[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10533
Non-Argument Calendar

D.C. Docket No. 1:14-cv-01891-SCJ

LESLIE J. CEPHUS,

Plaintiff - Appellee,

versus

CSX TRANSPORTATION, INC.,

Defendant - Appellant.

Appeal from the United States District Court
for the Northern District of Georgia

(April 29, 2019)

Before WILLIAM PRYOR, BRANCH, and ANDERSON, Circuit Judges.

PER CURIAM:

This case concerns a $1,875,000 judgment entered against CSX Transportation Inc. following a jury trial. Leslie Cephus, a CSX employee, injured his knee while he was working on one of CSX's trains. Cephus commenced this

action against CSX under the Federal Employers Liability Act ("FELA")[1] alleging that CSX's negligence in failing to repair the handle and doorframe of one of its trains caused the injury to his knee. After the jury verdict in favor of Cephus, CSX filed a motion for judgment as a matter of law or a new trial, which the district court denied. On appeal, CSX argues that it is entitled to (1) judgment as a matter of law because Cephus did not produce any evidence that CSX's negligence caused his injury; (2) a new trial because the district court excluded evidence relevant to the veracity of Cephus's story; (3) a new trial on damages or remittitur because the jury's future lost wages and benefits award was not supported by the evidence; and (4) a new trial because of Cephus's counsel's improper remarks to the jury. We conclude that the jury's award is greater than the amount supported by the evidence. Accordingly, we remand for remittitur to the amount supported by the evidence consistent with this opinion.

I. BACKGROUND

Unless otherwise indicated, the following facts are uncontested. Cephus began working for CSX as an engineer in 2008. At the time of trial in 2017, he was 46 years old. On May 4, 2014, he was working on a train with a two-

[1] "Every common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." 45 U.S.C. § 51.

locomotive configuration traveling from Atlanta, Georgia to Montgomery, Alabama. During the trip, he bumped his right knee while exiting the trailing locomotive. According to Cephus's trial testimony, the injury occurred when he moved the handle of the door into the unlatched position and tried to push the door open, but the door became stuck. When he returned to Atlanta later that day, he completed a personal injury form on which he indicated that his injury was caused by "tight quarters in [the] engine" and that "defective tools or equipment" had not been involved.

About a month after the injury, on June 17, 2014, Cephus filed his complaint in this case, in which he alleged that his knee was injured when the "locomotive cab door jammed and stuck during the opening process." On September 12, 2014, Cephus saw an orthopedic surgeon, Dr. Shervin Oskouei, for his knee injury. Dr. Oskouei performed a partial knee replacement on October 16, 2014. After the partial knee replacement, in February of 2016, a physical therapist named Daniel Navarro completed a functional capacity exam showing that Cephus was able to perform only light-duty work and could not return to his previous job. On September 13, 2016, Dr. Oskouei performed a total knee replacement on Cephus's right knee.

Before trial, Cephus moved to exclude evidence that he had been charged with a rule violation for using his cell phone three days before his injury under

Federal Rule of Evidence 403. CSX responded that the evidence was relevant to Cephus's credibility because it would tend to show that he anticipated CSX taking disciplinary action against him, and, therefore, that he had a motive to fabricate a work-place cause of the injury to his knee. The district court granted Cephus's motion because it found the evidence speculative and prejudicial. The trial began in January 2017, but the district court declared a mistrial three days into the trial due to what the court determined was prejudicial misconduct by Cephus's counsel.

The district court granted in part a motion in limine filed by CSX and prohibited counsel from making, inter alia, any argument that CSX should be punished.

The new trial began in June 2017. Cephus presented the testimony of a rail safety expert, Michael O'Brien, who had inspected the train where Cephus was injured. O'Brien testified that the train's doorframe had been bent as a result of a collision. O'Brien also testified that the latch assembly on the door in question was defective and that it required a significant amount of force to push the handle into the unlatched position.

Cephus also presented evidence concerning the extent of his knee injury and his prospects for returning to work. A vocational evaluator and rehabilitation expert, John McKinney, testified that Cephus's engineer job is considered "a medium- to heavy-type operation." McKinney testified that after meeting with

Cephus on five or six occasions, he had concluded that Cephus would be able to perform only sedentary- and light-type jobs. McKinney explained that those jobs would include "security guard work, assembly, hand packager, [and] cashier-type jobs," which would pay in the range of $10 to $15 per hour or $20,000 to $30,000 per year. The jury also heard the video-taped deposition testimony of Navarro, the physical therapist who performed a functional capacity evaluation of Cephus on February 1, 2016, after the partial knee replacement. Navarro testified that the artificial hardware in Cephus's knee from his partial knee replacement would prevent him from kneeling or crawling and that the same conclusion would apply with respect to a full knee replacement (which had not yet occurred at the time of this deposition). Navarro testified that based on his evaluation, he concluded that Cephus could perform only light duty work.

