NO. 12-19-00147-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

ENBRIDGE PIPELINES (NORTH TEXAS) L.P AND TOMMY DOYLE LEWIS, APPELLANTS	***§***	***APPEAL FROM THE 115TH***
	§	***JUDICIAL DISTRICT COURT***
V.		
JONATHAN SULLIVAN, JR., APPELLEE	***§***	***UPSHUR COUNTY, TEXAS***

OPINION

Enbridge Pipelines L.P. (Enbridge) and Tommy Doyle Lewis (Lewis) appeal the trial court's judgment awarding Jonathan Sullivan (Sullivan) damages as a result of a motor vehicle collision. Appellants present five appellate issues for our consideration. We reverse the trial court's judgment and remand the case for a new trial.

BACKGROUND

This lawsuit results from a motor vehicle collision that occurred on July 29, 2015 at the intersection of State Highway 300 and Bluebird Road in Upshur County, Texas. State Highway 300 runs from Longview, Texas northwest to Gilmer, Texas, and normally has two southbound lanes of traffic and two northbound lanes of traffic, with a designated center turn lane. Bluebird road intersects with State Highway 300 and runs east and west. At the time of the collision, the two northbound lanes of State Highway 300 were under construction, with northbound and southbound traffic diverted onto the southbound two lanes of the highway.

Lewis was travelling southbound on the open portion of State Highway 300 in his Enbridge pickup truck. Sullivan, operating an approximately fifty thousand pound dump truck, was travelling southbound on the portion of State Highway 300 that was under construction. Lewis

attempted to turn left from State Highway 300 onto Bluebird Road, in front of Sullivan. The front of Sullivan's dump truck struck the left side of Lewis's truck, causing Lewis's truck to land in the east barrow ditch and Sullivan's dump truck to roll over on its side, partially on top of Lewis's truck.

Sullivan claimed to suffer neck and back injuries from the accident and sued Lewis for negligence. Sullivan further claimed that Enbridge was vicariously liable because Lewis was acting in the course and scope of his employment, and that Enbridge was directly negligent under the theories of negligent entrustment, hiring and retention, training, and undertaking.[1]

When the case proceeded to a jury trial, Sullivan argued that Lewis was entirely responsible for causing the collision because he failed to keep a proper lookout and failed to yield the right of way to Sullivan. Lewis admitted that he did not see Sullivan's dump truck prior to making the turn because it was in his "blind spot." However, Enbridge and Lewis denied that Lewis was acting in the course and scope of his employment at the time of the collision. Lewis testified that he was driving home for lunch from the Enbridge plant where he was based. Enbridge and Lewis further argued that Sullivan was partially at fault for the collision because he did not yield at the intersection of State Highway 300 and Bluebird Road, which was open to the public despite the construction project. Enbridge and Lewis also argued that the Texas Department of Transportation (TxDOT) was partially responsible for the collision because it approved the construction plan, which Enbridge and Lewis classified as unsafe.

Throughout the trial, Sullivan's counsel asked questions, made sidebar comments, introduced evidence, and made arguments which Enbridge and Lewis challenge, under various theories, on appeal. Their complaints can be fairly categorized as follows:

1. Referencing Enbridge's status as a publicly traded company.

[1] Enbridge and Lewis filed a third-party action against H.H. Howard & Sons (Howard), the general contractor for the construction project on State Highway 300, for creating a condition that caused the accident. Sullivan then sued Howard and Panola Sign & Barricade, Inc. (Panola Sign), a company hired by Howard to erect signage and barricades, for negligence. Sullivan's attorney told the jury in opening statements that he did not think Howard or Panola Sign did anything to cause the motor vehicle collision and only sued them because "[Enbridge and Lewis are] pointing the finger at [Howard and Panola Sign]." During her testimony, Julie Knezek, a former employee of Enbridge, testified as the corporate representative for Enbridge. Knezek conceded that Howard and Panola sign were not at fault for the accident. The jury found that neither Howard nor Panola Sign contributed to the accident, and they are not parties to this appeal.

2. Emphasizing Enbridge's lawyers' status as outsiders, appealing to regional bias, and accusing Enbridge's lawyers of deception and ineptitude.

3. Introducing evidence and arguing that Enbridge committed multiple acts of discovery abuse and spoliated evidence.

Despite spending considerable time discussing Enbridge's alleged misconduct, Sullivan ultimately decided to forego submitting any direct negligence claims against Enbridge to the jury. The trial court's charge asked the jury to determine if Lewis was acting within the course and scope of his employment with Enbridge at the time of the collision and whether the negligence of Lewis, Sullivan, and/or TxDOT proximately caused the collision. Enbridge requested the trial court instruct the jury not to consider any evidence of the following when determining whether Lewis was negligent and whether any negligence of Lewis proximately caused the occurrence: (1) Enbridge's negligence in its implementation of its policies and procedures, (2) Enbridge's training, supervision, retention, undertaking, or entrustment, or (3) Enbridge's conduct or its attorneys' conduct in the production of documents during the discovery process.

The trial court denied all three instructions. Prior to reaching a verdict, the jury sent a note to the trial court asking if Enbridge would still be liable for Sullivan's injuries if the jury found Lewis was not acting within the course and scope of his employment. In its reply, the trial court instructed the jury to refer to the jury charge. The jury subsequently found that Lewis was acting within the course and scope of his employment at the time of the accident, and that Lewis's negligence proximately caused the collision. The jury awarded Sullivan $21,765,732.44 in compensatory damages. This appeal followed.

DENIAL OF REQUESTED JURY INSTRUCTIONS

In Appellants' first issue, they argue that the trial court abused its discretion in refusing to submit the aforementioned jury instructions. Appellants rely on ***Benge v. Williams***, 548 S.W.3d 466 (Tex. 2018) for their contention that the trial court's failure to give the requested instructions constitutes reversible error under Texas Rule of Appellate Procedure 44.1(a)(2). *See* TEX. R. APP. P. 44.1(a)(2) ("No judgment may be reversed on appeal on the ground that the trial court made an error of law unless the court of appeals concludes that the error complained of…*probably prevented the appellant from properly presenting the case to the court of appeals*.") (emphasis

added). Sullivan counters that ***Benge*** is distinguishable from this case and the trial court did not abuse its discretion in refusing to give Appellants' requested instructions.

Alternatively, Appellants argue that Sullivan strategically injected prejudicial evidence into the trial against Enbridge, only to drop any direct negligence claims against Enbridge, and the failure to instruct the jury to disregard the evidence constitutes reversible error under Rule 44.1(a)(1). *See* TEX. R. APP. P. 44.1(a)(1) ("No judgment may be reversed on appeal on the ground that the trial court made an error of law unless the court of appeals concludes that the error complained of *probably caused the rendition of an improper judgment*.") (emphasis added).

Standard of Review and Applicable Law

We review a trial court's decision to submit or refuse a particular instruction under an abuse of discretion standard of review. ***Thota v. Young***, 366 S.W.3d 678, 687 (Tex. 2012). The trial court has considerable discretion to determine proper jury instructions, and "[i]f an instruction might aid the jury in answering the issues presented to them, or if there is any support in the evidence for an instruction, the instruction is proper." ***Id.*** (quoting ***La.-Pac. Corp. v. Knighten***, 976 S.W.2d 674, 676 (Tex. 1998)).

When a trial court refuses to submit a requested instruction, the question on appeal is whether the request was reasonably necessary to enable the jury to render a proper verdict. *See* TEX. R. CIV. P. 277; ***Tex. Workers' Comp. Ins. Fund v. Mandlbauer***, 34 S.W.3d 909, 912 (Tex. 2000). For an instruction to be proper it must (1) assist the jury, (2) accurately state the law, and (3) find support in the pleadings and evidence. *See* TEX. R. CIV. P. 278; ***Mandlbauer***, 34 S.W.3d at 912; ***Columbia Rio Grande Healthcare, L.P. v. Hawley***, 284 S.W.3d 851, 855–56 (Tex. 2009). We will not reverse a judgment for charge error unless that error was harmful because it probably caused the rendition of an improper judgment or probably prevented the petitioner from properly presenting the case to the appellate court. *See* TEX. R. APP. P. 44.1(a).

