IN THE SUPREME COURT OF IOWA

NO. 19-1066

ROSALINDA VALLES, Individually, and on Behalf of FL, Her Child,
Plaintiff-Appellant

vs.

ANDREW MUETING, D.O., AMY WINGERT, M.D., KELLY RYDER, M.D., JOSEPH LIEWER, M.D., and NORTHWEST IOWA EMERGENCY PHYSICIANS, P.C.,
Defendants-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT FOR WOODBURY COUNTY LACV169198
THE HONORABLE JEFFREY POULSON

Defendants-Appellees Dr. Mueting, Dr. Liewer, and Northwest Iowa Emergency Physicians, P.C.'s Final Brief

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John C. Gray
Jeff W. Wright
Heidman Law Firm, L.L.P.
1128 Historic Fourth Street
Sioux City, IA 51101
(712) 255-8838
John.Gray@ Heidmanlaw.com
&
Kevin J. Kuhn *pro hac in dist.ct*
Wheeler Trigg O'Donnell, LLP
370 17th St, Suite 4500
Denver, CO 80202
Attorneys for Dr. Andrew Mueting

Christine L. Conover
Carrie L. Thompson
Simmons, Perrine, Moyer & Bergman, PLC
115 3rd St SE, Suite 1200
Cedar Rapids, IA 52401
(319) 366-7641
cconover@spmblaw.com
Attorneys for Dr. Joseph Liewer and Northwest Iowa Emergency Physicians, P.C.

Nancy J. Penner
Shuttleworth & Ingersoll
P.O. Box 2107
Cedar Rapids, IA 52406
(319) 365-9461
njp@ shuttleworthlaw.com
Attorney for Defendants-Appellees

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Routing Statement

Defendants/Appellees Dr. Mueting, Dr. Liewer, and Northwest Iowa Emergency Physicians, P.C.[1] submit that this case is appropriate for transfer to the Court of Appeals as it involves existing legal principles. Iowa R. App. P. 6.1101(3). The case is so deserving of affirmance on all issues that any other ruling would be in conflict with published decisions, warranting further review by the Iowa Supreme Court. *Id.* 6.1101(2)(b).

If the Court reaches Plaintiff's constitutional and preemption arguments as to the interpretation of Iowa Code §147.136, Defendants agree the case is appropriate for consideration by the Iowa Supreme Court. *Id.* 6.1101(2)(a)(c).

Introduction

This was a hard-fought case after years in the making and a three and a half week jury trial. The jury unanimously decided there was no negligence by Drs. Liewer or Mueting. They were the only remaining defendants after Plaintiff settled with seven others on the eve of trial.

[1]The only claim against Northwest Iowa Emergency Physicians, P.C. was a vicarious liability claim for the alleged negligence of Dr. Liewer. App.1, 3949 (Instruction 10). These two Defendants are referred to collectively as "Dr. Liewer." References herein are to the Amended Appendix (Vol. 1-3) filed February 20, 2020.

Every appeal issue as to Drs. Liewer and Mueting—save one—goes to issues the jury never reached: comparative fault, causation, and damages. As to the one issue pertaining to the jury's lack-of-negligence finding—the district court's use of a non-specialist standard of care instruction—Plaintiff ignores the evidence as well as other instructions which fully embodied the content Plaintiff requested.

A jury verdict should not be reversed unless "justice would not be served by allowing the trial court judgment to stand." *Shawhan v. Polk County*, 420 N.W.2d 808, 810 (Iowa 1988). Plaintiff has failed to advance any valid reason for a new trial. The verdict should not be disturbed.

Statement of the Case

Nature of the case

This is a medical malpractice case arising from care and treatment provided to Plaintiff's son, FL, at Mercy Medical Center ("Mercy") in Sioux City. FL had a confirmed diagnosis of Influenza B on April 5, 2015, when he was seen by Drs. Liewer and Mueting. He was admitted to Mercy and follow-up care was provided by other physicians. FL was diagnosed with bacterial meningitis on April 8, 2015.

Course of proceedings

This case was filed on January 28, 2016. App.1, 200 (Petition). Trial commenced on October 30, 2018. On November 21st the jury returned a verdict, finding Drs. Liewer and Dr. Mueting were not negligent. App.1, 3969-70. The jury never reached comparative fault, causation, or damages. *Id.*

Prior to trial, all Defendants jointly moved for partial summary judgment on an issue of statutory interpretation of Iowa Code §147.136 that addresses the scope of damages in medical malpractice cases. The district court granted the motion in part, ruling that past medical expenses paid by the Texas Medicaid program were not recoverable. App.1, 1293-1304 (Ruling, 6-7-18). The district court also granted summary judgment to Drs. Wingert and Ryder. App.1, 2877-92 (Rulings, 10-12-18).

On the eve of trial, Plaintiff reached settlements with seven other defendants. Consistent with Plaintiff's own proposed instruction, the court instructed the jury:

> Dr. Jesse Nieuwenhuis, Dr. Aruntha Swampillai, Dr. Thomas Morgan, Dr. Leah Johnson, Dr. Said Sana, Siouxland Medical Education Foundation, and Mercy Medical Center are shown in the caption of this matter as defendants. The case against these defendants has been settled and they are released parties.

App.1, 3940 (Instruction 1).[2] Plaintiff's opening statement referred to the settlement. App.2, 633 (11-1-18 a.m. 9:18-19, "why are we here? Well, other doctors in this case have settled"); *id.* 652 (28:19-20, "all the other defendants who settled stuck with that plan of care [determined by Drs. Liewer and Mueting]").

Summary of the facts

Eleven year old FL was seen in the Mercy emergency room ("ER") on April 3, 2015, by family practice physician Dr. Mueting[3] who was staffing the ER on that day. App. 2, 746 (11-1-18 p.m. 45:1-21, Plaintiff's expert Dr. von Elten). FL presented with a fever and cough and Dr. Mueting suspected Influenza—the flu—and ordered the appropriate lab tests. *Id.* 748-50 (47:12-49:4). Plaintiff's standard of care expert Dr. von Elten had no criticisms of the care on April 3rd. *Id.* 750 *(*49:7-11, "I think [the care on April 3rd by Dr. Mueting] was very appropriate and met the standard of care.").

FL returned to Mercy's ER on April 5, 2015, and was seen by ER physician, Dr. Liewer, at approximately 7:45 p.m. *Id.* 751, 757-58 (50:18-24,

[2] *See* App.1, 3254 (Plaintiff's instruction, 10-17-18). Plaintiff did not object to the settlement information in the court's instruction. App.1, 3521-22 (Order following FPTC); App.1, 3760 (Objections, 11-19-18); App.1, 3982-87 (Objections, 11-29-18); App.2, 187-89 (10-19-18, 6:13-8:4).

56:16-57:2). FL complained of a headache, had a fever, had fainted and vomited earlier in the day, and was ill enough for Dr. Liewer to order intravenous fluids and admission to the hospital. *Id.*; App.2, 1583 (11-8-18 a.m. 69:18-23, Dr. Liewer). By this time, the April 3rd test result was available and confirmed FL had Influenza B. App.2, 1557 (11-8-18 a.m. 43:6-25). Dr. Liewer left Mercy at 9:45 p.m. and did not see FL again. App.2, 1648, 1659-60, 1704-05 (11-8-18 p.m. 19:5-10, 30:1-31:12, 75:25-76:25).

Dr. Mueting was FL's admitting physician and he saw FL in the ER on April 5th at 10:14 p.m. App.2, 2972 (11-20-18 a.m. 31:3-9, Dr. Mueting). He also saw FL on the pediatric floor at approximately 11:15 p.m. *Id.* 2972-75 (31:13-32:13, 33:8-34:5). FL was improving based on treatment in the ER. *Id.* 2975-76 (34:18-35:20); *see also* App.2, 2125-26 (11-13-18 p.m. 73:3-74:14, Dr. Mueting). Dr. Mueting diagnosed FL with Influenza B. App.2, 2991 (11-20-18 a.m. 50:6-11). He left at approximately 11:30 p.m. *Id.* 2994 (53:16-23). He did not see FL again. App.2, 2193 (11-14-18 a.m. 27:10-25).

FL was then treated by the settling defendants over the next three days. App.2, 848-68 (11-2-18, 11:13-31:22, Dr. von Elten). On April 8, 2015, he was

[3] Dr. Mueting was a third year resident in the Siouxland Medical Education Foundation (a settling party) residency program. App.2, 2082 (11-13-18 p.m. 30:1-6).

diagnosed with bacterial meningitis. App.3, 84-91 (Exh. 1). He also suffered a respiratory emergency on April 8th. *Id.*

It was Plaintiff's theory that Drs. Liewer and Mueting breached the standard of care in failing to start antibiotics and do a lumbar puncture. App.1, 3955-56 (Instructions 16-17). The defense evidence was that FL did not have meningitis on April 5th, his condition was consistent with the Influenza B, and Drs. Liewer and Mueting appropriately treated FL. *See,e.g.*, App.2, 2441-44, 2453, 2529 (11-15-18 a.m. 39:9-42:21, 51:6-23, 127:9-22, defense expert Dr. Severidt); App.2, 2578-80 (11-15-18 p.m. 34:14-36:17, defense expert Dr. Krug).

The jury found in favor of Drs. Liewer and Mueting and Plaintiff does not appeal the sufficiency of the evidence to support the verdict.

Argument

I. The Court has no jurisdiction to consider Plaintiff's appeal.

A. Procedural background.

The jury's verdict was returned on November 21, 2018. App.1, 3969. The court entered judgment on the same day. App.1, 3979-80. Without additional proceedings, Plaintiff's appeal was due in 30 days or December 21, 2018. Iowa R. App. P. 6.101(1)(b). And, in fact, Plaintiff filed a notice of appeal on December 20, 2018 (No. 19-0055, "First Appeal"). App.1, 186-88. As explained

below, the First Appeal was from a final order as to the Defendants in this appeal ("Appeal Defendants").

Prior to filing her First Appeal, Plaintiff filed a motion asking the district court to rule on Plaintiff's motion for directed verdict as to the submission of comparative fault of settling defendant Mercy. App.1, 3990-96. The court held the motion was moot given the jury never reached the issue of comparative fault among other findings. App.1, 4006-09 (Enlarged Finding, 12-5-18).

Prior to filing her First Appeal, Plaintiff also obtained an extension of time to file post-trial motions. App.1, 4011 (Order, 12-6-18). However, Plaintiff still filed the First Appeal on December 20, 2018 *followed* by a post-trial motion on December 21st. App.1, 4018 (Bill of Exceptions). The district court agreed it had no jurisdiction to rule on the post-trial motion but also denied it on the merits. App.1, 4039-42 (Order, 1-25-19).[4] Had Plaintiff not filed the First Appeal before her post-trial motion, her appeal deadline would have been 30 days after the ruling on the motion—or February 24, 2019. Iowa R. App. P. 6.101(1)(b). This appeal was not filed by that date.

