No. 06-17-00090-CV

In the Sixth Court of Appeals
Texarkana, Texas

The Blacklands Railroad,
Appellant,

v.

Charles Knighton,
Appellee.

Appellee's Brief

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Statement of the Case

Nature of the Case:	This suit litigates railroad negligence. The Blacklands Railroad told Charles Knighton he could go to work atop a railcar. It then, inexplicably, moved that railcar as he was attempting to stand upon it. Knighton toppled 17 feet, splitting his pelvis in half necessitating four surgeries (and another to come), and causing permanent nerve damage to his genitals and rectum, and immense pain and impairment, both past and future.
Trial Court:	Hon. Will Biard, 62nd District Court of Hopkins County, Texas.
Course of Proceedings:	Jury Trial. The jury declared Blacklands' negligence the proximate cause of Knighton's injuries and found no one else culpable. 2CR783. Past medical-expense damages were stipulated at $300,000. The jury returned awards for lost-earning capacity, medical expenses, pain, and impairment, both in the past and future. Judgment was entered on the verdict awarding (1) the stipulated past medicals and (2) all jury-found damage items. 3CR841-46.

Issues

Blacklands' issue statements thrive on false premises and turn a deaf ear to key proof. Corrected for these defects, the issues are better stated as follows:

1. **Duty.** When any party performs a contract, it owes an established duty of reasonable care to avoid injuring others. Railroads owe such duties to persons loading rail cargo, and duties to look out for and warn persons on their tracks. When Blacklands jolted him during a railcar-switching operation, Knighton was loading a railcar, with its permission. Did Blacklands owe Knighton a duty of reasonable care?

2. **Others' Negligence.** Before trial, Mountain View determined that the best loading procedure had workers untethered from fall protection when rising to stand atop a railcar—as Blacklands' own employees did. Knighton thus would have been untethered in any event when Blacklands jolted the railcar. Pilgrims, for its part, had no control of the jobsite, Mountain View, or Knighton. Did Blacklands fail to prove others culpable? And has it waived harm, by not arguing they were over 50% responsible, as needed to avoid its joint-and-several liability?

3. **Charge Error.** The "judicial admission" Blacklands touts in attacking the right-of-control instruction doesn't exist: Knighton consistently denied Pilgrim's had any relevant control. Nor was there any basis for Blacklands' preexisting-condition instruction, both because the proof didn't raise a preexisting-condition defense and the Charge sufficiently restricted the jury to evaluating only damages Blacklands' negligence proximately caused. What is more, Blacklands shows no harm. And there is none. Should Blacklands' charge-error complaints be denied?

4. **Future-Impairment Damages.** A party alleging that a multi-element damage award is excessive must challenge every such element and the entire award, or the issue is waived. The jury returned a single award for pain and impairment, yet Blacklands argues only impairment, ignoring Knighton's pain. Did Blacklands waive its excessiveness issue? And in any event, does factually-sufficient evidence support the pain-and-impairment award?

5. **Future-Medical Costs.** Preexisting condition was a defensive issue for Blacklands to prove. Knighton causally connected all lifecare-plan items to the occurrence. There was no evidence any such items would have been incurred

absent Knighton's fall, under some prior condition. Should the Court deny Blacklands' attack on future-medical costs?

6. **Admission of Evidence.** Because Knighton's hardship proof was *consistent* with his collateral-source benefits, it opened no door. Madeley's few stricken opinions wouldn't have helped the jury. Regarding Miguel Fernandez, there was only a nonreviewable advisory ruling (which Blacklands mooted by not calling him), and Fernandez's notes would have been fair game if Blacklands sponsored him. There likewise was no abuse in denying novel, highly prejudicial proof exploring a speculative potential for health insurance. And, Blacklands hasn't adequately briefed harm. Should the Court deny Blacklands' admission-of-evidence attacks?

Statement of Facts

I. The Parties and Their Roles:

Charles Knighton is a 49-year-old former truck driver. 5RR10, 20. From 2012 (when Pilgrim's Pride outsourced its trucking operations, 5RR21) until his injury in May of 2015, he worked for the independent contractor Mountain View Hauling. PX179-181. His job was to haul "feed" (dehydrated, powdered chicken residue, 5RR28) from a chicken-processing plant to the railroad siding in Mount Vernon, then load it into waiting hopper cars. 5RR27-28; 6RR229.

Defendant Blacklands Railroad, a "shortline" railroad, operates a 60-mile stretch of East Texas track. 6RR257-58. Insofar as this case is concerned, it transports loaded hopper cars to destinations elsewhere and returns empties to be refilled. *See* 6RR124.

Mountain View Hauling is a Virginia-based trucking firm. 6RR216. Pilgrim's Pride is its customer. 6RR219, 136. Pilgrim's, which Knighton never sued but Blacklands joined on third-party claims, settled with Knighton shortly before trial. 7RR20.

II. The Railroad-Track Siding at Mount Vernon

A railroad-track siding is a short loop of track connected on both ends to a main track. Such sidings are used in switching railcars and for parking them off the main track to be loaded and unloaded. Blacklands, in website advertising, touted the railroad siding in Mount Vernon as its "premier transloading facility." PX133, 4RR119. This particular siding is shoehorned between Mount Vernon's downtown and a residential

neighborhood and is bisected by a north-to-south road, referenced at trial as the "trucker's crossing." PX10, 4RR19-20, 29. Because it lacks any manner of access control, PX10, there are all sorts of chances for vehicles and foot traffic to encroach on any railroad operations. 4RR29. There was no evidence Pilgrim's or Mountain View controlled this siding or its adjacent rights of way, and undisputed evidence they didn't. *See* 6RR200-01.

III. The Train Wreck

On the day of his injury, Knighton arrived at the Mount Vernon siding in the early morning. 5RR28. A Blacklands crew and locomotive arrived about the same time, to drop off empty railcars and pick up the full ones. 5RR29, 31. This exchange would require a series of preplanned switching "moves," including "coupling," "shoves," and "cuts." 4RR50-51, 108. During these operations, Knighton and his wife, who had brought him his breakfast, waited beside Knighton's truck. 6RR32, 34. They intended to wait there until the sun was up and the railroad crew had finished. 5RR32.

When the planned railcar exchange was completed, Blacklands' conductor, James Adams, directed that a "cut" be made in the long line of connected railcars on the siding. This "cut" reopened the trucker's crossing for vehicular travel and isolated the connected railcars remaining on the siding, east of the trucker's crossing. 4RR79-80. This—the locomotive's unhooking from the railcars east of the crossing and the

crossing's reopening—was visual confirmation to Knighton that Blacklands' moves on east of the trucker's crossing were at an end. 5RR37-38.

As testified by Knighton, after this cut was made, conductor Adams (the railroad crew's boss, 4RR70-75, 107) walked up to Knighton, patted him on the back, and said he could "go to work." 5RR35; *accord* 5RR138; 6RR16. Knighton was "100 percent" sure of this. 5RR35. There was no possibility he heard wrong. 5RR139. He also said Adams told him Blacklands would be working on the west side of the now-opened crossing, but it wouldn't affect Knighton's work east of the crossing, because "they [were] not coming back across ... the trucker's crossing." 5RR36; *see also* 5RR35-38. Knighton was adamant he would never go to work if the crossing was blocked and the locomotive connected to the string of railcars he would be working on. 5RR37.

Mrs. Knighton heard Adams authorize her husband to go to work. 6RR16.

After his conversation with Knighton at the siding, Adams, for unknown reasons, decided to make a previously unplanned "joint" or coupling maneuver so as to shove one more railcar onto the east side of the trucker's crossing. 6RR161. Both Adams and brakeman Brantley agreed this was after Adams spoke with Knighton. 4RR81, 103-08.

No one told Knighton about this unscheduled move or bothered to see whether the railcars remained clear of persons or obstacles before executing it. 4RR83. This confirmation could have been easily accomplished, just be stepping back a few feet and

looking both directions. 4RR36-37. But Adams didn't direct anyone to do so. 4RR82-84, 111-112.

Meanwhile, Knighton had climbed the railcar he needed to load. He was just rising to stand from a crouched position when the train jolted the string of railcars he was rising to stand on and sent him flying, in a 17-foot dive. 4RR149, 5RR44-45. He hit his pelvis, back, and hip on the coupler connecting the railcars, bounced, then fell hard on his back across the rails, with his head under the train, which continued to move a bit. 5RR44-48; 6RR19, 21-23. Knighton and his wife feared he would be run over. 5RR48; 6RR19.

IV. The Cover-up, the Confession, and a Laughable Explanation

Adams agreed he had spoken with Knighton at the time, but he denied giving the okay to go to work. 6RR121. Adams instead claimed he told Knighton he'd be clear to work *later*, when the railroad crew had finished. *Id.* So Adams testified that Knighton had "deliberately disobeyed" him, had "intentionally got up on that hopper car knowing" Blacklands would still be moving railcars, and had "lied" to the jury. *E.g.*, 4RR87-88. The jury had every reason to disbelieve these strong words.

For one thing, Misty Knighton, in the audio recording of her frantic 911 call, is heard to say:

> Oh, my God. Yes, my husband was on the train and he fell. They moved the train. We need an ambulance. Hurry, hurry, hurry . . . **They were moving it and *they told him that they were done***." 6RR21-23.

But the most compelling confirmation of the Knightons' account came from Blacklands' locomotive engineer, Mark Labrozzi.

Labrozzi said that, within minutes after Knighton's injury, Adams phoned him to confess: "I'm afraid I'm going to get fired on this one … *because I gave the man permission to get up there*." 4RR96-97. Labrozzi was sure of this. 4RR99.

On hearing Labrozzi's powerful testimony, Knighton wept. 5RR9. He considered it answered prayer. *Id.* It's import would not have been lost on the jury. It certainly was apparent to Adams.

After Labrozzi testified, Adams claimed his memory was miraculously refreshed. 6RR121. Then, he offered one of the strangest walk-backs ever conceived: Yes, he now recalled telling Labrozzi how he had expected to be fired and even recalled telling Labrozzi that he (Adams) had indeed "told the man he could go to work." 6RR121, 150. But in talking to Labrozzi he had selected "the wrong words." 6RR150. He *meant* to say he expected to be fired because he had told Knighton he could go to work *only when the Blacklands crew was done.*

This revisionist explanation would have fooled no one. For one thing, it was contradicted by the damning 911 audio recording. And it made no sense for a variety of reasons: For one thing, it lacked any basis why Adams would tell Knighton what

Knighton for years had already well known and practiced[1], *i.e.*, that he needed to wait until either Blacklands finished its moves or Adams granted him permission to work. 5RR41. Nor could it convincingly explain why Adams would expect to be fired for making the innocuous statement he now alleged he had told Knighton.

V. Knighton's Tragic Injuries

Knighton suffered devastating injuries, including: (1) an open-book pelvic fracture that split his pelvis in half and sheared its ligaments, (2) a fractured sacrum, (3) a ruptured bladder, and (4) fractures of the transverse processes of the lower spine. 4RR161-62, 194-95, 221; 7RR136. He was diagnosed with permanent sacral plexopathy (an injury to the nerves running from the low back down the legs). 4RR158-59, 161-62. His doctor likened the combination and severity of these injuries to something resulting from "a very significant motor vehicle accident *with ejection*." 4RR165.

These injuries caused extreme pain. When the shock wore off, Knighton thought he was dying. 5RR51. And when the EMTs positioned him for the life-flight transport, he felt like they "were ripping [his] leg off." 5RR52.

Once at the hospital, Knighton endured emergency surgeries on his pelvis and bladder. 4RR148-49, 151-52. Screws and a plate were inserted into his pelvis. 4RR157-58. Weeks later, this plate broke (which is not uncommon), starting a "cascade of

[1] Whenever a Blacklands crew was at the siding, Blacklands' conductor *always* controlled when and whether Mountain View's drivers started work. 4RR74-75, 76, 5RR37, 6RR209-10. Adams never knew Knighton to disobey or deviate from this practice. 6RR153-54.

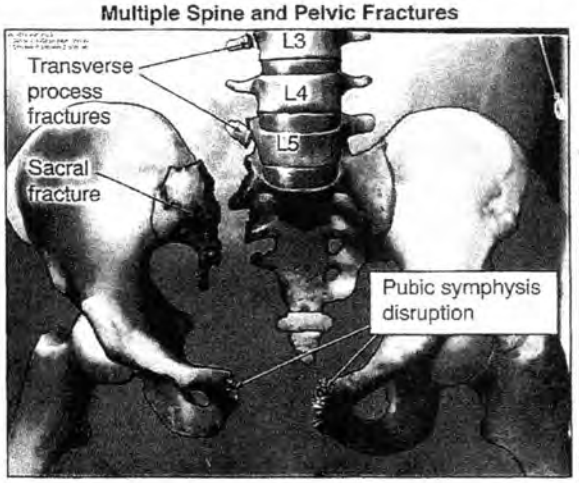
decreased mobility, more pain and–and more troubles." 4RR174. Later, the screws loosened, causing "inflammation everywhere," letting bones rub, and creating "tremendous" fluid and "a lot of pain and problems." 4RR224-26, 270.

