IN THE SUPREME COURT OF IOWA

No. 22-1317

S.K., a legally incapacitated Minor by and through his Conservator, THOMAS T. TARBOX, Esq.; Plaintiff-Appellee,

vs.

OBSTETRIC AND GYNECOLOGIC ASSOCIATES OF IOWA CITY AND CORALVILLE, P.C. Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT FOR JOHNSON COUNTY LACV081421
THE HONORABLE KEVIN MCKEEVER

Defendant-Appellant's Final Brief

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Routing Statement

This Court should retain this case for several reasons.

First, the nearly $100 million verdict is unprecedented for an Iowa birth injury case, and grossly excessive on the facts of this case. SK, who was 3½ years old at trial, talks in complete sentences, is learning new vocabulary, plays with toys, is learning to walk, loves and interacts joyfully with his family, and—as Plaintiff's expert conceded—will be toilet-trained and able to bathe independently. The out-of-pocket care-related expenses in the first 3½ years of SK's life totaled only $434. The shocking verdict resulted from instructional errors, evidentiary errors, and the misconduct of counsel, not from the evidence. The excessive verdict alone presents a fundamental issue of broad public importance requiring ultimate determination by this Court. Iowa R. App. P. 6.1101(2)(d).

Second, the misconduct of Plaintiff's counsel (Geoffrey Fieger) that inflamed the jury was not inadvertent. As demonstrated from Mr. Fieger's pro hac application and reported cases, he has been placed on probation, reprimanded, sanctioned, disciplined, and had jury verdicts vacated for similar misconduct. Following this pattern here, he repeatedly violated court orders, told the jury in his opening statement that the physician testified falsely, developed improper themes throughout trial, and presented an

improper closing argument. The nature of the misconduct—and whether it is permitted in Iowa—requires the enunciation of legal principles to address a fundamental issue of broad public importance requiring ultimate determination by this Court. *Id.* 6.1101(2)(d)(f).

Third, there is a substantial issue (involving nearly $27 million) of first impression. *Id.* 6.1101(2)(c). That issue concerns whether, under Iowa Code Chapter 668, a defendant is liable only for its equitable share of economic damages or is jointly and severally liable for all economic damages, where a co-defendant found to be 50% at fault settles with the plaintiff.

Statement of the Case

Nature of the case and relevant proceedings.

This medical malpractice case arose from SK's birth in August 2018 and was tried to a jury in March 2022. The issues included the extent of SK's injuries and whether the maternal forces of labor or alleged negligence caused them.

The original Defendants were Dr. Jill Goodman, the obstetrician who delivered SK; her employer, Obstetric and Gynecologic Associates of Iowa City and Coralville, P.C. (the "P.C."); and Mercy Hospital, Iowa City, where SK was born. 11/22/19 Petition. Before trial, Plaintiff dismissed Dr.

Goodman and the parents' consortium claims. 3/1/22 Tr. 200:22-202:21. That left the Conservator's claims against the P.C. for the alleged negligence of Dr. Goodman and against Mercy for alleged nursing negligence. App. 99 (Instruction 1).

Prior to the verdict, Plaintiff and Mercy reached a high-low settlement agreement, capping Mercy's liability at $7 million. App. 111 (4/15/22 Release and Satisfaction). Plaintiff argued to the jury that it should assign up to 40% of fault to Mercy. 3/18/22 Tr. 52:23-53:6. Seven million dollars would be 40% of a $17.5 million verdict.

The jury found in favor of Plaintiff and awarded $97,402,549. App. 106-08 (3/21/22 Verdict).

The P.C. filed post-trial motions—which were denied. App. 183-96 (7/27/22, 8/4/22 Orders). This appeal followed. App. 199 (8/5/22 Notice).

Summary of the facts.

Mrs. Kromphardt arrived at Mercy, in labor, at about 1 p.m. 3/16/22 Tr. 126:24-127:1 (Goodman). Dr. Goodman, the obstetrician on-call, evaluated her and provided care while also attending to two other deliveries. *Id.* 124:15-17, 127:2-145:8.

At about 4 p.m., a nurse alerted Dr. Goodman that Mrs. Kromphardt was ready to deliver, and that the baby's monitoring strips were showing

decelerations. *Id.* 145:9-18, 150:24-151:4. Dr. Goodman returned to Mrs. Kromphardt's room and SK was delivered at 4:09 p.m. *Id.* 176:18-24.

Dr. Goodman initially attempted to use forceps, but when she placed them, they slipped. *Id.* 157:7:158:18. She tried them again, but this time they did not lock. *Id.* She then used a vacuum and delivered SK after one pull for only 20 seconds. *Id.* 160:13-23.

During the labor process, SK suffered a traumatic injury—a fractured skull. He also has cerebral palsy and permanent motor weakness on one side of his body. 3/17/22 Tr. 13:17-15:6, 21:1-12 (defense expert Epstein).

Plaintiff's case – As to liability, Plaintiff's theories included that the fetal monitoring strips during labor showed fetal distress, Dr. Goodman should have delivered SK earlier by C-section, and she negligently used forceps and a vacuum extractor to deliver SK. 3/4/22 Tr. 21:11-23, 24:1-15, 38:2-16, 58:4-13 (Gubernick).

As to injuries, Plaintiff's experts testified SK suffered a fractured skull from the forceps as well as hypoxic ischemic encephalopathy ("HIE") during labor. 3/7/22 Tr. 20:17-21:14 (Gabriel). HIE is a condition where a lack of blood and oxygen causes brain damage. 3/17/22 Tr. 23:5-9 (Epstein). HIE was critical to Plaintiff's damages given defense evidence that patients

with traumatic injuries do better than those with HIE. 3/16/22 Tr. 61:4-9 (Meyer); 3/17/22 Tr. 24:24-26:4 (Epstein).

As for SK's future, Plaintiff's experts testified that SK is permanently, cognitively, and physically disabled and will need 24/7 custodial care the rest of his life. 3/9/22 Tr. 29:10-31:20 (Yarkony). They calculated that SK would need over $42 million in medical and custodial care expenses. 3/10/22 Tr. 110:8-17 (Thomson).

Defense case – On liability, the defense disagreed that the fetal monitoring strips showed fetal distress or that a C-section was warranted. 3/14/22 Tr. 23:19-24:6, 53:5-54:4 (Boyle). However, when it was time to deliver SK, it was appropriate to do so in an expedited manner with forceps and a vacuum extractor. *Id.* 57:20-59:25, 61:13-64:4, 81:12-86:18.

As to SK's injuries, Defendants' experts testified the forceps did not cause the skull fracture, including because Dr. Goodman felt an indentation in SK's skull before placing the forceps and SK had bruises on his body that forceps could not have caused. *Id.* 103:8-106:18 (Boyle); 3/15/22 Tr. 160:16-162:14 (Friedlich, explaining bruising is related to maternal forces). They testified that SK's skull fracture and brain hemorrhages resulted from maternal forces of labor—a known phenomenon. 3/14/22 Tr. 106:19-115:11 (Boyle); 3/15/22 Tr. 161:24-171:24 (Friedlich).

They also testified that SK did not suffer from HIE. 3/14/22 Tr. 86:22-87:21, 93:16-98:8 (Boyle); 3/15/22 Tr. 128:3-130:4 (Friedlich); 3/17/22 Tr. 23:10-24:23 (Epstein); 3/16/22 Tr. 30:16-21, 33:14-36:21, 47:10-51:10, 55:11-56:6 (Meyer).

Pediatric neurologist, Dr. Epstein, evaluated SK approximately 6 months prior to trial. 3/17/22 Tr. 29:18-31:1. He explained that SK "immediately engaged me to show me his toys" and "used words and pronouns and verbs . . . appropriate for a three-year-old." *Id.* 31:2-32:12.

As for SK's future, Dr. Epstein testified that SK would have residual right-sided motor weakness. *Id.* 21:1-22:3. But, based on his language function, SK will be cognitively normal and has a good long-term prognosis. *Id.* 33:18-22; 40:14-41:4. Even Plaintiff's expert, Dr. Gabriel, testified SK will be toilet-trained, capable of bathing himself, and will walk independently. 3/7/22 Tr. 69:24-70:15. He also testified SK is seizure-free and takes essentially no medicine. *Id.* 67:6-18.

Mrs. Kromphardt testified that SK can take a couple of steps by himself, "cruise" about by holding onto furniture, speak in short complete sentences, and learn new vocabulary. 3/11/22 Tr. 142:18-143:17, 146:9-17 (cross). SK shows joy at her presence and "you can . . . see that he loves us." *Id.* 133:8-20 (direct). The court reporter captured SK's statement at trial

when he saw a family photo: "We're at the river. I see Dada and [SK] and [sister] and [brother] and Momma." 3/18/22 Tr. 20:2-3.

As to Plaintiff's $42 million lifecare plan, Dr. Epstein testified SK would not need *any* custodial care. 3/17/22 Tr. 43:6-20. And, the out-of-pocket expenses for his first 3½ years of life totaled $433.89. App. 354 (Exh. Z). *See also, e.g.* 3/9/22 Tr. 79:5-19, 82:5-83:15, 87:12-91:4, 92:14-94:17 (Yarkony cross on lifecare plan).

The verdict –The jury found the P.C. and Mercy liable for negligence and each 50% at fault, awarding Plaintiff:

Future medical and/or care expenses	$42,203,818
Loss of future earning capacity	$11,698,731
Past loss of function mind and/or body	$1,050,000
Future loss of function mind and/or body	$20,700,000
Past pain and suffering	$1,050,000
Future pain and suffering	$20,700,000
	$97,402,549

App. 107-08 (3/21/22 Verdict).

The district court ruled that the P.C. was jointly and severally liable for all economic damages notwithstanding Mercy's settlement. App. 192-93 (8/4/22 Order). This resulted in a total verdict against the P.C. in the amount of $75,652,549. *Id.*[1]

[1] This ruling contains a typographical error on page 4. The correct calculation is $75,652,549 on page 2. App. 193 (8/4/22 Order); 5/19/22 Plaintiff's post-trial resistance at 68 with same number.

Summary of the Argument

The $97.4 million verdict shocks the conscience. The excessive verdict is explained, not by the evidence, but by district court errors and trial counsel misconduct. This Court should order a new trial.

First, the court summitted several claims of negligence to the jury without evidentiary support. One example is a specification that allowed the jury to find against the P.C. on an allegation that Dr. Goodman failed to treat Mrs. Kromphardt's low blood pressure. Yet Plaintiff's own evidence was that Dr. Goodman did not even know about the blood pressure. This clear error, as well as Plaintiff-favoring language in the specifications, require a new trial.

Second, a vacuum product insert—used repeatedly at trial—was inadmissible hearsay. And the residual hearsay exception does not apply, because the insert was not more probative than the testimony of Plaintiff's expert. The introduction of inadmissible hearsay is presumed to be prejudicial. Here, it was prejudicial.