[4]*See Wolf v. City of Ely*, 493 N.W.2d 846, 848 (Iowa 1992) ("The general rule that the district court loses jurisdiction when an appeal is perfected has application when the appeal is taken before the filing of posttrial motions."). The post-trial motion was a bill of exceptions pursuant to Rule 1.1001 and concerned closing argument—an issue Plaintiff does not raise on appeal. App.1, 4018-21 (Bill).

Plaintiff also filed a Motion for entry of Order Nunc Pro Tunc on December 20, 2018, seeking a clarification the judgment was entered only in favor of the trial Defendants. App.1, 4014. Drs. Liewer and Mueting did not resist a clarification of the judgment, noting the district court retained jurisdiction for this motion. App.1, 4030-31. The district court entered an order on January 25, 2019, amending the judgment. App.1, 4044-45. If that order somehow restarted the clock for an appeal, the deadline would have been 30 days after the order—or February 24, 2019. This appeal was not filed by that date.

Plaintiff referred to her First Appeal as "protective" and stated that she did "not believe that this case [was] ripe for an appeal" because of pending dismissals of seven settling defendants. App.1, 187 (Notice, 12-20-18). Referencing this, the Supreme Court ordered that Plaintiff file a statement as to jurisdiction. App.1, 4065 (Order, 2-5-19). In her statement, Plaintiff asked the Court to dismiss her First Appeal without prejudice and stated it "should not be considered an application for interlocutory review." App.1, 4080. Not surprisingly, Drs. Liewer and Mueting did not resist dismissal of the appeal, but they noted there was no authority for a dismissal *without* prejudice and "reserve[d] all argument and positions in any subsequent appeal . . . including as to its timeliness." App.1, 4105-06.

On March 14, 2019, this Court entered an order that it "treat[ed]" the First Appeal as an application for interlocutory appeal and denied the application. App.1, 4109. A procedendo issued on April 10, 2019, and the First Appeal is no longer before this Court. App.1, 4113.

On April 15, 2019, Plaintiff filed a dismissal of settling defendant Mercy in district court. App.1, 4047. On April 30, 2019, Plaintiff dismissed the remaining six settling defendants. App.1, 4049. On May 28, 2019, Plaintiff filed a motion requesting an order entering "final judgment." App.1, 4052. The district court entered the proposed order submitted by Plaintiff the next day. App.1, 4057-59. Plaintiff filed this appeal on June 24, 2019. App.1, 4060.

B. The November 21, 2018, judgment was a final order and Plaintiff's appeal is untimely.

Pursuant to Rule 6.101(1)(b), an appeal is timely if filed within 30 days of a final order or judgment. On November 21, 2018, the district court entered judgment after a trial and jury verdict. The November 21st judgment was an appealable final order as to the Appeal Defendants.[5] This appeal, filed over 6 months later on June 24, 2019, is untimely.

[5] Plaintiff herself has treated the November 21, 2018 order as the one at issue in determining appellate jurisdiction. *See* App.1, 4075 (First Appeal, identifying one issue as "Whether the district court's order filed on November 21, 2018 [amended nunc pro tunc]. . . resolved all of the claims and issues . . .").

A timely appeal is jurisdictional. *See Milks v. Iowa Oto-Head & Neck Specialist*, 519 N.W.2d 801, 803 (Iowa 1994) ("The timeliness of a notice of appeal is mandatory and jurisdictional"). "Want of subject matter jurisdiction may be taken advantage of at any stage of the proceedings and cannot be conferred by waiver, estoppel, or consent." *Id.* "Untimely appeals implicate [the Court's] subject matter jurisdiction." *Gordon v. Brown*, 2003 WL 118502 *2 (Iowa Ct. App. 2003).

"A 'final judgment' from which an appeal lies is one that finally adjudicates the rights of the parties and puts it beyond the power of the trial court to place the parties in their original position." *Id.* In *Gordon*, there was a November 30, 2001 ruling on a motion to vacate a domestic abuse order and a December 31, 2001 ruling on a contempt motion between the same parties. *Id.* *1. The defendant appealed the November 30, 2001 ruling on January 30, 2002. *Id.* The Court of Appeals dismissed the appeal of the first order as untimely. *Id.* *3.

The *Gordon* Court stated:

> An initial "final order," to be appealable when another order or orders are yet to be entered in a case, must therefore establish the substantial rights of the parties and place beyond the issuing court the power to return the parties to their original positions. [*Green v. Advance Homes, Inc.*, 293 N.W.2d 204, 207 (Iowa 1980)]. . . .
>
> Our supreme court has stated, "Two final orders are possible in a single case, one putting it beyond the power of the court to put the

> parties in their original positions *in relation to a specific issue, and the other adjudicating remaining issues in the case.*" *See Lyon v. Willie*, 288 N.W.2d 884, 887 (Iowa 1980) (emphasis added). Precisely that happened in this case. Brown's petition to vacate was tried and fully submitted on October 17, 2001, and Judge Blane stated his intention to rule on it. The factual and legal issues were separate and distinct from the factual and legal issues in the contempt action. Judge Blane's ruling on the petition to vacate put it beyond the power of the trial court to put the parties in their original positions in relation to the issues involved in that petition, while unrelated issues remained to be resolved following conclusion of the contempt hearing.

Id. *2.

In this case, the November 21st judgment in favor of Drs. Liewer and Mueting was after a full trial on the merits, which included the settling defendants' fault. Given the lack of timely post-trial motions, the judgment "put it beyond the power of the trial court to put [Plaintiff and the Appeal Defendants] in their original positions." *Id.* *2. The completion of voluntary dismissals of the settling defendants—even assuming it resulted in another final order—concerned remaining unrelated issues.

Plaintiff has never suggested anything further needed to be decided by the district court as to any of the Appeal Defendants. If any issues arose as to the voluntary dismissals, those issues would be separate and distinct from any factual or legal issues as to the Appeal Defendants. *See Riley v. Riley*, 2017 WL 512477 *6 (Iowa Ct. App. 2017) (finding some of trial court's findings were

final as they "required no further rulings and the order did not anticipate any further rulings").

Several procedural matters and positions taken by Plaintiff establish that there was nothing about the pending voluntary dismissals that rendered the November 21st judgment interlocutory.

First, Plaintiff agreed that the settling defendants would be treated as released parties at trial under Iowa Code Chapter 668 notwithstanding the fact the settlement agreements were not finalized.[6] For all evidentiary and legal purposes as to the Appeal Defendants, the settling defendants were treated as if they *had* been dismissed and the settlement documentation completed. The jury was instructed without objection from Plaintiff that seven defendants had settled and, accordingly, their conduct was at issue.[7] This is the law of the case. *Matter of Estate of Workman*, 903 N.W.2d 170, 175 (Iowa 2017) ("When instructions are not objected to, they become 'the law of the case.'"). Accordingly, the

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[6] Iowa Code §§668.2-3 and 7 allow comparative fault as to a released party on the basis of a "release, covenant not to sue, or similar document entered into by a claimant and a person liable."

[7] *See* App.1, 3940-58 (Instructions 1, 10, 18-19). Plaintiff only objected at trial to submission of the fault of settling defendant Mercy based upon the sufficiency of the evidence, not based upon any dispute about the status of Mercy as a released party under Chapter 668 or about the admissibility of evidence about Mercy's conduct. *See* App.1, 3982-84 (objections, 11-29-18).

November 21st judgment was a final order as to all the issues as to the Appeal Defendants and the underlying medical malpractice claim and defenses.

As to the May 29, 2019, order after the voluntary dismissals, it does not reflect an adjudication of the rights of any party. The trial court was not even involved in approving the settlements—that occurred in probate proceedings.[8] The voluntary dismissals were simply reported to the court. App.1, 4052-54 (Motion). There were no matters for the court to decide or adjudicate as to the settling defendants and the May 29th order was not an adjudication. *See Remer v. Bd. of Med. Examiners of Iowa,* 576 N.W.2d 598, 601 (Iowa 1998) (citing definition of adjudicate as: "'to settle finally ... on the merits of issues raised ... to pass judgment on: settle judicially ... to come to a judicial decision: act as judge.'").

In addition, the district court's entry of Plaintiff's "proposed order" on May 29th was collateral to the subject matter of Plaintiff's appeal. It did nothing to convert the November 21st judgment into an interlocutory order. *See Riley*, 2017 WL 512477 *5 ("Retention of jurisdiction of matters collateral to the subject matter of an appeal, or for purposes of enforcing a final order, does not render an order interlocutory"); *see also Montgomery Ward Dev. Corp. v. Cedar*

[8] *See* App.1, 4074 (First Appeal statement n.6, asking Court to take judicial notice of probate court's approval of settlement).

Rapids Board of Review, 488 N.W. 2d 436, 443 (Iowa 1992) (a "voluntary dismissal order is not a final judgment") *overruled on other grounds by Transform Ltd. v. Assessor of Polk Co.*, 534 N.W.2d 614 (Iowa 1996).

Even if the May 29th order is viewed as a final order, that does not mean the November 21st judgment was not. "A case, for purposes of appeal, may have more than one final order." *Green v. Advance Homes, Inc.*, 293 N.W.2d 204, 207 (Iowa 1980); *Hayes v. Kerns*, 387 N.W. 2d 302, 305 (Iowa 1986) ("Our case law is clear that there may be two final judgments or decrees 'in the same cause, the one settling the substantial merits of the case, and the other based upon further necessary proceedings, from each of which an appeal will lie.'").

In *Hayes*, the Supreme Court dismissed that part of an appeal that was based on the trial court's initial judgment—even though there was a timely appeal filed after the court's supplemental judgment. 387 N.W.2d at 305, 308. The Court focused upon whether the trial court intended its initial judgment to be final and refused to elevate form over substance. *Id.* at 306-07. Here, the district court signaled its intent that the November 21st judgment was a final order. It included assessment of costs, a reminder about post-trial motion deadlines, and a decision that directed verdict motions were moot. App.1, 3979-80.

Iowa Rule of Appellate Procedure 6.101(1)(d) does not help Plaintiff. That rule provides:

> A final order dismissing some, but not all, of the parties or disposing of some, but not all, of the issues in an action may be appealed within the time for appealing from the judgment that finally disposes of all remaining parties and issues to an action, even if the parties' interests or the issues are severable.

Under this rule, the May 29th order would need to be "the judgment that finally disposes of all remaining parties and issues." That order was not a judgment. *See* Iowa R. Civ. P. 1.951 (defining judgment as "[e]very final adjudication of any of the rights of the parties in an action"). Adjudicate means settling or deciding issues. *See Remer*, 576 N.W.2d at 601. The May 29th order was manufactured by Plaintiff and a ministerial act—the district court did not settle or decide any issues. *See* App.1, 4052-54 (Motion). Instead, the voluntary dismissals disposed of the claims against the settling defendants—and no appeal lies from such. *See Montgomery Ward*, 488 N.W. 2d at 443.

