

No. 08-0175

IN THE
SUPREME COURT OF TEXAS

WHIRLPOOL CORPORATION

Petitioner,

v.

MARGARITA CAMACHO, ET AL.

Respondents.

**RESPONDENTS'
BRIEF ON THE MERITS**

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STATEMENT OF THE CASE

<i>Nature of the case:</i>	Product liability case arising from a fire that started in a dryer and killed a 15-year-old boy.
<i>Trial court:</i>	370 th District Court, Hidalgo County, Texas, the Honorable Noe Gonzalez, presiding.
<i>Jury verdict:</i>	Jury found a that a design defect caused the fire, and found damages on behalf of the surviving family members of the deceased boy.
<i>Trial court disposition:</i>	Judgment entered on jury verdict.
<i>Court of Appeals</i>	Thirteenth Court of Appeals
<i>Court of appeals disposition</i>	Affirmed.
<i>Court of appeals opinion</i>	<i>Whirlpool Corp. v. Camacho</i> , 251 S.W.3d 88 (Tex. App.—Corpus Christi-Edinburg 2008, pet. filed). Opinion by Chief Justice Valdez, joined in by Justice Garza. ¹

STATEMENT REGARDING JURISDICTION

Whirlpool’s sole basis for jurisdiction is that the court of appeals opinion raises issues that are important to the jurisprudence of the state. As this brief demonstrates, the court of appeals opinion is consistent with well-established principles of Texas jurisprudence. It is Whirlpool that is asking the Court to go outside the jurisprudential mainstream and make new law.

¹ The third member of the panel during oral argument, Justice Hinojosa, left the court while the case was pending.

Experts and Causation

This Court has had numerous opportunities in the last two decades to write about experts and causation in product liability litigation. The court of appeals opinion is consistent with those opinions, especially with this Court's most recent writing on experts in fire causation, *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572 (Tex. 2006). That case reversed a causation finding because of unreliable expert testimony, and provided a blueprint for the types of supporting evidence that would have made the expert opinion reliable. Even though this case was tried before the *Tamez* opinion was written, the evidence in this case remarkably tracks this Court's blueprint in *Tamez*. *See infra* pp. 9-13. The only reason to grant on this point would be to reiterate the blueprint in *Tamez*, and point out what happens when the previously published factors are complied with.

Whirlpool asks this Court to rigidly declare that every case involving experts must be decided in accordance with the six *Robinson* factors. In prior decisions, the Court has repeatedly embraced a more flexible approach, based on the circumstances of the case. *See infra* p. 14.

Thus, Whirlpool is asking this Court to change existing law, not the Camachos.

Spoliation

The court of appeals opinion is consistent with the jurisprudence of this Court limiting spoliation sanctions to cases in which the trial court determines, in its discretion, that there was intentional destruction of relevant evidence, which was demonstrably prejudicial to the

other party. *See infra* pp. 36-42. That did not happen in this case — in fact, the record shows quite the opposite. *See infra* pp 34-36.

Whirlpool asks this Court to ignore current Texas cases and adopt a blanket rule preventing anyone from conducting a fire scene investigation until all possible responsible parties can participate — even though parties cannot be identified until there has been an investigation. *See infra* pp. 39-40.

Again, Whirlpool is asking this Court to change existing law, not the Camachos.

Mental anguish and loss of companionship damages

The court of appeals opinion follows existing precedent from this Court that allows juries to infer mental anguish and loss of companionship damages from the death of a family member. *See infra* pp. 42-43.

Whirlpool asks this Court to apply the *Saenz* standard for reviewing mental anguish damages in cases not involving physical injuries to all cases, including this one where family members were present at the scene where a son and brother burned to death.

Again, Whirlpool is asking this Court to change existing law, not the Camachos.

The real issues in this case are unwarranted evidentiary challenges, which are case-specific and not likely to reoccur. The petition should be denied.

ISSUES PRESENTED

Causation and experts

1. Was the evidence legally sufficient to prove that the fire was caused by a design defect in the dryer when the Camachos offered expert testimony supported, not only by experience, but by a variety of tests summarized in a government report on causation of dryer fires, inspection of an exemplar dryer, objective evidence from the fire scene, and eyewitness testimony?
2. Should this Court require experts to base every step in their opinions on tests, or can expert testimony be based on a variety of objective evidence, including studies and tests, inspection of the fire scene, inspection of an exemplar product, and objective evidence to eliminate other causes?
3. Should this Court change the law to replace the standard of review for legal sufficiency challenges from the well-established standard most recently articulated in *City of Keller v. Wilson*, 168 S.W.3d 802 (Tex. 2005), and replace it with a de novo standard of review?
4. When experts present conflicting testimony, should this Court disregard the expert testimony supporting the verdict and give conclusive effect to the testimony that is contrary to the verdict?
5. When an expert provides a reliable opinion on a safer alternative design, supported by a design actually used by Whirlpool in previous dryers, should this Court disregard that

testimony and give conclusive effect to a contrary expert opinion that was supported by nothing?

Spoliation

6. Did the trial court properly exercise its discretion by declining to dismiss the case or give a spoliation instruction when the fire scene evidence was not deliberately destroyed, but was carefully preserved?

7. Should this Court adopt a new standard preventing parties from conducting fire scene investigations until all potential parties have been identified and invited to attend the investigation?

Damages

8. Is there evidence to support the jury's award of mental anguish and loss of companionship damages to the surviving mother and brothers of a 15-year-old boy who burned to death in the family home as the others watched helplessly?

9. Should the *Saenz* factors be expanded to apply to cases involving the wrongful death of a family member?

STATEMENT OF FACTS

The fire and the rescue attempts

The Camacho family experienced one of the worst nightmares any family can endure: waking up in the middle of the night with their house on fire. The horror was compounded when the family realized that their 15-year-old son and brother was trapped, his bedroom cut off from the rest of the family by the fire. Whirlpool reports the family's response to this situation by saying: "Mr. and Mrs. Camacho fled the home with their sons Salvador, Asael and Abisai. . . . Joab did not get out, and perished." Pet. BOM at 2. This terse account hardly does justice to what the Camacho family experienced that night.

Joab Camacho was sleeping in his bedroom on the east end of the family's home when fire started coming out of the family's Whirlpool dryer. RR 7:152-54, 29; 10:75. Because the dryer was located in the hallway to Joab's room, the smoke and fire coming out of the dryer prevented family members from getting past the dryer to Joab's room. RR 10:75, 57-58. From outside the trailer home, Joab's brother, Salvador tried to enter Joab's room through three different doors or windows, but there was "a lot of smoke . . . real hot" coming out of the room, and he was unable to get inside. RR 10:59-61. He called out to Joab, urging him to crawl out through a window. RR 10:61-62. Joab responded to him, but already suffering from smoke inhalation, was "mumbling, like he was real tired." RR 10:62. Joab's father, Santos, asked to be sprayed down with water and stuck half of his body into a window, RR 10:76-77, but soon became overcome with smoke and heat and Salvador had to pull him out. RR 10:61. Salvador's 12-year-old brother, Asael, also tried to enter Joab's

room, and Salvador restrained him as well. RR 10:63. Despite their combined efforts, the family was never able to get to Joab, and he died in the fire as they watched helplessly.

Whirlpool's unsupported time line

Whirlpool's statement of facts makes representations about pre-fire timing that were disputed, or are not supported by the record. First, Whirlpool asserts that Mrs. Camacho started the dryer around 10:00 p.m., Pet. BOM at 1. Salvador Camacho testified that when he went to sleep at 10:30, his mother had not even started **washing** clothes. RR 10:53-54. Whirlpool's assertion is based on notes from a post-fire interview with Mrs. Camacho, which she did not even recall giving when asked about it at trial. RR 7:167. In her trial testimony, Mrs. Camacho did not remember when she put the clothes in the dryer or how long she set the dryer to run. RR 7:168, 170. She testified that "not too long of a time elapsed" between when she opened the dryer door after the clothes had been washed dried, and when she first smelled smoke and saw the dryer on fire. RR 7:154.

Second, Whirlpool asserts that the dryer's heating element was off from before 11:00-11:30 p.m. until the fire was reported at 1:26 a.m. Pet. BOM at 1 (citing RR 10:111-14; RR 9:147, 171-72). Whirlpool ignores the statement of Special ATF Agent Savage, who inspected the scene and concluded that the dryer was "operating" at the time of the fire. PX 102 at 4. Further, Whirlpool's citations are not evidence about how long the heating element was off.² The only evidence is that she started *washing* sometime after 10:30. RR 10:53-54.

² The first record citation is to the testimony of Whirlpool's own expert, who says nothing about the length of time the dryer was off. *See* RR 10:111-14. The other two record citations are to the testimony of the Camachos' expert, who explains why the fire could have started when the dryer was on, but did not become noticeable until the dryer cycle had concluded—again, nothing about how long the dryer was off. *See* RR 9:147, 171-72.

There is no evidence about how long after 10:30 she began the wash cycle, how long the wash cycle ran, or how long she waited to transfer the clothes from the washer to the dryer. It is impossible to say exactly when she would have opened the dryer after the drying cycle was completed— except that it could not have been completed by 11:00-11:30.

Expert testimony about the cause of the fire

The Camachos presented two experts on causation. Eduardo Sanchez, a certified fire investigator, concluded that the fire originated in the cabinet of the Whirlpool dryer. RR 8:111-12. Judd Clayton, an electrical engineer, testified that the dryer fire was caused by a design defect – the use of a corrugated lint tube instead of a smooth tube. RR 9:134-5, 148. The corrugated tube allowed lint to be trapped in the tube, forced to escape into the dryer cabinet, and ignited by the heater element, causing a fire in the dryer drum. RR 9:148.

Evidence that the defect in the dryer caused lint to escape and become airborne in the dryer cabinet.

The opinion that the corrugated transport tube caused lint to become trapped in the tube, and then to escape and become airborne in the dryer cabinet, was supported by several types of evidence. First, Clayton examined an exemplar dryer of the same model. RR 9:73. He found that the lint “gets hung up” on the corrugated edges. RR 9:130, 134-35. As a result of that blockage, lint had escaped into the dryer cabinet. RR 9:135.