A former CSX employee also testified that no light duty jobs are available in the railroad locomotive class or the conductor's class. Cephus and other witnesses testified about the physical demands of the job of an engineer, including walking the length of the train, carrying heavy equipment, and climbing around and under train cars.

The jury also heard the video-taped deposition testimony of Dr. Oskouei, who performed both of Cephus's knee surgeries. Dr. Oskouei testified that it typically takes about a year to 18 months for patients to reach full recovery after

total knee replacement surgery. He added that he believed Cephus would be able to return eventually to his job at the railroad. But he conceded that he would defer to the opinion of someone who had completed a functional capacity exam in determining whether a patient would be able to return to a particular job.

Cephus also presented the testimony of an economist, Richard Thompson, in order to establish the amount of his future lost wages and benefits. Thompson was asked by Cephus's counsel to project Cephus's expected earnings from the last day he had worked until the age of 67, or 21 years. The age of 67 was selected based on what Thompson determined was the "normal retirement age." After adjusting for taxes and inflation, Thompson calculated that, had Cephus remained in his engineer job until retirement, his future earnings would have been $1,479,134 (adjusted to present value) and his benefits would have been $463,515 (adjusted to present value), for a total of $1,942,649. Cephus's counsel then asked Thompson to do a second calculation based on the assumption that Cephus would be able to obtain a job paying $10 per hour. Thompson concluded that in such a situation, Cephus's future lost wages would be reduced to $946,645.80 and that benefits would not be available in such a job.

During closing arguments, Cephus's counsel claimed that CSX had developed a "game plan" to "blame Mr. Cephus" for the injury based on CSX's May 15, 2014 investigative report prepared by Trainmasters Bailey and Milton

concerning Cephus's injury. CSX objected that the material was not in evidence, but the court overruled the objection because the report had been entered into evidence. He speculated that CSX had made Cephus fill out his personal injury form sitting at a picnic table "out in the open for everyone to see" because "they wanted him out in the open where he would be uncomfortable and intimidated by peer pressure from the other employees." Counsel also stated that one of CSX's witnesses, the trainmaster who was in charge of the investigation, "changed his testimony substantively eight times from his deposition . . . regarding his supervisor's knowledge" of the incident. He also stated that the trainmaster "didn't even care about the other crew" because he "didn't call . . . and warn the relief crew." Cephus's counsel also stated that CSX was "terminating [Cephus] because of what's going on here."

Following trial, the jury returned a verdict for Cephus. CSX moved for judgment as a matter of law, which the district court denied. The jury awarded Cephus $250,000 for emotional distress, $125,000 for past lost wages and benefits, and $1,500,000 in future lost wages and benefits. CSX then moved for judgment as a matter of law, a new trial, or remittitur. On January 12, 2018, the district court denied CSX's motion for judgment as a matter of law and motion for a new trial.

II. DISCUSSION

A. Motion for Judgment as a Matter of Law.

This Court reviews "the denial of a motion for a judgment as a matter of law *de novo* and appl[ies] the same standards as the district court." *Skye v. Maersk Line, Ltd. Corp.*, 751 F.3d 1262, 1265 (11th Cir. 2014). This Court will reverse "only if the facts and inferences point overwhelmingly in favor for one party, such that reasonable people could not arrive at a contrary verdict." *Id.* (quoting *Ash v. Tyson Foods, Inc.*, 664 F.3d 883, 892 (11th Cir. 2011)).

