BEFORE THE IOWA SUPREME COURT

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

APPELLEE'S BRIEF

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ROUTING STATEMENT

None of the criteria for the Supreme Court to retain a case under Rule 6.1101(2) exist here. There are no constitutional questions or conflicts between Supreme Court and published Court of Appeals decisions. The case does not present fundamental and urgent issues of broad importance (indeed, the issues are tied narrowly to the particular circumstances of trial), and the case does not present a substantial question of enunciating or changing legal principles. Even the issue of "first impression" that Appellant highlights in its routing statement (the effect of a particular high-low agreement) is a very limited one that turns on the unique terms of the agreement.

The only significant thing about this case is the size of the verdict, the issue that Appellant leads with. But there is no "big verdict" factor in Rule 6.1101(2), because the standards that apply to a jury's measure of damages are well-settled. So too are the standards for substantial evidence, hearsay, and the "broad discretion" that district courts are given to decide on the "propriety of closing argument" and whether to grant a mistrial generally. *Rasmussen v. Thilges*, 174 N.W.2d 384, 391 (Iowa 1970).

This case, replete with common complaints about substantial evidence and how the district court exercised its discretion during trial, is not legally different from the typical appeal that is transferred the Court the Appeals under the Rules. As a result, the Conservator, on behalf of the incapacitated minor S.K.,

cannot claim that the Supreme Court should retain the case but, if the Court wishes to do so, the Conservator has no objection.

STATEMENT OF THE FACTS

Shortly after 1:00 p.m. on August 11, 2018, Kathleen Kromphardt and her husband Andrew arrived at Mercy Hospital in Iowa City. Kathleen was in labor, with her water breaking about an hour earlier, ready to deliver the couple's third child. 3/3 Tr. 144:9-16.

Until then, the pregnancy had been normal and without complication. 3/3 Tr. 135:9-18. And when she arrived at the hospital, it seemed that it would continue that way. Kathleen was put on a fetal-heart monitor and everything was well—there was no evidence the baby was in anything but perfect health. *Id.* 146:13-23. About 30 minutes later, shortly after 1:30, the baby began to experience decelerations, a term to describe the reduction in heartrate below a baseline (e.g., 120 beats per minute). *Id.* 143:21-144:6.

Starting at 2:00, the decelerations increased, causing enough concern that the physician in charge, Dr. Jill Goodman from Obstetric and Gynecologic Associates of Iowa City and Coralville, P.C., ordered hospital staff to prepare the operating room for a potential C-section. *Id.* 147:4-12. Dr. Goodman also gave Kathleen medication to slow her contractions. *Id.* 149:20-152:12. The heart-rate decelerations were corresponding with Kathleen's contractions, suggesting that the contractions were compressing the umbilical cord and depriving the baby of

the blood supply. *Id.* 147:19-148:8. Slowing the contractions with the medication was, presumably, designed to slow the occurrence of the decelerations. *Id.* 149:20-152:12.

Sometime before 3:00, Dr. Goodman ordered an epidural for Kathleen's pain. *Id.* One of the effects of an epidural, though, is to decrease the mother's blood pressure, which decreases the amount of blood and oxygen supplied to the baby. 3/10 Tr. 28:24-29:9. The anesthesiologist warned about this, stating that if Kathleen's blood pressure went down she was to be given ephedrine, a medication that would raise her pressure. 3/3 Tr. 152:1-16; 154:1-5. Despite that warning, and even though Kathleen's blood pressure dipped below the recommended level at least five times, neither the nurse nor Dr. Goodman administered the drug. 3/16 Tr. 211:8-12.

During this time, Dr. Goodman was not in the room attending to Kathleen and the baby; instead, from 3:00 p.m. to 4:00 p.m., she was with two other mothers who were in labor. 3/3 Tr. 159:17-22. During that hour, things got worse for Kathleen. By 3:30, the baby was on the cusp of an emergency, with his oxygen supply being depleted to the point where he was developing progressive hypoxia. 3/4 Tr. 83:25-84:12. Fifteen minutes later, by 3:45, the problem had progressed to the point where, in the opinion of an expert who testified at trial, the baby began to suffer permanent brain damage because of

lack of oxygen to the brain. 3/3 Tr. 162:20-21; 3/4 66:15-20. Every minute that went by, the damage became progressively worse. 3/4 Tr. 27:5–28:15.

The nurse called for Dr. Goodman at 3:50, but Dr. Goodman did not arrive to Kathleen's room for another ten minutes because she was suturing another patient following an uneventful labor. 3/4 Tr. 27:10-24; 3/10 Tr. 40:12-17; 3/16 Tr. 145:10-18.

When Dr. Goodman arrived, baby S.K. was in serious trouble, with his heartbeat "basically on the ground." 3/10 Tr. 41:1-7. As one expert put it, "unless there is no heartbeat, this is as bad as it gets." 3/4 Tr. 88:12-18. S.K. was in "terminal bradycardia," meaning there were severe, prolonged decelerations where his heartrate declined to an unsafe level for an extended period. 3/3 Tr. 128:4-21; 3/10 Tr. 41:1-7. Dr. Goodman discovered that the S.K.'s head was looking up, rather than down as preferred for delivery, so with S.K.'s oxygen at dangerous levels and brain damage continuing to worsen, she took the time to attempt to rotate his head downward. 3/4 Tr. 35:3-25. That failed, at which point Dr. Goodman made the decision to use forceps to try to deliver S.K.

On her first attempt, the forceps slipped off, sending Dr. Goodman tumbling backwards. 3/4 Tr. 42:10-43:16; 3/8 Tr. 157:2-20. She tried again, but without success, so she removed the forceps and used a vacuum. *Id.* The vacuum, known by its brand name Mityvac, is a device that pulls on the top of the baby's

head with suction. 3/3 Tr. 168:9-23. Using the vacuum, Dr. Goodman delivered S.K.

The opinion of three experts at trial—which was consistent with the diagnosis of treating physicians at the University of Iowa Stead Family Children's Hospital where S.K. was transferred after birth—was that Dr. Goodman fractured S.K.'s skull with the forceps.[1] 3/3 Tr. 133:22-134:19; 3/4 Tr. 38:2-13; 3/7 Tr. 43:5-23; 3/10 Tr. 43:11-44:15. That trauma caused further damage to S.K.'s brain, which was further exacerbated by the vacuum. 3/3 Tr. 131:24-132:4. For their part, Dr. Goodman and the P.C. claimed that the skull fracture and traumatic injuries to S.K. were caused by the "forces of labor." *Id.* 96:17-25.

S.K. spent the next 46 days in the NICU at the University of Iowa children's hospital. 3/8 Tr. 124:1-6. MRIs taken within the first week of S.K.'s delivery revealed that—along with his fractured skull, traumatic brain injury and hemorrhages—S.K. had hypoxic ischemic encephalopathy, known as HIE, which is a brain injury caused by inadequate oxygen or blood flow.[2] 3/7 Tr. 24:2-18. Hypoxia is when there is inadequate oxygen delivery to the tissues; ischemia

[1] A record from the day after S.K.'s birth, for example, noted the skull fracture and brain hemorrhages and stated "Newborn suspected to be affected by forceps delivery" and "Newborn affected by delivery by vacuum extraction." App. 202; 3/3 Tr. 134:12–135:8.

[2] Dkt. No. 480, Exh. 5A, Pt. 43, at 4189 ("His brain MRI scan showed evidence of hypoxic injury.")

is reduced blood flow to the tissue; and encephalopathy simply means brain pathology. *Id.* Ischemia is the "most important component" because lack of blood flow to the brain "is not tolerated for more than one or two minutes without irreversible brain damage." *Id.*

Six days after delivery, Dr. Seth Perlman, a pediatric neurologist at the University of Iowa children's hospital, discussed S.K.'s MRI results with the Kromphardts. According to Dr. Perlman, the MRI demonstrated that, among other things, S.K. suffered a bilateral "watershed ischemic injury to brain." App 205; 3/4 Tr. 72:2-20; 3/8 Tr. 37:17–38:9. In other words, S.K. had suffered permeant brain damage from the lack of blood flow and oxygen to his brain while Dr. Goodman was out of the delivery room. Dr. Perlman warned the Kromphardts that because of this injury, S.K. could have cognitive, developmental, and behavioral problems. 3/11 Tr. 47:15-49:2 (discussing App. 205).

At the time of trial, S.K. was three-and-a-half years old. Because of the ischemic injury caused by lack of blood flow to the brain and the traumatic injuries caused by the forceps and vacuum, he suffers from physical and mental impairments.

The traumatic injuries caused cerebral palsy, with significant weakness on his right side, such that S.K. cannot walk on his own and cannot support his own weight for more than a short period. 3/11 Tr. 146:12-14. His right calf muscle is

one centimeter smaller than his already small left calf muscle, a demonstration of how much weaker his right side is. *Id* 137:9-11. And his muscles are so tight that his right foot curls inward and is difficult to bend into the correct position, even manually. *Id.* 137:12-15. In addition to testimony, these physical limitations and injuries were demonstrated with a day-in-the-life video that was shown to the jury and is part of the record. *Id.* 135-39; Exh. 18. At three and half years old, S.K. was still in diapers and a crib. 3/10 Tr. 137, 3/11 Tr. 133:17.