Drs. Liewer and Mueting also join in Drs. Wingert and Ryder's argument on this issue.

Plaintiff's appeal should be dismissed for lack of jurisdiction.

II. There was no error in the jury instructions and no prejudice.

A. The standard of care instructions.

The district court instructed the jury:

> A physician must use the degree of skill, care and learning ordinarily possessed and exercised by other physicians in similar circumstances.
>
> A violation of this duty is negligence.

App.1, 3950 (Instruction 11). This is Iowa's Uniform Instruction 1600.2 and was proposed by Defendants. *See* App.1, 2974 (Defendants' Instruction 12).

The court also instructed the jury:

> You are to determine the standard of care, i.e. the degree of skill, care, and learning required of the physicians and nurses from the opinions of the physicians and nurses who have testified as to the standard.
> . . .

App.1, 3953 (Instruction 14).

The court's marshalling instruction for ER physician Dr. Liewer stated that Plaintiff must prove:

> 1. The standard of care, i.e., the degree of skill, care and learning ordinarily possessed and exercised *by physicians similar to Dr. Liewer* under circumstances similar to those presented in this case.
>
> 2. Dr. Liewer was negligent by failing to meet the standard of care in:
>
> > Failing to order antibiotics and a lumbar puncture for [FL] when he suspected or should have suspected that he had bacterial meningitis.

App.1, 3955 (*Id.* 16, emphasis added). The instruction for family practice physician Dr. Mueting was identical to Dr. Liewer's except for the physician's

name. App.1, 3956 (*Id.* 17). Thus, Plaintiff's allegations of negligence were identical for both ER physician Dr. Liewer and family physician Dr. Mueting.

Plaintiff does not appeal the court's instructions 14, 16, or 17.[9]

Plaintiff's proposed instruction stated:

> Physicians who hold themselves out as specialists in Emergency Medicine must use the degree of skill, care and learning possessed and exercised by Emergency Medicine physicians in similar circumstances.
>
> Physicians who hold themselves out as specialists in Family Practice must use the degree of skill, care and learning possessed and exercised by Family Practice physicians in similar circumstances.
>
> A violation of this duty is negligence.

App.1, 3261 (Plaintiff's Instruction). This is part of Iowa's Uniform Instruction No. 1600.3.[10] Plaintiff did not include language from 1600.3 that contrasts the standard of care applicable to a specialist from that of a general practitioner. *See* 1600.3 (including "not merely the average skill and care of a general practitioner.")

[9] It would be too late to do so in reply. *See State v. Walker*, 574 N.W.2d 280, 288 (Iowa 1998) ("We have long held that an issue cannot properly be asserted for the first time in a reply brief.").

[10] Plaintiff later proposed additional language not found in 1600.3 but Plaintiff does not argue on appeal that its omission was erroneous. *See* App.1, 3772 (Objections, 11-19-18).

No party requested, and the court did not instruct, on Iowa's version of the locality rule that allows the jury to consider available resources.

B. Standard of review.

Defendants agree that the Court reviews the refusal to give a requested jury instruction for corrections of errors at law. *See Alcala v. Marriott Int.'l, Inc.* 880 N.W.2d 699, 707 (Iowa 2016).

A court must give a requested instruction if it "'correctly states the applicable law and is not embodied in other instructions.'" *Id.* (citation omitted). "Parties are not . . . entitled to any particular instruction if the issue is adequately covered in other instructions." *Hutchinson v. Broadlawns Med. Ctr*, 459 N.W.2d 273, 275 (Iowa 1990). "Instructions must be read as a whole, not segmented and considered individually." *Id.; see also Kiesau v. Bantz,* 686 N.W.2d 164, 175 (Iowa 2004) *overturned on other grounds by Alcala* ("A trial court is not required to word jury instructions in a particular way and is free to draft instructions in its own way if it fairly covers the issues.").

"[I]t is well-settled that an instructional error must be prejudicial to warrant reversal." *Mumm v. Jennie Edmundson Mem'l Hosp.,* 924 N.W.2d 512, 518 (Iowa 2019). "'[I]f the jury has not been misled there is no prejudicial error.'" *Eisenhauer ex rel. T.D. v. Henry Cty. Health Ctr.*, 935 N.W.2d 1, 9 (Iowa 2019) (citation omitted). Given that instructions are considered as a

whole, an instructional error may be cured "if the other instructions properly advise the jury." *Thavenet v. Davis*, 589 N.W.2d 233, 237 (Iowa 1999).

C. Error preservation.

Defendants do not agree Plaintiff preserved error.

Plaintiff articulated objections to the court's standard of care instruction in the written objections. But there, Plaintiff objected to marshalling instructions 16-17—not instruction 11, at issue on appeal. *See* App.1, 3985-86 (Objections ¶¶7-8, 11-29-18). Even assuming these objections to instructions 16-17 can be applied to instruction 11, they are inadequate to support Plaintiff's appeal arguments. Plaintiff argued that Defendants were specialists and that the "cases cited as authority in Instruction 1600.3 clearly articulate that different language must be used to define the duty of a specialist . . . as contrasted with a general practitioner." *Id.* (also arguing it was error to use the same language for both physicians). But Plaintiff never proposed the language from 1600.3 that instructed the jury about contrasting specialists from general practitioners.

Uniform instruction 1600.3 states (with emphasis added):

> Physicians who hold themselves out as specialists must use the degree of skill, care and learning ordinarily possessed and exercised by specialists in similar circumstances, *not merely the average skill and care of a general practitioner.*
>
> A violation of this duty is negligence.

Plaintiff never proposed the italicized language above. *See* App.1, 3261 (Plaintiff's instruction, 10-17-18); App.1, 3528 (Plaintiff's Supp. Instruction, 10-25-18); App.1, 3772 (Plaintiff's redline of defense instructions, 11-19-18).

"A party is required to request an additional instruction designed to remedy a perceived defect when the party claims an instruction does not completely state the law. Failure to do so precludes us from determining the issue on appeal." *Schroeder v. Albaghdadi*, 744 N.W.2d 651, 655 (Iowa 2008). Plaintiff's appeal is based upon a distinction between specialists and non-specialists. Yet she failed to propose the very language from Uniform 1600.3 that would have advised the jury of such a distinction.

Further, Plaintiff's general reference to authority cited in uniform instructions is not sufficient to preserve instructional error. *See Hagedorn v. Peterson*, 690 N.W. 2d 84, 90-91 (Iowa 2004) (objection that instruction was "not proper" and "not a uniform instruction" was not sufficient to preserve error).

Nor did Plaintiff argue to the district court, as she does on appeal, that the court's instruction somehow inappropriately incorporated a locality rule. *See* App.1, 3985-86 (Objections ¶¶7-8, 11-29-18); *see Grefe & Sidney v. Watters*,525 N.W.2d 821, 824 (Iowa 1994) ("Objections to the court's instructions . . . must be sufficiently specific to alert the trial court to the basis

for the complaint so that if error does exist the court may correct it before placing the case in the hands of the jury."); *id*. at 824-25 (finding party preserved error on instructions only on the specific grounds raised at trial).

D. There was no error—under Plaintiff's own evidence the same standard of care applied to all physicians.

Plaintiff argues that the court's instruction failed to convey that Dr. Liewer (as a specialist in ER medicine) and Dr. Mueting (as a specialist in family medicine) were to be held to a different or higher standard of care applicable to their relative specialties. This argument fails under Plaintiff's own evidence.

Plaintiff's only standard of care expert,[11] Dr. Steven von Elten, is a family physician with experience in emergency room medicine.[12] App.2, 707-08 (11-1-18 p.m. 6:23-7:20). Dr. von Elten testified that a family practice physician "used to be called general practitioner." *Id.* 712 (11:11-13).

Rather than distinguish the standard of care applicable to emergency medicine and family practice (either from each other or from a non-specialist),

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[11] Consistent with Iowa law, the jury was instructed it could only determine the applicable standard of care from expert evidence. App.1, 3953 (Instruction 14); *see also Oswald v. LeGrand*, 453 N.W.2d 634, 635 (Iowa 1990) ("evidence of the applicable standard of care--and its breach--must be furnished by an expert.")

[12] It had been 33 years since Dr. von Elten worked as an ER physician. App.2, 808 (11-1-18 p.m. 107:20-23).

Dr. von Elten testified that there was *one* standard of care applicable to all physicians as to the treatment of suspected bacterial meningitis: one must start antibiotics and do a lumbar puncture.[13] In other words, under Plaintiff's evidence, any physician—regardless of specialty or with no specialty—was required by the standard of care to start antibiotics and do a lumbar puncture on April 5, 2015.

Dr. von Elten testified in re-direct:

> Q. . . . I'd like to start with the standard of care for evaluating a patient who presents with signs and symptoms of meningitis. Is the standard any different whether you see a patient in an office and urgent care facility, such as the one you run, or an emergency room?
>
> A. The standard of care is the same in all clinical settings, no matter where we come in contact with the patient.
>
> Q. Is the disease any different—I mean, if you have a child who's 11 years old who had –comes to the urgent care facility, your office, an emergency room and has signs and symptoms of a classic presentation of meningitis, is the disease the same no matter where his parent takes him?
>
> A. The disease process is the same, and our clinical approach should be the same.

[13] *See, e.g.*, App.2, 731 (11-1-18 p.m. 30:1-4, if meningitis is suspected "you initiate treatment, and you do a lumbar puncture"). Essentially the same specification of negligence was submitted for all physicians—ER physician Dr. Liewer, family physician Dr. Mueting, and all settling family physicians. App.1, 3955-57 (Instructions 16-18).

App.2, 920-21 (11-2-18, 83:17-84:9); *id.* 921-22 (84:20-85:3).[14]

Dr. von Elten testified on direct that the applicable standard of care is "what you're taught in medical school [and it's] in all the textbooks"—specifically textbooks in "family medicine," "pediatrics," "internal medicine," and "emergency medicine." App.2, 732 (11-1-18 p.m. 31:10-16, "[i]t's in every article that's published on meningitis for—for physicians."). In explaining the need for a lumbar puncture, he testified that *one* standard of care applied to all:

> . . . I can't stress how basic that is in medicine. They teach it to you as a second year student, third year student, fourth year student, every year of your residency, every textbook has it, every article has it about meningitis. No matter what field, pediatrics, emergency medicine, family medicine, internal medicine.

App.2, 744 (11-1-18 p.m. 43:10-18); *id.* 713 (12:19-25); *id.* 716-17 (15:24-16:14, agreeing "standard of care for the evaluation of a patient in the emergency room [is] the same nationally" and same for family practice).