FELA makes railroads liable for employees' injuries "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." 45 U.S.C. § 51. Although the statute applies to acts of negligence, it "did not incorporate any traditional common-law formulation of 'proximate causation[,] which [requires] the jury [to] find that the defendant's negligence was the sole, efficient, producing cause of injury.'" *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 694 (2011) (quoting *Rogers v. Mo. Pac. R.R. Co.*, 352 U.S. 500, 506 (1957)). Rather, under FELA, a railroad has caused a "plaintiff employee's injury if [its] negligence played any part in bringing about the injury." *Id.* at 688. Thus, "[i]f negligence is proved . . . and is shown to have '*played any part, even the slightest, in producing the injury,*' then the carrier is answerable in damages." *Id.* at 703–04 (quoting *Rogers*, 352 U.S. at 506) (citation and footnote omitted). In other words,

the plaintiff has established causation if the jury could reasonably attribute the injury to the employer's negligence even if the jury could also attribute the injury to other causes. *Rogers*, 352 U.S. at 506–07.[2] Although this standard is less stringent than the common-law proximate causation standard, mere "'but for' scenarios" are insufficient. *Id.* at 704.

CSX argues that Cephus failed to meet the FELA causation standard because he did not identify the defect in the door that caused his injury. As support, CSX contends that Cephus's explanation of how his injury happened was contradicted by the testimony of his railway safety expert. Cephus testified that he moved the handle into "what [he] believed to be the unlocked position when [he] tried to go through the door," but that when he tried to push the door open, the door stuck. O'Brien testified that the handle was defective and therefore difficult to move into the unlatched position but that once he was able to do so, he was able to open the door without issue.

We do not find that this testimony is necessarily contradictory. The jury could have inferred that Cephus moved the handle into what he thought was the unlatched position but because of the defect in the handle, he failed to disengage

[2] "[T]he fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." 45 U.S.C. § 53. The jury did not find contributory negligence here.

the latch fully, and therefore, the door did not open. Alternatively, the jury could have determined that Cephus was able to move the handle fully into the unlatched position but that the slight bend in the doorframe prevented the door from opening. Although O'Brien testified that he did not have trouble opening the door once the handle was unlatched, the jury could still conclude, based in part on O'Brien's testimony that there was a defect in the doorframe, that the doorframe nevertheless contributed to Cephus's injury. Under either scenario, a reasonable juror could conclude that CSX's negligence in failing to repair the handle or the doorframe played some part in causing Cephus's injury.

CSX's theory appears to be that even if there were defects in the handle or the doorframe, they did not cause Cephus's injury and that Cephus was injured outside work and fabricated a work-related cause of his injury. The jury certainly could have agreed with CSX, particularly if it found Cephus's testimony incredible. But under FELA the fact that the jury could attribute the injury to other causes is irrelevant so long as the jury reasonably could conclude that the employer's negligence played some part. *Rogers*, 352 U.S. at 506. Further, on a motion for judgment as a matter of law, this Court will reverse the jury's verdict only if the evidence "point[s] overwhelmingly" in the opposite direction. *Skye*, 751 F.3d at 1265. Because the evidence does not point overwhelmingly in CSX's favor and the jury could have concluded its negligence contributed to Cephus's

injury, we affirm the district court's denial of judgment as a matter of law.[3]

B. Motion for a New Trial.

CSX argues that it is entitled to a new trial for three reasons: (1) the district court erred by excluding evidence that Cephus was charged with a rule violation and was facing disciplinary action; (2) the award for future lost wages and benefits was not supported by the evidence; and (3) Cephus's counsel made improper remarks to the jury that encouraged the jury to render a verdict designed to punish CSX.

i. Whether CSX Is Entitled to a New Trial Due to the Exclusion of Evidence of Disciplinary Action Against Cephus.

CXS argues that it is entitled to a new trial because it should have been permitted to introduce evidence that Cephus had been charged with a rule violation three days before his alleged injury and faced possible disciplinary action. CSX argues that such evidence shows that Cephus had a motive to fabricate a work-related cause of his injury. The district court concluded that "such evidence is based on speculation and is irrelevant."

This Court reviews "the district court's rulings on the admission of evidence for abuse of discretion." *Furcron v. Mail Ctrs. Plus, LLC*, 843 F.3d 1295, 1304

[3] Cephus argues that the jury could have found CSX negligent per se on the basis of violations of the Locomotive Inspections Act, but because we find that the jury could have reasonably concluded that CSX was negligent even absent such violations, we do not address this argument.

(11th Cir. 2016). The district court's factual findings are reviewed for clear error, and its legal conclusions are reviewed de novo. *Cambridge Univ. Press v. Albert*, 906 F.3d 1290, 1298 (11th Cir. 2018). This Court will reverse a district court's decision for abuse of discretion only when the decision affected the appellant's substantial rights. *Proctor v. Fluor Enters., Inc.*, 494 F.3d 1337, 1352 (11th Cir. 2007).