Third, the misconduct of Plaintiff's counsel (Mr. Fieger) pervaded the trial. It began in opening statement, where he told the jury that Dr. Goodman lied under oath. It continued in cross examinations, where Mr. Fieger argued with witnesses, demeaned them, and ridiculed their opinions. And in closing,

Mr. Fieger encouraged the jury to "stop" Dr. Goodman's conduct "now;" make her, and the P.C., accept responsibility; and to consider the only thing that motivated them—"money." Mr. Fieger improperly appealed to juror emotions, by encouraging them to stand up for SK, to take responsibility for his welfare, and to put themselves in the parents' shoes. He mocked defense positions, Dr. Goodman, and her experts.

Unfortunately, the misconduct was neither inadvertent nor harmless. As Mr. Fieger's pro hac vice application and reported cases show, he routinely engages in misconduct to inflame juries, and courts reverse the excessive verdicts that result. This Court should do the same, based on Mr. Fieger's "repeated, deliberate" misconduct. *Kinseth v. Weil-McLain*, 913 N.W.2d 55, 73 (Iowa 2018). In doing so, the Court should also revoke Mr. Fieger's pro hac admission to allow a new trial without misconduct.

Fourth, the verdict is flagrantly excessive, shocks the conscious, and is the result of passion and prejudice created by Mr. Fieger.

Finally, this Court should clarify an issue of first impression—whether the P.C. is liable for 100% of economic damages under Iowa Code Chapter 668, where Mercy settled with the Plaintiff before the verdict. This was a $27 million error.

Argument

I. The district court erred in submitting specifications of negligence without evidentiary support and in the language used.

Two problems with the specifications of negligence require a new trial. First, there was no evidence to support three of them. Second, the language in many was extraordinary in its lack of neutrality, argumentative tone, and duplication, prejudicing the P.C.

A. Standard of review.

The Court will "review a claim that the district court gave an instruction not supported by the evidence for correction of errors at law." *Pavone v. Kirke*, 801 N.W.2d 477, 494 (Iowa 2011).

Challenges to jury instructions also are reviewed for correction. *Alcala v. Marriott Int'l, Inc.* 880 N.W.2d 699, 707 (Iowa 2016).

B. Error preservation.

The P.C. objected to the language of the specifications and to specifications "a," "b," and "e" as unsupported by the evidence. 3/17/22 Tr. 95:18-96:25, 98:17-24, 99:19-101:5 (P.C.); 3/18/22 Tr. 5:9-17 (court), 7:10-17 (P.C.); 3/18/22 P.C.'s Objections to Marshalling; 3/17/22 Defendants' Trial Brief on Specifications; App. 183-88 (7/27/22 Order).

C. A verdict cannot stand when, as here, any specification of negligence lacks evidentiary support.

"Submission of issues that have no support in the evidence to the jury is error." *Manno v. McIntosh*, 519 N.W.2d 815, 823 (Iowa Ct. App. 1994). Where one specification is erroneously submitted, the court presumes that the jury relied upon it. *Phillips v. Chicago Cent. & Pac. R. Co.*, 853 N.W.2d 636, 644-45 (Iowa 2014).

For this reason, when any specification submitted to the jury lacks support, a new trial is required. *E.g.*, *Alcala*, 880 N.W.2d at 710. This rule applies to general verdicts where (as here), it is impossible to tell how the jury decided the case. *Id.; Childers v. McGee*, 306 N.W.2d 778, 780 (Iowa 1981).

Here, there was no evidence to support three of the eight alternative specifications as to Dr. Goodman. Because the jury could have found that Dr. Goodman was negligent based on any one of these specifications, this Court should order a new trial.

1. Failing to treat maternal blood pressure.

Specification "e" allowed the jury to find that Dr. Goodman was negligent in:

e) Failing to administer medication and treat Mrs. Kromphardt's low blood pressures after the epidural.

App. 101 (Instruction 18(e)).

But there is no evidence that Dr. Goodman breached the standard of care on this issue.

Indeed, the nurses did not inform Dr. Goodman (or any doctor) that the blood pressure was low. *See, e.g.*, 3/16/22 Tr. 211:8-14 (Goodman cross-examination). Confirming this fact, Plaintiff submitted a specification (against Mercy) that the nurses failed to "call the doctor" about the blood pressure. App. 102 (Instruction 19(f)).

And, Plaintiff's evidence was that the nurses (not Dr. Goodman) were negligent in failing to treat the blood pressure. *E.g.*, 3/10/22 Tr. 33:15-34:24 (Brickner).

2. Failure to call a back-up physician.

Specification "a" allowed the jury to find that Dr. Goodman was negligent in:

a) Failing to call a back-up physician when she had too many patients including Mrs. Kromphardt and S.K. who were high risk with a nonreassuring heart rate pattern.

App. 101 (Instruction 18(a)).

But there is no evidence of what an available back-up physician

would have done. The possible "back-up physicians" were known individuals—Dr. Goodman's partners. Dr. Gubernick testified Dr. Goodman had "six people who she cross covers with, and basically she said in her deposition she can call these people any time." 3/3/22 Tr. 157:13-20. Plaintiff failed to subpoena any of these physicians to testify.

Without their testimony, the jury would be speculating about causation—what would have occurred had a back-up physician been called. But the "jury cannot be left to speculate about the but-for causal link." *Susie v. Fam. Health Care of Siouxland, P.L.C.*, 942 N.W.2d 333, 338-39 (Iowa 2020).

No back-up physician testified that, had they been called, they would have delivered SK earlier by C-section. In other words, the jury had to speculate that the back-up physician would have taken the position of Plaintiff's standard of care experts instead of agreeing with Dr. Goodman. Causation is pure guesswork.

3. Abandonment.

Specification "b" against Dr. Goodman allowed the jury to find that Dr. Goodman "was negligent" in:

> b) Abandoning Mrs. Kromphardt and S.K. [] who were high risk with a nonreassuring heart rate pattern for hour between 3 and 4pm.

App. 101 (Instruction 18(b)).

But Plaintiff did not plead an abandonment claim. 11/22/19 Petition; *Struck v. Mercy Health Servs.-Iowa Corp.*, 973 N.W.2d 533, 541 (Iowa 2022) ("Struck is bound by the allegations actually pleaded" and should have moved for leave to amend to add new claim).

And, Plaintiff did not provide evidence to support the specification. "Abandoning" a patient is a theory of liability separate from a traditional negligence claim, and it requires different proof. *Manno,* 519 N.W.2d at 820-21. Specifically, "what distinguishes abandonment from failure to meet the pertinent standard of care is that it requires an intent to terminate the professional relationship." *Id.* at 821. Here, there is no evidence of any such intent.

Nor is there evidence that the nursing staff was absent during the hour Dr. Goodman was with other patients; that Dr. Goodman was not on the labor and delivery unit; that Dr. Goodman ever failed to come to Mrs. Kromphardt's bedside after being asked; or that the outcome would have been different had she been at the bedside in that hour. 3/14/22

Tr. 45:8-46:8, 117:13-118-20 (Boyle); 3/15/22 Tr. 33:6-36:6, 41:2-44:19 (Taylor).

D. It was prejudicial error to use language that favored Plaintiff.

The language of the specifications for both Mercy and Dr. Goodman also was erroneous. The language is remarkable in its lack of neutrality, use of emotionally charged and argumentative phrases, and repetitive restatement of Plaintiff's theories. Three errors warrant a new trial.

1. The specifications improperly emphasized Plaintiff's theories.

First, the district court erred in using language in the specifications that emphasized (and adopted) Plaintiff's view of the disputed facts.

The Court "has long held that instructions that set apart, highlight, or accentuate the testimony of a particular witness or a particular piece of evidence are improper." *State v. Kraai*, 969 N.W.2d 487, 492 (Iowa 2022). And this Court has "disapproved repetitive instructions that unduly emphasize a feature of the case." *Rivera v. Woodward Res. Ctr.*, 865 N.W.2d 887, 903 (Iowa 2015); *see also, e.g.*, *State v. Mathis*, 971 N.W.2d 514, 519-21 (Iowa 2022) (reversing conviction based on instruction that unduly and unfairly emphasized certain testimony); *Olson v. Prosoco, Inc.*, 522 N.W.2d 284, 287 (Iowa 1994) ("even instructions correctly stating the law should not

give undue emphasis to any particular theory, defense, stipulation, burden of proof, or piece of evidence").

Similarly, jury instructions should not assume disputed facts or present controverted issues as established fact. *State v. Haesemeyer*, 79 N.W.2d 755, 762 (Iowa 1956) "The practice of embodying in an instruction a recitation of facts on which a party relies is not to be encouraged because of the tendency to thereby unduly magnify the importance of the matters thus selected for specific mention . . . ." *Van Norman v. Modern Bhd. of Am.*, 121 N.W. 1080, 1085 (Iowa 1909).

For example, in *Haesemeyer*, the Court reversed for a new trial when the trial court emphasized one party's theory: the "jury was told no less than five times" and "was expressly told twice and indirectly told at least twice" about a partnership defense. 79 N.W.2d at 761.

Here, Plaintiff's theory was that the fetal monitoring strips reflected a nonreassuring heart rate pattern, SK was in fetal distress, it was a high-risk situation, and that SK should have been delivered sooner. The P.C.'s experts disagreed with each of these assertions. Thus, what the monitoring strips conveyed, the level of risk, and whether there was fetal distress were critically important disputed facts.

Yet in the instructions, the court highlighted and emphasized Plaintiff's theories. Six specifications described the circumstances as including "a nonreassuring heart rate pattern;"[2] four described the situation as "high risk;"[3] and three stated there was fetal distress.[4]

These instructions recited Plaintiff's view of the facts and were critical to a finding of liability against Defendants.

The disputed descriptions were not needed to convey the alleged negligent act (i.e. the failure to timely deliver SK). They were Plaintiff's version of the case stated as fact by the court, repeated multiple times. They essentially instructed the jury that there *was* a nonreassuring heart rate pattern, a high-risk situation, and fetal distress. The jury was then tasked with deciding if Defendants were negligent in light of those facts. But those were disputed facts and it was prejudicial error for the court to repeatedly use such language.

2. The specifications were argumentative.

Second, the specifications also erroneously used argumentative language favoring Plaintiff.

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[2]App. 101-02 (Instruction 18(a)-(c); Instruction 19(c)-(e)).
[3]*Id.* (18(a)-(b); 19(c)-(d)).
[4]*Id.* (18(d); 19(g)-(h)).

