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 Reply Brief

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Introduction

Plaintiff's brief suggests the primary issue on appeal is whether there was sufficient evidence to support the economic damages award. He criticizes the P.C. for failing to discuss economic damages (even though the P.C. did). And after devoting pages to economic damages, he complains that he is out of words to resist the actual issues on appeal.

To be sure, the P.C. discussed the size of the award (both economic and noneconomic) as shocking, out of bounds, and indicating prejudice. The P.C. did so because large awards can indicate prejudice, even when supported by the evidence. *Whittenburg v. Werner Enters. Inc.*, 561 F.3d 1122, 1132 (10th Cir. 2009). But this discussion of prejudice does not constitute a challenge to the sufficiency of the evidence.

Nor does evidence of economic damages have anything to do with prejudice concerning liability, the prejudice relevant to most of the issues on appeal. Worse, for many of the errors, prejudice is *presumed*. Plaintiff does not acknowledge the presumption, which is dispositive for most errors.

When Plaintiff does address the merits, he addresses arguments the P.C. did not make and fails to engage meaningfully with the arguments the P.C. did make. The following summarizes those deficiencies.

First, the P.C. demonstrated that the court submitted to the jury specifications of negligence without evidentiary support. For example, the court submitted a claim that Dr. Goodman failed to treat Mrs. Kromphardt's low blood pressure. In response, Plaintiff concedes (as he must) that the nurses failed to tell Dr. Goodman about the blood pressure. Without knowledge of the blood pressure, Dr. Goodman could not have acted negligently in failing to treat it. Plaintiff scrambles—but fails—to explain how Dr. Goodman could be negligent by asserting that Dr. Goodman should have known about the blood pressure because she was in charge. But Iowa law does not recognize negligence stemming from being in charge.

The specifications also characterized Plaintiff's claim with inflammatory phrases and repeatedly and unnecessarily set forth disputed issues as fact. Plaintiff shrugs this off as a complaint that the specifications articulate his theories of negligence. But a comparison of the language used here with the language set forth in Iowa case law reveals how problematic and prejudicial the specifications in this case were.

When a trial court makes these errors in specifications, prejudice is presumed. And that prejudice goes to liability, not economic damages. The errors in the specifications alone warrant a new trial.

Second, the package insert—exploited repeatedly by Plaintiff at trial to bolster evidence on liability—was inadmissible hearsay. Plaintiff spends most of his argument asserting that package inserts are so trustworthy that they are prima facie evidence of the standard of care. But Plaintiff did not use the insert at trial for this purpose, and his arguments are beside the point.

When Plaintiff addresses the ground on which the court admitted the insert—the residual exception—Plaintiff fails to establish (as he must under Iowa law) that the insert is superior to other evidence, including his experts' testimony.

Plaintiff's alternative ground, the market report exception (first proposed after trial) fares no better. It applies to lists of drug ingredients, not the type of language at issue here. While Plaintiff is correct that he needs an alternative ground to support admissibility, he has not provided one under Iowa law.

The parties do agree, however, that the insert was powerful evidence against the P.C. The prejudice from the admission of the insert is clear, even if it were not presumed. This issue also warrants a new trial on its own.

Third, Plaintiff developed many improper themes in closing argument. While Plaintiff attempts to excuse the misconduct with selective quotes, he cannot dispute that he told the jury to "stop" the defense conduct "now;" to

make Defendants finally accept responsibility; and to consider the only thing that motivated Defendants—"money." This is a punitive damage argument. Iowa courts "observe a heightened sensitivity to inflammatory rhetoric and improper statements," precisely because "juries will inevitably take cues from attorneys during their respective closing arguments." *Kinseth v. Weil-McLain*, 913 N.W.2d 55, 73 (Iowa 2018).

Tellingly, Plaintiff fails to address most of the misconduct. Instead, he criticizes the defense for objecting too much (which, of course, the P.C. had to do to preserve error). He ignores the fact that the court admonished Plaintiff's counsel during trial, expressly contemplated mistrials, and sustained numerous objections. And he assumes that to show prejudice from misconduct, the P.C. must show that the P.C. would have prevailed a trial, whereas the P.C. must show only a substantial likelihood of a more favorable verdict for the P.C. *See Bronner v. Reicks Farms, Inc.*, No. 17-0137, 2018 WL 2731618, at *9 (Iowa Ct. App. June 6, 2018) (considering whether the jury would have "reached a different determination as to damages but for plaintiff's counsel's misconduct"). The misconduct also warrants a new trial.

Finally, Plaintiff's argument suggests that he tricked Mercy into settling claims while Mercy remained liable to the P.C. for contribution.

Plaintiff's argument contradicts the language of the settlement and undermines the purpose of the statute. If the Court does not order a new trial, it should reduce the judgment against the P.C. to its equitable share—50% of the total damages.

Clarification of the Record

Plaintiff's brief suggests that the P.C. mounted no defense at trial. The record says otherwise.