As an initial matter, Cephus argues that CSX has forfeited this argument in three ways. First, Cephus argues that CSX failed to include the transcript of the motion in limine hearing. However, that transcript has now been produced and is part of the record on appeal.

Second, Cephus argues that CSX forfeited this issue because it took the opposite position when it filed a motion in limine seeking to exclude as irrelevant evidence of its decision not to bring disciplinary action against Cephus for providing false information about the accident. We conclude that those issues are entirely separate. CSX's decision not to charge an employee with providing false information may be influenced by a number of factors and has no probative value with respect to the employee's truthfulness.

Finally, Cephus argues that CSX failed to renew its objection to the court's ruling during the second trial. However, the district court ordered that all of its rulings on the parties' motions in limine from the first trial would apply in the

second trial, so there was no reason for CSX to revisit the issue. *See Tampa Bay Water v. HDR Eng'g, Inc.*, 731 F.3d 1171, 1178 (11th Cir. 2013) ("[U]nder the Federal Rules of Evidence, it is no longer necessary for a party to renew an objection to evidence when the district court has definitively ruled on the party's motion in limine."); *see also United States v. Rosemond*, 841 F.3d 95, 106–07 (2d Cir. 2016) (holding that objection was preserved where the issue was fully litigated in the first trial, the court stated that its prior rulings remained in effect during second trial, and the party arguing for waiver did not point to any relevant change in circumstances). Having found that CSX did not forfeit this argument, we turn to the merits.

CSX argues that the district court's decision to exclude evidence of Cephus's rule violation was in error because the evidence was relevant to show that Cephus had a motive to fabricate a workplace cause of his injury since he was facing disciplinary action and could be fired from his job. Cephus argues that the evidence is more prejudicial than probative, and that CSX presented no evidence that Cephus was in fact disciplined for his rule violation or that he believed he would be. Therefore, Cephus contends, the evidence would have required the jury to speculate about whether Cephus believed CSX would bring disciplinary action.

CSX concedes that it has not taken disciplinary action against Cephus for his rule violation. As a result, the jury would be required to speculate about whether

such disciplinary action would have occurred if Cephus had not stopped working due to his knee injury, or more to the point, whether Cephus believed he would face disciplinary action. Therefore, we hold that the district court did not abuse its discretion in deciding to exclude evidence of Cephus's rule violation.

ii. Whether CSX Is Entitled to a New Trial on Damages, or in the alternative, Remittitur.

CSX argues that it is entitled to either a new trial on damages or remittitur because the jury's award of $1,500,000 for future lost wages and benefits is unsupported by the evidence presented at trial. This Court reviews the denial of a motion for a new trial for abuse of discretion. *Action Marine, Inc. v. Cont'l Carbon, Inc.*, 481 F.3d 1302, 1309 (11th Cir. 2007). In an appeal from the denial of a motion for remittitur, this Court first independently determines the maximum possible award reasonably supported by the evidence. *Frederick v. Kirby Tankships, Inc.*, 205 F.3d 1277, 1283 (11th Cir. 2000). Then "any excess must be remitted, or alternatively, a new trial may be granted on damages." *Id.*

Cephus's case on damages consisted of the testimony of Thompson, who projected Cephus's future earnings from his current job for the next 21 years, until Cephus reached the age of 67, which Thompson believed to be the average age of retirement. Based on earnings of $59,414.74 per year and a growth rate of 5.24 percent, the economist projected that after taxes, Cephus would have earned $1,479,134 post-tax in wages plus $463,515 in benefits for a total of $1,942,649.

Thompson then performed a second calculation, which assumed that Cephus would not return to his job as an engineer but would be able to obtain another job making $10 per hour. That second calculation resulted in $946,645.80 in future lost wages and $463,515 in future lost benefits for a total of $1,410,160.80. Cephus did not, however, present any calculation based on the $15 per hour job that McKinney testified he could do.

Cephus correctly argues that there was sufficient evidence from which the jury could have concluded that he would be unable to return to work at CSX. Cephus presented the testimony of an expert vocational evaluator and rehabilitation expert, John McKinney, who testified that in April 2016, before Cephus had full knee replacement surgery, that he had determined Cephus could not return to his previous job as he would only be able to perform light-duty work. Cephus presented the testimony of the physical therapist Daniel Navarro who testified that Cephus would be unable to return to his prior role at CSX because he could only perform light-duty work. Navarro's examination of Cephus occurred before his second surgery, but, as Cephus points out, Navarro explained that his opinion would be unchanged if Cephus had a total knee replacement.

