IN THE SUPREME COURT OF IOWA

NO. 17-1971

LARRY EISENHAUER, as the Conservator for TD,
Plaintiff-Appellant,

vs.

THE HENRY COUNTY HEALTH CENTER, JAMES WIDMER, MD.,
and FAMILY MEDICINE OF MT. PLEASANT, P.C.,
Defendants-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT FOR
HENRY COUNTY LALA011871
THE HONORABLE MARK KRUSE

Final Brief of Defendants-Appellees James Widmer, M.D. and Family Medicine of Mt. Pleasant, P.C.

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ROUTING STATEMENT

Defendants agree this case should be transferred to the Iowa Court of Appeals because it involves the application of existing legal principles and issues appropriate for summary disposition. Iowa R. App. P. 6.1101(3)(a)-(b).

STATEMENT OF THE CASE

Plaintiff ("T.D.") filed this medical malpractice action on March 10, 2016, in the Iowa District Court for Henry County, asserting Defendants (Dr. Widmer and Family Medicine of Mt. Pleasant, P.C. (hereinafter "Dr. Widmer") and Henry County Health Center (hereinafter "HCHC")) were negligent during the labor and delivery of T.D., causing injuries. App. Vol. I pp. 9-18 (Petition). On November 17, 2017, after eight days of trial, three motions for mistrial by Dr. Widmer and HCHC, the trial court finding T.D. violated several orders in limine, and the trial court taking the defense's final Motion for Mistrial under advisement, the jury returned a verdict finding Defendants were not negligent. App. Vol. II pp. 24-58 (oral motion for mistrial); *id.* at pp. 421-432 (oral motion for mistrial); App. Vol. I pp. 350-54 (Defendant's Joint Motion for Mistrial); *id.* at pp. 405-407 (Verdict Form). On December 6, 2017, T.D. filed a Notice of Appeal. App. Vol. I pp. 416-420.T.D.'s appeal involves trial court instructions to the jury regarding the

specifications of negligence, the trial court's exclusion of evidence regarding Dr. Widmer's training and medical education, Plaintiff's objections to Dr. Widmer's expert testimony, and alleged error in allowing the jury access to the birth video during deliberations.

STATEMENT OF THE FACTS

T.D. filed the Petition at Law alleging Defendants were negligent in 21 ways during T.D.'s delivery. App. Vol. I pp. 9-18 (Petition). T.D. was born on August 31, 2007 at HCHC; Dr. Widmer was the physician who handled the delivery. *Id.*

During T.D.'s delivery, Dr. Widmer and the nurses encountered a medical emergency of shoulder dystocia, when T.D.'s shoulder was stuck on his mother's pubic bone. Dr. Widmer and the nurses took appropriate steps to relieve the shoulder dystocia and deliver T.D. All experts and witnesses agreed that in the event shoulder dystocia is not resolved in a timely manner, a period of less than six minutes, a baby may experience a hypoxic event, which is a medical emergency that can rapidly cause severe brain damage or death. App. Vol. II pp. 117-18; *id.* at p. 128.

This case was unique in that it essentially involved events that occurred over one minute and ten seconds—all of which were recorded on a birth video.

App. Vol. II pp. 59-60. In this instance, Dr. Widmer and the nurses performed maneuvers such that the shoulder dystocia was resolved in one minute and ten seconds after it was recognized. App. Vol. II pp. 125-28. Plaintiff's criticisms relate only to that 1:10. *Id.*

T.D.'s standard of care expert, Dr. Duboe, criticized the traction Dr. Widmer applied and the maneuvers the medical team performed to deliver T.D. App. Vol. II pp. 122-24. The defense experts disagreed with T.D.'s experts, testifying that Dr. Widmer and the nursing staff complied with the standard of care and did not cause T.D.'s permanent brachial plexus injury. App. Vol. II pp. 182-84, 194-95 (Dr. Boyle); *id.* at pp. 279-280 (Nurse Drummond); *id.* at pp. 285-86 (Nurse Sanborn).

No testimony at trial was elicited from any expert regarding Dr. Widmer's training or medical education. Prior to trial, Plaintiff sought to amend the Petition to allege Dr. Widmer was negligently trained (and HCHC had negligently credentialed Dr. Widmer). App. Vol. I pp. 81-109 (Plaintiff's Motion for Leave to File Amended and Substituted Petition); *id.* at pp. 109-131 (Plaintiff's Second Motion for Leave to File Amended and Substituted Petition). The trial court denied T.D.'s Motion to Amend after lengthy briefing and argument. *Id.* at pp. 148-152 (Partial Ruling on Motion to Amend Pertaining to Declaratory Judgment); *id.* at pp. 177-187 (Ruling on Motion for

Leave to Amend and Motion to Strike Expert Opinion). T.D. did not appeal that ruling.

At trial, T.D. again sought to admit evidence regarding Dr. Widmer's training during his case in chief. App. Vol. II pp. 175-77; App. Vol. III pp. 74-93 (Ex. 139, 139A, 140). T.D. made no record regarding how Dr. Widmer's medical training and education was relevant to any issue before the court. *Id.*

T.D. elected not to call Dr. Widmer as a witness live at trial, but instead showed extensive parts of his August 3, 2016, eight-hour videotaped deposition, which parts were designated by T.D. and cross-designated by Defendants. App. Vol. I pp. 266-69 (Plaintiff's Expedited Motion for Rulings on Deposition Objections); *id.* at pp. 347-350 (Order on Deposition Objections). These designations were subject to numerous objections. *Id.* at pp. 269-318 (Ex. A, Plaintiff's Expedited Motion for Rulings on Deposition Objections). The Court ruled regarding the numerous objections, and T.D. published Dr. Widmer's video-taped testimony according to those rulings. App. Vol. I pp. 347-350 (Order on Deposition Objections); App. Vol. II pp. 454-542 (Widmer's Deposition Excerpts Shown at Trial). T.D. did not appeal the trial court's rulings regarding Dr. Widmer's deposition testimony.

During Dr. Widmer's video testimony shown to the jury, T.D. fully explored Dr. Widmer's opinions regarding T.D.'s birth and Dr. Widmer and HCHC's actions. App. Vol. I pp. 269-318.

On September 9, 2016, Dr. Widmer, along with other experts, were designated as experts by Defendants. App. Vol. I pp. 26-27. The designation made clear the substance of Dr. Widmer's proposed opinions:

> Dr. Widmer is a physician specializing in family medicine, a treating physician of plaintiffs, and a defendant in this case. A copy of his CV is attached. Dr. Widmer is qualified to testify in this case based on his education, training, and experience, his review of the medical records of Lisa Hirshy and Tristan Derby, birth video, deposition testimony in this case, and his care and treatment of Lisa Hirschy and [T.D.]. The purpose of calling Dr. Widmer will be to have him testify on the issue of standard of care, causation and damages. Dr. Widmer is expected to testify at trial consistent with deposition testimony given in this case.

Id. at p. 27.

During his video deposition, Dr. Widmer testified that the maneuvers were properly executed and promptly relieved the shoulder dystocia. App. Vol. I pp. 347-350 (Order on Deposition Objections); App. Vol. II pp. 487-88, 494, 540 (Widmer's Deposition Testimony). After T.D.'s case in chief, Dr. Widmer was called as a witness by the defense. He testified consistently with his video deposition shown to the jury and limited his expert opinion to a four-word opinion that he met the standard of care, an opinion less specific

than the opinions T.D. elicited by Plaintiff at his deposition shown to the jury. App. Vol. II pp. 208-09.

T.D.'s counsel then cross-examined Dr. Widmer and inquired extensively regarding whether T.D. had bradycardia (a decreased heart rate during the labor and delivery). App. Vol. II pp. 225, 228-232, 239-240. During his re-direct examination, Defense counsel questioned Dr. Widmer regarding his recollection of T.D.'s heartbeat. *Id.* at pp. 245-46, 258-262. Dr. Widmer, consistent with his previous testimony, testified that T.D.'s heart rate was low, with late decelerations prior to his delivery, which led to his concerns T.D. was under distress. *Id.* During his testimony, Dr. Widmer used his own handwritten notes showing the times of certain fetal heart rates from the birth video to refresh his recollection. *Id.* at pp. 245-47. T.D. objected to this testimony and refreshed recollection, and argument was made outside of the presence of the jury. *Id.* at pp. 248-257. The trial court properly determined Dr. Widmer could use the notes to refresh his recollection of the facts concerning T.D.'s heart rate at various times rather than watching and continually stopping the birth video. *Id.* at pp. 256-58. Dr. Widmer then testified with the assistance of his notes concerning T.D.'s heart rate during the birth video. *Id.* at pp. 258-262. This testimony is consistent with Dr. Widmer's earlier testimony elicited by T.D. during T.D.'s case and with

T.D.'s expert, Dr. Duboe who agreed T.D.'s heart rate had been in the 70's on the birth video. App. Vol. I pp. 347-350 (Order on Deposition Objections); App. Vol. II pp. 480-81, 565-67 (Widmer's Deposition Testimony); *id.* at pp. 129-131 (Duboe's Trial Testimony).

At the conclusion of trial, the court took Dr. Widmer's directed verdict motion under advisement and ultimately determined T.D. failed to establish that inadequate documentation, the use of a vacuum, any lack of informed consent, the use or discontinuance of Pitocin, or the failure to order blood gasses caused any injury to T.D. App. Vol. II pp. 290-325 (Motion for Directed Verdict); App. Vol. I pp. 354-361 (Ruling on Defendants' Motion for Directed Verdict). T.D. does not appeal this ruling. The court then took up jury instructions and held a lengthy hearing regarding the jury instructions in which many of T.D.'s requested instructions and revisions were adopted. App. Vol. II pp. 326-402. The trial court did not instruct the jury on additional specifications of negligence T.D. requested because the specifications were either not supported by the evidence or included in the instructions drafted by the court. *Id.*

ARGUMENT

I. THERE WAS NO ERROR IN THE SPECIFICATIONS OF NEGLIGENCE

A. Error Preservation.

Defendants agree T.D. preserved error. App. Vol. I pp. 364-375 (Plaintiff's Revised Jury Instructions p. 2-3); App. Vol. II pp. 346-352 (Hearing re: Jury Instructions).