Pursuant to ***Crown Life Ins. Co. v. Casteel***, 22 S.W.3d 378 (Tex. 2000), and its progeny, when a trial court submits a single broad-form liability question incorporating multiple theories of liability, some of which are invalid and therefore cannot support a finding of liability, it errs. ***Benge***, 548 S.W.3d at 475; ***Zurich Am. Ins. Co. v. Coastal Cargo of Tex., Inc.***, 596 S.W.3d 381, 386 (Tex. App.—Houston [1st Dist.] 2020, pet. filed). The error is harmful and requires a new trial if the appellate court cannot determine whether the jury based its verdict on an invalid theory. ***Benge***, 548 S.W.3d at 476; ***Zurich Am. Ins. Co.***, 596 S.W.3d at 386. Though ***Casteel*** concerned

the broad-form submission of multiple theories of liability, its harmful-error rule likewise applies when the trial court submits a broad-form question as to a single theory that allows a finding of liability based on evidence that cannot support recovery as a matter of law. ***Benge***, 548 S.W.3d at 475-76; *see also* ***Brannan Paving GP v. Pavement Markings, Inc.***, 446 S.W.3d 14, 23–25 (Tex. App.—Corpus Christi 2013, pet. denied). Harm is presumed in these situations because such errors prevent the appellant from properly presenting the case to the court of appeals. TEX. R. APP. P. 44.1(a)(2); ***Casteel***, 22 S.W.3d at 388.

When harm is not presumed, we examine the entire record to determine whether the instruction, or the omission of one, probably caused the rendition of an improper judgment. *See* ***Gunn v. McCoy***, 554 S.W.3d 645, 676 (Tex. 2018).

***Casteel/Benge* Analysis**

Appellants argue that ***Benge*** supports their position that the trial court's failure to submit their requested instructions constitutes reversible error under ***Casteel*** and its progeny. *See* ***Benge***, 548 S.W.3d at 474-77. We disagree.

In ***Benge***, a patient sued her surgeon, Dr. Benge, after she suffered a bowel perforation during a laparoscopic-assisted vaginal hysterectomy ("LAVH"). ***Id***. at 468. A third-year resident assisted Dr. Benge in performing the LAVH on the patient. ***Id.*** at 469. At trial, the patient introduced evidence that Dr. Benge failed to disclose the resident's experience level and degree of involvement in the surgery and argued throughout the trial that Dr. Benge's nondisclosure was deceitful and a betrayal of trust. ***Id.*** at 470.

The trial court submitted a broad form liability question to the jury: "Did Dr. Benge's negligence proximately cause [the patient's] injuries?" ***Id.*** Dr. Benge objected to the question because "it allowe[ed] the jury to base its finding on a violation of informed consent," which the patient did not plead. ***Id.*** Dr. Benge requested the jury be "instructed that in deciding whether [Dr. Benge] was negligent, you cannot consider what [Dr. Benge] told, or did not tell, [patient] about [resident's] being involved with the surgery." ***Id.*** The trial court overruled Dr. Benge's objection and refused to submit the requested instruction to the jury. ***Id.*** The trial court rendered judgment on the verdict in favor of the patient for almost $2,000,000.00. ***Id.***

On appeal, Dr. Benge argued that the trial court erred in denying his requested instruction because the trial court's broad form liability question allowed the jury to find him negligent for failing to disclose the resident's experience and involvement in the surgery, a basis for liability

that the patient had not pleaded. ***Id.*** The Texas Supreme Court noted that at trial and on appeal, the patient steadfastly disclaimed any assertion that Dr. Benge was liable for failing to obtain her informed consent to surgery. ***Id.*** at 472. The patient acknowledged that she consented in writing to the possible involvement of a resident in her surgery and did not argue that she misunderstood the consent forms she signed. ***Id.*** However, the patient argued that Dr. Benge was nonetheless liable for his negligence in allowing the particular resident—who had no experience in performing the surgery—to assist in the LAVH procedure, in assigning the resident the surgical tasks he did, and in supervising the resident's work. ***Id.*** The patient also argued that Dr. Benge failed to disclose that the resident had never performed an LAVH procedure and that the resident would be significantly involved in the surgery.[2] ***Id.***

After reviewing the record, the Supreme Court concluded that the patient substantially emphasized Dr. Benge's alleged nondisclosure at trial from "beginning to end." ***Id.*** at 473. The patient argued that the evidence of Dr. Benge's nondisclosure was not a claim of lack of informed consent for which he could be held liable, instead characterizing her claim as one for "nondisclosure." ***Id.*** at 473-74. The patient further argued that the evidence supporting her claim for nondisclosure was offered only to impugn Dr. Benge's credibility. ***Id.*** at 474. The Court rejected the patient's argument, concluding that lack of informed consent and the patient's claim for nondisclosure were one and the same. *See* ***id.*** The Court further rejected the patient's argument that evidence of Dr. Benge's nondisclosure impugned his credibility because the patient failed to identify any fact with respect to which Dr. Benge's credibility was important. ***Id.*** The Court noted that the evidence offered to substantiate Dr. Benge's nondisclosure was "not merely about what Dr. Benge did or did not tell the patient … [but] about whether he *should* have told her more—about whether he had a duty to do so under the standard of care." ***Id***. The Court explained that:

> The issues of whether Dr. Benge was negligent in involving [the resident] and supervising her in the surgery, and whether Dr. Benge was negligent in failing to disclose to [the patient] what was required to obtain her informed consent, are completely different. [The patient's] evidence and argument at trial confused them.

Id.

[2] The evidence about the level of the resident's involvement was inconclusive, with both Dr. Benge and the resident testifying at trial that the resident performed forty percent or less of the surgery. However, the resident reported to the hospital that she performed fifty percent or more of the surgery.

The Court agreed with Dr. Benge that the evidence regarding his failure to obtain the patient's informed consent/nondisclosure was problematic because, although a single theory of negligence was submitted, the jury could have based its verdict on an invalid theory, i.e., Dr. Benge's failure to procure the patient's informed consent. ***Id.*** at 476. Because the trial court refused to submit Dr. Benge's requested instruction, the Court held that it could not determine whether the invalid theory of lack of informed consent was the basis for the jury's verdict. ***Id.*** The Court held that this error was presumed harmful because it could not determine whether the jury found liability on an improper basis, reversed the case, and remanded the case to the trial court for a new trial. ***Id.***; *see* TEX. R. APP. P. 44.1(a)(2).

Here, Appellants' reliance on ***Benge*** is misplaced. Appellants argue that, like in ***Benge***, evidence regarding Enbridge's conduct was extremely prejudicial and confused the jury. However, the evidence that Appellants challenge would not support a liability finding against *Lewis*. Evidence that Enbridge employed deceitful lawyers, committed discovery abuse and/or spoliated evidence, and is a publicly traded company would not be a "theory of liability" upon which the jury could have found *Lewis* liable. If this evidence related to anything at all, it was Enbridge's direct negligence in proximately causing the collision. But the question of Enbridge's negligence was *not submitted* to the jury. Because we must presume that the jury followed the court's instructions, we do not conclude that the trial court erred in failing to submit Appellants' proposed instructions under ***Benge*** and we will not presume harm. *See* ***Salinas v. Salinas***, 365 S.W.3d 318, 320 (Tex. 2012).

Failure to Submit Requested Jury Instructions

Alternatively, Appellants argue that the trial court erred in denying their requested instructions and that this error probably caused the rendition of an improper judgment because: (1) a substantial amount of the trial concerned questions and testimony on topics unrelated to the ultimate issue in the case, i.e., whether Lewis's negligence proximately caused the collision, including comments, arguments, testimony, and suggestions that Enbridge committed discovery abuse and/or spoliated evidence; and (2) the trial court should have instructed the jury to disregard this evidence after Sullivan elected not to submit its direct negligence claims against Enbridge.

