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Commonwealth of Kentucky

Court of Appeals

NO. 2025-CA-0935-MR

FREEDOM WASTE SERVICES, LLC
AND JAMES H. WATTS — APPELLANTS

v.

APPEAL FROM LYON CIRCUIT COURT
HONORABLE JAMES R. REDD, III, JUDGE
ACTION NO. 23-CI-00033

JOSEPH MCALPIN; DAVID
HENDRIKS; JERRY WHITE; AND
MARK MUDRYK — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CETRULO, A. JONES, AND L. JONES, JUDGES.

CETRULO, JUDGE: Appellants, Freedom Waste Services, LLC, and James Watts (collectively "Freedom Waste"), appeal from a jury verdict of the Lyon Circuit Court, finding in favor of Appellees, Joe McAlpin, Mark Mudryk, Jerry White, and David Hendriks (collectively "Appellees"), in their negligence action and collectively awarding them $11,000,000 in damages for pain and suffering.

Freedom Waste brings this appeal claiming the circuit court erred by admitting evidence of a subsequent remedial measure and by permitting the presentation of other improper commentary, arguments, and evidence to the jury. Freedom Waste contends that these errors culminated in the jury's award of excessive damages and argues that a new trial is mandated. For the reasons set forth herein, we affirm.

I. BACKGROUND

In May 2022, Watts was employed by Freedom Waste as a professional truck driver. Freedom Waste is a waste management company and federal interstate motor carrier. On May 31, in the course of his employment, Watts arrived at Oak Grove Sewer Plant to drop off an empty container and pick up a full container for transport to Freedom Waste's landfill in Mayfield, Kentucky. The container was filled with thousands of gallons of human waste and designed to be secured with a latching system and backup mechanisms, including a pin and safety chains, to prevent the door from opening during transit. Watts would later maintain that the container was properly secured upon leaving Oak Grove.

After loading the full container onto his truck, Watts proceeded westbound on Interstate 24. Thirty miles into the transport, however, Watts noticed the waste spilling onto both lanes of the interstate. He pulled off the

roadway, called his manager, Kevin Harrison ("Harrison"), to report the spill and attempted to close the container door with a strap to prevent additional leakage.

Meanwhile, around noon that day, Appellees[1] were also traveling westbound behind Watts on Interstate 24. Riding at highway speeds of 60 to 70 miles per hour, they suddenly encountered a dark, sludge-like material on the roadway. The matter quickly became caked within their tire treads, and without any traction, Appellees were unable to maintain control of their motorcycles. As they crashed one by one, Appellees were thrown from their bikes onto the pavement, where they slid through the human waste that spilled from the Freedom Waste's container.

Appellees were experienced motorcyclists and wore DOT-approved helmets and other protective gear. Nevertheless, each sustained physical injuries, ranging in severity from a broken clavicle to bruising and abrasions.[2] They further claimed emotional distress resulting from the incident.

In April 2023, Appellees filed suit against Freedom Waste and Watts alleging that violations of the Federal Motor Carrier Safety Regulations ("FMCSR") constituted negligence. After extensive pretrial litigation, the case

[1] The group also included Joseph Von Herring, who settled his claim with Freedom Waste prior to trial.

[2] The breakdown of medical expenses incurred by Appellees were as follows: $61,128.68 for McAlpin; $7,318.95 for White; $6,653.98 for Mudryk; and $2,307.60 for Hendriks.

was tried before a jury from May 27 to May 29, 2025. Appellees presented witness testimony from Harrison, Watts, and each individual Appellee. Appellees also played the video depositions of Kevin Settles ("Settles"), Freedom Waste's regional environmental health and safety manager, and Dr. Justin Hallock. For the defense, Freedom Waste called James Olsen ("Olsen") as an expert witness.

At trial, Freedom Waste did not dispute its duties under the FMCSR to properly secure cargo to prevent leaking, spilling, blowing, or falling onto the roadway. Freedom Waste also acknowledged that it was responsible for securing the load from Oak Grove and that the load should not have spilled on May 31, 2022. The crux of its defense was that Freedom Waste and Watts did everything reasonable and necessary to properly secure the load and that the resulting spill was completely unforeseeable. This defense rested firmly on Watts's assertion that the container door was latched and secured with a pin and safety chain before he left Oak Grove.

Trial testimony, however, revealed that no pin or safety chain was found at the scene, and that there was no evidence that either had been previously attached or welded to the container. The record further established that Freedom Waste repaired the container's latching mechanisms the day after the incident, leaving Watts's testimony as the sole evidence of the container's condition at Oak Grove.

On May 29, 2025, the jury returned a unanimous verdict for Appellees, finding that both Watts and Freedom Waste failed in one or more of their duties and that such failure was a substantial factor in causing Appellees' injuries. Regarding damages, the jury awarded Appellee McAlpin past medical expenses in the amount of $61,128.68 and pain and suffering in the amount of $3.5 million; Appellee Mudryk past medical expenses in the amount of $6,653.98 and pain and suffering in the amount of $2.5 million; Appellee White past medical expenses in the amount of $7,318.95 and pain and suffering in the amount of $2.5 million; and Appellee Hendriks past medical expenses in the amount of $2,307.60 and pain and suffering in the amount of $2.5 million.

Freedom Waste filed a motion for a new trial under CR[3] 59.01(d), arguing that the jury's damages awards were excessive and resulted from passion or prejudice, or from a disregard of the evidence or the court's instructions. After a hearing on July 11, 2025, the circuit court denied the motion and held that "there was ample evidence in this highly unusual case to support the amount of damages awarded by the jury and was not overly excessive" and that "there [was] overwhelming evidence to uphold the finding of negligence in this case."