B. Standard of Review.

A district court's refusal to give a requested jury instruction is generally reviewed for errors at law. *Alcala v. Marriot Int'l, Inc.*, 880 N.W.2d 699, 707 (Iowa 2016). "Instructions must be considered as a whole, and if the jury has not been misled, there is no reversible error." *Thavenet v. Davis*, 589 N.W.2d 233, 236 (Iowa 1999). The Supreme Court reviews jury instructions to determine if they correctly state the law, are supported by substantial evidence, and are not embodied in other instructions. *Johnson v. Interstate Power Company*, 481 N.W.2d 310, 324 (Iowa 1992). Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion. *Ludman v. Davenport Assumption High School*, 895 N.W.2d 902, 912 (Iowa 2017). Giving or refusing to give a particular instruction is reversible error only when prejudicial. *Johnson v. Johnson*, 564 N.W.2d 414, 417 (Iowa

1997). "Marginal or technical" flaws in the instructions will not mandate a reversal on appeal. *Sonnek v. Warren*, 522 N.W.2d 45, 47 (Iowa 1994).

C. There Was No Error in the Court's Specifications of Negligence.

T.D. requested the district court to provide six specifications of negligence with respect to Dr. Widmer. Defendants objected to T.D.'s proposed jury instructions, and the district court ultimately submitted two specifications of negligence against Dr. Widmer. T.D. assigns error to the district court's alleged failure to give the following four of the six specifications he requested:

> 2. Dr. Widmer was negligent by failing to meet the standard of care in the following way:
>
> a) Repeatedly directing Lisa to push after should dystocia was identified and traction failed to deliver the anterior shoulder; . . .
>
> b) Failing to properly and effectively supervise, direct, or coordinate the efforts of the delivery team;
>
> c) Mistakenly concluding that T.D. was experiencing bradycardia and as a result, delivering T.D. hastily and without due care; . . .
>
> d) Failing to properly and effectively use maternal and fetal maneuvers to safely deliver T.D. after shoulder dystocia occurred, including but not limited to: McRobert's maneuver, suprapubic pressure, Wood's screw, reverse Woods screw (Rubin's), delivering the posterior arm, and Gaskin's maneuver

App. Vol. I p. 365 (Plaintiff's Revised Jury Instruction No. 21). The district court reframed T.D.'s proposed specifications of negligence against Dr. Widmer, and instructed the jury as follows:

> (2) Dr. Widmer was negligent by failing to meet the standard of care in one or more of the following ways:
>
> (a) In failing to direct or coordinate proper maneuvers to deliver the baby after the recognition of shoulder dystocia;
>
> (b) By applying excessive or improper traction in an effort to deliver him after the recognition of shoulder dystocia.

App. Vol. I p. 388.

The district court's marshalling instructions incorporated T.D.'s theory of the case without unduly emphasizing certain evidence. The Iowa Supreme Court has "on a number of occasions found instructions that unduly emphasized certain evidence were flawed and required reversal." *Burkhalter v. Burkhalter*, 841 N.W.2d 93, 106 (Iowa 2013); *see also Olson v. Prosoco, Inc.*, 522 N.W.2d 284, 287 (Iowa 1994) ("[E]ven instructions correctly stating the law should not give undue emphasis to any particular theory, defense, stipulation, burden of proof, or piece of evidence.").

Further, the district court was not required to submit specifications of negligence ultimately embodied in the marshalling instructions. *Van Iperen v. Van Bramer*, 392 N.W.2d 328, 332 (Iowa 1982) (affirming trial court's

refusal to submit specifications, notwithstanding expert testimony that the proposed specifications constituted separate grounds of negligence, because the specifications were embodied in the marshalling instructions). This holds particularly true when the concept underlying a proposed instruction places undue prominence on a particular aspect of the evidence. *Olson*, 522 N.W.2d at 287.

T.D.'s reliance on *Bigalk v. Bigalk*, 540 N.W.2d 247 (Iowa 1995), is misplaced. In *Bigalk*, the plaintiff was injured when she fell into an unguarded stairwell; she asked for a marshalling instruction with four separate specifications of negligence. The trial court rejected this request and summarized all four of Bigalk's requests into a single specification, while at the same time instructing on all of the defendant's specific allegations of comparative negligence. *Id.* at 248-49. Under those facts, the Iowa Supreme Court reversed finding the requirement to instruct on specific acts or omissions "is at least partially designed" to protect plaintiffs and the "plaintiff had a plausible argument that the jury was not advised sufficiently concerning her theory of the case," particularly because the jury was instructed on all of the defendant's specific allegations of negligence. *Id.* Here, unlike *Bigalk*, Defendants did not allege any comparative negligence, and the trial court

correctly declined to outright endorse T.D.'s proffered specifications of negligence.

Altogether, T.D.'s proposed specifications were duplicative, unsupported by substantial evidence, and unduly emphasized his theory of the case. The district court's marshalling instructions were consistent with the evidence presented and ensured the jury had a clear and intelligent understanding of what to decide.

1. The "Direction To Push" Specification.

The district court correctly found Dr. Widmer and his medical team's directions "to push" were properly factored into the first part of the marshalling instruction—failure to direct or coordinate proper maneuvers. This finding was supported by experts on both sides who unanimously agreed that directions "to push" may resume once a "proper maneuver is put into place." App. Vol. II p. 105 (Duboe's Testimony). Thus, directions to push could only deviate from the standard of care in the event Dr. Widmer "fail[ed] to direct or coordinate proper maneuvers to deliver the baby after the recognition of shoulder dystocia." App. Vol. I p. 388. (Jury Instruction No. 15(2)(a)).

The district court correctly recognized the same in rejecting T.D.'s request to submit a specification of negligence regarding instructions "to push":

> The maneuvers, it's how you do it properly, you stop, try and fix it and go on. You can argue [Dr. Widmer and his medical team improperly instructed Lisa "to push"], that's fine. You can argue that all you want, and that's fine, it just seems like it's part of maneuvers to do it properly.
>
> I mean, you can't say stop pushing and just sit there the rest of the day. At some point you have to start pushing again. I think that was the testimony of all the experts….At some point somebody has to push again.

App. Vol. II p. 349.

During closing summation, T.D. repeatedly emphasized Dr. Widmer and his medical team improperly directed Lisa "to push." T.D.'s counsel devoted three pages of transcript to arguing the directions "to push" were improper. App. Vol. II pp. 414-416. T.D.'s counsel then concluded the directions "to push" were improper because "[o]nce that shoulder dystocia is recognized at 13:42, there is no suprapubic pressure applied until 14:32." App. Vol. II p. 416.

T.D.'s argument that the instructions "to push" were improper in the absence of suprapubic pressure runs afoul of the evidence and his expert's testimony. App. Vol. II pp. 98, 105. Plaintiff's lone expert never testified that Dr. Widmer's direction to push breached the standard of care or caused

any injury. App. Vol. II pp. 104-107, 112-13, 123-24. Instead, Dr. Duboe testified traction and pushing can begin once a proper maneuver (or McRobert's suprapubic pressure) is in place. *Id*. Notwithstanding, T.D.'s argument acknowledges that any concern relating to the directions "to push" is tethered to maneuvers Dr. Widmer directed and coordinated. Specifically, T.D. would have to prove Dr. Widmer failed to direct or coordinate proper maneuvers in order to prevail on his theory Dr. Widmer's instructions "to push" breached the standard of care. Thus, T.D.'s proffered specification was circular with the marshalling instructions. *See Porter v. Iowa Power & Light Co.*, 217 N.W.2d 221, 233 (Iowa 1974) (finding reversible error where the trial court submitted duplicative specifications of negligence to the jury). The district court correctly refused to submit a duplicative specification of negligence that was unsupported by substantial evidence.

2. The "Effective Maneuvers" And "External Maneuvers" Specifications.

Next, T.D. assigns error to the district court's refusal to provide the following specifications of negligence against Dr. Widmer:

> 2(c) Failing to properly and **effectively** supervise, direct, or coordinate the efforts of the delivery team;
>
> 2(f) Failing to properly and effectively use **maternal and fetal maneuvers** to safely deliver T.D. after shoulder dystocia occurred, including but not limited to: **McRobert's maneuver, suprapubic**

pressure, Wood's screw, reverse Woods screw (Rubin's), delivering the posterior arm, and Gaskin's maneuver

App. Vol. I p. 365 (Plaintiff's Revised Jury Instruction No. 21). (emphasis added). With respect to these specifications, T.D. does not argue the district court's marshalling instructions were contrary to law; instead, T.D. quibbles over the phrasing of the marshalling instructions. *Crawford*, 828 N.W.2d at 308 *overruled on other grounds by Alcala*, 880 N.W.2d at 708 n.3. ("When the principles of law contained in the requested instructions are adequately embodied in the instructions given by the district court, we will not reverse the ruling of the district court simply because we would have chosen different language."). If the instructions taken as a whole do not mislead the jury, reversal is not required. *Osterfoss v. Illinois Cent. R.R.*, 215 N.W.2d 233, 235 (Iowa 1974) ("Counsel seems to feel he could have said it better. Whether true or not, this does not make the instructions bad.").

T.D. cannot argue the marshalling instructions were contrary to law because the marshalling instructions encompass the maneuvers Dr. Widmer and his medical team performed in addition to any maneuver Dr. Widmer and his medical team allegedly failed to perform. App. Vol. I p. 388 (Jury Instruction No. 15(2)(a) ("Dr. Widmer was negligent in failing to meet the standard of care…in failing to direct or coordinate **proper maneuvers**….") (emphasis added)).