For the first year and a half of his life, S.K. was on a feeding tube. 3/8 Tr. 135:2-14; 3/11 Tr. 135:16-136:5. At the time of trial, he was still struggling to feed himself—partially because of the physical limitations of his arms but also because he does not fully understand how to chew. 3/11 Tr. 135:16-136:5; 139:8-15. Rather than using his molars to break down his food, S.K. tries to mash food with his tongue. *Id.*

Because of the partial paralysis in his legs, which causes the muscles to spasm and his legs to go inward, S.K. will also likely require casting to prevent his legs from becoming stuck in that inward position. 3/9 Tr. 33:21-34:2, 37:17-38:16. He will also likely need surgeries on his hip and ankle. 3/11 Tr. 80:19-23. S.K. also has a shunt in his brain to drain fluid buildup from his brain into his stomach. 3/7 Tr. 18-19.

Cognitively, S.K. struggles. At the time of trial, his speech was improving, with his vocabulary growing and the ability to speak in short sentences. 3/11 Tr.

142:20-143:17. But his speech was still well behind his peers', and he struggles to understand what is being asked of him and to communicate his needs—a condition known as receptive language retardation, a sign of a serious cognitive impairment. 3/7 Tr. 48:10-25; 3/8 Tr. 139:21-140:21. S.K. tested in the first percentile for receptive and expressive language, social skills, and communication. 3/9 Tr. 30:2-14. And his treating pediatric neurologist at the University of Iowa, Dr. Leah Zhorne, remarked shortly before trial that S.K. "is making some developmental progress but remains behind in all domains including speech." 3/17 Tr. 71:15-17. S.K. also has behavioral outbursts exceeding those of the typical child. 3/8 Tr. 138:8-25, 3/9 Tr. 29:3-9; 3/10 Tr. 137-38.

In contrast to S.K.'s slow cognitive development, his mother Kathleen began playing piano at the age of five and violin at the age of six. 3/11 Tr. 102: 10-104:10. Kathleen was a concert violinist who, in addition to earning a bachelor's degree in business, earned a degree from the prestigious Mannes School of Music in New York. *Id.*

Because of his cognitive and physical limitations, S.K. will never be independent, he will not be employable, and his physical and cognitive problems will only make it harder to care for him as he ages. 3/9 Tr. 31:25-33:4; 40:9-11. He will fall further and further behind and will require 24-hour attendant care

for the rest of his life, in addition to ongoing medical treatment. 3/9: Tr. 30:15-40:25, 3/11 Tr. 58:19-24.

SUMMARY OF THE ARGUMENT

The jury's verdict is "shocking," "grossly excessive," and "is explained, ***not by evidence***, but by district court errors and trial counsel misconduct." (P.C. Br. 13, 20).

That is how the P.C. begins its brief, starting with the routing statement and leading the summary of the argument. But despite the P.C.'s claim that the verdict cannot be "explained by the evidence," the P.C. ignores the evidence. In fact, the P.C. does not directly address the size of the verdict until near the end of its brief, and at that point spends more time discussing the facts of other cases than it does this one. But when determining whether a verdict is excessive, this Court has said that "each case depends upon its own facts, and precedents are of little value." *Rees v. O'Malley*, 461 N.W.2d 833, 839 (Iowa 1990). And the facts of this case show that the jury's measure of damages is fully supported. Indeed, the damages were the only logical byproduct of the evidence introduced and (with respect to the P.C.'s affirmative case) *not* introduced at trial.

For economic damages alone, the Conservator introduced evidence demonstrating that because of S.K.'s extensive brain damage the cost of future care—including 24-hour attendant care for his life—is over $42 million and lost wages are nearly $12 million. 3/10 102:8-25, 110:8-17; App. 335-41. The P.C.,

on the other hand, took the hardline position that damages were zero—that S.K. was "cognitively normal," "will go to college" and, "if he wishes to, he can go on to graduate school" and become a professor. 3/17 Tr. 40:17-25, 54:5-7. Other than that, the P.C. provided no evidence to rebut the Conservator's lifecare plan or to give the jury any middle ground. Its strategy was to say that S.K. is cognitively normal and leave it at that.

Unsurprisingly, the jury rejected the P.C.'s theory and awarded what the Conservator asked for in economic damages (almost $54 million) and less than what he asked for in noneconomic damages. 3/18 Tr. 65:5-20. When the judgment against the P.C. of $75 million is understood in its proper context—after a discussion of the evidence and in light of the P.C.'s all-or-nothing strategy—the P.C.'s arguments about passion and prejudice lose all force. That is significant, because there cannot be reversible error in this case—that is, the district court cannot be found to have abused its discretion—unless any error during the 12-day trial caused prejudice. But each time the P.C. touches on prejudice, it simply points to the size of the jury verdict and nothing more. As large as it is, though, the verdict is fully supported by the record.

As to the merits of the P.C.'s other arguments:

First, there is substantial evidence to support each of the negligence specifications. While there is more evidence to support some of them than others (overall, there is overwhelming evidence of the P.C.'s negligence), each

specification in the marshaling instruction is supported by the record. Moreover, the district court's marshaling instruction was entirely appropriate; indeed, co-defendant Mercy agreed to nearly identical language for its marshaling instructions.

Second, the Mityvac vacuum package insert was properly admitted under the residual hearsay exception and could have been admitted under others. Package inserts, which are regulated by the FDA, are thought to have such a high indicia of reliability that courts in some states admit them as *prima facie* evidence of the standard of care and the majority of courts at least allow them to be introduced with expert testimony to establish the standard of care. So the P.C.'s complaints are unfounded. And even if it were somehow error to admit the package insert, the P.C. was not prejudiced by the admission—which is demonstrated by the P.C.'s own theory of the case.

Third, there is no reversible error related to any alleged attorney misconduct. The P.C. overstates its claims (e.g., counsel did not, in fact, call Dr. Goodman a liar) and understates the overwhelming evidence of the P.C.'s negligence and corresponding damages. For the P.C. to claim that "a different result would have been *probable* in the absence of" any alleged misconduct[3]—which is the standard for a new trial—the P.C. must set aside the days and days

[3] *Loehr v. Mettille*, 806 N.W.2d 270, 277 (Iowa 2011).

of damaging testimony and pages of medical records from S.K.'s treating physicians at one of the nation's leading children's hospitals. The district court made clear during and after trial that there was no sign of prejudice, even noting that the P.C. requested mistrials "at the slightest provocation" and that the P.C. was "afforded a fair trial at each and every stage of the proceedings." App. 188-89.

Finally, the P.C. is wrong to say the district court erred by entering a judgment against the P.C. for the entire economic-damage award. The Iowa Comparative Fault Act makes a party who is more than 50% at fault jointly and severally liable for economic damages, which is what happened here. While the Conservator has released co-defendant Mercy Hospital for claims that were ***not*** tried to the jury and has agreed not to seek further collection against Mercy, that does not affect the P.C.'s joint and several liability and does not limit the P.C.'s right of contribution against Mercy.

The verdict is large, but it is completely explained and supported by the record and the P.C.'s all-or-nothing trial strategy. The district court properly exercised its discretion at every turn of this hard-fought trial, and this Court should affirm.

ARGUMENT

I. The damage award is not only fully supported by the evidence; it was the only logical result of how the P.C. chose to try its case.

A. Standard of Review

The "determination of damages is peculiarly within the discretion of the jury," so this Court comes "to a claim of an excessive award disinclined to disturb the jury's verdict." *Hoffmann v. Clark*, 975 N.W.2d 656, 665 (Iowa 2022). The standard is high, so this Court should not intervene in the jury's determination unless it finds that the award was "flagrantly excessive or inadequate, so out of reason as to shock the conscience or sense of justice, a result of passion, prejudice or other ulterior motive, or lacking in evidentiary support." *Id.* (quotations omitted).

Notably, though, "support in the evidence" is the "most important" of these "enumerated tests," such that "[i]f the verdict has support in the evidence the other [tests] will hardly arise." *Rees v. O'Malley*, 461 N.W.2d 833, 839 (Iowa 1990). And when reviewing whether there is evidentiary support, this Court "view[s] the evidence in the light most favorable to the verdict and need only consider the evidence favorable to the plaintiff whether contradicted or not." *Id.*

The district court upheld the verdict, rejecting the P.C.'s arguments and stating that it "cannot find that any of the criteria for reducing the damages has been met." App. 189. Because "the trial court had the advantage of seeing and

hearing the evidence," that ruling is reviewed for an abuse of discretion. *Hoffman*, 975 N.W.2d at 666.

B. The economic damage award was overwhelmingly supported by the evidence.

The damage award would not be "shocking" in the least to anyone who sat through trial or reviewed the transcript. In fact, the verdict was the only logical result of the evidence and the defendants' trial strategy.