This appeal followed. Additional facts from the trial proceedings and testimony will be discussed as necessary.

[3] Kentucky Rule of Civil Procedure.

II. ANALYSIS

On appeal, Freedom Waste alleges the following counts of error: (1) the circuit court erroneously permitted evidence of a subsequent remedial measure under the impeachment exception of KRE[4] 407; (2) Freedom Waste was prejudiced by improper comments and arguments made by Appellees' trial counsel; (3) Freedom Waste was prejudiced by other improper evidence presented to the jury; (4) the cumulative effects of these purported errors prohibited a fair consideration of the claim; and (5) the jury awarded grossly excessive pain and suffering damages. We address each argument below.

A. Admission of KRE 407 Subsequent Remedial Measures

Freedom Waste first argues that the circuit court erred by permitting Appellees to introduce evidence of a subsequent remedial measure under KRE 407 during trial. This evidence consisted of a photograph ("Plaintiffs' Exhibit No. 13" or "PX13") of the latching mechanism Freedom Waste installed on the container the day after the accident. PX13 first came into play during the 2024 deposition of Watts. At his deposition, Watts reviewed the photo and drew a circle around a part of the container's latching mechanism, which he contended was on the container when he left Oak Grove. Later in the deposition, however, counsel confronted Watts with the fact that the circled part was added the day after the accident.

[4] Kentucky Rule of Evidence.

During trial, the court allowed the admission and use of the exhibit for impeachment of Watts.

Questions regarding evidentiary matters are reviewed on appeal for an abuse of discretion. *Davis v. Fischer Single Fam. Homes, Ltd.*, 231 S.W.3d 767, 777 (Ky. App. 2007) (citing *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000)). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear*, 11 S.W.3d at 581 (citing *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)).[5]

The admission of subsequent remedial measures is governed by KRE 407, which states the following:

> When, after an event, measures are taken which, if taken previously, would have made an injury or harm allegedly caused by the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

[5] *See Robertson v. Commonwealth*, 677 S.W.3d 309, 319-20 (Ky. 2023) ("The parties disagree as to whether this alleged error was properly preserved. However, we need not determine whether it was in fact properly preserved, as the trial court did not err in admitting [the] testimony.").

By its plain language, KRE 407 prohibits evidence of remedial measures offered to prove culpability. The reasoning for this exclusion stems from public policy concerns: "The rationale behind Rule 407 is that people in general would be less likely to take subsequent remedial measures if these repairs or improvements would be used against them in a lawsuit arising out of a prior accident. By excluding this evidence defendants are encouraged to make such improvements." KRE 407, Editors' Notes (quoting *Werner v. Upjohn Co., Inc.*, 628 F.2d 848, 857 (4th Cir. 1980)).

However, KRE 407 allows for the admission of such evidence if offered for a secondary purpose, such as impeachment. That said, this Court has cautioned that "the general rule against the use of [subsequent remedial measures] will be swallowed if plaintiffs are permitted to use [the impeachment] exception as a mere pretext for using the evidence to establish culpability." *Curtis v. Price Holdings, Inc.*, 610 S.W.3d 339, 346 (Ky. App. 2020) (alterations in original) (quoting Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 2.50[3][d] (2019 ed.)). Accordingly, the impeachment exception must be applied with care, requiring a trial court to ensure that the proposed evidence qualifies as proper impeachment and is admissible under the balancing considerations of KRE 403.

On the second day of trial, Appellees called Watts as an adverse witness. As mentioned, Watts was the only witness with personal knowledge of

what the container looked like prior to departing Oak Grove on May 31, 2022, and further, his testimony was the only evidence that a pin and safety chain were welded to the container at that time. Not only did Watts acknowledge that he was unable to remember other loads he hauled from Oak Grove, but he conceded that he did not recall the specifics of the loads he hauled earlier during his shift on May 31, 2022. Nevertheless, when asked if he had "absolute certain recall" of the container on that day, Watts answered, "Yes."

At trial, Watts testified that there was a pin attached to the container and that the pin was inserted through the latching mechanism and secured on the other side. Appellees' counsel asked Watts if that recollection aligned with the version he provided at his deposition, and Watts replied, "I believe so." Counsel then read the portion of Watts's deposition testimony where he had explained that once the pin was in the latching mechanism, there was "nothing" to prevent the pin from coming out.

Watts attempted to clarify his prior statement by explaining that method was used on *some* containers. When refocused to the container at issue, Watts doubled down that the container had a pin, the pin was attached to a chain, and the chain was attached to the container. He also contended that the container had another safety chain with one end welded to its door and the other end welded to the side.

Appellees' counsel then questioned Watts about his deposition testimony wherein he stated that the safety chain passed through the block, which he had circled on PX13. Watts did not recall that part of his deposition, and when Appellees' counsel went to introduce PX13, Freedom Waste's counsel asked to approach the bench where the following exchange occurred:

> Defense Counsel: Renewing my objection because it's a subsequent remedial measure after [Freedom Waste's mechanic] repaired the box.
>
> Appellees' Counsel: This is where we had [Watts] circle what he contended was on the box when he left Oak Grove. He contended that the chain went through this box area with the circle right there. The reality is when we revealed in our questioning that this thing was not on there until the day after, and so his recollection, this is obviously relevant to his purported recollection about what the container looked like prior to leaving Oak Grove.
>
> Court: I think it does come in for the purposes of impeachment of the witness under KRE 407, so I'm going to overrule the objection.
>
> Defense Counsel: Okay.