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[14] Plaintiff's counsel questioned Dr. von Elten on his report, including his opinion that:

> . . . accepted standards of care for both an emergency medicine doctor and a family practice doctor require that meningitis be suspected, as it was, and that [FL] be immediately started on empiric antibiotics, that blood cultures be ordered, and that a lumbar puncture be ordered immediately.
> Part of your disclosure?
> A. Yes.

Id. 938-39 (101:4-102:4).

In describing the anticipated evidence in opening statements, Plaintiff articulated one standard of care. App.2, 633 (11-1-18 a.m. 9:3-10, "the standard of care that applies to this case is . . ."); *id*. 642 (18:1-11). In summarizing the evidence in closing argument, Plaintiff emphasized one standard of care. App.2, 3072 (11-20-18 p.m. 13:14-17, "It is our job, the lawyer's job, to tell you exactly what the standard [of care] is so that you can compare the conduct of Drs. Mueting and Dr. Liewer to that standard"). He argued:

> The standard of care, which everyone agrees with when you're talking about bacterial meningitis, is that a lumbar puncture must be done and antibiotics must be started immediately if a doctor suspects. . . . And who agrees with that? Everybody. So we know that's the standard of care and we know that's what you compare the conduct to.

Id. 3074 (15:1-22).

The instruction submitted by the district court which simply and broadly instructed the jury that "[a] physician must use the degree of skill, care and learning ordinarily possessed and exercised by other physicians in similar circumstances" was consistent with the evidence and correct. Given the testimony from Plaintiff's expert and Plaintiff's argument, there was no chance the jury was confused on the applicable standard of care. In fact, Plaintiff's suggestion that there was some difference in the applicable standard of care as to Dr. Liewer and Dr. Mueting is inconsistent with the evidence.

E. The instructions, viewed as a whole, embodied the content Plaintiff proposed.

Assuming the evidence supports some distinction in the applicable standard of care, the instructions as a whole conveyed to the jury that each Defendant should be measured against a physician similar to them—in other words, a physician in their specialty. The court's marshalling instructions described the element of standard of care as "the degree of skill, care and learning ordinarily possessed and exercised by physicians similar to Dr. Liewer [and Dr. Mueting]." App.1, 3955-56 (Instructions 16-17). Thus, the jury was instructed that Dr. Liewer should be measured against the standard of care applicable to ER physicians and Dr. Mueting against the standard of care applicable to family physicians.

There is no error when the requested language is embodied in other instructions. *See Eisenhauer*, 935 N.W.2d. at 12 (rejecting claimed error in instructions as requested language was "adequately encompassed" in court's instruction); *Van Iperen v. Van Bramer*, 392 N.W.2d 480, 484-85 (Iowa 1986) (affirming trial court's refusal to submit specifications in part because they were subsumed in a broad claim).

F. Plaintiff's arguments about the locality rule and "general practitioners" lack merit.

Plaintiff seems to suggest that the jury was impermissibly allowed to consider a local standard of care (the locality rule) rather than apply a national standard of care. Plaintiff did not argue this to the district court and it was not preserved. App.1, 3982-87 (Objections, 11-29-18).

Defendants did *not* propose, and the court did not use, the language from the uniform instruction comments, based upon *Hagedorn v. Peterson*, 690 N.W.2d 84 (Iowa 2004), that available resources is a factor the jury may consider. *See* Comments to Iowa Uniform Instruction No. 1600.2 and 1600. 3 ("In cases where the facilities, personnel, services, and equipment reasonably available to a physician affect the appropriateness of care, further instruction regarding the resources available to the physician may be appropriate") (citing *Hagedorn*).

In *Hagedorn*, a case involving a family practitioner and the availability of on-call surgical teams—the Court found no error when an instruction included that "[t]he locality of practice in question is one circumstance to take into consideration but is not an absolute limit upon the skill required." *See* 690 N.W.2d at 88, 90. Contrary to Plaintiff's suggestion, the *Hagedorn* Court did not fully endorse the original locality rule under which physicians were measured against peers in like localities as a limit on the applicable standard of care. *Id.* 88-89. Instead, the Court acknowledged that the aspect of the locality rule that

remained valid concerned the availability of resources. *See* 690 N.W.2d at 89. Nor did the *Hagedorn* Court suggest that this aspect of the locality rule that remained valid in Iowa only applied to non-specialists and not to specialists. *Id.* Accordingly, the comments to the Uniform Instructions address this under *both* 1600.2 and 1600.3.

Regardless, and fatal to Plaintiff's argument, this jury was not instructed to apply any version of a locality rule. While Plaintiff cites non-Iowa cases that it is an error to apply the locality rule to a specialist, that is not how this jury was instructed (or what *Hagedorn* or other Iowa cases have held as to the aspect of the locality rule that remains in Iowa).

Nor does Plaintiff cite any evidence or argument that a lower standard of care applied because of the locale involved. The evidence from Dr. von Elten was that the same standard of care applied to ER physicians and family physicians regardless of locale. App.2, 716-17 (11-1-18 p.m. 15:24-16:14, agreeing "standard of care for the evaluation of a patient in the [ER is] the same nationally" and same for family practice). Defendants did not argue otherwise.

Plaintiff also cites cases that physicians in a residency program are held to the same standard of care as those who completed residency. But Plaintiff cites

no instruction to the contrary. Whether a resident is held to the same standard of care as a non-resident physician is not an issue on appeal.[15]

Plaintiff also suggests that Defendants should have been held to a higher standard "as contrasted with the average care and skill of a general practitioner." Plaintiff's proof brief 68. Yet, as discussed above, this language (found in uniform 1600.3), was *not* proposed by Plaintiff and this argument was not preserved. As to Dr. Mueting, Plaintiff's argument that there is a distinction between a family physician and a general practitioner is inconsistent with her own evidence. Dr. von Elten testified that family practice physicians "used to be called general practitioner[s]." App.2, 712 (11-1-18 p.m. 11:11-13).

G. There was no prejudice.

The court's instruction was consistent with the evidence that there was one applicable standard of care in this case. Given the evidence and argument, the jury would not have been confused or misled. There was no encouragement or suggestion to apply some lower standard. There was no prejudice. "Prejudice results when the trial court's instruction materially misstates the law, confuses or misleads the jury, or is unduly emphasized." *Anderson v. Webster City*

[15] Plaintiff suggests a "majority rule" on this irrelevant issue. *But see* authority cited by Plaintiff: Joseph H. King, *The Standard of Care for Residents and other Medical School Graduates in Training*, 55 Am. U.L.Rev. 683, 703 (2006) (noting case law was sparse and cases have not agreed).

Community Sch. Dist., 620 N.W.2d 263, 268 (Iowa 2000); *Mumm*, 924 N.W.2d at 519-20 (finding no prejudice even assuming a requested instruction would have corrected a flaw in instructions).

The court's broad instruction covered both Drs. Liewer and Mueting and, when considered in the context of the evidence and other instructions, fully and fairly conveyed the applicable law. The jury was instructed that each physician was to be judged against "similar physicians"—sufficiently embodying the language proposed by Plaintiff. *See Hagedorn*, 690 N.W.2d at 90 ("Given the clear focus of the [evidence], we do not see how the jury could have been misled by the court's instruction.").

III. That the court reserved ruling on an issue the jury never reached—submission of Mercy's comparative fault—does not support a new trial.

A. A ruling on whether the evidence might support a comparative fault defense in a second trial would be premature.

Plaintiff requests that the case be remanded for a new trial with instructions to "strike the . . . defense of [Mercy's] comparative fault." Plaintiff's proof brief 80. As explained below, this issue does not support a new trial. However, even assuming Plaintiff achieves a new trial on some other issue, whether or not there will be evidence to support submission of Mercy's fault in a second trial cannot be determined based upon the evidence from the first trial.

Plaintiff's only argument on this issue is that there was insufficient evidence to submit Mercy's fault. Plaintiff does not raise an evidentiary or legal issue that would impact the evidence on Mercy's fault in any second trial. Instead, she speculates Defendants "made a strategic decision not to introduce" evidence. The Court should not determine, based upon alleged strategic decisions and the evidence in the first trial, whether Mercy's fault could be submitted in a second trial. *See Whitlow v. McConnaha*, 2019 WL 1934898 n. 10 (Iowa Ct. App. 2019) *vacated on other grounds*, 935 N.W.2d 565(Iowa 2019) ("Because the propriety of giving such instructions will depend on the parties' presentation of evidence in the second trial, we decline to address those claims in this appeal.")

Such a ruling would be premature. *See Kilker v. Mulry*, 437 N.W.2d 1, 6 (Iowa Ct. App. 1988) (finding no merit in plaintiff's complaint in how trial court handled proposed evidence, including that trial court declined to make a predetermination on admissibility before defendant's rebuttal evidence); *Probatter Sports, L.L.C. v. Joyner Technologies, Inc.*, 2007 WL 2752080 *4 (N.D. Iowa 2007) (finding it would be premature to limit the scope of trial rebuttal testimony as "the court does not presently know how the trial of this matter will unfold").

B. Plaintiff cannot show prejudice.

A second reason the Court should decline to address the merits is the lack of prejudice. The jury never reached the issue of Mercy's fault. Plaintiff cannot show prejudice. The court correctly ruled all motions for directed verdict were moot given the jury's verdict. App.1, 3979-80 (Order, 11-21-18); App.1, 4006-08 (Enlarged Finding, 12-5-18).

The jury was specifically instructed to only consider the comparative fault defense against the released parties (including Mercy) if it first found Drs. Liewer or Mueting negligent. App.1, 3955-56 (Instructions 16-17). Based upon the verdict form, it is clear that the jury never reached the comparative fault issue. App.1, 3969-70.

"Jurors are presumed to follow the court's instructions." *State v. Piper*, 663 N.W.2d 894, 915 (Iowa 2003). Accordingly, it is presumed that the jury did not even consider Mercy's fault. The district court so found. App.1, 4008 (Enlarged Finding). Plaintiff cannot establish prejudice based upon the submission of Mercy's negligence.[16] *See DeMoss v. Hamilton,* 644 N.W.2d 302, 307 (Iowa 2002) (holding submission of a plaintiff's comparative fault could not have caused prejudice when the jury found the physician was not

[16]In addition, in closing argument Defendants did not argue Mercy's fault. *See* App.2, 3162 (11-20-18 p.m. 103:6-11).

negligent); *Mumm*, 924 N.W.2d at 519 (discussing and applying *DeMoss* to find no prejudice).