In opening statement, counsel for codefendant Mercy Hospital set the stage for how the trial would play out with respect to damages. "And look," she told the jury, "to say there's two sides to the story at this point is kind of an understatement of the century, you know this." 3/3 Tr. 115:19-25. "But it's going to be your job to figure that out. You've been primed for the $50 million [of economic damages] they've talked about. That's a really big number. And you've heard from us, **the zero**. We know there's a whole lot in between those two things." *Id.* (emphasis added).

There is indeed a whole lot between $50 million and $0—but neither the P.C. nor Mercy ever offered the jury a basis to find in between them. Zero is where they chose to stay, but zero is ***not*** what the evidence showed and not what the jury believed. These "two widely, vastly different stories," as Mercy's counsel

described them in closing argument,[4] make it impossible to say that the verdict was a product of anything other than the evidence.

The Conservator introduced evidence, through neurological experts and the medical records at the University of Iowa children's hospital, that S.K. had two significant brain injuries: (1) an ischemic injury caused by the loss of blood flow and oxygen to the brain (i.e., HIE), and (2) a traumatic injury, indicated by the fracture to S.K.'s skull and hemorrhages (brain bleeds).[5] These injuries, according to multiple experts, left S.K. with significant and debilitating physical and mental disabilities.

The ischemic injury, specifically, caused significant cognitive impairment, such that S.K. will never be independent. 3/7 Tr. 50:15-21. He will not "be able to function without a [lifetime] support system" that is "social and economic." *Id.* He will never work and will need 24/7 attendant care. *Id.* 51:5-14. The cost of that significant care, along with the cost of physical, occupational, and speech therapy and other medical expenses, totals over $42.2 million 3/10 102:8-25, 110:8-17; App. 335-340. And lost wages—assuming the baseline of someone

[4] 3/18 Tr. 123:21-25.

[5] 3/3 Tr. 133; 3/4 Tr. 27-28, 38, 62; 3/7 Tr. 20-21, 24.

who receives a college degree but not a graduate degree—are $11.7 million.[6] *Id.* Thus, the Conservator's evidence demonstrated the need for nearly $54 million in economic damages alone, which is to say nothing of the loss of function of the mind and body and pain and suffering (which are addressed below).

Because this Court must view "the evidence in the light most favorable to the verdict and need *only* consider the evidence favorable to the plaintiff whether contradicted or not," *Rees* 461 N.W.2d at 839, it is clear the economic damages are not excessive and not the result of passion or prejudice. But when considering the P.C.'s position on damages—that they are $0, regardless of causation—it becomes obvious why the jury landed where it did.

The P.C. called one expert witness to opine on S.K.'s future prognosis, Dr. Leon Epstein. 3/17 Tr. 6-89. Dr. Epstein testified that although S.K. did indeed have a traumatic brain injury that caused his cerebral palsy and other physical ailments, it was his opinion that these traumatic injuries—because they occurred to just one side of S.K.'s brain—would not lead to ***any*** cognitive dysfunction. 3/17 Tr. 24:24-25:17. Dr. Epstein therefore testified that S.K. would be "cognitively normal"—that he will graduate high school, go to college and even graduate school, if he wants. 3/17 Tr. 40:17-25. Dr. Epstein also told

[6] The Conservator's expert testified that the lifetime earnings of someone with a graduate degree are $13.7 million. 3/10 Tr. 102:14-17. All amounts were reduced to present value. *Id.* at 102:18-25.

the jury that S.K. "will be able to do a job just like basically anybody else in this courtroom, including me." *Id.* 41:2-3. When asked whether that means he believes S.K. can be a college professor, Dr. Epstein said "yes." *Id.* 54:5-7.

To understand how remarkable that position is, it's important to understand what the jury had heard, seen, and witnessed up to that point of the trial. Because it was more than just a battle of opposing experts. The idea that S.K. is and will be cognitively normal was so contrary to the evidence that it had to be nothing short of shocking for the jury to hear Dr. Epstein say it.

First, the jury had seen S.K. in person and watched a day-in-the-life video that was admitted as Plaintiff's Exhibit 18. The Court can view the video itself, but suffice it to say it belies Dr. Epstein's contention that S.K. has no cognitive issues. Reasonable people may disagree on the extent of impairments, but to say there are none was not credible.

Second, the jury had heard that S.K.'s treating neurologist believed S.K. had already fallen behind. Shortly before trial, Dr. Zhorne at the University of Iowa remarked that although S.K. is making progress, he "remains behind in all domains including speech." 3/17 Tr. 15-17. She referred him to ChildServe for additional treatment. 3/17 Tr. 50:10-51:12.

Third, Dr. Epstein conceded that even a mild hypoxic ischemic injury (HIE) would cause cognitive impairment that "will impact your entire life" because HIE is "obviously going to affect the entire brain." 3/17 Tr. 25:3-11.

Thus, Dr. Epstein's opinion that S.K. would be cognitively normal depended on his underlying belief that S.K. did not suffer HIE. But that opinion was contrary to the diagnosis of S.K.'s neurologists at the University of Iowa children's hospital[7] and the opinion of the P.C.'s *own* causation expert, Dr. Jeffrey Boyle.

Dr. Boyle testified that S.K. did suffer from HIE. 3/14 Tr. 159:21-24. And while he believed the injury occurred in the hours after S.K.'s birth, not during labor, the issue of when S.K. had HIE is irrelevant to whether S.K. is cognitively impaired. Again, Dr. Epstein said that a person with even a mild case of HIE will suffer from cognitive impairment but that S.K. did not have HIE; and the P.C.'s causation expert, Dr. Boyle, said that S.K. *did* have HIE.

In the face of all this, it would seem logical for the P.C. to call its own expert to rebut the Conservator's lifecare plan, if there was anything to rebut. Instead, the P.C. hinged its entire damage defense on the credibility of Dr. Epstein's opinion that S.K. suffered from no cognitive impairment and that damages were zero.

During closing argument—likely realizing it had been a mistake to claim there was nothing cognitively wrong with S.K. and that he would need no assistance whatsoever—the P.C. tried to suggest that there are alternative sources

[7] *See, e.g.,* App. 203 (University of Iowa neurologist noting, six days after S.K.'s birth that "[S.K.] underwent a brain MRI yesterday that showed bilateral cerebral hemispheric acute ischemic injury in the watershed distribution.")

of government assistance for S.K.'s brain injury. 3/18/22 105:24-24. The P.C.'s counsel told the jury that Kathleen Kromphardt "filled out and applied for the [Medicaid] Brain Injury Waiver shortly after [S.K.] was born" but that "you know, ***I think*** [she] either forgot about it or decided not to follow up." 3/18/22 105:24-24 (emphasis added). Putting aside counsel's speculation and expression of what she thinks—something the P.C. complains about when it comes to the Conservator's counsel—there is virtually no evidence in the record about what the Brain Injury Waiver program is, what it covers, or whether S.K. would qualify for it. The P.C. never called a witness to discuss it.

The P.C.'s counsel attempted to cross-examine multiple witnesses about the Brain Injury Waiver program, including Kathleen, but those witnesses did not know exactly what the program did or what it might provide. When the P.C.'s counsel asked the Conservator's damage expert Dr. Yarkony whether he was "familiar with the Iowa Department of Human Services Brain Injury Waiver Program," Dr. Yarkony testified that he was not. 3/9/22 100:6-9. P.C.'s counsel continued to examine Dr. Yarkony based on hypotheticals of what that program could be (*Id.* 100:9–102:18), but the P.C. never introduced evidence to support those hypotheticals.

The P.C.'s counsel also asked the Conservator's economist, Dr. Thomson, if he was familiar with the Brain Injury Waiver program. He said he was, and the sole testimony he provided on the subject—and thus the only evidence in the

record on this issue—is that the program's benefits are "[v]ery limited on caregiving," with no coverage for caretaking costs and overnight costs. 3/10/22 141:14-6. When the P.C.'s counsel asked Dr. Thomson to reaffirm he understood the waiver program to be "very limited," Dr. Thomson said that he had a copy in his file, at which point the P.C.'s counsel abruptly ended cross-examination. *Id.* 142:4-5.

The P.C.'s counsel also asked Kathleen three transcript pages worth of questions about the Brain Injury Waiver program, attempting to inject the issue into evidence by providing hypotheticals about what it might do. 3/11 Tr. 152-55. But Kathleen repeatedly said that she "had no idea"—that she was told about the program "in the NICU" but she and her husband "were not in a place to be taking in that kind of information," so she "probably filled out the paperwork but [] know[s] nothing about it." *Id.* Eventually, after repeating multiple times that she knew nothing about the program, the court sustained an objection and the P.C.'s counsel moved on. *Id.* 155:1-18.

As Mercy's counsel foreshadowed in opening statement, there was indeed a wide gap between the $54 million of economic damage requested by the Conservator and the "zero" put up by the P.C. and Mercy. And neither defendant gave the jury a basis to land anywhere in between. So, as Mercy's counsel

described it in closing, the jury was left to choose between "two wildly, vastly different stories":[8]

On the defendants' side, there was Dr. Epstein. And that's it. The P.C.'s entire basis for claiming zero damages hinged on his opinion that S.K. did not have HIE and is cognitively normal.