Second, tests were conducted by the Consumer Product Safety Commission, to investigate conditions that may have led to 15,600 dryer fires in 1998. PX 287 at iii. Those tests supported Clayton’s opinion that design features could cause lint to accumulate and escape into the dryer cabinet. RR 9:139-141; PX 287 at 69. Although tests were conducted

on a variety of dryer design, Clayton relied on the portion of the Report that dealt with a similar design to Whirlpool's Easy Clean 100. RR 9:139-140. That design demonstrated lint accumulation after only 100 cycles. PX 287 at 69. As a result, lint leaks at the seal between the lint chute and the blower housing, causing lint to be distributed inside the dryer cabinet where it is not supposed to be. RR 9:135, 141, PX 287 at 108.

Evidence that the fire was caused by lint ignited in the dryer

The Camachos' experts concluded that lint igniting in the dryer caused this fire. RR 8:111-12, 137; RR 9:147. There was evidence of burnt lint adhering to the heating element in the Camachos' dryer. RR 9:97-99; 10:48-9; PX 180. There also was evidence of charred lint by the heating element in the exemplar dryer. RR 9:145. Clayton participated in tests demonstrating that lint coming into contact with the heating element in the Easy Clean 100 will burn. RR 9:149-51; PX 289. The CPSC Report also demonstrated that the heater can ignite the airborne lint, which then ignites material downstream from the heater. RR 9:146.

The opinion that the fire began in the dryer was supported by the objective observations of an investigator not aligned with either party, ATF Special Agent Savage. He observed "severe damage to the interior of the dryer and the interior of the drum." PX 102 at 4. The origin of the fire inside the dryer also was supported by three eyewitnesses who saw the fire coming from the dryer. RR 7:155; 10:57, 75.

Sanchez's conclusion that the fire began in the dryer was based on evidence gathered while inspecting the fire scene for five days. 8 RR 92-95. He observed physical markings, which indicated that the fire started above the floor. RR 8:54-56, 118, 128. Evidence from

the burn pattern demonstrated that the fire was “internal to the drum.” RR 9:103. The pattern left by heat emerging from the top of the heater box reflects that it was escaping to the upper parts of the dryer. RR 9:103.

Evidence ruling out alternate causes for the fire

Sanchez and Clayton ruled out other plausible causes for the fire, including Whirlpool’s hypothesis that the fire was caused by arson or electrical failure. Investigations using trained dogs showed no indication of gasoline or hydrocarbons in the area of the dryer or anywhere else inside or outside the home. RR 8:68-74, 82-84, 90. Clayton ruled out electrical failure in the dryer receptacle because there was no indication of any thermal event that would have ignited the fire. RR 9:88-90. He ruled out wiring failure because there was no pinpoint damage in the wiring. RR 9:92-95. He also explained that a fire could not have started below the floor under the dryer or in the wall behind the dryer, as Whirlpool suggested, because the wire and the circuits in the control panel of the dryer were energized at the time of the fire, and that voltage would have been terminated by a fire below the floor or behind the wall. RR 9:93.

Fire investigation and evidence preservation

Although Whirlpool argues that the fire scene was altered before its experts inspected the scene, and implies that the Camachos’ experts destroyed relevant evidence, the undisputed proof established that the scene was substantially altered by firefighters and criminal investigators **before** the Camachos’ experts arrived. RR 8:23-24, 31. The dryer itself was damaged by the fire, and then thrown from the trailer during fire suppression and

overhaul efforts. RR 6:55, 68; 7:105. Then the dryer was disassembled by fire department and criminal investigators in an effort to determine the cause of the fire before the Camachos' experts ever saw it. RR 7:62-63, 103-04; 8:50-51, 59; 9:50. The only thing the Camachos' experts did to the dryer was to remove it and its components from the scene to protect them from disappearance or further alteration. RR 9:19-20, 46.

The site investigation by the Camachos' experts does not reflect a desire to destroy evidence, but, instead, a painstaking effort to preserve evidence. They began by taking over 600 photographs and videotaping their initial walkthrough — before moving anything. RR 8:24, 32. Every square foot of the site was documented in its original state by photographs or videotape, or both. RR 8:158. They took detailed written notes, all of which were admitted into evidence. RR 9:8.

Whirlpool alleges that debris was removed from the fire scene. Yet the evidence is undisputed that, “There was a lot of debris that obviously had been removed by the firefighters and/or investigators that were at the scene before [the Camachos' experts] got there.” RR 8:31. Whirlpool specifically talks about debris removal in the laundry room, but that room had been “fairly well cleaned out” by 10:30 on the morning the of fire. RR 7:111. The debris that remained by the time the Camachos' experts arrived on the scene was photographed, videotaped, and sifted, and every piece that did not sift through a half-inch sifter was identified, tagged, bagged, and preserved for inspection. RR 8:24, 32, 70-71, 84, 91-92, 158; 9:6. Whirlpool's expert admitted that “20 bins, big plastic bins” of debris were retained, and the rest of the debris was retained in piles close to the structure. RR 12:6.

Although some of this non-catalogued debris was cleared from its original location to study the origin of the fire, “[t]he debris was still there.” RR 8:165.

SUMMARY OF ARGUMENT

Experts and Causation. The cause of the fire was disputed by two teams of experts. Whirlpool’s experts suggested that the fire started below the mobile home; the Camachos’ experts pointed to objective evidence that it began in the dryer. Whirlpool’s experts speculated that the fire may have been started by arson or electrical malfunction; the Camachos’ experts pointed to evidence ruling out those alternate causes. Whirlpool discusses the origin of the fire and other possible causes in its statement of facts, but barely touches on those issues in its argument. The evidence overwhelmingly proved that the fire originated in the dryer and was not attributable to Whirlpool’s alternative causes.

There also was legally sufficient evidence that the fire was caused by a dryer defect. Many of the questions here were previously answered in *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 579-81 (Tex. 2006), where this Court gave a roadmap for the reliability of expert opinions on fire causation. The *Tamez* opinion identified types of reliable fire causation evidence, all of which were missing in that case: studies and tests, identification of a specific defect, inspection of the fire scene, observations of an exemplar product, and elimination of other causes. *Id.* at 580-81. All of those types of evidence were present here. Whirlpool incorrectly asserts that this case is a “published roadmap” to evade this Court’s *Robinson* jurisprudence. Instead, this case provides an example of what happens when the evidence closely follows the roadmap that this Court published in *Tamez*.

Safer alternative design. The Camachos' expert proposed that using a smooth lint tube would be a safer design than the corrugated tube used in this dryer, because a smooth tube would catch less lint. The smooth-tube design previously was used by Whirlpool. Whirlpool's expert could not, and did not dispute that a smooth tube would catch less lint than a corrugated tube because it had fewer edges to catch the lint. Although Whirlpool's expert testified that the earlier smooth-tube model had a problem with disconnecting from the housing, the same expert conceded that Whirlpool had fixed that problem by improving the design of the connection to the housing. The evidence was legally sufficient to establish that a smooth tube was a safer, feasible alternate design.

Spoliation. There was no spoliation because there was no evidence that the Camachos destroyed any relevant evidence at the fire scene. Whirlpool complains that the fire scene was not pristine when its experts inspected it, but ignores the fact that the scene was substantially altered by the fire, firefighters, and government investigators before the Camachos' experts ever arrived. When the Camachos' experts did arrive, they conducted extensive photographic and videotape documentation before touching anything, and then carefully identified and preserved every object that did not sift through a half-inch sifter. Significantly, none of Whirlpool's five experts testified that he was unable to reach conclusions or render opinions because of the condition of the fire scene.

Damages. A reasonable and fair-minded jury could have awarded mental anguish damages to Joab Camacho's mother and three brothers as a result of their being present in the burning home that took the life of their son and brother, their participation in the

unsuccessful rescue efforts, and their having to watch and listen helplessly as their son and brother burned to death. The law understandably allows jurors to infer mental anguish from the death of a family member.

ARGUMENT

I. The expert testimony complied with the *Daubert/Robinson* blueprint for reliable expert testimony that has been provided by this Court.

Whirlpool incorrectly depicts this is yet another case in which the expert testimony is based on nothing more than the expert's subjective, unsupported opinion. Yet that description does not fit here. This is a case in which the experts' opinions were based on substantial, objective evidence: tests, a published government report, observations of an exemplar product, and objective evidence of the fire scene demonstrated by photographs.

A. The expert opinions on fire causation were not based on the experts' subjective opinions, but were based on the types of objective evidence identified by this Court in *Tamez*.

Whirlpool argues that this case creates a blueprint to evade *Robinson* by allowing expert testimony to be based on mere "experience" and "observations." Pet. BOM at 11. This argument is wrong in two respects. First, the record proves the opinions were based on substantial objective support beyond mere experience: eyewitness reports, scene inspections, dryer inspections, dryer tests, and a published government report about the fire risks posed by this type of dryer design.

Second, this case is no blueprint to evade *Robinson*, but rather follows this Court's own blueprint for complying with *Robinson* to establish fire causation. In *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 579-81 (Tex. 2006), this Court held that expert opinions were

unreliable because key types of support were missing: an inspection of the burned remnants, identification of a particular defect that was a source of the fire, studies to support the expert's conclusion, and reasoning to rule out other theories of ignition. *Id.* All of the types of evidence missing in *Tamez* were present here.

(1) Studies and tests. In *Tamez*, the expert “did not specify any studies that supported his conclusion as to the specifics involved in the accident, and none were offered as evidence for the trial court to consider in evaluating his testimony.” 206 S.W.3d at 580. Here, expert opinions were supported by studies conducted – and published – by the CPSC, a government organization. *See* PX 287. The CPSC tests supported Clayton's opinions that, in a dryer with design components similar to this dryer, lint will accumulate, lint will escape the transport tube into the dryer cabinet, lint can be ignited by the heating element, and lint can ignite other material downstream from the heating element. RR 9:139-41; PX 287.

Other tests were conducted by one of the Camachos' experts, which demonstrated that when accumulated lint comes into contact with the heating element, the lint will ignite and burn. RR 9:149-51; PX 289.

(2) Identification of a specific defect. In *Tamez*, the experts “did not identify a particular alleged defect of the tractor's fuel system that he concluded was the source of a diesel fuel leak that initiated the fire.” 206 S.W.3d at 580. Here, Clayton identified a specific defect – the corrugation of the lint tube. RR 9:148. Clayton's examination of the exemplar dryer demonstrated that corrugation results in the escape of lint into the cabinet where it migrates to the heating element. RR 9:134-5, 148.

