Affirmed and Opinion Filed December 17, 2024

In The

Court of Appeals
Fifth District of Texas at Dallas

No. 05-23-00099-CV

DALLAS POLICE & FIRE PENSION SYSTEM, Appellant

V.

TOWNSEND HOLDINGS, LLC D/B/A THE TOWNSEND GROUP, RICHARD BROWN, MARTIN ROSENBERG, AND GARY B. LAWSON, Appellees

On Appeal from the 298th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-17-11306

MEMORANDUM OPINION

Before Justices Reichek, Carlyle, and Miskel
Opinion by Justice Miskel

The jury in this case spent five weeks in trial, heard testimony from twelve witnesses, considered over 400 exhibits, and returned a verdict finding, in part, no breach of fiduciary duty and no breach of contractual duty. Appellant Dallas Police & Fire Pension System (DPFP) argues that it is entitled to a new trial.

DPFP appeals the trial court's denial of its motion for new trial and entry of a final judgment ordering that DPFP take nothing on its breach of contract, breach of fiduciary duty, and negligence claims against appellees Townsend Holdings, LLC d/b/a The Townsend Group, Richard Brown, and Martin Rosenberg (collectively, Townsend)[1] related to real-estate investment consulting services provided by Townsend to DPFP. In two issues, DPFP argues that the trial court erred in denying its motion for new trial because (1) certain jury arguments by Townsend's counsel were improper and incurable, and (2) the evidence was factually insufficient to support the jury's findings that Townsend did not breach any contractual or fiduciary duties.

We conclude that the trial court did not abuse its discretion in impliedly determining that Townsend's jury arguments were not incurable jury arguments requiring a new trial. We further conclude that the evidence supporting the jury's findings was not factually insufficient. As a result, the trial court did not err in denying DPFP's motion for new trial. We affirm the trial court's judgment.

I. Background

This lawsuit arises out of twelve unsuccessful real estate investments made by DPFP between 2005 and 2008 during Townsend's tenure as DPFP's real-estate

[1] Gary Lawson, a former lawyer for DPFP, settled with DPFP prior to trial and is not a party to this appeal. The trial court granted a directed verdict in favor of Martin Rosenberg, a Townsend principal, after DPFP presented its evidence and rested its case.

investment consultant. DPFP is a public pension fund that provides retirement, death, and disability benefits to Dallas's current and retired police officers and firefighters. Townsend is a company headquartered in Ohio that provides real estate investment advising services.

During the time period at issue in this case, DPFP was governed by a Board of Trustees made up of four Dallas City Council members and eight active or retired firefighters and police officers. The Board approved DPFP's investments in accordance with DPFP's investment policies. From 2001 to 2016, Townsend provided investment consulting services on the real-estate portion of DPFP's investment portfolio. The parties documented the engagement in an investment consultant agreement (ICA) in 2004, which was subsequently renewed and then further modified in 2013.

The 2004 ICA provided, among other things, that Townsend would consult on DPFP's real estate investments; recommend revisions to the Board regarding its then-existing real estate investment procedures and guidelines; monitor real-estate investment performance and prepare quarterly performance reports; evaluate and monitor DPFP's real estate investment managers; prepare due diligence reports on properties owned by or being considered by DPFP; and document its recommendations with quantitative and qualitative analyses. In the ICA, Townsend acknowledged that it was a fiduciary to DPFP under Texas law and that its duties included "the obligation to affirmatively disclose information of which [Townsend]

has actual knowledge which may materially impact [DPFP's real estate investment]."

The parties signed a similar ICA in 2013 with a different compensation structure.[2] Separately, DPFP also hired investment managers, including CDK Realty Advisors, LP (CDK), to recommend real estate investments to DPFP and manage these real estate investments if acquired.

During much of the time period at issue, including from 2005 to 2008, DPFP pursued an investment strategy that included investing in higher-risk properties, including undeveloped land, in an effort to realize above-average returns. DPFP made the twelve disputed real-estate investments between 2005 and 2008. The global financial crisis in 2008 also negatively impacted various investments. Around 2014 and 2015, DPFP began to show significant losses on a number of real-estate investments in its financial statements, and in 2015 its actuary began reporting that DPFP was insolvent. Also in 2015, DPFP hired Kelly Gottschalk to replace former DPFP executive director, Richard Tettamant.

After the insolvency reports were published, many participants became concerned about DPFP's financial health and began to withdraw amounts from their Deferred Retirement Option Program (DROP) accounts, resulting in total

[2] DPFP acknowledges, and Townsend does not dispute, that the differences in the provisions of the 2013 ICA are not particularly relevant to this appeal.

withdrawals in 2016 of $600 million.[3] This "run on the fund" caused liquidity issues for DPFP, and it sold certain assets to manage the liquidity strain. The parties dispute the extent of any link between the DROP withdrawals and DPFP's losses on sales of some of the real-estate assets at issue in this case.

When Gottschalk arrived, she began to review DPFP's real estate portfolio. In August 2015, DPFP's Board directed Gottschalk to hire a law firm to conduct a review of potential claims related to past real estate transactions. DPFP terminated its prior counsel, Gary Lawson, and hired the law firm of Diamond McCarthy LLP to represent DPFP in its investigation of DPFP's investments and the professional services performed for DPFP. In connection with this investigation, in 2017, DPFP sued Townsend Holdings LLC, Richard Brown and Rosenberg (both Townsend principals), and Lawson, alleging claims for breach of contract, breach of fiduciary duty, and negligence with respect to the twelve real-estate investments. DPFP sought up to approximately $1 billion in out-of-pocket losses, lost profits, and other damages. It alleged that Townsend had failed to adequately advise DPFP regarding its real-estate investments and had permitted DPFP's real estate portfolio to become speculative, undiversified, and high risk.

[3] DPFP had implemented a Deferred Retirement Option Program (DROP) in 1993 for retirement-eligible members. This plan permitted them to deposit retirement funds into a DROP account that, during the time period at issue, guaranteed at least 8% return. Under the DROP, participants were permitted to make withdrawals from their accounts on short notice. The DROP plan initially applied to retirement-eligible members to encourage these experienced members to continue working but later also applied to retired members who chose not to continue working.

The trial court denied or did not rule on eight motions for summary judgment filed by various Townsend defendants and Lawson, and a five-week jury trial took place during the summer of 2022. After DPFP presented its case, the trial court granted a directed verdict in favor of Rosenberg. During the trial, primarily during closing argument, Townsend argued to the jury that DPFP's lawyers manufactured the case and engaged in deception, and that DPFP's witnesses had been given questions and told how to testify in advance of trial by DPFP's lawyers. DPFP did not object to Townsend's arguments on these points prior to or during the closing arguments, which ended on a Friday.

The following Monday, outside the presence of the deliberating jury, DPFP's counsel notified the trial court and Townsend of its position that Townsend's counsel had engaged in incurable and possibly sanctionable jury argument. DPFP's counsel did not seek a ruling or request a curative instruction or any other remedy. DPFP's counsel stated that he only wanted to raise the issue on the record because, depending on the trial outcome, it may feature in post-verdict motions, and he did not want to delay in making DPFP's position known.

The jury found that Townsend and R. Brown had not breached any contractual or fiduciary duties but found that the parties had been negligent, resulting in $169,920.92 in damages for lost value of consulting services. The jury determined that DPFP was responsible for 75% of the negligence, Townsend and R. Brown were

responsible for 10% each, and CDK was responsible for 5%. As a result, the trial court entered a take-nothing judgment in favor of Townsend.