Following the bench conference, Appellees' counsel showed the photo of the repaired container to Watts.

> Appellees' Counsel: Showing you what's been marked as Plaintiffs' Exhibit 13, see this black circle that you drew. . . . Do you see this black circle that you drew here on this photo on Plaintiffs' Exhibit No. 13?
>
> Watts: Yes sir.

> Appellees' Counsel: At your deposition, you contended that is what the side of the container looked like and that area right here that you had drawn the circle around was what the loose side of the chain went through?
>
> Watts: Yes sir.
>
> Appellees' Counsel: But you realized shortly thereafter that that testimony couldn't be accurate because that piece wasn't even on the container on May 31, 2022, correct?
>
> Watts: Correct, and honestly I don't remember circling this because that dumpster had a hook on that corner. That was fixed by our mechanic like that. Those aren't the pictures that were even showed [*sic*] to me at the deposition. These ones here.
>
> Appellees' Counsel: Given that, your honor, we'd like to play a portion of the deposition testimony showing the witness actually circling it.

Appellees' counsel then played the portion of Watts's videotaped deposition, which showed him reviewing the same photograph, *i.e.*, Plaintiffs' Exhibit No. 13, and stating that the block with the circle was on the container when he left Oak Grove and still attached when he examined the container on the roadside of Interstate 24 after the spill. The recording then showed Watts complying with counsel's request to draw a circle around the pertinent mechanism and holding up the marked photograph to the deposition camera, revealing that the exhibit was in fact Plaintiffs' Exhibit No. 13. At the end of this impeachment clip, Appellees' counsel resumed the examination.

> Appellees' Counsel: Sir, were you able to hear your own voice indicating that you did in fact circle Exhibit 13?
>
> Watts: Yes sir.
>
> Appellees' Counsel: Your memory was off with respect to that too, right?
>
> Watts: Yes sir.
>
> Appellees' Counsel: In fact, we know from this photograph taken at the scene of the latching mechanism that the thing that you circled as the purported chain going through was not actually on the container prior to the spill on May 31, 2022?
>
> Watts: Yes sir.
>
> Appellees' Counsel: That was something that was added the next day, wasn't it sir?
>
> Watts: I couldn't tell you on that.

At the conclusion of Watts's direct testimony, Freedom Waste opted not to conduct a cross-examination and reserved the right to recall Watts as part of the defense's case-in-chief. Outside the presence of the jury, Freedom Waste renewed its objection to Plaintiffs' Exhibit No. 13 as a subsequent remedial measure. The circuit court again overruled the objection, stating that the evidence was admissible for impeachment. Freedom Waste did not request an admonition under KRE 105.

On appeal, Freedom Waste relies on our Supreme Court's opinion in *Thomas v. University Medical Center, Inc.*, 620 S.W.3d 576 (Ky. 2020), to argue

that Watts's trial testimony did not directly contradict his deposition testimony, and, therefore, failed to trigger the impeachment exception of KRE 407. *See id.* at 590 (citing *Commonwealth v. Jackson*, 281 S.W.2d 891, 895-96 (Ky. 1955), *overruled on other grounds by Jett v. Commonwealth*, 436 S.W.2d 788 (Ky. 1969)) ("[T]he proffered impeachment evidence must actually contradict the witness's statements."). In *Thomas*, the Court found no error in the trial court's ruling that the plaintiff could not use a root cause analysis for impeachment. *Id.*[6] The post-incident report concluded that additional training might benefit the nursing staff, but did not determine that additional training was needed. *Id.* At trial, the nursing director testified to the effect that the nurses were adequately trained at the time of the incident. The trial court properly excluded the report for purposes of impeachment given that a recommendation of additional training did not equate to a finding of inadequate training. *Id.* "Simply put, . . . the [report did] not directly contradict [the witness's] opinions as stated." *Id.*

Freedom Waste likewise contends that Watts's trial testimony "did not directly or clearly contradict prior testimony by stating that the additional 'block' safety mechanism *was* or *was not* on the container on the day of the

[6] Of note, our Supreme Court determined that the root cause analysis in *Thomas* did not amount to a subsequent remedial measure under KRE 407 given the particular facts of that case, and the trial court erred in excluding it as such. 620 S.W.3d at 588. However, the Court found this error harmless as the report had limited probative value when weighed against the risk for undue prejudice, and therefore, its admission was barred under KRE 403. *Id.* at 588-89.

accident or that he did not connect the 'safety chain' to it." (Appellants Br. p. 18.) In propounding the "actually contradict" tenet upon which Freedom Waste heavily relies, the Court in *Thomas* supported its reasoning with established evidentiary precedent regarding witness impeachment. *Id.* (citing *Jackson*, 281 S.W.2d at 895-96). That precedent addressed the issue of whether a statement's inconsistency warranted its admission to impeach a witness's credibility:

> With respect to contradiction . . . "there must of course be a real *inconsistency* between the two assertions of the witness. The purpose is to induce the tribunal to discard the one statement because the witness has also made another statement which cannot at the same time be true. Thus, it is not a mere difference of statement that suffices; nor yet is an absolute oppositeness essential; it is an inconsistency that is required.
>
> Such is the possible variety of statement that it is often difficult to determine whether this inconsistency exists. But it must appear 'prima facie' before the impeaching declaration can be introduced. As a general principle, it is to be understood that this inconsistency is to be determined, not by individual words or phrases alone, but by the *whole impression or effect* of what has been said or done."

Jackson, 281 S.W.2d at 895-96 (quoting 3 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1040 (3d ed. 1940)).