(3) Inspection of fire scene and burned dryer. In *Tamez*, the expert “did not testify that he inspected the remnants of the burned tractor and trailer.” 206 S.W.3d at 580. Here, the experts’ opinions were based in part on their extensive five-day inspection of the fire scene and the Whirlpool dryer. *See generally* RR 8:18-128; 9:79, 82-106. For instance, the inspection uncovered burnt lint adhering to the heating element of the Camachos’ dryer – evidence that lint had migrated to the heating element. RR 9:97-98; 10:48-9; PX 180. The inspection also uncovered physical evidence that objectively proved that the fire had begun in the dryer, such as physical markings left by the fire on floorboards, the burn pattern, and the pattern left by heat emerging from the top of the heater box in the dryer. RR 8:54-55, 128; 9:103.

A completely independent inspection of the fire scene was conducted by ATF Special Agent Savage. His observation of severe fire damage inside the drum of the dryer supported the opinion that the fire began inside the drum. PX 102 at 4.

(4) Observations of an exemplar product. In *Tamez*, the expert “did not testify to having analyzed, tested, or investigated the characteristics of batteries like the battery in the wrecked tractor to support his opinion.” 206 S.W.3d at 580-81. Here, Clayton examined an exemplar dryer of the same model to address Whirlpool’s arguments that it is impossible for lint to leak into the dryer cabinet, or for it to be burned by the heater element. The exemplar dryer demonstrated that lint actually accumulated in the corrugated hose, and then escaped into the dryer cabinet. RR 9:130, 134-35. Further, lint in the exemplar had been drawn to the heating element and charred. RR 9:145-46; PX 220, 227, 279, 281.

(5) Elimination of alternate causes. In *Tamez*, the expert “failed to set out any process by which he excluded other sources for ignition of the diesel fuel such as mechanical sparks which could be generated when parts of a truck make contact with the pavement, or ignition of the cargo fuel” 206 S.W.3d at 581. Here, the experts eliminated alternate causes, including the two causation theories suggested by Whirlpool: (1) arson caused by gasoline under the home, and (2) electrical malfunction. *See infra* pp. 19 - 20.

(6) Robinson factors. In *Tamez*, the defendant pointed to the plaintiff’s expert’s “inability to demonstrate at least one of the *Robinson* factors” 206 S.W.3d at 579. Here, the expert testimony demonstrated multiple *Robinson* factors.

First, as described above, the different parts of the causation theory were supported by testing. *See supra* pp. 10, *infra* pp. 22-27; *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 557 (Tex. 1995).

Second, the scientific technique did not rely on the subjective interpretation of the expert. *Id.* at 557. Both Sanchez and Clayton testified that their conclusions were supported by objective data such as photographs, reports, and tests. *See generally* RR 8:6-129 (Sanchez’s direct examination); RR 9:62-150 (Clayton’s direct examination). Although Whirlpool asserts that Clayton’s theories rest on “subjective interpretations,” Pet. BOM at 15, Whirlpool ignores the fact that Clayton’s observations were supported by particularly objective evidence, such as photographs of the dryer. *See, e.g.*, 9 RR 129-135; PX 219-29, 239-40, 242, 245-46, 248, 253-54, 259, 262-63, 268, 277-83, 286. Clayton did not subjectively interpret data when he concluded that lint was escaping the lint transport tube

into the dryer housing and was being charred by the heater element; rather, he objectively demonstrated this fact to the jury through photographs and the exemplar itself. *See* RR 135, 145-46; PX 227, 220, 279.

Third, a court may consider whether a theory has been subjected to peer review and publication. *Robinson*, 923 S.W.2d at 557. Here, Clayton’s opinions about the dryer defect were supported in large part by the published government report of the CPSC about dryers of the same design as the Whirlpool dryer. *See supra* pp. 10, *infra* pp. 22-27.

(7) Other reliable support. The experts’ conclusion that the fire began in the drum of the dryer also was supported by the testimony of three eyewitnesses, who all saw fire coming from the dryer. RR 7:155, RR 10:57, 75. This eyewitness testimony confirmed the extensive physical evidence that the fire originated in the dryer.

B. The court of appeals applied *Gammill* correctly.

Whirlpool’s brief also suggests that the court of appeals opinion is a model for (1) using the *Gammill* “analytical gap” test to circumvent the *Robinson* factors, and (2) using an expert’s experience and observations as a replacement for *Robinson* factors such as testing. Pet. BOM at 11. Whirlpool is wrong for two reasons. First, it was not improper for the court of appeals to focus on the *Gammill* “analytic gap” test, particularly when Whirlpool’s own court of appeals’ briefing focused primarily on alleged “analytic gaps.” Second, Whirlpool’s framing of this issue as a choice between tests is illusory because the expert opinions were based on a broad range of objective support, including testing.

1. The court of appeals does not err in applying the *Gammill* “analytic gap” test, particularly when Whirlpool’s own briefing focused on that test.

The court of appeals opinion stated that it was focusing on the *Gammill* analytic gap test because Whirlpool’s briefing emphasized analytic gap arguments. *See Whirlpool Corp. v. Camacho*, 251 S.W.3d 88, 96 (Tex. App.—Corpus Christi 2008, pet. filed) (finding “that Whirlpool’s argument primarily relies on the analytical gap test.”). In the court of appeals, Whirlpool focused almost entirely on the “analytical gap” test, mentioning the *Robinson* factors only as an afterthought. *See* Br. Appellant at 12-13, 16-24, 26-27, 29-30 (“analytic gap” arguments); *Id.* at 31-34 (*Robinson* factor arguments).

Even if Whirlpool had not invited the court of appeals’ emphasis on the *Gammill* test, the court did not err in that approach. This Court repeatedly has recognized that the six *Robinson* factors are not appropriate in every case, particularly where the expert’s opinion is based on knowledge, training, or experience. *See, e.g., Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 726 (Tex.1998); *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 579 (Tex. 2006); *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 39 (Tex. 2007). Rather, this Court has applied, and should continue to apply, a flexible approach. *Tamez*, 206 S.W.3d at 579. Under any standard for reliability, there must be “some basis for the opinion offered to show its reliability.” *Ledesma*, 242 S.W.3d at 39 (citation omitted).

2. The purported choice between legal tests is unimportant in this case because the expert opinions were based on a large body of objective support.

The court of appeals opinion also cannot be read to eliminate the need for experts to base their opinions on more than experience. The experts' opinions in this case were based on a broad range of objectively verifiable information that satisfied different *Robinson* factors, including:

- the CPSC tests and published government report, PX287;
- Clayton's videotaped ignition tests, RR 9:149-51, PX 289;
- the examination of the exemplar dryer, which was extensively photographed and made available to the jury to examine, RR 9:134-35, 145-47, 9 RR 129-135; PX 219-29, 239-40, 242, 245-46, 248, 253-54, 259, 262-63, 268, 277-83, 286; and
- objectively verifiable information, which was photographed, from investigation of the site and the Camachos' dryer, RR 8:6, 54-56, 62-63, 68-74, 84, 90, 89-95, 103, 111-13; 9:89-95, 97-98.

In this case, there is no need to choose between the tests in *Gammill* and *Robinson* because the experts' opinions were based on a wide variety of support that complies with both tests. The fact that the court of appeals opinion did not focus on the *Robinson* test does not create an issue of jurisprudential importance.

C. The court of appeals properly applied the "abuse of discretion" standard of review to admissibility questions, but not to legal sufficiency questions.

Whirlpool asserts that this case conflicts with other decisions because the court of appeals used an "'abuse of discretion' standard in reviewing Whirlpool's legal sufficiency challenge." Pet. BOM at 10. This is simply not true. In the court of appeals, Whirlpool

raised complaints about both the admissibility of evidence and sufficiency of the evidence.

The court of appeals used the correct standard of review for each:

We review the trial court's decision to admit or exclude expert evidence for an abuse of discretion.

Whirlpool, 251 S.W.3d at 96.

In conducting a legal sufficiency review, we credit evidence supporting the judgment if reasonable jurors could and disregard contrary evidence unless reasonable jurors could not. *City of Keller*, 168 S.W.3d at 827.

Id. at 100. The court of appeals used an abuse of discretion standard only to review Whirlpool's evidentiary complaints, not its legal sufficiency complaints.

D. The court of appeals correctly applied *City of Keller* in holding that Whirlpool's own expert failed to conclusively disprove the expert testimony offered by the Camachos.

Whirlpool asserts that the court of appeals disregarded *City of Keller* by failing to consider whether the testimony of Whirlpool's experts conclusively disproved assumptions made by the Camachos' experts. Pet. BOM at 17-18. To the contrary, the court of appeals carefully reviewed the evidence and rejected Whirlpool's arguments, not by disregarding *City of Keller*, but by concluding that Whirlpool had failed to disprove the disputed facts conclusively. All of the evidence Whirlpool asserts was "uncontroverted," in fact was controverted by reliable evidence.

First, Whirlpool asserts that its expert's tests proved that lint in this dryer cannot be drawn up to the heater box. Pet. BOM at 6. Yet the CPSC studies proved that lint could escape into the dryer cabinet. RR 9:140-141; PX 287 at 69. Plus, in both the Camachos'

dryer and the exemplar, lint **had** been drawn from the cabinet into the heating element and **had** burned. RR 9:97-98, 145-47; PX 220, 227, 229..

Second, Whirlpool asserts that its expert's tests proved that burning lint could not ignite the tumbling clothes in the dryer drum. Pet. BOM at 6-7. Yet the CPSC Report demonstrated that the dryer's heater can turn airborne lint into embers that, in turn, ignite material downstream from the heater in the dryer's drum. RR 9:146. Further, there was objective evidence that this actually had occurred in the Camachos' fire because the fire originated from the clothes inside the drum. This evidence included ATF Agent Savage's observation of severe damage inside the dryer drum, PX 102 at 4, eyewitness accounts of fire coming from inside the drum, RR 7:155; 10:57, 75, and objective burn patterns indicating that the fire had originated inside the drum, RR 8:54-55, 9:103. Importantly, Whirlpool has never offered any other explanation for how the fire could have originated in the drum.

Whirlpool's expert testimony was not uncontroverted. This "battle of the experts" presents only a conflict in the evidence – not a conflict in the law. When conflicting positions are both reasonably supported, it is the role of the finder of fact to resolve conflicts in the evidence. *City of Keller v. Wilson*, 168 S.W.3d 802, 820–21 (Tex. 2005).

II. Legally sufficient evidence supports the verdict on causation.

More than a scintilla of evidence exists when the evidence supporting the finding rises to a level that "would enable reasonable and fair-minded people to differ in their conclusions" *City of Keller*, 168 S.W.3d at 822 (quoting *Burroughs Wellcome Co. v.*

Crye, 907 S.W.2d 497 (Tex.1995)). Here, more than a scintilla of evidence supported the verdict.