Soon after the verdict, DPFP moved for a new trial and later amended its motion. The trial judge orally denied the motion after a hearing but did not sign a written order, so the motion was denied by operation of law on February 6, 2023.

II. DPFP Has Not Shown that Townsend's Arguments Were Incurable

In issue one, DPFP argues that the trial court erred in denying its motion for a new trial because Townsend's counsel improperly and incurably attacked DPFP's lawyers and witnesses during the trial. DPFP asserts that these arguments were incurable under Texas law because Townsend's counsel's arguments were unsupported, extreme, and personal attacks on opposing counsel and witnesses that damage the judicial system and require a new trial.

Townsend responds that "[t]he record fully supports the part of Townsends's defense that [DPFP] engineered a specious claim against Townsend years after the fact with the help of lawyers" and that its arguments about the case being "lawyer-driven" were "entirely proper" under Texas law. We note that this language fails to address the more aggressive arguments of Townsend's counsel that extended beyond a "lawyer-driven" case by suggesting that the litigation conduct of DPFP's lawyers was dishonest and deceitful. Townsend further argues that, to the extent any arguments are determined to be improper, they are not incurable, and that DPFP waived any objections to curable jury argument by failing to object at trial.

A. Standard of Review

We review the denial of a motion for new trial for abuse of discretion. *Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 813 (Tex. 2010); *Hopkins v. Phillips*, No. 05-18-01143-CV, 2019 WL 5558585, at *2 (Tex. App.—Dallas Oct. 29, 2019, pet. denied) (mem. op.). A trial court abuses its discretion if it acts in an arbitrary or unreasonable manner or without reference to any guiding rules or principles. *Primestar Constr., Inc. v. Dellew Corp.*, No. 05-17-01412-CV, 2019 WL 2296041 at *2 (Tex. App.—Dallas May 30, 2019, no pet.) (mem. op.).

B. Applicable Law

A litigant is entitled to have his counsel argue the facts of the case to the jury. *In re BCH Dev., LLC*, 525 S.W.3d 920, 928 (Tex. App.—Dallas 2017, orig. proceeding). Reasonable inferences and deductions from the evidence are also permissible during closing argument. *Id.*; *see also Standard Fire Ins. Co. v. Reese*, 584 S.W.2d 835, 837 (Tex. 1979). Hyperbole is also generally a permissible rhetorical technique in closing argument. *In re BCH*, 525 S.W.3d at 928. Counsel may comment on the credibility of witnesses. *Id.* Trial counsel should be given wide latitude in arguing the evidence and the reasonable inferences from the evidence to the jury. *Id.*

Ordinarily, appellate complaints about an improper jury argument must be preserved by timely objection and request for an instruction that the jury disregard the improper remark. *Phillips v. Bramlett*, 288 S.W.3d 876, 883 (Tex. 2009); *see*

also TEX. R. APP. P. 33.1(a). A presumption exists that probable harm from improper jury argument can be remediated by retraction of the argument or curative instruction from the judge. *Alonzo v. John*, 689 S.W.3d 911, 912 (Tex. 2024) (per curiam).

A complaint of incurable argument, however, may be asserted and preserved in a motion for new trial, even without a complaint and ruling during the trial. *Phillips*, 288 S.W.3d at 883; *see* TEX. R. CIV. P. 324(b)(5). Incurable argument occurs in rare instances when argument is "so inflammatory and prejudicial" that its harmfulness is incurable. *Alonzo*, 689 S.W.3d at 913 (quoting *Tex. Emp. Ins. Ass'n v. Haywood*, 266 S.W.2d 856, 859 (1954)).

"[J]ury argument that strikes at the appearance of and the actual impartiality, equality, and fairness of justice rendered by courts is incurably harmful not only because of its harm to the litigants involved, but also because of its capacity to damage the judicial system." *Living Ctrs. of Tex., Inc. v. Penalver*, 256 S.W.3d 678, 681 (Tex. 2008) (per curiam). In rare cases, incurably harmful statements may include remarks of racial prejudice, unsupported extreme and personal attacks on opposing parties and witnesses, or unsupported accusations of witness manipulation or evidence tampering. *See In re Rudolph Auto., LLC*, 674 S.W.3d 289, 312 (Tex. 2023); *Living Ctrs.*, 256 S.W.3d at 681. However, this list is not comprehensive. *See In re Rudolph Auto.*, 674 S.W.3d at 312. Nor is it the case that anything that barely satisfies one of those requirements is inevitably fatal to the entire trial. *Id.* In

addition, jury argument that is not inherently incurable may prove incurable in a particular trial depending on the circumstances. *Id.* at 312–13.

The "amount of harm from the argument" determines whether that threshold has been breached. *Alonzo*, 689 S.W.3d at 913 (quoting *Living Ctrs.*, 256 S.W.3d at 681). The test is:

> whether the argument, considered in its proper setting, was reasonably calculated to cause such prejudice to the opposing litigant that a withdrawal by counsel or an instruction by the court, or both, could not eliminate the probability that it resulted in an improper verdict.

Id. (quoting *Haywood*, 266 S.W.2d at 858). This inquiry requires an evaluation of the case as a whole—beginning with voir dire and ending with closing argument—and includes an assessment of whether the complaining party invited or provoked the argument. *Id.* (citing *Reese*, 584 S.W.2d at 839–40). Stated differently, "[t]he party claiming incurable harm must persuade the court that, based on the record as a whole, the offensive argument was so extreme that a juror of ordinary intelligence could have been persuaded by that argument to agree to a verdict contrary to that to which he would have agreed but for such argument." *Phillips*, 288 S.W.3d at 883 (citation omitted). The complainant has the "high burden" to prove that improper argument was incurable. *See Alonzo*, 689 S.W.3d at 913; *see also Living Ctrs.*, 256 S.W.3d at 680–81.

C. No Abuse of Discretion in Determining that Arguments Were Either Proper or Curable

DPFP complains that Townsend's counsel made two types of incurable jury arguments: (1) unsupported personal attacks on DPFP's lawyers asserting that they invented the lawsuit and acted deceitfully, and (2) assertions that DPFP's lawyers scripted their witnesses' trial testimony. DPFP asserts that these arguments occurred throughout the trial as part of a carefully orchestrated strategy by Townsend's counsel to discredit the case and that the constant "drumbeat" of these improper arguments rendered them "all the more incurable."

The record indicates that DPFP made a strategic decision not to object to the statements or seek a curative instruction or other remediation at trial. As a result, to obtain a new trial, DPFP must show that the purportedly improper arguments were so prejudicial and inflammatory that a curative instruction or retraction could not have eliminated the probability that the argument resulted in an improper verdict. *See Alonzo,* 689 S.W3d at 913. Although we consider the propriety of some of these comments individually, we ultimately evaluate the trial judge's decision to deny the motion for new trial based on whether the requisite degree of harm from improper arguments reached the incurability threshold upon a review of the record as a whole. *See id.*

1. DPFP Complains About Townsend's Jury Argument That DPFP Lawyers Manufactured Lawsuit

Townsend's counsel argued at trial that DPFP's lawyers manufactured the lawsuit with no factual basis. DPFP details the following quotes, comments, questions, and argument from various stages of the trial[4] to support its assertion that this argument was incurable.[5]

Opening Statements

DPFP complains of the following remarks made by Townsend's counsel during opening statements:

- "I'm sure Ms. Gottschalk is a fine person, but she does not have a clue what happened at the Pension System in 2004 or 2005 or 2008 or 2010. Her only role after she was hired in 2015 was *to manufacture a lawsuit* to take the heat off the Trustees."
- They now claim they didn't know that land investment was risky, how many projects CDK managed, or that they needed to diversify, get appraisals or pay back loans. "This is *completely made up after the fact*. The Trustees knew all of this."