Further, T.D.'s proposed specifications relating to "effective" and "fetal" maneuvers were unsupported by substantial evidence and unduly emphasized his theory of the case. First, all of the medical proof at trial was that maneuvers to resolve shoulder dystocia are performed sequentially and fetal maneuvers are only applied in the event the preliminary maternal maneuvers—McRoberts and suprapubic pressure—are ineffective. Even T.D.'s expert, Dr. Duboe, acknowledged an ineffective maternal maneuver, in and of itself, does not breach the standard of care. App. Vol. II p. 134. When asked whether Dr. Widmer had approximately six minutes to perform fetal maneuvers before oxygen deprivation, Dr. Duboe testified: "Yeah, either proper maternal maneuvers or followed by fetal maneuvers, *if the proper maternal maneuvers were not effective* in reducing the shoulder dystocia." (*Id.*) (emphasis added); *see also id.* at p. 111 ("in the face of a stuck shoulder that hasn't resolved because of inadequate McRoberts and suprapubic pressure efforts….[m]oving on to other maneuvers is what needed to be done here."). Because an ineffective maternal maneuver does not breach the standard of care, no reasonable mind could conclude Dr. Widmer was negligent simply because an ineffective maternal maneuver was performed. *See Ludman*, 895 N.W.2d at 912 (evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion). Contrary to the

medical evidence adduced at trial, T.D.'s proposed specification was an attempt to emphasize an ineffective maternal maneuver, in and of itself, constitutes negligence when the expert testimony does not support such an instruction.

Next, T.D.'s proposed specification identifying specific fetal maneuvers unduly emphasized his misplaced argument that Dr. Widmer was negligent for not performing fetal maneuvers. App. Vol. II pp. 234-35, 409. Dr. Duboe testified maneuvers are performed sequentially, and "rushing ahead tends to produce a greater chance of errors and mistakes…." *Id.* at pp. 117, 134. T.D. was born within one minute and ten seconds of Dr. Widmer recognizing shoulder dystocia. *Id.* at p. 244. Dr. Widmer, when asked why fetal maneuvers were not performed, testified "Tristan had been delivered at that time." *Id.* at p. 93.

Delineating specific fetal maneuvers would have only emphasized T.D.'s theory that Dr. Widmer was negligent for not performing fetal maneuvers. The district court correctly left this decision to the jury by incorporating any and all maneuvers into the marshalling instructions. There was no error in declining to submit a specific negligence claim that unduly emphasized T.D.'s case in addition to a general negligence claim. *Burns v.*

Rodriguez, 448 N.W.2d 673, 675 (Iowa App. 1989) (where cumulative or repetitive, even correct statements may be reversible error).

3. The Misdiagnosis of Bradycardia Specification.

Next, T.D. assigns error to the district court's refusal to provide the following specification of negligence with respect to Dr. Widmer:

> 2(d) Mistakenly concluding that T.D. was experiencing bradycardia and as a result, delivering T.D. hastily and without due care;

App. Vol. I p. 365 (Plaintiff's Revised Jury Instruction No. 21). T.D. fails to explain how the marshalling instructions failed to incorporate this specification of negligence. (Plaintiff's Brief pp. 42-44). Instead, T.D. simply points to evidence that putatively supports his contention that Dr. Widmer misdiagnosed bradycardia. T.D.'s evidence, however, is insufficient to support this proposed specification of negligence.

In an effort to assert Dr. Widmer misdiagnosed bradycardia, T.D. relies on deposition testimony from Rebecca Fraise, a HCHC nurse who did not testify at trial. (Plaintiff's Brief, p. 43); App. Vol. II pp. 238-242. T.D. also mistakenly relies on Dr. Duboe's testimony. (Plaintiff's Brief, p. 43). Dr. Duboe testified it is impossible to determine whether Dr. Widmer misdiagnosed bradycardia because the fetal heart monitoring records only reflect T.D.'s heart rate in five minute intervals. App. Vol. II pp. 96-97, 116, 122; App. Vol. III p. 160 (Ex. B, Lisa Hirschy's HCHC medical records, p.

41). Without expert testimony that Dr. Widmer misdiagnosed bradycardia, the record was insufficient to support this specification of negligence.

This conclusion is reinforced by the fact Dr. Widmer, the treating physician, did not limit his testimony to the fetal heart monitoring records. Dr. Widmer testified that, based upon his personal recollection, viewing of the birth video, *and* the fetal heart monitoring records T.D.'s heart rate lowered to 80 beats per minute following contractions, which revealed T.D. was in distress and "not doing well." App. Vol. II pp. 203-04, 231-32. Dr. Widmer testified further that when T.D. was born he "was not breathing and was not doing well and needed resuscitation." *Id.* at p. 207.

Even assuming without conceding Dr. Duboe's testimony was sufficient to support a specification of negligence, the trial court did not err in refusing to provide a specification of negligence that placed undue prominence on T.D.'s theory that Dr. Widmer *may* have misdiagnosed bradycardia, particularly when T.D. cannot articulate how the marshalling instructions failed to incorporate this proposed specification of negligence. *Olson*, 522 N.W.2d at 287.

4. No Prejudice Resulted From the District Court's Marshalling Instructions.

Error in refusing to give a particular instruction does not warrant reversal unless the error is prejudicial. *Johnson*, 564 N.W.2d at 417. As

outlined above, T.D.'s proffered specifications of negligence were embodied in the marshalling instructions and/or unsupported by substantial evidence. Further, the trial court allowed T.D. to emphasize his proffered specifications of negligence breached the standard of care throughout his opening, case in chief, and closing summation. App. Vol. II pp. 10-17, 20-21 (opening); *id.* at pp. 63, 70, 76, 78, 111, 123-24, 134-35 (case in chief); *id.* at pp. 197-98, 265-271 (rebuttal); *id.* at pp. 349, 405, 409, 411, 414-16, 443-44 (closing). In view of T.D.'s trial presentation and the marshalling instructions, the district court fulfilled its duty of ensuring the jury had an understanding of what to decide. *Sonnek v. Warren*, 522 N.W.2d 45, 47 (Iowa 1994). The jury unanimously rejected T.D.'s arguments.

In an attempt to establish prejudice, T.D. asserts the district court's marshalling instructions: (1) were "based on what was done in another case"; and (2) allowed defense counsel "to accuse T.D.'s counsel of presenting irrelevant evidence." (Plaintiff's Brief p. 49). Neither argument is persuasive.

T.D.'s attempt to assign error to the district court's statement "What I'm doing, I'm going to look at the Des Moines County case, see what they said, which is very general, and I think I'll just leave it general" is misplaced. App. Vol. II p. 343. The district court made this statement after hearing all the evidence adduced at trial and arguments from counsel relating to the

parties' proposed jury instructions. The district court's statement was not uttered in a vacuum, nor should it be analyzed in one. Simply put, T.D. failed to convince the district court that his proffered specifications of negligence were warranted.

Similarly, T.D.'s argument that the marshalling instructions allowed defense counsel to make improper arguments during closing summation is misplaced. During closing summation, Defense counsel correctly stated T.D. presented irrelevant evidence: "Now you just heard an hour and a half closing argument and how many days of testimony that addressed **Pitocin**, that addressed **vacuums**, that addressed **charting**, that addressed **calling for help**, that addressed all sorts of things that are totally irrelevant." App. Vol. II pp. 434-35 (emphasis added). T.D. does not assign error to the district court's refusal to instruct the jury that Dr. Widmer breached the standard of care by "failing to follow the HCHC policy on Shoulder Dystocia, or Vacuum Extraction, or Pitocin." App. Vol. I p. 365 (Plaintiff's Revised Jury Instruction No. 21). Nor does T.D. appeal the trial court's ruling on Defendants' Motion for Directed Verdict which dismissed any claim Dr. Widmer's use of the vacuum or Pitocin breached the standard of care, and any claim that inadequate documentation resulted in damages to T.D. App. Vol. I pp. 354-361 (Ruling On Defendants' Motion For Directed Verdict). Evidence relating

to Pitocin, vacuum, charting, and calling for help was irrelevant to the issues at trial. Defense counsel correctly identifying the same during closing summation did not result in prejudice.

5. Dr. Widmer Adopts HCHC's Arguments.

Dr. Widmer also agrees there was no error as to the specifications for HCHC and joins in HCHC's appeal arguments as to the specifications of negligence.

II. T.D FAILED TO PRESERVE ERROR AND THE TRIAL COURT CORRECTLY EXCLUDED DR. WIDMER'S CME RECORDS

A. Error Preservation.

T.D. failed to preserve error. T.D. contends the trial court abused its discretion by excluding Dr. Widmer's Continuing Medical Examination ("CME") records because the records were: (1) relevant to Dr. Widmer's qualifications and training; and (2) admissible to impeach Dr. Widmer in his capacity as a designated expert. T.D. contends he preserved error by making an offer of proof. (Plaintiff's Brief, p. 50). Specifically, at the close of his case only, T.D. renewed his arguments "related to Defendant's motion in limine number 19, which the Court granted, which excluded evidence of Dr. Widmer's CME's." App. Vol. II p. 175. In addition to rehashing his motion in limine arguments during this offer, T.D. asserted Dr. Widmer's CME

records were admissible to impeach Dr. Widmer's credibility as a designated expert. *Id.* at pp. 175-77. T.D.'s offer of proof failed to preserve error on either issue.