Under Iowa law, instructions should not be argumentative but should be drafted in a fact-neutral, balanced fashion. “A trial court must walk a middle course and avoid arguing the case for either side in the instructions." *State v. Fagan*, 190 N.W.2d 800, 802 (Iowa 1971). In fact, “[a] court should go as far as possible to avoid giving undue prominence to a particular theory.” *Vanskike v. Acf Indus.*, 665 F.2d 188, 201 (8th Cir. 1981); *see also Alcala*, 880 N.W.2d at 710 (“district court erred by taking one side” and adopting plaintiff’s expert’s position in instruction).

The district court made the same errors here, using language that emphasized Plaintiff’s theory. Three specifications described the circumstances as Dr. Goodman having “too many patients,”[5] one described her as “overwhelmed,”[6] and one accused her of abandonment.[7]

Such descriptors were not necessary, fact-neutral, or balanced. These are emotionally charged, argumentative, and gratuitous words, inappropriate for specifications of negligence.

3. The specifications were duplicative.

Third, the specifications are duplicative, unfairly accentuating and emphasizing Plaintiff’s case.

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[5]*Id.* (18(a); 19(b)-(c)).
[6]*Id.* (19(b)).
[7]*Id.* (18(b)).

It is error to submit the same conduct to the jury more than once. *Olson*, 522 N.W.2d at 289; *see also Conner v. Menard, Inc.*, 705 N.W.2d 318, 323 (Iowa 2005) (reversible error to submit both general and specific negligence based on same evidence, doing so impermissibly gave the plaintiffs "'two bites of the apple'"); *Childers*, 306 N.W.2d at 780-81 (remanding on other issue but holding duplicative specifications should not be submitted on retrial); *Dickman v. Truck Transp., Inc.*, 224 N.W.2d 459, 464 (Iowa 1974) ("court may not unduly emphasize, by repetition or otherwise").

For example, in *Olson*, the Court held that it was error to submit a failure to warn allegation under two theories because they were "duplicative." 522 N.W.2d at 289.

The same problems exist in the specifications here.

As to Dr. Goodman, specifications "g" and "h" both alleged that it was negligent to use multiple instruments. App. 101 (Instruction 18).

As to Mercy, specifications "b," "c," and "h" all concerned the failure to obtain a second physician. App. 102 (Instruction 19). Specifications "g" and "h" both alleged the failure to secure a timely C-section. *Id.* And specifications "a," "i," and "j" all alleged negligence in allowing instrument use. *Id.*

These duplications are improper. The specifications repeat Plaintiff's theories with such minimal changes that they essentially required the jury to repeatedly evaluate the same conduct. The differences are so minor that the specifications cannot be viewed as alternative claims of negligence. This all served to accentuate and highlight Plaintiff's case. This is reversible error.

4. The language caused prejudice.

The Court will "'presume prejudice [from erroneous instructions] and reverse unless the record affirmatively establishes there was no prejudice.'" *Mathis*, 971 N.W.2d at 521. Indeed, jurors are "inclined to agree with" statements from the court. *State v. Williams*, 62 N.W.2d 241, 243 (Iowa 1954). It is Plaintiff's burden to show harmlessness. *Rivera*, 865 N.W.2d at 903. And Plaintiff cannot show harmlessness on this record, because the record demonstrates the opposite.

Presumption aside, prejudice results when there is undue emphasis. *Anderson v. Webster City Comm. Sch. Dist.*, 620 N.W.2d 263, 268 (Iowa 2000). And this Court will find prejudice if it concludes that "a jury instruction could reasonably have misled or misdirected the jury." *State v. Hanes*, 790 N.W.2d 545, 551 (Iowa 2010).

Instructional errors that go to the "the very heart of the case" require reversal. *Law v. Hemmingsen*, 89 N.W.2d 386, 390, 397 (Iowa 1958); *State*

v. Gordon, 560 N.W.2d 4, 6-7 (Iowa 1997) (court's "gratuitous addition" to instructions was prejudicial error when it adopted a disputed issue).

Here, the specifications were replete with gratuitous statements of Plaintiff's theories—Dr. Goodman was overwhelmed and had too many patients; Mrs. Kromphardt and SK were high risk; the strips were nonreassuring and there was fetal distress; and Dr. Goodman abandoned the Kromphardts. These additions to the alleged acts of negligence were not necessary and served only to highlight and restate Plaintiff's theories.

In his rebuttal closing argument, addressing specifications, Plaintiff's counsel emphasized that the instructions came from the court—it's "not from me." 3/18/22 Tr. 150:2-8. This statement to the jury served only to add to the prejudice caused by the erroneous language.

Making matters worse, all but one ("f") of the ten Mercy specifications expressly or impliedly stated allegations and theories against Dr. Goodman—prejudicing the P.C. App. 102 (Instruction 19). *Mundy v. Warren*, 268 N.W.2d 213, 218 (Iowa 1978) (party has standing to object to instructions pertaining to another if party "was prejudiced by the claimed error").

Nothing in the record affirmatively establishes the lack of prejudice. In fact, the record demonstrates the opposite. The language requires reversal.

II. The court erred in admitting the Mityvac package insert.

The district court also erroneously allowed Plaintiff to introduce into evidence the package insert that came with the Mityvac vacuum used to deliver SK. App. 341-51 (Exhibit 42). Plaintiff represented that the insert prohibited Dr. Goodman's use of the vacuum after a failed forceps attempt. Plaintiff also argued the insert established causation because it lists the injuries suffered by SK as adverse events.

The P.C. argued that the insert was inadmissible as hearsay and under Iowa Rule of Evidence 5.403. Plaintiff did not dispute that the insert was hearsay. The court admitted the insert under the residual exception to the hearsay rule. 3/4/22 Tr. 15:7-17:3; 3/7/22 Tr. 6:2-7:11.

That erroneous ruling allowed the jury to hear inadmissible evidence, which, under Iowa law, is presumed to be prejudicial. Worse, it enabled Plaintiff to suggest that the insert was from the FDA—prejudicing the P.C. and violating a court order. The error warrants a new trial.

A. Standard of review.

Whether evidence is admissible as hearsay is a legal issue that the Court reviews for correction. *State v. Dullard*, 668 N.W.2d 585, 589 (Iowa 2003). Other evidentiary rulings are reviewed for abuse of discretion. *Id.*

B. Error preservation.

The P.C. preserved its argument that the package insert is inadmissible. 2/17/22 Defendants' Joint Motion in Limine at 19-23; 3/3/22 Tr. 47:13-20 (P.C.), 50:7-51:12 (court); 3/4/22 Tr. 9:12-12:12 (Defendants), 14:17-17:3 (court); App. 86-89 (3/6/22 Defendants' Supplement to Motions for Mistrial); 3/7/22 Tr. 6:21-22 (P.C.); 33:13-34:10 (court). App. 188 (7/27/22 Order).

C. The package insert was inadmissible because it was not more probative than expert testimony.

Hearsay is admissible under the residual exception only in the rare case where the hearsay is more probative than any other evidence that the proponent reasonably *could* obtain. The package insert does not satisfy that test because it is not more probative than the other evidence Plaintiff *did* obtain—an expert who testified that the use of the vacuum was contraindicated after a failed forceps attempt. For these reasons, demonstrated below, the district court erred in admitting the insert.

1. Hearsay is admissible under the residual exception only if it is superior to other available evidence.

The residual exception to the hearsay rule is provided in Rule 5.807 of the Iowa Rules of Evidence.

The exception seldom applies. The exception is intended to be "'used very rarely, and only in exceptional circumstances.'" *State v. Brown*, 341

N.W.2d 10, 14 (Iowa 1983). Indeed, the Court has "been careful not to allow the residual exception to swallow the rule against hearsay." *State v. Skahill*, 966 N.W.2d 1, 11 (Iowa 2021). Thus, the rule is applied "sparingly" and only in "rare instance[s]." *State v. Veverka*, 938 N.W.2d 197, 204 (Iowa 2020) ("sparingly"); *McVay v. Bergman*, No. 05-1009, 2006 WL 2690225, at *6 (Iowa Ct. App. 2006) ("rare instance").

Confirming the exception's narrowness, hearsay evidence is admissible only if five requirements are met: (1) trustworthiness, (2) materiality, (3) necessity, (4) service of the interests of justice, and (5) notice. *State v. Kone*, 562 N.W.2d 637, 638 (Iowa Ct. App. 1997).[8]

This Court has explained that "[t]hese are not factors to be weighed; all five requirements must be satisfied." *Skahill*, 966 N.W.2d at 10. The five requirements "are designed to limit the exception and protect the overarching rule against hearsay." *Id.* at 11.

The third requirement—necessity—is dispositive here. Under that requirement, the hearsay evidence must be "more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts." Iowa R. Evid. 5.807(a)(3).

[8] Here, the district court admitted the insert as probative and trustworthy without addressing all five requirements. 3/4/22 Tr. 15:12-16:13.

As this Court has explained, "[t]he necessity element requires the hearsay evidence to be superior to other available evidence." *Skahill*, 966 N.W.2d at 13. Put differently, the question is whether the hearsay tends to prove the point "better than" the other available evidence. *Id.* at 11.

In medical malpractice cases, Iowa courts have applied the necessity requirement strictly—and correctly. Iowa appellate courts consistently hold that hearsay concerning the standard of care is inadmissible under the residual exception if the plaintiff admitted other testimony on that point.

For example, in *Manno v. McIntosh*, the district court granted a new trial, finding hearsay testimony that the doctor violated the standard of care should have been admitted. 519 N.W.2d 815, 818, 820 (Iowa Ct. App. 1994). The appellate court reversed. *Id.* at 820, 824. The court held that the hearsay evidence failed to satisfy the necessity requirement because it was "not more probative than other evidence which plaintiff could procure through reasonable efforts. In fact, the plaintiff had a medical expert . . . who testified on this issue." *Id.* at 820.

Similarly, in *McVay v. Bergman*, the district court admitted hearsay video evidence supporting that the defendant doctor violated the standard of care. 2006 WL 2690225, at *3, 6. The appellate court reversed and ordered a new trial. *Id.* *7. The court held that the video failed to meet the necessity

requirement because the plaintiff "introduced expert testimony supporting her theory that [the doctor] committed malpractice." *Id.* *6.

And in *Arnold v. Lee*, the appellate court applied these principles to a package insert. No. 05–0651, 2006 WL 1410161, at *4 (Iowa Ct. App. 2006). In *Arnold*, the plaintiff sought to introduce a package insert from a medical device that was used during her surgery. *Id.* *1. She argued the insert was probative on the standard of care. *Id.* The district court refused to admit the package insert under the residual exception. *Id.* *5.

The appellate court affirmed. *Id.* The court held that the package insert failed to meet the necessity requirement because "[t]he insert is not the only means by which [plaintiff] could introduce similar information." *Id.* *4. In fact, one of the plaintiff's experts "testified to substantially the same information as was contained in the insert." *Id.* *4.