Sullivan counters that he did not offer evidence or argue that Enbridge spoliated evidence and that his remarks and questions were grounded in the evidence. In support of his argument, Sullivan cites the definition of spoliation and notes that Appellants cited to cases involving the

destruction of evidence, which this case does not involve. *See* ***Brookshire Bros., Ltd. v. Aldridge***, 438 S.W.3d 9, 18 (Tex. 2014); *see also* ***Smith v. Williams***, No. 06-14-00040-CV, 2015 WL 3526089, at *3 (Tex. App.—Texarkana May 29, 2015, no pet.) (mem. op.) (emphasis added).

Our review of the record shows that Sullivan introduced evidence and argued, through his questions of witnesses, sidebar remarks, and statements to the jury during opening and closing arguments, that Enbridge:

1. Deceived Brandon Love, the Texas Department of Public Safety Trooper who investigated the collision, into altering his crash report.

2. Falsified or otherwise altered Lewis's work cell phone bill to conceal that Lewis was using his cell phone at the time of the collision.

3. Failed in its duty to supplement its discovery responses to inform Sullivan that Julie Knezek, Enbridge's designated corporate representative, and Lewis were no longer employed by Enbridge by the time of trial.

4. Failed to timely produce a report about the crash made by Lewis.

5. Failed to disclose the names of the members of a committee commissioned by Enbridge to investigate the accident.

6. Altered its internal investigation report before producing it to Sullivan.

These are clear allegations of spoliation. *See* BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "spoliation" as "[t]he intentional destruction, mutilation, alteration, or concealment of evidence."); ***Tex. Elec. Co-op. v. Dillard***, 171 S.W.3d 201, 208 (Tex. App.—Tyler 2005, no pet.) (a spoliation instruction is an instruction given to the jury outlining permissible inferences they may make against a party who lost, altered, or destroyed evidence). Moreover, courts of appeals have generally limited the use of spoliation instructions to two circumstances: (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.***, 438 S.W.3d at 19 (emphasis added).

As demonstrated below, these allegations were pervasive and a substantial focus of Sullivan's case.

The Irrelevant and Prejudicial Arguments and Evidence

Sullivan's counsel began the trial by assuring the jury of his own personal truthfulness. In voir dire, Sullivan's counsel made the following statement while discussing the burden of proof:

> I submit to everybody on this panel that even though that's all I have to do, by the end of this case it's going to be like this and I'm going to show you evidence where they failed to yield the right of way, they failed to look in their blind spot, and they didn't follow their own procedure. I make that commitment to you and I also want to make a commitment to you throughout this case you hold every lawyer, every witness to everything they say. I will not once misstate the facts. I will not once misstate the law. Hold every lawyer to that.

This theme continued during Sullivan's counsel's opening statement:

> I want you to recall everything you heard in the courtroom. You remember yesterday, I said it numerous times, I said I want you to hold us accountable for everything we said. I looked you in the eyes and I said there will not be one time where I misstate the law or misstate the facts. I'm not going to tell you we took a left and we take a right. I'm not going to tell you we were going this speed when we were going that speed. There's a reason and you know what it is. I don't have to tell you. And you don't have to be from Gilmer, Longview, Houston or Tyler to understand that.

Sullivan called Love to testify as his first witness. Love initially found the collision resulted from Lewis's failure to yield the right of way while turning left. However, prior to trial and after meeting with one of Enbridge's attorneys, Love amended his crash report to reflect that Sullivan's actions possibly contributed to the collision because Sullivan failed to yield the right of way at an open intersection. By the time of trial, Love changed his opinion again and testified that Lewis's failure to yield the right of way was the sole cause of the collision. Sullivan accused Enbridge of deceiving Love for the purpose of convincing Love to alter his crash report. Sullivan elicited testimony from Love that he felt "deceived" by Enbridge's attorney.

> Q. Now, I understand after you worked this accident that somebody from Enbridge's office showed up, and had a meeting with you at your office; is that correct?
>
> A. Yes, earlier in the year I believe.
>
> Q. In fact, it was three years after your accident report; is that correct?
>
> A. Yes, sir.
>
> …
>
> Q. [] When he showed up did they tell you -- did Enbridge's lawyer tell you I had already taken the deposition of the corporate rep and of Mr. Lewis?
>
> A. No.
>
> …
>
> Q. When they came to see you did they tell you that the other lawyers in the case too had already taken their people's deposition; did they tell you that?

A. No, sir. None of that was told to me.

Q. Did they show you when they came and sat down with you all the times in the depositions where the driver said, "I failed to yield the right-of-way[?]"

A. No, that was never mentioned to me.

Q. Did they show you when they came and met with you all the times in the deposition where the driver said, "I failed to see what was in my blind spot"?

A. That was never told to me, no.

Q. Did they show you when the corporate rep in her deposition when she testified about him failing to yield the right-of-way and failing to see in his blind spot?

A. No, I was never told that.

Q. And let me ask you this, did they tell you that they invited me to the meeting with you?

A. No.

Q. Did they tell you, "Well, just a minute, let's call Mr. Goudarzi or Mr. Young or Mr. Hoover and see if they want to come and attend so you can look at all the evidence"?[3]

A. No, they didn't.

…

Q. And before I get to that, how do you feel you were handled and you were treated in your office by Enbridge's lawyers?

A. Well, I think -- there was only one lawyer that came and I don't see him in here. But honestly I felt like I was deceived and I also felt like my kindness was taken advantage of and I just felt completely deceived from what they did to me.

Through Love, Sullivan's counsel also challenged the veracity of the cell phone records produced by Appellants for Lewis's Enbridge provided cell phone and suggested that the records were somehow altered or fraudulent:

Q. [] Sir, if you would take the time to look at Exhibit 6. It's been represented to us that that is the phone records from Enbridge. It's also been represented to us that the phone is provided to him by Enbridge. It's further represented to us that he doesn't have his own personal phone. Did they tell you any of that information?

A. No, sir.

Q. Now again, I assume you, like most of us, from time to time look at your cell phone bill?

A. Yes, I do. I look at my phone bill along with all my other bills.

[3] Mr. Young and Mr. Hoover are Mr. Goudarzi's co-counsel in this case.

> Q. I want you -- I mean, the providers that we have are AT&T, Verizon, there's a Google, do you see any of those names on this alleged bill?
>
> A. No, this is just some spreadsheet with phone numbers and stuff, but there's no -- this doesn't look like a bill I've ever received.
>
> Q. Again, I want you to be real careful to look through it, sir.
>
> A. This doesn't even have page numbers. Usually they'll have page 1 of 10 or 1 of 5. I'm not seeing anything.
>
> Q. So would you agree with me there's no way to look at this document and determine if it's the totality of the documents from the phone he was provided by Enbridge?
>
> A. Yes, I agree. There's no way to determine that.

Sullivan's counsel reiterated the allegations regarding the cell phone bill during his examination of Lewis:

> Q. So you're telling this jury, again, and you want to call it a bill -- I don't think it's a bill, when you looked at it -- what you're looking at -- are you sure it's the same document, because I'm going to ask you a question here in a minute.
>
> A. Yes.

Sullivan's counsel continued to accuse Enbridge of discovery abuse and spoliation. Enbridge designated Julie Knezek as the corporate representative with the most knowledge about Enbridge's policies and procedures at the time of the accident. Prior to trial, Knezek's division was sold to another company, which Knezek admitted during her examination by Sullivan's counsel. Sullivan questioned Knezek at length about her change in employment and Enbridge's failure to disclose the change, emphasizing Enbridge's duty to supplement its discovery responses in that regard.

> Q. And let's back up. What is your role at Enbridge?
>
> A. Currently?
>
> Q. Yes, ma'am.
>
> A. I'm currently not working for Enbridge. I work for Midcoast Energy.
>
> Q. You don't work for Enbridge?
>
> A. Not currently, no, sir.
>
> Q. Do you understand your lawyers, Enbridge's lawyers, have never told the plaintiffs?
>
> …

Q. (By Mr. Goudarzi) Ma'am, you're telling me in front of this jury that you, as you sit in this courtroom where you just told them you're the corporate rep for Enbridge, that you do not currently work for Enbridge, correct?