A. Legally sufficient evidence proved the defective dryer design caused the fire that killed Joab Camacho.

Whirlpool's argument barely challenges the legal sufficiency of two of the most important steps in the experts' reasoning: the location where the fire started, and the elimination of other possible causes. First, reliable evidence supports the experts' conclusion that the fire began in the dryer cabinet and escaped from the dryer drum. *See infra* pp. 27-31. Second, reliable evidence supports the experts' conclusion that all the other suggested possible causes – such as arson and electrical failure – did not cause this fire. *See infra* pp.19-20.

Although these two conclusions do not end the inquiry, they make it easier. Because there was legally sufficient evidence that the fire began in the dryer, and other possible causes were eliminated, the question is how much additional reliable support is required to support the experts' conclusion that the fire resulted from a dryer defect.

Whirlpool's answer is that the experts must perform tests that completely recreate every step of the fire, using an identical dryer operated under exactly the same circumstances. The problem with Whirlpool's proposed requirement is that testing cannot always recreate a fire because all the events that come together to start a fire must happen at once. RR 10:44-45. A better answer is that Texas law does not require testing of every step, but instead requires "some basis for the opinion offered to show its reliability." *Ledesma*, 242 S.W.3d at 39. Given that the fire began in the dryer, and all alternate causes were negated, the

various tests, reports, and objective data in this case were more than sufficient to establish that the fire was caused by a dryer defect.

1. Legally sufficient evidence ruled out other possible causes.

By itself, the elimination of other possible causes may not always constitute legally sufficient evidence of causation. *See Cooper Tire & Rubber Co. v. Mendez*, 204 S.W.3d 797, 807-08 (Tex. 2006). But an expert's opinion on causation is unquestionably stronger when it is supported by evidence ruling out other possible causes. *See Tamez*, 206 S.W.3d at 581; *Robinson*, 923 S.W.2d at 559 (noting that an expert who is trying to find a cause of something should carefully consider alternative causes). Whirlpool's statement of facts argues that there was some evidence of two possible alternate causes. Pet. BOM 7-8. Yet Whirlpool's argument does not maintain that it conclusively proved these alternate causes. Nor does its argument challenge the legal sufficiency of the expert testimony negating these alternate causes. Thus, the parties may agree that there was at least legally sufficient evidence to rule out these possible alternate causes.

The experts eliminated both of Whirlpool's suggested alternate causes: (1) arson caused by gasoline under the mobile home; and (2) electrical malfunction. The theory that the fire could have begun under the home was disproved by objective evidence including: the downward fire pattern visible on the floor, RR 8:54-55, 128; the physical markings indicating the fire started above the floor, RR 8:118; the melting pattern of an aluminum duct, RR 8:118, 120-22; the fact that the floor under the dryer was not burned as much as the floor around the dryer, RR 8:56; and evidence that the circuit and wires feeding the dryer

were energized at the time of the fire, which would have been highly unlikely if the fire had begun below the floor. RR 9:93-95. The arson theory was negated by investigations of the scene using trained dogs, which found no evidence that would ordinarily indicate arson, such as gasoline or hydrocarbons. RR 8:68-74, 82-84, 90, 91. The electrical malfunction theory was disproved by objective evidence, including the fact that a light and outlet were energized at the time of the fire, 8 RR 112-13; the absence of electrical damage to the receptacle into which the dryer was plugged, RR 9:88-90; the absence of pinpoint damage in the wiring, RR 9:92-95, and the fact that wires in the dryer, as well as the circuit feeding the dryer, were energized at the time of the fire, RR 9:93-94.

There was substantial objective support for the expert opinions ruling out the possible causes of the fire asserted by Whirlpool. The only plausible explanation for this fire was offered by the Camachos' experts.

- 2. Reliable evidence supported the expert testimony that the dryer defect caused lint to escape and be ignited.**
 - a. Reliable evidence supported the opinion that the corrugated tube caused lint to escape into the dryer cabinet.**

Clayton concluded that the fire was caused by Whirlpool's use of a corrugated lint tube, which allows lint to be trapped, resulting in back pressure that causes lint to escape into the dryer cabinet. RR 9:134-35, 148. The lint then becomes airborne and can be ignited by the heater element. RR 9:135, 148. Clayton testified that this fire was caused by lint that had been drawn into the heater box and ignited, causing the ignition of other lint downstream and resulting in the fire. RR 9:147. This opinion was supported by objective evidence.

Exemplar dryer. In the exemplar dryer, Clayton observed that the lint had “hung up” on the corrugated edges, resulting in blockage of the tube. RR 9:134-35. He also observed that the blockage had caused lint to escape the housing into the dryer cabinet. RR 9:135.

Whirlpool responds that the owner of the exemplar used her dryer differently than the Camachos. Pet. BOM 20-22. This argument improperly assumes disputed facts in Whirlpool’s favor. Although Whirlpool argues that the exemplar dryer was used frequently and not vented properly during the first year it was used, Whirlpool fails to mention that the exemplar dryer was vented properly for the three years before Clayton examined it. RR 11:9. Whirlpool also asserts that the Camachos used their dryer less frequently and vented it properly. Pet. BOM at 26. But Whirlpool fails to mention that the Camachos only owned the dryer for three months before the fire, and there was no evidence that its previous owner used the dryer less frequently than the exemplar. *See* RR 7:147-48.

Even if the use history of the exemplar had been significantly different, it provided reliable support to rebut Whirlpool’s assertions and support the Camachos’ theory. The exemplar was properly used to rebut Whirlpool’s claim that using a corrugated hose instead of a smooth hose cannot cause excess lint to accumulate. Clayton’s examination of the exemplar demonstrated that Whirlpool is wrong. In the exemplar, the corrugated hose caused lint to accumulate and escape into the dryer cabinet. RR 9:135. Whirlpool also argues that it is impossible for lint to ever be drawn up into the heating element in a functioning dryer. Pet. BOM 26-7. Clayton’s examination of the exemplar again demonstrated that lint had been drawn into the heating element of the exemplar and charred. RR 9:145-46; PX 227,

229. Even if the use history of the exemplar had been significantly different, it provided reliable support to rebut Whirlpool's assertions and support the Camachos' theory. Regardless of whether the exemplar had been used under the same conditions as the Camachos' dryer, Clayton's observations of the exemplar disproved Whirlpool's claims that certain events would never occur in its dryer.

CPSC tests. Published tests conducted by the CPSC also confirmed that dryers with the same design features as the Whirlpool dryer cause lint to accumulate and escape into the dryer cabinet. RR 9:139-141; PX 287 at 69. Although the CPSC Report addressed four different dryer designs, Clayton only relied on the portion of the Report that dealt with dryer design A, which had a similar design and the same relevant components as Whirlpool's Easy Clean 100. RR 9:139-140. The Report demonstrated the following about that design:

- Lint accumulation in that design occurs after only 100 cycles. PX 287 at 69.
- Lint could leak at the seal between the lint chute and the blower housing. RR 9:141; PX 287 at 108.
- This design "produces lint in an abnormal location, where it is not intended to be." RR 9:141. Compared to other designs, it results in a greater amount of lint distributed inside the dryer cabinet. RR 9:135.
- This design "creates an air flow in the cabinet which will allow that lint to become airborne." RR 9:141.

Whirlpool asserts the Report is inadmissible because it contains a disclaimer that it "should not be used to suggest that current clothes dryers are unsafe or defective." Pet. BOM at 22. This disclaimer does not make the document inadmissible; the disclaimer is just part of the evidence weighed by the jury. Additionally, the disclaimer does not apply here

because Clayton did not use the Report, by itself, to prove the Whirlpool dryer was defective. The report was offered only as support for steps in Clayton's analysis. *See* 9 RR 130-41.

Whirlpool attacks the lint accumulation tests in the CPSC Report by disputing whether the dryer design tested was the same design as the Camachos' dryer. Pet. BOM at 23. Clayton explained that the Whirlpool dryer analyzed in the CPSC Report uses a similar design to the Camachos' dryer with regard to the open-ended design of the heater box, and the use of a positive air flow and a porous seal that can result in lint leakage at the seal of the lint chute and blower housing. RR 9:140-41.

Ignoring Clayton's testimony about similarities, Whirlpool points to its own evidence about design differences between the Camachos' dryer and the dryer used in the CPSC Report. Pet. BOM at 23. This evidence may go to the weight given to Clayton's testimony, but not the reliability of his supporting evidence. First, Whirlpool argues that the use of a speed increaser belt in its dryer meant that airflow was faster in the Camachos' dryer. Pet. BOM at 23. Clayton agreed that a faster air flow could make it less likely that lint would stick to anything, but he explained, "That's why when it is restricted, it is more apt to stick." RR 10:43. Clayton explained how the airflow became restricted in this design. RR 9:133-34. More important, Whirlpool's claim is rebutted by objective evidence – the burnt lint that stuck to the heater element in the Camachos' dryer. RR 10:48-9.

Second, Whirlpool points to the bare assertion by its expert that the Camachos' dryer model is 50 percent more efficient and therefore less likely to spread lint around the cabinet. Pet. BOM 23. Remarkably, Whirlpool calls this bare assertion "undisputed evidence" –

asserting a completely different legal standard that allows its experts' unsupported conclusions to bind the jury. *See* Pet. BOM at 23. Nonetheless, this assertion is no basis to challenge Clayton's conclusion. The dispute between the experts' testimony goes to the testimony's weight, not its admissibility. *See Ledesma*, 242 S.W.3d at 40-41.

b. Reliable evidence supported the opinion that lint escaped and was ignited.

Substantial, objective supported both experts' testimony that lint was ignited.

Burnt lint in the Camachos' dryer. When Clayton examined the Camachos' dryer, he found burnt lint underneath the heating element. RR 9:97-98. A photograph of the burnt dryer shows that lint was in a part of the cabinet where it should not have been and that it had burned. RR 9:98-100; PX 180. Whirlpool argues that Clayton failed to test the material to confirm that it was lint. Pet. BOM 25-26. But the jury could give weight to Clayton's observation that "[i]t certainly had the appearance of lint." RR 10:48. Whirlpool questions whether the lint could have been burned in the fire, rather than being the cause of the fire itself. Pet. BOM 25. Yet the Camachos do not argue that this lint started the fire. Rather, the significance of this evidence was its location – the lint was adhered to the heater element of the Camachos' dryer, "stuck and wedged in there." RR 10:48-49. Even if this particular piece of lint did not cause the fire, its presence proves that lint had migrated to the heating element and stuck to it.