The Court also agreed that the plaintiff "could have called a representative of the manufacturer to testify to its own cautions and concerns." *Id.* *4.

a. The package insert was not superior to Plaintiff's expert, who established the same point with more probative testimony.

The same is true of the package insert here. The insert stated that the vacuum should not be used after a failed forceps attempt:

CONTRAINDICATIONS
Do not initiate vacuum if any of the following conditions exist:

- Non-vertex positions (breech or transverse lie/position) or face or brow presentation
- Suspected cephalopelvic disproportion
- Previous scalp sampling
- Suspected macrosomia, or risk of shoulder dystocia
- Failed vacuum or forceps attempt

App. 342 (Exhibit 42).

Plaintiff used the insert to establish that Dr. Goodman breached the standard of care when she used the vacuum after attempting to deliver SK with forceps. *See* Part II(E). But Plaintiff could—and did—introduce other more probative evidence to establish this point.

Specifically, Plaintiff introduced expert witness, Dr. Martin Gubernick, who was unequivocal that Dr. Goodman should not have used the vacuum after using forceps. Dr. Gubernick stated that "if you have a failed forcep delivery it's contraindicated to use this [the vacuum]." 3/4/22 Tr. 61:12-13. And he elaborated that "it's well known that the use of sequential instruments, vacuum to forcep or forcep to vacuum, increases the risk of all the things we're talking about . . . . As you use more and more instruments, and as you use them over time, the incidence of injury increases." *Id.* 61:15-22.

The package insert's general statement was not more probative than Dr. Gubernick's case-specific testimony. It therefore cannot satisfy the

necessity requirement in Rule 5.807(a)(3); *Skahill*, 966 N.W.2d at 13. Indeed, just as in *Manno* and *McVay*, it is inadmissible under the residual exception because other evidence could be—and in fact, *was*—introduced to establish the same point. *Manno*, 519 N.W.2d at 820; *McVay*, 2006 WL 2690225, at *6.

In fact, Plaintiff conceded that the insert was less probative on the point. Specifically, Plaintiff conceded that the insert was consistent with the standard of care but did not set the standard. As Dr. Gubernick put it, "[j]ust to be crystal clear, they [package inserts] don't set the standard of care." 3/4/22 Tr. 59:10-12. And Plaintiff's counsel later reiterated the point, explaining to the court that "nobody has suggested that the package insert creates the standard of care." 3/9/22 Tr. 112:9-10.

Another reason the insert is not more probative than Plaintiff's expert is that it states: "These instructions are intended as general guidelines." App. 342 (Exhibit 42). Dr. Gubernick's testimony on the standard of care was not a "guideline." *See also* 3/4/22 Tr. 135:2-4 (Gubernick cross, agreeing guidelines do not establish standard of care); *Gerischer v. Snowstar Corp.*, No. 05-0241, 2006 WL 1278732, *3-4 (Iowa Ct. App. 2006) (affirming exclusion of industry "guidelines," citing Rules 5.403 and 5.702); *Arnold*,

2006 WL 1410161*3 (describing inserts as recommendations, not instructions).

It is therefore undisputed that the package insert was less probative than Dr. Gubernick's testimony. This was not the rare, exceptional circumstance where the residual exception could apply. The insert was therefore inadmissible.

D. The insert was inadmissible under Rule 5.403.

The insert also should have been excluded under Rule 5.403. As explained above, the probative value of the insert was *less* than Plaintiff's expert evidence on the same subject matter. Yet—even without the connections made to the FDA discussed below—the insert was highly prejudicial. Plaintiff used it to convey there was a bright line rule from the manufacturer prohibiting what Dr. Goodman did in this case *and* SK suffered the very injuries the manufacturer warned about. The prejudicial impact of the evidence outweighed its probative value. *See also* Part II(E).

E. The erroneous admission was prejudicial.

The admission of the package insert was not only erroneous, but also highly prejudicial.

When hearsay evidence is wrongly admitted, this Court "presume[s] it is prejudicial . . . unless otherwise established." *Skahill*, 966 N.W.2d at 15 (internal quotation marks omitted). Thus, the P.C. need not establish

prejudice. This Court therefore may—and should—order a new trial based on the erroneous admission alone.

Regardless, prejudice is easily established. First, the admission of insert suggested that the vacuum's manufacturer would have strongly disapproved of Dr. Goodman's care. By admitting the insert Plaintiff could suggest that the vacuum's manufacturer opined that Dr. Goodman breached the standard of care, even though no representative from the manufacturer testified or could be cross-examined. But as the court explained in *Arnold*, the appropriate way to handle this situation was not to admit the hearsay, but to "call[] a representative of the manufacturer to testify to its own cautions and concerns." 2006 WL 1410161, *4.

Second, and relatedly, the admission allowed the jury to rely on the package insert to find a breach of the standard of care. Indeed, during closing, Plaintiff's counsel asked the jury to do just that, highlighting the insert and linking it to SK's injuries:

> And this thing with a warning on it, you'll take it back -- you won't have any trouble, I've shown you the warning a hundred times. Don't use this thing in the face of a failed forceps. . . . It's in evidence, the package insert, . . .

3/18/22 Tr. 26:6-16.

Similarly, Plaintiff's counsel emphasized that the insert warned about "what happened" here—causation:

> The vacuum that says don't use it if there's a failed forceps delivery. Why? . . .
>
> Subarachnoid hemorrhage. Fracture of the parietal bone. Let me see some more hemorrhages here. Subgaleal hemorrhage. Subarachnoid hemorrhage. Facial nerve palsy. You got them all. . . .
>
> Read it. Go back in the jury room. He has every hemorrhage they warn about. Do not initiate the vacuum. These words are pretty clear. You don't have to be a doctor to know what they say. You can be a nurse. Failed vacuum or forceps attempt, don't do it. Don't do it. Don't do it. If you do it, here's what will happen and that's what happened.

3/18/22 Tr. 50:20-51:13.[9] Because the insert undisputedly did not establish the standard of care, Plaintiff's counsel's suggestion was improper and prejudicial. And it could not have occurred without the erroneous admission of the insert.[10]

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[9] The defense moved for a mistrial based, in part, on Plaintiff's argument that the package insert formed a basis for the jury to find a violation of the standard of care. 3/18/22 Tr. 118:22-119:2 (motion), 121:20-22 (joined), 120:22-23 (denied).

[10] Plaintiff also used the insert in cross-examinations. 3/14/22 Tr. 161:4-162:16 (Boyle); 3/15/22 Tr. 93:2-95:9 (Nurse Taylor), 180:7-16 (Friedlich); 3/16/22 Tr. 187:7-16, 195:19-25, 197:13-198:23, 222:4-223:1 (Goodman).

Third, and significantly, the admission of the insert allowed Plaintiff to suggest that it and other warnings were authored by the FDA, and thus that use of the vacuum violated FDA standards.

Plaintiff made this connection for the jury multiple times. In its opening statement, Plaintiff's counsel stated that the warning was "require[d]" by the FDA:

> All of [SK's] injuries, by the way, are warned against by the standard of care of this device that says never to use this device after forceps. The FDA requires the manufacturer of these and you'll hear it's the standard of care that you may never --.

3/3/22 Tr. 39:2-6; 39:7-14 (objection); 46:16-18 (overruled).

Then, Plaintiff's expert, Dr. Gubernick suggested that the package insert was approved by the FDA. The court reporter recorded: the insert "warns you about contraindications" and that "it's sent to the FDA." 3/4/22 Tr. 19:4-10. This occurred within minutes of the court's ruling that the package insert was admissible but that "it cannot be used for the proposition that the FDA has said any of these things." *Id.* 15:9-16:18. Even Plaintiff's counsel heard the witness convey that the FDA approved the insert. *Id.* 93:10-12. The court sustained an objection based upon the prior ruling and instructed the jury to disregard the statement (*id.* 19:11-22) but—given Plaintiff's opening remark—the damage was already done. The court denied

the P.C.'s motion for mistrial based on this violation of the court's order on FDA involvement. *Id.* 90:17-92:10 (motion), 96:5-14 (delayed ruling); 3/8/22 Tr. 19:12-21:13 (denial).

Finally, Plaintiff's pediatric neurologist expert, Dr. Ronald Gabriel, suggested that the FDA published warnings about the use of the vacuum. Specifically, he stated that "[w]e know that both forceps and vacuum can cause fractures of the skull. FDA has warning of vacuum --." 3/7/22 Tr. 27:24-25. The court again sustained an objection based on its prior FDA ruling and instructed the jury to disregard this statement, something the jury could not have done given that it was the third time Plaintiff had linked warnings to the FDA. *Id.* 28:1-9, 29:20-30:4, 33:3-17, 41:14-18. The court denied the P.C.'s motion for mistrial based on this second violation of the court's order on FDA involvement. *Id.* 32:17-22 (motion); 3/8/22 Tr. 19:12-21:13 (denial).

These references were prejudicial. They created a substantial likelihood that the jury substituted supposed "FDA" standards for a physician's standard of care and purported "FDA" findings on causation for SK's injuries. At a minimum, the jury likely gave the package insert undue weight, given that they were told it was blessed by the FDA.

The erroneous admission of the insert requires a new trial. The Court has been clear that evidence from a "purportedly unbiased" agency—like the FDA—is "unfairly prejudicial" because there is a risk that the jury will substitute the agency's determination for its own. *State v. Huston*, 825 N.W.2d 531, 537-39 (Iowa 2013) (citing Rule 5.403). The admission of an agency report can "'amount to admitting the opinion of an expert witness as to what conclusions the jury should draw.'" *Vaughn v. Must, Inc.*, 542 N.W.2d 533, 542 (Iowa 1996). And the Eighth Circuit has explained that "[t]here is a danger that government reports" will "sway the jury by their aura of special reliability and trustworthiness." *Gehl v. Soo Line R. Co.*, 967 F.2d 1204, 1208 (8th Cir. 1992) (internal quotation marks omitted).

The P.C. was therefore prejudiced by the erroneous admission of the package insert, both presumptively and in fact.

III. The court erred in denying a mistrial based upon misconduct.

This Court should also order a new trial because Plaintiff's counsel (Mr. Fieger) engaged in misconduct throughout trial. The capstone was closing argument, where Mr. Fieger inflamed the jury to award a grossly excessive verdict, and the jury did just that.

The district court expressed concern, admonished Mr. Fieger, and sustained objections—yet denied no fewer than seven motions for mistrial.

E.g., 3/2/22 Tr. 78:18-79:5, 80:2-8; 3/3/22 Tr. 61:23-62:14 (contemplating mistrial); 3/4/22 Tr. 92:11-17 (requesting briefing on cumulative misconduct); App. 74-89 (3/6/22 Defendants' Supplement to Motions for Mistrial). The court ultimately tolerated the conduct, which resulted in the excessive verdict.