Plaintiff's suggestion that she was prejudiced because she was required to address the issue in closing argument fails. Out of the nearly 70 pages of transcript reflecting Plaintiff's closing and rebuttal argument, she cites only one page devoted to Mercy. App.2, 3104-05 (11-20-18 p.m. 45:2-46:1). The district court—which heard all the evidence and argument—found Plaintiff did not suffer prejudice. App.1, 4008 (Enlarged Finding).[17] "It is axiomatic that a trial court is better equipped than appellate courts can be to determine whether prejudice occurs." *State v. Anderson*, 448 N.W.2d 32, 34 (Iowa 1989).

C. If the Court reaches the merits, the district court did not err or abuse its discretion.

1. Standard of review.

While Defendants agree the review of a motion for directed verdict is generally reviewed for correction of errors at law, the court did not rule on the motion for directed verdict. It reserved ruling.

[17]The court noted that the issue of Mercy's fault (via the alleged acts or omissions of nursing staff) was related to the physicians who had already settled and for whom there were comparative fault defenses—not to Drs. Liewer and Mueting. *Id.* "Accordingly, the jury could not and was not misled to the erroneous conclusion that Dr. Mueting and Dr. Liewer weren't negligent because they did not receive critical information about changes in [FL's] condition." *Id.*

Review of a trial court's procedural decision to reserve ruling should be reviewed for an abuse of discretion. *See Matter of Estate of Wilson*, 2018 WL 739248 *3 (Iowa Ct. App. 2018) (finding district court did not abuse its discretion in denying a motion to reserve summary judgment ruling pending further discovery); *T.D. II v. Des Moines Indep. Cmty. Sch. Dist.*, 2016 WL 351516 *3 (Iowa Ct. App. 2016) ("the district court was well within its rights to reserve ruling on the motion in limine until such time as an actual objection to evidence is made during trial").

To the extent the Court considers the trial court to have denied the motion for directed verdict, there was no error.

2. Error preservation.

Defendants agree Plaintiff preserved error.

3. There was no abuse of discretion or error.

It was not an abuse of discretion to reserve ruling on the motion for directed verdict. Reserving ruling caused no prejudice as Plaintiff's motion could be decided later if required. Plaintiff cites no cases supporting that reserving ruling was an abuse of discretion or an error. The district court noted: "the Iowa Supreme Court has even noted that 'the preferred procedure in *close cases* is to delay sustaining the motion [for directed verdict] until after verdict of the jury in order to avoid retrial if there is a reversal.'" App.1, 4007 (Enlarged Finding,

quoting *Larkin v. Bierman*, 213 N.W.2d 487, 490 (Iowa 1973), emphasis and brackets by district court).

To the extent that reserving ruling is considered to be substantively the same as denying the motion for directed verdict—there was no error. Denying such a motion is an approved procedure given the court may grant a judgment notwithstanding the verdict:

> This court has adopted the "Uhlenhopp rule" which encourages the district court to deny a motion for directed verdict, even if it is clear the movant is entitled to judgment as a matter of law. *Reed v. Chrysler Corp.*, 494 N.W.2d 224, 229 (Iowa 1992). Instead, the court should submit the case to the jury to avoid another trial in case of error. After the jury returns a verdict the court may grant a motion for judgment notwithstanding the verdict, as long as it is based on the same grounds as the original motion at the close of evidence and the movant is entitled to judgment as a matter of law.

State v. Keding, 553 N.W.2d 305, 308 (Iowa 1996) (affirming grant of judgment notwithstanding the verdict even though court denied directed verdict).

Further, there was evidence to support the court's decision to instruct the jury on Mercy's fault and reserve ruling. The instruction as to Mercy described the claim as one or more nurse was negligent in:

> Failing to notify Physicians of changes in [FL's] condition.

App.1, 3958 (Instructions 19).

This case spanned four weeks and included testimony from many physicians and nurses. The care and treatment at issue spanned four days, from

April 5, 2015 when FL was seen by Drs. Liewer and Mueting through April 8, 2015 when he was diagnosed with bacterial meningitis. The jury heard that FL's condition changed and evolved after he was seen by Drs. Liewer and Mueting and that subsequent physicians (all released parties whose fault was to be compared) should have acted accordingly. *See* App.2, 848-70 (11-2-18, 11:13-33:7, Plaintiff's expert von Elten criticizing Drs. Sana, Nieuwenhuis, Morgan, Johnson, and Swampillai); App.2, 1209-10 (11-6-18 p.m. 44:17-45:6, Plaintiff's expert Correa, symptoms progressed over a period of days).

All of the care by the released physicians occurred in the hospital—where Mercy's nurses provided 24 hour care. Plaintiff testified that FL deteriorated after admission and she "kept asking" about meningitis and a lumbar puncture to no avail. App.2, 1792-96 (11-9-18 a.m. 42:7-46:20); App.2 1871-75 (11-9-18 p.m. 30:24-34:4). The jury heard that released physician Dr. Swampillai testified that a nurse did not report certain signs or symptoms. App.2, 863-64 (11-2-18, 26:23-27:8, Dr. von Elten). There was also testimony that the role of Mercy nurses was a cause of FL's injuries. App.2, 1225-27 (11-6-18 p.m. 60:17-62:1, Dr. Correa).The role of the nursing staff in monitoring FL and reporting to the physicians was also reflected in detail in the medical record. *See,e.g.*, App.3, 181-89 (Exh. 1).

There was no abuse of discretion in reserving ruling on a motion for directed verdict—nor error if the failure to rule is viewed as a denial.

IV. The district court did not abuse its discretion in allowing defense expert Dr. Meyer's testimony on causation and it caused no prejudice.

Plaintiff argues that the testimony of defense expert neuroradiologist, Dr. Joel Meyer, was beyond the scope of his disclosed report, including his testimony:

> [1] "that the damage to F.L.'s brain was not caused by meningitis;
>
> [2] that a CT scan taken on April 8, 2015 was negative, signifying that F.L. couldn't have had meningitis on April 5, 2015;
>
> [3] that follow-up MR imaging studies indicated the brain damage to F.L.'s brain injury [sic] resulted from of [sic] brain infarction or hypoxic-ischemic injury caused by a respiratory compromise . . . on April 8, 2015; and
>
> [4] to expansively disagree with opinions that had supposedly been expressed by Plaintiff's neuroradiologist, Dr. Neel Madan."

Plaintiff's proof brief at 78-79 (formatting supplied). Dr. Meyer's trial testimony was well within the fair scope of his report and Plaintiff suffered no prejudice.

A. Standard of review.

Defendants agree that this issue is reviewed for an abuse of discretion. *See Milks v. Iowa Oto-Head & Neck Specialist*, 519 N.W.2d 801, 805 (Iowa 1994) ("the trial court has broad discretion in making rulings on expert testimony

under rule [1.508].") (citing predecessor rule 125). Further, "[i]ssues of relevancy and prejudice are matters normally left to the discretion of the trial court; we reverse the trial court only when we find a clear abuse of that discretion." *Shawhan v. Polk County*, 420 N.W.2d 808, 809 (Iowa 1988).

"Rulings within the trial court's discretion are 'presumptively correct, and a party challenging the ruling has a heavy burden to overcome the presumption.'" *Williams v. Dubuque Racing Ass'n*, 445 N.W.2d 393, 394 (Iowa Ct. App. 1989)(quoting *Countryman v. McMains*, 381 N.W.2d 638, 640 (Iowa 1986)). A court abuses its discretion only if its decision was "based on a ground or reason that is clearly untenable or when the court's discretion [was] exercised to a clearly unreasonable degree." *Pexa v. Auto Owners Ins. Co.*, 686 N.W.2d 150, 160 (Iowa 2004).

"'Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected. . . .'" *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 183 (Iowa 2004).

B. Error preservation.

Plaintiff argues that parts of Dr. Meyer's testimony should have been excluded as a sanction for non-disclosure under the four factor test of *Lawson v. Kurtzhals*, 792 N.W.2d 251, 259 (Iowa 2010) and that the district court failed to consider the factors. But Plaintiff did not argue the *Lawson* factors to the district

court. *See* App.2 1935-38 (Tr. 11-13-18 a.m. 14:2-17:6). The issue at trial was whether certain trial testimony was within the fair scope of Dr. Meyer's report. *Id.* 1959 (38:1-20).[18] "'[I]t is fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider.'" *DeVoss v. State*, 648 N.W.2d 56, 60 (Iowa 2002).[19]

C. Plaintiff cannot show prejudice.

Dr. Meyer was a causation expert and he offered no testimony on standard of care or breach. App.2, 1971 (11-13-18 a.m. 50:1-14); *id.* 2033 (112:6-8, "I'm not expressing an opinion on the clinical diagnosis of meningitis"); App.2, 3096, 3100 (11-20-19 p.m. 37:14-17, 41:15-22, Plaintiff's closing, discussing Dr. Meyer under causation).

Plaintiff cannot establish they were prejudiced by Dr. Meyer's testimony when the jury never reached causation. *See Vachon v. Broadlawns Med. Found.*, 490 N.W.2d 820, 825 (Iowa 1992) (plaintiff in medical malpractice case alleging defense causation expert was allowed to testify beyond scope of

[18] If this Court reviews the issue under *Lawson*, Plaintiff still cannot prevail. Dr. Meyer's report *was* disclosed in discovery; his trial testimony, while important, was within the fair scope of that report; Plaintiff *did* "meet the evidence" and suffered no harm; and Plaintiff never asked for a continuance, including a brief one during trial to depose Dr. Meyer. *See Lawson*, 792 N.W.2d at 259.

[19] Of note, Plaintiff does not cite to specific transcript pages for the allegedly problematic testimony and objections, instead citing a span of over 50 pages. Proof brief at 77, 79 (citing 11-13-19 a.m. 52:10-106:12).

disclosure was not prejudiced "when the issue of causation was not reached by jury"); *Slutzki v. Grabenstetter*, 2002 WL 31114657 *4 (Iowa Ct. App. 2002) (any evidentiary error relating to causation evidence is not prejudicial when jury finds in favor of defendant on liability).

Plaintiff also cannot establish prejudice because she presented ample evidence from her own experts on the subjects about which she complains. This also refutes Plaintiff's claim she was surprised by Dr. Meyer's opinions. *See Millis v. Hute*, 587 N.W.2d 625, 628 (Iowa Ct. App. 1998) (no prejudice by testimony from expert allegedly beyond scope of disclosure as plaintiffs "had several experts of their own to counter" the testimony).