Under this approach, Watts's trial testimony created a *prima facie* inconsistency when measured against his deposition testimony and a literal, word-for-word contradiction regarding the presence of the block mechanism. At trial,

Watts agreed to having an "absolute certain recall" of the container's pre-accident appearance, yet claimed to not recall his own deposition statements when he confidently identified and circled a block mechanism that was undisputedly added the following day. Accordingly, the "whole impression or effect" of this testimony created a situation where both assertions could not simultaneously be true.

In this case, the subsequent remedial measure falls within the traditional scope of impeachment evidence and was introduced for the purpose of casting doubt on the credibility of Watts's testimony and not as a pretext for establishing culpability. Put another way, the Appellees did not use the photograph to argue culpability, such as telling the jury that the subsequent repair proved that the container was previously unsafe. Rather, the photograph was used strictly as evidence of Watts's (in)ability to accurately recall the specifics of the container's latching mechanism.

Having determined that PX13 constituted permissible impeachment under KRE 407, we next evaluate whether the evidence satisfies the balancing requirements of KRE 403. Under KRE 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury. Freedom Waste contends that PX13 carried an inherently high risk of unfair prejudice because a jury might

improperly consider the post-accident modification as an indication that the container was unsafe on May 31, 2022.

The admissibility of subsequent remedial measures must be considered in the context of the evidence and arguments Freedom Waste chose to present at trial. Although such evidence raises concerns about undue prejudice, those concerns must be weighed against the need to permit meaningful impeachment when a party's own trial strategy places the credibility, accuracy, and adequacy of its conduct squarely before the jury. Here, Freedom Waste opened the door to such evidence and attempted to use KRE 407 as both a sword and a shield by promoting its own version of events yet foreclosing Appellees' opportunity to challenge it.

At the outset of trial, Freedom Waste advised the jury during opening statements that no one could explain why the latching mechanism failed 30 miles into Watts's return to the Mayfield landfill. The record quickly established that the only witness with any personal knowledge of the container prior to its departure from Oak Grove was Watts himself. Appellees called Harrison, Watts's manager, as their first trial witness. Harrison testified that a spill should not occur if the load is properly secured, and it is the driver's responsibility to check the container prior to transport. When Harrison arrived at the accident scene on May 31, he photographed and examined the container, noting that it lacked a pin, the chain

connected to the pin, and the additional safety chain. Moreover, when asked about the presence of any physical evidence at the scene indicating that either chain had been welded or connected to the container, Harrison testified, "[o]ther than [Watts] telling me it was attached, there's no way of us knowing."

On cross-examination, Freedom Waste elicited testimony from Harrison identifying Watts as "one of his best drivers" and a "model employee." Freedom Waste pursued a line of questioning where Harrison reiterated that the company relied upon its drivers in the field to report container problems, like a missing pin or safety chain. Based on his experience, Harrison testified that the drivers do report such issues and are instructed not to haul the container until the required maintenance has been performed. Freedom Waste then concluded its cross-examination with the following question: "Do you have any doubt in your mind that Mr. Watts properly secured this load prior to getting on the road?" Harrison responded, "No sir, no doubt." These statements were followed by Watts's own trial testimony asserting an "absolute certain recall" of the container's condition before leaving Oak Grove.

Finally, the record demonstrates that Freedom Waste failed to utilize available procedural safeguards to restrict or limit the presentation of this evidence before it reached the jury. Freedom Waste did not object to the photograph's inclusion in the Appellees' pretrial exhibit list, nor did it file a motion *in limine* to

preclude any portion of Watts's deposition testimony or otherwise prohibit the use of the subsequent remedial measure prior to trial. When the circuit court ultimately admitted the evidence for the proper purpose of impeachment under KRE 407, Freedom Waste did not request a limiting admonition under KRE 105 to restrict the jury's consideration of the photograph to the credibility of Watts's testimony. Although Freedom Waste states that Watts was confused during his deposition and his statements were taken out of context, it did not cross-examine Watts at trial nor recall him in the defense case-in-chief to correct or further explain.

In short, Freedom Waste framed the incident as an inexplicable mechanical mystery in opening statement, eliciting improper lay opinion testimony regarding Watts's competence and diligence, and hinging its defense on Watts's ability to accurately recall certain facts. Given these circumstances, the probative value of the impeachment evidence was not outweighed by any prejudice and was in direct response to the defense Freedom Waste presented to the jury. Moreover, any potential for undue prejudice was mitigated by the manner of Watts's impeachment, which focused the jury's attention on Watts's ability to recall, rather than the necessity of the repair. Accordingly, the circuit court did not abuse its discretion by admitting evidence of a subsequent remedial measure.

B. Admission of Improper Comments, Arguments, and Evidence

Freedom Waste raises six grounds upon which it argues a new trial should be granted. The first half centers on alleged improper comments or arguments made by Appellees' counsel (*i.e.*, inflammatory comments and send-a-message and golden rule arguments) and the latter half revolves around the presentation of inadmissible evidence (*i.e.*, the KSP[7] citation and testimony regarding the lack of post-accident drug and alcohol testing and preventative measures). These allegations of error were not preserved with a contemporaneous objection; therefore, Freedom Waste requests review for palpable error. Our review for palpable error is governed by CR 61.02:

> A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

"To qualify as 'palpable error' . . . an error 'must be easily perceptible, plain, obvious and readily noticeable.'" *Nami Res. Co., LLC. v. Asher Land & Min., Ltd.*, 554 S.W.3d 323, 338 (Ky. 2018) (quoting *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006)). "Implicit in the concept of palpable error correction is that the error is so obvious that the trial court was remiss in failing to act upon it *sua*