On the Conservator's side, there were three testifying experts (including the 30-year chief of neurology at the Yale University of Medicine who is also the past-president of the American Society of Neuroradiology[9]), there was the diagnosis of S.K.'s treating neurologists at the University of Iowa children's hospital, and there was the testimony of the P.C.'s *own expert*, Dr. Boyle, who opined that S.K. did have HIE.

In its 80-page brief, the P.C. ignores all of this. With nothing but hyperbole and its *ipse dixit*, the P.C. claims that the verdict is "shocking," "out of reason," "unprecedented," and "clearly excessive." But it wasn't. It was the natural consequence of the evidence and the case presented to the jury.

[8] 3/18 Tr. 123:21-25.

[9] App. 275, CV of Dr. Gordon Sze; 3/8 Tr. 23-24.

C. The jury's award for loss of function of mind and body and pain and suffering is consistent with the jury's award of economic damages, supported by the evidence, and within the jury's discretion.

The P.C. does not separately address the economic and noneconomic damage awards; instead, it lumps them together, urging this court to order a new trial based on the conclusory claim that the "nearly $100 million verdict is excessive and resulted from passion or prejudice." (P.C. Br. 73).

We have chosen to address the damage awards separately, however, because the analysis of the economic damages—which are by definition based on objective, concrete evidence—puts the hard-to-value noneconomic damages in context. As explained above, the evidence supporting the economic damage award demonstrates that the jury's verdict was not only free from passion and prejudice, it was the only logical result of the evidence and the P.C.'s all-or-nothing approach. With that context, and when reviewing the jury's finding on noneconomic damages under the proper standard of review, it becomes equally clear that the noneconomic award was also based on the evidence and the jury's sound judgment—with *judgment* being the key term.

Noneconomic damages like loss of function of mind and are "highly subjective" and "not easily calculated in economic terms," *Frazier v. Iowa Beef Processors, Inc.*, 200 F.3d 1190, 1193 (8th Cir. 2000), which is why this Court has said that the "the jury [is] in the best position to judge the credibility of the

witnesses and to *make the judgment call* about what the noneconomic elements of damages were worth." *Matthess v. State Farm Mut. Auto. Ins. Co.*, 521 N.W.2d 699, 704 (Iowa 1994). Indeed, "[t]hat is exactly what juries are for," which is why the Court "should not set aside a verdict simply because [it] might have reached a different conclusion." *Id.*

As discussed above, the jury's award of *economic* damages demonstrates that S.K.'s injuries are severe—severe enough that he will require 24/7 care for the rest of his life, will never be socially or economically independent, and will never have the cognitive ability to hold a job. S.K. will also struggle to sleep through the night, (3/9 Tr. 52:9-12), will be unable to converse with children his own age, (*id.* 28:19-21), will struggle with behavioral issues, (*id.* 29:3-9), will have problems with his joints and will likely need surgery for his hips and feet, (3/11 Tr. 80:19-23), will need surgery to replace the shunt in his brain, (3/7 Tr. 54:20-55:3), and will need continuing therapy, (*id.* 50:5-23). In almost every way, S.K. will struggle his entire life, and those struggles began on day one.

Again, the P.C. does not address any of this. Instead, it relies on a comparison to verdicts in other cases, even though this Court has already said that "[i]n determining whether the damage award is excessive, we must abide by the principle that each case depends upon its own facts, and precedents are of little value." *Rees*, 461 N.W.2d at 839.

Even more strange, the P.C. relies in part on cases that are no comparison to this one. Cases like *Stanley v. Paulsen* (cited at P.C. Br. 71), where the jury awarded $1,424,467 in noneconomic damages to a child who suffered a disability to his arm. That injury is so far afield from what S.K. has and will suffer that there is virtually no benefit to citing the case; if anything, that verdict undercuts the P.C.'s argument. If nearly $1.5 million in noneconomic damages is a reasonable award for a child who suffers a physical disability to his arm, then it's surely reasonable to award 30 times that amount to a child who, among other things, has significant and permanent brain damage such that he will require 24/7 care for the rest of his life and who has physical disabilities that make it extremely difficult for him to even walk.

There are other examples like that. In *Nicholson v. Biomet, Inc.*, 537 F. Supp. 3d 990, 1027 (N.D. Iowa 2021), *aff'd*, 46 F.4th 757 (8th Cir. 2022), an Iowa jury awarded compensatory damages of $1,050,000 to an older Iowan who had a defective artificial hip implant and had to have a "revision surgery" to replace it. Like *Stanley*, the injuries in *Nicholson* were nowhere near the category of the injuries that S.K. suffered and will suffer. But unlike *Stanley*, the plaintiff in *Nicholson* was injured as an older adult, not as newborn baby, meaning the plaintiff did not have 70+ years of pain, suffering and mental anguish ahead of them like S.K. Yet, in *Nocholson* the district court upheld the award that exceeded $1 million.

Similarly, in *Gonzalez v. United States*, 681 F.3d 949 (8th Cir. 2012) the Eighth Circuit affirmed an $813,000 noneconomic award to a prisoner who suffered a broken ankle. Because "awards for pain and suffering are highly subjective," the court explained that appellate judges should not "substitute their 'highly subjective' valuation" unless the award is so extreme as to fall outside [the factfinder's] 'enormous' range of discretion." *Id.* at 953 (Colloton, J.).

If there is any value to comparing the verdict here to the verdicts in other cases—an exercise fraught with difficulty because of the inability to review the entire record—then the Court should not limit its review to Iowa cases, especially since so many settle before trial.

To that end, on May 17, 2022, a Minnesota jury in federal court awarded noneconomic damages of $110 million to a plaintiff who was severely injured because of medical malpractice. App. 176-77.

Also in May 2022, the New Mexico Supreme Court affirmed a $165 million award to four plaintiffs, with most of the damages being noneconomic. *Morga v. FedEx Ground Package Sys., Inc.*, 512 P.3d 774 (N.M. 2022). Explaining that other jury verdicts are of little to no value "because the propriety of the amount of the damages awarded must be determined from the evidence in the case under consideration," the court rejected the defendant's claim that the award—which was the largest in state history—was excessive. *Id.* at 783-85. The "valuation of noneconomic damages is an inexact undertaking at best," the court

explained, so "there can be no standard fixed by law for measuring the value of noneconomic damages." *Id.* Instead, the Court reasoned that it must be left to the sound judgment of the jury, especially when that judgment has been reviewed and upheld by the district court: "When the jury makes a determination and the district court approves, the amount awarded in dollars stands in the *strongest position known in the law*." *Id.* at 783 (emphasis added).

In post-trial briefing, the Conservator highlighted other verdicts where juries awarded large damages in cases involving mental and physical injuries caused during labor. App. 135-177. Those cases, like the ones cited by the P.C., depend on their own facts and are necessarily reflective of the entire record, but at the very least they show that the award here does not "shock the conscience." *See also Gen. Motors Corp. v. Burry,* 203 S.W.3d 514, 551–52 (Tex. App. 2006) (affirming $15 million noneconomic damage award, which is $22.8 adjusted for inflation).

In ruling on the P.C.'s post-trial motion, the district court said that it was "apparent" that the jury "found the Plaintiff's evidence and argument regarding damages to be more persuasive than the Defendants' evidence and argument for damages." App. 189. The jury then weighed that evidence and exercised its judgment to measure the unmeasurable: the value of S.K.'s loss of function of his mind and body and his lifetime pain and suffering. The district court, having witnessed the same evidence at trial, concluded that the "damage award was

supported by the evidence in the record and should not be reduced." *Id.* There is no indication that the district court abused its discretion; its ruling should be affirmed.

II. The specifications of negligence the district court submitted to the jury are supported by substantial evidence.

A. Standard of Review

The P.C. claims that three of the negligence specifications in the marshaling instruction were not supported by the record and that the district court erred in submitting them to the jury. This Court reviews "a claim that the district court gave an instruction not supported by the evidence for correction of errors at law," but the trial court's ruling must be affirmed so long as there is substantial evidence to support the challenged specifications. *Asher v. OB-Gyn Specialists, P.C.*, 846 N.W.2d 492, 496 (Iowa 2014).

When examining the record, the Court must "afford the nonmovant every legitimate inference that can reasonably be drawn from the evidence, *Top of Iowa Co-op. v. Sime Farms, Inc.*, 608 N.W.2d 454, 466 (Iowa 2000), giving it "the most favorable construction it will bear in favor of supporting the instruction." *Asher*, 846 N.W.2d at 496-97.

B. The blood-pressure specification was supported by substantial evidence.

The P.C. first challenges the sufficiency of the evidence on whether Dr. Goodman was negligent in "failing to administer medication and treat Mrs.

Kromphardt's low blood pressures after the epidural." According to the P.C., "there is no evidence that Dr. Goodman breached the standard of care on that issue" because "Plaintiff's evidence was that the nurses (not Dr. Goodman) were negligent in failing to treat the blood pressure." (P.C. Br. 24).

That is not true. The evidence is that *both* Dr. Goodman and the nurses were negligent. The anesthesiologist ordered that Kathleen was to receive medication if her blood pressure dropped below a certain level, and it is undisputed her blood pressure went below that level multiple times. 3/16 Tr. 211:8-12. As one of the Conservator's experts testified, "you have to give the medicine to bring her blood pressure up." 3/3 Tr. 152:1:25.