First, Plaintiff is wrong in suggesting (at 17, 23, 28) that only Dr. Epstein rebutted Plaintiff's damages. In fact, the P.C. had four highly qualified experts who rebutted Plaintiff's claim that SK suffered harm from HIE during labor: Dr. Boyle (3/14/22 Tr. 86:22-87:21, 93:16-98:8);[1] Dr. Friedlich (3/15/22 Tr. 128:3-130:4);[2] Dr. Epstein (3/17/22 Tr. 23:10-24:23);[3]

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[1] Dr. Boyle is a board-certified obstetrician and maternal-fetal medicine physician, delivering over 6,000 babies. 3/14/15 Tr. 6:11-9:11.

[2] Dr. Friedlich is a board-certified neonatologist from the University of Southern California-LA and chief of neonatology at Children's Hospital Los Angeles. 3/15/22 Tr. 116:14-118:22, 124:4-9.

[3]Dr. Epstein is a board-certified pediatric neurologist and professor from the Children's Hospital associated with Northwestern University. 3/17/22 Tr. 6:9-11:9.

and Dr. Meyer (3/16/22 Tr. 30:16-21, 33:14-36:21, 47:10-51:10, 55:11-56:6).[4]

The defense that SK suffered only traumatic injury—and not HIE during labor—was strong and credible given the qualifications of the experts. While the jury ultimately disagreed, that does not mean the case, including Plaintiff's position on damages, was not vigorously defended. Indeed, if the defense was as weak as Plaintiff suggests, Plaintiff would not have entered a high-low settlement agreement with Mercy before the verdict—necessarily contemplating there could be a defense verdict. App. 180 (Plaintiff's Post-trial App. Exh. Q ("Agreement")).

Second, Plaintiff is wrong in stating repeatedly (at 25, 28, 60) that the P.C.'s expert, Dr. Boyle, agreed that SK suffered HIE. Plaintiff's theory was that SK suffered HIE *during labor*. P.C. initial brief at 16. But Dr. Boyle was unequivocal that the HIE he was discussing during cross-examination occurred *after* delivery and because of the traumatic injury. 3/14/22 Tr. 159:14-20 ("I said there was no HIE in labor. That's what matters."); *Id.* 160:4-9 ("It was after delivery because of the . . . bleeding."); *see also id.*

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[4] Dr. Meyer is a board certified neuroradiologist, previously a professor at Northwestern University and at the University of Chicago. 3/16/22 Tr. 22:2-26:23.

25:16-20; 93:16-98:8. He explained the HIE from trauma was "unilateral" and "not generalized hypoxia." *Id.* 160:24-161:3. This is in contrast to the HIE that Plaintiff's experts opined occurred during labor—bilateral and with a watershed distribution. *E.g.*, 3/8/22 Tr. 61:2-16, 38:1-40:1 (Sze).

Third, Plaintiff overstates the strength of his case. In addition to the above, even *Plaintiff's* experts did not agree with the all-important HIE during labor diagnosis. Far from it. Plaintiff's expert, Dr. Muraskas, testified that SK "did not suffer an injurious level of hypoxia before delivery" and "there was no irreversible brain damage before delivery." 3/8/22 Tr. 119:3-120:1 (cross-examination).

Plaintiff suggests (at 56) that maternal forces could not have caused SK's injuries. But Plaintiff's experts conceded that birth trauma (hemorrhages and skull fractures) can occur during labor without an outside force. 3/8/22 Tr. 63:24-65:23 (Sze); 3/11/22 Tr. 85:16-88:10 (Lloyd).

Further, Plaintiff put his settlement agreement with Mercy into the district court record. That agreement reflects that Plaintiff was not sure he would win and that he valued his case at less than $18 million.[5] Plaintiff,

[5] Plaintiff capped Mercy's exposure at $7 million and later argued to the jury that Mercy was up to 40% at fault. App. 180 (Agreement); 3/18/22 Tr. 52:23-53:6. Seven million is 40% of $17.5 million. This suggests that

therefore, did not believe that he was certain to prevail on liability, that the damages were uncontested, or that the verdict returned by the jury here was a foregone conclusion. Liability was far from certain, damages were contested, and the verdict shocked everyone, including Plaintiff in light of his settlement with Mercy.

Argument

I. The specifications of negligence were erroneous and prejudicial.

Plaintiff does not dispute that error was preserved or that the standard of review is for errors at law. Nor does Plaintiff argue that prejudice is required for a new trial if one specification of negligence lacked evidentiary support. Indeed, reversal is required if a specification is unsupported by the evidence. *Alcala v. Marriott Int'l, Inc.* 880 N.W.2d 699, 710 (Iowa 2016).

A. The lack of evidence for specifications requires a new trial.

Iowa law is well-settled. "A new trial is required after a general verdict is returned for the plaintiff if the evidence was insufficient to submit one of several specifications of negligence." *Id.* Put differently, "one faulty specification taints the entire verdict." *Phillips v. Chicago Cent. & Pac. R. Co.*, 853 N.W.2d 636, 645 (Iowa 2014); *see also Alcala*, 880 N.W.2d at 707,

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Plaintiff anticipated the maximum verdict to be $17.5 million.

710 (remanding for new trial given one of four specifications lacked evidentiary support); *Hawkeye Bank v. State,* 515 N.W.2d 348, 352-53 (Iowa 1994) (remanding for new trial as two specifications lacked evidentiary support); *Guidichessi v. ADM*, 554 N.W.2d 563, 566 (Iowa Ct. App. 1996) (remanding for new trial "given the erroneous submission of [one of four alternative] specification of negligence" that lacked evidence).