Procedural rules permit a party, during opening statements, to state the nature of its claim or defense and what it expects to prove at trial. *See* TEX. R. CIV. P.

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[4] DPFP points to pretrial-conference discussions at which Townsend's counsel indicated that its trial strategy could include an argument that the case was lawyer-driven. Although this discussion may shed light on Townsend's strategy and mindset, these comments were not argument before the jury. We must primarily consider Townsend counsel's actual jury arguments, not their strategy or intent. *See Howsley & Jacobs v. Kendall*, 376 S.W.2d 562, 565 (Tex. 1964) ("[I]t is not the attitude, purpose, or motive of counsel that is of controlling importance. The important considerations are what was said and how in all probability such statements were understood by the jury.").

[5] Throughout the opinion, when describing evidence we have paraphrased or added language from the testimony or document in some places to provide more context. Italics denotes language emphasized by DPFP in its brief.

265(a), (c). Although phrased aggressively, Townsend's counsel's opening statements by themselves were not improper to the extent that Townsend introduced evidence from which the jury could infer that DPFP and its Board understood the disclosed risks of its investments but later hired counsel to investigate possible claims to pass on liability for real estate investment losses.

Witness Examination

In addition, DPFP complains of the following questions and tactics by Townsend's counsel while examining witnesses during the trial, arguing that the framing of counsel's questions further demonstrated Townsend's attempt to convince the jury that the case was manufactured by DPFP's lawyers:

- On cross-examination of Gottschalk, Townsend's counsel framed five questions in fairly close succession around whether she had interviewed various DPFP trustees, counsel, or others about the disputed investments "prior to hiring these lawyers."
- Townsend's counsel asked Gottschalk to concede that her own investigation into the real estate portfolio was "done under the direction of these lawyers."
- Townsend's counsel asked Gerald Brown, DPFP Board chair during this period, to agree that the attorneys chose the twelve investments at issue in the case.
- Arguably to remind the jury of their view that lawyers drove the lawsuit, Townsend's counsel injected various references to DPFP's trial counsel by name throughout questioning and directly claimed that certain witness testimony was scripted by these lawyers.

Closing Arguments

DPFP's most serious complaints relate to the following arguments by Townsend's counsel during closing:

- Townsend's counsel David Marroso stated: "The truth is that this lawsuit was invented. *It was invented by Kelly Gottschalk and the lawyers in this courtroom. And when I say 'invented,' I mean it. Invented*."

- Townsend's counsel argued: "Before filing this lawsuit, you heard Ms. Gottschalk admit they did not even bother to talk to any of the trustees who were in the room when those decisions were made. Not one. They did not talk to Richard Tettamant, the administrator, who was setting the agendas, dealing the strategy who's in the room. They didn't talk to any of the investment managers. They didn't talk to Townsend. *They just made up the story.*" [DPFP asserts that, in context, "they" also included DPFP's trial counsel.]

- Townsend's counsel Leon Carter accused DPFP's lawyers by name, stating: "This is the first case that I've seen *where the attorneys have totally made up a case. Totally manufactured by Mr. Greg Taylor and Mr. Mark Sales*. Good lawyers."

- Townsend's counsel asked "Why the deceit and the deception? Why?" regarding a response by DPFP's lawyer Mr. Taylor.[6]

- Later, during closing, Townsend's counsel stated, "I wonder why. Why the deception, the dishonesty, and the deceit?" when remarking on objections by DPFP's counsel to Townsend's attempt to introduce evidence of other DPFP lawsuits (which objection the trial court had sustained).

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[6] The expanded language from the closing argument is: "Because what you have to reconcile in your answers that the attorneys have told you you need to answer, is that the two clients of Mr. Taylor and Mr. Sales have said something totally different than them. Mr. Tettamant, the executive director for 20-plus years, Mr. Taylor was asking him, 'Have you ever known Mr. Brown or Mr. Rosenberg to breach a contract?' And you remember he said, 'No, never,' and Mr. Taylor stopped him. 'You didn't mean to say that.' His own client, stopped him. Why the deceit and the deception? Why?"

- Townsend's counsel vaguely suggested it was unethical for Taylor to represent DPFP as well as G. Brown and Tettamant.
- Townsend's counsel called out Joshua Mond, DPFP's in-house counsel, by name for not testifying and stated that if he had, "it wouldn't have been pretty, I can promise you."
- Townsend's counsel argued that a verdict in favor of DPFP would mean "[the] community in Dallas, Texas accepts a lawyer going out, looking at documents, *filing a lawsuit with no factual basis whatsoever*, getting a witness to read documents, and come just testify about what she reads."
- Townsend's counsel stated, "You're going to have to believe Ms. Gottschalk and her lawyers over everyone else who came in here and testified, to say, 'yes,' on any of those questions."

During closing arguments, trial counsel should be given wide latitude in arguing the evidence and the reasonable inferences from the evidence. *In re BCH Dev., LL*C, 525 S.W.3d at 928. Courts permit some hyperbole by lawyers in the zealous representation of their clients. *See Reese*, 584 S.W.2d at 838 ("Hyperbole has long been one of the figurative techniques of oral advocacy. Such arguments are a part of our legal heritage and language."). Several of these statements are not improper, much less incurable, but DPFP argues that, cumulatively with its opening statement and questioning of witnesses, the persistent references to Townsend's overarching theme culminated in its counsel's improper closing argument.

Townsend has pointed to evidence admitted at trial supporting its theory that the case was lawyer-driven, and that the purpose of the suit against Townsend was for the trustees to "take the heat off" themselves. However, to the extent DPFP

argues that Townsend's counsel made unsupported statements that DPFP's lawyers acted with deceit, deception, and dishonesty, we consider below whether these statements were incurable in the context of the entire trial. *See Alonzo*, 689 S.W.3d at 913.

2. DPFP Complains About Townsend's Jury Argument that DPFP Scripted Witnesses

DPFP separately asserts that the accusations by Townsend's counsel that DPFP's counsel scripted its witnesses' testimony were incurable arguments. Townsend argued that DPFP's witnesses were coached to repeat the lawyers' purportedly unsupported theories. DPFP points to the following statements relating to this argument:

- When questioning Tettamant, Townsend's counsel stated, "You knew exactly what questions Mr. Taylor was going to ask you yesterday and today, didn't you, sir?"[7]
- He also asked, "Is there a reason why you're saying 'Townsend' even if I don't ask you a question about Townsend? Were you told to say Townsend every time you could?"

[7] The following exchange took place when Townsend's counsel cross-examined Tettamant:

Q You knew exactly what questions Mr. Taylor was going to ask you yesterday and today, didn't you, sir?
A No, I did not.
Q Are you telling this jury you didn't have a clue the questions he was going to ask you about?
A A clue?
Q Yeah.
A Probably a clue, yes.
Q Okay.
A But not the exact questions.

- When cross-examining G. Brown, Townsend's counsel asked, "[Y]ou knew exactly what questions he was going to ask and what your answers were going to be, didn't you?" and also contended, "Your testimony was scripted with Mr. Sales because he was reading from his list of questions and you knew the questions and you knew how you had to answer, didn't you, sir?" [8]

- During closing arguments, Townsend's counsel incorrectly claimed that G. Brown had admitted "90 percent" of his answers on direct examination were scripted.