Lint ignition tests. Clayton presented videotaped tests demonstrating that when lint makes contact with the heating element, the lint ignites. RR 9:149-51, 176-7; PX 289.

Burnt lint in the exemplar dryer. A photograph of the exemplar dryer showed a tuft of lint that had been drawn into the heating element, captured, and subsequently charred as a result of the heat from the heating element. RR 9:145; PX 227. Another photograph showed that charred lint had become captured on a plate above the heating element. RR 9:145-6; PX 281. Like the burnt lint in the Camachos' dryer, the burnt lint in the exemplar proves that lint migrates to the heating element and burns.

CPSC lint ignition tests. Clayton's opinions were further confirmed by the CPSC Report, which demonstrated that a heater with a similar design to the Camachos' dryer can ignite the airborne lint that, in turn, ignites material downstream from the heater, in other words, material in the dryer drum. RR 9:140-41, 148.

Whirlpool attacks the burn tests in the CPSC Report in various respects that all go to the weight of the report, not its admissibility or its use as reliable support for some of Clayton's opinions. Whirlpool complains that safety features were disabled on all these tests. Pet. BOM at 24 (citing CR 3:873; RR 11:60). Yet, its record citations suggest only that safety features were disabled as a variable condition for some tests in the Report. Those tests are not the subject of the portions of the Report that were admitted. *See generally* PX 287.

Whirlpool also complains that the burn tests in the CPSC Report involved tests of component parts rather than the entire dryer and did not follow real world conditions. Pet. BOM at 24. Yet an examination of the report demonstrates that each of those tests was carefully designed to determine whether different stages that lead to lint ignition could occur

in conditions that simulated the operation of actual dryers in real-world conditions. *See* PX 287 at 71, 89-93, 121-22, 133-36.

Whirlpool finally complains that the CPSC tests were conducted at a slower airflow than the Camachos' dryer design. Pet. BOM at 24. But the CPSC tests must be read, not in isolation, but with evidence that lint blockage impedes airflow in this dryer, RR 9:133-34, as well as evidence that lint in the exemplar and the Camachos' dryer had stuck to the heater element and burned.

3. Whirlpool did not conclusively disprove that lint in the dryer was ignited.

Whirlpool failed to conclusively prove that lint could not be ignited in the dryer. Whirlpool improperly focuses only on its own experts' testimony that their in-house tests failed to result in lint being ignited. Pet. BOM at 26-27. There was substantial evidence that lint not only could be ignited in this design, but empirical evidence that lint had contacted, and even adhered, to the heater element and had burned. RR 9:97-99, 145; 10:48-9; PX 180. Thus, Whirlpool's experts' testimony was not conclusive, but only disputed evidence that the jury could weigh or disregard. *See Ledesma*, 242 S.W.3d at 40-41.

4. Reliable evidence supported the expert testimony that the lint that ignited in the dryer caused the fire.

Clayton testified that this fire was caused because lint was drawn to the heater box, ignited, and then ignited other material including lint and clothing downstream. RR 9:147. Both Clayton and Sanchez concluded that the fire began in the drum of the dryer. RR 8:111; 9:103. Whirlpool's primary challenge to these opinions is that the experts did not perform

a test to prove that burning lint could ignite clothing, or a test to prove that the fire could escape the dryer. Pet. BOM 27-28, 31-32. Yet tests were not required to prove that material downstream could possibly be ignited, or that the fire could escape from the dryer. There is a substantial body of objective evidence that this is exactly what happened here.

CPSC Report. The test described in the CPSC Report, which used conditions representing the air flow of a dryer during the later part of its cycle, demonstrated that ignited lint “can easily ignite additional lint or fabric in the air stream, resulting in additional embers in the dryer system and exhaust vent.” RR 9:146; PX 287 at v. Whirlpool challenges this aspect of the CPSC Report, arguing that there were differences in the CPSC Report and real-world conditions. Pet. BOM at 29. Yet the CPSC Report – an objective government report – said that the testers had “variables that they utilized to simulate real world conditions. . . .” RR 10:41-42; *see also* PX 287 at 71, 89-93, 121-22, 133-36.

Objective evidence from the fire scene. Substantial evidence supports the opinion that this fire began with clothes in the drum of the dryer. For instance, Sanchez concluded from his origin-and-cause exam that the fire originated in the utility room within the cabinet of the dryer. RR 8:111. His conclusions were based on objective evidence gathered while inspecting the fire scene for five days. 8 RR 92-93, 111. First, the physical markings left by the fire on the floorboards reflected a downward burn, which proves the fire moved down toward the floor. RR 8:55, 128. Second, physical markings below the floor also indicated that the fire started above the floor. RR 8:118, 120-22. Third, the floor under the dryer was not burned as much as the floor around the dryer, which is expected when the fire comes

from above the floor rather than from below the floor. RR 8:56. Fourth, floorboards near the dryer were completely consumed by fire, which proves that the intensity of the fire was tremendous near the dryer. RR 8:128.

There also was evidence that the fire began, not just in the dryer, but inside the dryer drum. The burn pattern demonstrated that the fire was “internal to the drum.” RR 9:103. The pattern left by heat emerging from the top of the heater box reflects that it was escaping to the upper parts of the dryer. RR 9:103.

ATF Agent Savage. Sanchez’s opinion was further supported by other testimony. ATF Special Agent Savage – not a paid expert – inspected the fire scene. He concluded that the dryer had been operating at the time of the fire and had “severe damage to the interior of the drier and the interior of the drum.” PX 102 at 4. Whirlpool argues that Savage had not yet trained as a “cause and origin” investigator and that he offered no opinion that the fire started in the dryer drum. Pet. BOM at 33. But Savage was not offered as an expert witness to prove the cause of the fire. Rather, his objective observations about the fire scene supported the experts’ opinions that the dryer began in the drum.

Eyewitness testimony. Eyewitness testimony also proved the fire came from the dryer. Margarita Camacho testified that, after she first smelled smoke, she saw fire coming from the rear part of the dryer and from inside the dryer. RR 7:155. Salvador Camacho also saw fire coming from inside the drum of the dryer, RR 10:57, and Santos Camacho testified that the fire was “coming very strongly from the machine.” RR 10:75.

Whirlpool attacks some of this eyewitness evidence, but its argument does not challenge the overall legal sufficiency of the evidence that the fire began in the dryer. For instance, Whirlpool argues that the eyewitness testimony of Margarita Camacho (but not Salvador and Santos Camacho) was consistent with its alternate theory that the fire started beneath the floor and migrated into the dryer. Pet. BOM at 33-34. The problem with Whirlpool's alternate theory is that it is inconsistent with objective evidence: the downward fire pattern on the floor, RR 8:55, 128; the physical markings indicating the fire started above the floor, RR 8:118, 127; the fact that the floor under the dryer was not burned as much as the floor around the dryer, RR 8:56; and evidence that the circuit and wires feeding the dryer were energized at the time of the fire, which would have been highly unlikely if the fire had begun below the floor. RR 9:93-95. Unsurprisingly, Whirlpool presents its alternate, under-the-floor theory almost exclusively in its statement of facts, not in its argument. There was legally sufficient evidence negating it. *See supra* pp. 19-20.

Whirlpool's time line argument. Whirlpool asserts that the experts' causation theory was "facially incredible" because the clothes would have had to smolder for over two hours. Pet. BOM at 28. But Whirlpool's time estimate is unsupported by the evidence it cites, and contradicted by other evidence. *See supra* pp. 2-3. In a legal sufficiency review, this Court should assume that jurors resolved all conflicts in accordance with the verdict. *City of Keller v. Wilson*, 168 S.W.3d 802, 820 (Tex. 2005). Because there was conflicting evidence about the actual timing, Whirlpool did not establish that the time line rendered the experts' causation theory "facially incredible."

Whirlpool's two shirt argument. Whirlpool makes a similar mistake with its unsupported assertion that the fire was unlikely because the “fuel load” consisted only of two shirts. Pet. BOM at 31. When asked what was in the dryer, Margarita Camacho only testified that the dryer contained “The T-shirts from the - for - from the children.” RR 7:151. Then, during Clayton’s testimony, Whirlpool’s counsel asks Sanchez whether he could dispute Mrs. Camacho’s testimony that she was drying two tee-shirts. RR 9:55. Sanchez does not “admit,” as Whirlpool argues, that there were two tee-shirts, but only responds, “No. I’m not disputing her testimony.” RR 9:55. Whirlpool did not conclusively establish that the dryer contained only two tee-shirts.

Whirlpool also points to evidence that, after the fire, the dryer contained a shirt that was “unburned.” Pet. BOM at 31. Other evidence indicates the shirt was “a clump of burnt material.” RR 8:51. Photographs show the seriously burnt material which had “melted onto . . . the drum surface area.” PX 131, 137, 144; RR 8:51; 9:50-52.

Regardless of how burnt the one remaining shirt was, this evidence showed that it was the only remaining article of clothing in the dryer. The remainder of the inside of the drum was coated with “burnt debris” from other clothes. RR 9:51-52. The fact that the melted remains of one shirt had not been completely consumed is explained by the “telephone book effect” – a common phenomenon where the fire burns the outer edges, but not the inside of an item such as a telephone book because the inside does not have enough oxygen for fire to consume it. RR 8:40-41. Whirlpool attacks the telephone book effect as unproven by any tests conducted by the experts. However, Sanchez explained this effect with common sense:

the inside of the burning material will not burn because it does not have enough oxygen. *Id.* He also demonstrated the telephone book effect with photos of the burnt remains of a wall in the Camachos' home. RR 8:40. The interior part of the wall survived as a result of the telephone book effect. *Id.* Finally, the telephone book effect was not a key step in the experts' reasoning; it was a response to Whirlpool's counter-argument that the fire did not begin in the drum because of the remaining shirt. Whirlpool does not respond with any tests or reasoning to negate the telephone book effect in support of its own counter-argument.

The Camachos offered substantial objective evidence to prove that the fire began in the dryer, not under the floor as Whirlpool argued at trial. This evidence supports the experts' opinions about the cause of this fire.

5. Whirlpool did not conclusively disprove that ignited lint caused the fire.

Whirlpool did not conclusively disprove that the fire was caused by lint. There was conflicting expert testimony establishing that lint in the dryer could be ignited. *See supra* pp. 26-31. When conflicting positions are both reasonably supported, it is the jury's role to resolve conflicts in the evidence. *City of Keller*, 168 S.W.3d at 820.