The record here warrants the same.

1. Failing to treat maternal blood pressure.

As to the specification that Dr. Goodman negligently failed to treat Mrs. Kromphardt's blood pressure, Plaintiff concedes (at 35)—as he must—that the nurses did not notify the doctor of the low blood pressure.[6] Recognizing the problem, Plaintiff asserts that Dr. Goodman could be negligent for failing to treat something she knew nothing about because she was "in charge." Plaintiff cites no law for this proposition.

In fact, Iowa has not approved imposing broad liability upon physicians for the conduct of others "irrespective of their employment or agency relationship to the doctor." *Tappe v. Iowa Methodist Med. Ctr*., 477

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[6] 3/16/22 Tr. 211:8-14 (Goodman cross-examination); 3/10/22 Tr. 34:2-24 (Brickner); 3/7/22 Tr. 112:12-22 (Atkisson); 3/3/22 Tr. 154:6-155:8 (Gubernick); 3/15/22 Tr. 91:27-92:5 (Taylor cross-examination).

N.W.2d 396, 402-03 (Iowa 1991). Indeed, the captain of the ship doctrine has been "widely discredited" and "the majority of courts shun this rigid doctrine of vicarious liability." *Id*; *Pillers v. Finley Hosp.*, 2003 WL 22087488, at *2 n.1 (Iowa Ct. App. Sept. 10, 2003).

Plaintiff's reference to the anesthesiologist's order to treat low blood pressure is unavailing. The order pertains to the nurses—not Dr. Goodman. App. 201 (Exh. 3: "RN to administer ePHEDrine").[7]

Plaintiff also argues Dr. Goodman's absence from Mrs. Kromphardt's room supports that she was negligent in failing to treat the blood pressure—in other words, she "should have known" about the blood pressure. But this is not the specification submitted. And, Plaintiff cites no expert evidence that Dr. Goodman should have known about the blood pressure. *See Alcala*, 880 N.W.2d at 708-09 (rejecting there was sufficient evidence for a specification by "connecting the[] dots").

There are more problems with this argument.

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[7] *See also* 3/3/22 Tr. 154:6-155:8 (Gubernick); 3/10/22 Tr. 33:15-34:24 (Brickner); 3/9/22 Tr. 171:1-173:6 (Shinn); 3/7/22 Tr. 112:12-113:1 (Atkisson); 3/15/22 Tr. 90:1-92:5 (Taylor cross-examination); 3/16/22 Tr. 211:21-25 (Dr. Goodman cross-examination).

First, leaving the room was captured in a different specification. App. 101 (Instruction 18(b)). The jury could have found against the P.C. based on a failure to treat the blood pressure even if it rejected the claim about not being in the room. This is fatal. Each specification must stand on its own or the verdict fails. *Phillips,* 853 N.W.2d at 645.

Second, Plaintiff's criticism about the blood pressure related to the time period between 2:30 and 3 p.m. 3/3/22 Tr. 154:21-25 (Gubernick). But the criticism about Dr. Goodman not being in the room concerned 3 to 4 p.m. App. 101 (Instruction 18(b)). Plaintiff identifies no evidence that Dr. Goodman should have been in the room between 2:30 and 3 p.m. *or* that the blood pressure remained low between 3 and 4 p.m.[8]

Third, Plaintiff's evidence was that if SK had been delivered by 3:45 p.m., there would be no injury. 3/4/22 Tr. 27:10-28:15, 29:22-30:1 (Gubernick). But on this view, a failure to treat low blood pressure between 2:30 and 3:00 p.m. was not the cause of Plaintiff's injury.

2. Failure to call a back-up physician.

As to the specification that Dr. Goodman negligently failed to call a back-up physician, Plaintiff suggests it was permissible for the jury to

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[8] Dr. Goodman explained the blood pressures were repeated after low readings and then were normal. 3/16/22 Tr. 211:15-20.

assume that SK would have been delivered by 3:45 p.m. if a back-up had been called. But Plaintiff cites no evidence that a back-up doctor, if called, would or could have delivered SK by 3:45 p.m. (there is none).

On this point, Plaintiff suggests (at 37) that a back-up doctor's opportunity to deliver earlier is sufficient. But an opportunity to avoid harm is nothing more than a possibility and an invitation to speculate—both of which are insufficient to satisfy a plaintiff's burden to prove causation. *Susie v. Fam. Health Care of Siouxland, P.L.C.*, 942 N.W.2d 333, 337-39 (Iowa 2020).

B. Improper specification language requires a new trial.

The language of the specifications unnecessarily included disputed factual issues, was argumentative, and improperly emphasized Plaintiff's theories. There was error.

In response, Plaintiff mischaracterizes the argument (at 41), claiming that "the P.C. is complaining that the Conservator's alleged claims of negligence emphasized the Conservator's alleged claims of negligence."

That is not the P.C.'s complaint. Instead, the P.C.'s complaint is that the court unnecessarily included disputed factual issues in the specifications and the language lacks neutrality, uses emotionally charged and

argumentative phrases, and repeats Plaintiff's theories. App. 101-02 (Instructions).