First, T.D. failed to adduce any evidence indicating the proportion of CME hours other members of the American Board of Family Medicine devote to obstetrics. App. Vol. II pp. 175-77. Nor was there any evidence indicating physicians ordinarily devote a proportional amount of CME hours to their practice areas. *Id*. T.D. also left out Dr. Widmer's practical experience and access to sources of medical information in authoritative journals. *Id.* at pp. 200-01 (Widmer's Trial Testimony); *id.* at pp. 471-74, 476-77 (Widmer's Deposition Testimony); App. Vol. I p. 283-84 (Ex. A, Plaintiff's Expedited Motion for Rulings on Deposition Objections, pp. 60-61). Without these quintessential facts, T.D.'s offer of proof failed to establish any basis from which the jury could conclude Dr. Widmer lacked the skill and knowledge a competent physician would ordinarily possess. T.D.'s offer of proof was inadequate and failed to preserve error. *See State v. Taylor*, 310 N.W.2d 174, 177-78 (Iowa 1981) (finding offer of excluded evidence of decedent's extramarital affair inadequate because the offer "failed to demonstrate [defendant's] knowledge of any extramarital sexual activity of his wife" and therefore failed to establish a threshold element of provocation); *State v.*

Wood, No. 11-1124, 2012 WL 3200868, at *3 (Iowa Ct. App. Aug. 8, 2012) ("In this case, the evidence presented in the offer of proof had such a little amount of relevance, if any, that we have no problem in finding the district court did not abuse its discretion in determining that any probative value was substantially outweighed by the danger of confusion of the issues and misleading the jury."); *State v. Wages*, 483 N.W.2d 325, 327 (Iowa 1992) ("Defendants cannot now advance arguments to establish the relevance of their offered materials which were not articulated to the district court."); *State v. Ritchison*, 223 N.W.2d 207, 212 (Iowa 1974) (purpose of offer of proof is to make meaningful record for appellate review).

Second, T.D. failed to preserve error regarding the admissibility of Dr. Widmer's CME records to impeach Dr. Widmer in his capacity as a designated expert. In order to preserve this issue for review, T.D. had the burden of demonstrating the substance of the offered testimony by an offer of proof. *Strong v. Rothamel*, 523 N.W.2d 597, 599 (Iowa Ct. App. 1994) (citing Iowa R. Evid. 103(a)(2) (now 5.103(a)(2)). "An offer of proof provides a record because the reviewing court cannot predicate error upon speculation as to what testimony would have come in the record had the objection not been sustained." *Id.* (citing *Parrish v. Denato*, 262 N.W.2d 281, 286 (Iowa 1978).

Of importance, T.D.'s offer of proof was made at the close of his case only. T.D. did not make an offer of proof when or after Dr. Widmer testified live at trial during Defendants' case. By failing to establish the questions T.D. intended to ask and, more importantly, Dr. Widmer's associated testimony, T.D. failed to make an offer of proof regarding any excluded cross-examination. Without knowing the substance of Dr. Widmer's proposed testimony, there is no way to determine whether the trial court abused its discretion by excluding such evidence and, especially, whether the exclusion was harmful. Further, without Dr. Widmer's associated testimony, nothing was shown as to the effect, if any, the mere admission of Dr. Widmer's CME records would have had on his capacity to testify as an expert. Altogether, T.D.'s offer of proof failed to demonstrate the facts essential to establish the admissibility and the weight, if any, of his proposed impeachment of Dr. Widmer. Because T.D.'s offer of proof was inadequate, it cannot be said T.D.'s right of cross-examination was unduly restricted.

Finally, the sum total of Dr. Widmer's purported "expert" testimony which T.D. sought to impeach Dr. Widmer with his CME records amounted to one foundational question and one substantive question by his attorney. First, Dr. Widmer was asked if he held an opinion regarding whether he met the standard of care, to which he answered "Yes." App. Vol. II p. 208.

Second, he was asked his opinion as to whether he met the standard of care, to which he answered "I believe I did." *Id.* T.D.'s inability to use Dr. Widmer's CME records to impeach this single expert opinion could not reasonably be considered prejudicial to T.D.'s case even if the alleged error had been preserved. *Id.* at pp. 208-09.

B. Standard of Review.

A district court's evidentiary rulings, including its determination of whether a witness may testify as an expert on a particular topic or to admit relevant evidence, are reviewed for an abuse of discretion. *See Giza v. BNSF Ry. Co.*, 843 N.W.2d 713, 718 (Iowa 2014); *Quad City Bank & Trust v. Jim Kircher & Assocs., P.C.*, 804 N.W.2d 83, 92 (Iowa 2011). "An abuse of discretion occurs 'when the district court exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable.'" *Rowedder v. Anderson*, 814 N.W.2d 585, 589 (Iowa 2012) (citation omitted). "A ground or reason is untenable when it is not supported by substantial evidence or when it is based on an erroneous application of the law." *Graber v. City of Ankeny*, 616 N.W.2d 633, 638 (Iowa 2000). An abuse of discretion only warrants reversal if the abuse is prejudicial. *Leaf v. Goodyear Tire & Rubber Co.*, 590 N.W.2d 525, 531 (Iowa 1999); *Lane v. Coe College*, 581 N.W.2d 214, 218 (Iowa App. 1998) ("The trial court will be reversed and a

new trial granted only when there has been an abuse of discretion which resulted in prejudice to the opposing party."). Similarly, a trial court has considerable discretion in determining the scope and extent of cross-examination and an appellate court will reverse only if an abuse of discretion is shown and then only if it appears that prejudice resulted. *Hamilton v. O'Donnell*, 367 N.W.2d 293, 296 (Iowa Ct. App. 1985).

C. T.D.'S Assignment of Errors With Respect to Dr. Widmer's CME Records Are Fatally Flawed.

1. Dr. Widmer's CME Records As They Relate to His Qualifications and Training Are Irrelevant.

Setting aside the fundamental flaws of T.D.'s offer of proof, whether Dr. Widmer "regularly train[ed] or hone[d] his obstetrical skills" was entirely irrelevant. (Plaintiff's Brief, p. 54). The determination of whether evidence should be admitted requires the court to first determine if the evidence is relevant. *See Graber*, 616 N.W.2d at 638. "Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case." Iowa R. Civ. P. 5.401 cmt. Ultimately, the "test is 'whether a reasonable [person] might believe the probability of the truth of the consequential fact to be different if [the person] knew of the proffered evidence.'" *McClure v. Walgreen Co.*, 613 N.W.2d 225, 235 (Iowa 2000) (alteration in original) (citation omitted).

Irrelevant evidence is not admissible. *See* Iowa R. Civ. P. 5.402. "The converse proposition—that relevant evidence is admissible—is not automatically true." *Graber*, 616 N.W.2d at 638. "Even relevant evidence should not be admitted when 'its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury….'" *Id.* (quoting Iowa R. Civ. P. 5.403). A determination of the probative value of relevant evidence focuses on the strength and force of the tendency of the evidence "to make a consequential fact more or less probable." *McClure*, 613 N.W.2d at 235. "Unfair prejudice arises when the evidence prompts the jury to make a decision on an improper basis…." *Waits v. United Fire & Cas. Co.*, 572 N.W.2d 565, 569 (Iowa 1997).

T.D. contends Dr. Widmer's CME records establish "he did not regularly train or hone his obstetrical skills." (Plaintiff's Brief, p. 54). Dr. Widmer's training and credentialing, however, were not at issue in the case. In order for Dr. Widmer's CME records to be relevant, such evidence must make more likely than not that— during T.D.'s birth—Dr. Widmer was negligent in his duties or in supervising his medical team. A physician's CME records are not determinative of his or her ability to meet the standard of care on a specific occasion. Dr. Widmer's CME records only go to his discretion

in electing CME courses and do not make his negligence during T.D.'s birth more likely than not.

Further, it would be improper for the jury to use the evidence in the manner T.D. intended, that is, for the jury to conclude that because Dr. Widmer purportedly did not devote a proportional amount of CME hours to his practice areas he was negligent on a specific occasion. For the same reasons T.D.'s Second Motion for Leave to Amend was denied, T.D. was prohibited from admitting evidence or soliciting testimony regarding negligent training facts because such evidence was irrelevant and allowing the evidence "defeats the reasons as to why it was disallowed." App. Vol. I p. 182 (Ruling on Motion for Leave to Amend and Motion to Strike Expert Opinion, p. 6). The trial court did not abuse its discretion in excluding Dr. Widmer's CME records to affirmatively attack his qualifications and training.

Furthermore, any harm in excluding Dr. Widmer's CME records is de minimis. T.D. argues "[t]he CME records, *coupled with* Dr. Widmer's own admissions that he was unfamiliar with most of the fetal maneuvers available to a physician to resolve shoulder dystocia, provide strong evidence that Dr. Widmer lacked the reasonable degree of knowledge and skill possessed by others in the profession." (Plaintiff's Brief, p. 54) (emphasis added). The district court allowed T.D. to elicit testimony from Dr. Widmer regarding his

inability to identify fetal maneuvers with specific terminology. App. Vol. II pp. 234-35. The district court also allowed T.D. to introduce the following portion of Dr. Widmer's deposition:

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Q. And I'm going to put a finer point on that. If for any reason you were on the phone to the University of Iowa Hospitals and Clinic and they said, "Use the reverse Woods screw method" or "Use the Zavanelli method," would you know how to do and perform either of those methods if you were directed to do so or it was suggested by someone that you had respect for medically and it was an authoritative source?
A. I probably would not know it under those terms.
Q. Would you know it by any other term?
A. Probably—probably not.

App. Vol. II pp. 491-92.

T.D. emphasized that Dr. Widmer, although familiar with fetal maneuvers, could not identify fetal maneuvers with specific terminology during his deposition. App. Vol. II pp. 234-35; *id.* at p. 409. T.D. fails to differentiate between evidence of Dr. Widmer's inability to identify external maneuvers by specific terminology and evidence delving into why Dr. Widmer was unable to do so.

2. Dr. Widmer's CME Records Were Properly Excluded For Impeachment Purposes.

Assuming *arguendo* this issue is preserved, the trial court properly excluded Dr. Widmer's CME records. Dr. Widmer fulfilled his CME requirements, and his CME records bear no relevance to his ability to render a medical opinion: his license was not suspended on account of his CME records, or for any error of treatment or other issues related to his training or expertise as a doctor. Furthermore, as stated above, Plaintiff provided no offer of proof regarding his proposed questions to cross-examine Dr. Widmer and never asked any question on cross-examination regarding Dr. Widmer's CME attendance or records. Tr. Vol. III p. 8:5–88:11; App. Vol. II pp. 265-271.