To fix the resulting instability, Knighton required two more pelvic surgeries—a "much bigger" surgery in back and a later surgery in front, in which the surgeons removed the broken plate, the loose screws, and a 'big chunk of [previously-undetected] bone" floating in Knighton's pubic area. 4RR233-34, 269-70. They then inserted heavier, dual plates, bone graft, and yet more screws, and fused the sacroiliac joint. 4RR230-38, 269. The main injuries and surgeries are depicted in exhibits 31, 32, and 166:

Charles Knighton

Multiple Traumatic Injuries

Multiple Spine and Pelvic Fractures



May 2, 2015 AP X-ray

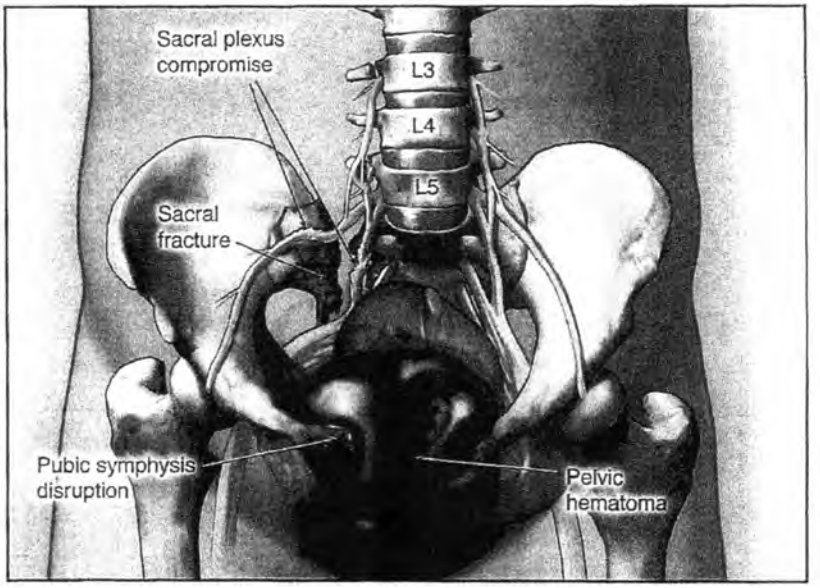


EXHIBIT
31

D27527-01

Charles Knighton's
May 3, 2015 Pelvic Fixation Surgery

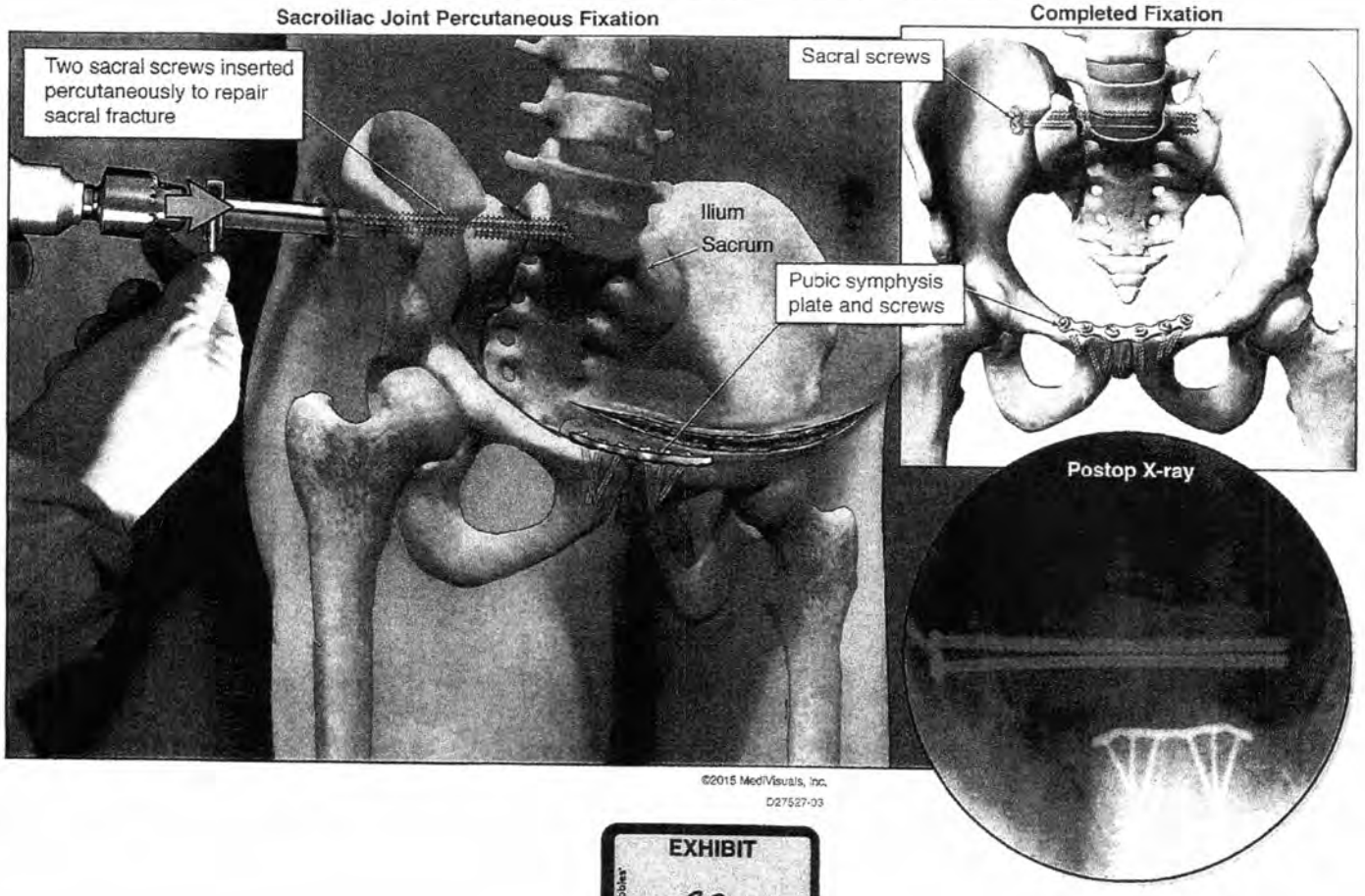


EXHIBIT
32

Charles Knighton

Jan. 27, 2017 Pubic and Anterior Pelvic Columns Reconstruction

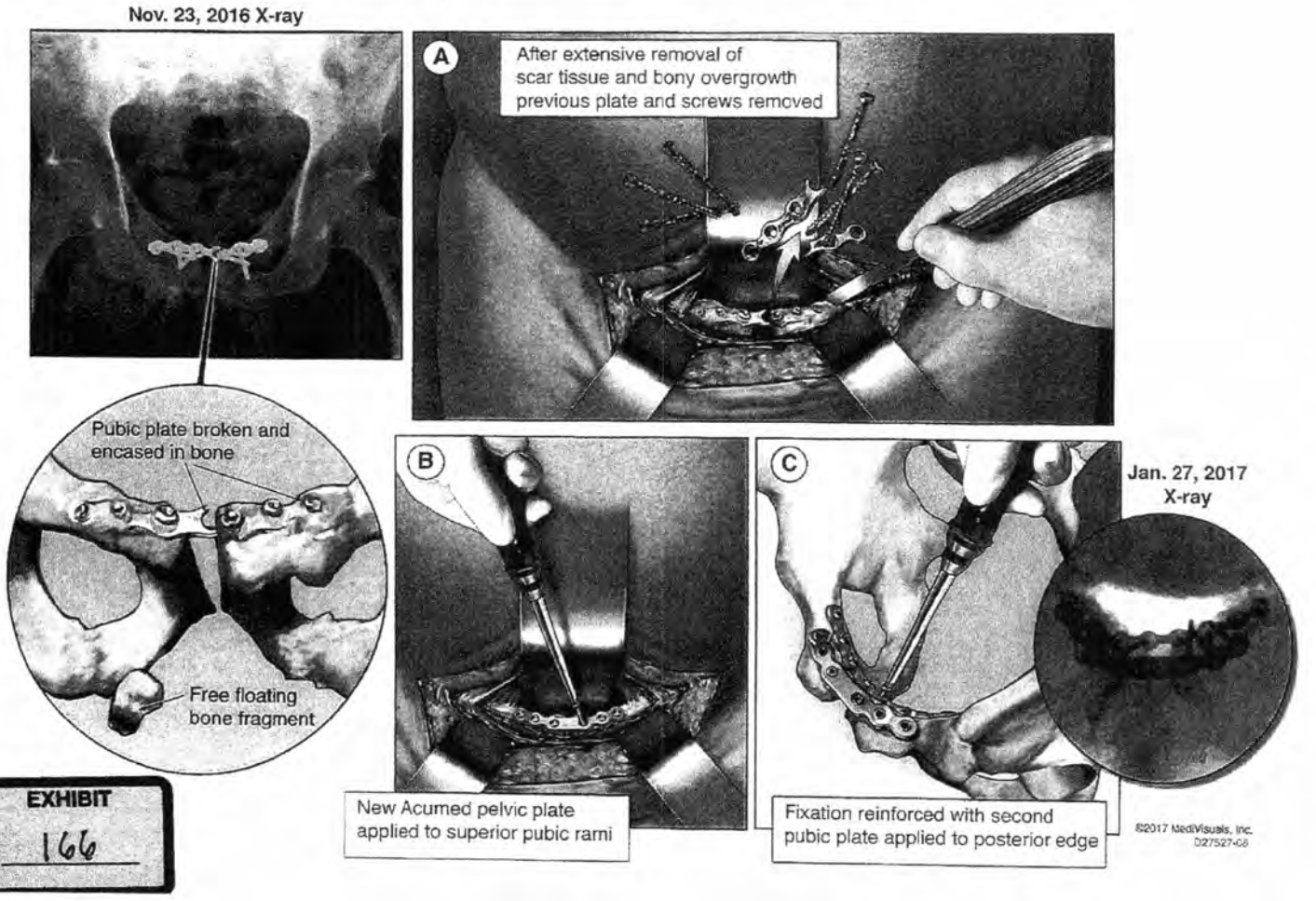


EXHIBIT
166

Knighton will require yet another surgery, to his lower back. 5RR222.

Knighton's current and future condition: As stated in more detail *infra* §IV(B), Knighton is in bad shape, with permanent numbness in his genitals, buttocks, and rectum, 4RR278; 5RR53-54, 61, 207, erectile dysfunction, and numbness in his right hand, right leg, lower back, and left foot. 5RR56, 62; 4RR283. He suffers "constant" chronic lower-extremity pain, 4RR159-60, and pain continuously in his hip and lower back. 5RR55. At night, he can't lay still but is "constantly up and down" and thus doesn't sleep much, because his legs jerk from lightning-bolt sensations of pain. 4RR160-62; 5RR55-56, 77, 80-81.

Knighton can't perform simple daily activities. 5RR66. Nor can he do the things he used to enjoy, such as keeping up his seven acres surrounding his home, 5RR71-72, 76, or fishing. 5RR86-87. He will never again be normal or walk unaided or with a normal gait. 4RR277, 226.

VI. Character and Credibility

Knighton's background and character. When Knighton was two years old, he was removed from their mother's custody after being locked in an abandoned house while she left for the weekend. 5RR13. Knighton was adopted by a brother (who died when Knighton was 4 or 5), and raised by his brother's widow. 5RR13-14. He had quit school after the eighth grade, to support the girl he got pregnant (later his first wife) and their children.

Knighton rose above these obstacles, earned a G.E.D., and landed a stable career as a truck driver. 5RR20.

When he met his wife Misti, Knighton was raising two elementary-school-age daughters. 5RR17-18. At the time of his injury, he and Misti were (1) raising his ten-year-old granddaughter, Megan (whose mother, Knighton's daughter, has bipolar disorder, 5RR81), (2) assisting Megan's mom, and (3) housing a son's friend while he completed school. 5RR12.

Mount Vernon's constable recounted how Knighton risked his life trying to save a stranger from a burning car. Knighton's hands, arms, face, and hair were burned. 4RR141-43. As a result, Knighton joined the volunteer fire department. 4RR144.

Unsurprisingly, Knighton was described as:

- a "stand-up guy," and "Godly man," 4RR261,
- stable, 5RR15, and a hard worker, 6RR196,
- proud with "old-fashion value[s]," and "always focused on taking care of his family," 4RR130, 208.

Even Blacklands' counsel called him a "nice guy." 8RR68.

Blacklands' shabby credibility: Engineer Labrozzi didn't just call out Adams. He impugned the entire company's credibility, testifying that "quite a while ago" he had revealed Adams's confession of negligence to manager Miguel Fernandez, 4RR98, who had then sat silently through the deposition in which Adams called Knighton a liar. 6RR150-51. So when Blacklands' owner, Wayne Defebaugh, claimed not to have heard of Adams's confession, 4RR118, and then Adams concocted the story about what he

meant to tell Labrozzi, 6RR151, the jury had ample reason to find Defebaugh and Adams untrustworthy.