The nurses were negligent for not providing the medication or calling the doctor but, as the attending OB, Dr. Goodman was the "primary individual" charged with the care of Kathleen and her baby. 3/3. Tr. 136:15-6. She was, to put it "in plain English, who's calling the shots." *Id.* On cross-examination, when Dr. Goodman was asked whether she knew that Kathleen's blood pressure had dropped below the safe level, Dr. Goodman replied: "I know that now." 3/16 Tr. 211:8-12. Dr. Goodman also admitted that she knows that "low blood pressure decreases perfusion to the baby." *Id.* 212:15-20.

The implication of the P.C.'s argument is that because Dr. Goodman is out of the room, and because the nurse did not alert her to the drop in Kathleen's blood pressure, Dr. Goodman could not have been negligent. "That's not my

job" is certainly an argument the P.C. was free to make, but it is also one that the jury, based on the evidence, was free to reject. Again, Dr. Goodman was in charge. And the jury heard multiple experts testify that Dr. Goodman should have been in the room during this time, and it heard that Kathleen should have been given blood pressure medication. That is more than sufficient evidence to support giving specification (e) to the jury.

C. The specification on failing to call a back-up physician was supported by substantial evidence.

Negligence specification (a) required that the Conservator prove Dr. Goodman was negligent in failing to call a backup physician. According to the P.C., the district court should not have submitted this specification to the jury because the Conservator did not elicit testimony from any of these "known" backup physicians that "they would have delivered SK earlier by C-section."

That is not what was required. The Conservator put on evidence that, under the appropriate standard of care, S.K. should have been delivered by C-Section well before 3:45 p.m. 3/3 Tr. 159:5-9. Calling a back-up physician allows that to occur, since Dr. Goodman apparently did not want to leave her other patients. 3/10 36:14-37:16. To make a claim that Dr. Goodman was negligent for failing to call in backup, the Conservator was not required to solicit an admission from Dr. Goodman's colleagues that they would have indeed met the standard of care had they been called, because meeting the standard of care is

what is expected. At the very least, calling a backup physician would have provided the *opportunity* for someone to meet the standard of care and for S.K. not to suffer brain damage. As one expert testified, "*someone* had to be called to do a C-section." 3/10 Tr. 36:14. Of course, if that backup physician—whether a member of the P.C. or not—had also failed to deliver S.K. by C-Section as required by the standard of care, then the resulting lawsuit would be the same. The P.C. would still be to blame; there would just be another doctor in the mix.

Making all reasonable inferences available in the record, there is clearly sufficient evidence to submit specification (a).

D. There was sufficient evidence to submit a specification on Dr. Goodman abandoning Kathleen and her baby.

Multiple experts testified that it was below the standard of care for Dr. Goodman to leave Kathleen and S.K. from 3:00-4:00 p.m.[10] Indeed, one of the Conservator's experts testified that by 3:30 the situation was "an emergency" and that Dr. Goodman needed to be in the room. 3/4 Tr. 84:2-21.

The P.C. nevertheless claims the district court erred by asking the jury whether the Conservator had proven that Dr. Goodman "abandon[ed] Mr. Kromphardt and S.K." during that one-hour period because "abandonment" is

[10] 3/10 Tr. 35:13-18; 3/3 Tr. 159:3-9; 3/4 27:18-24.

a separate legal claim that requires "different proof" from what the Conservator offered here.

That is half right; Iowa does recognize a specialized medical-malpractice claim called "abandonment," which is when a doctor terminates the patient-physician relationship without sufficient time for the patient to "procure another physician." *See Manno v. McIntosh*, 519 N.W.2d 815, 820-21 (Iowa Ct. App. 1994) (cited at P.C. Br. 26). But the Conservator was not bringing an "abandonment claim," and the district court was not instructing the jury on one.

Instead, the district court was giving a label to the Conservator's claim that Dr. Goodman breached the standard of care by leaving Kathleen for an hour while S.K. was in an emergency. In other words, "abandoning" was a descriptor of the Conservator's claim of negligence; it was not the name of a specific legal theory. *See Glenn v. Carlstrom*, 556 N.W.2d 800, 803 (Iowa 1996) (recognizing that a physician's medical judgments and failure to use diligence may not support a formal abandonment claim but may state a claim for negligence).

To that end, there was substantial evidence to show that Dr. Goodman breached the standard of care by leaving S.K. "between 3 and 4pm." The district court was correct to include the specification.

III. The language of the negligence specifications, which the Conservator had to prove, correctly articulated plaintiff's alleged claims of negligence and were not prejudicial error.

A. Standard of Review

The P.C. lumps its sufficiency-of-the evidence arguments together with its arguments about the precise language the district court used in drafting the negligence specifications. Those are different arguments, with different standards.

For starters, as long as the district court does not misstate the law, it has "rather broad discretion in the language that may be chosen to convey a particular idea to the jury." *State v. Davis*, 975 N.W.2d 1, 10 (Iowa 2022). And even then, if there is error on how the instructions were crafted, this Court will not reverse "unless the error is prejudicial to a party." *Eisenhauer ex rel. T.D. v. Henry Cnty. Health Ctr.*, 935 N.W.2d 1, 16 (Iowa 2019).

B. The instructions appropriately stated the Conservator's specifications of negligence.

The P.C. makes multiple arguments about the language the district court used to describe the Conservator's theories of negligence in the marshaling instruction. As support for those arguments, the P.C. strings together quotes from numerous cases that say jury instructions should not "set apart" or "highlight" certain evidence, should not "unduly emphasize any particular theory," and should "avoid arguing the case for either side." (P.C. Br. 27, 30).

All of that is true about general instructions, but the problem is that the specifications of negligence are not the typical, neutral instructions: they are, by definition, the *plaintiff's* allegations of negligence against the defendant that the *plaintiff* must prove. That is why the marshaling instruction begins by saying that the "Plaintiff must *prove*" that Dr. Goodman "acted in one or more of the following ways" and "further that acting in such a way or ways was negligent." (Instruction 18.). That is also why none of the cases the P.C. quotes on pages 27-30 of its brief relate to the specifications of negligence in a marshaling instruction.

Take *Alcala v. Marriott International Inc.*, 880 N.W.2d 699, 710 (Iowa 2016), quoted on page 30 of the P.C.'s brief for the proposition that the "district court erred by taking one side." In that case, a jury instruction (which was *not* the marshaling instruction) listed multiple industry safety standards and then instructed the jurors that they "may consider a violation of these standards as evidence of negligence." *Id.* That was error, because the defense's expert testified that one of those of standards was not applicable, and therefore it was for the plaintiff to *prove* that the industry standard did indeed provide for the standard of care and that a violation of that standard established negligence. *Id.* In other words, the industry standard should have been written into the negligence specifications that the plaintiff was required to prove.

In this case, the P.C. is complaining that the Conservator's alleged claims of negligence emphasized the Conservator's alleged claims of negligence—which is *exactly* what specifications do. In fact, it is error for a court *not* to instruct the jury on any specification of negligence that the plaintiff puts forward that is supported by sufficient evidence. *Bigalk v. Bigalk*, 540 N.W.2d 247, 250 (Iowa 1995). To be sure, district courts have some latitude to combine specifications (*see Eisenhauer*, 935 N.W.2d at 15) but the purpose of the negligence specifications is to state how the plaintiff claims the defendant was negligent. In other words, they not only emphasize the plaintiff's case—they *are* the plaintiff's case.

In short, the district court was well within its "broad discretion" to craft the specifications of negligence the Conservator claimed. Indeed, the marshaling instruction against Mercy—which the P.C. also complains about—was similar and yet Mercy told the district court that it agreed to the language. 3/17 Tr. 138:5-139:10. Thus, the P.C.'s arguments are without merit.

The P.C. also contends that two of the negligence specifications are duplicative because they both discuss using the vacuum and the forceps. The specifications are similar, to be sure, but even if that duplicity was error, it was not prejudicial. In *Kellar v. Peoples Nat. Gas Co., a Div. of InterNorth*, 352 N.W.2d 688, 692 (Iowa Ct. App. 1984), one specification alleged "that the defendant was negligent in failing 'to warn of the existence of the gas line or riser exposed above the ground,'" while another specification claimed negligence for "failure to mark,

warn or inform others of the existence or presence of the line or riser." *Id.* "The similarity between these two subparagraphs cannot be denied," the court said, but it could not see how the instructions "so unduly emphasize [the plaintiff's] theory of negligence that reversible error ha[d] been committed." *Id.*

The same is true here. The jury knew full well what the Conservator was claiming about the sequential use of the forceps and the vacuum; it's difficult to conceive how any duplication on those specifications would have confused the jury and prejudiced the P.C. *See Thavenet v. Davis*, 589 N.W.2d 233, 236 (Iowa 1999) ("Instructions must be considered as a whole, and if the jury has not been misled there is no reversible error.") And as explained in the next section (*infra* 49), the jury necessarily found that Dr. Goodman's negligence injured S.K. even *before* she used the forceps or the vacuum, so the inclusion of the two instructions on that topic cannot be prejudicial.