DPFP did not object to this questioning by Townsend's counsel or his closing argument but instead chose to address this issue in closing rebuttal.

Incurable, harmful argument can result from accusations that the opposing party manipulated a witness if there is no evidence of witness tampering. *Living Ctrs.*, 256 S.W.3d at 681; *see also Howsley & Jacobs v. Kendall*, 376 S.W.3d 562, 565-66 (Tex. 1964) (reversing judgment when the plaintiff's attorney argued—without evidence—that the key witness had been instructed by lawyers on what to

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[8] When cross-examining G. Brown, the following exchange occurred:

> Q You rehearsed what your testimony was yesterday and today with Mr. Sales, didn't you?
> A We went over documents.
> Q Your testimony was scripted with Mr. Sales because he was reading from his list of questions and you knew the questions and you knew how you had to answer, didn't you, sir?
> A Some of them I knew, yes.
> Q Ninety percent of them you knew, didn't you, sir?
> A I don't know a percentage.

The transcript indicates that Brown testified that he knew "some of" the questions he would be asked by DPFP counsel. When asked by Townsend counsel whether he knew "ninety percent" of the questions, Brown responded, "I don't know a percentage." However, in his closing argument, Townsend counsel Marroso argued: "And there was a very important moment in this case when Mr. Carter first started examining Mr. Brown. He said, 'Did you have a script? Did you rehearse these answers?' And he said, 'Well, not all of them, just 90 percent of them.' Just 90 percent."

say and how to testify, stating: "You knew the truth but you knew it wasn't coming from the testimony of [the witness], because [the witness] wasn't testifying. Somebody was testifying through the lips of [the witness]" and further arguing the testimony was "under the coaching of this battery of lawyers, when he got on there to give words that were not his words.").

Although it is not improper to challenge a witness's credibility by asking whether he knew the questions in advance, it may be improper to misstate or unreasonably exaggerate a witness's testimony, as DPFP alleges occurred in this case where G. Brown did not actually state that "90 percent" of his answers were scripted. *See generally In re BCH Dev.*, 525 S.W.3d at 928 ("Reasonable inferences and deductions from the evidence are permissible . . . during closing argument."). DPFP particularly objects to the implication that DPFP's lawyers crossed the line of appropriate pre-trial preparation of witnesses and engaged in impermissible witness-scripting; however, the testimony provides at least some support for Townsend's argument that two DPFP witnesses knew some of the questions. Based on possible interpretation of G. Brown's answer to the compound question asked by Townsend's counsel, a juror could infer that he knew some of the answers to provide.

The misstatement of G. Brown's "90 percent" testimony does not, by itself, meet the "high burden" to warrant a new trial in this case. See *Alonzo*, 689 S.W.3d at 913. We assess below DPFP's contention that the combined effects of this

argument, together with Townsend's argument that the lawyers behaved deceptively or dishonestly, are so harmful to our civil justice system that a new trial is inexorably required. *See Rudolph Auto.*, 674 S.W.3d at 312 ("[S]ometimes—but rarely—statements will be so incurably harmful as a matter of law that a new trial is inexorably required.").

3. DPFP Has Not Shown Trial Court Abused Discretion in Denying Motion for New Trial

Given that DPFP did not object to any of the complained-of arguments at trial, the issue in this case is not simply whether arguments of Townsend's counsel were improper, but whether they were incurable. DPFP asserts that Townsend's arguments—that the case was "made up" by DPFP lawyers and that DPFP's counsel scripted its witnesses—were each "categorically incurable" because they fell into categories of incurable argument previously identified by the supreme court.

The supreme court has stated that, in rare cases, incurable argument "may include" unsupported and extreme attacks on opposing counsel and witnesses, or unsupported accusations of witness manipulation or evidence tampering by opposing parties. *See In re Rudolph Auto.*, 674 S.W.3d at 312; *Living Ctrs.*, 256 S.W.3d at 681. However, the supreme court also pointed out that "We do not suggest that . . . anything that barely satisfies one of those requirements would be inevitably fatal to the entire trial." *In re Rudolph Auto.*, 674 S.W.3d at 312. The supreme court recently reiterated that incurability depends on the amount of harm from the

argument. *See Alonzo*, 689 S.W.3d at 913 (reversing and remanding based on incurable arguments relating to discriminatory animus).[9]

To the extent that DPFP contends that these arguments are *per se* harmful by falling into one of these categories, we disagree. As required by *Alonzo*, our review must consist of a holistic evaluation of the entire record to assess the amount of harm from the argument and whether the harmfulness was incurable. 689 S.W.3d at 913. We conclude that, considering the record as a whole, DPFP has not shown that the trial court abused its discretion in determining that these arguments did not meet the "high burden" to be considered incurably "extreme," "inflammatory," and "prejudicial." *See Phillips*, 288 S.W.3d at 883; *Alonzo*, 689 S.W.3d at 913.

a. Invited Argument

Our inquiry must include an assessment of whether DPFP invited the arguments. *Alonzo*, 689 S.W.3d at 913. Townsend argues that its counsel's arguments were invited by the opening remarks of DPFP's counsel because he raised the anticipated theory of a lawyer-driven case to the jury by stating: "You may even hear, I don't know for sure, but you may even hear Townsend try to blame the Dallas Police & Fire and the lawyers here for just bringing this suit, but we'll see what the

[9] The parties filed supplemental letter briefs with the Court after the issuance of the *Alonzo* opinion by the Texas Supreme Court. In its letter, DPFP states that *Alonzo* reaffirmed Texas Supreme Court precedent that certain jury arguments are incurably harmful and argues that the arguments at issue in the present case are functionally analogous to the "[e]xtreme and unsupported personal attacks on the opposition" in *Alonzo*. *See Alonzo*, 689 S.W.3d at 914 ("An appeal to racial prejudice is a paradigmatic example of incurable jury argument.").

evidence has to say about that." DPFP argues that this statement merely "suggests that Townsend might blame lawyers and other third parties for the ultimate fault of the investments." Townsend also claims that its lawyer-manufactured argument was invited by Gottschalk's testimony that she had no personal knowledge of the investments and had acquired knowledge of them by reviewing documents.

The trial court could have concluded that this statement and testimony invited, in part, argument that the claims in the lawsuit may have been driven by the lawyers, but not that the lawyers were deceitful, deceptive, or dishonest. At the very least, it demonstrates that DPFP was aware of Townsend's theme pre-trial, and its decision not to object or request other relief was purposeful and strategic.

b. Evidence Supports Some of the Complained-Of Jury Arguments

Generally, arguments must be unsupported to be improper. *See Living Ctrs.*, 256 S.W.3d at 681. "Unsupported, extreme and personal attacks on opposing parties and witnesses can . . . compromise the basic premise that a trial imparts impartial, equal justice." *Id.* Similarly, unsupported accusations of manipulating witnesses also can be incurable argument. *See id.*

DPFP argues that the record contains no evidence that its counsel violated any legal or ethical rules in bringing this lawsuit and asserts that the record contains no support for Townsend's argument that DPFP's lawyers manufactured the lawsuit with no factual basis, particularly given the trial court's denial of Townsend's summary judgment motions and all but one motion for directed verdict. DPFP points

to the evidence it introduced at trial to support its trial claims that Townsend failed to properly disclose material information and provide appropriate warnings and advice. DPFP argues that witness testimony, the performance reports prepared by Townsend, and other evidence supports its claims and refutes Townsend's arguments that the case was manufactured by DPFP's counsel without factual basis.