Plaintiff attempts (at 40) to explain away the improper language by suggesting Iowa jury instruction law applies only to "general instructions" and not to marshalling instructions. But Plaintiff cites no case law to support that assertion. None was located. In many cases (as here), the marshalling instruction is one of the few places with substantive modification to uniform instructions.

And it is quite possible to articulate specifications without improper language. Other cases demonstrate that a court can instruct a jury on the allegations without improperly emphasizing the plaintiff's case. For example, in *Eisenhauer v. Henry County Health Center*, the district court instructed the jury as to plaintiff's claim the physician and nurses were negligent in the following ways:

> (a) in failing to direct or coordinate proper maneuvers to deliver the baby after the recognition of shoulder dystocia;
>
> (b) by applying excessive or improper traction in an effort to deliver him after the recognition of shoulder dystocia;
>
> . . .
>
> (a) in the performance of the [relevant] maneuver and/or the application of suprapubic pressure.

935 N.W.2d 1, 10-11 (Iowa 2019). While the appeal issues were different in *Eisenhauer,* the Supreme Court rejected the plaintiff's argument that five more specifications should have been submitted. *Id.* at 11, 15.

Eisenhauer demonstrates objective and non-argumentative specifications that adequately and fairly set forth the allegations are indeed possible. And the *Eisenhauer* language reveals the extraordinary nature of the language here. The specifications here were duplicative, repeatedly and unnecessarily described disputed circumstances as fact, and used emotionally charged phrases (Dr. Goodman had "too many patients," was "overwhelmed," and abandoned her patients). App. 101-02 (Instructions).

The Court will "'presume prejudice [from erroneous instructions] and reverse unless the record affirmatively establishes there was no prejudice.'" *State v. Mathis*, 971 N.W.2d 514, 521 (Iowa 2022). It was Plaintiff's burden to show harmlessness. *Rivera v. Woodward Res. Ctr.*, 865 N.W.2d 887, 903 (Iowa 2015) Plaintiff did not carry this burden.

Instead, Plaintiff attempts to rebut the presumption by noting that the P.C. lost its case. But if losing at trial demonstrates no prejudice, courts would never reverse. Indeed, the loss at trial *is* the prejudice. This Court should order a new trial at which all specifications are supported by evidence and phrased in an impartial way.

II. The admission of the package insert was erroneous and prejudicial.

The issue is whether a hearsay exception applies. Plaintiff does not dispute that the error was preserved, that the insert is hearsay, that the admission of hearsay is not a discretionary ruling, or that prejudice is presumed when inadmissible hearsay is admitted.

A. The residual exception does not apply.

The P.C. argued that the district court erred in admitting the Mityvac package insert under the residual exception. Plaintiff provides several responses, most of which are off topic, and none of which change the result.

Trustworthiness – First, Plaintiff argues (at 43-44) that package inserts are trustworthy.

This response misses the point. The narrow residual hearsay exception has five requirements, and all five must be satisfied. *State v. Skahill*, 966 N.W.2d 1, 10 (Iowa 2021). The only one at issue on appeal is the necessity requirement—whether the insert was superior to other evidence Plaintiff could offer. Whether the insert was material or trustworthy—two other requirements—are beside the point.

Relatedly, Plaintiff suggests that the insert is trustworthy because it was approved by the FDA. But Plaintiff never established FDA approval or specifics as to any applicable regulatory requirements. Indeed, Plaintiff

previously conceded that he failed to establish at trial "whether the package insert really was required by and recorded by the FDA." 5/19/22 Plaintiff's Resistance to [P.C.'s] Motion for New Trial at 25 ("Post-trial resistance").[9]

Prima facie evidence – Second, Plaintiff argues (at 45) that other courts allow package inserts to be used as prima facie evidence of the standard of care. This is irrelevant. The insert in this case was not offered for that purpose. Whether package inserts can be used as prima facie evidence of the standard of care—an issue not yet decided by the Iowa Supreme Court—is not an issue on appeal. It wasn't an issue at trial.

Instead, Plaintiff's counsel carefully elicited testimony from his expert that the insert did not establish the standard of care—it was merely consistent with the standard.[10] To be clear, while Plaintiff made this distinction to avoid raising this legal issue, the way Plaintiff used the insert

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[9] Plaintiff never even established (at trial or on appeal) whether the vacuum is a Class II or Class III device, an important distinction that governs regulatory requirements. *Duvall v. Bristol-Myers-Squibb Co.*, 65 F.3d 392, 395-96 (4th Cir. 1995); 5/27/22 P.C. Reply in Support of Motion for New Trial at 12-13. Plaintiff's conclusory statements about FDA approval are unpersuasive.

[10] 3/4/22 Tr. 59:5-12 (Gubernick). Since the P.C. cited *Arnold*, Plaintiff argued for "anybody reviewing this" that he offered the insert only as consistent with the standard of care. 3/9/22 Tr. 112:8-16; *Arnold v. Lee*, No. 05–0651, 2006 WL 1410161, at *7 (Iowa Ct. App. 2006) (majority of courts do not allow inserts to establish a prima facie standard of care).

at trial negated the distinction for the purpose of jury consideration and the insert caused overwhelming prejudice.