However, Cephus is incorrect that there is evidence to support the assumption underlying Thompson's first calculation that Cephus would be unable to obtain other work. Indeed, Navarro and McKinney testified that Cephus could

still perform light-duty work. And McKinney explained that light-duty jobs would include "security guard work, assembly, hand packager, [and] cashier-type jobs," which would pay between $10 and $15 per hour. Cephus did not present any contradictory evidence. Thompson calculated lost wages of $946,645.80 based on Cephus's ability to perform a $10 per hour job. When combined with the benefits that Thompson testified Cephus would not have received in that job, the result is $1,410,160.80 in total lost wages and benefits.[4]

CSX argues that in the alternative to a new trial, this Court should order remittitur to $59,141.74 in lost wages and benefits because the evidence supports only the conclusion that Cephus would be absent from his job as an engineer for 18 months based on Dr. Oskouei's testimony. But that amount is not the maximum award supported by the evidence. CSX argues that the Navarro and McKinney's testimony is irrelevant because the functional capacity exam took place before Cephus's full knee replacement. However, Navarro testified that his opinion that Cephus would be unable to kneel or crawl as required for his job as an engineer would not be resolved by a full knee replacement because it was based on the

[4] CSX does not address the absence of any calculation of future lost wages based on Cephus's ability to perform a $15 per hour job. It appears that the jury's award allows Cephus to benefit from his failure to present a calculation based on the $15 per hour job even though McKinney testified that he could perform such a job. In any event, CSX has failed to raise any argument regarding this issue on appeal and thus we do not address it. *See Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 680 (11th Cir. 2014) (arguments not raised on appeal are waived).

presence of artificial hardware in Cephus's knee. The jury was entitled to credit this testimony, discredit the testimony of Dr. Oskouei, and conclude that Cephus would be unable to return to his previous job as an engineer. *See Strickland v. Norfolk S. Ry. Co.*, 692 F.3d 1151, 1154 (11th Cir. 2012) ("Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge."). Future lost wages and benefits in the amount of $59,141.74 is thus not the maximum award supported by the evidence.[5]

Based on the foregoing, we hold that the maximum amount of future lost wages and benefits supported by the evidence is $1,410,160.80. There is no evidence in the record from which the jury could have calculated $1,500,000 in future lost wages. Aside from Thompson's calculation based on the $10 per hour job, the only other calculation the jury could have made would be that based on a $15 per hour job, which only would have lowered Cephus's damages. Because the jury's award is in excess of the amount supported by the evidence, the "excess must be remitted, or alternatively, a new trial may be granted on damages." *See Frederick*, 205 F.3d at 1283–84 (reducing an award for maintenance, cure, and

[5] CSX argues that this amount would actually overcompensate Cephus for a year of disability because it does not account for taxes and the relevant measure of damages under FELA is after-tax income. *See Norfolk & W. Ry. v. Liepelt*, 444 U.S. 490, 492–95 (1980). Because we conclude that this amount is not the maximum amount of future lost wages supported by the evidence and because Thompson's calculation of future lost wages that does form the basis for the jury's award has been adjusted for taxes, we need not consider this issue.

unearned wages from $525,069 to $107,947.43—the maximum amount supported by the evidence).

iii. Whether CSX Is Entitled to a New Trial Because of Counsel's Improper Remarks to the Jury.

CSX argues that it is entitled to a new trial because Cephus's counsel's improper remarks to the jury regarding matters were unrelated to Cephus's injury and were designed to encourage the jury to punish CSX for unrelated conduct. Specifically, CSX argues that Cephus's counsel improperly encouraged the jury to render a punitive verdict in four principal ways—(1) by implying that CSX manipulated or fabricated evidence, (2) by suggesting that CSX willfully ignored the safety of its crew, (3) by suggesting that CSX tried to intimated Cephus, and (4) by suggesting that CSX was in the process of firing Cephus in retaliation for the lawsuit.