Further, the testimony of Whirlpool's experts was hardly conclusive. First, in a videotaped "demonstration," Adams ignited "a little lint ball" that did not cause three shirts to ignite. RR 10:131-37. That demonstration does not eliminate the possibility that an ignited lint ball could cause a load of laundry to ignite. Tests will not result in ignition every time because not every portion of the fire triangle comes together every time. RR 10:44-45.

This is common sense for anyone who has ever tried to start a fire with flint; striking flint may not always ignite a fire, but after hundreds of tries, it sometimes will.

Second, Whirlpool asserts that opening the dryer does not result in increased oxygen. Pet. BOM at 30. Yet that was not a necessary step in the analysis of the Camachos' experts. Clayton's "increased oxygen" hypothesis was only a theory to explain how the fire inside the drum would have enough oxygen to result in open flames. RR 9:147. Whirlpool points out that its design "ensures that the drum is always full of air." Pet. BOM at 30. If that is true, then there was no need to explain how the dryer would have had enough oxygen to result in a fire. Further, Whirlpool's argument is contradicted by the substantial body of evidence that this fire began in the drum of the dryer. *See supra* pp. 27-31.

Third, Whirlpool points to burn patterns that its experts claim to have been indicators that the fire did not begin in the dryer. Pet. BOM at 32. However, this evidence does not address the other burn patterns that show the fire did begin in the dryer. *See supra* pp. 19-20, 27-28. Nor does it negate three eyewitnesses who saw the fire coming from inside the dryer. RR 7:155, 10:57, 75. Although Whirlpool's experts asserted that the fire could not escape the dryer, there was substantial evidence that this fire did, in fact, escape this dryer.

B. Legally sufficient evidence supports a safer alternative design.

In a products case, a safer alternative design must be proved to a reasonable probability. *See* TEX. CIV. PRAC. & REM. CODE § 82.005(a), (b); *Hernandez v. Tokai Corp.*, 2 S.W.3d 251, 258 (Tex. 1999). Here, the Camachos' electrical expert testified that Whirlpool could fix the defect resulting in lint accumulation by using a smooth lint tube

instead of a corrugated tube.³ RR 9:148. Contrary to Whirlpool’s assertion, this opinion was based on reliable support. First, a smooth tube was undoubtedly feasible, because both Whirlpool and Westinghouse have used smooth tubes in their dryers. RR 135. Second, both the expert’s examination of a Whirlpool dryer and common sense demonstrated why the corrugated tube is inferior – it causes lint to become hung up in the ridges of the tube:

It [the corrugated tube on the exemplar dryer] is blocked by virtue of the fact that the tube is corrugated. And the corrugated edges afford restriction to the movement of the lint. The lint gets hung up, and it effectively stops up the lint.

RR 9:134.

Whirlpool asserts that there was “uncontradicted evidence” that the smooth tube was less safe because it could disconnect the blower housing. Pet. BOM at 38. But the testimony Whirlpool cites establishes that this disconnection problem was solved by adding a clamp and two screws to the connection. RR 10:225. Whirlpool’s expert testified that the change from a semi-corrugated tube to a smooth tube “was part of the fix to fix the problem that was happening before.” RR 10:228. But Whirlpool’s expert neither identified which problem was fixed, nor supported Whirlpool’s assertion that the corrugated tube was superior. The jury was free to accept the Camachos’ expert’s opinion that the smooth tube used in earlier models was safer, based on his experience, examination of the exemplar dryer, and logic, and to reject the assertion by Whirlpool’s expert, which had no support.

³ The expert also testified that Whirlpool could prevent the escape of lint that could cause a fire by changing the material of the seal on the housing or by placing a screen over the entry to the heater box itself. RR 9:149.

III. The trial court acted within its discretion in denying the spoliation motion.

Trial courts have “broad discretion” in spoliation matters. *See Trevino v. Ortega*, 969 S.W.2d 950, 953 (Tex. 1998). The test for an abuse of discretion “is not whether, in the opinion of the reviewing court, the facts present an appropriate case for the trial court’s action, but ‘whether the court acted without reference to any guiding rules and principles.’” *Cire v. Cummings*, 134 S.W.3d 835, 838-39 (Tex. 2004) (citations omitted). “An abuse of discretion does not exist where the trial court bases its decision on conflicting evidence.” *Davis v. Huey*, 571 S.W.2d 859, 862 (Tex. 1978).

In the only case in which a Texas appellate court has found an abuse of discretion in a spoliation ruling, this Court found that a trial court abused its discretion in **giving** a spoliation instruction. *See Wal-Mart Stores v. Johnson*, 106 S.W.3d 718, 723 (Tex. 2002). No Texas appellate court has found an abuse of discretion in **denying** a spoliation motion.⁴

A. Because there is no proof that evidence was deliberately destroyed, this is not a case of spoliation.

This Court has held that a spoliation instruction is appropriate “when a party has deliberately destroyed relevant evidence.” *Cire*, 134 S.W.3d at 843; *see also Wal-Mart*, 106 S.W.3d at 721 (“deliberate destruction of relevant evidence”); *Trevino*, 969 S.W.2d at 954 (Baker, J., concurring) (“improperly destroyed evidence”).

⁴ There is one case where a denial of a spoliation motion was reversed: *Watson v. Brazos Valley Electric Co-Op., Inc.*, 918 S.W.2d 639, 642-43 (Tex. App.—Waco 1996, writ denied). But *Watson* was decided before this Court applied the abuse of discretion standard to the review of spoliation rulings in *Trevino v. Ortega*, and the *Watson* opinion did not find that the trial court abused its discretion. Moreover, in *Watson* the evidence was undisputed that the defendant took the critical piece of evidence into its possession, inspected it, and “without taking pictures or otherwise preserving information about [it], [they] allowed [it] to be destroyed.” *Id.* at 642. The facts of this case were far different. *See supra* pp. 5-7.

Whirlpool offers no proof that any relevant evidence was deliberately destroyed by the Camachos. Instead, it resorts to inflammatory assertions, without any citation to the record: “[t]his knowing destruction of key evidence,” Pet. BOM at 40; “their complete clean-up of the fire debris,” Pet. BOM at 42; “intentional destruction of critical evidence.” Pet. BOM at 45. In other places, Whirlpool makes similar statements followed by record references that do not support the language in Whirlpool’s text.⁵ None of Whirlpool’s record citations prove that the Camachos or their agents deliberately destroyed evidence.

Instead, the record shows that the fire scene was substantially altered by firefighters and criminal investigators before the Camachos’ experts arrived. RR 8:23-24, 31. *See supra* pp. 5-7. After the Camachos’ experts arrived, the record does not reflect a desire to destroy evidence, but a painstaking effort to preserve evidence: numerous photographs, extensive videotaping, detailed written notes. RR 8:24, 32, 158; 9:8.

Whirlpool does not mention these preservation efforts. Instead it focuses on the removal of debris from the fire scene, particularly in the laundry room area. *See* Pet. BOM at 40, 42-43. Yet the evidence is undisputed that a lot of debris had been removed by the firefighters and/or investigators before the Camachos’ experts arrived; the laundry room had been “fairly well cleaned out”; the debris that remained was sifted, and every piece that did not sift through a half-inch sifter was preserved for inspection; and the rest of the debris was

⁵ “Plaintiffs’ own expert conceded that they substantially altered the fire scene,” Pet. BOM at 39 (citing RR 8:162-65, which says nothing about substantially altering the scene, and RR 11:31-32, which is not Plaintiffs’ expert, and does not say the scene was substantially altered); “they had destroyed the fire scene by removing all debris,” Pet. BOM at 40 (citing RR 8:160-62 (2 pictures were taken after debris removal); RR 9:40-41 (no picture was taken looking straight down a particular hole); RR 6:133 (a single picture was taken after debris removal)); “they completely dismantled the evidence and destroyed the scene,” Pet. BOM at 42 (citing RR 11:31-32; RR 8:143-47 (neither of which say anything about completely dismantling the evidence or destroying the scene)).

retained in piles close to its original location, but was still there. *See supra* pp. 6-7 (citing RR 7:111; 8:24, 31-32, 70-71, 84, 91-92, 158, 165; 9:6; 12:6).

Whirlpool's real complaint is not that evidence was deliberately destroyed, but that Whirlpool was not invited to participate in the investigation of the fire scene starting the day after the fire. The reason for that is simple: notwithstanding Whirlpool's unsupported assertion that the Camachos' experts had identified Whirlpool as a likely defendant two days after the fire, Pet. BOM at 41, the Camachos' expert consistently testified that he did not conclude that Whirlpool was a likely defendant until eight days after the fire, **after** the site investigation was completed. *See* RR 8:18-19, 147-48, 167-72. In any event, not a single Texas case has recognized fire scene inspection invitation protocol to be a spoliation matter. Whirlpool's complaint does not rise to the level of spoliation, and this Court need not even reach the following discussion under spoliation law.

B. Even if this were a case of spoliation, the three factors recognized by Texas law do not establish an abuse of discretion by the trial court.

Whirlpool acknowledges that the three factors for evaluating spoliation requests were articulated by Justice Baker's concurring opinion in *Trevino v. Ortega*, 969 S.W.2d 950, 954-55 (Tex. 1998) (Baker, J., concurring). Pet. BOM at 40. Those factors are: (1) whether there was a duty to preserve the evidence; (2) whether the spoliation was negligent or intentional; and (3) whether the other party was prejudiced. *Id.* Applying those factors here establishes that the trial court acted within its discretion.

1. Although a duty to preserve evidence arose, the parameters of that duty are not as expansive as Whirlpool suggests.

The Camachos agree that there is a general duty to preserve evidence. As previously documented, they complied with that duty, and Whirlpool cannot produce any proof that the Camachos deliberately destroyed evidence. *See supra* Part III.A. But Whirlpool seeks to expand this duty to include “afford[ing] a potential defendant the opportunity to conduct its own investigation before the scene is altered or destroyed.” Pet. BOM at 41. No Texas case has gone this far, and two Texas cases have declined an invitation to do so.

In *Cardoza v. Reliant Energy HL&P*, No. 01-03-01126-CV, 2005 WL 1189649 (Tex. App.—Houston [1st Dist.] May 20, 2005, no pet.) (mem. op.), Cardoza sought a spoliation instruction because Reliant Energy had removed a critical part of a power line from a fire scene, taken it to a Reliant service center, and unloaded it onto a dock to be recycled, after which it was co-mingled with other materials and either recycled or destroyed. *Id.* at *1, 3. Because Reliant followed standard operating procedures in disposing of drop lines recovered from fire scenes, the court of appeals found no abuse of discretion in the trial court’s denial of a request for a spoliation instruction. *Id.* at *3–4.