Townsend argues that its arguments were proper and supported by ample evidence. Texas law does not categorically prohibit counsel from arguing that evidence supports an inference that a case was lawyer-driven, because counsel may make arguments involving attorney and party behavior that are supported by evidence or inferences from the evidence. *See Reese*, 584 S.W.2d at 836–37 (concluding that jury argument was not improper where direct evidence, as well as inferences from the evidence, supported the argument that a "sham or plot" existed between the plaintiff and his attorney to inflate medical bills in a personal injury case). The jury may choose to draw this inference or reject this argument as invalid or overstated.

The record indicates that there was a basis for Townsend's arguments that the claims were at least lawyer-driven. The evidence showed:

- DPFP's Board was satisfied with Townsend's advice at the time it made the investments.
- Gottschalk hired Diamond McCarthy law firm to conduct a review of potential claims related to past real estate transactions and to confirm there had been no "wrongdoing" based on the significant real estate losses in the portfolio.

- Gottschalk testified that she did not have discussions with the Board members regarding the disputed real estate transactions prior to the hiring of Diamond McCarthy or the filing of this lawsuit.

- The record indicates that the investigation by the law firm led to the decision to file a lawsuit about the twelve real estate transactions at issue.

- Testimony indicated that the larger real estate portfolio contained successful investments even if these twelve were unsuccessful (although the contract provides that Townsend had a fiduciary duty relating to each individual investment).

As discussed above, the record also contains some testimony that DPFP witnesses knew some of the questions they would be asked and, in one case, possibly some answers. We conclude that the record contained some support for Townsend's arguments. However, Townsend does not cite evidence showing dishonest or deceitful conduct by DPFP's counsel. Regardless, we still conclude that the arguments were not incurable.

c. Arguments Were not Incurably Extreme, Inflammatory, and Prejudicial

DPFP argues that Townsend's reiteration of the theme throughout trial that DPFP's lawyers manufactured the case and scripted witnesses demonstrates Townsend's conscious intent to attack the integrity of DPFP's lawyers and witnesses. Regardless of Townsend's intent, in the context of the entire case, we conclude that the trial court did not abuse its discretion in rejecting DPFP's argument that any improper comments were so inflammatory that their perceived prejudicial

effect on the verdict could not have been cured by an instruction to the jury or otherwise remediated.

The trial court listened to the evidence throughout the five-week trial, heard the complained-of arguments, witnessed the jury's reaction to the comments, and was in the best position to remedy the problem through curative instruction, retraction, or admonishment. *See Jones v. Republic Waste Servs. of Texas, Ltd.*, 236 S.W.3d 390, 403 (Tex. App.—Houston [1st Dist.] August 2, 2007, pet. denied). Trial courts' "special vantage point makes it essential that they be willing to [grant new trials] when they observe problems that threaten the integrity of the process and, therefore, the reliability of the verdict." *In re Rudolph Automotive*, 674 S.W.3d at 302. However, "disregarding a jury's verdict is an unusually serious act that imperils a constitutional value of immense importance—the authority of a jury." *Id*.

Only in rare and egregious circumstances will improper argument rise to the level of incurable jury argument requiring a reviewing court to reverse a trial court's judgment and set aside a jury verdict. *See Alonzo*, 689 S.W.3d at 913; *In re Rudolph Auto.*, 674 S.W.3d at 312-13. Incurable jury argument is rare because, typically, retraction of the argument or instruction from the court can cure any probable harm. *Phillips*, 288 S.W.3d at 883 (citing *Living Ctrs.*, 256 S.W.3d at 680). Our jury system presumes that jurors follow curative instructions. *In re Rudolph Automotive*, 674 S.W.3d at 312. This "powerful" presumption "is not a featherweight to be disregarded without some powerful reason." *Id.*

An unprovoked, inflammatory, and prejudicial argument is incurably harmful when it was reasonably calculated to cause such prejudice that a withdrawal or instruction could not eliminate the probability that it resulted in an improper verdict. *See Alonzo*, 689 S.W.3d at 913. In *Alonzo*, the supreme court determined that a request for retraction or a curative instruction was not required because an uninvited and unprovoked appeal to racial prejudice is a paradigmatic example of incurable jury argument that strikes at the fairness and equality of justice. *Id*. at 914. In *Living Ctrs.*, the supreme court held that incurable argument required a new trial when counsel equated opposing counsel's argument for a lesser damages award with atrocities committed against the elderly and infirm in Nazi Germany's World War II T-4 Project. 256 S.W.3d at 682. In other words, "Repeatedly telling jurors that they would align themselves with Nazis if they ruled for the defense could not have been cured; urging a jury to send a message responding to too-low verdicts could have been." *In re Rudolph Auto.*, 674 S.W.3d at 311.

Repeated, unsupported accusations of attorney dishonesty can become so harmful as to be incurable. For example, in *Montgomery Ward & Co. v. Brewer*, our sister court held that argument was incurable when counsel repeatedly made unsupported accusations that opposing counsel, as part of a conspiracy, told lies, manufactured evidence, destroyed evidence, and persuaded witnesses to perjure themselves. 416 S.W.2d 837, 845–48 (Tex. App.—Waco 1967, writ ref'd n.r.e.). However, another court of appeals more recently determined that "[i]mproper

argument regarding the alleged wrongful conduct by a lawyer is not *per se* incurable." *Jones*, 236 S.W.3d at 403. In *Jones*, appellants argued that opposing counsel's closing argument was incurable because, without evidence: she argued that the case was "a lawyer construct, it is created by lawyers;" she concocted a conversation between appellant's counsel and appellant; and she implied that appellant's counsel suborned perjury and induced his client to change his story. *Id.* at 399–400. The appellate court concluded that, although opposing counsel's argument was "reprehensible," under the facts in that case, the comments were curable. *Id.* at 403.

After evaluating the present case as a whole, we conclude that the complained-of arguments are different in kind and in degree from those that the supreme court has found to be incurable. Under these facts, the arguments were not so inflammatory that their perceived prejudicial effect would have prevented the jury from following its oath with proper instructions from the trial court. Based on our review of the entire record, this case is not one of the "rare instances, [where] argument may be 'so inflammatory and prejudicial' that its harmfulness is incurable." *Alonzo*, 689 S.W.3d at 913.

The most controversial comments in the present case—characterizing a witness's testimony as "90 percent" scripted and asking "why the deceit and deception?"—occurred during closing argument. By then the jury had heard all the evidence, including DPFP's evidence and arguments that contradicted the arguments

of Townsend's counsel. The jury deliberated all day. During that time the jury sent several notes to the trial judge requesting a definition as well as a table of contents of the various performance reports, meeting minutes, and other exhibits admitted into evidence. This suggests that the jury was considering the evidence and deliberating conscientiously. We note that the jury was not persuaded that the case was entirely manufactured because the jury found that Townsend bore 25% of the blame for negligence.[10] Although this finding still resulted in a take-nothing judgment, it is some indication that the jury did not wholly buy into the arguments that DPFP believes were "so extreme that a juror of ordinary intelligence could have been persuaded by that argument to agree to a verdict contrary to that to which he would have agreed but for such argument." *Phillips*, 288 S.W.3d at 883 (citation omitted).

