race, ethnicity, or national origin as a tool to obtain leverage in this case, but instead "solicited testimony from his own medical expert without any foundation in an attempt to inject liability insurance into the trial and impugn the character of Dr. Timberlake."[16] [Appellant's Brief, 17]. The facts and circumstances of this case and *TXI* differ entirely, even when all citations in Appellant's brief (and indeed the entire reporter's record) to testimony by Dr. Starry concerning Dr. Timberlake are considered, and, therefore, *TXI* does not support Appellant's argument. *See* 306 S.W.3d at 245. Accordingly, any reliance that Appellant has placed on *TXI* is inappropriate.

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[16]In writing this, Appellee's appellate counsel does not know what Dr. Timberlake's "race, ethnicity, or national origin" is.

ii. Appellant's Case is Also Unlike Penalver

Similarly, Appellant's argument is unlike *Penalver*, in which the Court found that the comparison between a retirement center and a Nazi German program that conducted unspeakable medical tests on elderly and infirmed persons and then killed them, constituted an incurable jury argument. *See* 256 S.W.3d 681. The distinction between an allegation that a person works for an insurance company and a Nazi program designed to kill elderly or infirmed people is so self-evident that it does not require explanation.

iii. Appellant's Case is Similar to Phillips

Instead, Appellant's case more closely resembles *Phillips*. 288 S.W.3d 883. In *Phillips*, a medical malpractice case, the allegedly incurable jury argument was a contention that the jury should send a message to doctors by awarding the plaintiff a large amount of money damages. *Id.* The supreme court considered the case as a whole and affirmed the appellate court's decision that this argument did not constitute an incurable jury argument. *Id.* Similarly, here, when the entire record is reviewed, the two comments made by Dr. Starry that Dr. Timberlake worked for "insurance companies" appear incidental and isolated. Indeed, Appellant testified that she was injured in this collision and that she received six weeks of chiropractic care for her back [2 RR 58, 63], testimony from Dr. Starry established that Appellee's medical treatments were reasonable and necessary, affidavits from Appellee's medical providers established that the treatments were necessary and the costs were reasonable, testimony from Dr. Timberlake established that some treatment Appellant received was appropriate for the injuries Appellee sustained in this accident, etc. When the entire record is considered, as in *Phillips,* the testimony Appellee objected to at trial (and even when combined with the unobjected to testimony in the entire appellate record) cannot be construed as so

extreme that 'a juror of ordinary intelligence could have been persuaded by that argument to agree to a verdict contrary to that to which he would have agreed but for such argument.'" *Id.* at 883.

iv. Appellant's Case is Less Extreme Than Rupe, in Which This Court Found That There was Not an Incurable Jury Argument

Further, Appellant's case is far less extreme than *Rupe*, which this Court decided in 2010. 339 S.W.3d at 308. In that case, arguments concerning shares in the "Koon Kreek Klub" were considered next to other arguments presented in the case and based on that comparison the appellant argued that the appellee had injected race into the case. *Id.* This Court, however, determined that based on the entire record that the testimony did not rise to the level of an incurable jury argument. *Id.* Here, there is no allegation of thinly veiled racism, instead there are two isolated allegations that Appellant's medical expert worked for "insurance companies." [2 RR 84–85]. Here, the allegation made by Appellee's medical expert is far less incendiary than a veiled reference to a group responsible for murdering and terrorizing entire segments of the population for decades. *Id.* Thus, *Rupe* shows that distantly connected, and isolated, references to allegations of possible racism will not necessarily constitute an incurable jury argument. Accordingly, the two isolated allegations that Dr. Timberlake works for "insurance companies" should not be considered an incurable jury argument. *Id.*

v. Conclusion

Accordingly, this case is entirely distinct from *TXI* or *Penalver*, in which the supreme court found incurable jury arguments.[17] Appellant's case is even distinguishable in degree and character from *Rupe*, in which this Court found that an allegedly veiled reference to the Ku Klux Klan did not

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[17] *TXI* did not address incurable jury argument directly.

constitute incurable jury arguments. 339 S.W.3d at 308. Here, Appellee's medical expert provided isolated and incidental testimony that Appellant's medical expert worked for "insurance companies." This is distinct in every way from any case cited by Appellant,[18] or located by Appellee, in which the appellate courts have found incurable jury argument.[19]

Accordingly, Appellee asks the Court to affirm the jury's verdict.

IV. CONCLUSION: APPELLEE ASKS THIS COURT TO OVERRULE APPELLANT'S SECOND ARGUMENT BECAUSE: 1) APPELLANT FAILED TO BRIEF THIS ARGUMENT ADEQUATELY; 2) APPELLANT WAIVED THIS ISSUE BY NOT RAISING IT IN HER MOTION FOR NEW TRIAL; AND, 3) THE TESTIMONY DID NOT CONSTITUTE AN INCURABLE JURY ARGUMENT

Here, Appellant has failed to present a "clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." TEX. R. APP. P. 38.1(i). Appellant makes only three incidental references to the record and then asserts generalities without providing citations

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[18]Appellant also references *Macias v. Ramos*. 917 S,W,2d 317, 375 (Tex. App.—Tyler 1994, no writ). In this case there was a veiled reference to insurance. However, after reviewing the entire record, the court found "it is apparent that the complained of jury argument in the present case does not rise to the level of incurable error." *Id.* Additionally, Appellant refers the Court to *Boone v. Panola County.* 880 S.W.2d 195, 197–98 (Tex. App.—Tyler 1994, no writ). Again, this case found that after reviewing the record there was no incurable jury argument. *Id.* at 198. Appellant also directs the Court to *McGrede v. Coursey*. 131 S.W.3d 189, 193–94 (Tex. App.—San Antonio 2004, no pet.). This case concerned, among other things, an incidental reference to insurance. In this case, the court determined that error was not preserved, but that even if it had been "McGreed present[ed] this court with no evidence showing Appellee's testimony probably caused the rendition of an improper judgment." *Id.*

Appellant directs the Court to two additional cases, *Kruleuvitch v. United States* and *Walker v. State*. These two cases are criminal cases, and Appellee elects not to respond to them.

[19]In his comparison with *TXI*, Appellant appears to reference Rule 403 of the Rules of Evidence, but Appellant does not address this balancing test in his brief nor does he provide any argument of why the prejudicial effect of Dr. Starry's two incidental references to "insurance companies" outweighs any probative value gained from them. Accordingly, Appellant has waived this issue on appeal. TEX. R. APP. P. 38.1(i); TEX. R. EVID. 403.

to support her general assertions. Accordingly, Appellant has not complied with Rule 38.1(i) and has waived these issues. Further, Appellant failed to raise the issue of incurable jury argument in her motion for new trial and therefore has waived any argument for this unless her trial counsel objected to it at trial. The limited places where Appellant has preserved her argument for incurable jury argument are categorically different than cases in which appellate courts have found arguments to be incurable. Accordingly, Appellee asks this Court to affirm the jury's verdict.

PRAYER

For the reasons stated above, Appellee respectfully requests that this Court affirm the jury's verdict and overrule Appellant's arguments on appeal.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Appellee's Brief has been forwarded to all counsel of record and in accordance with Texas Rules of Appellate Procedure on this the 28th day of March 2012, as follows:

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