Summary of Argument

Blacklands, impliedly, concedes Adams's negligent conduct—negligence in giving Knighton a false "all clear," failing to clear the train of persons, then moving it when he should have known Knighton would be upon it. It likewise ignores other key facts—including conductor Adams's lie and the excruciating details of Knighton's pain. Instead, Blacklands peddles a "spread-'em-thin" mash-up of arguments that go nowhere. Some derail on waiver grounds. The rest invariably track to dead-ends, stymied by settled law and compelling facts.

Duty. Blacklands owed Knighton a broad duty to perform its contracts with reasonable care for his safety and owed a specific duty to look for persons on the tracks before making any "move." These duties, long accepted by the courts, are a foundation of the railroad industry's General Code of Operating Rules, which is its published standard of conduct. Blacklands' conduct violated these universally-recognized duties owed to Knighton.

Others' Culpability. The jury was within its rights not to find Mountain View or Pilgrim's to have committed any injury-causing negligence. Neither of them had reason to foresee Blacklands' startling negligence or had any means to neutralize it. Nor could they have proximately caused Knighton's injuries: By trial, it was determined the safest procedure was for workers to untether their fall protection before standing atop the railcars. So whatever Mountain View or Pilgrim's might reasonably have done, Knighton would have remained exposed to Blacklands' negligence. Pilgrim's, moreover,

which didn't participate in the loading operation, neither possessed nor exercised any relevant control over it, and thus lacked any duty. And the record doesn't begin to prove Mountain View and Pilgrim's over 50% responsible, as required to affect Blacklands' joint-and-several liability.

Jury Charge. Because there was no admission that Pilgrim's exercised any relevant control and because the right-of-control instruction was not possibly harmful, the appellate attack on this instruction fails. Blacklands' proposed instruction on preexisting conditions was correctly denied, both because the preexisting-condition defense wasn't raised by the evidence and the proposed instruction wouldn't have been necessary or even proper if such a defense were raised. The Charge correctly limited the jury's damage analysis to only awards that Blacklands' negligence proximately caused.

Future Damages. The Charge submitted a single blank for pain and impairment. Blacklands, by attacking only the impairment component, waived review of the combined award. In any event, ample proof supported the award. Blacklands' other charge attack, addressing future-medical expenses, should be denied, primarily because Blacklands failed to prove a preexisting-condition defense at trial and it inadequately briefs the point now (by, for example, failing to demonstrate what portions of the future medicals it considers improper and failing to argue that any damage item was solely caused by a prior condition).

Admission of Evidence. Blacklands waives all its complaints about the trial court's discretionary evidence rulings, by failing to adequately brief harm. Otherwise,

each challenged ruling was a proper exercise of discretion: The excluded Madeley opinions were unhelpful. Any challenge concerning Miguel Fernandez's testimony/investigation was mooted when Blacklands chose not to proffer Fernandez's testimony. (Moreover, the advisory ruling about Fernandez's notes was correct because Fernandez, if he testified to a part of his investigation, would render the full investigation fair game to cross-examination.) Knighton's financial-hardship proof never opened the door to proof of collateral-source benefits. And there was no basis for admitting speculative proof of hypothetical health-insurance coverages.

The judgment below is proper and should be affirmed.

Argument

I. The law invests Blacklands with clear duties.

This is anything but the "case in search of a duty" that Blacklands accuses. *See* Blacklands' Brief at 18 (henceforth, references to Blacklands' brief will be cited as simply "Br.18.") Blacklands' failure was both breathtaking—it green-lighted Knighton to work atop a railcar only to straightaway ram him off it—and breached established duties, including:

- a duty to take reasonable care in performing one's contracts so as not to hurt others,
- duties that a railroad must maintain a lookout for persons on or about the right of way and warn them before moving a train,

- a general duty to exercise reasonable care to avoid causing foreseeable injury to others, and
- A duty to take reasonable steps to avoid harming those it has put in danger.

So, the Court can dispense with the risk-utility analysis that Blacklands would foist on it. That analysis, which comes in play when considering whether to adopt *new* duties, has no place here. *Pagayon v. Exxon Mobil*, 536 S.W.3d 499, 503-04 (Tex. 2017)(risk-utility analysis applies when a duty has *not* been recognized in the circumstances); *Smithkline Beecham Corp. v. Doe*, 903 S.W.2d 347, 353 (Tex. 1995).

A. Blacklands owed Knighton a duty to use reasonable care not to injure him in performing its contract.

> "One who undertakes to perform a contract assumes a duty to all persons to take reasonable care not to injure them or their property in the performance of that contract, and one who is not privy to the contract may assert a claim for negligence for a breach of that duty."
>
> *Goose Creek Consol. Indep. Sch. Dist. of Chambers v. Jarrar's Plumbing*, 74 S.W.3d 486, 494 (Tex. App.—Texarkana 2002, pet. denied); *accord Schambacher v. R.E.I. Elec.*, 2010 Tex. App. LEXIS 6426, *18-19 (Tex. App.-Fort Worth 2010, no pet.)(following *Goose Creek*).

The duty discussed in *Goose Creek*, to perform one's contracts with reasonable care towards others, already was firmly entrenched when, shortly after World War II, the Texas Supreme Court decided *Montgomery Ward v. Scharrenbeck*. 204 S.W.2d 508, 511 (Tex. 1947). It was reaffirmed in *Southwestern Bell v. Delanney,* 809 S.W.2d 493, 494 (Tex.

1991)(following *Scharrenbeck* and holding that every contracting party must act with reasonable care "so as not to injure a person or property by his performance"). And in *Goose Creek*, this Court restated the duty with unmistakable clarity.

> "Jarrar's Plumbing owed an independent tort duty to use reasonable care in the performance of the contract to install the plumbing so as not to injure persons or property. … Therefore, Goose Creek properly maintained a tort action for negligence against Jarrar's Plumbing." 74 S.W.3d at 495.

Blacklands owed Mount Vernon's residents, any passersby, and certainly Knighton, a similar duty while performing its railcar-switching contract. That Blacklands had a right to be on the sidetrack is a red herring. *Wolf Hollow I, LP v. El Paso Marketing, LP*, 329 S.W.3d 628, 644 (Tex. App.-Houston [14th Dist.] 2010)("that an act is induced by and done pursuant to a contract does not shield it from regular tort liability.")(citing *Goose Creek*), *rev'd on other grounds* 383 S.W.3d 138 (Tex. 2012).

B. Relatedly, Blacklands owed Knighton duties common to all railroads.

Courts time and again have held that railroads owe duties to persons on and around their tracks. This includes an established duty that the railroad first warn persons, like Knighton, who are loading and unloading railcars before the railroad moves them. *Blair v. Jefferson & N.W.R.*, 214 S.W. 936, 938 (Tex. Civ. App.-Texarkana 1919, no writ); *Texas & P.R. v. Duncan*, 193 S.W.2d 431, 435 (Tex. Civ. App.-El Paso 1945, writ ref'd w.o.m.). In *Blair*, an oil-company employee was killed when the railroad moved a car unannounced. 214 S.W. at 938. This Court stated:

> "[I]f the trainmen knew that employees of the oil company were at work on the track, they owed such employees a duty to warn them before shunting the loaded car against the empty one as they did." *Id.*

A railroad's duty to look out for and warn persons found on or around the tracks applies regardless of the plaintiff's status.

> [I]t was the duty of the railroad to use ordinary care or reasonable care to discover and warn defendant in error, whether she be considered a trespasser or a mere licensee, and a failure to use such care was negligence. *St. Louis S.R. Co. v. Watts*, 216 S.W. 391, 392 (Tex. 1919); *see also Texas & N.O.R. Co. v. Darton*, 241 S.W.2d 181, 181-82 (Tex. Civ. App. 1951).

Blacklands doesn't acknowledge, dispute, or distinguish this body of law, which other railroads and courts long ago accepted. *E.g.*, *Thate v. Tex. & P.R. Co.*, 595 S.W.2d 591, 596 (Tex. Civ. App.-Dallas 1980, no writ)(no issue as to duty where railroad's negligence injured trucker loading railcars).

C. Blacklands owed Knighton the general duty to exercise reasonable care to avoid causing him foreseeable injury.

Every actor has a "duty to exercise reasonable care to avoid foreseeable injury to others." *El Chico Corp. v. Poole*, 732 S.W.2d 306, 315 (Tex. 1987); *Elliff v. Texon Drilling Co.*, 210 S.W.2d 558, 563 (Tex. 1948); *Whitehead v. Tobias*, 7 S.W.3d 658, 661 (Tex. App.-Texarkana 1999, no pet.). Courts actively apply this duty today. *See Crosstex N. Tex. Pipeline, LP v. Gardiner*, 505 S.W.3d 580, 614 (Tex. 2016). Every motorist owes it, *see Ciguero v. Lara*, 455 S.W.3d 744, 748 (Tex. App.—El Paso 2015, no pet.), even when the vehicle is a 100-ton locomotive.

D. Blacklands, having created a dangerous situation, owed Knighton a duty to take reasonable steps to avoid harming him.

> "[I]f a party negligently creates a situation, then it becomes his duty to do something about it to prevent injury to others if it reasonably appears or should appear to him that others in the exercise of their lawful rights may be injured thereby."
>
> *Buchanan v. Rose*, 159 S.W.2d 109, 110 (Tex. 1942); *accord Jacobs-Cathey Co. v. Cockrum*, 947 S.W.2d 288, 291 (Tex. App.—Waco 1997, no pet.)

As *Buchanan* states, every actor is duty-bound to exercise reasonable care to control or avoid increasing any dangers it contributes to causing. *Buchanan*, 159 S.W.2d at 110; *see* RESTATEMENT (THIRD) OF TORTS: *Liability for Physical and Emotional Harm* §7(a) ("An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm"). By telling Knighton he could go to work while its locomotive remained on the sidetrack, and falsely telling him it would *not* be working on his side of the trucker's crossing, Blacklands created the clearest danger. It thus owed Knighton a duty to act reasonably to alleviate or manage that danger. This could have been done simply by ceasing further "moves" or by allowing Knighton the chance to get clear.

E. The railroad industry has long conceded the relevant duties.

Under any reasonable view, Blacklands owed Knighton multiple duties. They obliterate the ridiculous, blinkered position Blacklands now stakes—that its "right to be working" nullified its obligation "to watch out for Knighton." Br.18. Indeed, the

railroad industry, in its General Code of Operating Rules, which Blacklands at trial accepted as setting the standard of care, 4RR70-71, acknowledges the culmination of these duties, in its Rule 7.8:

> Before coupling to or moving cars on tracks where cars are being loaded or unloaded, crew members must be sure that all of the following have been removed or cleared: persons in, on, or about cars. PX13; 4RR35.

So, every time Blacklands made a move, it was dutybound to confirm the track remained clear of persons. 4RR38-39, 53. This was hardly onerous, requiring only that a crewman step back and look in each direction. 4RR36, 39. To have done so would have revealed the boom auger of Knighton's truck as big as Dallas over the railcar and would have revealed Knighton climbing atop that car. 4RR111, 67, 6RR156-57.

II. As the verdict confirms, Blacklands failed to prove either Mountain View or Pilgrim's culpable.

Blacklands can't challenge its own culpability, so it wants to pass the buck. But to have benefitted from Mountain View's and Pilgrim's presence in the case, Blacklands needed to (1) prove at least one of them culpable *and* (2) prove them collectively over 50% responsible for Knighton's injuries. *See Bay Rock Operating Co. v. St. Paul Surplus Lines Ins. Co.*, 298 S.W.3d 216, 233 (Tex. App.-San Antonio 2009, pet. denied)(third party's 49% responsibility wouldn't affect defendant's joint-and-several liability); *Joyce Steel Erection, Ltd. v. Bonner*, 506 S.W.3d 58, 65-66 (Tex. App.-Texarkana 2015, no pet.). Anything less leaves Blacklands fully liable. TEX. CIV. PRAC. & REM. CODE §33.013(b). Blacklands doesn't argue that Mountain View and Pilgrim's should have been assessed

over fifty-percent responsibility, thus nullifying the attack on their non-culpability. In any event, the proof easily supports the liability verdict.

A. Probative evidence negated proximate cause.

Blacklands says Phillip Peery, Mountain View's president, admitted negligence. This ignores the true nature and context of Peery's testimony.

- It was a hindsight lamentation akin to Monday-morning quarterbacking, which need not be taken to admit legal culpability.
- It also was preliminary and later disproved.
- Evidence Blacklands ignores showed Knighton would in all events be untethered as he crouched preparing to stand atop the railcar.

1. By trial, Peery's deposition lament was disproved.

When Peery was deposed, seven months pretrial, CR163, Mountain View—preliminarily and, it turns out, inaccurately—considered use of a manlift the safest practice. But that later was disproved.

Between Peery's deposition and trial, Mountain View's safety consultant declared the manlift procedure *un*safe and its use was discontinued. 6RR248-50. Through consultation, study, and trial-and-error, Mountain View determined the safest practice, given the site's constraints, was to use a harness/lanyard to climb the railcar ladders, but then to untether such devices before rising to stand atop the car. The impact of this reevaluation was clear at trial:

Q: **Did you or your company eventually determine that that [*i.e.*, a manlift] was not the safer way to approach the work?**

A: **We did.**

Q: Specifically, why was it not a safer way to do the work?