The P.C.'s complaints about the specifications lack merit; the language was within the district court's discretion and any error on duplicative instructions was harmless.

IV. The district court properly admitted the vacuum package insert.

A. The package insert was properly admitted under the residual exception.

The Mityvac vacuum that Dr. Goodman used to deliver S.K. contained a label, or "package insert," which warned users when it should not be used. That

warning, known as a "contraindication," stated: "Do not initiate vacuum if any of the following conditions exist: … Failed vacuum or forceps attempt." App. 342. The district court admitted the package insert under the residual hearsay exception, Rule 5.807, and was correct to do so.

The hearsay exceptions exist because there are certain categories of relevant, out-of-court statements that have such a high indicia of reliability that they should be admitted, even though the declarant is not on the witness stand. But not all such "trustworthy" statements fit neatly into one of the enumerated exceptions, so the Iowa Rules of Evidence (like their federal counterpart) contain a "residual exception" for other statements that are "supported by sufficient guarantees of trustworthiness" and "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 warning in a package insert, which the manufacturer must submit to and obtain approval from the FDA,[11] is exactly the type of trustworthy statement

[11] *See* 21 C.F.R. § 801.109(c) (requiring manufacturers of a medical device to include with the device "labeling on or within the package from which the device is to be dispensed" with any "information for use…and . . . contraindications" under which physicians can "use the device safely and for the purpose for which it is intended"); 21 C.F.R. § 807.87(e); 21 C.F.R. § 814.20 (requiring manufacturers to submit labels for approval); *Huck v. Wyeth, Inc.*, 850 N.W.2d 353, 357 (Iowa 2014) (explaining the FDA approval process for drug labels and noting that the "FDA must approve the accuracy and adequacy" of the label);

that the hearsay exceptions contemplate. As one commentator observed, these warning labels are *more* trustworthy than the medical journals that are admitted under the treatise hearsay exception. "The author of the package insert—the manufacturer—must provide accurate and complete information for the safe use of the drug both to avoid potential civil liability and to comply with federal law." Vicki E. Lawrence. *Drug Manufacturers' Recommendations and the Common Knowledge Rule to Establish Medical Malpractice*, 63 Neb. L. Rev. 859, 870 (1984) ("*Drug Manufacturers' Recommendations*"). Indeed, the "supervisory role of the FDA ensures the trustworthiness of the drug manufacturer's recommendation and arguably serves as a substitute for cross-examination," which makes it "more trustworthy than most medical books." *Id.*

That position—that package inserts are more trustworthy than medical journals—was borne out here. Through its expert, Dr. Boyle, the P.C. introduced several medical journals that discuss the risks associated with using both forceps and a vacuum in the same delivery, but do not outright prohibit such a practice. 3/14 Tr. 164:6-166:22. On cross-examination, Dr. Boyle admitted that medical journals "publish all kinds of articles showing both sides, different—different opinions, different data sets." *Id.* 165:19:21. In other words, there is always a little

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Duvall v. Bristol-Myers-Squibb Co., 65 F.3d 392, 401 (4th Cir. 1995) (explaining the same process for medical devices).

something for everyone, yet these medical journals are freely introduced into evidence to show the truth of the matter asserted; indeed, they were discussed at length in this case (*infra* 48). Surely a warning label that is written by the manufacturer and requires FDA approval is at least as reliable.

The majority of state courts certainly think so. A "number of courts hold that" the "instructions supplied by the manufacturers of drugs or devices" are admissible as *prima facie* evidence of the standard of care, and others hold that these labels are admissible as long as the plaintiff also introduces expert testimony on the standard of care (which was true here). *Thone v. Reg'l W. Med. Ctr.*, 745 N.W.2d 898, 903 (Neb. 2008) (citing cases).[12]

In *Reemer v. State*, 835 N.E.2d 1005, 1008 (Ind. 2005), the Indiana Supreme Court stated that if Indiana had a residual exception equivalent to Rule 807, then FDA-regulated drug labels would meet the test. But the Court held that these labels are still admissible under the market-reports exception—and it noted that this Court had already held as much. *Id.* (citing *State v. Heuser*, 661 N.W.2d 157, 165 (Iowa 2003) for the proposition that a "label from cold medicine box was offered under both the residual and market reports exceptions"). We address the

[12] *See also Richardson v. Miller*, 44 S.W.3d 1, 16 (Tenn. Ct. App. 2000) (citing additional cases, including *Mueller v. Mueller*, 221 N.W.2d 39, 43 (S.D. 1974) ("manufacturers' recommendations on the use of drugs are not only admissible but essential in determining the possible lack of care of a doctor")).

market-reports exception below, as the package insert was admissible on that basis too, but there is no need for this Court to go beyond the district court's decision under the residual exception.

The P.C. contends that the package insert cannot be admitted under the residual exception because it was not "superior to other available evidence"; we disagree, and so did the district court that heard that evidence. How a medical-device manufacturer tells physicians to use its product is incredibly probative of how the product should be used, and the introduction of the warning label is truly the only reasonable way to do it. Yes, the Conservator called experts who also said that forceps and vacuum should never be used sequentially, but the P.C.'s expert highlighted the probative value of the manufacturer's warning when he testified that it did not matter what the Conservator's experts said because, in his view, "the textbooks" and "the articles" and the American College of Obstetrics and Gynecology set the standard of care; he then explained what multiple medical journals said on the subject. 3/14 Tr. 161:25-162:3, 164:6-166:22.

Moreover, it is not reasonable for the Conservator to call a representative of the manufacturer who was responsible for the warning label, which is where the Court of Appeals went wrong in its unpublished decision in *Arnold v. Lee*, No. 05-0651, 2006 WL 1410161, *4 (Iowa Ct. App. 2006), when it said that the plaintiff "could have called a representative of the manufacturer to testify to its

own cautions and concerns." That is unrealistic, unnecessary, and defeats the very purpose of the residual exception.

Because the package insert is reliable and more probative than any other evidence on the subject of the manufacturer's warning, it was properly admitted under Rule 5.807.

B. The package insert could have been admitted under the market-reports exception.

There are often multiple hearsay exceptions that apply and, when it comes to such evidentiary issues, this Court can affirm based "on any valid alternative ground supported in the record." *State v. Smith, 876 N.W.2d 180*, 198 (Iowa 2016). To that end, the package insert could have been admitted under the market-reports exception and thus the district court's ruling can be affirmed on that basis too.

This Court has already held that drug labels, which follow the same regulatory construct as medical-device labels, are properly admitted under the hearsay exception for "'market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.'" *Heuser*, 661 N.W.2d at 163 (quoting Rule 5.803(17)). Indeed, as noted above, the Indiana Supreme Court relied on this Court's decision in *Heuser* in holding that a drug label is admissible under the market-report exception.

In *Heuser*, this Court found it relevant that over-the-counter drug labels—like medical-device labels—are highly regulated by federal and state law. "The applicable state and federal regulations suggest the cold medication labels are accurate,[] trustworthy" and "relied upon," the Court reasoned. *Id.* at 164-65. The same is true here, as a similar regulatory process applies and physicians "rely heavily on the PDR or package inserts in the practice of medicine"[13] Thus, the package insert could have been admitted under Rule 5.803(17), and the district court's decision can also be affirmed on that basis.

C. Even if the hearsay exceptions did not apply, there was no prejudice.

Even if no hearsay exception applies, the P.C. was not prejudiced by the package insert's admission.

First, the jury heard other evidence demonstrating that physicians should not use a vacuum after a failed forceps delivery. It heard, for example, that medical journals warn against it: that the American College of Obstetrics and Gynecology warns doctors that "[s]equential use of a vacuum extractor and forceps has been associated with increased rates of neonatal complications and should not routinely be performed." 3/14 Tr. 85:12-16. The jury heard that the American Journal of Obstetrics and Gynecology says that "sequential use of a

[13] *Drug Manufacturers' Recommendations*, Neb. L. Rev. at 870.

vacuum and forceps is associated with increased risk of both neonatal and maternal injury." *Id.* 164:22-165. It also heard that the European Journal of Obstetrics warns that "the use of sequential instruments significantly increases maternal and neonatal morbidity." *Id.* 165:24-166:6. With the introduction of these medical journals, it is hard to see how the P.C. was prejudiced by the introduction of the package-insert warning.

Also, there was no prejudice because of how the P.C. framed its defense and the way the jury awarded damages.

First, Dr. Goodman said she did not violate the package-insert warning against sequential use because, in her view, she did not actually use the forceps because they did not lock. 3/16 Tr. 187:11-18. In other words, Dr. Goodman's defense on this issue was to say there was no "failed forceps attempt" so the literal terms of the package-insert warning did not apply.

Second, based on the jury's award of economic damages for lifelong attendant care, the jury necessarily agreed that S.K. suffered severe cognitive damaged from HIE before Dr. Goodman even reached for the vacuum or the forceps. That, alone, shows there is no prejudice. Indeed, as explained above, the evidence that S.K. suffered HIE was overwhelming. *See State v. Skahill*, 966 N.W.2d 1, 15 (Iowa 2021) ("overwhelming evidence of the defendant's guilt" shows there is no prejudice from admission of hearsay and thus no retrial even when defendant's liberty is at issue).