DPFP could have objected and sought curative relief before the jury returned its verdict rather than taking a strategic risk on a successful outcome. DPFP complains of comments that Townsend's counsel made beginning with pretrial conferences and continuing throughout the trial—from opening statements, during witness testimony, and in closing statements. As DPFP points out, even Townsend's

[10] DPFP argues that the jury's findings that Townsend did not breach any contractual or fiduciary duties were against the great weight and preponderance of the evidence and thus that DPFP's factual sufficiency argument in issue two further buttresses its argument that Townsend's improper arguments probably resulted in an improper verdict. As discussed below, we disagree that the evidence is factually insufficient to support the jury's verdict.

opening argument signaled Townsend's trial strategy. However, DPFP chose not to raise its concerns until after the jury began deliberations. DPFP's chosen strategy risked that any error would be unpreserved if improper arguments were curable. DPFP had significant time during the five weeks of trial to consider objections and request curative action. If DPFP were concerned about provoking the ire of the jury, it could have requested admonitions outside the presence of the jury to rein in overzealous attorneys. To preserve error, DPFP should have timely objected and sought appropriate instructions from the trial court, who was in the best position to fashion the appropriate remedy.

D. Conclusion—Issue One

Though certain arguments in this case were arguably improper, we conclude that the record, viewed as a whole, does not demonstrate that the complained-of statements were so harmful as to be incurable. Under the facts of this case, the trial court did not abuse its discretion in impliedly determining that the arguments of Townsend's counsel were either proper or curable. We decide issue one against DPFP.

III. DPFP Has Not Shown that the Evidence Was Factually Insufficient to Support the Jury's Findings

In its second issue, DPFP argues the evidence was factually insufficient to support the jury's findings that Townsend did not breach any fiduciary or contractual duties because those findings were against the great weight and preponderance of

the evidence.[11] DPFP argues that the evidence shows "some kind" of contractual or fiduciary breach because Townsend failed to disclose all material information that DPFP needed for its decisions. As stated above, DPFP asserts that that this argument also supports its contention that the jury probably reached the wrong verdict due to the incurable arguments of Townsend's counsel. Townsend responds that DPFP's factual sufficiency argument is both waived and wrong.

A. Townsend Has Not Shown that DPFP Waived its Factual Sufficiency Argument

Townsend argues that DPFP waived its ability to allege factual insufficiency on appeal because it did not establish the factual insufficiency of the evidence for "*each* element of *each* claim." Townsend thus asserts that DPFP's appeal is fatally flawed because it does not cite evidence to support the causation and damages elements of its breach claims or to contradict the jury's finding attributing 75% of the responsibility for the negligence claim to DPFP.

However, DPFP has not appealed the factual sufficiency of the negligence claim. In addition, DPFP does not need to refute breach of contract or fiduciary duty elements for which no jury finding was made because factual sufficiency arguments relate to "adverse findings" by the jury. *See Lion Copolymer Holdings, LLC v. Lion*

[11]In its amended motion for new trial, DPFP also asserted that the evidence was legally insufficient; however, on appeal it argues only that the jury's findings of no breach of fiduciary or contractual duties were against the great weight and preponderance of the evidence and thus factually insufficient.

Polymers, LLC, 614 S.W.3d 729, 733 (Tex. 2020) (per curiam). Townsend relies on cases in which the *trial court* made actual findings or implied findings as to the elements or issues after a bench trial.[12] In the *jury trial* in the present case, the jury did not reach the elements of causation or damages because it found that Townsend did not breach its contractual or fiduciary duties. The jury instructions expressly instructed the jury to skip questions that would have resulted in jury findings on these elements if it found no breach.

Townsend has not cited Texas law establishing that an adverse finding has been impliedly made when a jury does not reach an element of a cause of action. In such cases, the jury has made no finding. *See, e.g., Cartwright v. Armendariz*, 583 S.W.3d 798, 804–05 (Tex. App.—El Paso 2019, pet. denied) (reversing based on factual insufficiency for jury's no causation finding without addressing damages issue). In this case, a jury was not convinced by a preponderance of evidence on the breach questions, and we may only reverse when warranted by the great weight and preponderance of the evidence. *See Herbert v. Herbert*, 754 S.W.2d 141, 144 (Tex. 1988). We do not interpret existing law to require that, in addition to reviewing

[12] *See In re M.C.M.*, Nos.05-21-00242-CV & 05-21-00373-CV, 2023 WL 4117080, at *6 (Tex. App.—Dallas June 22, 2023, no pet.) (mem. op.) (trial court made findings of fact after a bench trial). When the *trial court* makes no findings of fact and conclusions of law, all facts necessary to support the judgment and supported by the evidence are implied. *See BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002) (ruling on special appearance); *Casteel v. Stayton*, No. 04-15-00273-CV, 2016 WL 625808 (Tex. App.—San Antonio Feb. 17, 2016, no pet.) (mem. op.) (bench trial); *Marrs and Smith P'ship v. D.K. Boyd Oil & Gas Co., Inc.*, 223 S.W.3d 1, 13–14 Tex. App.—El Paso, pet. denied) (bench trial).

actual jury findings under the higher factual sufficiency standard, this Court must review evidence for elements for which findings were expressly *not* made by the jury.[13] We conclude that Townsend has not shown that DPFP waived its factual sufficiency argument.

B. Standard of Review and Applicable Law

We review the denial of a motion for new trial for abuse of discretion. *Waffle House*, 313 S.W.3d at 813. However, when appellate courts review the denial of a motion for new trial based on a factual sufficiency complaint, we do not defer to the trial court's determination that the evidence is factually sufficient; instead, we apply the same factual sufficiency standard that the trial court applied. *Griggs v. Cohen*, No. 05-19-01174-CV, 2020 WL 6128225, at *2 (Tex. App.—Dallas Oct. 19, 2020, no pet.) (mem. op.); *In re Campbell*, 577 S.W.3d 293, 300 (Tex. App.-Houston [14th Dist.] 2019, orig. proceeding).

When a party attacks the factual sufficiency of an adverse finding on an issue on which it has the burden of proof, it must demonstrate on appeal that the adverse finding is against the great weight and preponderance of the evidence. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001) (per curiam). The court of appeals must consider and weigh all of the evidence, and it can set aside a verdict only if the evidence is so weak or if the finding is so against the great weight and preponderance

[13] We note that doing so would result in our applying a higher standard of proof to those elements on which the jury has *not* spoken than the appellant would bear at trial.

of the evidence that it is clearly wrong and unjust. *Id.*; *Babiy v. Kelley*, No. 05-17-01122-CV, 2019 WL 1198392, at *2 (Tex. App.—Dallas Mar. 14, 2019, no pet.) (mem. op.). Courts of appeals "should, in their opinions, detail the evidence relevant to the issue in consideration and clearly state why the jury's finding is factually insufficient or is so against the great weight and preponderance as to be manifestly unjust; why it shocks the conscience; or clearly demonstrates bias." *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003) (quoting *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986)). The court of appeals need not detail the evidence regarding factual sufficiency when affirming a jury verdict, but it must provide the basic reasons for that decision. *See Gonzalez v. McAllen Med. Ctr.*, 195 S.W.3d 680, 681 (Tex. 2006).

In a factual sufficiency review, appellate courts must examine the evidence that both supports and contradicts the jury's verdict in a neutral light. *Embry v. Martinez*, No. 05-20-00022-CV, 2021 WL 2309983, at *3 (Tex. App.—Dallas June 7, 2021, no pet.) (mem. op.); *see also Dow*, 46 S.W.3d at 242. In conducting this review, an appellate court must not merely substitute its judgment for that of the jury. *Golden Eagle Archery*, 116 S.W.3d at 761. The jury is the sole judge of the credibility of witnesses and the weight to be given to their testimony. *Id.* Jurors may disregard even uncontradicted and unimpeached testimony from disinterested witnesses. *City of Keller v. Wilson*, 168 S.W.3d 802, 820 (Tex. 2005).