A: It was determined that the property, the grounds there was very uneven, and these machines—this machine needs to be operated in a level, more stable environment. And there was some overhead wires that caused concern. In addition to that, it was an issue of potentially tripping over their own lanyard.

…

Q: Okay. **Since the manlift has been removed for safety reasons from the jobsite, how is it being performed today?**

A: **Today we are—use a harness and lanyard. As they're climbing the ladder, they're tied off. Tied off until once they get on top of the railcar, which they detach the lanyard.**

…

Q: **So even as we sit here today, it's the judgment of your company [Mountain View] that it's safer to disconnect the lanyard once you're working on top of the railcar?**

A: **That is correct.** 6RR249-51.

* * *

A: **While he's on top of the car, he can't be attached to anything.**

…

Q: **And that's because you still haven't been able to come up with a safer way to do it with whatever you can take out there?**

A: **That's correct.** 7RR50-52.

Because Knighton, rising to stand when Blacklands moved the car, would have been untethered in any event and fallen to the ground, 5RR44-45, the jury needn't have found Mountain View's (or Pilgrim's) conduct a proximate cause.

2. Peery's deposition lament was never a confession of liability.

Drafted as a Monday morning quarterback, Peery, opined basically that he would like to have provided Knighton with different fall-protection procedures *if* he could have foreseen Blacklands' remarkable negligence. 6RR253; *accord* 6RR232. But in this case, Mountain View's legal culpability must be adjudged by what the company reasonably should have anticipated in May of 2015, which wouldn't include Blacklands' negligent actions. *See Boren v. Texoma Med. Ctr.*, 258 S.W.3d 224, 230 (Tex. App.-Dallas 2008, no pet.)("Foreseeability is not measured by hindsight…").

Additionally, a party's testimonial declarations are at most nonconclusive quasi-admissions. *Mendoza v. Fid. & Guar. Ins. Underwriters*, 606 S.W.2d 692, 694 (Tex. 1980). To be a conclusive, judicial admission, a testimonial declaration must be contrary to an essential fact embraced in that party's claim or defense, and be "deliberate, clear, and unequivocal." *Id.* This is extremely rare. Even a defendant's testimony that a rear-end collision was his "fault" and "yes, I'm liable for the accident" has been denied the status of a judicial admission. *Campbell v. Perez*, 2015 Tex. App. LEXIS 2070, (Tex. App.—Fort Worth 2015, no pet.); *see also Neese v. Dietz*, 845 S.W.2d 311, 314 (Tex. App.—Houston [1st Dist.] 1992, writ denied)(no liability affirmed in rear-end collision case). Nothing about Peery's hindsight testimony, made without knowing key facts, would require a different conclusion here. Indeed, while Peery lamented over Knighton's injury, he was quick to add qualifiers expressly identifying Knighton's experience and calling out the unforseeability that Blacklands would jolt the train with him on it.

6RR240 ("[I]n the big scheme of things, this guy had done this job for some six years without incident and he would have this time had he not gotten bumped and knocked off of it"), 6RR232 ("but this guy's done this job so many times"), 6RR226-27. Peery's testimony didn't possibly bind the jury to find Mountain View (or Pilgrim's) negligent or a proximate cause.

3. Mountain View's loading procedure makes sense.

The catwalk atop each railcar is 3 to 3.5 feet wide—basically an elevated sidewalk. 6RR253. Knighton and his co-workers had performed the loading task for years without prior incident, working atop these cars many times each day. *See* 6RR253. Blacklands' own out-of-court actions confirm the propriety of Mountain View's procedure: when its workers climb atop railcars to inspect them, Blacklands doesn't have them wear fall protection—not even today. 4RR90-91. Conductor Adams thus refused to "blame" or "criticize" Pilgrim's or Mountain View "in any way" respecting Knighton's injury.[2] 4RR92. This, alongside the failure of other potential loading methods, vindicates Mountain View.

4. Blacklands' alternatives wouldn't have prevented Knighton's fall.

Blacklands' expert, Jack Madeley, posited five attachment points for fall protection: (1) the railcar's grab bar, (2) a manlift, (3) a rigged forklift, (4) a permanent

[2] As for Pilgrim's representative's deposition, he merely agreed Mountain View "should explore" or "probably look into" some manner of fall protection. 6RR199. Mountain View did so, concluding the safest practice was to use fall protection while climbing but not while atop the railcars. 6RR249-51.

structure, or (5) an "overhead fall-protection system." 7RR85-95. The jury was entitled to reject this testimony, because it was vague and conclusory, *Coastal Transp. Co. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 232 (Tex. 2004), Madeley never tested his alternatives under the conditions of the Mount Vernon siding, 7RR91-94, and he didn't show any alternative to be practical and safer overall. Each hypothesized alternative had its drawbacks.

The Grab Bar. Because it created a tripping hazard, 7RR50-51, Madeley ultimately agreed he wouldn't recommend hooking a lanyard to the railcar's grab bar. 7RR89.

A Forklift. Pilgrim's once used a rigged-forklift apparatus as an attachment point. But a worker who had used it called it "the dangerous part of the job," because it could lock unexpectedly and "jerk[] you off that car." 6RR177, 183, 190-91 (the task was safer "without the forklift"). Even Madeley said he didn't criticize Mountain View for deciding the forklift wasn't practical. 7RR91. What is more, a forklift wouldn't have benefitted Knighton, because a worker would attach to it only *after* he "got up on the railcar." 6RR172-75, 186, 192, 194.

The Manlift. As explained *supra*, Mountain View's experiment with a manlift was found unworkable and properly abandoned. 6RR248; 7RR45, 47-49 ("We thought [the man lift] was a good idea but it wasn't").

A Permanent Structure. Whatever were the pros or cons of some undefined "permanent structure," it would not affect Mountain View's or Pilgrim's culpability,

because there is no evidence Pilgrim's or Mountain View controlled the siding or right of way or had any right or ability to install such a structure. 6RR262, 7RR95-97, 103.

An Attachment-Point System. As with the undefined permanent structure, Madeley's testimony in this regard was simply too vague and conclusory. 7RR102, 108 (referencing a nonspecific "methodology for overhead horizontal lifeline type system … moveable down the railcar"). Madeley never tested such a system, 7RR87, or explained how it functioned, let alone proved it a superior option overall at Mount Vernon. From Madeley's cryptic testimony, the jury couldn't intelligently evaluate it. Nor were they bound to his bare opinions, which, being *ipse dixit*, were unreliable and no evidence. *See Mack Trucks v. Tamez*, 206 S.W.3d 572, 578 (Tex. 2006).

Blue Flags. Blacklands talks up a "blue-flag" procedure for warning when someone works around the tracks. 6RR265. But, as Blacklands' owner admitted, such a system "obviously" wasn't necessary for a safe loading process. 8RR10. Nor would it have benefitted Knighton. Blacklands knew Knighton was going to work—because conductor Adams gave the permission. Besides, a blue flag can't be seen if no one looks for it. After clearing Knighton to work, Adams neither looked back down the track nor directed anyone else to. 6RR158. If someone would have, he could have seen the truck's boom in position. 4RR111. And, on stepping back just a few feet, would have seen Knighton. 4RR67.

5. Because the evidence left the jury free to make up its own mind, the "no" findings are proper.

The jury was entitled to consider the failure of the manlift and entitled to take Peery's preliminary viewpoint as a hindsight musing that the record counterbalanced with a cornucopia of factors, including Blacklands' own practice of foregoing fall-protection atop railcars, and Mountain View's ultimate return to a practice of untethering before standing. The record thus supports a jury determination that Blacklands failed in its burden to prove Mountain View (or Pilgrim's) negligent.[3] And, because Knighton would be untethered when Blacklands bumped him off, the jury independently could base the same "no" answers upon Blacklands' failure to prove proximate cause.

B. Pilgrim's lacked control and, thus, had no relevant duty.

While Blacklands claims Pilgrim's nonetheless controlled the loading operation, overwhelming evidence said otherwise.

Mountain View operated as an independent contractor. 6RR242. As Pilgrim's area safety manager testified, Pilgrim's had no one on the scene and no right to control Knighton's work that day. 6RR201, 208-09. Pilgrim's neither owned the siding nor controlled Blacklands' car-switching operations. 6RR201. Mountain View's employees, when at this siding, were not on Pilgrim's property, not under its supervision or control,

[3] Nor was Mountain View negligent for failing to train Knighton. An employer has no duty to instruct an experienced employee. *National Convenient Stores v. Matherne*, 987 S.W.2d 145, 149 (Tex. App.-Houston [14th Dist.] 1999, no pet.). Because Knighton performed the same job previously, 5RR21, 109, 6RR226-27, 240, 242, Mountain View rightly expected that he knew the job. 6RR226.

and not governed by its safety rules, which applied only to its own facilities and employees. 6RR200. Mountain View's president agreed. 6RR242-45. When Pilgrim's temporarily furnished Mountain View with a manlift, it did so only at Mountain View's direction, as a courtesy, to avoid a "contractor's markup." 6RR206-08, 233; 7RR34-36, 46. Mountain View, not Pilgrim's, ordered the lift removed when it proved hazardous. 6RR233-34, 248; 7RR45, 47-49.

Blacklands says its owner testified that Pilgrim's controlled the site. Br.37. But that would be wrong. He said only that Pilgrim's furnished the *railcars,* "just like any one of [Blacklands'] other customers," not that it controlled Mountain View's loading operations. 6RR262-63.[4]

In summary: There simply is no great weight of evidence that any Mountain View or Pilgrim's negligence proximately caused Knighton's injuries, no great weight of evidence that Pilgrim's had any relevant control or duty, and no suggestion these others could have been over fifty percent responsible.

[4] Blacklands also implies that Pilgrim's is liable for not telling it about Mountain View. Blacklands, however, never showed Pilgrim's had such a duty. Nor is it credible to think Blacklands hadn't learned of Mountain View in the three years its crews had worked next to Mountain View's drivers—three years that Mountain View's identity was emblazoned on the sides of its trucks. PX266. And, just how could an alleged duty towards Blacklands affect *Knighton's* recovery?

III. The jury charge was proper.

A. The right-of-control instruction was proper and, in any event, its submission was harmless.

Blacklands thinks Knighton judicially admitted that Pilgrim's controlled the loading operation. On this basis, it claims the trial court erred by instructing the jury on the need to find control. There was no such admission or error.

1. Knighton consistently *denied* that Pilgrim's controlled the loading operation.

Judicial admissions—formal waivers of proof usually found in pleadings or stipulations[5]—are not found lightly. To qualify, a statement must be *clear*. It must be *deliberate*. And it must be *unequivocal* in admitting a material fact. *See Horizon/CMS Healthcare v. Auld*, 34 S.W.3d 887, 905 (Tex. 2000). In addressing these strict requirements, courts consider "the entire motion and other documents in the record." *Lentz Eng'g, LLC v. Brown*, 2011 Tex. App. LEXIS 7723, *4 (Tex. App.-Houston [14th Dist.] 2011, no pet.); *see also Highlands Ins. v. Currey*, 773 S.W.2d 750, 753 (Tex. App.-Houston [14th Dist.] 1989, writ denied)(no admission because party later denied the same fact in amended answer). The point is to be certain an admission was intended.

It's inconceivable Knighton judicially admitted that Pilgrim's controlled the loading operation. That would contradict the testimonial facts and everything Knighton (who never sued Pilgrim's or accused it of fault) argued about Pilgrim's in the *Daubert/Robinson* motion, at that motion's hearing, and throughout trial.

[5] *Phillips v. Phillips*, 296 S.W.3d 656, 668 (Tex. App.—El Paso 2009, pet. denied).

The *Daubert/Robinson* motion. Knighton's Motion to Exclude, 1CR177-85, did not admit control. It identified "an obvious *issue*" on which the parties staked competing positions. 1CR182. That is the opposite of admitting the opponent's position.

The motion's overarching point was that the challenged opinions were unhelpful (and thus inadmissible) spin on the testimony of others. Its synopsis said:

> Madeley offers some opinions which … *are not "helpful" to the jury* … because they are well within the common knowledge of the public. Because *the jury is equally competent* to form these opinions, Madeley's testimony *will not help the jury* …. Madeley's testimony should be limited *to avoid "jury argument"* hidden behind the veil of an expert witness. 1CR177-78 (emphasis added).

The motion's body hammered the same point. It:

- quoted Evidence Rule 702's requirement that the expert "*help* the trier of fact," 1CR178,
- discussed cases holding that expert testimony fails the helpfulness test "[w]hen the jury is equally competent to form an opinion," 1CR179-80, and
- prayed the trial court would strike the challenged opinions because they weren't "helpful to the jury." 1CR184.

The motion also declared that "[t]he hopper car … and railroad siding were controlled and operated by Defendant [*i.e.*, Blacklands]," and thus not Pilgrim's. 1CR178.

Blacklands' response didn't raise any judicial admission. 2CR597-98.