Given the jury's resounding rejection of the P.C.'s factual defenses that were unrelated to the sequential use of forceps and the vacuum, there was no prejudice even if this Court were to be in the minority of courts to reject the admission of a package insert.

V. The district court did not abuse its discretion in denying the P.C.'s motions for mistrial and for a new trial.

A. Standard of Review

A district court's decision of whether to grant a new trial is "highly discretionary," *McGough v. Gabus*, 526 N.W.2d 328, 333 (Iowa 1995), and thus the Court gives "great deference to the district court's denial" of the motion. *Tibodeau v. CDI, LLC*, No. 16-0560, 902 N.W.2d 592, 2017 WL 2665107, at *4 (Iowa Ct. App. 2017) (McDonald, J.). That highly deferential standard of review is borne out by the fact that misconduct does not require retrial unless there was so much prejudice that "a different result would have been *probable* in the absence of misconduct," and the trial judge who viewed the whole trial is in the best position to determine what is probable. *Loehr v. Mettille*, 806 N.W.2d 270, 277 (Iowa 2011) (emphasis added).

The district court denied the P.C.'s motion for mistrial and its post-trial motion for a new trial, stating that "although there were numerous mistrials requested"—sometimes "at the slightest provocation" where "there had been no misconduct" at all—at no time was there "any misconduct resulting in the kind

of prejudice that would jeopardize the ability of the Court to provide a fair trial to all of the parties." App. 188-89. "[T[here was no prejudice to the Defendants," the district court found, "and the Defendants were afforded a fair trial at each and every stage in the proceedings." *Id.*

That ruling, reviewed in light of the district court's broad discretion, should be affirmed.

B. Counsel's statements did not amount to misconduct and, in any event, none of the complained-of statements would have led to a different result.

The Conservator's lead counsel irritated the P.C.'s counsel, that much is clear. At the end of the second day of the P.C.'s case-in-chief, the P.C.'s counsel rose to air his "dirty laundry," as he called it. 3/14 Tr. 223. The P.C.'s counsel told the court that he was "really not used to lawyers standing up" and that "in [his] eyes it's badgering when [Mr. Fieger's] standing up, raising his voice at a witness, cutting him off." *Id.* 223:7-16. The P.C.'s counsel asked the district court to tell Mr. Fieger to stop it—to remain at counsel's table because "it's distracting, it interrupts the flow of the witness, and it's intimidating." *Id.* The district court, which had denied a similar request before trial (App. 71), did not oblige.

That anecdote may seem minor but it's important to give color to what the P.C. means when it claims that Mr. Fieger "badgered" the witnesses and "ridiculed" the P.C. and its defense. It gives context for why the P.C. focuses more on Mr. Fieger than it does S.K. and his injuries. Because if standing up and

slowly walking during cross-examination is "badgering," if raising and changing the inflection of one's voice during cross-examination is "badgering," and if interrupting a hostile witness who goes beyond the scope of the question is "badgering,"[14] then badgering is nothing but zealous trial advocacy.

The district court—who saw and heard the same thing P.C.'s counsel did—had a different take. In the district court's view, the P.C.'s overheated characterizations were driven by animosity. This "was a fiercely contested trial and the attorneys all fought tirelessly for their clients," the court wrote in its post-trial order, but "[p]erhaps ferocity of the trial led to requests for a mistrial which ordinarily would not have been made." App. 189. At the close of trial, the district court observed that "interwoven in [the P.C.'s] arguments have been accusations about motivations and about what we think the other party is trying to do." 3/18 Tr. 161:13-20. And from "this position" on the bench, the court said, "it's apparent to me that when there are suspicions that others are motivated by one

[14] The day when the P.C.'s counsel rose to complain about Mr. Fieger's cross-examination style, Mr. Fieger did indeed interrupt one of the P.C.'s witnesses while he was speaking. This is one of the incidents the P.C. highlights in its brief as an example of Mr. Fieger's interruptions and "responding sarcastically to their answers." (P.C. Br. 51). The interruption occurred because Mr. Fieger asked a yes or no question and the witness gave a non-responsive narrative. When Mr. Fieger interrupted him, the P.C.'s counsel objected, and the district court properly overruled the objection, saying: "It is a yes or no question, so if you can answer the last question, we can move on to the next question." 3/15 Tr. 173:4-24. Later that day, a similar interruption occurred, the P.C. again objected, and the district court again overruled the objection. *Id.* 192:12-19.

thing or another, they can have an impact on how one views anything that is stated at any time whether it's on the record or not." *Id.*

With that in mind, we respond to the P.C.'s charge of "misconduct."

The P.C. starts with the accusation that Mr. Fieger called Dr. Goodman a liar during opening statement. (P.C. Br. 49). That is not true. Mr. Fieger told the jury that one of the Conservator's witnesses will "tell you straight out from the stand that [Dr. Goodman's] testimony under oath that she's used forceps a hundred times is patently false." 3/3 Tr. 36:9-11. That turned out to be wrong, and the Conservator's expert witness, Dr. Gubernick, told the jury so, saying that Mr. Fieger was mistaken; it was he (Dr. Gubernick) who had used forceps more than 100 times, not Dr. Goodman. 3/4 Tr. 110:19-111:6. But regardless of whether Mr. Fieger was wrong (which the jury heard loud and clear, so how can there be prejudice?), Mr. Fieger did *not* say that Dr. Goodman lied; he said that her alleged comment was "false." In virtually every trial, lawyers will necessarily say that an opposing party's witness was factually wrong about something; that is the nature of an adversarial trial. Whether that incorrect statement is based on a lie or a misunderstanding is a different question. Sometimes the line is thin, to be sure, but Mr. Fieger did not call Dr. Goodman a liar; if anything, the fact that Mr. Fieger was corrected on the record by his own witness would seem to only bolster the P.C.'s case.

The P.C. also complains that Mr. Fieger accused Dr. Goodman of changing her story about when she first felt S.K.'s cracked skull. (P.C. Br. 49). But Dr. Goodman's story did change, or at least that was a fair characterization of the evidence. Her note from the day of delivery states (or at least suggests) that she felt the fracture after she put the forceps on S.K.'s skull (3/14 144:13-22); in her deposition she said she did not know, (*id.* 151:9-18); and at trial she said that it was probably before. *Id.* To say that her story changed was well within the range of permissible argument given the evidence.

The P.C. spends a significant amount of time on Mr. Fieger's closing argument, claiming that he was melodramatic and violated the golden rule. The P.C. claims, for example, that it was wrong for Mr. Fieger to talk about the "loss of hope" and what "make[s] life worth living"—by telling the jury that "all that was taken" from S.K. and "that's what you measure." (P.C. Br. 59, quoting 3/18 Tr. 62-63). Melodramatic as it may be, Mr. Fieger was not wrong—actually, that is what pain and suffering is. The P.C. just did not want him to say it.

"One component of pain and suffering is loss of enjoyment of life," (*Pexa v. Auto Owners Ins. Co.*, 686 N.W.2d 150, 158 (Iowa 2004)) and what is the enjoyment of life if not the things that Mr. Fieger highlighted to the jury? He spoke of the "hope of finding meaning in life, in work, in love. The hope of falling in love. The hope of having children." 3/18 Tr. 63:2-11. Because of his significant brain damage, S.K. "doesn't have that," Mr. Fieger told the jury. And

given what the Conservator's expert witnesses said about S.K.'s mental condition, he was right—or at least well within his right as an advocate to make the argument to the jury.

What the P.C. is saying, in effect, is that the Conservator's counsel should have just asked the jury to award pain and suffering damages in the most benign, cold way possible. That counsel was prohibited from articulating what the "enjoyment of life" is. But that cannot be the rule, because that is not the law.

Relatedly, the P.C. claims that Mr. Fieger made "golden-rule arguments" because he spoke in terms of "the things ***we*** all look forward to, our hopes, our dreams, our aspirations." (P.C. Br. 59, quoting 3/18 Tr. 57-58 (emphasis added)). "A 'golden rule' argument is where counsel asks the jurors to put themselves in the place of a party or victim." *Tibodeau*, 2017 WL 2665107 at *4. But speaking about what "we ***all*** look forward to"—in other words, what ***every*** human being values—is not a golden-rule argument. It cannot be, lest the golden rule limit the jury's ability to properly measure noneconomic damages. Again, the measure of damages includes "loss of enjoyment of life," and the life the jury is being asked to consider is of a child who has been severely brain damaged since birth. How else is the jury supposed to value that "loss of enjoyment" but for considering the things that *everyone* values but that this child will never experience?

The P.C. also complains that Mr. Fieger disparaged the P.C.'s defenses, calling them, among other things, "nonsensical" and "ridiculous." The P.C.

argues, for example, that it was misconduct for Mr. Fieger to say it was "preposterous" for the P.C. to claim that S.K.'s skull was cracked by the "forces of labor" and that S.K. is cognitively normal. (P.C. Br. 50, 64). But these comments did not cross the line because they "merely bolstered testimony previously given at trial."[15] *United States v. Churchwell*, 807 F.3d 107, 121 (5th Cir. 2015). And while Mr. Fieger's characterizations may be rhetorical hyperbole, hyperbole is a standard tool of the trial lawyer. (Indeed, the P.C.'s brief has plenty of it.)