A. Standard of review.

A denial of a motion for mistrial and attorney misconduct are reviewed for an abuse of discretion. *Kinseth v. Weil-McLain*, 913 N.W.2d 55, 66 (Iowa 2018) (mistrial); *Rosenberger Enters., Inc. v. Ins. Serv. Corp. of Iowa*, 541 N.W.2d 904, 906 (Iowa Ct. App. 1995) (misconduct).

B. Error preservation.

The P.C. repeatedly moved for a mistrial but the court denied each:

- Comments during jury selection on insurance, health care costs, and personal opinion. 3/2/22 Tr. 44:18-22, 50:1-2 (comments); 73:1-75:9 (motion); 77:7-80:8 (denial, admonishment).

- Improper argument to court on P.C.'s refusal to settle, being grossly under-insured, and acting in bad faith. 3/2/22 Tr. 80:16-84:21 (motion, denial, admonishment).

- Improper opening statement. 3/3/22 Tr. 36:3-13 (objection); 53:4-55:5, 59:17-60:8 (motion); 60:12-62:14 (denial, admonishment).

- Expert Gubernick's reference to FDA approval of package insert. 3/4/22 Tr. 90:17-92:10

(motion); 92:11-17, 96:5-14 (delayed ruling); 3/8/22 Tr. 19:12-21:13 (denial); Part II(E).

- Expert Gabriel's reference to FDA warning. 3/7/22 Tr. 32:17-22 (motion); 3/8/22 Tr. 19:12-21:13 (denial); Part II(E).

- Expert Lloyd's comments on defense expert Epstein. 3/11/22 Tr. 60:3-61:2 (comment, objection sustained), 71:18-74:7 (motion); 74:17-75:24 (admonishment, denial).

- Improper closing argument. 3/18/22 Tr. 111:15-119:6, 159:18-160:14 (motion); 121:14-19, 162:9-10 (denial).

The issues were re-urged after trial. App. 188-89 (7/27/22 Order).

All of the conduct is relevant to prejudice, but the conduct below was most problematic.

C. Incidents before closing argument.

1. Stating Dr. Goodman lied under oath.

In his opening statement, Mr. Fieger told the jury that Dr. Goodman lied under oath. This violated Iowa law, and the district court's order in limine.

"Iowa has joined those jurisdictions holding it improper to call the defendant a liar." *State v. Graves*, 668 N.W.2d 860, 876 (Iowa 2003). "It is well-settled law in Iowa that a bright-line rule prohibits the questioning of a witness on whether another witness is telling the truth. . . . There are no

exceptions to this rule." *Bowman v. State*, 710 N.W.2d 200, 204 (Iowa 2006) (new trial ordered).

Here, Dr. Goodman's credibility was critically important, including because she testified that she felt an indentation in SK's skull *before* she placed the forceps. 3/16/22 Tr. 153:3-13, 171:15-172:22. During opening statement, Mr. Fieger stated that his expert, Dr. Gubernick, would say that Dr. Goodman's "testimony under oath that she's used forceps a hundred times is patently false." 3/3/22 Tr. 36:4-11. (Counsel was factually wrong. 3/4/22 Tr. 110:19-111:6 (Gubernick cross)).

The court denied a mistrial but admonished counsel: "I don't want to hear it again." 3/3/22 Tr. 61:18-25.

Mr. Fieger engaged in this misconduct, even though the district court had entered an order in limine to prevent any witness testifying that another was dishonest. App. 60 (2/28/22 Order ¶ 4); App. 69 (*id.* ¶ 15, "accusing [any witness] of lying during their testimony will not be tolerated by the Court").

Mr. Fieger kept the theme of Dr. Goodman's alleged dishonesty alive throughout the trial by stating she changed her "story" about when she felt an indentation on SK's head. *E.g.*, 3/16/22 Tr. 185:9-186:17 (Goodman cross); 3/18/22 Tr. 154:13-155:3 (closing rebuttal).

And the strategy paid off, as the jury did not believe Dr. Goodman.

2. Improper opening "argument.

Mr. Fieger's opening statement also was improper because it contained argument.

"Making argument during opening statement is improper." 8 Iowa Practice Series: Civil Litigation 63:7 (2020) (citing *State v. Williams*, 18 N.W. 682, 684 (Iowa 1884)). This Court has been clear that opening statement must not contain counsel's personal opinion as to the "outcome of the case [or] the credibility of a witness." *State v. Shanahan*, 712 N.W.2d 121, 139 (Iowa 2006).

Yet here, in opening, counsel stated that "no physician in America or in [the] western world under the standard of care is permitted to do" what Dr. Goodman did, there was "no excuse" for her conduct in an American hospital, her conduct was "gross negligence," sequential use of instruments is "absolutely forbidden," SK was "abandoned," Dr. Goodman "walked away" from SK "until he was basically dead," and the defense position is "preposterous." 3/3/22 Tr. 9:16, 11:1, 26:1-2, 34:11-35:15, 40:16-17.

This was argument and improper in opening statements.

3. Improper cross-examination.

Mr. Fieger also improperly argued with and demeaned defense witnesses. This violated Iowa law and a court order. The cross-examinations

are relevant to prejudice as Mr. Fieger further developed the same improper themes during cross-examinations and then brought them to fruition in closing argument.

Under Iowa law, "'cross-examination must be confined to a fair and legitimate field of inquiry.'" *Jettre v. Healy*, 60 N.W.2d 541, 545 (Iowa 1953). As this Court has put it, "[i]t is, we think, highly improper to attempt impeachment of a witness by insinuations or slurs, or indirection." *Id.* The Court has condemned demeaning cross-examination of an expert. *State v. Werts*, 677 N.W.2d 734, 738-39 (Iowa 2004).

Consistent with Iowa law, the district court entered an order in limine stating that "[a]rguing with any witness . . . will not be tolerated." App. 69 (2/28/22 Order ¶ 15). But it was tolerated.

Mr. Fieger's cross-examinations continued the themes started in opening that the defense was preposterous and inexcusable in the Western world. He asked Dr. Boyle about junk science, implying the defense theory "has been rejected by virtually everyone in medicine." 3/14/22 Tr. 137:9-25 (objection sustained). He misstated Dr. Boyle's testimony as accusing University physicians of not "know[ing] what [they] were talking about." *Id.* 130:5-11, 133:13-19, 134:10-15. He conveyed that Dr. Epstein viewed University physicians as puppets. 3/17/22 Tr. 72:12-20 (objection sustained).

He badgered and interrupted witnesses and responded sarcastically to their answers. *See, e.g.*, 3/15/22 Tr. 172:24-179:2 (Dr. Friedlich); *id.* 223:6-224:23 (objection to Mr. Fieger "standing up, raising his voice at a witness, cutting him off"). He belittled experts, asking "Do you know the difference between opinions and facts?" (*id.* 179:12-13), accused them of making things up (*id.* 181:3-16, objection sustained), and twisted their words (*id.* 184:13-185:4, bench conference after objection).

D. Misconduct in closing argument.

Mr. Fieger's closing argument contained numerous improper statements. They warrant a new trial alone and particularly when considered with his other misconduct.

"The single purpose of closing argument is to assist the jury in analyzing, evaluating and applying the evidence." *State v. Melk*, 543 N.W.2d 297, 301 (Iowa Ct. App. 1995). Indeed, jurors are to decide cases based only on the evidence and the law—not their emotions, feelings, or a sense of partisanship or what is right. *Kinseth*, 913 N.W.2d at 73. Therefore, the Court "observe[s] a heightened sensitivity to inflammatory rhetoric and improper statements." *Id.*

Applying this law, Iowa courts reverse verdicts and order new trials when counsel makes improper statements or develops improper themes.

E.g., *id.* (remanding for new trial based on counsel's "repeated, deliberate references" to improper themes for jury consideration); *Rosenberger*, 541 N.W.2d at 909 (considering cumulative effect of improper conduct and holding that trial court abused its discretion in failing to grant a new trial); *State v. Vickroy*, 205 N.W.2d 748, 751 (Iowa 1973) (reversing and remanding for new trial based on two improper statements); *Kipp v. Stanford*, No. 18-2232, 2020 WL 3264319 *6-8 (Iowa Ct. App. 2020) (affirming new trial based on improper closing argument); *Bronner v. Reicks Farms, Inc.*, No. 17-0137, 2018 WL 2731618 *9 (Iowa Ct. App. 2018) (affirming new trial based on improper closing argument); *Conn v. Alfstad*, No. 10-1171, 2011 WL 1566005 *3,7 (Iowa Ct. App. 2011) (affirming new trial based on three improper statements in closing argument); *see also Andersen v. Khanna*, No. 20-0683, 2021 WL 3075711 *1-3 (Iowa Ct. App. 2021) (affirming mistrial for one improper statement in opening statement; discussing prior two mistrials in same case for one improper statement in each).

Mr. Fieger's improper statements and themes similarly warrant a new trial here.

1. Improper themes about the failure to take responsibility and admit liability, money, and the need to "stop" Defendants.

Mr. Fieger repeatedly invited the jury to punish the P.C. for its failure to

take responsibility for SK's injuries, and for spending time and money to defend itself. All were improper under Iowa law.

For example, in *State v. Musser*, the prosecutor argued for a conviction "because it is the right thing to do," was "the only way that [defendant] will care," and to "[m]ake him responsible." 721 N.W.2d 734, 755 (Iowa 2006) (emphasis removed). The Court held that the argument was improper as "injecting issues broader than the guilt or innocence of the defendant." *Id.* at 756. "Whether the defendant should be made to care" and because a conviction was "the right thing to do" were not the issues for the jury in the case. *Id.*

Similarly, in *Kinseth*, this Court held it was improper to develop a theme that defendant "has chosen to spend exorbitant sums of money defending [cases] instead of compensating innocent victims, and this case is an opportunity to tell them what you, the jury, think of that choice." 913 N.W.2d at 73.

These decisions are not outliers. *E.g.*, *Rosenberger*, 541 N.W.2d at 908 (improper to tell story about being expected to "answer for" wrongs and to "interject[]" counsel's "personal opinion as to the merits"); *State v. Johnson*, 534 N.W.2d 118, 128 (Iowa Ct. App. 1995) (argument is improper

when it is an "emotional appeal designed to persuade the jury to decide the case on issues other than the facts").

Further, "[t]o imply or argue that the mere act of defending oneself . . . is reprehensible serves no proper purpose, and for time out of mind it has been the basis for appellate courts ordering new trials." *Whittenburg v. Werner Enters. Inc.*, 561 F.3d 1122, 1130 (10th Cir. 2009).

In addition, so-called "send a message" arguments are improper. *Kinseth*, 913 N.W.2d at 71. "It is facially improper to suggest that a jury use a compensatory damages award, which is designed to recompense the plaintiff for actual harms suffered, to punish the defendant." *Id.* It matters not whether counsel used the words punish or "send-a-message." The analysis turns on the intent and effect of the argument. *Rosenberger*, 541 N.W.2d at 907 (while not directly stated, counsel's improper message was clear).