The hearing. At the hearing, Knighton singularly argued the opinions were "not helpful" and would put Madeley "in the jury box," to influence the jury's assessment of other witnesses' testimony. *E.g.*, 2RR5-9. When referencing control, Knighton *denied* Pilgrim's had it. *E.g.*, 2RR8 ("[W]e disagree that that indicates control…"). For its part, Blacklands didn't argue for any judicial admission, 2RR12-24, but characterized the motion as joining issue on whether "the five opinions they've isolated are they helpful to the jury." 2RR13; *see* 2RR14, 2RR16-17. Blacklands also agreed Madeley averred "I can interpret the evidence" testified by others. 2RR14.

The trial. As stated *supra*, in argument §II(B), the proof at trial overwhelmingly indicated Pilgrim's lacked control: Pilgrim's safety manager said it. 6RR200-01. Its plant manager agreed. 6RR206-09. And Mountain View's president (who, being protected by the workers-comp shield, had no reason to lie) confirmed it. 6RR233-34, 242, 245.

Overall. It would be odd were a litigant to, in opposing an opinion's admission in evidence, clearly, deliberately, and unequivocally concede the opinion to be true. Yet that is what Blacklands is reduced to arguing. If Knighton would have intended to stipulate to control, he would have done so directly—not by referencing an "issue" in a lone sentence tucked mid-paragraph in a motion about excluding a few expert opinions. There simply was no admission.

2. Blacklands waived any would-be admission.

Formal judicial admissions can preclude opposing proof but they will be waived if such proof is admitted without objection. *Phillips*, 296 S.W.3d at 668; *Balbuena v. Balbuena*, 2002 Tex. App. LEXIS 8357 (Tex. App.—Dallas 2002, no pet.). Here, Blacklands didn't object when abundant testimony was admitted explaining the *lack* of any Pilgrim's control. *See* 6RR201, 208.[6] This both conceded the absence of any admission and waived appellate reliance on one.

B. The control instruction was proper, its substance unchallenged, and its submission harmless.

A proper harm argument would show how the control instruction probably caused an improper judgment. TEX. R. APP. P. 44.1(a); *see Columbia Rio Grande Healthcare v. Hawley* 284 S.W.3d 851, 856 (Tex. 2009). Blacklands makes no such showing. Nor could it: The instruction's legal correctness isn't challenged. Br.40-42. And the instruction didn't comment unduly on the proof but put Blacklands to its proper burden. TEX. R. CIV. P. 277, 278; *see H.E. Butt Grocery v. Bilotto*, 985 S.W.2d 22 (Tex. 1998).

Moreover, the jury would have answered "no" as to Pilgrim's without any instruction, based on (1) the lack of proof implicating Pilgrim's in causing Knighton's

[6] While Blacklands objected pretrial to some proffered deposition excerpts, it's not possible to discern if any such objections addressed the denial-of-control proof (because it omits the deposition transcripts), let alone to know whether Blacklands objected to all such proof. *See* 2CR549-51.

injury, and (2) the jury's evaluation in answering "no" as to Mountain View, whom Blacklands accused of basically the same acts and omissions. 2CR783. A "no" answer as to Pilgrim's was thus baked into the cake.

C. Blacklands' proposed instruction on pre-existing conditions was correctly refused.

Because (1) the evidence raised no issue of pre-existing condition, (2) the Charge limited the recovery to medical costs proximately caused by Blacklands' negligence, 2CR783, and (3) Blacklands' proposed instruction would have misled the jury and misstated applicable law, the trial court—which has great discretion to determine what instructions are necessary, *Wal-Mart Stores v. Morgan*, 1999 Tex. App. LEXIS 9681, *5 (Tex. App.—Tyler 1999, no pet.)—was authorized to deny Blacklands' instruction on pre-existing conditions.

1. There was no triable issue of a preexisting condition.

Mainly because the trial included vague references to a sore back experienced some eight years prior, Blacklands thinks there was a triable issue of preexisting condition. Br.42. There wasn't.

The propriety of instructing a jury about conditions not resulting from the occurrence, as the instruction Blacklands proposed to the trial court (PJC 28.8) would have done, rests on three conjunctive criteria:

(1) Is there proof of an infirmity distinct from those the occurrence contributed to causing?

(2) Is this infirmity causally connected to damages suffered after the occurrence?

(3) And is there a "confusing close 'intermingling'" between any such distinct damages and the injuries the occurrence contributed to causing? *Dallas Ry. & Terminal Co. v. Orr*, 215 S.W.2d 862, 864 (Tex. 1948); *Spellman v. Dinh*, 1995 Tex. App. LEXIS 4111, *7-8 (Tex. App.—San Antonio 1995, no pet.).

Blacklands proved none of this.

For example, there was no evidence that the touted prior backache was a continuing condition with ongoing effects, let alone that it was the medically probable sole cause of some damage for which Knighton sought recovery. But that is precisely what would have been necessary before it would be proper to instruct on conditions not resulting from the occurrence—or any other instruction on preexisting conditions, for that matter (such as the aggravation instruction embodied in PJC 28.9, which Blacklands argued for the first time post-trial, 3CR879, and seems to argue again on appeal, Br.43).

To be clear, "[p]reexisting condition is a defensive issue," *Spellman*, 1995 Tex. App. LEXIS 4111, *6-7, which Blacklands needed to prove by showing that some of Knighton's damages would occur regardless of the fall. Blacklands' own case, *City of San Antonio v. Esparza*, concedes this. 2005 WL 3477826, *8 (Tex. App.-San Antonio 2005, no pet.)(to prevail on a preexisting-condition theory, defendant needed to show that "regardless of the trauma ... the [treatment at issue] would have been necessary"); *see Coates v. Whittington*, 758 S.W.2d 749, 752 (Tex. 1988); *see also* RESTATEMENT OF TORTS § 432 cmt c ("[T]o prevent the actor's negligent conduct from being a substantial factor, it must clearly appear that . . . the harm would have been sustained even had the

negligent act not been done."). Knighton, in contrast, may fully recover for any damages that a jury could have found the incident *contributed* to causing—even if some prior susceptibility (such as Knighton's weight or alleged predisposition to depression) contributed to or increased its consequences. *Coates*, 758 S.W.2d at 752 (defendant "takes a plaintiff as it finds him"); *Katy Springs & Mfg. v. Favalora*, 476 S.W.3d 579, 591 (Tex. App.-Houston [14th Dist.] 2015, pet. denied)("If a latent condition does not cause pain or suffering but that condition plus an injury caused such pain, then the injury, not the latent condition, is the proximate cause"); RESTATEMENT (SECOND) OF TORTS §461 cmt a ("negligent actor must bear the risk that his liability will be increased by reason of the actual physical condition of the other").

Rather than attempt the required showing, as by proving that some unrelated condition would have caused Knighton's damages anyway, Blacklands floated tidbits about an enlarged heart, acid reflux, and a prior backache and some depression. This feeble effort couldn't support a finding that Knighton's damages weren't connected to the occurrence. ***No pre-accident medical records were admitted.*** No one alleges the post-accident records, which were admitted, might support Blacklands' defense. Nor did Blacklands moor the defense to the case with any other proof that in reasonable medical probability—as is required—might show that some alleged prior condition would in all likelihood have caused some of Knighton's damages. Blacklands' tidbits about prior conditions—in most cases barely more than innuendo—were plain old

irrelevant diversions. *See Esparza*, 2005 WL 3477826, *8. There thus was no reason to instruct the jury on them.

2. Because the charge properly limited Knighton's recovery, the requested instruction(s) would have been surplusage.

If a material issue of "other condition" or "preexisting condition" would have been raised, it would not have required Blacklands' touted instructions (not PJC 28.8, requested at trial, nor PJC 28.9, apparently argued here). Such instructions as Blacklands promotes are intended to "confine[]" liability to those injuries that the defendant's negligence contributed to causing. *E.g., Spellman*, 1995 Tex. App. LEXIS 4111, *7. Here, this already was accomplished, by a jury charge that removed from the jury's grasp any injury not proximately caused by Blacklands' negligence. 2CR783, 786; *see* Committee on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: General Negligence* PJC 28.8, comment.

In answering the Charge, the jury determined that Blacklands' negligence proximately caused Knighton's injuries and then evaluated only the damages resulting from that negligence. 2CR783, 786. This was more than adequate, as the PJC commentaries to Blacklands' own instructions establish, stating: "[i]f the liability question in PJC 4.1 is submitted with the term 'injury'"—the situation here, 2CR783—then PJC 28.8 and PJC 28.9 "should not be submitted." PJC 28.9 comment; *see also* PJC 4.1. comment. These commentaries reflect what the Texas Pattern Charge Committee perceives the law to be and are heavily relied on by the bench and bar. *H.E. Butt Grocery*

Co. v. Bilotto, 928 S.W.2d 197, 199 (Tex. App.—San Antonio 1996), aff'd 1998 WL 388586 (Tex. July 14, 1998). Blacklands ignores them, choosing instead to cite cases that only recite the boilerplate principle, uncontested here, that courts should submit whatever instructions prove necessary. *Francis v. Cogdell*, 803 S.W.2d 868, 871 (Tex. App.—Houston [1st Dist.] 1991, no writ). In this case, that would exclude Blacklands' proposed instructions. *Bean v. Baxter Healthcare Corp.*, 965 S.W.2d 656, 664 (Tex. App.—Houston [14th Dist.] 1998, no pet.)(surplus instructions prohibited). Indeed, to have further instructed on the matter would have risked jury confusion, by seeming to invite an apportionment of Knighton's damages among the occurrence and the earlier conditions, regardless of Blacklands' failures to prove those conditions relevant. That, no doubt, is why Blacklands wanted the instructions in the first place.

3. The instructions' omission was harmless.

Nor could a bad ruling on Blacklands' surplus instructions be reversibly harmful, for two reasons. *First*, the jury is presumed to have understood and followed the Charge's correct and clear directives to compensate only those injuries that "resulted from the occurrence." *See Patillo v. Franco*, 2016 Tex. App. LEXIS 9550, *9-10 (Tex. App.—Houston [14th Dist.] 2016, no pet.)(refusal of eggshell-skull instruction was harmless where the charge instructed the jury to determine damages "result[ing] from the accident"). *And, second*, when it awarded precisely the amount of discounted future-medical costs that Gonzales's lifecare-plan attributed to Knighton's fall, the jury clearly

found there were no such conditions as PJC 28.8 would have sought to address. *Compare* 6RR46-47 *and* 2CR787.

4. Blacklands waived at least part of its appellate complaint.

On appeal, Blacklands reups the argument it made in the charge conference, about PJC 28.8. 8RR38-39. But it also seems to argue that the trial court should have submitted an aggravation instruction, such as PJC 28.9. Br.43. By failing to raise the aggravation instruction at the charge conference, Blacklands waived it. TEX. R. CIV. P. 278; *Andrews v. Sullivan*, 76 S.W.3d 702, 708 (Tex. App.-Corpus Christi 2002, no pet.). In any event, the newly-urged aggravation instruction was just as ill-suited to this case (and its omission just as harmless) as was the "other condition" instruction in PJC 28.8, and for all the same reasons already argued. *See, e.g.,* PJC 28.9 commentary (explaining why, in cases submitting negligence in terms of causation of plaintiff's *injury*, PJC 28.9 should not be submitted).

IV. Blacklands' attacks on future damages never launch.

A. By ignoring Knighton's excruciating pain, Blacklands waives its challenge to future impairment.

Proving a multi-element award to be excessive by addressing only one constituent is logically impossible. An appellant must attack all such elements, or waive error:

> [A]n appellant who seeks to challenge a multi-element damage award on appeal must address each element …. **If an appellant fails to address an element of damages, the appellant waives the sufficiency**

> **challenge.** *SunBridge Healthcare v. Penny,* 160 S.W.3d 230, 248 (Tex. App.-Texarkana 2005, no pet.); *accord Thomas v. Oldham*, 895 S.W.2d 352, 359-60 (Tex. 1995).

This universally-recognized[7] principle applies to *every* multi-element damage award, even pain and mental anguish. *See Barnhart v. Morales*, 459 S.W.3d 733, 747-49 (Tex. App.-Houston [14th Dist.] 2015, no pet.); *Mariner Health Care of Nashville v. Robins*, 321 S.W.3d 193, 211 (Tex. App.-Houston [1st Dist.] 2010, no pet.); *Brookshire Bros. v. Lewis*, 997 S.W.2d 908, 922 (Tex. App.-Beaumont 1999, pet. denied).

By mischaracterizing the two-element pain-and-impairment award, CR787, as a single-element "impairment award," Br.45, Blacklands fails to challenge the entire award. Pain and impairment are distinct elements, as Blacklands concedes. Br.51; *see also Golden Eagle Archery v. Jackson*, 116 S.W.3d 757, 772 (Tex. 2003)("effect of any physical impairment must … extend beyond any pain, suffering, mental anguish …"). Blacklands thus has waived its excessiveness attack (and doing so has mooted the tacked-on challenge to the excessiveness standard of review).