[7] Kentucky State Police.

sponte." *Id.* (quoting *Lamb v. Commonwealth*, 510 S.W.3d 316, 325 (Ky. 2017)). However, a palpable error warrants relief only if it results in a manifest injustice; "in other words, the error so seriously affected the fairness, integrity, or public reputation of the proceeding as to be 'shocking or jurisprudentially intolerable.'" *Commonwealth v. Jones*, 283 S.W.3d 665, 668 (Ky. 2009) (quoting *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006)).

i. Organized Crime & Corporate Bias

Freedom Waste argues that Appellees' counsel made improper remarks designed to inflame corporate bias and associate the waste industry with organized crime. As to corporate bias, Freedom Waste contends that Appellees improperly invited the jury to consider the out-of-state location of its corporate management and the large scale of its operations, which employed approximately 17,000 employees across multiple facilities and locations. According to Freedom Waste, these comments were "irrelevant" and prejudicial because they portrayed Freedom Waste as a large, distant corporation unconcerned by this accident that occurred in Kentucky. In support, Freedom Waste points to opposing counsel's statement during closing argument: "The folks who are responsible are sitting in Arizona and New Jersey, who still haven't done anything to change."

Freedom Waste's other complaint in this regard concerns a comment by Appellees' counsel: "Waste management in New Jersey. I'm not going to say

anything about it. I want both my legs." Counsel made the remark during Settles's deposition, which was later played for the jury, and made a similar comment during Harrison's trial testimony. Freedom Waste describes this commentary as "outrageous" and contends that they were "unfairly prejudic[ial]."

"Appeals to bias against out-of-state residents and corporations have historically been condemned by the courts of this Commonwealth." *Rockwell Int'l Corp. v. Wilhite*, 143 S.W.3d 604, 629 (Ky. App. 2003). Our Supreme Court summarized earlier case law in which "express characterizations of foreign corporations as wolves preying upon humble Kentuckians" were held impermissible:

> In [*Clement Brothers Co. v. Everett*], plaintiff's counsel characterized the corporate defendant in a negligence case involving blasting damages as a "rich, grasping, foreign corporation running ruthlessly roughshod over the poor, honest, long-suffering citizens of Barren County; its attorney as a rich man who would be upset if it were his 'mansion' that suffered the blasting damage" and the whole scenario as akin to "a wolf devouring a lamb." [414 S.W.2d 576, 577 (Ky. 1967)]. In *Rockwell*, plaintiff's counsel referred repeatedly to the corporation's California base "where everybody has got a tan and a $60 haircut and life is good." Counsel also implored the jury to consider the difference between men (which God made with a soul) and corporations (which men made to make money), and the champagne corks that would pop in Seal Beach, California if the jury did not impose punitive damages. 143 S.W.3d at 627-28.

Baston v. Cnty. of Kenton ex rel. Kenton Cnty. Airport Bd., 319 S.W.3d 401, 412 n.2 (Ky. 2010).

Even assuming counsel's arguments and comments crossed the line of impropriety, they were not sufficiently egregious to rise to the level of the conduct described in these cases, and "we do not see manifest injustice arising from the trial court's failure to intervene when [Freedom Waste]'s trial counsel failed to complain." *Nami*, 554 S.W.3d at 339. Likewise, counsel's comments making light of "waste management in New Jersey" do not provide grounds for relief within our review for palpable error. As Appellees point out in their response, Freedom Waste did not object to this portion of Settles's deposition when it was designated for trial, nor did it object when the deposition was played for the jury. Freedom Waste did not object when counsel made a similar comment during Harrison's trial testimony nor raise the issue in their post-trial motion. Having failed to bring the matter to the circuit court's attention at any of these junctures, Freedom Waste cannot fault the court for failing to address an objection it did not make. *See id.* at 339-40 (discussing alleged attempt to appeal to racial and nationalistic prejudices by referring to the party by his first name rather than his nickname or Mr. Nami).

ii. "Send a Message"

Freedom Waste next argues that Appellees' counsel improperly encouraged the jury to send a message with its verdict. During closing argument, Appellees' counsel addressed the jury as follows:

> The point, ladies and gentlemen, is that – I told y'all in opening – we can't make them admit liability. We can't make them accept responsibility. All we can do is bring that case to you. That's what we've done. This is what happens, though. This is what happens when you don't do preventative maintenance. That's what happens when you don't do periodic inspections. That's what happens when you got no idea how old the containers are out there on the roadway. People get hurt. They can potentially die. Today is the day that I want it to stop, and I ask y'all to help in that regard.

Generally, it is improper to argue that the jury should "send a message to the community" through its verdict. *McMahan v. Commonwealth*, 242 S.W.3d 348, 350 (Ky. App. 2007). Such arguments are highly disfavored because they encourage the jury to base its decision on considerations other than the evidence presented at trial; "[t]he practical effect of such a statement is to incite jurors to assume the responsibility of curing the community's problems[.]" *Gaines v. Commonwealth*, 283 S.W.3d 243, 246 (Ky. App. 2008). An argument aimed instead at deterring a particular defendant from future misconduct, however, is not necessarily improper. *See Cantrell v. Commonwealth*, 288 S.W.3d 291, 299 (Ky. 2009); *Fields v. Commonwealth*, 219 S.W.3d 742, 751 (Ky. 2007). The argument

made by Appellees' counsel falls more in the latter category. *See Hall v. Commonwealth*, 337 S.W.3d 595, 612 (Ky. 2011) ("From our review of the record, it appears that the prosecutor asked the jury to send a message to Hall – not to the community – about what a local jury would tolerate in the community. To the extent that the prosecutor made an improper 'send a message' argument, it did not appear to be an egregious one. And because the prosecutor did not clearly insinuate that the jurors would be subjected to scorn from their community if they did not convict Hall or urge the jury to convict Hall for reasons other than the evidence and reasonable inferences from the evidence, Hall is not entitled to relief."). While counsel's statements were impassioned, they do not warrant a new trial under review for palpable error.