And, Plaintiff's cases on this point do not involve the hearsay issue. *See Thone v. Reg'l Med. Ctr.*, 745 N.W.2d 898 (Neb. 2008); *Richardson v. Miller*, 44 S.W.3d 1 (Tenn. Ct. App. 2000).

Relatedly, Plaintiff never argued the insert was admissible under the learned treatise exception—most likely because that exception only allows the hearsay to be read at trial, not admitted as an exhibit. Iowa R. Evid. 5.803(18). Nor did Plaintiff offer the insert as evidence relied upon by his experts under Rule 5.703—most likely because it could not be used substantively under that rule. *Gacke v. Pork Xtra, LLC,* 684 N.W.2d 168, 183 (Iowa 2004).

Probative value – Third, Plaintiff argues (at 46) that the insert was admissible because it was probative: "How a medical-device manufacturer tells physicians to use its product is incredibly probative of how the product should be used."

This point establishes the prejudicial impact of the evidence. But it is otherwise beside the point. The necessity element is not satisfied when evidence is "incredibly probative."

The test for necessity is whether it is "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). Plaintiff cannot meet this test. As the P.C. previously briefed (at 39-41), Plaintiff offered the insert as only consistent with the standard of care whereas Plaintiff's experts were unequivocal in stating the standard of care. While Plaintiff's experts testified in case-specific terms, the insert is necessarily divorced of *any* case-specific facts. The insert expressly states it provides "general guidelines" and Plaintiff's expert testified guidelines do not establish the standard of care. App. 342 (Exhibit 42); 3/4/22 Tr. 135:2-4 (Gubernick).

Relatedly, Plaintiff argues (at 46) that the P.C. rebutted Plaintiff's experts with medical literature, and thus the insert was superior evidence. But that is not the test, either. Admissibility does not turn on the opponent's ability to rebut other evidence. And the analysis of the Court of Appeals in *Arnold*—holding that a manufacturer's insert was not admissible under the learned treatise exception—shows that Plaintiff is mistaken in claiming that the insert was superior to medical literature. *Arnold v. Lee* No. 05–0651,

2006 WL 1410161, at **2-4 (Iowa Ct. App. 2006).[11] The residual exception does not apply.

B. The market-reports exception does not apply.

Plaintiff asserts that the insert was admissible under Iowa Rule of Evidence 5.803(17), which provides that the following is admissible: "Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations." In support, Plaintiff cites (at 47) *State v. Heuser*, 661 N.W.2d 157 (Iowa 2003), arguing that the rule applies as medical-device labels "follow the same regulatory construct" as a drug label at issue in *Heuser*.

While the *Heuser* Court relied upon the regulatory requirements that apply to over-the-counter medication, the only specifics it cites are *state* requirements, not federal. 661 N.W.2d at 164. Plaintiff paints with too broad a brush in equating medical device regulations to drug regulations—particularly given Plaintiff's conclusory treatment of FDA issues.

And the *Heuser* Court's use of the exception was specific and narrow—to allow introduction of over-the-counter cold medicine labels as

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[11] The *Arnold* Court explained that manufacturers are motivated by reasons other than providing medical education and there was no indication inserts were subject to "the type of competition and scrutiny required by . . . peer-reviewed compilations or journals."

proof that they contained a particular chemical—"a precursor to methamphetamine." *Id.* at 164-65. The directions for use and contraindications on the label—such as at issue here—were not discussed. And while an ingredient list may qualify as a list or compilation, the instructional and warning language of a medical device insert does not. Ingredients are objective verifiable facts not subject to the manufacturer's decision-making about the type and nature of risks and uses to warn about.

The *Heuser* Court also explained that, in the context of listing ingredients, manufacturers have no motivation to be anything but technically accurate. *Id.* at 163, 165. In contrast, manufacturers of medical devices are motivated to avoid liability, *Arnold*, 2006 WL 1410161, at *4; *Richardson*, 44 S.W.3d at 16, and, thus, to include overly broad warnings. The market report exception does not apply.

C. Plaintiff is silent on the Rule 5.403 issue.

Plaintiff offers no response to whether the insert was inadmissible under Rule 5.403. Nor does Plaintiff ever mention, much less explain, the violations of court orders involving references to the FDA in connection to warnings.[12] The package insert should have been excluded under Rule

[12]This occurred with experts Gubernick and Gabriel as explained in the P.C.'s initial brief at 44-45.

5.403. Its probative value was *less* than Plaintiff's expert evidence on the same subject matter. And it was highly prejudicial. *Arnold*, 2006 WL 1410161, at **5-6 (affirming exclusion of insert, citing Rule 5.403 factors).

D. The insert was highly likely to have impacted the jury's liability finding—it was prejudicial.

Because the insert was inadmissible hearsay, prejudice is presumed. *Skahill*, 966 N.W.2d at 15. But here, prejudice is also demonstrable.

Closing arguments "are often a barometer of how the case was tried and whether the presence or absence of certain evidence mattered." *McGrew v. Otoadese*, 969 N.W.2d 311, 326 (Iowa 2022) (remanding for new trial, citing closing argument)*; Skahill*, 966 N.W.2d at 17 (wrongfully admitted hearsay was not harmless error, it "featured prominently in the State's closing argument").