B. The proof soundly supports the jury's assessment of pain and impairment.

Because future noneconomic damages are inherently "uncertain," *Moore v. Lillebo*, 722 S.W.2d 683, 686 (Tex. 1986), juries have wide discretion in valuing them, *Baptist*

[7] *See, e.g., Tex. Youth Comm'n v. Koustoubardis*, 378 S.W.3d 497, 501-02 (Tex. App.-Dallas 2012, no pet.); *Norfolk S. Ry. Co. v. Bailey*, 92 S.W.3d 577, 584 (Tex. App.-Austin 2002, no pet.); *Wal-Mart Stores, Inc. v. Garcia*, 30 S.W.3d 19, 24 (Tex. App.-San Antonio 2000, no pet.).

Memorial Hosp. System v. Smith, 822 S.W.2d 67, 68 (Tex. App.-San Antonio 1991, writ. denied), and may draw on their own experience, empathy, and discretion in doing so. *Moore*, 722 S.W.2d at 686. In reviewing such an award, this Court examines the whole body of relevant evidence. *Pope v. Moore*, 711 S.W.2d 622, 624 (Tex. 1986). Blacklands violates this standard—twice—both by ignoring Knighton's pain and by cherry-picking the proof in order to belittle his impairment. The omitted proof makes all the difference. But first, some perspective.

The pain-and-impairment award translates to just $150,000/year—for thirty years, 5RR200, of expected constant pain and a substantially impaired quality of life. Annualized, this is one-fifth the amount awarded for past pain and impairment—an amount Blacklands impliedly accepts. Knighton argued for a larger future-damage amount, 8RR55, which the jury was authorized to give, but it returned a more conservative award. 2CR787. Both parties are bound to it, because the proof supports it.

Knighton's unrelenting pain: Eighteen months post-accident, Dr. Conflitti, whom Blacklands credits for its rosy view, agreed Knighton still suffers "chronic lower extremity pain," registering an excruciating eight on a ten-point scale. 4RR159-60. To be precise, Knighton has "constant," "continuous[]" pain in his hip, lower back, and right leg, 5RR55, which intensifies with daily activity, 4RR160, such as standing a few minutes, 5RR65, or doing anything putting pressure on his hip. 5RR63. As stated, his legs jerk with lightning-bolt sensations. 4RR160-62, 5RR56. He has "chronic pain

syndrome," magnifying the pain's effects. 5RR207-08. When last seen at church, he "nearly ha[d] tears in his eyes from the pain." 4RR132. His only respite is standing in a pool. 5RR67.

Knighton's simple wish is one pain-free day. 5RR90. Yet his outlook is for increased pain as he undergoes back surgery, 5RR222, his body atrophies, and his medication-tolerance builds. Dr. Gonzales, board-certified in pain medicine, considered the present—even with the continual pain and restless nights—"probably the best" days of Knighton's remaining life. 5RR215.

Impairment: Knighton's impairment is starkly worse than Blacklands' selective, cheery characterization. He is *not* healed.[8] 4RR246. He will never be normal, 4RR277, but suffers devastating impairment to his function, lifestyle, and enjoyment of life.

Before the fall, Knighton was:

- constantly busy, "always active," "on the move," independent, and "very outgoing,"
- fastidious about work,
- focused on caring for his family,
- active in the outdoors (with backyard cook-outs, camping, fishing, and hiking), and
- engaged with the grandkids, playing ball with them and attending school functions. 4RR181-88, 209-11, 5RR77-78.

[8] After Dr. Conflitti's deposition, Dr. Buch, a later treating doctor, testified convincingly that Knighton was "not healed" and that any doctor who had thought otherwise was "mistaken." 4RR246.

Knighton did handiwork, built a gazebo, repaired vehicles, and regularly mowed seven acres. 5RR69-72. He maintained fences and tended livestock. 5RR71. He danced. 5RR70. He opened his home to others—friends, his children's friends, and relatives. 4RR212, 5RR12.

Knighton now is a shadow of that former self. His capacity for altruism is depleted. He's "real depressed," "very dependent," "agitated," "aggravated," and "angry." 4RR133, 188. And because he gets angry, the kids don't come around like they used to. 5RR88.

Perhaps worst of all, Knighton's injuries have "stolen his manhood." 5RR88. He can't get a full erection. 4RR279; 5RR61, 207. His genitals, buttocks, and rectum are numb. 4RR278, 5RR53-54, 61, 207. So, he doesn't feel when he's having a bowel movement. 4RR279, 5RR57. And he requires his wife's help cleaning up after one, when she's available. 5RR59. If his stools become loose, he has no control. 5RR57. His bladder leaks. 4RR278, 5RR60. When he must leave home, he carries extra underwear and baby wipes, which he uses because he cannot feel toilet paper. 5RR58, 60. He avoids public restrooms. 5RR59.

He has permanent numbness in his right hand, right leg, around his lower back, and in his left foot, and a prickly, cactus-type feeling over his thigh. 5RR56, 62, 4RR283. His injury restricts the sacroiliac joint, prompting a "constant battle" with spasms and leg cramps. 5RR56. As a result, he doesn't sleep much at all, but is "up and down" all night. 5RR55, 77, 80.

Just standing is a chore. 4RR261. When he walks, he relies on a cane and is limited to short spurts. 5RR63. And this is about as good as his mobility will get: his doctor says *if everything goes well*, he *may* someday "get around halfway decent with [his] cane." 4RR277. Because of decreased ankle/foot function, he'll never regain any semblance of a normal gait. *Id.*; 4RR261.

Knighton can't perform basic activities like putting on socks and shoes, and he can't cross his legs. 5RR66, 210. He can't really drive, because it's dangerous: when he presses the accelerator he can't tell how hard. 5RR278. He can't do handiwork, 5RR76, maintain the fences, mow his yard, prune trees, or teach his grandchildren to drive. 5RR71-72, 78, 85. He's had to sell his livestock. 5RR71. And he's incapable of helping the family out. For instance, when his bipolar daughter recently gave birth to her second child (Megan's younger sister, Cheyenne), CPS sought to place the child—Knighton's own grandchild—with a caring adult, the Knightons were declared ineligible for the placement, because of his impairment. 6RR13-15.

He and Misty don't get out. 4RR187. Being in public is humiliating, and it hurts too much afterwards. 5RR87. So, he mostly sits in his room, feeling "locked up in prison," with "nothing you can enjoy anymore." 5RR87. Obviously, he no longer fishes or goes camping. 5RR78, 86-87.

Knighton badly wants to work. 5RR82. But he hasn't been released for even the lightest part-time sedentary work. 4RR165. Invoking Dr. Conflitti's testimony, Blacklands says Knighton should someday "return to a full-time sedentary job with no

issues. (4RR176)." Br.49. Not at all. Conflitti raised only a speculative *possibility* of such work. 4RR176 (testifying "I think he *could*" someday return to a sitting job). The jury had good reason to disbelieve even this speculation, given how wrong Conflitti had been about Knighton's healing, as later disproved by Dr. Buch, 4RR246, and the further pelvic surgeries.

Adding insult to injury, Knighton's injury will accelerate the major changes of aging: his discs will degenerate faster. 5RR205. And he's burdened with elevated risks of early arthritis of the spine, and low-back, hip, and leg-pain problems. 4RR239-40. The screws in his pelvis could come loose, and "all sorts of things … can still happen." 4RR275.

If anything, $150,000 per year for the life Knighton is now locked into is not enough.

C. This is neither the case nor time to rethink the standard of review.

Were it not moot, Blacklands' challenge to the standard of review still would be a dead end because, as Blacklands admits, Br.52, any change to this statewide test should come from the top—the Texas Supreme Court. This Court is bound by stare decisis to apply the existing test. *Rentech Steel, LLC v. Teel*, 299 S.W.3d 155, 166-67 (Tex. App.-Eastland 2009, pet. dism'd).

V. The proof supports all awarded future-medical costs and negates Blacklands' challenges.

Blacklands says the future-medical award compensates unrecoverable preexisting conditions. Br.54-55. It is wrong.

A. Because of a fatal variance between the issues at trial and on appeal, Blacklands waived its appellate attack.

Blacklands theorizes that certain costs (it never quantifies their amount) might be incurred solely because of alleged preexisting conditions. Its witnesses didn't say that but claimed only that Knighton didn't need some of the lifecare-plan treatments or needed less of them.[9] *E.g.*, 7RR121 (agreeing psychiatric care is necessary *as a result of the occurrence* but suggesting it could be discontinued after three years). Thus, Blacklands waived its trial-court complaint, by failing to assert it on appeal, and waived its appellate issue below. TEX. R. APP. P. 33.1(a)(1)(A); *USAA Tex. Lloyds Co. v. Menchaca*, 2018 Tex. LEXIS 313, *62-63 (Tex. 2018).

B. Of the $908,290 future-medical award, less than $218,000 is in issue, and proof supports the entire award.

Dr. Gonzales prepared a detailed lifecare plan pegging Knighton's future medical costs from this occurrence at $1,021,339.57, PX192(d), 5RR198-31, which Dale Funderburk discounted to $908,290, 6RR46-47, and the jury awarded. 2CR787. Of the

[9] As stated before, these witnesses mentioned some conditions or risk factors (enlarged heart, blood pressure, prior backache, acid reflux) they claimed Knighton had or once had. But they never showed any such conditions solely caused some item on Gonzales's lifecare plan. So, these items were red herrings, planted to confuse the jury. *See Esparza*, 2005 WL 3477826, *8. Knighton need not further address them. *Transcon Ins. Co. v. Crump*, 330 SW.3d 211, 218 (Tex. 2010)(medical-causation expert need not "disprov[e] or discredit[] every possible" other cause).

plan's nine treatment categories, PX192(d), Blacklands' appellate defense doesn't contest five of them, totaling $532,151.56—diagnostics, labs, equipment/supplies, environmental modifications, and nursing/attendant care. *Compare* PX192(d) *with* Br.54-57. Within the other categories, Blacklands contests something less than $217,442.14 (about $7,000 annually), comprising:

- $110,895.20 for future back surgery;
- An unidentified portion of the $55,000 in antidepressant medication, 5RR240; PX192(d);
- under $21,507.83 in physician care[10]; and
- possibly part of the $31,659.12 in rehabilitation services Dr. Garrison didn't overtly concede. 7RR164-65.

C. Blacklands failed in its burden to prove any lifecare-plan treatment was *solely* caused by preexisting conditions.

1. Blacklands never proved that any lifecare-plan item would be incurred without Knighton's fall.

To avoid an item of future-medical treatment via a preexisting-condition defense, Blacklands needed evidence, grounded in reasonable medical probability, that some

[10] This includes eight psychiatrist visits, one neuropsychologist visit, annual gastroenterologist visits, and twice-annual urologist appointments. PX192(d); 268 p.47. (Of the $39,507.83 Gonzales allotted to physician care, Blacklands doesn't challenge $18,000 for physical-medicine and pain-management doctors. 5RR234-35.)

lifecare-plan treatment would be incurred even without Knighton's fall. *See City of San Antonio v. Esparza*, 2005 WL 3477826 at *8. Blacklands produced no such proof.

2. Blacklands' preexisting condition argument fails for other reasons.

Blacklands needed to quantify "the extent of the damages that the preexisting condition would inevitably have caused." *See Koch v. United States*, 857 F.3d 267, 273 (5th Cir. 2017); *accord Evans v. S. J. Groves & Sons Co.*, 315 F.2d 335, 348 (2d Cir. 1963). Blacklands didn't do this. Instead, Blacklands alleged Knighton had prior conditions and posited that his treatments could have been less costly if he would have started out a perfect physical specimen—slim and not predisposed to depression or acid reflux. *E.g.*, 6RR120-21. This at best could prove some prior condition to be a concurrent cause *alongside* Blacklands' negligence.

If Blacklands would have joined issue on medical causation of some lifecare plan treatments at trial (it didn't), Gonzales could have addressed the matter in detail, with factual data. But in the absence of any such challenge, he need not have done so. TEX. R. EVID. 705(a); *Bustamente v. Ponte*, 529 S.W.3d 447, 464-65 (Tex. 2017)(expert's opinions not conclusory even though foundational data not in the record and it was unclear how he reached his conclusions); *Arkoma Basin Exploration v. FMF Assoc.*, 249 S.W.3d 380 (Tex. 2008)("experts are not required to introduce such foundational data at trial unless the opposing party or the court insists"). Besides, if there would have

been any material disagreement as to causation between the experts, it would have been a jury matter.

3. The proof supports the challenged items.

Dr. Gonzales causally connected all lifecare-plan treatments to the occurrence. 5RR203 (Knighton's lifecare plan covers only "those things that I could relate to the accident"). He also both acknowledged the risk factors identified at trial, 5RR248-49, 199-200, and affirmatively testified there was no preexisting condition he needed to account for. 5RR251. Notwithstanding this proof, Blacklands suggests that unidentified portions of the following items might have been incurred based solely on preexisting conditions: (i) back surgery, (ii) urologic care, (iii) psychiatric care including antidepressants, (iv) gastroenterological care, and (v) gym membership and nutritional counseling. Br.56-57. Blacklands is once again wrong.