While there is no reported Iowa decision addressing whether a treating physician may be impeached with his or her fulfilled CME requirements, the Court need not decide whether the trial court abused its discretion in the dark. In an analogous situation, appellate courts in other jurisdictions unanimously uphold district court rulings that an expert witness may not be impeached on cross-examination with evidence the expert failed board certification exams to affirmatively attack the physician's competence to give expert testimony on whether the standard of care was met. *See Campbell v. Vinjamuri*, 19 F.3d 1274, 1277 (8th Cir. 1994) (applying Eighth Circuit rule that evidentiary rulings are reviewed for an abuse of discretion and finding the Missouri trial

court did not abuse its discretion by excluding evidence of the defendant's failure, on three or four occasions, to pass examinations required to be board-certified anesthesiologist for the purpose of attacking his competence to give limited expert testimony on whether he met the standard of care in treating the plaintiff because such evidence was irrelevant to the issue of his professional competence and his actions on the date in question); *Marsingill v. O'Malley*, 58 P.3d 495, 501 (Alaska 2002) ("courts generally disfavor admission of evidence showing that a defendant failed board certification tests when that evidence is affirmatively offered to prove lack of professional knowledge or skill."); *Gipson v. Younes*, 724 So.2d 530, 533 (Ala.Civ.App.1998) ("We have reviewed a number of decisions from other jurisdictions in which the courts have been required to determine whether a physician who testifies as an expert witness may be cross-examined about his failure to pass a board certification exam. The decisions are virtually unanimous in upholding the trial court's Rule 403 determination—regardless of whether the determination resulted in admission or in exclusion of the evidence.").

In *Campbell*, the defendant, Dr. Vinjamuri, admitted in his deposition that he was not a board-certified anesthesiologist and that he had failed the certification examination on three of four occasions. 19 F.3d at 1276. Dr. Vinjamuri moved to exclude the evidence of his past examination failures,

and the trial court granted the motion. *Id.* The plaintiff was permitted, however, to elicit from Dr. Vinjamuri the fact that he was not board certified. *Id.* During direct examination, Dr. Vinjamuri's attorney asked him if his care "was below standard care and treatment for [plaintiff]." *Id.* at 1277 n. 2. Dr. Vinjamuri responded, "I don't think so." *Id.* In light of this testimony, the plaintiff requested the trial court to reconsider its evidentiary decision. Specifically, the plaintiff "argued that the evidence of Vinjamuri's test failures should be allowed for the purpose of impeaching his credibility as an expert." *Id.* at 1276. The trial court denied plaintiff's request because the admission of evidence revealing Dr. Vinjamuri was not board certified in his specialty was sufficient to attack his expert opinion. *Id.* The Eighth Circuit affirmed finding the evidence of Dr. Vinjamuri's past failures to pass his board-certification examination was irrelevant to the issue of his professional competence and his actions on the date in question. The court explained:

> [Dr. Vinjamuri's] test failures have no clear connection to his knowledge and experience of the matter of which he was testifying (whether or not he met the standard of care in his treatment of Campbell). It is sufficient that the jury was given the information that Vinjamuri was not board certified in his specialty. The reason for his lack of certification is of limited significance. To hold otherwise we would have to conclude that admission of Vinjamuri's test failures would probably have led to a verdict for the plaintiff. However, the jury could legitimately only use the information to impeach Vinjamuri's statement where he asserts he met the appropriate standard of care. Given the additional expert testimony presented by other defense

> witnesses on whether Vinjamuri met the standard of care, we cannot conclude that a jury would be significantly swayed by casting doubt on Vinjamuri's statement.

Id. at 1277 (citations omitted). The court further recognized "it would be improper for the jury to use the evidence in the manner suggested by [the plaintiff], that is for the jury to conclude that because a physician was unable to pass his board exams, he was negligent on a specific occasion." *Id.* at 1277 (citing *Beis v. Dias*, 859 S.W.2d 835 (Mo. Ct. App. 1993) (ability to pass a board examination only goes to a physician's test taking abilities and does not make his or her negligence on one particular day more likely than not)).

Campbell is on point. During direct examination, Dr. Widmer was asked whether he met the standard of care. App. Vol. II pp. 208-09. Dr. Widmer responded, "I believe I did." *Id.* at p. 208. Defense counsel's question regarding the standard of care and Dr. Widmer's answer are virtually identical to the question and response at issue in *Campbell*. *See Campbell*, 19 F.3d at 1277 n. 2. In view of Dr. Widmer's limited expert testimony, the probative value of Dr. Widmer's CME records, if any, was substantially outweighed by the danger of unfair prejudice. In addition, the trial court allowed T.D. to introduce evidence that Dr. Widmer was unable to identify fetal maneuvers with specific terminology during his deposition. App. Vol. II pp. 234-35, 371. The underlying reason for Dr. Widmer's inability to

identify fetal maneuvers with specific terminology is of such marginal significance, T.D. cannot contend the exclusion of Dr. Widmer's CME records was harmful. This conclusion is bolstered by the fact that Dr. Boyle testified Dr. Widmer met the standard of care and did not cause T.D.'s injury. *Id.* at pp. 180-81, 184-192, 195-96. Given this additional expert testimony, casting any doubt on Dr. Widmer's belief that he met the standard of care would not have swayed the jury. *Campbell*, 19 F.3d at 1277.

In addition, Plaintiff elicited testimony during Dr. Widmer's deposition regarding his training in obstetrics. App. Vol. II pp. 464-65, 471-74, 476-77. Additional evidence of that training is of no probative value. Other differences between the facts in *Campbell* and the present case make *Campbell* all the more persuasive. First, Dr. Widmer is board certified. *Id.* at pp. 199-200. Second, Dr. Widmer did not fail to satisfy his CME requirements. T.D.'s sole contention is that Dr. Widmer putatively failed to devote a proportional amount of CME hours to his practice areas. Again, however, T.D. failed to adduce any evidence indicating physicians ordinarily devote a proportional amount of CME hours to their practice areas. *Id.* at pp. 175-77. As a result, the trial court correctly excluded Dr. Widmer's CME records for impeachment purposes.

3. Dr. Widmer Adopts HCHC's Arguments.

Dr. Widmer also agrees with, and joins in, HCHC's arguments on this issue.

III. THE TRIAL COURT CORRECTLY ALLOWED DR. WIDMER TO TESTIFY REGARDING THE STANDARD OF CARE AND HIS OBSERVATIONS DURING T.D.'S BIRTH

A. Error Preservation.

Dr. Widmer and FMMP agree T.D. preserved error with respect to Dr. Widmer opining he met the standard of care. App. Vol. II p. 209.

T.D. waived the appeal issue pertaining to Dr. Widmer's notes by going substantially further than Dr. Widmer's counsel and actually displaying the notes to the jury during re-cross examination.[1] *Id.* at pp. 265-68.

B. Standard of Review.

As in all evidentiary matters, the trial court has broad discretion in making rulings on expert testimony under Iowa R. Civ. P. 1.508. *Milks v. Iowa Oto-Head & Neck Specialists, P.C.*, 519 N.W.2d 801, 805 (Iowa 1994). Iowa is committed to a liberal rule allowing opinion testimony if it will aid the jury and is based on special training, experience, or knowledge on the

[1] In fact, Dr. Widmer's counsel only ever intended to use the notes to refresh Dr. Widmer's recollection. *See* App. Vol. II p. 245-47.

issue. *Yates v. Iowa W. Racing Ass'n*, 721 N.W.2d 762, 774 (Iowa 2006). If such specialized knowledge "will assist the trier of fact to understand the evidence or to determine a fact in issue," an expert witness may provide an opinion on the topic. Iowa R. Evid. 5.702. An appellate court will not disturb a trial court's rulings on expert testimony absent an abuse of discretion. *Id.*

C. The Court Properly Allowed Dr. Widmer to Testify He Met the Standard of Care and Refresh his Recollection with Notes.

T.D. argues the district court abused its discretion by: (1) allowing Dr. Widmer to opine he met the standard of care; and (2) allowing Dr. Widmer to refresh his recollection with notes summarizing the fetal heart rate tones he observed while watching the birth DVD. Both arguments are untenable. First, Dr. Widmer was properly designated as an expert to testify on the standard of care. Second, Dr. Widmer's notes summarized T.D.'s fetal heart tones on the birth DVD, which was properly admitted into evidence, and the notes were simply used to refresh Dr. Widmer's recollection and assist the jury understand his testimony.

1. The Trial Court Correctly Found Dr. Widmer's Opinion On The Standard Of Care Was Within The Scope Of His Expert Disclosure And Deposition Testimony.

Defendants properly designated Dr. Widmer to opine on the standard of care pursuant to Iowa Code Section 668.11 and Iowa R. Civ. P. 1.508. Iowa Code Section 668.11 provides in pertinent part:

> 1. A party in a professional liability case brought against a licensed professional…who intends to call an expert witness…shall certify to the court and all other parties the expert's name, qualifications and purpose for calling the expert.

IOWA CODE Section 688.11 (2017). Section 688.11 "is designed to require plaintiffs to have their proof prepared at an early stage in the litigation *in order to protect professionals* from having to defend against frivolous suits." *Nedved v. Welch*, 585 N.W.2d 238, 240 (Iowa 1998) (emphasis added).

Iowa R. Civ. P. 1.508(4) provides: "The expert's direct testimony at trial may not be inconsistent with or go beyond the fair scope of the expert's disclosures, report, deposition testimony, or supplement thereto." Iowa R. Civ. P. 1.508(4). Iowa Rule of Civil Procedure 1.500(2) required Dr. Widmer to disclose the following:[2]

> (1) The subject matter on which [he was] expected to present evidence under Iowa Rules of Evidence 5.702, 5.703, or 5.705.
>
> (2) A summary of the facts and opinions to which [he was] expected to testify.

Iowa R. Civ. P. 1.500(2)(c)(1)-(2).