Mr. Fieger violated each of these rules here.

He insisted that the jury make the P.C. take responsibility and asked the jury to send a message to the P.C.:

> So they came up in a court of law in America . . . with a fantastical explanation for the indefensible actions that they did. . . .
>
> And I don't get to come up here anymore and I'm going to give his case to you and it's got to stop.

> This has got to stop now, what they've done, what they've put this family through for three and a half years by saying that black is white, up is down, day is night, all the doctors are wrong. It's time to take –just responsibility. It's not so bad. Just take responsibility. They didn't. Now take responsibility.
>
> Now, I understand, it's a fact of life, children don't take responsibility and they learn as they grow, hopefully to do so. But, frankly, we expect more from adults. Certainly more from professionals, from hospitals and doctors.

3/18/22 Tr. 36:12-37:4. He continued:

> [T]oday it stops. Today it stops. [SK] and I will be waiting for you.

Id. 38:19-21.

And he criticized the P.C. for defending itself:

> The reason we're here is the money. . . . the dollar is more important than admitting mistakes, admitting a violation of the standard of care, and doing what's right and taking responsibility for what you've done.

Id. 37:15-16, 38:7-10. He similarly argued that Dr. Goodman chose to spend weeks in the courtroom to defend "money" when she didn't spend sufficient time during the delivery of SK:

> Dr. Goodman sat in this courtroom for three and a half weeks, but she, my estimation of the facts in this case, didn't have time to do what was correct under the standard of care . . . . But she's got all sorts of time to sit in here, because the only thing

we're doing here is money. Money.

Id. 37:18-24.

This is not a punitive damage case. Suggesting that Defendants must be stopped now, were motivated only by money, and that there was something morally wrong in not admitting liability had no place in this trial.

2. Improper emotional themes, golden rule argument, and misstatements of the law.

Mr. Fieger also improperly appealed to the juror's emotions, made golden rule arguments, and misstated the law.

"[M]elodramatic argument does not help the jury decide their case but instead taints their perception to one focused on emotion rather than law and fact." *Rosenberger*, 541 N.W.2d at 908. It is therefore improper to ask the jury to "stand up for" the plaintiff. *Bronner*, 2018 WL 2731618 *8; *Kipp*, 2020 WL 3264319 *6 (improper argument that "play[ed] on the jurors' notions of pride of being a hero" for the plaintiff).

It is also improper to make "golden rule" arguments that ask the jurors to put themselves in a party's shoes. *Russell v. Chi., R. I. & P. R. Co.*, 86 N.W.2d 843, 848 (Iowa 1957); *State v. May*, 2005 WL 3477983 *8 (Iowa Ct. App. 2005); *Kipp*, 2020 WL 3264319 *7.

Courts reverse verdicts where counsel used improper emotional themes in closing argument. For example, in *Werts*, the Court ordered a new trial

because, in closing argument, the prosecutor tore out pages of a baby book and stated they would not be written for a deceased child. 677 N.W.2d at 739. The Court explained that this was "an improper attempt to appeal to the passion and prejudice of the jury and should be condemned."

Similarly, in *Fasani v. Kowalski*, the court held it was improper to compare an injured brain to a ripped Picasso painting worth $80 million. 43 So.3d 805, 810-11 (Fla Dist. Ct. App. 2010); *see also id.* (citing cases where argument compared life to a Van Gogh painting, a Boeing 747, or SCUD missile).

Here, Mr. Fieger broke all of these rules.

He compared the value of SK's life to billion-dollar fighter jets and priceless works of art worth hundreds of millions of dollars. 3/18/22 Tr. 56:23-57:21 (arguing firemen would save the life of a janitor in a museum rather than such art and SK is "every bit as valuable as" a $500 million van Gogh painting slashed with a knife).

He implored the jurors to take responsibility for SK in the "temple of justice":

> I knew the time would come that I would have to turn over [SK's] case to your shoulders in this temple of justice, and that you would bear the responsibility that I have borne for the last years for his welfare and his life into the future. . . .
>
> And now . . . I'm going to be turning over [SK's] welfare and his case to you.

Id. 19:12-23; *id.* 156:11-12 (someone needed to "stand up" for SK).

He asked the jurors to put themselves in SK's parents' shoes:

> Take the time to really understand what it's like 24/7 to care for that child for the rest of his life?

Id. 64:2-4; *see also id.* 54:2-4.

But the jurors' responsibility was to reach a determination based solely upon the evidence and law—*not* to bear the emotional and psychological burden of SK's welfare or that of his parents' when doing so.

In another golden-rule argument, he encouraged damages based upon what *jurors* value:

> The things we all look forward to, our hopes, our dreams, our aspirations. . . . Every attribute that we find as human beings that we consider valuable, our hopes, our dreams, our love.

Id. 57:22-24, 58:18-20.

And he argued for damages for "spiritual" suffering and the loss of hope for "life, liberty, and the pursuit of happiness," "finding meaning in life," and what "make[s] life worth living." *Id.* 62:17, 63:2-11. "All that was taken.

That's what you measure." *Id.* 63:10-11. But there was no constitutional tort here and the measure of damages does not include a spiritual loss or the value of life itself. App. 104 (Instruction 21).

Counsel also misstated the law when he stated damages would go "right back" to the health care profession who "really is responsible for [SK's] condition in the first place." 3/18/22 Tr. 54:15-25 ("it just goes back"). The court did not so instruct the jury. And in the absence of a lien, subrogation, or reimbursement obligation (which did not apply in this case), a plaintiff has no obligation to use a damage award in a certain way. *Shanahan*, 712 N.W.2d at 140 (counsel cannot "misstate the law").

3. Improper vouching with counsel's beliefs and experience.

Mr. Fieger also improperly vouched for the evidence.

Under Iowa law, "[c]ounsel has no right to create evidence by his or her argument." *Rosenberger*, 541 N.W.2d at 908. "An attorney can only argue a theory of the case from the evidence admitted at trial." *State v. Elliott*, 806 N.W.2d 660, 674 (Iowa 2011); Iowa R. of Prof'l Conduct 32.3.4(e) ("A lawyer shall not . . . assert personal knowledge of facts in issue except when testifying as a witness").

Indeed, counsel may not interject personal opinions or beliefs, including comments based on "counsel's experience in similar cases." *Rosenberger*, 541

N.W.2d at 908; *see also Graves*, 668 N.W.2d at 879 (prosecutor improperly personally vouched for credibility of police officer, went beyond evidence, and implied he "knew something the jurors did not"); *Gilster v. Primebank*, 747 F.3d 1007, 1011 (8th Cir. 2014) (reference to personal experiences pertained to facts not in evidence and constituted vouching).

Mr. Fieger did all of that here. Counsel personally guaranteed, and vouched for, the University records:

> So it's not like [the University] would have it in for Mercy . . . . If anything, *my experience is that* the hospitals like to cooperate with one another.
> . . .
> *I can guarantee* there's an absolute requirement that [its] records have to be truthful, and the records are.

3/18/22 Tr. 30:7-11, 41:9-10 (emphasis added).

Counsel's message was that the treatment records were more important than physician testimony *and* that the University considered the defense maternal forces theory and rejected it. *Id.* 27:25-28:1, 42:10-12. Yet the court instructed that liability could be established only by the *testimony* of physicians. App. 100 (Instruction 15). Plaintiff called no treating physicians from the University to testify, and there was no evidence that they actually considered the maternal forces of labor.

Mr. Fieger also stated—without support—that the University had "all" of the records from SK's birth: "[T]hey have the records. The records go with

the child, maybe not that second, but they get transferred over. They've seen all the records. They know it all." 3/18/22 Tr. 41:17-22. The defense knows of no evidence that the University had the fetal monitoring strips—and what they showed was an important issue in the case.

Mr. Fieger similarly told the jury that the pediatrician at the delivery who documented "fetal distress" was referring to the fetal heart monitor. *Id.* 46:22-47:1. The defense knows of no such evidence. The pediatrician did not testify. His documentation does not state he reviewed or was referring to the fetal heart monitor. App. 352-53 (Exhibit C).

Mr. Fieger created evidence about his first meeting with the Kromphardts. He said: "they sa[id] my son has been brain damaged. The doctors say that it's from the forceps, they say it's from the vacuum, can you help me?" 3/18/22 Tr. 40:12-15. But the Kromphardts did not testify to this conversation with counsel at trial, and the court had ordered in limine to exclude any reference to the circumstances of the employment of counsel. App. 64 (2/28/22 Order ¶ 22).

Finally, Mr. Fieger explained his investigation of Plaintiff's case, including the University records and his many decades of experience. 3/18/22 Tr. 38:1-7, 40:16-24. This improperly bolstered counsel and Plaintiff's case.

4. Disparaging the defense, vouching, and stating counsel's personal opinions.

Mr. Fieger also improperly stated his personal opinion, disparaged the defense, and vouched for Plaintiff's case.

It is improper for a lawyer to state a personal opinion. Under Rule 32.3.4(e) of the Iowa Rules of Professional Conduct, "[a] lawyer shall not . . . state a personal opinion as to the justness of a cause, the credibility of a witness, [or] the culpability of a civil litigant." As this Court put it, unless this rule "is accorded full recognition . . . the standard is rendered meaningless [and] continued violations will be thereby encouraged." *Vickroy*, 205 N.W.2d at 750.

Similarly, vouching is improper. *Bronner*, 2018 WL 2731618 *8; *Gilster*, 747 F.3d at 1011.

It is also improper for a lawyer to disparage the opposing party. "It is not the function of closing argument 'to debase, degrade or impugn the veracity of a litigant' or opposing counsel." *Whittenburg*, 561 F.3d at 1130; *Graves*, 668 N.W.2d at 876 (prosecutor "improperly resorted to inflammatory characterizations of the defendant's testimony" and made disparaging comments); *Shanahan*, 712 N.W.2d at 140 (improper arguments include "referring to the defense counsel's argument as a 'smoke screen'"); *Bronner*, 2018 WL 2731618 *8 (improper to disparage counsel and tell jury

they had been misled); *Kipp*, 2020 WL 3264319 *7 (improper to focus on "moral quality" of physician's conduct and suggest defense was dishonest, deceitful, scheming or dishonorable).[11]

Again, here, Mr. Fieger did all of that. He described the defense as being caught in a tangled web,[12] frivolous,[13] nonsensical,[14] ridiculous,[15] preposterous,[16] outrageous,[17] based in an alternate reality or universe,[18] and "the most fantastical story that anybody could ever hear."[19] He equated the "total lack of a defense" to "an admission, really." 3/18/22 Tr. 35:12-13. He argued the defense will "say anything. . . . they've got a script." *Id.* 152:14-17.