As to the complaints that Dr. Meyer testified that FL's brain damage was not caused by meningitis but instead by an infarction or hypoxic injury during a time of respiratory compromise as shown on the April 8th imaging, Plaintiff elicited substantial testimony from her own experts that meningitis caused the injury.[20] Plaintiff's neuroradiologist expert, Dr. Madan, testified at length about causation as related to infection, a hypoxic injury or infarction, or a combination of these. *See,e.g.,* App.2, 1418-20 (11-7-18 p.m. 37:4-39:9, explaining imaging,

[20] *See,e.g.,* App.2, 1082, 1084 (11-6-18 a.m. 24:18-21, 26:4-9, Dr. Correa: FL had meningitis on April 5, 2015 and if treated on the 5th would not have suffered brain injury); App.2, 1457 (11-7-18 p.m. 76:16-22, Dr. Madan: "there's extensive injury to the brain, and it is a direct result of that infection").

infection as cause of brain injury, infarction as cause of injury, and that April 8, 2015 imaging shows combination of infection and infarction related to infection); *id.* 1437-39 (56:4-58:8, discussing vascular issues, infarction, and infection); *id* 1449 (68:11-19, discussing images as showing two possibilities including extended infection or an infarct). Plaintiff's counsel specifically asked Dr. Madan if he agreed with Dr. Meyer's report that FL "suffered a hypoxic ischemic event [resulting] in multifocal infarcts"—to which Dr. Madan answered "No." *Id.* 1479 (98:19-25); *see also* App.1, 608-09 (Meyer report). Plaintiff was clearly not surprised by Dr. Meyer's trial testimony about a hypoxic event and infarction as a cause of the brain injury—it was reflected in Dr. Meyer's report and Plaintiff responded with her own expert.

As to Dr. Meyer's trial testimony that a negative CT scan on April 8, 2015 meant FL did not have meningitis on April 5th, again, Plaintiff's experts specifically addressed this subject–days before Dr. Meyer testified on November 13th. On November 7th, Plaintiff asked Dr. Madan if he agreed with the statement that given "the April 8th CT is normal [it] means there's absolutely no way [FL] had meningitis . . . on April 5th" –to which Dr. Madan testified "I do not." App.2, 1482 (11-7-18 p.m. 101:11-23); *id.* 1402 (21:21-25). On November 6th, Plaintiff's expert Dr. Correa testified similarly to essentially the same

question. App.2, 1123 (11-6-18 a.m. 65:4-8). Plaintiff cannot show surprise or prejudice from Dr. Meyer's testimony on this subject.

As to the court allowing Dr. Meyer to comment on Dr. Madan's trial testimony, the court specifically observed that it had been cognizant of the need to prevent surprise and that "all the parties know what Dr. Madan testified to." App.2, 1959 (11-13-18 a.m. 38:8-12). Plaintiff cannot establish unfair surprise by a response to their own expert. *See West Realty, Inc. v. Fox*, 2009 WL 1676155 *3 (Iowa Ct. App. 2009) (no abuse of discretion in allowing allegedly new expert testimony from defense which was to respond to the plaintiff's trial evidence).

Further detracting from the claim of prejudice, Plaintiff chose not to depose Dr. Meyer during discovery. *See Countryman v. McMains*, 381 N.W.2d 638, 640-41 (Iowa 1986) (affirming denial of motions to continue and for new trial, "surprise" testimony from the defendant "could have been discovered prior to trial by routine discovery procedures").

Finally, Plaintiff had the opportunity to fully cross-examine Dr. Meyer. *See Milks*, 519 N.W.2d at 807 ("'Dr. Wyatt was thoroughly cross-examined concerning his inconsistent pretrial testimony. Under the circumstances, there was no unfair prejudice.'") (quoting trial court); App.2, 1985 (11-13-18 a.m. 64:17-23, court ruling on plaintiff's objection: "You will get your opportunity to

cross-examine.").[21]

D. There was no abuse of discretion.

Iowa Rule of Civil Procedure 1.508(4) states:

> 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.

This "'is not a rule with sharp edges. It requires some latitude.'" *Milks*, 519 N.W.2d at 807 (quoting trial court). The purpose of rule is to avoid surprise. *See U.S. Borax & Chem. Corp. v. Archer-Daniels-Midland Co.*, 506 N.W.2d 456, 461 (Iowa Ct. App. 1993). As demonstrated above, Plaintiff cannot show surprise—she fully responded in anticipation of the very testimony at issue.

The nature of an expert's disclosure, including whether it is written in broad terms, is relevant. *See Eisenhauer*, 935 N.W.2d at 21-22 (holding physician's specific trial testimony was "well within" the scope of a broad and general designation under Rule 1.508(4)); *Vachon*, 490 N.W.2d at 824-25 (affirming admission of expert's specific testimony at trial as within fair scope

[21] Plaintiff incorrectly objected to Dr. Meyer's trial testimony as pertaining to an April 9th study when in actuality (as the court noted), Dr. Meyer testified about an April 8th study (and consistent with his report). App.2, 1984-85 (11-13-18 a.m. 63:1-64:16). In response, Plaintiff argued the report included the word "distinct" but the trial testimony did not—to which the court appropriately responded: "You will get your opportunity to cross-examine." *Id.* 1985 (64:17-23).

when expert's report referenced causation but had no specific statement regarding causation); *West Realty*, 2009 WL 1676155 *3 (expert's disclosure "sets out a fairly broad scope of testimony;" concluding opposing side "had adequate notice of the broad scope of [the expert's] opinions."); *Millis*, 587 N.W.2d at 628 (affirming admission of expert trial testimony when expert said in report that accident contributed to back condition but was more specific in testimony); *Milks*, 519 N.W.2d at 807 (agreeing that given expert's explanation of his opinion, it was consistent with prior disclosure even though it reflected "further study," was "'more precise and accurate,'" and reflected increased understanding); *U.S. Borax*, 506 N.W.2d at 462-63 (expert testified in deposition that he intended to review material on grain dust standards; his trial testimony on the results of that review was within fair scope).

The district court did not abuse its discretion. By the time Dr. Meyer testified, many witnesses had testified and trial was in its third week. The court had established a pattern of balanced rulings, guided by its position that "I tend to be fair to both sides" and that it was "cognizant . . . of its obligation to prevent unfair surprise and prejudice." App.2, 833 (11-1-18 p.m. 132:17-19); App.2, 1959 (11-13-18 a.m. 38:8-10). For example, the court allowed Plaintiff's expert von Elten to testify that certain medical literature was reliable authority over Defendants' objection it was not in his disclosures and was contrary to his

deposition. App.2, 797-801 (11-1-18 p.m. 96:9-100:15, medical literature testimony); *id.* 804-06 (103:20-105:11, cross examination regarding contrary deposition testimony); *id.* 826-31 (125:3-130:20, defense objection and court ruling allowing evidence given lack of surprise).

When it came to Dr. Meyer, the court listened to the parties' argument at length, was provided Dr. Meyer's written opinion, and took a recess to read case law. App.2, 1934-38, 1949-58 (11-13-18 a.m. 13:8-17:6; 28:7-34:6; 34:25-37:13). His preliminary ruling included:

> . . . the case law makes it clear [the expert disclosure rule] is not a rule with sharp edges and that there must be some latitude. The scope his testimony under Rule 1.508 is premised upon the concept that the scope of the expert's testimony must be within the fair scope of his report. And the testimony must all relate back to that disclosure. The Court has been cognizant throughout this proceeding of its obligation to prevent unfair surprise and prejudice. I believe that all the parties know what [Plaintiff's neuroradiologist] Dr. Madan testified to.
>
> And it's therefore my ruling that under Rule 1.508(4) that the testimony must be limited to the fair scope of his disclosure, but also allows the defendants to respond to specific issues raised in Dr. Madan's testimony.
>
> And within that range, I believe that the disclosure falls within the ambit of the scope set for the in 1.508(4).

App.2, 1959 (11-13-18 a.m. 38:1-20).

Dr. Meyer's testimony at trial was organized around his report and the imaging studies upon which his report was based. Defense counsel provided Dr.

Meyer his report on the witness stand and the direct examination flowed from it, providing the jury an explanation of the broad, yet highly technical language and radiological evidence. *See,e.g.*, App.2, 1969-73 (11-13-18 a.m. 48:16-19; 50:1-17; 52:17-22, "In your report, you describe the CT scan . . . I would like for you to pull up the CT imaging . . . and please explain . . . "); *id.* 1980 (59:6-16, "in your report, you make a note of this phrase: . . . I'm going to ask you some explanatory questions"); *id.* 1987-09 (66:10-67:8, 70:16-20, 72:3-23, 78:1-6, 82:5-8, 85:3-5, 87:12-15, 88:1-8, counsel referencing report and asking for explanation).

Plaintiff's central objections voiced at trial were to any testimony as to the time when meningitis started and that something besides meningitis caused injury. App.2 1937-38 (11-13-18 a.m. 16:8-17:6). Dr. Meyer's report included these very subjects. It described April 9, 2015 MR imaging as "suggestive of *early* meningitis" and stated that FL "suffered an hypoxic ischemic *event* resulting in multifocal infarcts." *See* App.1, 608-09 (report, emphasis added). Dr. Meyer's trial testimony, which included more detail and explanation about these disclosed subjects (what was meant by "early"[22] and explanation of the

[22] For example, defense counsel quoted Dr. Meyer's report: "when you say 'early meningitis' what does that mean?" App.2, 1993-94 (11-13-18 a.m. 72:22-73:4, overruling objection).

hypoxic event[23]), was within the fair scope of his report and hardly surprising to Plaintiff. The court did not abuse his discretion in this ruling.

Further, the court *sustained* Plaintiff's objection to several questions regarding what would be expected on imaging if FL had meningitis on April 5th. App.2, 2013 (11-13-18 a.m. 92:2-18).

Without identifying any specific testimony, Plaintiff complains generally the court allowed Dr. Meyer to respond to Dr. Madan's prior trial testimony. But Dr. Meyer's report specifically indicated areas of disagreement with Dr. Madan (App.1, 609), and the full scope and content of Dr. Madan's trial testimony was not known until trial. While disputed by Plaintiff, Dr. Madan himself had been allowed to expand his opinions beyond prior disclosures. *See* App.2, 1950 (11-13-18 a.m. 29:3-25); *West Realty*, 2009 WL 1676155 *3 (allegedly new expert testimony from defense was to respond to new evidence from plaintiff).

V. The Texas Medicaid issue does not support a new trial.

A. Summary of the issue.

[23] Dr. Meyer was allowed to testify over objection that the injury correlates with a respiratory problem where FL experienced hypoxia. App.2, 1997-98 (11-13-18 a.m. 76:22-77:6, describing respiratory event and compromise); *id.* 2006 (85:14-22, describing imaging as "All infarctions related to hypoxic ischemic injury from the respiratory compromise"); *id.* 1988-89 (67:19-68:4, overruling objection to testimony about infarction).