It is well established that damages under FELA are limited to compensating the plaintiff and that punitive damages are not available. *See Gulf, Colo. & Santa Fe Ry. Co. v. McGinnis*, 228 U.S. 173, 175–76 (1913); *Mich. Cent. R.R. Co. v. Vreeland*, 227 U.S. 59, 71–72 (1913). As already explained, the maximum amount of future lost wages and benefits supported by the evidence is $1,410,160.8, and although the jury's award of $1,500,000 exceeds that amount, the difference can be logically explained by the jury rounding the number up. Accordingly, we do not

conclude that the jury's award constitutes an impermissible punitive damages award. Our conclusion that the damages award was not based on a motive to punish is further bolstered by the fact that the district court instructed the jury that it "must not award any damages by way of punishment or through sympathy." *See United States v. Roy*, 855 F.3d 1133, 1186 (11th Cir. 2017) ("we must presume that juries follow their instructions").

CSX argues it is entitled to a new trial on the basis of the Georgia Court of Appeals decision in *Norfolk S. Ry. Co. v. Blackmon*, 262 Ga. App. 266, 269, 585 S.E.2d 194, 198 (2003). In that case, the court concluded that a FELA award was punitive because it exceeded the amount of the maximum award supported by the evidence, which conclusion was bolstered by the plaintiff's counsel's calls to punish the employer. *Blackmon*, 262 Ga. App. at 369–70, 585 S.E.2d at 198–99. Cephus argues that *Blackmon* is inapplicable because the jury's verdict was supported by the evidence and well below the amount Cephus requested. As an initial matter, we certainly are not bound by any decisions rendered by the Court of Appeals of Georgia. Further, as we already explained, our independent assessment of the evidence on damages has already revealed that the award was not significantly in excess of the evidence.

CSX's argument invokes a separate but related principle that a district court will set aside a jury verdict in any case if the court determines counsel's remarks

have impaired the jury's consideration of the case. In reviewing the denial of a new trial on the grounds of misconduct by counsel, "[a]n appellate court will look to the entire argument, the context of the remarks, the objection raised, and the curative instruction to determine whether the remarks were 'such as to impair gravely the calm and dispassionate consideration of the case by the jury.'" *Allstate Ins. Co. v. James*, 845 F.2d 315, 318–19 (11th Cir. 1988) (quoting *Spach v. Monarch Ins. Co.*, 309 F.2d 949, 953 (5th Cir. 1962)). However, "[t]he trial judge is given considerable discretion to control the tone of counsels' arguments and, absent an abuse of discretion, the decision of the trial court . . . should not be disturbed." *Id.* at 318. This Court "is reluctant to exercise its power to set aside [a] verdict" and will exercise such power "sparingly." *Id.* Because we must consider the entire context of counsel's statements including any objections or curative instructions, we outline the factual details of the remarks that CSX argues were improper.

Cephus's counsel stated during his opening statement "you're going to hear evidence and that evidence will reveal that there were attempts by the CSX railroad to create or manipulate evidence." CSX objected. The district court sustained the objection, gave a curative instruction that the attorneys' statements are not evidence, and directed Cephus's counsel to "move away from that." Later in the opening, Cephus's counsel mentioned that "the evidence will show you that there

is missing photographs" that CSX had not turned over. CSX objected and shortly after provided a letter showing that the photographs had been sent by email. The district court did not give a curative instruction but allowed CSX to reference the letter in its opening statement and introduce the letter into evidence later in the trial. Counsel also stated that CSX's "goal at this point is to not allow [an FRA-reportable injury] to happen." Counsel also stated that CSX was "not interested in what really happened. They were more interested in creating their story and defense." There was no objection to the last two statements.

Also in his opening, Cephus's counsel stated that CSX's trainmaster "never went and inspected the locomotive engine, the engine that Mr. Cephus was on. Trainmaster Bailey never notified the relief crew to warn or check the defective door. Moreover, trainmaster Bailey never called Mobile or New Orleans to have CSX Locomotive 7840 and the door checked out." There was no objection.

During his closing argument, Cephus's counsel stated that CSX had a "game plan" to blame Cephus for the incident. Cephus's counsel also noted that despite CSX's claim that it did not know about Cephus's injury until the lawsuit was filed, there was a letter in CSX's incident report showing that CSX knew about the injury. CSX objected that the material was not in evidence, but the district court overruled the objection because the letter was in the report which had been entered into evidence. Counsel also stated that one of CSX's witnesses, the trainmaster

who was in charge of the investigation, "changed his testimony substantively eight times from his deposition . . . regarding his supervisor's knowledge" of the incident. There was no objection.