iii. Golden Rule Argument

Next, Freedom Waste argues that Appellees' counsel improperly solicited testimony throughout trial that no preventative maintenance or inspection protocols were implemented following the accident and made arguments aimed to instill fear in the jurors that a similar accident could happen again to them or their loved ones. Freedom Waste claims that counsel continued this trend in closing argument by presenting a "want ad" hypothetical for the jurors to consider in awarding damages. In particular, Appellees' counsel asked jurors to go back to the morning of May 31, 2022, and imagine Appellees having breakfast before their

trip, reading the newspaper, and coming across a "want ad" seeking motorcyclists to ride into the spill and crash in exchange for financial compensation. Referencing the amounts of damages suggested by Freedom Waste's counsel in opening statement, Appellees' counsel stated the following: "Who in the world thinks they would answer that want ad for $15,000 or $25,000 or $150,000? Nobody. I promise you if given the opportunity, every single one of those gentlemen would have wadded that newspaper up and thrown it in the trash if it offered every one of them $1 million dollars. They would have said let's get started on our trip to Colorado. If you believe that, that that's what they went through, that's what this experience was worth to them, that will be within your discretion about what you award in your pain and suffering portion of the award."

A party is expressly prohibited from making golden rule arguments, whereby jurors are asked to imagine themselves or a loved in the position of the plaintiff. *Caudill v. Commonwealth*, 120 S.W.3d 635, 675 (Ky. 2003) (citing *Golden Rule*, BLACK'S LAW DICTIONARY (7th ed. 1999)); *May v. Francis*, 433 S.W.2d 363, 363 (Ky. 1968) ("[It] is the kind of argument which calls upon the jury to put itself in the place of the injured plaintiff and to award damages based upon that the jurors would consider themselves entitled to."). An improper statement in closing argument must have a probability of real prejudice to warrant reversal and each case must be assessed on its own unique set of facts. *Stanley v.*

Ellegood, 382 S.W.2d 572, 575 (Ky. 1964); *see also Mason v. Stengell*, 441 S.W.2d 412, 416 (Ky. 1969) (citations omitted) ("As a general rule, improper argument of counsel requires reversal only when it is prejudicial and results in injustice or deprives a party of a fair and impartial trial."). Closing arguments should be considered as a whole, keeping in mind the wide latitude to be afforded to counsel. *Miller v. Commonwealth*, 283 S.W.3d 690, 704 (Ky. 2009) (citing *Young v. Commonwealth*, 25 S.W.3d 66, 74-75 (Ky. 2000))

The want ad hypothetical did not ask the jurors to put themselves or someone they care about in the position of Appellees. Instead, counsel used the scenario to argue that Appellees would not voluntarily endure the accident and its aftermath in exchange for the amounts proposed by Freedom Waste's counsel as reasonable or sufficient for their pain and suffering. The argument did not violate the "golden rule," and therefore, no error occurred.

iv. Lack of Drug and Alcohol Testing

Freedom Waste claims error in the admission of testimony and argument concerning its failure to follow industry standards for post-accident drug and alcohol testing for drivers of commercial motor vehicles.[8] Although Appellees

[8] *See* 49 Code of Federal Regulations ("C.F.R.") § 382.303(a)-(b) (2022) (requiring post-accident testing for alcohol and controlled substances when a driver is cited for a moving violation arising from an accident that caused bodily injury requiring immediate medical treatment away from the scene).

did not allege that Watts was impaired or under the influence of drugs or alcohol, the absence of post-accident testing was referenced during Harrison's and Watts's trial testimony and in Settles's deposition, which was played for the jury. Freedom Waste did not object to any of these references.

On appeal, Freedom Waste argues such evidence is irrelevant under KRE 401 and unduly prejudicial under KRE 403. Appellees maintain the evidence was relevant because testing is the only means of determining whether a driver was affected by drugs or alcohol, and the failure to test resulted in a lost opportunity to determine whether such substances played a role in the accident. Without some evidence suggesting that Watts was intoxicated or otherwise impaired, however, the relevance of the failure to test is marginal at best. Even so, the references were brief, and because Freedom Waste failed to object, we cannot conclude under palpable error review that they warrant a new trial.

v. Presentation of KSP Citation

Freedom Waste challenges the admission of testimony surrounding the contents and existence of the KSP citation issued to Watts on May 31, 2022. As noted by Appellees, a KSP citation and a report were generated because of the accident, and both documents were noticed as intended trial exhibits by Appellees. In its motion in limine, Freedom Waste moved to exclude the KSP *report*, which

the trial court granted. Freedom Waste, however, did not move pretrial to exclude the KSP *citation*.

The citation made its first appearance at trial during Appellees' opening statement wherein counsel recited the narrative portion and displayed the document to the jury. Freedom Waste did not object. During Harrison's testimony, Appellees' counsel again read the portions of the citation alleging a violation of federal safety regulations regarding proper load securement and stating that "the gate on roll-off container came open spilling human waste onto Interstate 24 for about half a mile, was the contributing factor in collision of five motorcycles." Harrison agreed to the citation's contents and acknowledged that Freedom Waste paid the citation on behalf of Watts. At the conclusion of Harrison's testimony, Freedom Waste objected to admitting the citation as an exhibit on hearsay grounds. The circuit court agreed, yet remarked (presumably to Appellees' counsel) "although you've, I think you've gotten that proof in through your witness." No further motions were made concerning the admission of the citation in the form of testimonial evidence.