Here, Plaintiff's counsel made a mighty use of the insert in closing argument. "Read it. Go back in the jury room. . . . These words are pretty clear. . . . don't do it. Don't do it. Don't do it." 3/18/22 Tr. 51:7-12. He reminded them "you'll take it back—you won't have any trouble, I've shown you the warning a hundred times. . . . It's in evidence . . ." *Id.* 26:6-16. He linked the insert to whether Dr. Goodman was negligent as well as to causation: "[SK] has every hemorrhage [the insert] warn[s] about." *Id.* at 51:7-8.

Ignoring his own closing argument, Plaintiff asserts that the insert was not prejudicial because the jury heard that medical literature also warns against sequential use of instruments.[13] But this ignores that the jury could not read the medical literature in the jury room. Rule 5.803(18). Only the insert was admitted.

Indeed, the learned treatise rule keeps literature out of the jury room to prevent "written evidence from assuming more importance than oral testimony." Iowa Practice Series, Ch. 8 Hearsay, § 5.803(18) (2006 ed.). The insert, as written evidence in the jury room, assumed more importance than oral testimony, something Plaintiff's counsel exploited in closing argument. The presumption of prejudice is dispositive, but even if it were not, the record reveals actual prejudice.

Nor does Plaintiff's speculation as to how the jury decided the case rebut the presumption of prejudice. Plaintiff argues that the evidence that SK

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[13] This cuts against Plaintiff's argument (at 44) that the insert was superior to medical literature.

Plaintiff's representation of the evidence also is inaccurate. Plaintiff cites (at 48-49) testimony concerning literature that warned against sequential use of instruments. But the defense expert explained that sequential use is not prohibited and is within the standard of care when, as here, prompt delivery is warranted. 3/14/22 Tr. 85:5-86:18. In comparison, the insert purports to be a black and white prohibition—exactly how it was argued by Plaintiff's counsel.

suffered HIE during labor was overwhelming and thus any evidence about the use of the vacuum at the end of the delivery did not matter. But as discussed above, the evidence was not as overwhelming as Plaintiff suggests. And the prejudice impacted the damages evidence, as Plaintiff did not separate dollar amounts allegedly caused by HIE from dollar amounts caused by the use of the vacuum (App. 330-40) and Plaintiff linked SK's injuries to the vacuum. Plaintiff did so in his closing argument: "He has every hemorrhage [the insert] warn[s] about," 3/18/22 Tr. 51:7-8, and in his appeal brief (at 12-13, 22).

III. Counsel's misconduct caused prejudice.

In response to the P.C.'s arguments about Plaintiff's counsel's misconduct, Plaintiff suggests that the P.C. is overreacting and notes that the district court ultimately denied the defense motions for mistrial. But that is precisely the problem. The trial was remarkable for the number of times the same district court contemplated granting a mistrial (at least three times)[14]

[14] 3/2/22 Tr. 79:1-4, 80:2-7 (regarding mistrial: "we're not there yet."); 3/3/22 Tr. 61:24-62:14 ("I am not yet ready to grant the mistrial, although I've thought about it."); 3/4/22 Tr. 89:22-92:17 (reserving ruling on mistrial on improper FDA evidence, requesting briefing on cumulative effect of events); App. 74-89 (3/6/22 Defendants Joint Supplement to Motions for Mistrial).

and admonished or instructed Plaintiff's counsel.[15] Numerous objections to argumentative cross-examination were sustained.[16]

Plaintiff's suggestion that the defense over-reacted to the conduct is also belied by Plaintiff's own acknowledgments, post-trial[17] and on appeal,[18] that there were, indeed, grounds for the defense position. And, of course, the P.C. was required to object and move for mistrial to preserve error.

Importantly, the misconduct was not inadvertent. Other courts have repeatedly found that attorney Fieger acted improperly, resulting in new

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[15] 3/2/22 Tr. 77:16-78:2 (counsel's damage opinion problematic and improper); *id.* 78:3-17 (don't mention insurance [again]); 3/3/22 Tr. 61:10-23 (on witness lying: "I don't want to hear it again"); *id.* 104:21-105:2 (no witness to use "gross negligence" [after Plaintiff's use in opening, *id.* 10:21-11:1]; 3/7/22 Tr. 33:3-17 (witnesses should be instructed on court orders [after violation of FDA court order by Plaintiff's witness]); 3/11/22 Tr. 74:19-75:24 (witnesses should be instructed not to share feelings and "it should not happen again" [after Plaintiff's witness testimony]).

[16] 3/14/22 Tr. 143:4-10, 158:24-159:4; 3/15/22 Tr. 50:8-14, 105:23-106:5, 181:9-16, 202:17-203:4; 3/16/22 Tr. 86:6-11, 96:2-8, 187:19-188:3, 197:1-5; 3/17/22 Tr. 50:3-7, 69:3-9, 72:15-20, 73:10-13, 74:6-11.

[17] 5/19/22 Post-trial resistance at 45-60 (multiple concessions of vouching and inadvertent statements, arguing incidents were isolated).