Defendants timely designated Dr. Widmer as an expert and outlined his opinions. App. Vol. I pp. 26-27. Dr. Widmer's designation expressly stated:

> Dr. Widmer is qualified to testify in this case based on his education, training, and experience, his review of the medical

[2] Dr. Widmer, a named defendant, was not required to provide a written report outlining his expert opinions. *See* Iowa R. Civ. P. 1.500(2)(b).

> records of Lisa Hirshy and Tristan Derby, birth video, deposition testimony in this case, and his care and treatment of Lisa Hirschy and Tristan Derby. The purpose of calling Dr. Widmer will be to have him testify on the issue of standard of care, causation and damages. Dr. Widmer is expected to testify at trial consistent with deposition testimony given in this case.

Id. at p. 27. T.D. did not object or move to strike Dr. Widmer as an expert at the time of his designation but responded by supplementing his own designation to include Dr. Widmer and other treaters as experts. *Id.* at pp. 42-46.

Against this backdrop, there are no grounds to find the trial court abused its discretion by allowing Dr. Widmer to opine he met the standard of care. Dr. Widmer was made "available for discovery." IOWA CODE Section 688.11 (2017). T.D. deposed Dr. Widmer for more than 8-hours. App. Vol. II pp. 544, 579. Dr. Widmer's designation provided he would "testify at trial consistent with deposition testimony given in this case." App. Vol. I. p. 27. Dr. Widmer's deposition testimony reveals he was a practicing, board-certified Family Practice physician who specialized, in part, in the delivery of babies in 2007. App. Vol. II pp. 545-49. At his deposition, Dr. Widmer further testified regarding his experience and the standard of care when encountering shoulder dystocia:

> **Dr. Widmer's Deposition Testimony**
>
> Pg. 83

Q. And you say the nurses were asked. Who asked them to do that?
A. I did.

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Q. And did they comply with your order?
A. Yes.
Q. And you're familiar with that method of properly doing the McRoberts maneuver?
A. I would say yes.
Q. And did you witness them perform the McRoberts maneuver satisfactorily?
A. I believe so.

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Q. Was the McRoberts maneuver successful?
A. I believe so.

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Q. And do you believe it was properly executed?
A. I do.

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Q. And you have looked at the video numerous times?
A. I have.
Q. Were these maneuvers that you ordered effective, the application of the suprapubic pressure and the McRoberts maneuver?
A. Yes.

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Q. And would you please tell the ladies and gentlemen of the jury and the Court why those

maneuvers that you ordered were effective.
A. They were performed as needed, and the baby was delivered.
Q. And the baby was delivered, what, within a minute after the head was delivered, the entire body was delivered?
A. I believe our time we thought a minute, 35.
Q. And you said you usually like to see the baby delivered three to five minutes after the head was delivered?
A. Yes.
Q. And that was well within your time frame; correct?
A. It was.

Id. at pp. 562-63, 572-73, 577-78.

Consistent with this testimony, defense counsel asked Dr. Widmer only questions relating to the standard of care during direct examination. *Id.* at pp. 208-09. Dr. Widmer responded with only a four-word answer: "I believe I did." *Id.* at p. 208. Dr. Widmer testified he held this belief because the maternal maneuvers were properly performed and satisfied the standard of care. *Id.* at pp. 208-09. Dr. Widmer's opinion relating to the standard of care did not exceed the fair scope of his deposition testimony and was significantly less detailed than his testimony during his deposition. T.D. received sufficient notice from the discovery proceedings that Defendants would seek to introduce Dr. Widmer's opinion relating to the standard of care. The deposition testimony cited above provided T.D. sufficient notice as to the

content of Dr. Widmer's testimony. T.D. had adequate notice of Dr. Widmer's opinions. The purpose of Rule 1.508 is "to avoid surprise to litigants and to permit issues to become both defined and refined before trial." *Mercy Hosp. v. Hansen, Lind & Meyer*, 456 N.W.2d 666, 670 (Iowa 1990). The trial court reasonably determined T.D. was not subject to undue surprise by Dr. Widmer's belief that he met the standard of care.

In addition, all of Dr. Widmer's opinions are based upon "his observations during the course of treatment" and guided his decision-making on August 31, 2017. Rule 1.508 does not preclude an expert from testifying to facts and opinions derived prior to being retained as an expert. As a treating physician, Iowa law allows Dr. Widmer to testify regarding the care he provided and any opinions he reached in connection with that care. *See Hansen v. Cent. Iowa Hosp. Corp.*, 686 N.W.2d 476, 482 (Iowa 2004) (citing *Carson v. Webb*, 486 N.W.2d 278, 281 (Iowa 1992)). "A treating physician ordinarily learns facts in a case, and forms mental impressions or opinions, substantially before he or she is retained as an expert witness, and often before the parties themselves anticipate litigation." *Carson v. Webb*, 486 N.W.2d 278, 280 (Iowa 1992). In this case, Dr. Widmer supervised T.D.'s birth almost ten years before this lawsuit commenced. Dr. Widmer was clearly a treating physician. Dr. Widmer's limited four-word opinion on the standard of care

("I believe I did") is derived solely from his observations during the course of treatment. There is no evidence to support a finding Dr. Widmer's opinions were subsequently acquired or developed in anticipation of trial. Absent evidence to the contrary, it is reasonable to presume the focus of a physician's inquiry and opinions about his or her patient were medical. *Morris-Rosdail v. Schechinger*, 576 N.W.2d 609, 612 (Iowa 1998).

Further, "[i]t would be an abuse of discretion to exclude or limit the testimony of a treating physician as a nondisclosure sanction under rule 125." *Id*. (Rule 125 renumbered to Iowa R. Civ. P. 1.508 and amended Nov. 9, 2011, eff. Feb. 15, 2002). As a result, even if the Court is inclined to find Defendants failed to properly designate Dr. Widmer, "rule [1.508] did not authorize the trial court to impose sanctions for nondisclosure." *Id*. at 612.

Finally, no prejudice resulted from, and no different result was occasioned by, Dr. Widmer's limited expert testimony on whether the standard of care had been met in treating T.D. Again, Dr. Boyle testified Dr. Widmer met the standard of care and did not cause T.D.'s injury. App. Vol. II pp. 180-81, 184-192, 195-96. Given this additional expert testimony, Dr. Widmer's limited expert testimony on the standard of care did not prejudice T.D.

2. The Trial Court Correctly Allowed Dr. Widmer To Refresh His Recollection With Notes Summarizing The Fetal Heart Rate Tones He Observed While Watching The Birth DVD.

Next, T.D. asserts he was subject to undue surprise because Dr. Widmer prepared notes summarizing his observations of T.D.'s birth video, which he used to refresh his recollection. This argument is unpersuasive. Dr. Widmer viewed the birth video prior to his deposition. App. Vol. II pp. 560-61. At his deposition, Dr. Widmer testified he would have to rely on his personal recollection, the birth video, and medical records to identify the specific timing of T.D.'s fetal heart tones and late decelerations. *Id.* at pp. 565-67. During his deposition, Dr. Widmer described T.D.'s birth as "problematic" because "[t]he head did not descend without assistance. There was fetal distress present." *Id.* at pp. 555-56. In particular, Dr. Widmer was "concerned that [T.D.] was having decelerations, and the heart rate was going down, some late decelerations…." *Id.* at pp. 557-58. Dr. Widmer testified T.D. was under fetal distress because T.D.'s heart rate dropped "down in the 70 to 80 range" and "[n]ormal would be about 130 to 150." *Id.* at p. 559.

Consistent with his deposition, Dr. Widmer testified on direct examination that T.D. was under fetal distress and he "felt that it would be in [T.D.'s] best interest to get him delivered sooner rather than later." App. Vol. II p. 203. To support this contention, Dr. Widmer testified, without objection,

to his recollection of the fetal heart rates he heard while watching the birthing DVD. *Id.* Dr. Widmer testified T.D.'s heart rate was initially "good" "in the 130 possibly even higher range." *Id.* However, Dr. Widmer testified that T.D.'s heart rate lowered to between 80 and 90 beats per minute during the second stage of labor and did not rise following contractions, which is "usually a sign that the baby is not doing well." *Id.* at p. 204.

During cross-examination, T.D.'s counsel emphasized that the fetal heart monitoring records only reflect T.D.'s heart rate in five minute intervals. App. Vol. II pp. 227-232; App. Vol. III p. 160 (Ex. B, Lisa Hirschy's HCHC medical records, p. 41). In response, Dr. Widmer noted his testimony is not limited to the fetal heart monitoring records, but also his personal recollection. App. Vol. II pp. 231-32. Thereafter, T.D.'s counsel proceeded, over defense counsel's objection, to have Dr. Widmer read aloud portions of Ms. Fraise's deposition. *Id.* at pp. 237-240.[3] As adduced at trial, Ms. Fraise testified during her deposition that a fetal heart rate fluctuating between 80 to 90 beats per minute is "normal during pushing stage." *Id.* at p. 240.