Iowa Code §147.136 ("Section or §147.136") provides that in medical malpractice cases, "damages awarded shall not include" medical expenses paid by any source with two exceptions. Recovery is allowed for: 1) payments by Iowa's Medicaid program, and 2) out-of-pocket expenses paid by the plaintiff or her family.[24] The exception for Iowa's Medicaid program was added in 2011.[25]

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[24] Section 147.136 states:

> 1. Except as otherwise provided in subsection 2, in an action for damages for personal injury against a physician . . . or against a hospital licensed for operation in this state, based on the alleged negligence of the practitioner in the practice of the profession or occupation, or upon the alleged negligence of the hospital in patient care, in which liability is admitted or established, the damages awarded shall not include actual economic losses incurred or to be incurred in the future by the claimant by reason of the personal injury, including but not limited to the cost of reasonable and necessary medical care, rehabilitation services, and custodial care, and the loss of services and loss of earned income, to the extent that those losses are replaced or are indemnified by insurance, or by governmental, employment, or service benefit programs or from any other source.
>
> 2. This section shall not bar recovery of economic losses replaced or indemnified by any of the following:
>   a. Benefits received under the medical assistance program under chapter 249A.
>   b. The assets of the claimant or of the members of the claimant's immediate family.

[25] Allowing recovery for Iowa Medicaid payments allows reimbursement to the State. The State may assert a lien in medical malpractice cases as of the 2011 amendment. *See* Iowa Admin. Code 441-75.4 (1) (department is allowed liens in "medical malpractice claims for injuries sustained on or after July 1, 2011").

The legislature's intent in enacting §147.136 was to address the medical malpractice insurance crisis and "reduce the size of malpractice verdicts by barring recovery for the portion of the loss paid for by collateral benefits." *Rudolph v. Iowa Methodist Med. Ctr*, 293 N.W.2d 550, 558 (Iowa 1980). The reduction in verdicts would then "result in a reduction in premiums for malpractice insurance, making it affordable and available, helping to assure the public of continued health care services." *Id.*; *Lambert v. Sisters of Mercy Health Corp.*, 369 N.W.2d 417, 424 (Iowa 1985) (intent was to "help assure the public of continued health care services at affordable rates."); *Toomey v. Surgical Services, P.C.*, 558 N.W.2d 166, 170 (Iowa 1997) (describing "legislature's desire . . . to reduce malpractice insurance premiums and assure availability of health care.").

Defendants sought a ruling that damages could not include any amounts paid by the Texas Medicaid program.[26] App.1, 616-18 (Motion, 1-15-18). Alternatively stated, Defendants argued the Texas Medicaid program is a collateral source under §147.136. Courts had previously held that Iowa's Medicaid program (prior to the 2011 amendment) was a collateral source under

[26]Defendants were granted permission to join the Texas Health and Human Services Commission as an indispensable party. App.1, 1270-80 (Ruling); App.1, 1287-88 (Aff. Serv., 3-16-18). It declined to participate. App.2, 54 (Tr. 4-27-18, 5:9-17). While Plaintiff refers to the joinder issue, her appeal issue is plainly stated and presented as the district court's interpretation of §147.136.

§147.136. *See U.S. ex rel. Hixson v. Health Mgmt Sys.*, 613 F.3d 1186, 1190 (8th Cir. 2010) ("We think, however, that . . . Medicaid is merely another 'collateral source' under §147.136.");[27] *U.S. ex rel. Hixson v. Health Mgmt Sys.*, 657 F.Supp.2d 1039, 1054 (S.D. Iowa 2009) (finding "Medicaid payments are within the scope of the language in §147.136 concerning replacement of medical costs by governmental benefit programs."); *see also Peters v. Vander Kooi*, 494 N.W.2d 708, 714 (Iowa 1993) (listing Medicaid as a possible collateral source payment under §147.136).

After agreeing that Iowa law applied (which Plaintiff did not resist),[28] citing legislative history, and discussing the *Hixson* cases, the district court held:

> Despite the amendment in 2011 . . . subsection one remained the same [since the statute was enacted in 1975]. This along with the specificity of the exceptions in subsection two indicate that the legislature's underlying intent and purpose behind its enactment of section 147.136 has not changed. . . . Therefore the Court finds section 147.136(1) does preclude medical malpractice defendant's liability for those medical expenses *paid* by governmental benefit programs and payers except when those expenses are paid by Iowa's governmental benefit program. Thus, the Defendants are not liable for those past medical expenses paid by the Texas Medicaid program to the Plaintiffs.

App.1, 1302 (Ruling, 6-7-18).

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[27] *Hixson* involved an unsuccessful claim that Iowa's Medicaid program violated federal law by not seeking reimbursement from medical malpractice defendants. *Id.* at 1187.

[28] *See* App.1, 837-38 (Plaintiff's brief, 1-29-18).

The Texas statute at issue provides that a Medicaid recipient assigns his or her "right of recovery" from "another person for personal injury caused by the other person's negligence" to the Texas Health and Human Services Commission. TX Hum Res §32.033(a). Given Iowa law determined Plaintiff's "right of recovery" and under that law Plaintiff had no right to recover medical expenses paid by the Texas Medicaid program, there was no right to assign to Texas. The district court agreed. App.1, 1303 (Ruling, Texas' "rights rise no higher than those of the Plaintiffs").[29] Plaintiff does not address or appeal the interpretation of the Texas statute.

B. Error preservation.

Defendants do not agree Plaintiff preserved error.

Plaintiff argued in the summary judgment proceedings (and on appeal) that §147.136 is preempted by federal law and, under Defendants' position, would violate the right to travel and full faith and credit clause under the U.S. constitution. The district court did not rule upon these issues. App.1, 1293-1304

[29] This is consistent with Texas law and Texas' positions taken in other cases. *See Gulf Ins. Co. v. Burns Motors, Inc.*, 22 S.W.3d 417, 420 (Tex. 2000) ("As assignee, Burns Motors stands in Nash's shoes and may assert only those rights that Nash himself could assert."); 2014 WL 1676283 *57-58 (Tex. Ct. App.-Austin), Response Brief of Appellee State of Texas, in *Malouf v. State of Texas* (discussing §32.033 in Medicaid fraud case as "permit[ting] a cause of action for the Health and Human Services Commission that is wholly derivative of the patient's damages;" citing *Gulf*).

(Ruling). There was no mention of the right to travel or the full faith and credit clause. *Id.*[30] Nor did the court rule on the preemption argument. While the court discussed the federal court decision that found no preemption, the court's ruling was based only upon statutory interpretation. *Id.*

Plaintiff did not ask the court to enlarge its ruling under Iowa Rule of Civil Procedure 1.904 or by any other means.

"It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal." *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). "When a district court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal." *Id.; see also Fennelly v. A-1 Mach. & Tool Co.*, 728 N.W.2d 181, 187 (Iowa 2007) (claim that was not addressed in court's order and not thereafter brought to the court's attention not preserved); *Stammeyer v. Div. of Narcotics Enforcement*, 721 N.W.2d 541, 548 (Iowa 2006) ("Without . . . a ruling or motion requesting a ruling, there is nothing for us to review"); *Sierra Club Iowa*

[30] While the court noted §147.136 had been held constitutional by the Iowa Supreme Court, those decisions did not involve the right to travel or the full faith and credit clause. *See Rudolph*, 293 N.W.2d 550; *Lambert*, 369 N.W.2d 417.

v. Iowa Dept. of Transportation, 832 N.W.2d 636, 641-42 (Iowa 2013) (1.904(2) motion preserved error on legal issue the court did not address).

C. Plaintiff cannot show prejudice.

This issue only pertains to damages. The jury never reached damages and Plaintiff cannot show prejudice. *See,e.g., Bingham v. Marshall & Huschart Machinery Co., Inc.*, 485 N.W.2d 78, 82 (Iowa 1992) ("Even if the court improperly excluded evidence offered to prove damages, it is not reversible error where the jury finds in favor of the defendant on the issue of liability"); *Gore v. Smith*, 464 N.W.2d 865, 868 (Iowa 1991) ("Because plaintiff failed to establish liability by defendants, any alleged error in the damage instruction could not have prejudiced plaintiff.").

The Court should also pause before reaching constitutional and preemption arguments because the circumstances have changed since the district court's ruling. Plaintiff received dollars from seven settling defendants. Subsequent to trial, Plaintiff satisfied an Iowa Medicaid lien even though she received no dollars to do so from the Appeal Defendants.[31]

D. If the Court reaches the merits, there was no error.

[31] *See* Release of Medicaid Lien in favor of Iowa Department of Human Services, filed 9-5-19, Iowa Medicaid Enterprise v [FL], Case No. LNCV170159, Iowa District Court, Woodbury County. *See* Iowa R. Evid. 5.201 (judicial notice may be taken at any stage of the proceeding of facts "not subject to reasonable dispute").

1. Standard of review.

Summary judgments and statutory interpretation are reviewed for correction of errors at law. *Magellan Health Servs., Inc. v. Highmark Life Ins. Co.*, 755 N.W.2d 506, 509 (Iowa 2008) (summary judgment); *State v. Kamber*, 737 N.W.2d 297, 298 (Iowa 2007) (statutory interpretation).

As to preemption by federal law, the "'starting presumption [is] that Congress does not intend to supplant state law.'" *Magellan*, 755 N.W.2d at 513 (quoting *N.Y. State Conf. BCBS Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995)).

Constitutional issues are review de novo. *Immaculate Conception Corp. v. Iowa Dept. of Transp.*, 656 N.W.2d 513, 515 (Iowa 2003)."[A] court faced with an important constitutional question should seek to interpret statutes in a fashion to avoid constitutional issues." *Mall Real Estate, L.L.C. v. City of Hamburg*, 818 N.W.2d 190, 200 (Iowa 2012). The Court "presume[s] that statutes are constitutional." *Johnston v. Veterans' Plaza Authority*, 535 N.W.2d 131, 132 (Iowa 1995). "A challenger must show beyond a reasonable doubt that a statute violates the constitution and must negate every reasonable basis that might support the statute." *Id*.

2. Section 147.136 does not unconstitutionally burden or restrict the right to travel.

There are any number of differences in state laws that may impact an individual's decision to travel or relocate. Plaintiff cites no case in which a state statute establishing the scope of a plaintiff's recovery in a tort action has been held an unconstitutional infringement on the right of interstate travel. In *Rudolph*, 293 N.W.2d at 558-59, the Iowa Supreme Court upheld §147.136 under an equal protection challenge that the statute treats medical malpractice plaintiffs differently from other tort plaintiffs. The Court observed that "[n]o court has invalidated a limitation on the amount of recovery under the Federal Constitution using traditional equal protection analysis." *Id* at 559.

The U.S. Supreme Court explained:

> The "right to travel" discussed in our cases embraces at least three different components. [1] It protects the right of a citizen of one State to enter and to leave another State, [2] the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, [3] for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.