[18] Brief at 54, 56 (referring to counsel's argument as melodramatic and "rhetorical hyperbole").

trials or sanctions[19]—to which Plaintiff offers no rebuttal, explanation, or justification.

Plaintiff also does not respond *at all* to many of the improper themes and statements identified by the P.C.—perhaps because there is no response. There was indeed misconduct, and it was pervasive and prejudicial.

A. Accusing Dr. Goodman of lying under oath.

As to counsel's opening statement that another witness would testify Dr. Goodman's testimony under oath was "patently false," Plaintiff responds (at 53) that he did not actually use the word "liar."

The district court did not find that distinction dispositive. Indeed, in response to that comment, the court admonished Plaintiff's counsel that:

> no one gets to say witness X is lying, witness X is a liar, witness X testified falsely. No one can say that. Not the lawyers, not the witnesses. So if you have anywhere in your notes . . . cross it out right now because I don't want to hear it again.

3/3/22 Tr. 61:18-25; 36:4-11 (statement). The district court heard the same thing the P.C. heard—Plaintiff's counsel accused Dr. Goodman of lying under oath.

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[19] *See* P.C.'s initial brief at 68-69.

And contrary to Plaintiff's argument (at 54), the P.C. did not argue that it was improper for Plaintiff to emphasize that Dr. Goodman changed her story. Instead, the P.C. explained how Plaintiff nurtured the seed improperly planted in opening statement that Dr. Goodman would not tell the truth under oath.

B. Misconduct during closing argument.

In closing, there were numerous incidents of improper statements and themes—too many to count. Mistrials have been granted and new trials ordered for a fraction of the number of incidents. *E.g.*, *State v. Vickroy*, 205 N.W.2d 748, 751 (Iowa 1973) (two improper statements); *Andersen v. Khanna*, No. 20-0683, 2021 WL 3075711 *1-3 (Iowa Ct. App. July 21, 2021) (one improper statement in opening statement; discussing prior two mistrials in same case for one improper statement in each).

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

Plaintiff is curiously silent as to the P.C.'s first grounds that closing argument was improper. Counsel does not attempt to justify his statements that "[t]he reason we're here is the money. . . . because 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."

3/18/22 Tr. 37:15-16, 38:7-10. Counsel compared the money (in time) spent in defending the allegations to the alleged lack of time spent caring for SK. *Id.* 37:18-24.[20] He argued "it's got to . . . stop now" and he and SK would be waiting for the jury's decision. *Id.* 36:17-19, 38:19-21.

This bears a striking resemblance to the improper argument in *Kinseth v. Weil-McLain*, 913 N.W.2d 55, 73 (Iowa 2018) that resulted in a new trial. In *Kinseth*, the Court summarized plaintiff's counsel's closing as suggesting that the 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." *Id.*

The same comments here were improper and require reversal. *See also Whittenburg v. Werner Enters. Inc.*, 561 F.3d 1122, 1129 (10th Cir. 2009) (improper argument included defendant "improperly took this case to trial [and spent] money to avoid responsibility").

2. Improper emotional themes and golden rule arguments.

Plaintiff cherry picks the easiest statements for response and leaves much untouched. On the golden rule argument (at 54-55), Plaintiff fails to

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[20] The references to money were not about damages. These arguments were at 9:41-42 a.m. and Plaintiff began his damage argument in earnest at 10:12 a.m. 3/18/22 Tr. 37:18-39:10, 53:25.

explain the most blatant violation: asking the jurors to place themselves in the position of SK's parents: "Take the time to really understand what it's like 24/7 to care for that child for the rest of his life?" 3/18/22 Tr. 64:2-4. Counsel expressly asked the jurors to put themselves in the parents' shoes.

These comments, too, require reversal.

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

The P.C. identified numerous incidents in which Plaintiff's counsel either cited evidence where none existed or improperly stated his personal beliefs, opinions, or experience. Plaintiff offers no explanation or contrary authority. And this misconduct goes to important disputed issues pertaining to liability—whether Dr. Goodman was negligent, causing the damages Plaintiff sought:

- Counsel personally guaranteed, and vouched for, the University records. 3/18/22 Tr. 30:7-11 ("my experience is that" hospitals cooperate), 41:9-10 ("I can guarantee" the truthfulness of the University records).

- Counsel stated (with no evidence in the record) that the University had "all" of the records from SK's birth and thus "know it all." *Id.* 41:17-22.

- Counsel stated (with no evidence in the record) that the pediatrician at the delivery who documented "fetal distress" was referring to the fetal heart monitor. *Id.* 46:22-47:1.

- Counsel stated (with no evidence in the record and in violation of a limine order) that the Kromphardts told him in a meeting that physicians told them "it's from the

forceps, they say it's from the vacuum." *Id.* 40:12-15; App. 64 (2/28/22 Order ¶ 22).

- Counsel bolstered himself and Plaintiff's case by explaining his decades of experience and his investigation of Plaintiff's case, including the University records. 3/18/22 Tr. 33:12-34:3, 38:1-7, 40:16-24.