A. I do not currently work for Enbridge.

Q. And tell the jury how long it's been since you worked for Enbridge.

A. July 31st of this year we were sold.

…

Q. So again, when your deposition was taken there was Enbridge lawyers there representing you, correct?

A. Yes.

Q. And representing the interest of Enbridge, correct?

A. Sure.

Q. All right. And with that being said, and at that time it was represented to us that you were the corporate rep for Enbridge, correct?

A. Correct.

Q. And again, that being said, since you're no longer working for Enbridge, I mean, is there another corporate rep on this side of the room? Point to them.

A. Not that I'm aware of, no.

Q. So what you're telling the judge and the jury is Enbridge did not send a corporate rep to their courthouse to stand in front of them and to be questioned, correct?

A. I thought that was me. That's my understanding.

Q. Just – that's your – who told you that?

A. I was – I got subpoenaed to be here.

Q. Who told you that you can be a corporate rep when you're not even employed by the company?

A. It was my understanding. I was asked to be here.

Sullivan's counsel then returned to questioning Knezek concerning Enbridge's document production, before circling back to Enbridge's failure to disclose that Knezek was no longer employed by Enbridge. Sullivan then accused Enbridge of playing a "shell game."[4]

Q. There was no time during this case that I could ever go to your office or Enbridge's office and get the documents, could I, ma'am?

A. To get which documents?

[4] A shell game is a game involving sleight of hand, in which three inverted cups or nutshells are moved about, and contestants must spot which is the one with a pea or other object underneath.

Q. Any documents concerning this case, correct?

A. No, sir, I guess.

Q. You agree with me that not only is this side of the room but these two gentlemen and their respective clients have to go through Enbridge to get whatever documents y'all choose to get us, correct?

A. Correct.

Q. And as we sit in this courtroom the individual who's brought before this jury doesn't even work for them and Enbridge has known that since July 31, correct?

A. They realize I don't work for them, yes.

Q. And this case has been going on all morning and yesterday and at no time did you ever see any lawyer come to me or come to the judge and say, "She no longer works for Enbridge, even though we've held her out to be our corporate rep." Did you ever see that happen?

A. I don't know anything about the conservations.

…

Q. Ma'am, is this a shell game? Do you or do you not work for Enbridge?

A. I do not work for Enbridge.

…

Q. Do you agree with me that when these lawyers and when Enbridge puts things in their records, I've got to take them at their word because I don't get to go to your office, go through your computer, go through your file cabinets to see if you're telling me the truth; do you agree with that?

A. Yes.

Q. You understand y'all are the defendant in this case, correct?

A. Yes.

Q. Do you understand that you have a duty when I send you discovery to supplement your answers, correct?

A. I guess.

Q. Right. I mean, you guess? Let's back up. You told me in the deposition you graduated from Texas A&M, correct?

A. Yes, sir.

…

Q. So you agree with me. So your supplementation would be to Mr. Sullivan and Sweaney, who are the two gentlemen me and Mr. Young represent, correct?

A. Yes.

Q. So what you've done, again, you've supplemented as I said your responses, correct? Did I say that correctly?

A. I don't understand I supplemented. That's what the document says.

Q. Right. The document speaks for itself. It means your lawyers, they supplement our requests, correct?

A. I don't think I've ever seen that document.

…

Mr. Goudarzi: Mr. Hoover, go back to it because it's real important to know what the date is.

Q. (By Mr. Goudarzi) What's the date, ma'am?

A. Fourth day of September 2018.

Q. Now, that's clearly after July 31st, isn't it?

A. Yes.

Q. That's clearly after you're no longer working for Enbridge, correct?

A. Yes.

Q. Now let's read what they put. It's on page 5 of 23. Read that name?

A. Julia Knezek.

Q. And is that who you are?

A. Yes.

Q. What's the name underneath?

A. Enbridge.

Q. What does it say you are?

A. Corporate Safety Representative.

Q. They could have told this courtroom; they could have told this jury; they could have told my clients back on September the 18th that you were no longer employed by Enbridge; couldn't they have, ma'am?

A. I assume so, yes.

Q. And had they told me that then, I could have tried to get somebody else to come here to tell this jury about the policies and procedures and what went wrong at Enbridge, couldn't I, ma'am?

A. The current policies, sure, previous policies back on the date of the incident, no. I mean—

…

Q. (By Mr. Goudarzi) Thank you. This man, despite what I've just proven to this jury in their courtroom, picked you; is that correct?

A. Sure.

Q. All right. Tell the judge why an actual employee who is a corporate rep wasn't selected?

A. I cannot answer that.

Sullivan's counsel then began to question Knezek about the late production of a report Lewis completed after the accident.

Q. Ma'am, you understand, because you were here in the room in open court so it's not privileged, I was told yesterday after the jury was here that there's a new document that came in to where he could give it to me, correct?

A. I'm sorry, can I correct my previous, it reminded me, the police report, I looked at the police report.

Q. Which one?

A. Both revised one and the previous one. I am sorry, question?

Q. You know that yesterday because this jury showed up finally they produced Exhibit 12?

…

Q. (By Mr. Goudarzi) You understand this is when it was given to me yesterday?

A. That's my understanding, yes.

Q. Right. And it was given to me when the jury had assimilated [sic] out here just before jury selection, correct?

A. If you say so, yes.

Q. Well, what do you mean, if I say so?

A. If that's when it was given to you, I did not see it.

Q. All right. Well, you were in the courtroom, in fact, I remember it and I'll put witnesses on to prove it if you make me.

A. I was in the courtroom.

Q. You were sitting right here when he says, "Mr. Goudarzi, I've got a document that you've been asking for and we need to bring it up to the Court." You were in the room when he said that?

…

Q. (By Mr. Goudarzi) So if there's other witnesses who are going to take that stand that say you were in the courtroom when this lawyer yesterday, as this jury is sitting outside, says I've got a document you've been requesting and I'm going to give it to you, you're telling the jury you weren't in the room; is that correct?

A. I might have been in the room, but I didn't -- I knew you got this paper because you made a big deal about getting the paper. But as far as the transfer -- you had it by that point. I did not see an exchange of papers.

Q. Well then you overheard the conversation I was upset that I'm just getting it on the day the jury shows up for the jury box, correct?

A. I understand you're upset, yes.

…

Q. Now you would agree with me that had this case not made it to trial I'd have never got that document, would I, ma'am?

A. Sure, yes.

Q. It's a good thing the jury showed up, isn't it, ma'am?

Sullivan's counsel also questioned Knezek about her failure to disclose the members of a committee appointed by Enbridge to investigate the accident.

> Q. And you remember I asked you to tell me the members and you told me in depo you couldn't do that?
>
> A. Correct.
>
> Q. And, in fact, you told me in depo, you said, "Mr. Goudarzi, I'm going to get you that information." Do you remember that?
>
> A. Yes.
>
> Q. And I'm going to read it for you. "Okay. I'm going to leave a hole in the deposition and I'm going to ask you to fill it in with everybody's name." What was your answer?
>
> A. "I can do that."
>
> Q. "And I'm going to take everybody's deposition who was in that room, okay? So be careful whose name you write." Did I say that?
>
> A. Yes.
>
> Q. "They're -- okay. They're listed in the system. Sure, we can provide that to you." So the system is something at Enbridge, correct?
>
> …
>
> Q. (By Mr. Goudarzi) And, ma'am, the sheet that I was at, that's where you're supposed to write it in, correct?
>
> A. That's for corrections, as I understand.
>
> Q. Right. And you agree I can't go get on your computer and go to figure out who those names are, correct?
>
> A. No.
>
> Q. And because you didn't write it in, I told you I was going to take their depo, I couldn't take their depo, could I?
>
> A. No.