Cephus's counsel told the jury that CSX made Cephus fill out his personal injury report at a picnic table "out in the open for everyone to see" because "they wanted him out in the open where he would be uncomfortable and intimidated by peer pressure from the other employees." There was no objection. Cephus had testified that he filled out the personal injury report at the picnic tables. Cephus's counsel also claimed that CSX was "terminating [Cephus] because of what's going on here."[6] There was no objection. Finally, counsel again stated that trainmaster Bailey "didn't call and warn the relief crew" about the train and "didn't even care about the other crew." Again, there was no objection. Finally, before the jury began its deliberations, the court instructed the jury that it "must not award any damages by way of punishment or through sympathy."

CSX argues that although it did not object to counsel's remarks in closing arguments, its failure to object should be excused because it learned during opening statements that objecting would only draw attention to the misconduct rather than stop it from occurring. This Court has recognized that an issue may be preserved where the party has made its position clear and further objection would

[6] There is no evidence suggesting that CSX was firing Cephus for filing a lawsuit.

be futile. *Jones v. Triple Z, Inc.*, 679 F. App'x 986, 987 (11th Cir. 2017). However, CSX only objected twice during Cephus's opening statement (with respect to the issues it raises on appeal), and in each instance, the district court sustained the objection. In one instance, the district court gave a curative instruction, and in the other, the court allowed counsel to introduce evidence to rebut counsel's incorrect statement. Accordingly, we do not conclude that it was apparent from what happened during Cephus's opening statement that any objection would be futile.

This Court has upheld the denial of a motion for a new trial based on improper remarks of counsel where counsel did not introduce any evidence outside the record or in violation of a ruling of the district court. *BankAtlantic v. Blythe Eastman Paine Webber, Inc.*, 955 F.2d 1467 (11th Cir. 1992). In that case, PaineWebber introduced evidence of BankAtlantic's chairman's compensation, referred to him as a "corporate raider," and claimed that he had "cooked the books." *Id.* at 1474. This Court explained that while some of the arguments could be viewed as improper, they did not reference matters outside the record. *Id.* Further, the references to the chairman's income were relevant to support PaineWebber's defense and show bias. *Id.* at 1474–75. On the other hand, this Court has affirmed a district court's decision to grant a new trial where counsel's closing argument focused on a theory eliminated during pretrial conference.

McWhorter v. City of Birmingham, 906 F.2d 674, 677 (11th Cir. 1990).

This Court has also recognized that whether the district court gave a curative instruction is critical to determining if the court abused its discretion in not granting a new trial. *Allstate Ins. Co.*, 845 F.2d at 318–19. Counsel in that case remarked during his closing argument that if the jurors had read about the facts of the case in the paper they would say "[w]hy didn't somebody do something about this? That's why my insurance premiums are so high." *Id.* at 318. Counsel then appealed to the jury to do something about it. *Id.* This Court concluded that the statement could impair the jury's dispassionate consideration of the case by implying a basis for a verdict other than the evidence presented. *Id.* at 319. Further, this Court emphasized that "[c]ounsel's argument was amplified by the court's denial of the appellants' objection and refusal to instruct the jury." *Id.* On the other hand, when the trial court does give a curative instruction, this Court has determined that the instruction may render potentially prejudicial remarks harmless. *Cote v. R.J. Reynolds Tobacco Co.*, 909 F.3d 1094, 1105 (11th Cir. 2018).

We recognize that some of Cephus's comments arguably violate the district court's order on the motion in limine prohibiting counsel from making any argument that CSX should be punished. But CSX did not object to the statements made during Cephus's closing argument and thus failed to give the district court an

opportunity to sustain the objection and provide immediately a curative instruction. In any event, the district court did instruct the jury before its deliberations that it "must not award any damages by way of punishment or through sympathy." Thus, although we find that counsel's remarks were improper, based on the failure of CSX to object and the trial court's curative instruction, we conclude the district court did not abuse its discretion in not ordering a new trial.

III. CONCLUSION

We conclude that CSX is not entitled to a new trial based on the trial court's decision to exclude evidence of a potential disciplinary action or counsel's improper remarks. Because we conclude that the maximum amount of future lost wages and benefits is $1,410,160.80, rather than the $1,500,000 awarded by the jury, we vacate that portion of the judgment entered on the jury's verdict and remand for the district court to order a remittitur reducing the total award of damages to $1,410,160.80, or, at Cephus's option, to grant a new trial on the question of damages. We affirm the judgment as to all remaining issues.

AFFIRMED in part, VACATED in part, and REMANDED.