In considering complaints of a jury's failure to find a fact, courts of appeal may not reverse a verdict "merely because they conclude that the evidence preponderates towards an affirmative answer." *Herbert*, 754 S.W.2d at 144; *Embry*, 2021 WL 2309983 at *3. Therefore, the amount of evidence necessary to affirm a judgment is far less than that necessary to reverse. *Embry*, 2021 WL 2309983 at *3. Reversal is warranted only when the *great* weight of the evidence supports an affirmative answer. *Herbert*, 754 S.W.2d at 144.

C. Factually Sufficient Evidence Supports Jury's Finding of No Breach of Fiduciary Duties

The starting point in a proper factual sufficiency review generally is the charge and instructions to the jury. *Golden Eagle Archery*, 116 S.W.3d at 762. In the jury-charge questions regarding failure to comply with fiduciary duties, the charge stated that Townsend's fiduciary duties were set forth in specific sections of the 2004 and 2013 ICAs as well as Texas Government Code § 802.203(a) and Townsend's Code of Ethics. Generally, as a fiduciary under the ICAs, Townsend agreed to disclose information which could materially impact an investment.[14] DPFP argues that,

[14] Section 4(a) of the ICAs provides that Townsend's duties "include, without limitation, the obligation to affirmatively disclose information of which the Consultant has actual knowledge which may materially impact the investment of the System in the Client Account (materiality to be determined based on the particular investment and without regard to the total value of [DPFP's] other assets). The Consultant further acknowledges and agrees that all actions of the Consultant shall conform to ['Chapters 551, 52 [sic] and 802 of the Texas Government Code']." Section 802.203 of the Texas Government Code sets forth the fiduciary responsibilities of an investment manager or the governing body of public retirement systems, including discharging its duties solely in the interest of the participants and beneficiaries by diversifying the investments and in accordance with documents governing the system. TEX. GOV'T CODE ANN. § 802.203(a).

despite the jury's no-breach findings, the great weight and preponderance of the evidence at trial demonstrated that Townsend breached its fiduciary duties to DPFP on the twelve real estate investments at issue (1) because Townsend knew about significant problems with the investments but failed to advise DPFP about its concerns, and (2) through inadequate disclosure of material risks associated with DPFP's use of its recourse-debt loan program.

1. Evidence on Townsend's Failure to Disclose Portfolio Concerns

To support its argument that the jury's no-breach-of-fiduciary-duty verdict is against the great weight and preponderance of the evidence, DPFP highlights excerpts from four emails by Townsend employees sent in 2010 and 2011 and testimony by R. Brown to show Townsend failed to disclose its internal concerns:

i. In an email sent in December 2010, Rosenberg reports on a presentation to the Board, stating that "[w]e were honest about problems in the portfolio" and states that "I don't know whether we explained adequately why we didn't give this assessment sooner." He also refers to the portfolio as "an unbelievable nightmare."

ii. An email sent in February 2011 indicates Rosenberg's concern that Townsend "historically" may not have provided the DPFP Board "with a clear enough picture." In context, this email refers to an apparent change in the manner in which Townsend was reporting recourse debt to DPFP.

iii. In an email from August 2011 providing feedback on a performance report, Rosenberg states that "in future PMRs, we should stop saying that the DPF portfolio is well-diversified by location. It really isn't. I should've caught this sooner."

iv. In an email chain, also from August 2011, a Townsend employee refers to the "massive bets on resi land and other freakin' dumbass investments" in DPFP's portfolio and states that Townsend was

> concerned about being blamed for the "shitty" portfolio built by Tettamant. He also refers to a presentation Townsend made to the Board the prior month demonstrating that DPFP's actual exposure after taking into account its loans was over 40% of the total plan assets. R. Brown confirmed that this employee's views on the portfolio were not expressed to DPFP.

These emails disclose both Townsend's internal concerns about the existing portfolio at that time as well as its disclosure of some of these concerns to DPFP's Board around the same time.

Other evidence in the record would support a finding that Townsend disclosed the information. Townsend representatives R. Brown and Rosenberg each testified that he had no knowledge of any information that could materially impact an investment by DPFP that he did not disclose to DPFP. DPFP's former counsel also testified that he neither witnessed nor heard about a fiduciary or contractual breach by Townsend. Townsend argued that it disclosed all important information in its quarterly reports and other documents relating to the various investments. Many of these reports and documents were discussed at trial and admitted into evidence for the jury's consideration. Evidence showed that the Board had sole investment authority for DPFP and made the investment decisions. Townsend also introduced witness testimony and evidence to support its argument that DPFP had been pursuing a high-risk, high-reward strategy that impacted the level of risk DPFP was willing to take in making investment decisions.

2. Evidence on Townsend's Failure to Disclose Risks of Recourse Loan Program

DPFP also argues that Townsend failed to disclose material risks and reservations about DPFP's use of its recourse debt loan program on investments in raw land.[15] It asserts that this program was intended to be used only for income-producing assets and that Townsend breached its fiduciary duties by failing to tell DPFP to stop using the program to purchase raw land.

R. Brown testified that the original loan program was intended to be used only for income-producing properties but that the revised program could be used for other investments and that DPFP chose to use it to invest in raw land. He further testified that the investments were recommended by DPFP's investment managers and that he did not tell DPFP to stop using the loan program to invest in raw land. In a 2014 internal email, R. Brown states that the loan program was never intended to make certain raw land investments.

However, Townsend points to evidence in the record that would support the jury's finding. The record also contains evidence that the general benefits and risks of the original loan program were disclosed to the Board in 2004 prior to the real-estate investments at issue. R. Brown testified that Townsend also disclosed this

[15] The recourse debt loan program was established in late 2004 when Townsend proposed a new loan program in which DPFP's assets would be used to guarantee loans to purchase real estate by DPFP. This recourse debt loan program allowed DPFP to save on interest payments for purchase loans by agreeing to be fully liable in the event of a default. In that case, the lender could foreclose on the defaulted property as well as recover the balance of the loan from DPFP's other assets. That loan program funded several of the twelve investments at issue in this case.

information in 2005 as well as other times. R. Brown stated that, in 2004, he discussed the differences between recourse and nonrecourse loans with the Board as well as the risks associated with recourse loans, as documented in a memo by Townsend about the original 2004 loan program. He discussed these risks with DPFP's executive director and Board in 2005 when DPFP approached a bank to expand the program. He testified that he also discussed the risks of using recourse loans for land investments. Minutes of the Board meeting adopting the expanded loan program also indicate that the Board knew the recourse nature of the expanded loan program to be used for these real-estate investments. The record contains evidence of Townsend's reports to DPFP, such as one in August 2010, describing DPFP's increased exposure to real estate from past use of the recourse loan program.

The record thus contains conflicting evidence, but it does include evidence from which the jury could find that Townsend disclosed to DPFP the risks and benefits regarding the use of the loan program.