At this point, the court decided to take a break and sent the jury out. The court told the parties "ya'll need to talk…[y]a'll really need to settle this case…[y]a'll need to go talk settlement." She went on to tell Appellants that "[the jury is] going to be upset…that this stuff wasn't done…[i]t doesn't look good."

After the break, Sullivan's counsel revisited the topic of the undisclosed committee member names later in his examination of Knezek:

> Q. And as you sit here today, do you know the names of the people you didn't tell me about?

A. Yes.

Q. But you recognize I can't go take their deposition today, correct?

A. Yes.

Q. And I assume you learned the names of those individuals after I took your deposition, right?

A. I looked them up.

Q. You just didn't choose to tell me, the judge and jury who they were so I could go take their deposition?

A. That wasn't my decision.

Q. Whose decision was it?

A. The lawyers.

The court then interjected: "Oh my goodness. We need to take a break. Let's take a break." Thereafter, the trial court conducted a hearing outside the presence of the jury to determine who instructed Knezek not to produce the names of the committee, but Knezek was unable to recall the lawyer's name. Knezek clarified that the lawyer did not instruct her not to disclose the names, only that the lawyer would produce the names in a different way and that Knezek did not need to write the names on her deposition change sheet.

After this break, Sullivan's counsel resumed his examination of Knezek and accused Enbridge of altering its internal accident investigation report.

Q. And when was the investigation completed?

A. That's where I was having trouble finding on here. I see the due date was 8/12/15, but I don't see where on this printout when it was completed.

Q. Well, if the due date is 8/12/15, we got Susan who is in health and safety sending out 12/10/15, correct?

A. Well, that wouldn't have been an e-mail, but it was last modified by her on 12/10/15.

Q. What did she modify?

A. You will see in that evidence there was –

Q. Ma'am, you can't tell this jury -- in other words, we should have copies before it's modified, shouldn't we, ma'am? Because there's no way this jury is going to ever know where the document started, where it was modified and where it ended, correct?

A. That's what this system tracks in here.

Q. Ma'am, listen to the question?

A. Okay.

Q. There's no way -- and y'all didn't provide for me the first draft, did you?

A. If this is what you got --

Q. I didn't get it, correct?

A. Then, no.

Q. And it gets modified and it gets changed, correct?

A. It can. It's all documented in the system when things are changed.

Q. But it doesn't document what changed, does it, ma'am?

A. I believe it does.

Q. It does. Well, then tell the jury why we didn't get a copy of it.

A. I can't answer that.

Q. And the people who would have control of that are Ms. Tanner in Houston and this group over here, correct? It surely wouldn't be me or Mr. Young, correct?[5]

A. Not you and Mr. Young.

…

Q: And, ma'am, just to be real clear, you understand ya'll modified it after the lawsuit was filed; did you know that?

Sullivan's counsel then questioned Knezek on whether anyone actually employed by Enbridge was in the courtroom.

Q. All right. And I want you to look over here on this side of the room and I want you to march me toward who here works for Enbridge who's even in the jury's courtroom?

A. I don't recognize anybody.

Q. There's nobody here who works for Enbridge? Was there anyone here for Enbridge yesterday at jury selection?

A. No.

Q. Ma'am?

A. No.

Q. There wasn't, correct?

A. No.

Sullivan's counsel then returned his focus to Enbridge's alleged discovery abuses.

[5] Ms. Tanner works in house for Enbridge as senior legal counsel.

Q. (By Mr. Goudarzi) All right. Ma'am, you understand the purpose of all this work we do before we get here is we try to streamline cases so we don't waste the jury's time you understand that, don't you?

A. Yes.

Q. In other words, Judge Parish makes us go take the depos, makes us do all this discovery so when the jury gets here we don't learn things at the courthouse steps and you know that, correct?

A. Yes.

Q. And you know when you learn things at the courthouse steps, what it takes away from me, what it takes away from my client, is my ability to question what's actually in the documents, correct?

A. Yes.

Q. Now, ma'am, did you know for the first time at the break I was informed by Enbridge that Mr. Doyle…doesn't even work for Enbridge; did you know that?

A. Tommy?

Q. Yes.

A. Yes.

Q. You understand nobody told me, Mr. Young, or this Court that neither you or Mr. Lewis don't work for Enbridge?

Sullivan's counsel engaged in similar enquiries regarding the fact that Lewis was no longer employed by Enbridge and Enbridge's failure to supplement its discovery responses to inform Sullivan that Lewis was no longer employed by Enbridge by the time of trial. Sullivan also directly accused Enbridge of deceiving Love by specifically asking Knezek: "Now, as the individual brought here by the Enbridge lawyer in Houston and these lawyers here, why did y'all deceive Trooper Love at his office?"

Sullivan's counsel questioned Lewis in a similar fashion regarding his failure to produce his written report of the accident and suggested that Enbridge was hiding other documents.

Q. Now, you, I'm told by Enbridge the morning of jury selection was when you first decided to give them a copy of that incident report, correct?

A. That was the first time that I could.

Q. Let me stop you there, sir. I can't go to your computer, you heard that whole line?

A. Yes.

Q. I can't go to any of their computers, correct?

A. That's correct.

Q. That document is an Enbridge document, correct?

A. Yes.

Q. That document supposedly you made for Enbridge to use it, correct?

A. Yes.

Q. And when you make that document, you supply that document to Enbridge, correct?

A. Yes.

Q. Then why didn't Enbridge give it to me if you supplied it to them?

A. I don't know.

Q. That's the second time. Sir, I want you to look this jury in the eye and tell them all the other documents that I couldn't find.

A. I don't know what other documents you couldn't find.

Q. You understand, sir, and I'm going to apologize to both of my clients now that there's no way I'm ever going to know what documents I couldn't find because I can't go to your computers and I can't look in your file cabinets, can I?

In closing argument, Sullivan's counsel asked the jury to send a message to Enbridge through its verdict and continued to emphasize his allegations that Enbridge spoliated evidence and committed discovery abuse, despite disclaiming any direct negligence against Enbridge. The following excerpts, listed in chronological order in Sullivan's counsel's closing arguments, are illustrative:

Me and Mr. Young have been standing toe-to-toe and back-to-back for three years on this case. And for three years on this case we've been fighting this company to do the right thing.

…

And you learned through this process that had I had that document, what could I have done? I could have questioned witnesses with it. I could have uncovered things. And I'm going to take this moment to look at my clients and apologize that I couldn't get it. I'm sorry. Because I should have had it earlier, because I promise you, just like you saw every time I questioned the witness, there was something I could uncover.

…

The corporate rep sent here by those people in Houston is not even employed there anymore. Look in this courtroom. There's still no one in your courtroom from Enbridge. They don't care. I've tried cases for 21 years, I've got verdicts all over this state, and I've never had a case where the defendant didn't show up to look the jury in the eyes and either say, "I'm sorry. I'm wrong. I need to be held accountable," or "I didn't do it." They didn't even show up. And then we find out when we talk to Mr. Lewis that he's not employed either. And you remember they have a duty, we talked about it, the lawyers admitted it, to supplement their answers so I would have known.

…

I want to walk through some of the things that we clearly proved. Enbridge -- you remember the whole thing about page 100 to the corporate rep's depo, where I asked her, "I want to know who is on the investigative team so I can go question them." "I'm going to get that for you, Mr. Goudarzi. I'm going to get that to you, because you can go take their depositions." And you heard just two days ago why I didn't get it in your courtroom. Do not think for a minute -- you saw the cross-examination and how I was able to prove what I said. And I'm going to ask you, you remember in voir dire I told you this, I said, I want you to listen to everything I say. I want you to listen to everything this side of the room says, and I want you to hold me accountable for the first time I misstate the facts, for the first time I try to stretch the facts, or I try to tell you something that's not in the record. It never happened.

…

You heard the trooper get on the stand and say someone from Enbridge came to his office, sat down, and talked to him, a lawyer, and convinced him wrongly about the evidence, deceived him.