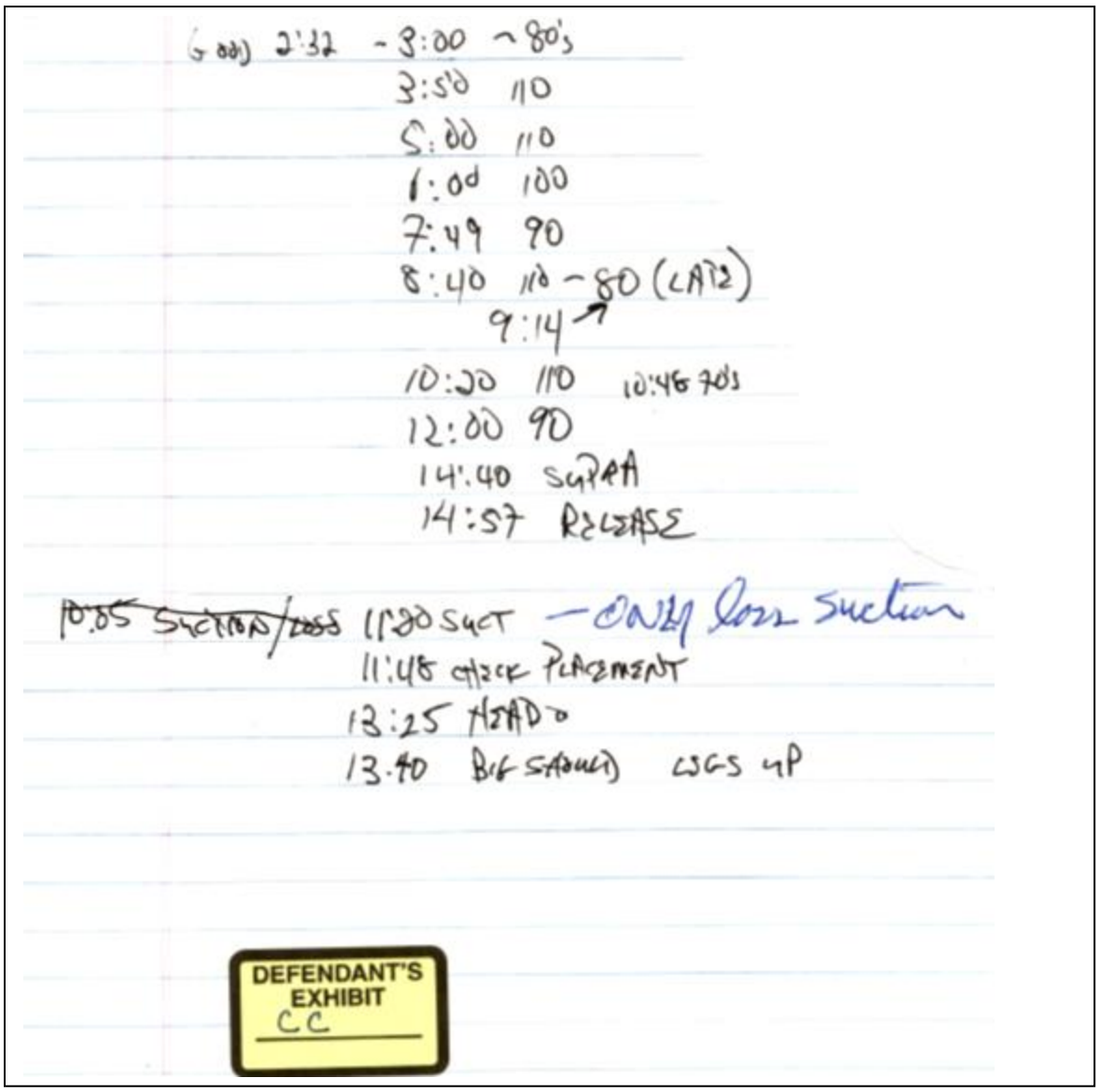
On re-direct examination, defense counsel questioned Dr. Widmer further concerning his recollection of T.D.'s fetal heart rate during the birthing

[3] Ms. Fraise, did not testify at trial, which the trial court later noted during an offer of proof would have impacted its ruling on defense counsel's objection. App. Vol. II pp 241-42.

video. To facilitate this testimony, Dr. Widmer relied upon notes he prepared several days prior while watching the birth video.[4] At this time, Dr. Widmer's notes were simply used to refresh Dr. Widmer's recollection and assist the jury understand his testimony. App. Vol. II pp. 258-64, 271-72.

T.D., on re-cross examination, went into Dr. Widmer's notes, establishing that they were made "last Friday." App. Vol. II p. 265. T.D.'s counsel then published the notes for the jury. *Id.* at pp. 265-68. In further re-direct, Dr. Widmer's counsel offered the notes "that's been shown to the jury now." *Id.* at p. 271. The court admitted the notes as demonstrative only. *Id.* at pp. 271-72. Dr. Widmer's notes were simply his handwritten calculations of the fetal heart rate tones with the video times he observed while watching the birth video:

[4] Dr. Widmer provided defense counsel these notes during a break in his cross-examination. App. Vol. II p. 255. Defense counsel emailed Dr. Widmer's notes to T.D.'s counsel within minutes of receiving the same. *Id.* at pp. 431-32.



App. Vol. III p. 190.

T.D. contends Dr. Widmer's notes fell outside the scope of the opinions and observations Dr. Widmer formulated during T.D.'s birth and constituted a "trial by ambush." (Plaintiff's Brief, p. 64).

T.D.'s first point—Dr. Widmer's notes do not relate to observations made during the course of treatment—begins and ends with a mistaken

premise. T.D. argues Dr. Widmer's notes were prepared after trial commenced and therefore necessarily reflect opinions made in anticipation of litigation. T.D. overlooks, however, that Dr. Widmer's notes are derived from the birth video. It is undisputed Dr. Widmer was acting as a treating a physician in the birth video. Dr. Widmer's notes, therefore, are inextricably intertwined to the course of treatment. The notes simply summarized the observations and opinions he formulated during T.D.'s birth and correlate those with the times on the video. Dr. Widmer's determination that T.D. was under fetal distress was not an opinion reached solely for the purposes of litigation.

As a treating physician, Iowa law allows Dr. Widmer to testify regarding the care he provided and any opinions he reached in connection with that care. *See Hansen v. Central Iowa Hosp. Corp.*, 686 N.W.2d 476, 482 (Iowa 2004) (citing *Carson v. Webb*, 486 N.W.2d 278, 281 (Iowa 1992)). Iowa Rule of Civil Procedure 1.508 does "not preclude an expert from testifying to facts and opinions derived prior to being retained as an expert." *Morris-Rosdail*, 576 N.W.2d at 612. Further, opinion testimony is admissible if it helps the trier of fact understand the witness's testimony or to determine a fact in issue. Iowa R. Civ. P. 5.701; 5.702.

Further, T.D. cannot claim Dr. Widmer's notes caused undue surprise. Dr. Widmer specifically testified during his deposition that he would have to rely on his personal recollection, the birth video, and medical records to identify the specific timing of T.D.'s fetal heart tones and late decelerations. App. Vol. II pp. 565-67. Dr. Widmer's notes were derived from T.D.'s own birth video and within the fair scope of his deposition testimony. App. Vol. II pp. 557-59, 565-67. The only surprise during Dr. Widmer's examination stems from T.D.'s attempt to tether Dr. Widmer's opinion to the medical records during cross-examination, which opened the door for further inquiry on redirect examination concerning Dr. Widmer's opinion that T.D. was under fetal distress.

Finally, any harm using Dr. Widmer's notes to refresh his recollection is de minimis. The notes were merely a summary extracted from the properly admitted birth video. In the interest of judicial economy, Dr. Widmer testified with the aid of his notes rather than playing the entire birth video again. T.D. also had a full opportunity to vigorously cross examine Dr. Widmer regarding his notes from the birth video, wherein T.D.'s counsel displayed Dr. Widmer's notes. App. Vol. II pp. 265-71.

There was no undue surprise or prejudice from Dr. Widmer's notes. Dr. Widmer's notes refreshed his recollection and were properly allowed.

3. Dr. Widmer Adopts HCHC's Arguments.

Dr. Widmer also agrees with, and joins in, HCHC's arguments on this issue.

IV. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING THE JURORS UNLIMITED ACCESS TO THE BIRTH DVD

A. Error Preservation.

Defendants agree T.D. preserved error. App. Vol. II pp. 387-94, 399-401.

B. Standard of Review.

Submissions of exhibits to the jury is a matter resting in the trial court's discretion. *Brooks v. Holtz*, 661 N.W.2d 526, 532 (Iowa 2003); *State v. Baumann*, 236 N.W.2d 361, 366 (Iowa 1975) (stating a trial court has "considerable discretion" in determining what exhibits the jury may have during its deliberations). Appellate courts do not find an abuse of discretion unless the district court ruled on grounds clearly untenable or to an extent clearly unreasonable. *Rowedder*, 814 N.W.2d at 589 (citation omitted). Reversal is only warranted if an abuse of discretion results in prejudice. *State v. Jackson*, 387 N.W.2d 623, 629 (Iowa App. 1986).

C. The Court Properly Denied Jurors Unlimited Access to the DVD.

Rather than risking the jurors replaying parts of the birth DVD multiple times, and placing disproportionate importance on particular portions in comparison to expert testimony, the trial court correctly allowed the jurors to view the birth video once in its entirety in open court. App. Vol. II pp. 388-91. During closing summation, T.D. encouraged the jurors to request to watch the birth video during deliberation. *Id.* at pp. 408, 410, 442. The trial court specifically informed the jurors at the close of the case that they could review the birth video upon request. *Id.* at pp. 445-46. The jury requested and was allowed to view the birth video in its entirety.

T.D. relies exclusively on *State v. Jackson*, 387 N.W.2d 623 (Iowa Ct. App. 1986) and *State v. Hernandez*, No. 12-0219, 2013 WL 1452958 (Iowa Ct. App. April 10, 2013) to support his contention the trial court abused its discretion. In *Jackson* and *Hernandez* this Court found the trial court did not abuse its discretion in allowing the jury unlimited access to a video or audio tapes during deliberation. *Jackson*, 387 N.W.2d at 629; *Hernandez*¸ 2013 WL 1452958, at *5-6. *Jackson* and *Hernandez*, however, are distinguishable. There was not extensive and competing expert testimony surrounding the video in *Jackson* or the audio tape in *Hernandez*.

Jackson and *Hernandez* merely found it was not an abuse of discretion for a trial court to grant the jury unlimited access to a video or audio tape. It does not follow that it would therefore be an abuse of discretion to deny a jury unlimited access to a video during deliberation. *See State v. McCullough*, 825 N.W.2d 327 (Iowa Ct. App. 2012) (finding "the district court properly exercised its discretion" by "limiting the jury to a single viewing of the video-recording in the courtroom, rather than risking that the jurors would use the DVD player to replay parts of the interview multiple times, overemphasizing it in comparison to other evidence."); *Brooks v. Holtz*, 661 N.W.2d 526, 532 (Iowa 2003) (upholding trial court's decision to not send videotape to the jury and noting the "trial court stated 'I personally think the jury has already seen the videotape more often than required.' Clearly, the trial court thought additional viewing of the tape would overemphasize this evidence. This judgment call was one for the trial court to make.").