Following Harrison's testimony, Appellees pursued a similar but more limited line of questioning with Watts, simply confirming that he received a citation and that Freedom Waste paid it. During Settles's testimony and Appellees' closing argument, the citation was mentioned briefly when discussing

the federal regulations requiring post-incident drug and alcohol testing for drivers cited with traffic violations following accidents resulting in bodily injury. Freedom Waste did not raise an objection during either examination or closing argument.

Based on the record, we do not believe this issue is sufficiently preserved for review under the abuse of discretion standard. Regardless of whether the citation's omission from the pretrial litigation was intentional or inadvertent, Freedom Waste permitted the citation and testimony concerning it to be presented without objection until the conclusion of Harrison's testimony. By that point, the jury had already heard twice about the citation's existence, content, and payment. Even then, Freedom Waste did not move to strike the testimony or request any relief beyond exclusion of the citation as a trial exhibit. *See Hadley v. Commonwealth ex rel. Jackson*, 105 S.W.3d 427, 429 (Ky. 2003) (citations omitted) ("It is well settled that a party must object and seek relief at the time the error or objectionable behavior occurs. This is to afford the trial court an opportunity to make correction.").

Having found this issue unpreserved, we review it for palpable error and find that no palpable error occurred. Even assuming the citation's contents were improperly admitted, the admission did not result in manifest injustice. The content of the citation relayed that the container door opened, a spill occurred, and

a crash followed. This content was consistent with the facts Freedom Waste itself acknowledged at trial, substantially diminishing any prejudice arising from the citation's contents. To the extent Freedom Waste's concern instead rests on the citation's existence, its issuance by KSP, or its payment, those circumstances were not the subject of a contemporaneous objection on relevance or undue prejudice grounds. Moreover, the evidence concerning those matters was brief and Appellees did not emphasize the payment as evidence of liability. Whatever evidentiary error may have occurred, the record does not establish the substantial prejudice or manifest injustice necessary to warrant relief under CR 61.02.

vi. Lack of Post-Accident Investigation

Freedom Waste next challenges the admission of evidence concerning the extent of its post-accident investigation, arguing that what it did or did not do after the accident has no bearing on whether it acted negligently before the accident occurred. Freedom Waste further contends that the argument improperly invited the jury to consider the possibility of a similar accident occurring again. Although Freedom Waste now characterizes the argument as irrelevant and prejudicial, it did not object on either ground when the argument was made. Those concerns warrant consideration, but they do not establish palpable error. As with any claim of unpreserved error, the challenged argument or evidence must be considered in the context of the trial as a whole.

Within this context, Appellees contend that the failure to conduct a meaningful post-accident investigation was relevant to counter Freedom Waste's defense that "[d]espite investigation and litigation, no evidence ever emerged to explain how, why, or what caused wastewater to start leaking 30 miles into what had been a routine transport." (Appellant Br. 4.) In essence, Appellees' argument is an attempt to undermine the credibility of that defense: how can Freedom Waste state that the underlying incident was inexplicable when it failed to thoroughly investigate?

As discussed in our KRE 407 analysis, Freedom Waste's defense hinged on Watts's assertion that the load was properly secured prior to departing Oak Grove. To support that defense, Freedom Waste called an expert, Olsen, to opine that Watts met industry standards by first conducting a visual inspection and walkaround of the container. Appellees established that Olsen was retained to offer an opinion solely on the conduct of Watts at the pickup site. However, it was also established at trial that Freedom Waste's duty extended beyond pickup. Arguably, the fact that Freedom Waste's own expert did not investigate potential reasons that may have led to the latching mechanism's failure *during* transport undercuts the defense theory that Freedom Waste complied with its duty of care and the spill was an unforeseeable accident.

Appellees made other concerning references to the lack of post-incident investigation in trial, but it was their burden to show that Freedom Waste breached its duty of care. The jury weighed the evidence, evaluated the credibility of the witnesses, and returned a verdict supported by the record. Because these unobjected-to arguments did not result in a miscarriage of justice, we perceive no palpable error. *See Commonwealth v. Mitchell*, 165 S.W.3d 129, 132 (Ky. 2005) (citations omitted) ("This Court has repeatedly held that a prosecutor is permitted wide latitude during closing arguments and is entitled to draw reasonable inferences from the evidence, as well as respond to matters raised by the defense.").

vii. Cumulative Effect

Finally, Freedom Waste contends that, even if the alleged errors do not individually warrant a new trial, their cumulative effect requires one. Kentucky law permits reversal when multiple errors, considered together, render a trial fundamentally unfair. *See Commonwealth v. Harbin*, 602 S.W.3d 166, 174 (Ky. App. 2019) (citing *Brown v. Commonwealth*, 313 S.W.3d 577, 631 (Ky. 2010)). That principle does not, however, convert multiple unpreserved and non-prejudicial claims into reversible error. *See Brown*, 313 S.W.3d at 631 (citation omitted) ("Where, as in this case, however, none of the errors individually raised any real question of prejudice, we have declined to hold that the absence of

prejudice plus the absence of prejudice somehow adds up to prejudice."). As discussed above, none of the challenged evidence or arguments, considered individually, resulted in manifest injustice, and Freedom Waste identifies no combination of errors that deprived it of a fair trial.