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[11] *See also U.S. v. Holmes*, 413 F.3d 770, 775 (8th Cir. 2005) (improper to argue positions were "all smoke and mirrors" and attempts to distract); *Pryor v. State*, 254 P.3d 721, 722-23 (Ct. Crim. App. Okla. 2011) (improper to sarcastically ridicule defense as a "blatant appeal to emotions"); *Chin v. Caiaffa*, 42 So.3d 300, 309 (Fla. Dist. Ct. App. 2010) (improper to argue the defense was frivolous and "trying to fool you"); *Lioce v. Cohen*, 174 P.3d 970, 983-84 (Nev. 2008) (improper to convey opinion that plaintiffs' cases were frivolous or worthless).

[12] 3/18/22 Tr. 28:8; 30:24-25.
[13] *Id.* 24:15-23.
[14] *Id.* 25:13.
[15] *Id.* 28:14, 29:17, 32:11, 42:1-2.
[16] *Id.* 35:10-12.
[17] *Id* .152:6-8.
[18] *Id.* 26:19-20, 33:3-5, 35:1-7, 51:14-15, 149:18-19.
[19] *Id.* 34:3-4; *see also id.* 36:6-11.

Mr. Fieger also suggested that defense witnesses were deceptive and repeating falsehoods. "Why in the world did they think they could get away with this in a court of law? Why did they think that we'd sit here . . . they could pull the wool over the eyes of everybody?" *Id.* 32:18-22; 34:17-18 (it was "too easy to catch these people"). He argued the defense was a falsehood and propaganda. *Id.* 42:3-5. It was a "cockamamy theory called the forces of labor . . . And if you believe that, then I've got a bridge to sell you in Brooklyn." *Id.* 50:10-16. He accused the defense of presenting "junk science or made-up causes" and engaging in "slight of hand." *Id.* 34:7-11.[20]

And Mr. Fieger vouched for himself—his honesty, integrity, and years of experience, including:

> . . . I've been doing this for nearly half a century. . . . I have not personally seen every case in the world, but this is certainly an interesting case in which the facts seem so unequivocal, so unanimous, the record is so voluminous.

Id. 33:12-34:3; 38:2-7.

[20]In cross-examination, Plaintiff's experts agreed that birth trauma (hemorrhages and skull fractures) can occur during the labor without an identifiable outside force (such as forceps). 3/8/22 Tr. 63:24-65:23 (Sze); 3/11/22 Tr. 85:16-88:10 (Lloyd).

E. The misconduct caused prejudice.

"A new trial is required for improper conduct by counsel if it appears that prejudice resulted or a different result would have been probable but for any misconduct." *Rosenberger*, 541 N.W.2d at 907. A new trial is warranted here.

Incidents are viewed cumulatively to determine prejudice. *Kinseth*, 913 N.W.2d at 73; *Graves*, 668 N.W.2d at 869 (prejudice from misconduct is viewed "'within the context of the entire trial.'"); *Gilster*, 747 F.3d at 1011 (same); *Rosenberger*, 541 N.W.2d at 909 (considering cumulative effect of improper conduct combined with improper evidence, granting new trial). Incidents that standing alone may not warrant a new trial, "when they are all considered together," can support that "a fair trial has not been had." *Wilson v. Iowa State Highway Comm'n*, 90 N.W.2d 161, 165 (Iowa 1958).

Here, the cumulative impact of the misconduct was overwhelming. The trial started with references to Dr. Goodman lying under oath, abandoning SK, and practicing in an inexcusable manner unheard of in the Western world. The jury heard multiple references connecting the FDA to the package insert—which, according to Plaintiff, prohibited Dr. Goodman's actions and foretold SK's injury. Abusive cross-examinations followed. Many court orders were violated and many objections were sustained. The misconduct went to central

issues—liability and damages—a factor in determining prejudice. *Graves*, 668 N.W.2d at 869.

Closing argument alone warrants a new trial. As in *Rosenberger*, "the cumulative effect of [] counsel's closing argument was an impassioned and inflammatory speech that likely caused severe prejudice to the defendant." 541 N.W.2d at 909; *Vickroy*, 205 N.W.2d at 751 (prejudice from two improper statements (on defendant's culpability and a golden rule argument) was "self-evident"); *Kinseth*, 913 N.W.2d at 73 (viewing argument in its entirety, new trial given repeated, deliberate references to improper subjects and themes).

The court considers the severity and pervasiveness of the misconduct. *Graves*, 668 N.W.2d at 869, 883 (prejudice when "misconduct permeated the entire trial"); *Gilster*, 747 F.3d at 1011 (argument was "a deliberate strategic choice to make emotionally-charged comments" that "permeated" the argument).

Mr. Fieger developed improper themes. It was improper to charge the jury with stopping Defendants and making them accept responsibility, standing up for SK, bearing responsibility for SK's future, or compensating SK for the very value of life. Counsel's ridiculing and belittling characterization of the defense and defense witnesses was pervasive and

severe in nature. His argument was peppered with his own opinions and facts without evidentiary support.

Nor was the misconduct inadvertent. This is not the first time Mr. Fieger has engaged in misconduct. As demonstrated in Mr. Fieger's pro hac vice application and reported cases, he has been placed on probation, reprimanded, sanctioned, and disciplined. App. 12-15 (11/22/19 Application).

Other courts have reversed jury verdicts, like this one, obtained by Mr. Fieger's misconduct. "Overreaching, prejudice-baiting rhetoric appears to be a calculated, routine feature of [Mr. Fieger's] trial strategy." *Gilbert v. DaimlerChrysler*, 685 N.W.2d 391, 406 (Mich. 2004) (new trial granted based on Mr. Fieger's misconduct (citing *Powell v St. John Hosp*, 614 N.W.2d 666 (Mich. Ct. App. 2000) and *Badalamenti v Beaumont Hosp.-Troy*, 602 N.W.2d 854 (Mich. Ct. App. 1999)); *Harris v. Mt. Sinai Med. Ctr.*, 876 N.E.2d 1201, 1203-05, 1210 (Ohio 2006) (new trial ordered, including for Mr. Fieger's misconduct; dissent would remit damages and deny pro hac admission of Mr. Fieger); *see also Davis v. Marcotte*, 951 N.E.2d 117, 121, 123 (Ohio Ct. App. 2011) (affirming revocation of Mr. Fieger's pro hac admission, citing "the number of instances in which Fieger has been implicated in some sort of impropriety," including "outrageous

comments to the jury regarding damages" and "calling opposing counsel, witnesses, and jurors 'liars'"); *In re Fieger*, 887 N.E.2d 87, 88 (Ind. 2008) (barring Mr. Fieger from temporary admission for two years; citing misrepresentations in sworn application); *In re Fieger*, No. 97-1359, 1999 WL 717991 *3 (6th Cir. 1999) (affirming sanctions and reprimand of Mr. Fieger, noting that "[h]e circumvented the random assignment rule, specifically tried to control the assignment of judges to his cases, and boasted publically that he had done so"); App. 47 (11/26/19 Fieger pro hac admission Exhibit (*Duggan v. The Charlotte Mecklenburg Hosp. Auth.*, North Carolina Superior Court, 12/19/16 Rule 11 Order ¶¶ 79-85, concluding attorneys Fieger and Beam alleged fraud as "a tactical maneuver to gain an unfair advantage in the litigation")).

The overwhelming prejudice is confirmed by the size of a verdict—a significant factor suggesting prejudice. *Whittenburg*, 561 F.3d at 1132. Indeed, where a plaintiff's counsel presents an improper closing argument, an excessive award "'suggest[s] that counsel's comment had a prejudicial effect.'" *Gilster*, 747 F.3d at 1012; *see also, e.g.*, *Moody v. Ford Motor Co.*, 506 F. Supp. 2d 823, 835 (N.D. Okla. 2007) ("inflammatory statements can provide a basis for granting a new trial, particularly when a large verdict suggests that the jury was influenced by passion or prejudice").

Demonstrating the prejudice, in cases involving worse brain injuries than those at issue here, juries in Iowa have awarded noneconomic damages, in today's dollars, of roughly $4.3 million to $10.3 million. Here, the jury awarded $43.5 million. App. 108 (3/21/22 verdict).

An in-depth analysis of available information in Iowa birth injury cases demonstrates that a range for noneconomic damages has been between $125,000 and $8.5 million. Put in today's dollars, the range is between $500,000 and $10.3 million.[21]

At one end of the spectrum fall cases involving only isolated motor impairments, with no evidence of any cognitive impairment. Those cases resulted in noneconomic damages awards, in today's dollars, of roughly $500,000 to $1.5 million:

- $125,000 (**$501,645** in today's dollars) total award to infant whose arm was rendered "deformed, unattractive, and eighty-five percent permanently disabled" during delivery. *Reilly v. Straub*, 282 N.W.2d 688, 690, 693 (Iowa 1979).
- $638,600 (**$834,866** in today's dollars) in noneconomic damages for the permanent injury

[21] To calculate the awards in today's dollars, the P.C. used the inflation calculator on the U.S. Bureau of Labor Statistic's website, https://www.bls.gov/data/inflation_calculator.htm (last visited Oct. 10, 2022). The P.C. entered August as the relevant month for each year because, at the time of briefing, August was the most recent month for which data was available for 2022. *Id.*

of a baby's arm resulting from a fractured clavicle and brachial plexus injury. *Asher v. Wheaton Franciscan Health Care-Iowa*, 2011 WL 7443937, at *2. App. 119-20 (5/5/22 P.C.'s Post-trial Appendix).

- $1 million (**$1,424,467** in today's dollars) in noneconomic damages for the permanent disability of a baby's arm as a result of a brachial plexus injury during delivery. *Stanley v. Paulsen*, 2007 WL 5187909, at *2. App. 122-23 (5/5/22 P.C.'s Post-trial Appendix).

At the other end of the spectrum fall cases involving brain injuries occurring during delivery that resulted in profound motor impairments and developmental delays. Those cases resulted in noneconomic damages awards, in today's dollars, of roughly $4.3 million to $10.3 million:

- $3 million (**$4,273,402** in today's dollars) in noneconomic damages to infant for injury resulting in permanent brain damage that caused cerebral palsy and prevented the infant from speaking or controlling his bladder and bowels. *Gardner v. Broadlawns Med. Ctr.*, 2007 WL 2915206, at *1-2. App. 125-27 (P.C.'s Post-trial Appendix).

- $912,124 (**$5,402,894** in today's dollars) total award to child who experienced profound permanent brain damage following delivery resulting in quadriplegia, an inability to speak, deafness, and impaired vision. *Schnebly v. Baker*, 217 N.W.2d 708, 716-17 (Iowa 1974).