Back Surgery. Knighton needs a back surgery that will cost $110,895.20. 5RR225, PX192(d). A neurosurgeon recommends it. 5RR222. And Gonzales testified that it's medically necessary and probable *as a result of the occurrence*. 5RR204 (at least three discs damaged, from Knighton's fall); *accord* 5RR222, 225, 282. Post-accident films showed spinal changes *resulting from great force such as occurs in falling 17 feet*. 5RR204. Blacklands doesn't challenge this proof or the jury's right to believe it. *No witness attributed the surgery to a prior condition.* Rather, Dr. Garrison excluded the back surgery solely because another defense expert, Benzel MacMaster, said Knighton didn't need it. *Id.*; *see also* 6RR107-08. While Garrison claimed that pre-accident medical records from

years ago indicated prior "intractable back pain," 7RR118, 121, she never causally connected the prior condition to the future surgery. And the facts negated any such connection: Knighton's back had been utterly asymptomatic for at least eight years—during which Knighton drove his truck and climbed railcars without difficulty[11], 7RR134-35, and passed the DOT's vigorous physicals "with flying colors," 5RR26—until the accident generated such force that it pulled bone processes off Knighton's lower spine. 4RR152. The jury didn't overlook this gaping hole in Blacklands' proof. Neither should this Court.

Gastroenterologist care. Gonzales opined that because of the occurrence Knighton needs to see a Gastroenterologist annually. Blacklands challenges this even though its total cost is merely $2,430. PX268. The challenge fails. Gonzales acknowledged Knighton's prior reflux disease and "hyperacidity," 5RR236, and attributed the GI doctor visits to the occurrence expressly because stress from Knighton's devastating injuries was "contributory to [Knighton's post-accident] GI symptoms." *Id.* What is more, the accident caused a bowel problem, 5RR57, independently supporting gastroenterological care. 7RR121. Thus, the occurrence was itself a proximate cause even if prior reflux was a concurrent cause.

[11] Ms. Knighton placed the backache in 2007 or 2008, when her husband had missed work due mostly to complications from intermingling prescription drugs; once the medication issues were sorted out, "everything was better." 6RR26. The then treating physician *never* suggested a potential back surgery. 6RR25.

There was no counterproof. Garrison just cited the reflux Gonzales had already taken account of.

Urologic care. Because Knighton has an enlarged prostate, Blacklands thinks some portion of the lifecare plan's tiny allotment for urological treatment ($7,414 for twice annual doctor visits, PX268 p.47) must be the sole result of a preexisting condition. Br.56. Nonsense.

Gonzales connected Knighton's need of urologic care to the new urologic problems the accident caused, including erectile dysfunction. 5RR212. No one denied urologic care was recoverable for this. Garrison conceded it. 7RR120. She just thought Knighton needed one annual visit instead of two. *Id.*

Psychiatric care. Blacklands apparently contests a portion of the lifecare plan's psychiatrist/neuropsychologist visits ($3,475) and antidepressant medications ($55,000). The full amounts are recoverable. Gonzales tied Knighton's depression to chronic pain suffered as a result of this accident, 5RR208, and Knighton denied any previous major depression. 5RR105. While Garrison contended Knighton had prior depression (making him an eggshell claimant *susceptible* to future depression), 7RR120-21, she too agreed some psychiatric treatment was "attribute[able] … to what happened in this accident." 7RR121; *accord* 7RR126, 147, 162. Her sole quibble was that Gonzales's plan called for five years of psychiatrist visits, PX268 p.47, while she claimed anything beyond three years should "be determined" later. 7RR125-26, 147. The jury, which lacked the luxury of Garrison's wait-and-see approach, sided with Gonzales.

Gym membership and nutritional counseling. Before his fall, Knighton was active. 7RR134. The fall destroyed his mobility. In consequence, the gym membership and nutritional counseling that otherwise could have been luxuries became medical necessities for maintaining Knighton's residual fitness. 5RR244 (Gonzales, testifying these items were necessary because of Knighton's devastating injuries). Even Dr. Garrison awarded Knighton the modest gym membership. 7RR126. When she inexplicably then opined that nutritional counselling wasn't also necessary "as a result of these injuries," 7RR127, the jury need not have accepted it over Gonzales's contrary proof.

Moreover, the awards for gastroenterological care, urologic care, and nutritional counselling are so small—each less than $1/10^{th}$ of one percent of the future-medical award—that they are "*de minimis* and not worth eliminating." *Waltrip v. Bilbon Corp.*, 38 S.W.3d 873, 879 (Tex. App.-Beaumont 2001, pet. denied). This is especially true given three points:

First, Gonzales laid out a "minimum" plan, including only the minimum care Knighton needs. 5RR191, 200-01.

Second, Gonzales's approach was consistently conservative. He:

- allotted Knighton only four hours daily of home healthcare (starting at age 65), even though Knighton would need "far more," and "a lot more" of that service, 5RR229-30, 246;

- used conservative unit costs, which Blacklands' experts accepted, 7RR178, 189; *see* 5RR216 (Gonzales averaged generic and brand-name medication costs); 5RR217 (Gonzales provided lab studies annually although they ideally should be done twice annually);
- ignored rampant medical-cost inflation, 5RR230;
- computed home healthcare costs at the rate of an aide rather than a nurse, 5RR228; and
- rounded Knighton's life expectancy downward almost a year. 5RR202.

Third, Gonzales ignored follow-up services connected to the future back surgery, 5RR225, and likewise chose not to consider possible complications, 5RR230, even though Knighton had complications before trial, 4RR178, has had complications post-trial (he now uses a catheter), will surely have further complications and perhaps other surgeries, 5RR202, 222, 230, 299, 7RR178, 189, and has injuries of a type that will "progress[] over time." 5RR193.

Given all this, the jury would have been within its power to substantially *increase* the amounts testified by Gonzales. *San Antonio v. Vela*, 762 S.W.2d 314, 321 (Tex. App.—San Antonio 1988, no writ); *McCall v. Hester*, 2015 Tex. App. LEXIS 1348, *16-17 (Tex. App.—Texarkana 2015, no pet.); *Oney v. Crist*, 517 S.W.3d 882, 901 (Tex. App.—Tyler 2017, pet. granted, judgment vacated w.r.m). But it didn't.

4. Blacklands' argument about pre-incident medical records is a red herring.

Dr. Garrison thought pre-incident medical records could be important. 7RR119. But those records were neither admitted in evidence nor proved material. Garrison never connected them to any opinion that a future treatment would have been necessary absent Knighton's fall. Gonzales, by examining and interviewing Knighton, determined there was no significant past illness or injury he needed to consider. 5RR250-51. And while Gonzales at his deposition offered to look at any records Blacklands might think relevant, 5RR253, Blacklands declined the invitation. *Id.* In these circumstances, any issue about pre-accident records could at most have been a matter of weight, for the jury, *Morrell v. Finke*, 184 S.W.3d 257, 282 (Tex. App.—Fort Worth 2005, pet. denied), just as was the fact that Dr. Garrison had opined on Knighton's prognosis without either examining or interviewing him. *See* 5RR196-97.

Nor does *City of Trinity v. Goodall,* the withdrawn opinion Blacklands cites, make any prior records material. *Goodall* speaks to a much different matter, holding that juries can infer conclusions about future treatments based on a plaintiff's pre-trial (but post-incident) treatments. 1997 Tex. App. LEXIS 46, *8 (Tex. App.-Houston [14th Dist.] 1997, op. withdrawn).

VI. The challenged admission-of-evidence rulings are no basis for reversal.

A. Blacklands waives harm.

Because few trials are perfect, judgments may be reversed only for harmful error—error contributing substantially to bringing about the judgment. *Gunn v. McCoy*, 2018 Tex. LEXIS 560, *40 (Tex. 2018). Blacklands' admission-of-evidence complaints don't adequately brief, let alone prove, this level of harm.

Rather than the necessary argument including analysis and citation, TEX. R. APP. P. 38.1(i); *see In re Marriage of Barnes*, 2012 Tex. App. LEXIS 2149, *5 (Tex. App.-Texarkana 2012, no pet.), Blacklands offers only speculative conclusions about unidentified harm. For instance, Blacklands' entire harm discussion respecting exclusion of collateral-source proof is this *ipse dixit*:

> It was harmful error for the trial court to exclude this evidence, and the error caused the rendition of an improper judgment. Br.61.

But this is a case in which Blacklands doesn't even contest its liability on appeal. The damage case is proven with solid evidence. And the collateral-sources Blacklands would have proffered would not have been at all inconsistent with the evidence of Knighton's financial hardships. *See argument infra* §VI(D). If Blacklands thought there was reversible error in these circumstances, it owed it to Knighton and the Court to say so, in its opening brief. The failure to do so was a waiver. Indeed, the reporters are chock full with opinions declaring admission-of-evidence errors harmless. *See, e.g.*, *Gunn*, 2018 Tex. LEXIS 560, *48; *Jones v. Colley*, 820 S.W.2d 863, 866-67 (Tex. App.—

Texarkana 1991, writ denied). And rightly so: if mere conclusions such as Blacklands panders were all it took to prove harm, the harm requirement would become superfluous. *Walker v. TEIA*, 291 S.W.2d 298, 301 (Tex. 1956).

The harm discussion about cross-examining Gonzales over health-insurance premia is also a bare conclusion:

> It was harmful error for the court to exclude Gonzales's testimony and the error probably caused the rendition of an improper judgment. Br.67-68.

This is unacceptable to preserve harm, for much the same reasons the harm discussion about collateral sources is inadequate. The remaining harm "discussions" are equally conclusory. Br.65, 67.

The admission-of-evidence rulings should collectively be held harmless and any alleged error waived. And yet there is more. Each individual ruling is defensible on its merits.

B. Because the excluded Madeley opinions would have usurped the jury's function, they were properly stricken.

Before trial, the court struck five Madeley opinions. 2CR636-37. The ruling was proper, largely for the reasons stated before: the challenged opinions were unhelpful, and in several cases sought to instruct on the law.

Because expert testimony must "assist the [jury]," TEX. R. EVID. 702, trial courts should exclude expert testimony when "the jury is equally competent to form an opinion." *K-Mart v. Honeycutt*, 24 S.W.3d 357, 360 (Tex. 2000)(safety expert).

Madeley's challenged opinions didn't advise the jury on complex issues. 1CR177-84. As Knighton told the trial court and Blacklands never denied or disproved, Madeley's opinion on control was based merely on reading others' depositions. *See* 2RR6, 17. The other excluded opinions would likewise have (1) browbeat the jury about facts within its reach or (2) impermissibly instructed on the law—usurping the court's function. 1CR180 (Madeley's opinion 1, purporting to instruct about legal duty respecting "[r]esponsibility for safety of a cargo loading operation"); 1CR183 (opinion 16, instructing on an employer's legal "duty to provide … a safe place to work … under [OSHA]," and opinion 17, pressuring the jury to find Mountain View "failed to develop and properly implement safe work methods").

None of this is helpful. It doesn't bring to bear any specialized knowledge about the science of "control," legal "responsibility" or an employer's legal duty. It does nothing a lawyer couldn't do in jury argument. It just puts a thumb on the juridical scales, via Madeley's credentials and air of infallibility.[12] A trial court never abuses its discretion in excluding such attempts to put an expert in the jury box. *See K-Mart*, 24 S.W.3d at 360. And insofar as Madeley sought to instruct on the law, the trial court correctly called it out as infringing his role. 2RR17; *see Greenberg Traurig v. Moody*, 161 S.W.3d 56, 94 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (expert can't testify on

[12] This lack of scientific basis distinguishes Blacklands' cases. In *Burns v. Baylor Health Care System*, for example, the excluded testimony would have provided specialized knowledge on the human visual process. 125 S.W.3d 589, 596 (Tex. App.-El Paso 2003, no pet.).

legal questions); *Ledbetter v. Missouri Pac. R.R.*, 12 S.W.3d 139, 144 (Tex. App.—Tyler 1999, pet. denied) ("whether OSHA regulations comprised the proper standard of care … was one of law for the trial court.").

To the extent Blacklands' evidentiary attack relies on the debunked "judicial admission" of control, the attack should be rejected for all the reasons there is no such admission. *See Supra* §III. (In contrast to Blacklands' argument, the record doesn't hint that the trial court relied on the spurious "judicial admission" in deciding to strike Madeley's opinions. 2RR4-24.)

There also is the matter of proof. As Knighton told the trial court, 2RR24, Blacklands, the testimony's proponent, bore the burden to prove it helpful and not just pseudo-scientific spin. *Coca Cola Co. v. Harmar Bottling Co.*, 111 S.W.3d 287, 299 (Tex. App.—Texarkana 2003) (proponent must show expert's testimony qualified, relevant, reliable, and "helpful to the trier of fact"), *rev'd on other grounds*, 218 S.W.3d 671 (Tex. 2006). Rather than attempt this, Blacklands stood pat on Madeley's conclusory report—a document that merely listed the items "reviewed" and rattled off Madeley's bare opinions. 1CR186-92. Blacklands, in its response and at the hearing, wrongly insisted it had no burden. 2CR597-98; 2RR14.