Even assuming the trial court abused its discretion in denying the jury unfettered access to the birth DVD, T.D.'s claim fails because he cannot establish any prejudice. *Jackson*, 387 N.W.2d at 629. T.D. emphasizes the trial court abused its discretion because it allowed Defendants' Exhibit BB into the jury room. (Plaintiff's Brief, p. 66). Defendants' Exhibit BB is comprised of ten still photos extracted from the birth DVD and were properly

admitted. *See* App. Vol. III pp. 180-89. T.D. overlooks, however, that the trial court allowed the jury to review Defendants Exhibit BB *and* the birth DVD during deliberation. Further, T.D. emphasized during closing summation that Exhibit BB depicts "less than one percent" of the birth DVD. App. Vol. II 406. T.D. cannot establish the screenshots alone induced the jury's verdict. *See Jackson*, 387 N.W.2d at 629 (holding the jury's use of "freeze frame technique" on film footage of a robbery was not grounds for reversal). Because T.D. cannot establish Defendants' Exhibit BB induced the jury's verdict, any error was harmless. *Id.*

Dr. Widmer also agrees with, and joins in, HCHC's arguments on this issue.

V. T.D.'S PASSING MENTION OF DEFENDANTS' MOTIONS IN LIMINE IS INSUFFICIENT TO PRESERVE ERROR

T.D.'s arguments with respect to the trial court's rulings on Defendants' motions in limine are insufficient to present an issue for consideration on appeal. *See* Iowa R. App. P. 6.903(2)(g)(3) (requiring the argument section of an Plaintiff's Brief to contain the appellant's contentions and the reasons for them with citations to the authorities relied on and references to the pertinent parts of the record); *see also Parsons v. Brewer*, 202 N.W.2d 49, 53

(Iowa 1972) (holding a claim, absent supportive argument or authority, is deemed waived).

T.D. alleges the trial court abused its discretion in granting overly broad motions in limine. In doing so, however, T.D. fails to provide the transcript of the hearing on motions in limine or the parties' underlying arguments. More importantly, T.D. does not cite any legal authority to support the trial court erred in any of its decisions regarding Defendants' motions in limine, and fails to provide any substantive discussion of why or how he believes the trial court erred. (Plaintiff's Brief p. 69-70). T.D.'s argument, which consists of nothing more than a bald assertion without any elaboration, is insufficient to present an issue for consideration on appeal. Iowa R. App. P. 6.903(2)(g) ("Failure in the brief to state, to argue or to cite authority in support of an issue may be deemed waiver of that issue."); *Soo Line R.R. Co. v. Iowa Dep't of Transp.*, 521 N.W.2d 685, 691 (Iowa 1994) (holding a litigant's "random mention of [an] issue, without elaboration or supportive authority, is insufficient to raise the issue for our consideration."). T.D.'s general approach to the trial court's rulings on Defendants' motions in limine is insufficient to preserve error, and the Court should not construct T.D.'s arguments for him. *Cook v. State*, 431 N.W.2d 800, 804 (Iowa 1988) ("Matters contained in a brief point must be sufficient in and of themselves to lay before the court,

without independent investigation, the precise ruling complained of and the law applicable.").

To the extent T.D.'s assignment of error contains any specificity, it is with respect to Defendants' Motions in Limine Nos. 4 and 19, which relate solely to training and credentialing. (Plaintiff's Brief, p. 70); App. Vol. I pp. 214, 229-30 (Defendants' Motion in Limine Nos. 4, 19). Training and credentialing, however, were not at issue in this case. App. Vol. I p. 182 (Ruling on Motion for Leave to Amend and Motion to Strike Expert Opinion, p. 6). The trial court correctly excluded evidence relating to irrelevant topics.

Furthermore, T.D. can hardly be heard to complain about the trial court's rulings on Defendants' motions in limine given his counsel's brazen disregard for the same. T.D.'s counsel violated several orders in limine during his opening statement. *See* App. Vol. I pp. 350-53 (Defendants' Joint Motion for Mistrial). The trial court specifically found T.D.'s counsel violated three orders in limine during his opening statement. App. Vol. II pp. 49-50. The trial court also noted such violations might cumulate into a mistrial if misconduct persisted. *Id.* at p. 51. Undeterred, T.D.'s counsel also violated numerous orders in limine and Iowa law during his closing summation. Some of the more prominent examples include:

- T.D.'s counsel telling the jurors "You have to consider what it was like to be [T.D.] from the date of birth until he was seven…" App. Vol. II

pp. 412-13. T.D.'s counsel also characterized T.D.'s future as "a tough row to hoe" *Id.* at p. 417, and encouraged the jurors to consider what they would pay to avoid pain. *Id.* at pp. 418-19. These arguments violated the trial court's ruling on Defendants' motion in limine no. 8. App. Vol. I pp. 216-19 (Def. Joint Motions in Limine); *id.* at p. 343 (trial court ruling re: motions in limine); *see also Russell v. Chicago, Rock Island & Pac. R.R. Co.*, 86 N.W.2d 843, 848 (Iowa 1957) ("Direct appeals to jurors to place themselves in the situation of one of the parties…are condemned by the courts.").

T.D.'s counsel requesting the jurors to "tell the hospital and the doctor that [T.D.] cannot do anything he wants, and tell them that next time they need to have three goals…." App. Vol. II p. 444. This "send a message" argument violated the trial court's ruling on Defendants' motion in limine no. 8. App. Vol. I pp. 216-19 (Def. Joint Motions in Limine); *id.* at p. 343 (trial court ruling re: motions in limine); *see also Kinseth v. Weil-McLain*, No. 15-0943, 2018 WL 2455300, at *11 (Iowa Ct. App. June 1, 2018) ("Given counsel's repeated, deliberate references to [defendant's] expenditures defending this suit and others, and instructions to use this case to send a message about such expenditures, we must conclude that counsel's rhetoric prejudiced the defendant, and a new trial is warranted.");

- T.D.'s counsel alluding to the financial disparity between Plaintiff and Defendants in violation of the trial court's ruling on Defendants' motion in limine no. 16. App. Vol. II p. 406; App. Vol. I p. 225 (Def. Joint Motions in Limine); *id.* at p. 344 (trial court ruling re: motions in limine)

- T.D.'s counsel suggesting the fetal heart rate monitoring strips, if available, would "convict Dr. Widmer." App. Vol. II p. 411. This argument created evidence, violated the trial court's ruling on Defendants' motion in limine no. 3, and violated the trial court's ruling on Defendants' joint motion for mistrial following opening statements. App. Vol. I pp. 213-14 (Def. Joint Motions in Limine); *id.* at p. 343 (trial court ruling re: motions in limine); App. Vol. II pp. 49-51 (trial court ruling re: mistrial). *see also Rosenberger Enterprises, Inc. v. Insurance Serv. Corp. of Iowa*, 541 N.W.2d 904, 908 (Iowa Ct. App. 1995) ("Counsel has no right to create evidence by his or her argument"

and it is improper when argument is an "interjection of his personal opinion as to the merits of the case.").

- T.D.'s counsel creating evidence by: (1) arguing Defendants do not want the jurors to view the birth DVD App. Vol. II p. 406; (2) inferring Dr. Widmer's notes summarizing his observations of the birth DVD were the product of bad faith or dishonesty *id.* at pp. 403-05; (3) postulating Nurse Fraise would have testified she was inexperienced if she had taken the stand *id.* at p. 416; and (4) emphasizing no partner of Dr. Widmer came to trial to endorse him *id.* at p. 443. These arguments improperly urged the jury to make a decision on something other than evidence and instructions and violated the trial court's ruling on Defendants' motion in limine no. 8. App. Vol. I pp. 216-19 (Def. Joint Motions in Limine); *id.* at p. 343 (trial court ruling re: motions in limine); *see also* Iowa R. Prof'l Conduct 32.3.4(e) ("A lawyer shall not:….in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused;…."); *Bronner v. Reicks Farms, Inc.*, No. 17-0137, 2018 WL 2731618, at *8-9 (Iowa Ct. App. June 6, 2018) (finding misconduct during closing summation warranted a new trial where plaintiff's counsel asserted personal knowledge of the facts in issue and made improper remarks including, but were not limited to, vouching for the veracity of plaintiff and her witnesses).

Defendants jointly moved for mistrial following T.D.'s closing arguments. App. Vol. II pp. 421-33, 447-49. The trial court took Defendants' joint motions for mistrial under advisement, but, in doing so, specifically noted T.D.'s counsel's misconduct during closing summation "was pretty bad." *Id.* at pp. 427-28. Notwithstanding the multitude of violations stemming from T.D.'s counsel, the jury returned a unanimous verdict in favor of Defendants.

T.D. asserts "the trumpet of error blew early, often, and loudly during trial." (Plaintiff's Brief, p. 24). The rhetoric rings hollow for purposes of this appeal. The adage is only felicitous to the extent T.D.'s counsel is analogized as the proverbial "trumpet."

Dr. Widmer also agrees with, and joins in, HCHC's arguments on this issue.

CONCLUSION

For the foregoing reasons, Defendants James Widmer, M.D., and Family Medicine of Mt. Pleasant, P.C., respectfully request that the district court's rulings be affirmed, that T.D.'s appeal be denied in its entirety, and that the verdict and judgment in favor of Defendants be affirmed.

REQUEST FOR ORAL ARGUMENT

Dr. Widmer and FMMP believe this case could be affirmed without oral argument. If argument is granted, Dr. Widmer and FMMP request to be heard.

Respectfully submitted,

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The undersigned certifies the actual cost of printing Defendant-Appellee's Brief is the sum of $0.00.

/s/ Robert V. P. Waterman Jr.

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