In *Continental Casualty Co. v. Hartford Insurance ex. rel. Blue Line Promotions Inc.*, 74 S.W.3d 432 (Tex. App.—Houston [1st Dist.] 2002, no pet.), there was an allegation of negligence in removing evidence from a fire scene. The court found a meritorious defense to this allegation existed based on expert testimony that it “is standard practice . . . to remove important evidence from a fire scene for safe-keeping . . . an investigator would be negligent if he did not remove an important piece of fire scene evidence.” *Id.*

In both of these cases, appellate courts specifically addressed the removal of evidence from a fire scene and found that circumstances might exist where removal of evidence from a fire scene before it could be inspected by other parties would not be sanctionable, and might even be advisable. In other words, the across-the-board rule advocated by Whirlpool in this case has been expressly rejected by Texas courts.

In the absence of Texas cases, Whirlpool relies on cases from federal district courts in Pennsylvania and Illinois and one state appellate court in Minnesota. Pet. BOM at 42. Yet those cases involve complete demolition of fire scenes, a denial of any opportunity to investigate by the other side, and a failure to preserve electrical appliances.⁶ Here, the scene was largely preserved, Whirlpool was allowed to inspect the scene, and everything larger than half an inch was preserved. Thus, these cases address different kinds of conduct,

⁶ In *Howell v. Maytag*, 168 F.R.D. 502 (M.D. Pa. 1996), the court approved a spoliation instruction because the plaintiffs' causation theory was not supported by direct evidence, but only by circumstantial evidence and the elimination of secondary causes. *Id.* at 507. The court also noted that the prejudice to the defendant would be less serious if an independent third party had conducted its own investigation. Here, the Camachos presented direct evidence, and there was an independent investigation by several government agencies.

In *American Family Insurance ex. rel. Dunn v. Black & Decker (U.S.), Inc.*, No. 00C50281, 2003 WL 22139788 (N.D. Ill., Sept. 16, 2003). In that case a plaintiff was barred from presenting evidence on fire causation for several reasons: (1) failure to notify the defendant of the fire for a year and a half, after the kitchen in question had been entirely renovated; (2) failure to retain evidence, including electrical switches, an electrical receptacle, and a cappuccino maker alleged to be the cause of the fire; (3) destruction of a recorded statement from a witness who subsequently died; and (4) failure to supply exemplar units to the defendant. *Id.* at *1. None of those problems were present here: (1) Whirlpool was allowed to inspect the fire site before it was destroyed, and was provided with extensive photos, videotapes, and catalogued objects; (2) the Camachos' experts did not destroy or dispose of critical evidence, but meticulously retained it; (3) witness statements were not destroyed, but produced; (4) an exemplar dryer was provided to Whirlpool.

In *Auto-Owners Insurance Co. v. Heggie's Full House Pizza, Inc.*, No. A03-316, 2003 WL 22293643 (Minn. Ct. App. Oct. 7, 2003), the property owner bulldozed the fire scene without notice to the other party, and failed to retain electrical appliances that could have caused the fire. In *Dodd v. Leviton Manufacturing Co.*, No. CX-02-1570, 2003 WL 21147151 (Minn. Ct. App. May 20, 2003), the homeowner did not advise the defendant of a claim until after the kitchen where the fire occurred had been fully repaired, and several appliances that were potential fire sources were discarded. In both cases the appellate court held that the trial court's ruling on spoliation was not an abuse of discretion. But both cases involved a complete destruction of the fire scene, a denial of any opportunity to conduct an investigation, and a failure to preserve electrical appliances from the scene. In this case, the fire scene was not destroyed, experts for Whirlpool were allowed to inspect the scene, and every object from the scene was carefully preserved.

impose a lesser duty than what Whirlpool argues for here, and would not change the outcome of this case, even if they were binding Texas authority.

Lacking binding or persuasive authority recognizing the duty that Whirlpool seeks to impose, Whirlpool repeatedly asserts that the Camachos' expert admitted a duty to preserve evidence in accordance with the guidelines of the National Fire Protection Association: "every attempt should be made to protect and preserve the fire scene as intact and undisturbed as possible, with the structure, contents, fixtures, and furnishings remaining in the pre-fire location." *See* Pet. BOM at 41. The Camachos' expert made no such admission. In fact, despite being asked to unequivocally adopt this guideline, he consistently used language like "to some degree," "there are conditions to this," "the key word there is when possible," "in a perfect world," and "in a perfect situation." RR 8:145-48. Whirlpool's trial counsel understood that the expert did not completely accept this guideline, noting, "you don't totally agree with that statement, I take it?" RR 8:145. Moreover, the Camachos' expert explained why, in this case, as in many cases, it was impossible to determine who the responsible parties were until after conducting an investigation:

"[I]n order to establish whether you have interested second or third parties, then you have got to do an investigation, clearly, to identify the possibility of these people. And in order to do the examination as per NFPA 921, you have to do what we did." RR 8:145.

"[T]hat book you are reading from, the 921, is a guideline. And . . . in the second or third page of that guideline book, it gives the investigator the right to deviate from that if, in fact, he can justify it. And in this particular case, I can, in my opinion, justify that." RR 8:146.

“I have to perform my own examination to determine if . . . there are other individual components or appliances or an undetermined fire at hand before I go and notify everybody, manufacturers of the TV set, lamp, electricians, plumbers. That would really get out of hand if I took that position on every fire.” RR 8:147.

In light of this testimony, Whirlpool’s representation that this expert admitted a duty to preserve evidence governed unequivocally by the NFPA guideline is not accurate.

2. There is no evidence of intentional spoliation.

As previously indicated, there is no evidence that the Camachos intentionally destroyed a single piece of evidence. Unable to provide any evidence of intentional spoliation, Whirlpool argues that there was an intentional breach of the expanded duty of fire scene preservation not recognized by Texas law, and then makes unsupported assertions about “dismantl[ing] the evidence and destroy[ing] the scene” and a “complete clean-up of the fire debris.” Pet. BOM at 42. As previously established, much of the debris — particularly in the laundry room — was cleaned up before the Camachos’ experts arrived. *See* RR 8:31, 7:111. The debris that remained was sifted, catalogued, bagged, tagged, preserved and made available to Whirlpool. RR 8:24, 32, 70-71, 84, 91-92, 158; 9:6. And the remaining debris smaller than one-half inch was retained on the premises, just moved to a different location. RR 8:84-85, 165; 12:6. None of this conduct represents an intentional effort to destroy evidence, but a careful attempt to preserve it.

3. There is no evidence of actual prejudice to Whirlpool.

Whirlpool’s argument on prejudice consists of theoretical possibilities of prejudice borrowed from cases in other jurisdictions and one law review article. *See* Pet. BOM at 43-

44. But when it comes to identifying actual prejudice in this case, the evidence is sorely lacking. Whirlpool supplies two record references, without any elaboration, to support its prejudice theory. *See* Pet. BOM at 44 (citing RR 11:32; 12:6.). One of them is to the testimony of an electrical engineer, Roger Owens, who testified after reviewing the “considerable” number of electrical components that were preserved. RR 11:29, 31. He did state that there is a difference between examining an electrical wire that has been preserved and seeing it in place in the trailer, RR 11:32, but he never stated that he was unable to render an opinion based on the available evidence, or that his opinion might have been different if additional material had been available for inspection.

The other testimony cited by Whirlpool was from another of its experts, Jean McDowell, who testified about the evidence preserved in “20 bins, big plastic bins.” RR 12:6. When asked if the relocation of some debris to a different part of the trailer hampered his investigation, he replied, “Well, it made it more difficult. **It didn’t preclude findings being reached**, but it certainly made it more difficult, as it took more time.” RR 12:6 (emphasis added). Of course the standard is not whether the other party’s investigation was made more time-consuming or more difficult, but “whether the spoliation prejudiced the nonspoliator’s ability to present its case or defense.” *Trevino v. Ortega*, 969 S.W.2d 950, 955 (Tex. 1998) (Baker, J., concurring). Not a single one of Whirlpool’s five expert witnesses testified that the condition of the fire scene during their inspection prevented them from presenting a case or defense, and it obviously did not prevent any of them from testifying under oath about the causation and origin of the fire.

IV. Legally sufficient evidence supports the damage awards.

Whirlpool's analysis of damages lumps this wrongful death case together with other cases involving much less severe sources of non-economic damages. *See e.g.* Pet. BOM at 48 (citing *Saenz v. Fid. & Guar. Ins. Underwriters*, 925 S.W.2d 607 (Tex. 1996) (mental anguish from loss of medical benefits); *Edinburg Hosp. v. Trevino*, 941 S.W.2d 76 (Tex. 1997) (bystander recovery for observing negligent nursing care administered to wife); *El-Khoury v. Kheir*, 241 S.W.3d 82 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (alleged mental anguish from alleged defamatory statements about failure to pay a debt); *GTE Mobilnet of S. Tex. Ltd. v. Pascouet*, 61 S.W.3d 599 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (alleged mental anguish from loss of privacy attributable to maintenance men on adjoining property being able to see into back yard)). As this Court has realized, “some types of disturbing or shocking injuries have been found sufficient to support an inference that the injury was accompanied by mental anguish.” *Fifth Club, Inc. v. Ramirez*, 196 S.W.3d 788, 797 (Tex. 2006) (quoting *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 445 (Tex. 1995)). Among those shocking and disturbing injuries from which mental anguish may be inferred is “the death of . . . a family member.” *Parkway*, 901 S.W.2d at 445. In wrongful death cases, “[p]roof of [the] family relationship constitutes some evidence [the family members] suffered from the wrongful death of [a family member].” *Moore v. Lillebo*, 722 S.W.2d 683, 686 (Tex. 1986). In those cases, juries are allowed to determine mental anguish damages “on the basis of emotional impact suggested by the circumstances surrounding their

loss.” *Id.*⁷ This Court has held that “assessment of the resulting grief is a task for which juries traditionally have been considered well-suited, and in which they can be properly expected to draw upon their own experience and empathy.” *Id.*

A. Legally sufficient evidence supports the award of damages to Margarita Camacho for her mental anguish and loss of companionship arising from the death of her son.

Damages suffered by Margarita Camacho for the death of her son were submitted to the jury in a single issue, with sub-parts for past and future damages. The jury found \$1.5 million for mental anguish and loss of companionship in the past, and \$1.5 million for mental anguish and loss of companionship in the future. CR 1128-29. Thus, this Court’s inquiry is whether there is any evidence that “would enable reasonable and fair-minded people” to award those damages for either mental anguish or loss of consortium, or both. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005).