Because Blacklands ignored its burden and the challenged opinions wouldn't assist the jury but would have repackaged lawyerly advocacy and usurped the court's function, the trial court couldn't possibly have abused its discretion. Nor was the ruling harmful.

Harm. Excluding an expert's unhelpful *ipse dixit,* whether seeking to spin the factual testimony of others or instruct on the law, is, per se, not calculated to probably cause an improper judgment. *Hackett v. Littlepage & Booth*, 2009 Tex. App. LEXIS 1166, *9-10 (Tex. App.—Austin 2009, no pet.). Madeley's only bases for opining on control were the immaterial fact that Pilgrim's had trained Knighton *in a former employment* and the notion (already thoroughly explored in the record, 6RR206-08) whether Pilgrim's demonstrated control by, at Mountain View's direction, renting a manlift. 7RR105-08. The jury heard the relevant facts directly and was capable of evaluating them. Here, moreover, there was no close issue as to Pilgrim's control or anything else Madeley sought to attest to. The facts screamed Pilgrim's lack of control. And, as explained, Pilgrim's wouldn't have contributed to causing Knighton's injury for the same reasons the jury exonerated Mountain View: rising from a crouched position after mounting the railcar, Knighton was going to be vulnerable to Blacklands' negligence regardless.

Madeley testified in the jury's presence on the responsibility for furnishing a reasonably safe place to work. 7RR67. So the pre-trial ruling was innocuous, and any excluded proof, if there was any such proof, was cumulative (and thus its exclusion was harmless).

C. The trial court made no reviewable ruling or error respecting Miguel Fernandez.

1. Blacklands commits another briefing waiver.

Blacklands' argument about the never-proffered testimony of Miguel Fernandez identifies no reviewable ruling and states no legal analysis. This is yet another briefing waiver. TEX. R. APP. P. 38.1(i); *In re Marriage of Barnes*, 2012 Tex. App. LEXIS 2149, *5.

2. Blacklands' "would've, could've, should've" argument lacks a reviewable trial-court ruling.

To preserve error, Blacklands needed to proffer testimony and get a ruling. TEX. R. EVID. 103; TEX. R. APP. P. 33.1; *Bean*, 965 S.W.2d at 660. Blacklands instead announced it would *not* offer Fernandez then made a *pretend* offer of proof summarizing what he would have said *if* Blacklands would have proffered him. 6RR90-92. In this Court, Blacklands references a limine order. Br.65 (citing 2CR593). That order, which would merely have required Blacklands to approach the bench before sponsoring Fernandez, is unreviewable. *Wackenhut Corp. v. Gutierrez*, 453 S.W.3d 917, n.3 (Tex. 2015)(per curiam). So is the related discussion, from the limine hearing hypothetically probing potential cross-examination scenarios in the event Fernandez were to testify. 2RR42-49. These matters—the limine ruling and the related discussion about cross-examination points—were entirely "tentative" and, thus, presented nothing for review. *Id.; see Hunt v. CIT/Consumer Fin., Inc.*, 2010 Tex. App. LEXIS 2767, *17-18 (Tex. App.—Austin 2010, pet. denied).

Until evidence is proffered, there is only the speculative potential for harm. *Luce v. United States*, 469 U.S. 38, 41 (1984). Where, as here, a party decides against proffering testimony, it "remove[s] the issue from contention," mooting any error that could have followed an actual proffer. *Dailey v. State*, 956 A.2d 1191, 1195 (Del. 2008). Any other result denies trial courts the freedom to freshly evaluate actual proffers.

3. Fernandez's notes would have been fair game.

If Blacklands would have called Fernandez and Knighton would have cross-examined him, no error would have occurred. By testifying about part of his day-of-accident investigation, Fernandez would have waived any privilege respecting the investigation's remainder. TEX. R. EVID. 511(a)(1). One can't use the work-product privilege to shield unfavorable investigative material and yet use the same investigation as a sword at trial. *Republic Ins. Co. v. Davis*, 856 S.W.2d 158, 163 (Tex. 1993); *Terrell State Hosp. v. Ashworth*, 794 S.W.2d 937, 940-41 (Tex. App.—Dallas 1990, orig. proceeding) (disclosure of "psychological autopsy" waived hospital-committee privilege respecting underlying report). But that's exactly what Blacklands—the sole claimant asserting Pilgrim's culpability—attempts.

4. Blacklands' surmise of a hypothetical harm doesn't suffice.

Because harm can't be determined hypothetically, Blacklands' withdrawal of Fernandez forestalled any opportunity to adjudge the "might have beens."

Blacklands had obvious reasons not to call Fernandez unrelated to the question of his investigative notes. Chiefly, it wouldn't have wished to expose Fernandez to a bombshell cross-examination. Any testimony by Fernandez would have invited counterproof that Fernandez, who long knew of Adams' confession of negligence , was complicit in and had suborned Adams's false deposition attacks on Knighton's truthfulness. This cross-examination would surely have stained the company and its owner, Wayne Defebaugh. 4RR98. Yet Fernandez's testimony would have promised Blacklands no offsetting material benefit. Whereas he alleged seeing only a harness, 5RR111, (1) a lanyard is necessary for a harness to function as fall-protection equipment[13], 5RR44-45, (2) Blacklands' own expert didn't fault Knighton for not wearing a harness or lanyard, 7RR89-90, and (3) under any practical fall-protection protocol, Knighton would have been untethered as he attempted to stand. A Fernandez proffer was for these reasons highly unlikely (and wouldn't have affected the jury's decisional analysis).

If Blacklands would have sponsored Fernandez's testimony, Knighton would have been unlikely to probe his investigative notes. (And without such cross-examination testimony, there could be no potential error.) When Blacklands made its pretend bill, 6RR91, it was late in the trial and Knighton was winning decisively. At that

[13] For what it's worth, Blacklands' accusation that Knighton testified he knew a harness and lanyard were in his truck is wrong. Knighton testified only that years earlier, when he worked for Pilgrim's (and thus presumably when Pilgrim's was experimenting with the since-discarded forklift procedure), there then had been a harness in *one* of *Pilgrim's* trucks. 5RR111.

point, Knighton would have had every reason to adopt a conservative home-stretch strategy. So, the overwhelming probability is that the investigative notes would not have seen the light of the courtroom, and Blacklands' hypothetical error would never have come to be.

D. The trial court likewise was within its discretion to exclude prejudicial collateral-source evidence.

Because there was testimony of Knighton's budgeting choices, Blacklands thinks the door swung open to collateral-source proof. This is just not so. The proposed evidence was overtly prejudicial and thus presumptively inadmissible. *Johnson v. Dallas County*, 195 S.W.3d 853, 855 (Tex. App.-Dallas 2006, no pet.). The trial court made a proper discretionary call by excluding it.

As Blacklands conceded below, 5RR98, to override a court's discretion to exclude collateral-source proof, the claimant's testimony must be logically irreconcilable with the collateral benefits, such as testimony he's "penniless" when he in fact receives regular benefits. *See J.R. Beadel & Co. v. De La Garza*, 690 S.W.2d 71, 74 (Tex. App.-Dallas 1985, writ ref'd n.r.e.). But when the testimony merely recounts real-life struggles after a man's income stream craters by sixty percent—testimony consistent with the receipt of benefits—this door can and should remain shut. *See, e.g., Synar v. Union Pacific R. Co.*, 2001 WL 1263573, *8 (Tex. App.—Tyler 2008, no pet.) (disability-benefit proof disallowed where plaintiff never denied receiving benefits or declared abject poverty); *Macias v. Ramos*, 917 S.W.2d 371, 374 (Tex. App.—San Antonio 1996, no

writ)(testimony plaintiff no longer received paychecks didn't open door). A plaintiff need not forego honest testimony to keep out prejudicial collateral-source evidence.

Knighton never claimed to be destitute or denied receiving benefits. 5RR77, 84. Rather, the proof Blacklands cites reflects the belt-tightening necessary when a breadwinner's income drops from over $80,000 annually beforehand, 5RR23, to a post-accident income of about $30,000/year.[14] 7RR19-20. Knighton responded legitimately to questions focused on his reduced income stream, including: "What's it like not to be able to make 80,000-plus a year?" 5RR84. As for third-party witnesses Paul Lester and Jo Call, their testimony likewise was consistent with Knighton's decreased cash flow, and Blacklands at trial conceded it was "harmless." 5RR91. Similar proof was held consistent with the receipt of benefits in *LMC Complete Auto v. Burke*, 229 S.W.3d 469, 480-81 (Tex. App.—Houston [1st Dist.] 2007, pet. denied)(testimony plaintiff "pull[ed] [his] daughter out of college," "got behind on … bills," "almost lost [his] home," and borrowed from relatives).

Nor is *Mundy v. Shippers, Inc.* on point. There, the plaintiff retained "numerous and substantial" income sources and *lost less in income than the benefits he received post-accident*. *Mundy*, 783 S.W.2d 743, 744-45 (Tex. App.-Houston [14th Dist.] 1990, no writ); *see*

[14] Neither the Pilgrim's settlement nor any modest social-security benefits factor into this before-and-after comparison: the settlement was finalized only weeks before trial and its proceeds were never available to Knighton but were held in trust, to reimburse the workers-compensation carrier and pay litigation expenditures. 7RR21. And while Knighton had begun receiving modest Social Security payments, totaling under seven thousand dollars at time of trial, 7RR20, he was on notice he could have to repay them. 7RR21-22.

Exxon Corp. v. Shuttlesworth, 800 S.W.2d 902, 907 (Tex. App.-Houston [14th Dist.] 1990, no writ)(discussing but refusing to follow *Mundy*). *Mundy,* moreover, held only that the trial court didn't abuse its discretion in *admitting* collateral-source proof. *Mundy*, 783 S.W.2d at 745.

In any event, the Pilgrim's settlement was inadmissible under Evidence Rule 403, because the jury would be likely to take it as an admission of responsibility. *Houston v. Sam P. Wallace & Co.*, 585 S.W.2d 669, 673 (Tex. 1979).

Harm. To show harm, Blacklands needed to identity some materially false impression the testimony created. *See Mundy*, 783 S.W.2d at 745. Blacklands made no attempt at this. It is too late to do so on reply, when Knighton cannot respond. *McAlester Fuel Co. v. Smith Int'l, Inc.*, 257 S.W.3d 732, 737 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).

E. The trial court was right to resist Blacklands' attempt at interjecting insurance.

When Gonzales testified to future-medical care, Blacklands sought to cross-examine him about procuring healthcare insurance. 5RR265-68. Because there is no law suggesting this might be permissible cross-examination, the trial court couldn't have abused its discretion by ruling this novel proof inadmissible. Abuse of discretion requires that the trial court ignore *existing* rules or principles. *Downer v. Aquamarine Operators*, 701 S.W.2d 238, 241-42 (Tex. 1985).

The proffered evidence was affirmatively improper. Testimony about hypothetical insurance benefits would have interjected highly prejudicial material into the case. *See Myers v. Thomas*, 186 S.W.2d 811, 813 (Tex. 1945)(insurance proof is irrelevant and calculated to injure). It would have confused the jury, which was tasked with evaluating medical costs, not with surmising future health-insurance practices. And, as Gonzales explained outside the jury's presence, to speculate on insurance availability or its coverage limits would be rank crystal-balling. 6RR267.

Blacklands also inadequately briefed this issue, omitting all legal analysis and authority. TEX. R. APP. P. 38.1(i).

F. Cumulative-error doctrine does not apply, and was waived.

The cumulative-error doctrine is sparsely applied (the Texas Supreme Court hasn't applied it in nearly seventy years) and generally confined to jury argument and juror misconduct. *Haskett v. Butts*, 83 S.W.3d 213, 221 (Tex. App.-Waco 2002, pet. denied), citing *Scoggins v. Curtiss & Taylor*, 219 S.W.2d 451, 454 (Tex. 1949) and *Smerke v. Office Equipment Co.*, 158 S.W.2d 302, 304 (Tex. 1941). It makes no sense to now extend this doctrine to admission-of-evidence points, each of which generally concerns a discrete item requiring a separate harm analysis. Advocating such a change, Blacklands should have discussed the doctrine, its history, its limitations, and any policy or prudential reasons for revamping it. And in applying it, Blacklands should have explained how the individually harmless rulings accumulated to a harmful whole. It

instead invokes cumulative error as a talisman, seeking to excuse its component briefing errors via one bald conclusion that the rulings below, "taken cumulatively, should result in [] a reversal." Br.68.

The cumulative-error doctrine doesn't apply, wouldn't implicate reversible error in this case if it did apply, and was waived through inadequate briefing. *See In re Marriage of Barnes*, 2012 Tex. App. LEXIS 2149, *5.

Conclusion and Prayer

The trial court's judgment should be affirmed in all respects. Of course, Knighton also requests all other related and subsidiary relief in his favor to which he is entitled.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Tex. R. App. P. 9.4 because it contains 14,716 words, excluding the parts of the brief exempted by Tex. R. App. P. 9.4(i)(2)(B).

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Dated: August 6, 2018

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