…

When did they produce the names of the investigative team? That was just two days ago. They didn't supplement the responses to disclosures, changed the story from 3 to 10 to 20, modified 13 after the lawsuit was filed. Do you remember that? We were talking about it, and I questioned them before, I said, "You agree with me that just because a lawsuit is filed, the evidence shouldn't change and your report shouldn't change?" Every one of them agreed with me. And then I showed them, I said, "Well, look, let's look at what your report says. Let's go to the modification date." They modified it 12/10/15. The lawsuit was filed in October. They had answered the lawsuit before they changed that. They had lawyered-up. This is your courtroom.

…

And then I brought the phone records and I showed them to the officer, and, again, I want you to look at these records. And I want you to find -- I mean, compare it to the records you've all looked at.

And remember in voir dire I asked y'all, I said, "How many of y'all have looked at your phone records?" There's a reason why, because I knew that was going to be an issue in this case. There's not one emblem on here that says AT&T and Verizon. And did he ever ask them one question about this? I wonder why? Why wouldn't he hand it to her and try to get her to explain to you why the emblem is not on there, why it didn't look like the ones I brought up of my business. The AT&T that gives me service, the Verizon that gives some of us service, is the same one that gives them service.

…

And when Mr. Newton gets up here in a minute, he needs to look you in the eyes and he needs to be able to tell you why Enbridge has not shown up in your courtroom. He needs to tell you why they weren't here at voir dire, why they weren't here Tuesday, Wednesday, Thursday, and why they hadn't shown up today after I made an issue of it, after they knew that, we knew, you knew most importantly, that nobody from Enbridge showed up. That tells you how brazen they are. How they don't care what you do.

…

> And when he gets up here, he needs to look you in the eyes and tell you why it took the jury showing up in this courthouse for them to give me documents. And why they showed up so late to where I couldn't question witnesses that would have driven me to find other information. And why that was proper and why they think they can get away with doing it.
>
> …
>
> And he wants to talk about -- he got up here again and talked about Mr. Sweaney's paperwork. This is a corporation that's traded in New York and he wants to talk about our paperwork. And when we go to their site that's what it says, "Maintain truth in all interactions." I submit to you, did that happen in this courtroom, and he wants -- the reason they didn't show up is because I told them not to. I don't believe that for a second. He knows I can't put him on that stand. Do you think I would if I got the opportunity? How many questions would I have asked him? I bet by the second question I'd have him squealing. He knows that as a lawyer. And these lawyers know it. And this Court knows it. That's inappropriate. They didn't show up because they don't care to be here, but they're going to read your verdict. Enbridge is going to read it and every other company is going to read it.
>
> …
>
> And you remember in voir dire when I talked to y'all about voir dire and how it's important to tell the truth and how your testimony in deposition should be the same, and we got Sherry Tanner and what is she? She's the one who signs the interrogatory, and they didn't get an associate lawyer, they didn't get a junior lawyer, they got the senior legal counsel for Enbridge, the senior counsel in Harris County, which is Houston, to sign this stuff. Who also, like myself, and like every lawyer in this room and like this Judge takes an oath that if the evidence changes, we have a duty to tell the other side, because guess what? It may affect the case. It may cause Mr. Goudarzi to be able to take another depo to get to some truth. But guess what, maybe Mr. Goudarzi is wrong. Maybe he needs to dismiss his case. Or maybe -- and this is what it was -- if we change it, he's going to find this person, he's going to question them, as I showed in the depo that I did, and he's going to get us worse, he's going to expose our wrongdoing. That's why they do it.
>
> …
>
> And when he was talking about it's not a big deal that they don't work for them anymore, for Enbridge, then why didn't he tell me? Why didn't he tell me before you got here? And, in fact, he didn't tell me. They had to tell me when they were under oath. Enbridge's lawyers knew it. And guess what? I'm glad I asked that question because if I wouldn't have asked that question, would we have found out? And that's my point, ladies and gentlemen, and that's why I've apologized to these two gentlemen. I promise you there were some questions or some documents that I didn't think to go get and I didn't think to ask that they should have told me or have given me.
>
> …
>
> This is probably the 45th case I've tried in this courtroom. And I've tried every one of them in front of this Judge. And there's never been a time in my career where I've had a company or I've had a defendant as sophisticated as I know they are, as I showed you through the documents, try to walk in a courtroom and do what they're doing. It's wrong.

The Charge and Requested Instructions

At the close of the evidence, Sullivan elected to submit only his negligence claim against Lewis to the jury. While the charge asked the jury to answer whether Lewis was acting in the

course and scope of his employment, for the purpose of vicarious liability against Enbridge, Sullivan elected to forego submitting its direct negligence claims for negligent entrustment, hiring and retention, training, and undertaking against Enbridge. Appellants objected to the charge and tendered to the trial court three separate requests for instructions:

> 1. You are instructed to not consider whether Enbridge Pipelines (North Texas), L.P. was negligent in its implementation of its policies and procedures in determining whether Tommy Doyle Lewis was negligent and whether any negligence of Tommy Doyle Lewis proximately caused this occurrence.
>
> 2. You are instructed to not consider any evidence of Enbridge Pipelines (North Texas), L.P.'s training, supervision, retention, undertaking, or entrustment in determining whether Tommy Doyle Lewis was negligent and whether any negligence of Tommy Doyle Lewis proximately caused this occurrence.
>
> 3. You are further instructed to not consider Enbridge Pipeline's (North Texas, L.P.) and its attorney's conduct in the production of documents or in the discovery process in determining whether Tommy Doyle Lewis was negligent and whether any negligence of Tommy Doyle Lewis proximately caused this occurrence.

After the trial court denied the instructions, Appellants moved for a mistrial. Appellants' counsel made the following argument to the court:

> Despite the fact that plaintiffs pled a variety of direct negligence theories of undertaking, retention, training, and supervision and spent hours talking about Enbridge in this case and Enbridge's documents, policies, and conduct, the charge proposed by plaintiffs, and adopted by the Court, has no question about Enbridge and the Court refused all tendered instructions during the charge conference relating to Enbridge. It is clear to the defendants now that the sole purpose of this evidence, which is not any more relevant, because of this submission of the charge was to inflame the jury against the driver and artificially increase the damages. So Defendants Enbridge and Lewis move for a mistrial.

Sullivan's counsel responded that "there's a liability dispute, it's a very contested liability dispute, and the evidence presented in this case was very germane and relevant about the liability fight." The trial court denied Appellant's motion for mistrial.

Failure to Instruct

We must determine whether the requested instructions were reasonably necessary to enable the jury to render a proper verdict. *See* TEX. R. CIV. P. 277; ***Mandlbauer***, 34 S.W.3d at 912. We conclude that they were. The jury needed guidance from the trial court after Sullivan elected not to submit any direct negligence claims against Enbridge because Sullivan spent a substantial amount of the trial emphasizing Enbridge's conduct, yet that evidence had no relevance to whether

Lewis's negligence proximately caused the motor vehicle collision or whether Lewis was acting in the course and scope of his employment at the time of the collision. *See* TEX. R. EVID. 401 ("Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action."). Sullivan argues that the evidence regarding Enbridge's conduct was relevant to the liability dispute because it served to impugn Appellants' credibility. However, as Sullivan points out, Appellants acknowledged that Lewis failed to keep a proper lookout and did not see Sullivan before turning left from State Highway 300 onto Bluebird Road. Appellants acknowledged that Lewis's negligence was a factor in causing the collision but argued that Sullivan's negligence and TxDOT's construction plan also contributed to the collision. While Appellants did argue that Lewis was on his way home for lunch and was not acting in the course and scope of his employment, Sullivan was unable to link any of Enbridge's conduct to any of the contested issues, beyond mere speculation that his counsel "could" have "uncovered things" if he had all of the documents.[6]

Enbridge's requested instructions accurately state the law and were supported by the pleadings and evidence because they instructed the jury to disregard evidence that was not relevant to the issue of whether Lewis was negligent, and whether his negligence caused the collision. *See* TEX. R. CIV. P. 278; *see also* ***Mandlbauer***, 34 S.W.3d at 912. Moreover, the instructions certainly would have assisted the jury because the evidence regarding Enbridge's alleged spoliation and discovery abuses was such a pervasive theme throughout the trial. As we will discuss below, the jury was undoubtedly confused when Sullivan spent a substantial portion of the trial seeking to establish that Enbridge spoliated evidence or otherwise abused the discovery process and should be held accountable, yet, was given no avenue to hold it accountable for these alleged wrongs by the trial court's charge. Thus, the instructions that Appellants requested would have assisted the jury in considering the evidence relevant to the issues in the case. *See* TEX. R. CIV. P. 278; *see also* ***Mandlbauer***, 34 S.W.3d at 912. Therefore, we hold the trial court abused its discretion in refusing to instruct the jury to disregard Enbridge's conduct as Appellants requested.