But under Iowa law, "[c]ounsel has no right to create evidence by his or her argument." *Rosenberger Enters., Inc. v. Ins. Serv. Corp. of Iowa*, 541 N.W.2d 904, 908 (Iowa Ct. App. 1995); 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").

C. There was prejudice.

All of this misconduct caused prejudice, particularly when it is considered cumulatively, and especially when considered with the prejudice from the specifications and insert.

Plaintiff's position on prejudice focuses on the purported strength of his case. Putting aside that Plaintiff's case was not as strong as he portrays, Plaintiff cannot so easily dismiss a nearly $100 million verdict. If that were the law, few verdicts would be overturned.

Indeed, "the size of a verdict—whether it is large or excessive—is a significant factor suggesting prejudice sufficient to require a new trial." *Whittenburg*, 561 F.3d at 1132; *see also Gilster v. Primebank*, 747 F.3d 1007, 1012 (8th Cir. 2014) (size of damage award suggested counsel's

improper argument had a prejudicial effect and accomplished its purpose; remanding for new trial); *Bronner v. Reicks Farms, Inc.*, No. 17-0137, 2018 WL 2731618, at *9 (Iowa Ct. App. June 6, 2018) ("we find it probable the jury would have reached a different determination as to damages but for plaintiff's counsel's misconduct"); *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").

Plaintiff also is mistaken on the effect of the prejudice. He suggests that, because his case was strong, he would have won regardless. But in a trial without misconduct a jury might have awarded a smaller verdict, even if the jury still found liability. Any likely change in the magnitude of the verdict, but for misconduct, demonstrates prejudice.

And here, contrary to Plaintiff's argument, the misconduct was pervasive. This was not a closing argument involving isolated missteps but instead the misconduct was pervasive and summed up intentional and deliberate themes.

IV. The damages award is excessive.

Under Iowa law, a court will set aside a jury's damages award—not just if unsupported by the evidence—but also 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." *Rees v. O'Malley*, 461 N.W.2d 833, 839 (Iowa 1990) (internal quotation marks omitted). And "a flagrantly excessive verdict raises a presumption that it is the product of passion or prejudice." *WSH Props., LLC v. Daniels*, 761 N.W.2d 45, 50 (Iowa 2008).

Plaintiff argues that the damages award is not excessive because there was evidence to support the award of economic damages. But the fact there is evidence to support some damages does not mean the verdict was not influenced by passion and prejudice. *See Whittenburg*, 561 F.3d at 1132 (improper closing argument prejudiced defendant even though $3.2 million in damages was within plaintiff's evidence).

Plaintiff also is mistaken on the effect of the prejudice. Again, if there is a substantial likelihood that a trial without misconduct would have resulted in a more favorable verdict for the P.C., there is prejudice.

Plaintiff finds it "strange" (at 30-31) that the P.C. provided comparisons with awards in other Iowa birth injury cases. Yet, in *Jasper v. H. Nizam, Inc.*, the Court found that "it is helpful in considering a claim of excessive damages to consider the rough parameters of a range from other like cases." 764 N.W.2d 751, 772 (Iowa 2009). Comparison to Iowa cases is

appropriate, including because the measure of damages and other substantive law varies by jurisdiction, rendering verdicts from other states less helpful. Plaintiff mostly compares cases outside Iowa.

This verdict is far outside the boundaries set by other Iowa birth injury cases and is flagrantly excessive. This Court should reverse.

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

Plaintiff does not dispute the P.C.'s interpretation of the statute. Instead, Plaintiff argues (at 63) that "Mercy is not protected from a right of contribution." While Plaintiff may think he has hoodwinked Mercy, Plaintiff's own judicial admissions in the post-trial phase and his agreement with Mercy reveal otherwise. As an initial matter, the P.C. does not agree the agreement with Mercy trumps Iowa Code Chapter 668.

Plaintiff asserts that the agreement with Mercy did not settle the claims submitted to the jury. He does so even though in Plaintiff's words, "[p]ursuant to the agreement, Mercy Hospital paid $7,000,000 as satisfaction for its responsibility of the judgment." 5/19/22 Post-trial resistance at 72.

The judgment includes only those claims submitted to the jury, so the agreement operated to release Mercy from any liability for those claims. Further, Plaintiff agreed to dismiss the lawsuit with prejudice—which included claims submitted to the jury. App. 180 (Agreement ¶ 3). And the

agreement states three times that the parties have reached an agreement with regard to "minimum and maximum amounts owed *as a result of the verdict.*" App 179 (emphasis added). There was a settlement of the claims submitted to the jury.[21]

As to the language about joint and several liability, the agreement does not contemplate that "Mercy left open the risk that the P.C. would seek contribution" as Plaintiff argues (at 64). It contemplates possible claims *against* the P.C. App. 180 (¶¶ 2,5).

If the Court does not order a new trial, it should reduce the judgment against the P.C. to its equitable share of the judgment—50% of the total damages.

Conclusion

This Court should reverse and remand for a new trial and revoke Mr. Fieger's pro hac vice admission. In the alternative, the Court should reduce the verdict to reflect the P.C. equitable share of the judgment.

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[21] *See Wright v. Scott*, 410 N.W.2d 247, 249 (Iowa 1987) (a settlement "obviates the necessity of further legal proceedings between the settling parties.").

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