3. Conclusion—Evidence Supports the Jury's Finding of No Breach of Fiduciary Duty

The record indicates that both parties presented evidence in support of their positions at trial. In addition to weighing the evidence, the jury was tasked with assessing the credibility of the witnesses and the weight to be given to their testimony, including any self-serving testimony. *See Golden Eagle Archery*, 116 S.W.3d at 761. We may not merely substitute our judgment for that of the jury. *Id.* Based on evidence in the record, we conclude that the jury's finding that Townsend

did not breach its fiduciary duties was not so against the great weight and preponderance of the evidence that it rendered the judgment clearly wrong or unjust.

D. Factually Sufficient Evidence Supports Jury's Finding of No Breach of Contractual Duties

DPFP also disputes the factual sufficiency of the jury's finding that Townsend did not breach its contractual duties under the ICAs. Townsend's various contractual duties in the 2004 and 2013 ICAs included obligations to prepare reports for DPFP about whether its real estate investments complied with DPFP investment guidelines. DPFP argues that Townsend breached its contractual duties to advise the Board about DPFP's noncompliance with the guidelines' prohibition on raw land deals exceeding $15 million of equity per property and the requirement that its real estate investments be diversified by economic region, property type, and investment manager.

The jury charge instructed that a failure to comply with Townsend's contractual duties must be material. As stated in the jury charge, a breach of the ICAs was material if the breach deprived DPFP of the benefit it could have reasonably anticipated from Townsend's full performance.

1. Evidence on $15 Million Equity Cap Per Property

DPFP specifically argues that the great weight and preponderance of the evidence shows that Townsend breached its contractual duties by failing to disclose that the Board was out of compliance with the $15 million equity cap. Testimony at trial demonstrated that Townsend reported on equity amounts DPFP spent on

investments and that the Board ultimately determined whether to make investments in excess of the cap. The record also contains testimony about the Board's ability to deviate from the cap. The jury heard testimony and argument about whether Townsend should have been more direct in advising DPFP not to make investments that violated its equity cap.

2. Evidence on Diversification of Real Estate Portfolio

DPFP also asserts that Townsend failed to fully disclose to the Board its concerns about the portfolio's inadequate geographic and property diversity and its concentration of assets with one investment manager. DPFP argues that Townsend's reports to the Board merely stating that DPFP was "concentrated" in certain non-major markets violated its fiduciary duties to explain the facts and the consequences to the Board rather than to include statements in lengthy reports.

The consulting agreement indicates that the Board is responsible for ensuring that DPFP's investments do not violate any DPFP documents regarding the percentage of DPFP assets which may be invested in any type of property. Testimony at trial supported Townsend's position that its reports informed the Board that it was heavily concentrated in a particular area and adequately warned that DPFP should pause and consider its investment strategy. DPFP argues that the disclosures in the reports were inaccurate or misleading at times, and that Townsend should have expressly told DPFP not to make certain investments.

According to Gottschalk's testimony relating to her review of documents relating to the twelve investments, Townsend never recommended to the Board that it not invest in those investments, advised the Board that the projects were inappropriate investments for DPFP, or advised the Board that it was overinvested with investment manager CDK. However, the record also contains evidence and testimony by R. Brown that he told DPFP that it had a highly concentrated risk exposure to a single manager, CDK. R. Brown testified that he made recommendations to mitigate the overconcentration but did not directly recommend against further deals with CDK, taking the position that this was implicit in the statement that DPFP had too much money invested with CDK.

An internal email by Townsend employees indicated that DPFP was not well-diversified geographically. The evidence, however, also included reports to the Board that contained mixed disclosures on these topics. For example, one 2006 performance report contained a map depicting DPFP's investment locations by stars of equal size. DPFP argues that this map and map title misleadingly indicated that the investments were well-diversified geographically and that the stars should have been different sizes proportionate to relative investment size, thus demonstrating that the investments were not geographically diverse. However, the next page contains a chart listing the net equity for the investments in each city, showing that 23.8% of the portfolio was located in the Dallas area and 23.4% in Boise, the cities with the largest investment.

3. Evidence on Written Recommendations

DPFP also asserts that Townsend violated the ICA provision stating that, in providing research, documentation, and other services to DPFP, Townsend would "[m]ake all recommendations definitive and in writing." The provision does not clarify when Townsend must make recommendations: Townsend argued that recommendations were not contractually required unless requested by the Board. Tettamant testified that DPFP did not request written recommendations on the twelve investments at issue. Gottschalk testified that Townsend was not required to make recommendations on investments, but that, if a recommendation was made, it must be in writing.

4. Conclusion—Evidence Supports the Jury's Finding of No Breach of Contractual Duty

The evidence and testimony in this case was voluminous and covered a long time frame, beginning prior to the investment decisions on the twelve investments at issue and continuing throughout Townsend's consulting relationship with DPFP. We may not usurp the role of the jury by reversing a verdict because we may determine "that the evidence preponderates toward an affirmative answer." *Herbert*, 754 S.W.2d at 144. Even if we were to determine that Townsend should have provided more direct warnings or robust risk disclosures to the Board regarding noncompliance with DPFP's investment guidelines, the record contains evidence from which the jury could have found otherwise. We defer to the jury's implicit determinations of credibility and the weight to be given to the evidence. *Johnson v.*

Vitt, No. 05-22-01240-CV, 2024 WL 3451512, at *2 (Tex. App.—Dallas Jul. 18, 2024, pet. filed) (mem. op.). Although we review the factual sufficiency of the evidence, we may not substitute our judgment for that of the jury. *See Golden Eagle Archery*, 116 S.W.3d at 774.

Based on evidence in the record, we conclude that the jury's finding that Townsend did not breach its contractual duties was not so against the great weight and preponderance of the evidence that it rendered the judgment clearly wrong or unjust.

E. Conclusion—Issue Two

DPFP has not shown that the evidence is so weak or that the jury's findings are so against the great weight and preponderance of the evidence that they are clearly wrong and unjust. *See Dow Chem.*, 46 S.W.3d at 242. We conclude that DPFP did not meet its burden to show that it is entitled to a new trial on factual sufficiency grounds. We decide issue two against DPFP.

IV. Statute of Limitations and Insufficiency of Evidence of Damages Not Reached

Townsend asserts two alternative bases to affirm the trial court's judgment, arguing that limitations bars DPFP's claims related to investments made between 2005 and 2008 and also that DPFP failed to present competent evidence to support its damages theory at trial. We need not reach Townsend's alternative arguments because we concluded that the trial court did not err in denying DPFP's motion for new trial.

V. Conclusion

We conclude that the trial court did not abuse its discretion in determining that the arguments of Townsend's counsel were not incurable jury arguments. We also conclude that the evidence was factually sufficient to support the jury's findings that Townsend did not breach its contractual or fiduciary duties. Accordingly, the trial court did not err in denying DPFP's motion for new trial.

We affirm the trial court's judgment.

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/Emily Miskel/
EMILY A. MISKEL
JUSTICE

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

DALLAS POLICE & FIRE PENSION SYSTEM, Appellant

No. 05-23-00099-CV V.

TOWNSEND HOLDINGS, LLC D/B/A THE TOWNSEND GROUP, RICHARD BROWN, MARTIN ROSENBERG, AND GARY B. LAWSON,, Appellees

On Appeal from the 298th Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-17-11306.

Opinion delivered by Justice Miskel. Justices Reichek and Carlyle participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellees TOWNSEND HOLDINGS, LLC D/B/A THE TOWNSEND GROUP, RICHARD BROWN, MARTIN ROSENBERG, AND GARY B. LAWSON, recover their costs of this appeal from appellant DALLAS POLICE & FIRE PENSION SYSTEM.

Judgment entered this 17th day of December, 2024.