[6] We note that there were discrepancies in the evidence regarding how fast Lewis was traveling at the time of the collision which varied between three, ten, to twenty miles per hour. However, there was no argument by either side that Lewis's speed contributed to the collision, only his failure to see Lewis prior to turning left from State Highway 300 onto Bluebird Road.

Harm Analysis

We now decide whether the trial court's refusal to submit Appellants' requested instructions caused the rendition of an improper judgment. *See* TEX. R. APP. P. 44.1(a)(1). In so doing, we consider the entire record. ***Gunn***, 554 S.W.3d at 676.

The jury found Lewis's negligence was the sole cause of the collision. However, the evidence in support of this finding is questionable. While it is undisputed that Lewis failed to see Sullivan prior to turning left on Bluebird Road, the evidence also showed that Sullivan, who was traveling fifty miles per hour in a fifty thousand pound dump truck, failed to take any action to avoid the impact when he approached Bluebird Road, which was open to the public.

Furthermore, the only evidence that Lewis was acting in the course and scope of his employment at the time of the collision came from Love's testimony. Love testified, purely from memory, that Lewis told him he was traveling in between Enbridge job sites at the time of the collision. However, on cross examination, Love was unable to recall other facts relating to the accident, such as whether he interviewed Lewis in front of his camera, or whether Lewis told him if he used his turn signal. Love explained that he could not recall these facts because it had been three years since he investigated the accident. Love acknowledged that he had no field notes or other documentation from his investigation that reflected Lewis's statements that he was traveling in between job sites at the time of the collision.

Conversely, Lewis testified that he was not traveling in between job sites but was on his way home for lunch at the time of the collision. *See* ***Gant v. Dumas Glass & Mirror, Inc.***, 935 S.W.2d 202, 212 (Tex. App.—Amarillo 1996, no writ) (employee was not in the course and scope of his employment where employee was returning from lunch at time of collision). Lewis testified that the site of the collision was approximately four miles from his home. Lewis testified that he took Bluebird Road, which dead ends into another road called Bob White, where he would turn right and then access June Road. Lewis and Knezek testified that Lewis's work for Enbridge was based at the plant and that there were no Enbridge facilities off Bluebird Road to which Lewis would be traveling. Additionally, the undisputed evidence showed that the collision occurred at approximately 11:15 a.m.

Moreover, after the jury retired to deliberate, they sent out a note asking the court "Q: Number 1: If Tommy Lewis is determined to not be acting in the scope of his employment with Enbridge[] is Enbridge out of the rest of the lawsuit and not responsible for damages." In total,

the jury awarded Sullivan $21,765,732.44 in compensatory damages. The award is broken down as follows:

$549,519.84 for past medical expenses

$2,822,589.60 for future medical expenses[7]

$119, 239 for past lost earning capacity

$1,244,384 for future lost earning capacity

$3,000,000 for past physical pain and mental anguish

$5,500,000 for future physical pain and mental anguish

$3,000,000 for past physical impairment

$5,500,000 for future physical impairment

$10,000 for past disfigurement

$20,000 for future disfigurement

Sullivan's doctors testified that Sullivan suffered traumatic lower back injuries as a result of the collision, including a fractured sacral ala and flattening of the spine, and underwent invasive spinal surgery for treatment of the injuries. Dr. Charles Gordon, Sullivan's surgeon, testified that the sacral fracture required no treatment and that these fractures generally heal naturally. Appellants introduced records documenting that Sullivan had degenerative issues in his lower back prior to the accident. Dr. Gordon acknowledged that Sullivan "may have had degenerative changes before" but testified his injuries were "at least aggravated by the accident." Dr. Gordon also acknowledged that he knew Sullivan had some back problems prior to the accident, but he never reviewed Sullivan's past medical records.

The records showed that Sullivan suffered from chronic lower back pain prior to the accident, sought treatment for lower back pain on numerous occasions prior to the accident, and took prescription painkillers on occasion for lower back pain prior to the accident.[8] In 2008, Sullivan described experiencing lower back pain fifty to seventy five percent of the day and described the pain as sharp and tingling. Sullivan testified that his pain from the accident caused

[7] Sullivan voluntarily remitted $1,058,471.20 of the jury's award for future medical expenses, bringing the total award to $20,001,614.04.

[8] Sullivan suffers from ulcerative colitis, a bowel condition, that can cause spinal degeneration.

him to be irritable, quick tempered, and anxious. However, he acknowledged that he suffered from anxiety attacks prior to the accident. At his final post-surgery appointment, Dr. Gordon released Sullivan to return to work. Moreover, at his deposition, Sullivan's vocational rehabilitation expert assumed Sullivan would return to work. Nevertheless, at trial, Dr. Gordon opined that Sullivan would not be able to return to the kind of work for which he was qualified.

At trial, Sullivan described holding several jobs after high school. He worked in construction for a time, then at Lowe's Distribution center, and then for a series of individuals. His testimony with regard to his work history was not detailed, but he described working for one individual for about a year hauling lumber and leaving when he did not receive a pay raise. He obtained another job but left after injuring his elbow. He drove a dump truck for another individual for a month before working for Leonard Sweaney, the owner of the dump truck that he was driving at the time of the collision. In 2014, Sullivan's tax return reflected that he earned $4,638, yet the jury awarded him almost $119, 239 in lost earning capacity and $1,244,384 in lost future earning capacity.

As previously discussed, the evidence and arguments that Enbridge and/or its attorneys (1) deceived Love into altering his crash report; (2) falsified or otherwise altered Lewis's work cell phone bill to conceal that Lewis was using his cell phone at the time of the collision; (3) failed to supplement its discovery responses to inform Sullivan that Julie Knezek and Lewis were no longer employed by Enbridge; (4) failed to timely produce a report about the crash made by Lewis; (5) failed to disclose the names of the members of a committee commissioned by Enbridge to investigate the accident; and (6) altered its internal investigation report before it produced it to Sullivan all constitute accusations that Enbridge spoliated evidence and committed discovery abuse. *See* ***Brookshire Bros., Ltd.***, 438 S.W.3d at 26.

Spoliation is essentially a particularized form of discovery abuse. ***Id.*** at 20.[9] Discovery matters are within the sole province of the trial court, being a preliminary question for it alone to decide. *See* ***Id.*** Further, evidence bearing solely on whether a party spoliated evidence or the party's degree of culpability in doing so is not generally relevant and should not be introduced at

[9] In ***Brookshire Bros., Ltd. v. Aldridge***, 438 S.W.3d 9, 26 (Tex. 2014), the Texas Supreme Court developed a new framework for analyzing and remedying the spoliation of evidence. The Court held that spoliation jury instructions are warranted only when the spoliating party acted with the specific intent to conceal discoverable evidence or that a party's negligent destruction wholly prevented the other party from presenting a claim or defense. ***Id.***

trial.[10] ***Id.*** at 26 ("there is no basis on which to allow a 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").