Freedom Waste argues that no curative instruction addressed any of the alleged errors; however, a curative instruction was unnecessary where Freedom Waste did not object to the challenged matters in the first place. *See* KRE 105(a). The law does not guarantee a perfect trial, but a fair one. *See McDonald v. Commonwealth*, 554 S.W.2d 84, 86 (Ky. 1977) (citing *Michigan v. Tucker*, 417 U.S. 433, 447 (1974)). Because the record does not demonstrate that the challenged matters, individually or collectively, rendered the trial fundamentally unfair, cumulative palpable error provides no basis for a new trial.

C. Excessive Pain and Suffering Damages

Lastly, Freedom Waste argues that it is entitled to a new trial because the cumulative award of $11 million for pain and suffering is shockingly excessive and was the result of passion and prejudice on the part of the jury. It argues that the pain and suffering awards here – when compared to the motorcyclists' injuries and limited medical expenses – were unreasonably disproportionate. For example, one appellee claimed only $2,307.60 in medical expenses but was awarded $2.5 million for pain and suffering. Finally, Freedom Waste asserts the award of $2.5

million to three of the plaintiffs and $3.5 million to one (the "not to exceed" number contained in the interrogatories) suggests the jury did not consider the evidence as to the actual damages of each motorcyclist.

There is no mathematical formula to determine whether a verdict was excessive. *Field Packing Co. v. Denham*, 342 S.W.2d 524, 526 (Ky. 1961). "[E]ach case must be determined by the facts and circumstances peculiar to it." *Lawson v. Sitgraves*, 186 S.W.2d 182, 183 (Ky. 1945). The circumstances of this case were certainly peculiar.

However, the circuit court's determination that the pain and suffering awards did not result from passion or prejudice is not clearly erroneous. "If the issue of excessive damages has been squarely presented to the trial judge, who heard and considered the evidence, a reviewing court on appeal cannot 'substitute [its] judgment on excessiveness for [the trial judge's] unless clearly erroneous.'" *Nami*, 554 S.W.3d at 337 (alternations in original) (quoting *Asbury Univ. v. Powell*, 486 S.W.3d 246, 264 (Ky. 2016)). Appellees endured a deeply distressing incident for which they bore no responsibility. They were thrown from their motorcycles onto a busy interstate and into human waste. Each suffered road rash that was exposed to the waste and required numerous medications, antibiotics, vaccinations, and injections. Several Appellees underwent wound debridement procedures and continued removing particles of human waste from their wounds

for days or weeks after the incident. Some sustained injuries requiring surgery or physical therapy and reported continued pain from those injuries at the time of trial. They also experienced the emotional trauma of witnessing a fellow rider lying motionless on the roadway.

Further, this argument too is largely unpreserved. The instructions given to the jury included directions to award pain and suffering damages "not to exceed" $2.5 million or $3.5 million as claimed by each of the Appellees. Each of the jury's answers to interrogatories were unanimous.

Here, Freedom Waste acknowledges that it made only a general objection to the circuit court's tendered instructions and it did not specifically object to the "not to exceed" amount for pain and suffering. Quite the opposite, the proposed instructions tendered by Freedom Waste to the court included the same "not to exceed" language and award amounts. *See Morris v. Boerste*, 641 S.W.3d 688, 695 (Ky. App. 2022) (holding that appellants waived any objection and failed to preserve their argument because appellants' instruction contained the same amounts and they did not contemporaneously object). In fact, counsel for Freedom Waste specifically informed the jury in opening statements that the plaintiffs would be asking for more than $2 million each. The defense strategy appeared to be one of essentially admitting some award was warranted but then suggesting Appellees were overreaching in seeking such amounts. Thus, Freedom Waste tendered

instructions containing those amounts and again argued to the jury that the amounts were excessive. The jury did not agree.

Therefore, Freedom Waste's claim to this Court that the jury's damages award for Appellees' pain and suffering is excessive is not preserved for appellate review, because it failed to specifically object to the "not to exceed" provisions, which the jury awarded in full. *See Gersh v. Bowman*, 239 S.W.3d 567, 574 (Ky. App. 2007).

This Court has held that "[a]n objection to a jury instruction raised for the first time in a motion for a new trial is not timely and will not be considered by this Court." *Burgess v. Taylor*, 44 S.W.3d 806, 814 (Ky. App. 2001) (citations omitted). Moreover, our Supreme Court held in *Gibson v. Fuel Transport, Inc.*, that where the trial court's instructions to the jury for awarding damages for pain and suffering included "not to exceed" language, the defendant "was required to make a specific objection to the jury instructions or tender proposed instructions reflecting a different award limit." 410 S.W.3d 56, 61 (Ky. 2013) (citing CR 51(3)). The Court held that defendant did not preserve the issue by arguing against the award limit in its closing argument. *Id.*

Based on this evidence and more that was presented at trial, we find that there was sufficient evidence to support the jury's award of damages for pain

and suffering, and the circuit court did not err in denying the motion for a new trial.

> The trial court, when confronted with a motion for a new trial under CR 59.01(d) on excessive damages, must evaluate the award mirrored against the facts. It is said, if the trial judge does not blush, the award is not excessive. On the level before us, we only determine whether the trial court erred. No question, the award was monumental but so was the injury. Clearly, the relationship between the award and the injury in this case is not bizarre.

NKC Hosps., Inc. v. Anthony, 849 S.W.2d 564, 569-70 (Ky. App. 1993) (citation omitted).

CONCLUSION

Based upon the foregoing, Freedom Waste is not entitled to a new trial, and we AFFIRM the judgment of the Lyon Circuit Court.

ALL CONCUR.

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