Saenz v. Roe, 526 U.S. 489, 500 (1999); *id*. at 499 (classification that has the effect of imposing a penalty on travel could violate equal protection clause absent a compelling state interest).[32]

[32]*But see Hughes v. City of Cedar Rapids, Iowa,* 840 F.3d 987, 996 (8th Cir. 2016) (given ordinance did not burden right to travel, equal protection challenge subject to rational basis test); *see also Minnesota Senior Federation v. U.S.*, 273 F.3d 805, 808-10 (8th Cir. 2001).

The second component does not appear to apply. As to the third, there is no indication that Plaintiff would be treated any different in Texas than any other Texas resident based upon §147.136. *See Rosenbrahn v. Daugaard*, 61 F.Supp.3d 845, 861 (D. S.D. 2014) (no violation of the right to travel when new state residents treated same as existing residents).[33]

As to an individual's right to leave Iowa, the statute imposes no restriction. "If a statute does not burden entry into or exit from the State, then it does not directly impair the right to free interstate movement." *Hughes v. City of Cedar Rapids, Iowa*, 840 F.3d 987, 995 (8th Cir. 2016).

The statute operates the same regardless of where a plaintiff lives and regardless of the collateral source payer (with the sole exception of the Iowa Medicaid program). It does not impact travel or penalize a plaintiff for moving. *See, e.g., Washington v. Sessions*, 2018 WL 1114758 *9 (S.D. N.Y. 2018) (right to travel not impinged by law that is "facially neutral as to travel" and applies same "*regardless* of one's movement between states") (emphasis by court).

Under the district court's ruling, §147.136 would be applied the same to Iowa residents as to residents of any other state. Assume an Iowa resident is

[33] *Compare Saenz*, 526 U.S. 489 (California's twelve month residency requirement before new state resident qualifies for certain benefits violates right to travel); *see also Minnesota Senior Federation*, 273 F.3d at 809-10 (interpreting *Saenz* as rejecting deterrence analysis, finding it was insufficient if resident is only deterred from moving).

treated in an Omaha hospital and expenses are paid by the state of Nebraska under some circumstance. The Iowa resident—just like the Texas resident in this case—would not be allowed to recover the Nebraska state payments. There is no unconstitutional classification.

There is also no denial of health care or payment for health care because Plaintiff moved. Instead, the payor of Plaintiff's medical expenses potentially cannot recover reimbursement. But, as explained above, Texas voluntarily—by statute—limited its right to *Plaintiff's* rights.

Plaintiff has not met her heavy burden to establish §147.136 is unconstitutional.

3. There is no conflict with federal law and no preemption.

Two federal courts have ruled contrary to Plaintiff's position as to §147.136 and federal Medicaid statutes. *See Hixson*, 657 F.Supp.2d at 1055-56 (§147.136 does not conflict with federal Medicaid law, does not make Medicaid something other than a "payor of last resort," and is not preempted); *Hixson*, 613 F.3d 1186.

"Federal Medicaid law requires states operating Medicaid programs to ascertain whether there is third party liability for costs paid for by Medicaid and to seek reimbursement for such costs." *Hixson*, 657 F.Supp.2d at 1044 (citing 42 USCA §1396a(a)(25)(A)). Plaintiff fails to address the basic and foundational

first step—whether there is "third party liability."[34] Neither federal nor Texas law purport to establish when a third party is liable. Instead, when the Court turns to the law that determines Defendants' liability for medical expenses in this case (§147.136), the threshold requirement of third party liability is not met. *See Hixson,* 657 F.Supp. 2d at 1056 (finding medical malpractice defendant would have no liability under §147.136 for purposes of Medicaid reimbursement); *Hixson,* 613 F.3d at 1191 ("we have already concluded that medically negligent tortfeasors have no liability for medical costs paid by Medicaid under a reasonable interpretation of §147.136" and thus are not third parties for Iowa's Medicaid lien statute). Even the State of Iowa in *Hixson* agreed given the case arose prior to the 2011 amendment.[35]

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[34] This threshold requirement before a state Medicaid program can seek reimbursement is the same prior to and after 2013 amendments to the federal statute. Plaintiff does not argue otherwise and cites 2002 authority for her argument. 42 USC §1396a(a)(25)(A) was not amended in 2013. *See also* App.1, 763-70 (Defendants' brief, 1-5-18).

[35] The Iowa Medicaid program (represented by the defendants in *Hixson*) argued it *could not* seek reimbursement in medical malpractice cases "because Iowa Code §147.136 precluded Medicaid recipients from recovering those costs, and Medicaid's right to reimbursement is wholly dependent on the recovery right of its recipient." 613 F.3d at 1189; *see also Hixson*, 657 F.Supp.2d at 1055 (Iowa argued it was complying with *both* federal and state law as "Medicare regulations only require ascertaining legal liability under state tort law, and under §147.136 there is no legal liability to ascertain.").

Plaintiff argues Iowa Code §147.136 stands as an obstacle to a federal objective because it prevents Texas' ability to recover "from responsible third parties." This is incorrect. Defendants are not "responsible third parties" for purposes of Medicaid reimbursement.

In a case cited by Plaintiff, the Court summarized:

> Federal law requires states or local administering agencies to take "all reasonable measures *to ascertain the legal liability of third parties" for costs incurred under state Medicaid plans.* 42 U.S.C. § 1396a(a)(25)(A). *In cases where legal liability is found to exist* . . . states are required to "seek reimbursement for such assistance to the extent of such legal liability". 42 U.S.C. § 1396(a)(25)(B). . . .

Barton v. Summers, 293 F.3d 944, 951–52 (6th Cir. 2002) (emphasis added).

Barton demonstrates the lack of conflict between the federal scheme and §147.136. The federal scheme necessarily requires a threshold determination of legal liability based upon something *other than* the federal scheme itself—such as state tort or damage law. There is no conflict between the federal scheme (that requires that some other law determine liability) and §147.136 (that determines that liability).[36]

[36]*See also Hixson*, 657 F.Supp.2d at 1052 ("Section 1396a(a)(25)(A) requires [Medicaid] to look to legal responsibilities that exist independently of the federal regulations—namely, in existing state tort law" for third party liability); *id.* at n.10 ("Put another way, §1396a(a)(25)(A) does not require Iowa to legislate certain kinds of third party liability. Rather, it only requires that [Medicaid] ascertain and enforce liability based on pre-existing state tort or contract law."); *Com. of Mass. v. Philip Morris Inc.*, 942 F. Supp. 690, 694 (D. Mass. 1996) (third party liability issue for purpose of Medicaid "will be judged

4. Section 147.136 does not violate the full faith and credit clause.

Plaintiff's premise—that §147.136 extinguishes Texas' right to recover—is flawed. To the contrary, §147.136, the Texas statute, and the applicable federal statutes do not conflict and can all be given effect. The district court interpreted the Texas statute as giving Texas no greater rights than Plaintiff. App.1, 1302-03 (Ruling). Plaintiff does not argue on appeal that this holding by the district court was erroneous. Plaintiff has never explained how an Iowa statute can unconstitutionally extinguish a right that never existed. Plaintiff glosses over the actual relevant statutory language to make generalized arguments that fail upon review. Plaintiff's scope of recovery and right to recover in this medical malpractice case is determined by Iowa law. The Texas statute does not purport to determine those issues.

The district court did not rule the Texas statute was unenforceable or void because of Iowa Code §147.136. It did not legislate for Texas, substitute Iowa law for Texas law, or ignore the Texas statute. It simply interpreted the Texas statute. The full faith and credit clause is not at issue. Plaintiff does not actually

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by reference to Massachusetts law"); *Massachusetts v. Sebelius*, 2009 WL 3103850 *2 (D. Mass. 2009) ("Although §1396a(a)(25)(B) requires Medicaid to seek reimbursement from "liable third parties," it does not create liability where none otherwise exists. Section 1396a (a)(25)(B) creates a duty to seek reimbursement, not a right to receive it.")

appeal the district court's interpretation of the Texas statute and cites no authority that it somehow violates the full faith and credit clause when a court in one state interprets the statute of another state.

VI. Defendants join in Drs. Wingert and Ryder's brief.

While Drs. Liewer and Mueting join in, and agree with, the positions set forth in Drs. Wingert and Ryder's brief, the Court's ruling as to the summary judgment in favor of Drs. Wingert and Ryder does not impact Drs. Liewer and Mueting.

Conclusion

For the reasons set forth above, Defendants request that Plaintiff's appeal be dismissed for lack of jurisdiction. If the Court reaches other issues, Defendants request that the district court's rulings be affirmed, Plaintiff's appeal be denied in its entirety, and the verdict and judgment be affirmed.

Request for Oral Argument

While Defendants believe this case could be affirmed without oral argument, if argument is granted, they request to be heard.

/s/Nancy Penner
NANCY J. PENNER AT0006146
SHUTTLEWORTH & INGERSOLL, P.C.
500 U.S. Bank Bldg., P.O. Box 2107
Cedar Rapids, IA 52406
PHONE: (319) 365-9461

FAX: (319) 365-8443
e-mail: njp@shuttleworthlaw.com

ATTORNEY FOR DEFENDANTS-APPELLEES

/s/John Gray
John C. Gray AT0002938
Jeff W. Wright AT0008716
Heidman Law Firm, L.L.P.
1128 Historic Fourth Street
Sioux City, IA 51101
Phone: (712) 255-8838
E-mail: John.Gray@Heidmanlaw.com
E-mail: Jeff.Wright@Heidmanlaw.com
&
Kevin J. Kuhn
Admitted pro hac in district court
Wheeler Trigg O'Donnell, LLP
370 17th Street
Suite 4500
Denver, CO 80202
ATTORNEYS FOR DEFENDANT ANDREW MUETING, D.O.

/s/Christine Conover
Christine L. Conover AT0001632
Carrie L. Thompson AT0009944
Simmons, Perrine, Moyer & Bergman, PLC
115 Third Street S.E. Suite 1200
Cedar Rapids, IA 52401
Phone: (319) 366-7641
E-mail: cconover@spmblaw.com

ATTORNEYS FOR DEFENDANTS JOSEPH LIEWER, M.D., AND NORTHWEST IOWA EMERGENCY PHYSICIANS, P.C.

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James J. Carlin
Carlin Law Office
5728 Sunnybrook Drive
Sioux City, IA 51106
&
James M. Leventhal
Bruce L. Braley
Brian N. Aleinikoff
Benjamin I. Sachs
Leventhal Puga Braley PC
950 S. Cherry Street, Suite 600
Denver, CO 80246
Attorneys for Plaintiff

Patrick G. Vipond
Lamson, Dugan & Murray, LLP
10306 Regency Parkway Drive
Omaha, NE 68114
Attorney for Defendants-Appellees Dr. Wingert and Dr. Ryder

Clerk of the Iowa Supreme Court
Iowa Judicial Branch Building
1111 East Court Avenue, 4th Floor
Des Moines, IA 50319

/s/ Haley Fauconniere