Moreover, allegations that a party spoliated evidence and committed discovery abuse have the tendency to skew the focus of the trial from the merits to the conduct of the spoliating party. ***Id.*** at 26. This raises a significant risk of both prejudice and confusion of the issues. ***Id.*** Here, our review of the record shows that Sullivan spent an inordinate amount of time emphasizing Enbridge's conduct in the discovery process. Sullivan's counsel seems to have made Enbridge's untrustworthiness a theme for his entire case, so much so, that the focus of the trial was not on the merits, but rather on Enbridge's conduct in the discovery process. This undoubtedly skewed the focus of the trial and confused the jury given that Enbridge's direct negligence was not submitted to the jury. *See* ***id.***

A fundamental tenet of our legal system is that each and every trial is decided on the merits of the lawsuit being tried. ***Id.*** at 13. The introduction of spoliation evidence before a jury can shift the focus of the case from the merits of the lawsuit to a party's improper conduct. *See* ***id.*** This shift can unfairly skew a jury verdict resulting in a judgment that is based not on the facts of the case, but on the conduct of the parties during or in anticipation of litigation. *See* ***id.*** at 13-14. This is precisely what occurred in the present case.

After a review of the entire record, and given the relatively weak evidence supporting the jury's findings regarding liability and damages, and the inherent prejudicial nature of the evidence and arguments Sullivan made about Enbridge's conduct in the discovery process, we conclude that the trial court's failure to submit the requested instructions probably caused the rendition of an improper judgment. *See* TEX. R. APP. P. 44.1(a)(1). Therefore, we sustain Appellants' first issue.

LEGAL SUFFICIENCY CHALLENGE

Finally, we address Appellants' contention that Enbridge is entitled to rendition of judgment in its favor because the jury's finding that Lewis was acting within the course and scope of his employment is not supported by legally sufficient evidence. *See* TEX. R. APP. P. 43.3; *see also* ***Natural Gas Pipeline Co. of Am. v. Pool***, 124 S.W.3d 188, 201 (Tex. 2003); ***Granbury***

[10] The Court did not hold that all references to missing evidence, whether lost due to a party's spoliation or missing for some other reason, should be foreclosed. For example, to the extent permitted by the 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. ***Brookshire Bros., Ltd.***, 438 S.W.3d at 26. This type of exception is not applicable in this case.

Marina Hotel, L.P. v. Berkel & Co. Contractors, Inc., 473 S.W.3d 834, 839 (Tex. App.—El Paso 2015, no pet.). Specifically, Appellants argue that the jury's finding that Lewis was in the course and scope of his employment with Enbridge is not supported by legally sufficient evidence, but is "the product of counsel's constant improper attacks and the court's failure to instruct the jury to disregard those attacks – rather than the relevant evidence." [11]

In reviewing a legal sufficiency challenge to the evidence, we credit evidence that supports the verdict if reasonable jurors could have done so and disregard contrary evidence unless reasonable jurors could not have done so. ***City of Keller v. Wilson***, 168 S.W.3d 802, 827 (Tex. 2005). A legal sufficiency challenge "will be sustained when (a) there is a complete absence of evidence of a vital fact, (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a scintilla, or (d) the evidence conclusively establishes the opposite of the vital fact." ***Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp.***, 299 S.W.3d 106, 115 (Tex. 2009) (quoting ***Merrell Dow Pharms., Inc. v. Havner***, 953 S.W.2d 706, 711 (Tex. 1997)).

As previously discussed, the only evidence that Lewis was in the course and scope of his employment came from Love's testimony that Lewis told Love that Lewis was traveling between Enbridge job sites at the time of the collision. Appellants argue that this evidence is legally insufficient to support the jury's verdict because "there was no evidence Mr. Lewis was, in fact, driving from one Enbridge location to another." In support of this contention, Appellants point to testimony from Lewis and Knezek that Lewis's job was relegated to working at the plant, the collision occurred near Lewis's home, and there were no Enbridge facilities in the area where the collision occurred.

"It is recognized in Texas that when it is proved that the truck was owned by the defendant and that the driver was in the employment of defendant, a presumption arises that the driver was

[11] Appellants further argue that the evidence is legally insufficient to support the jury's finding that Lewis's negligence was the sole proximate cause of the collision. However, Lewis does not argue that he was not negligent or that his negligence was not a proximate cause of the collision. Instead, he argues that Sullivan's negligence and the Texas Department of Transportation's negligence also proximately caused the collision. Because the resolution of this issue would not result in the rendition of judgment in Appellants' favor, we will not address this argument. *See* TEX. R. APP. P. 47.1. Further, Appellants argue that the compensatory damages the jury awarded Sullivan are not supported by legally sufficient evidence. However, Appellants do not argue that the jury should have awarded no damages. Appellants instead argue only that the awards are excessive. We similarly need not address this argument, because the resolution of this issue would not result in the rendition of judgment in favor of Appellants. *See* ***id.***

acting within the scope of his employment when the accident occurred." ***Robertson Tank Lines, Inc. v. Van Cleave***, 468 S.W.2d 354, 357 (Tex. 1971). The defendant can rebut that presumption with evidence that the employee used the vehicle for a personal errand. ***Morris v. JTM Materials, Inc.***, 78 S.W.3d 28, 47-48 (Tex. App.—Fort Worth 2002, no pet.). If the defendant rebuts the presumption, the plaintiff must offer other evidence to prove the employee was acting within the course and scope of his employment. ***Robertson Tank Lines, Inc.***, 468 S.W.2d at 358.

At the time of the collision, Lewis was operating an Enbridge vehicle and was employed by Enbridge. Therefore, a presumption arose that Lewis was acting within the course and scope of his employment at the time the collision occurred. *See* ***id.*** at 357. Lewis rebutted that presumption by presenting evidence, through his testimony and that of Knezek, that he was on his way home for lunch at the time of the accident. *See* ***Morris***, 78 S.W.3d at 47-48. However, Sullivan offered additional evidence, i.e., Love's testimony. We must credit evidence that supports the verdict if reasonable jurors could have done so. ***City of Keller***, 168 S.W.3d at 827.

Jurors are the sole judges of the credibility of the witnesses and the weight to give their testimony. ***Id.*** at 819. Love testified three years after the accident and purely from memory, that Lewis told him he was traveling in between Enbridge job sites at the time of the collision. Love was unable to recall other facts relating to the accident, such as whether he interviewed Lewis in front of his camera, or whether Lewis told him if he used his turn signal. While we acknowledge that Love's testimony is questionable, reviewing courts cannot impose their own opinions on a witnesses' credibility. *See* ***id.*** Love's testimony provided more than a scintilla of evidence that Lewis was acting within the course and scope of his employment at the time of the collision. ***Akin, Gump,*** 299 S.W.3d at 115. Thus, we overrule this portion of Appellants' third issue.

DISPOSITION

Having sustained Appellants' first issue, we ***reverse*** the trial court's judgment and ***remand*** this case for a new trial.[12]

JAMES T. WORTHEN
Chief Justice

[12] We therefore need not address Appellants' remaining issues, in which they argue: (Issue Two) the trial court erred in allowing Sullivan's counsel to engage in a systematic smear campaign that obstructed the legal and factual merits of the case; (Issue Three) the jury's finding that Lewis's negligence was the sole cause of the collision is unsupported by the record; (Issue Four) the jury's award of damages is excessive and unsupported by sufficient evidence; and (Issue Five) cumulative error requires reversal. *See* TEX. R. APP. P. 47.1.

Opinion delivered May 29, 2020.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

MAY 29, 2020

NO. 12-19-00147-CV

ENBRIDGE PIPELINES (NORTH TEXAS) L.P.

AND TOMMY DOYLE LEWIS,

Appellants

V.

JONATHAN SULLIVAN, JR.,

Appellee

Appeal from the 115th Judicial District Court
of Upshur County, Texas. (Tr.Ct.No. 15-00536)

THIS CAUSE came to be heard on the appellate record and the briefs filed herein, and the same being considered, because it is the opinion of this court that there was error in the judgment of the court below, it is ORDERED, ADJUDGED and DECREED by this court that the trial court's judgment be **reversed** and **remanded** for a new trial; and that this decision be certified to the court below for observance.

James T. Worthen, Chief Justice.

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