- $8.5 million (**$10,253,600** in today's dollars) in noneconomic damages to an infant who experienced permanent brain damage and as a result had cerebral palsy, could not speak, could

> not walk independently, and had little fine motor control. *Philips v. Flexible Family Care*, (2017). App. 128-32 (P.C.'s Post-trial Appendix).

Here, SK's injuries were not as severe as those at issue in the cases on this end of the spectrum. Thus, the jury's award of noneconomic damages should not have been in the $4.3 to $10.3 million dollar range, let alone anywhere near the $43.5 million the jury awarded. Three comparisons demonstrate the dispositive differences.

First, the child in *Philips* was completely unable to speak or walk independently. App. 131-32 (P.C's Post-trial Appendix). Similarly, the child in *Gardner* could not speak. App. 126 (*Id.*). In contrast, Plaintiff's own expert testified SK will walk independently and he is already speaking in sentences.

Second, the child in *Gardner* was unable to control his bladder or bowels. *Id*. In contrast, Plaintiff's expert testified that SK would eventually be toilet-trained and capable of bathing and showering himself.

And third, the child in *Schnebly* was able to "possibly recogniz[e] his mother and father in only a primitive way." *Schnebly*, 217 N.W.2d at 716 (internal quotation marks omitted). In contrast, SK's mother testified that SK recognizes her, that he shows joy at her presence, and that "you can . . . see that he loves us."

In denying the P.C.'s motion for new trial, the district court acknowledged that the damage award was "much higher than expected" and "extremely high compared to most." App. 189 (7/27/22 Order). Indeed it is—because of the errors discussed above, and especially Mr. Fieger's misconduct. The size of the verdict confirms the prejudice from the misconduct.

This Court should order a new trial and revoke Mr. Fieger's pro hac vice application so the new trial can be without misconduct.

IV. The damages award is clearly excessive.

The nearly $100 million verdict is excessive and resulted from passion or prejudice. This also requires a new trial.

A. Standard of review.

In reviewing a claim for excessive damages, this Court applies an abuse of discretion standard. *WSH Props., L.L.C. v. Daniels*, 761 N.W.2d 45, 49 (Iowa 2008).

B. Error preservation.

This issue was preserved. App. 189 (7/27/22 Order).

C. The verdict is excessive.

A jury is entitled to discretion when assessing damages, "but 'this discretion is not unlimited.'" *Hoffmann v. Clark*, 975 N.W.2d 656, 666 (Iowa 2022). Instead, this Court has held that, "when a verdict is so

flagrantly excessive that it goes beyond the limits of fair compensation and fails to do substantial justice between the parties, it is our duty to correct the error by granting a new trial or requiring a remittitur." *Rees v. O'Malley*, 461 N.W.2d 833, 839-40 (Iowa 1990) (alteration and internal quotation marks omitted).

Thus, under Iowa law, a court will set aside a jury's damages award if it "(1) is flagrantly excessive . . . ; or (2) is so out of reason as to shock the conscience or sense of justice; or (3) raises a presumption it is a result of passion, prejudice or other ulterior motive; or (4) is lacking in evidentiary support." *Id.* at 839 (internal quotation marks omitted).

First, as explained above, this verdict is far outside the boundaries of other Iowa birth injury cases. It is flagrantly excessive and shocks the conscience. *See* Part III(E).

Second, as this Court has explained, "a flagrantly excessive verdict raises a presumption that it is the product of passion or prejudice." *WSH Props.*, 761 N.W.2d at 50.

Third, presumption aside, Mr. Fieger's conduct combined with the verdict and demonstrates there *was* passion and prejudice. *E.g.*, *Whittenburg*, 561 F.3d at 1132; *Gilster*, 747 F.3d at 1012-13; *Bronner*, 2018 WL 2731618, at *9 ("we find it probable the jury would have reached a different

determination as to damages but for plaintiff's counsel's conduct"); Part III(E).

V. The court erred in failing to reduce the P.C.'s liability for economic damages.

If this Court does not order a new trial, it should reduce the P.C.'s liability for economic damages. Under Iowa's Comparative Fault Act ("Chapter 668"), the P.C. is liable for only 50% of the total damages. The district court correctly acknowledged the P.C. was only liable for 50% of noneconomic damages but failed to reduce the P.C.'s liability to 50% of economic damages in light of Mercy's settlement. App. 193 (8/4/22 Order). This Court should clarify the law and correct the error.

A. Standard of review.

"Matters of statutory interpretation are questions of law which [this Court] review[s] without deference to the trial court's opinion." *Prod. Credit Ass'n of Midlands v. Farm & Town Indus., Inc.*, 518 N.W.2d 339, 341 (Iowa 1994).

B. Error preservation.

The P.C. preserved its argument that it is liable for only 50% of the economic damages. 5/5/22 P.C.'s Restated and Supplemental Motion for New Trial ¶3.

C. The court erred in failing to reduce the P.C.'s liability for economic damages to reflect its percentage (50%) of liability.

The district court erred in failing to correct the judgment to reflect that the P.C. is liable for only 50% of the economic damages.

The reduction is required because of Plaintiff's pretrial settlement agreement with Mercy. Specifically, Plaintiff filed a Release and Satisfaction of Judgment as to Mercy, indicating that Mercy's liability for the verdict has been satisfied. App. 111 (4/15/22 Release and Satisfaction). Plaintiff explained that Plaintiff and Mercy entered into a pretrial high-low settlement agreement, under which Mercy's liability was capped at $7 million. *Id.*; App. 179-82 (5/19/22 Plaintiff's Post-Trial Appendix, High-Low Agreement).

The settlement reduces the P.C.'s liability for the jury verdict. Under Chapter 668, because the jury found that Mercy and the P.C. were equally negligent—and Mercy settled—the P.C. is now liable for only 50% of the jury verdict.

Indeed, under Chapter 668, a defendant who is found to be 50% at fault is jointly and severally liable for economic damages. But as explained below, where a codefendant enters into a settlement (or similar) agreement, the remaining defendant is liable for only 50% of the damages. This is true

because, where one codefendant settles with the plaintiff, the remaining codefendant is liable only if its "equitable share of the obligations," even when the defendants are jointly and severally liable.

As background, it is helpful to understand how Chapter 668 applies to economic damages in a case (unlike here) where there was no settlement. In the absence of a settlement by a co-defendant, a defendant who is found to be 50% liable is jointly and severally liable for the entirety of the economic damages in the jury verdict. Iowa Code § 668.4.

But in this situation, a codefendant who is jointly and severally liable has a right of contribution from the remaining codefendant. *Id.* § 668.5. The contribution amount depends on each codefendant's "equitable share of the obligations." *Id.*

Thus, in a situation where two codefendants are each found to be 50% liable for a plaintiff's damages, each codefendant would be liable to the plaintiff for 100% of the economic damages. But each codefendant also would have a right of contribution from the other codefendant for 50% of that total amount. Because of the right of contribution, each codefendant ultimately would be responsible for paying 50% of the economic damages, even though they are each liable to the plaintiff for 100% of the economic damages.

Importantly, the situation described above is *not* this case. One defendant (Mercy) settled here. Chapter 668 addresses this situation.

Under Chapter 668, where a codefendant settles with the plaintiff, the situation changes. The settlement eliminates the non-settling defendant's right to recover a contribution from the settling defendant. *Id.* § 668.7.

But—and dispositive here—Chapter 668 provides that the non-settling defendant's liability is reduced by the percentage of fault that was allocated to the settling defendant. *Id.* Specifically, "the claim of the releasing person is reduced by the amount of the released person's equitable share of the obligation." *Id.* This equitable result is required given that the non-settling defendant has no contribution claim against the settling defendant.

Notably, the phrase "the equitable share of the obligation" is used to describe both the right of contribution and also the amount by which a non-settling defendant's liability is reduced after one defendant settles. *Id.* §§ 668.5 (right of contribution), 668.7 (effect of release). The phrase must mean the same thing in both places. *Patterson v. Iowa Bonus Bd.*, 71 N.W.2d 1, 6 (Iowa 1955) ("Undoubtedly there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning." (citation and internal quotation marks omitted)). Both

references to "the equitable share of the obligation" therefore refer to the amount to which a person or entity was apportioned fault.

And this rule is not limited to traditional settlements. Instead, Chapter 668 is clear that section 668.7 applies to "[a] release, covenant not to sue, or similar agreement entered into by a claimant and a person liable." *Id.* § 668.7. Regardless, high-low agreements are settlement agreements. *Freer v. DAC, Inc.* 929 N.W.2d 685, 686-87 (Iowa 2017) (analyzing the parties' high-low agreement as a settlement agreement).[22]

Here, the jury found that Mercy and the P.C. were each 50% liable for Plaintiff's damages. App. 193 (3/21/22 Verdict). This made Mercy and the P.C. jointly and severally liable for the full amount of Plaintiff's economic damages. Iowa Code § 668.4.

But Mercy entered into a settlement agreement with the Plaintiff. Thus, under Chapter 668, Mercy is now discharged "from all liability for contribution" to the P.C. *Id.* § 668.7. But if the P.C. remains jointly and severally liable for all economic damages, then Mercy remains liable for contribution, an absurd result where Mercy settled for a sum certain.

[22] Courts in other jurisdictions agree that high-low agreements are settlement agreements. *E.g.*, *Vargo v. Mangus*, 94 F. App'x 941, 943 (3d Cir. 2004); *Stewart v. M.D.F., Inc.*, 83 F.3d 247, 250 (8th Cir. 1996); *Monti v. Wenkert*, 947 A.2d 261, 273 (Conn. 2008); *Serico v. Rothberg*, 189 A.3d

The P.C.'s liability for economic damages therefore must be "reduced by the amount of [Mercy's] equitable share of the obligation." *Id.* The jury determined that Mercy's equitable share of the contribution was 50%. Thus, the district court should have reduced the P.C.'s liability for the economic damages by 50% to $26,951,274.50.

The court, however, ruled that the P.C. is liable "for *all* economic damages." App. 107 (8/4/22 Order) (emphasis added). The court stated that this was true under "[a] plain reading of the statute." *Id.* Presumably, the court was referring to section 668.4, which imposes joint and several liability for economic damages. But the plain language of section 668.7—which reduces a non-settling defendant's liability—requires the opposite result. This court should correct the error and correct the judgment against the P.C. to $48,701,274.50.

Conclusion

For the reasons set forth above, the P.C. requests that the district court's ruling denying the motion for a new trial be reversed and the case be remanded for a new trial. The P.C. further requests that Mr. Fieger's pro hac vice admission in district court be revoked.

343, 349 (N.J. 2018); *Cunha v. Shapiro*, 42 A.D.3d 95, 98 (N.Y. 2007); *Thompson v. T.J. Whipple Const. Co.*, 985 A.2d 221, 224 (P.A. 2009).

Oral Argument Statement

The P.C. requests oral argument.

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