Whirlpool asserts that there was no evidence about the relationship between Margarita Camacho and her deceased son that would justify the award of damages for “the loss of positive benefits that flowed to the plaintiff from her relationship with the decedent.” Pet. BOM at 46-47 (citing *Moore*, 722 S.W.2d at 688)). The *Moore* opinion that Whirlpool cites provides examples of the evidence relevant to this inquiry:

In awarding damages for mental anguish and loss of society and companionship in a wrongful death case, the trier of fact . . . may consider (1) the relationship between . . . parent and child; (2) the living arrangements of the parties; (3) any absence of the deceased from the beneficiary for extended

⁷ Many of the citations to *Moore* in this brief incorporate this Court’s quotation of *Connell v. Steel Haulers, Inc.*, 455 F.2d 688, 691 (8th Cir. 1972). Because this Court adopted the reasoning of the Eighth Circuit in that case, those references are made without further attribution.

periods; (4) the harmony of family relations; and (5) common interests and activities.

Id.; *see also* CR 1128 (the jury charge in this case). There was evidence of every one of these factors. Mrs. Camacho and Joab had the kind of relationship where he shared his dreams with her about wanting to build a building where children could meet. RR 7:159. He talked to her about giving his toy car collection to a less fortunate boy a few days before he died. RR 7:162. The jury also got to see pictures of Mrs. Camacho and Joab together, and watch her reaction when showing pictures of her dead son. *See generally* RR 7:158-62; PX 107, 111, 114. There was evidence that Mr. and Mrs. Camacho lived together in their mobile home continuously from 1980 until the fire in 2003, raising all four of their sons in that home. RR 7:131, 132, 135. There was no evidence that any of the family members had ever been absent from the home for any period of time. The family had a “very good,” “very close” relationship.” RR 10:71-72. The family enjoyed going to church together, and going to the zoo together. RR 7:159-60, 161.

This Court has clarified the distinction between damages for loss of companionship and society (“loss of positive benefits which flowed to the family from the decedent’s having been a part of it”) and damages for mental anguish (“an emotional response to the wrongful death itself”). *Moore*, 722 S.W.2d 687-88. For Mrs. Camacho, there was evidence of both.

With regard to Mrs. Camacho’s loss of companionship and society, the jury was allowed to consider evidence of what kind of young man Joab was. It could consider the evidence that was a strong Christian, RR 7:159, who enjoyed going to church, RR 7:159-60, 162, 10:51. He helped elderly people in his community by mowing their yards for free. RR

10:51. And, as previously mentioned, he gave his toys to less fortunate children, RR 7:162, and, even at 15, dreamed of building a youth center. RR 7:159.

Mental anguish damages are for compensating beneficiaries “for their harrowing experience resulting from the death of a loved one.” *Moore*, 722 S.W.2d at 688. In this case, Mrs. Camacho’s experience was particularly harrowing because she was in the home where the fire started that burned her child, and was the first one who smelled smoke, discovered the flames coming from the dryer, and began screaming to try to warn and evacuate her family. RR 7:154-56, 10:55-56, 75. She even tried to get to the room where Joab was sleeping, and “yelled at him a lot,” but was blocked by flames and smoke, and restrained by her husband. RR 7:155-56, 10:75. She eventually took her two younger children to safety at her next-door-neighbor’s home, but then had to wait by the side of the road while the fire raged on and the rescue efforts continued without her. RR 7:158. This must have only added to her feelings of helplessness and horror as her son died, trapped by the fire in his bedroom, while she watched from outside, unable to help him.

Whirlpool belittles Mrs. Camacho because when asked about the effect that Joab’s death has had on her, she answered simply and stoically, “It has been very difficult.” Pet. BOM at 47. But as this Court has stated under similar circumstances, “We are not convinced that mental anguish necessarily manifests itself objectively to the world, nor do grief stricken parents need to offer evidence of physical symptoms such as sleeplessness, weight loss, nervousness, personality changes, and the like. Mental anguish represents a deep inner feeling of pain and hurt, often borne in silence.” *Moore*, 722 S.W.2d at 686. Juries

“traditionally have been considered well-suited” to determine whether someone like Margarita Camacho is experiencing “deep inner feelings of pain and hurt,” but bearing them in silence. *Id.* The jury did that, and the evidence is legally sufficient to support its findings.

B. Legally sufficient evidence supports the award of damages to Salvador, Asael, and Abisai Camacho for the mental anguish they experienced as bystanders at the death of their brother by fire.

Salvador, Asael, and Abisai Camacho are all surviving brothers of Joab Camacho, who were awarded bystander damages because they were present at the scene where their brother was trapped and burned to death. Because Salvador was more actively involved in the tragically futile efforts to rescue Joab, he was awarded more damages (\$1.5 million past, \$1.5 million future) than Asael and Abisai (\$250,000 each for past mental anguish, \$250,000 for future mental anguish). Accordingly, Salvador will be discussed separately.

1. Legally sufficient evidence supports the award of bystander damages to Salvador Camacho.

On the night of the fire, Salvador was awakened by his mother screaming that the house was burning. RR 10:55-56. He left his bedroom, entered the living room, saw fire coming from the dryer down the hall, and helped his mother get Asael and Abisai out the front door. RR 10:56-57. When he noticed that Joab was missing, he tried to go back to the living room, but was unable to get very far because “the smoke was real intense and real hot.” RR 10:57-58. He went back outside, and ran directly to a window on the east side of Joab’s room, got up on a stool, and tried to enter the open bottom half of the a window. RR 10:58-59. But there was hot smoke pouring out of that window, and he almost choked. RR 10:59. He then broke out the glass in the top half of the window and tried to enter again, but

again was unable to make it very far. RR 10:59-60. He then went to the north wall, where there were two smaller windows. RR 10:60-61. He broke out those windows and called out to Joab to try to get him to crawl out those windows. RR 10:61. He heard Joab asking for help, but he was “mumbling like he was real tired.” RR 10:62. As a last resort, Salvador went to a door on the south side of the building, but saw flames through a window and knew he could not get in that way, either. RR 10:60-61. Salvador saw his father trying to crawl in a window on the east side, but because his father looked like he was about to faint, Salvador had to pull him out. RR 10:61. Salvador also saw Asael trying to enter the burning home, and because Asael was only 12 or 13, Salvador restrained him as well. RR 10:63. A fire marshal spoke with Salvador within an hour or two after the fire started, and, described him as “very distraught.” RR 6:71, 75.

Despite their age difference of 10 years, Salvador and Joab were quite close, describing themselves as more than brothers, but friends who talked a lot, shared a lot, and counted on each other. RR 10:50-52. They were involved in their community and church together, rented and watched movies together, and mowed yards together. RR 10:51-52.

Since Joab’s death, Salvador has not been able to mow a yard, not even once. RR 10:52. He goes to the cemetery to visit Joab’s grave every chance he gets, RR 10:63, and often does not come home until very late. RR 7:163. Salvador’s mother testified that he has been “quite affected” by his brother’s death. RR 7:163.

It is hard to imagine a more appropriate recipient of bystander damages. Salvador was not a passive observer of his brother’s death, but an active participant in the event, himself

exposed to danger from the same fire, and the person most actively involved in the excruciatingly futile efforts to save his beloved brother from agonizing death. He not only will have to deal with the horrific memory of his whole family being exposed to death, but also with the frustration and guilt of not being able to save his brother. Given the extraordinary circumstances surrounding his bystander experience, and the evidence of his relationship with Joab and his ongoing emotional response to the loss of his brother, the evidence is more than legally sufficient to support a reasonable and fair-minded juror in awarding bystander damages to Salvador.

2. Legally sufficient evidence supports the award of bystander damages to Asael and Abisai Camacho.

Although Asael and Abisai were not as directly involved in the attempted rescue as Salvador, they, too, were in the home when the fire started, and they were exposed to grave danger themselves. In fact, the room where Joab had been sleeping and was trapped by the fire was the room that Asael and Abisai shared with Joab, RR 7:135, they just happened to have fallen asleep on the sofa next to their mother that night. RR 7:154. So they were present while their brother was trapped and burning to death in the room that they should have been sleeping in. Additionally, Asael attempted to help with the rescue, but was pulled from the burning structure by his older brother. RR 10:63.

Nevertheless, Whirlpool suggests that neither “experienced compensable mental anguish” because Abisai did not participate in the rescue attempt, and that “[b]ystander damages cannot be inferred merely by Asael’s apparent presence at the scene.” Pet. BOM at 49. The definition of “bystander” in the jury charge is one “who was located near the scene

of the incident, who was closely related to the person who died, and whose shock resulted from a direct emotional impact from a sensory and contemporaneous observance of the incident.” CR 1132-34. There is no question that Asael and Abisai were both “near the scene of the incident,” or that they were closely related to their brother, Joab. Whirlpool’s argument is that they did not “contemporaneously observe the incident.” Yet both brothers contemporaneously observed their home go up in flames, knowing that their brother was trapped inside and burning to death. The cases cited by Whirlpool explain this requirement as a means of distinguishing between those who directly observe an event “as contrasted with learning of the accident from others after its occurrence.” *See Freeman v. City of Pasadena*, 744 S.W.2d 923, 924 (Tex. 1988) (emphasis omitted); *Gen. Motors Corp. v. Burry*, 203 S.W.3d 514, 547 (Tex. App.—Fort Worth 2006, pet. denied). Unfortunately, Asael and Abisai did not learn of the fatal fire from others after the event — they watched the event.

Whirlpool concedes that there was testimony that, since the fire, the two younger boys had done poorly in school, RR 7:163, and that they had been behaving more aggressively, as if they are angry. RR 10:62-63. Whirlpool does not mention the statement by their mother that they “have been affected a lot.” RR 7:163. Its only response to this evidence is that this testimony does not meet the *Saenz* requirements. Pet. BOM at 49. As previously demonstrated, these requirements apply to mental anguish damages arising in the absence of a physical injury. When mental anguish arises from traumatic injury or death to a family member, mental anguish damages are inferred. *Fifth Club, Inc.*, 196 S.W.3d at 797; *Parkway*, 901 S.W.2d at 445; *Moore*, 722 S.W.2d at 686.

PRAYER


Respondents, Margarita Camacho, et al., respectfully request that this Court deny the petition for review, or that if it grant the petition, it affirm the judgments of the trial court and the court of appeals. Respondents also request all other relief to which they may be entitled.

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CERTIFICATE OF SERVICE

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