As to the P.C.'s claim that "normal labor forces" cracked S.K.'s skull: one expert witness called that "nonsense," and he explained why (3/3 Tr. 144-45); another expert witness testified that in his 40-50 years of practice he had never seen labor cause such a large skull fracture and that it "would be a violation of

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[15] *See also Hamilton v. State*, 396 P.3d 1009 (Wyo. 2017) (attorney did not commit misconduct when he characterized witness testimony as "fundamentally ridiculous" and "so off-the-wall ridiculous it's beyond belief" because "though ill-advised" the comments were within the allowed characterization of the evidence); *United States v. Ruiz*, 710 F.3d 1077, 1086 (9th Cir. 2013) ("characterization of the defense's case as 'smoke and mirrors' was not misconduct") *United States v. Thompson*, 482 F.3d 781, 786 (5th Cir. 2007) (affirming the denial of a new trial and noting that while "there is no question" that the prosecutor voiced his opinion about the conclusions that the jury should reach" and "**engaged in a bit of oratory and hyperbole, as trial lawyers are want to do in closing arguments**," there was an evidentiary basis for the hyperbole and, in any event, the "jury was not likely to mistake the prosecutor's statements for trustworthy conclusions based on his own knowledge or expertise").

Newton's laws of motion" for "normal labor forces" to do such a thing. 3/7 Tr. 42-44. And another expert testified there was "[n]ot a bit of uncertainty" that the forceps fractured S.K.'s skull. 3/10 Tr. 43.

As for the P.C.'s claim that S.K. was cognitively normal, even the P.C.'s counsel (unintentionally) mocked the P.C.'s own expert witness on this issue. In closing, the P.C.'s counsel told the jury that "Dr. Epstein, *I believe*, has been belittled by Mr. Fieger and Mr. Patterson, making comments that he **suggested [S.K.] would be a college professor** or professional golfer. My heavens." 3/18/22 101:5-11. "I don't know if those are attempts to make fun of a medical doctor," the P.C.'s counsel continued, but "Dr. Epstein never said anything like that." *Id.* Except he did. Dr. Epstein told the jury "yes, [S.K.] could be a college professor. It's well within the realm of possibility based on his current performance." 3/17/22 54:5-7.

If the P.C. thinks it's "belittling" to Dr. Epstein to repeat his own testimony, then Mr. Fieger was clearly within the appropriate range of advocacy to call Dr. Epstein's opinion "preposterous." As noted above, even the P.C.'s own expert contradicted the underpinnings of Dr. Epstein's "cognitively normal" theory. Sometimes it's okay to call a spade a spade, and sometimes it's okay to call a party's theory what it is: nonsense.

The P.C. also accuses Mr. Fieger of misstating Dr. Boyle's testimony by saying that he was "accusing University physicians of not 'know[ing] what [they]

were talking about.'" (P.C. Br. 51). But Mr. Fieger's characterization was more than fair. Dr. Boyle, who said that the University physicians were wrong in their diagnosis of S.K.'s injuries, replied to Mr. Fieger by saying "I didn't say he didn't know what he was talking about. I said he used the incorrect description." 3/14 Tr. 133:18-19. That is hardly misconduct, and the P.C.'s accusation is the type of overreaction that the district court spoke of in its post-trial ruling.

There is not space within the word limit of the Appellate Rules to respond to every one of the P.C.'s accusations, because—as demonstrated above—it takes very few words to take a quote out of context and call it misconduct; it takes many more to provide the proper context and show why the P.C. is wrong.

But even if misconduct occurred at some point, that does not require a new trial. Instead, this Court has said that in "assessing whether retrial is warranted," the Court considers "(1) the severity and pervasiveness of misconduct; (2) the significance of the misconduct to the central issues in the case; (3) the strength of the [plaintiff's] evidence; (4) the use of cautionary instructions or other curative measures; and (5) the extent to which the defense invited the misconduct." *State v. Neiderbach*, 837 N.W.2d 180, 210 (Iowa 2013).[16]

[16] These factors come from the Court's opinions in criminal cases, but the district court's discretion should be no less—indeed, it should be even greater—in civil cases where the burden of proof is significantly less and the defendant's liberty is not on the line. Indeed, the Court of Appeals has applied the same factors in the tort context. *See Tibodeau*, 2017 WL 2665107 at *4.

Of those factors, "the most important" "is the strength of the [plaintiff's] evidence" and—as this Court has stressed—the district court is "better positioned than an appellate court reviewing a cold transcript to determine whether any misstatements by the [attorney] prejudiced the defendant." *Id.*

As noted above, virtually all the complained-of statements were not misconduct at all. So while the *allegations* are pervasive, the misconduct is certainly not. As the district court stated in its post-trial ruling, "the sheer number of requests for a mistrial may indicate to the casual observer that the trial was replete with incidents of misconduct"—a theme the P.C. repeats on appeal—but that "conclusion would be unwarranted." App. 188. Instead, the P.C. requested mistrials "at the slightest provocation" but at no time was there "any misconduct resulting in the kind of prejudice that would jeopardize the ability of the Court to provide a fair trial to all of the parties." App. 188-89. And that, of course, is the polestar. Because "unless a different result would have been probable in the absence of misconduct, a new trial is not warranted." *Loehr*, 806 N.W.2d at 277.

In *State v. Veal*, 930 N.W.2d 319, 336 (Iowa 2019), for example, this Court rejected a claim for retrial because even though "the prosecutor's comments may have veered improperly into personal attacks on defense counsel," the "evidence against [the defendant] was strong." And in *Tibodeau*, the Court of Appeals ruled that the district court did not abuse "its considerable discretion" in denying a new trial because "some of the purported misconduct was not misconduct at all"

and "the plaintiff's evidence was very strong." *Tibodeau*, 2017 WL 2665107 at *4-5. (McDonald, J.)

And so it is here. The evidence was overwhelming that, because of Dr. Goodman's negligence, S.K. suffered severe brain damage that left him mentally and physically disabled. As noted in Section I above, the evidence that S.K. suffered HIE, and is therefore cognitively impaired, is so one-sided that the P.C.'s experts did not even agree. And this issue was so important to the case, and thus certainly to the jury's decision, that Mercy's counsel teed it up this way in her closing argument:

> And then there is HIE. Probably the most hated term in this whole lawsuit, you've heard it. It's the most hotly contested injury in this case. Why? Because he doesn't have it, but they need you to believe that he does so they can reach $127 million.

3/18 Tr. 141:50-10. With that framing of the case, it's surprising the damage award was not larger. The P.C. and Mercy hinged their defense on the idea that S.K. did not have HIE and was thus cognitively normal. They said the treating neurologists at the University of Iowa children's hospital were wrong, that all the Conservator's experts were wrong, and that their *own* expert (who said that S.K. had HIE) was wrong. And the P.C. asked the jurors—who had seen S.K. in the courtroom—to disbelieve their own eyes and conclude that he is cognitively normal.

In short, nothing that Mr. Fieger said during closing argument would have changed this result. The die was cast when the P.C. and Mercy decided to go with their all-or-nothing theory, which was overwhelmingly contrary to the evidence.

At the close of trial, after both parties had given their closing arguments, the district court addressed counsel. There "have been a lot of motions, both written and oral" that "reference motives of other attorneys." 3/18 Tr. 162:9-163:15. But "I'm not supposed to figure out who's bad and who's good," the court said. *Id.* "I'm only interested in affording every party a fair trial" and "I don't see that the elements as enumerated in our case law" about the need for a mistrial "are met by what I saw before me today." *Id.* 162:11-163:15.

With that, the court denied the P.C.'s motion for a mistrial. That ruling was thoughtful, sound, and based on having witnessed three weeks of trial between "fierce" advocates on both sides. The district court properly exercised its discretion, and its ruling—the product of having spent 14 days with the jury and the parties—should be affirmed.

VI. The district court correctly ruled that the P.C. is jointly and severally liable for the entire economic damage award.

The jury found the P.C. was 50% at fault, which means the P.C. is jointly and severally liable for the economic damages and is responsible for 50% of the noneconomic damages. *See* Iowa Code § 668.4. If the P.C. pays more than 50%

of the economic damages, though, the P.C. maintains a right to contribution against Mercy for that additional amount paid. Iowa Code §§ 668.5, 668.6.

On appeal, the P.C. claims that, despite the language of section 668.4, which creates joint and several liability, the district court should have entered judgment against the P.C. for only half of the economic damages because its codefendant Mercy entered into a "high-low agreement" with the Conservator. But that is incorrect. Based on the plain language of Chapter 668 and the terms of that high-low agreement, the district court followed the law by entering judgment against the P.C. for the entire economic-damage award.

Under Iowa Code section 668.7, a "release, covenant not to sue, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution," and, in turn, the "claim of the releasing person [i.e., the plaintiff] against other persons [i.e., other defendants] is reduced by the amount of the released person's equitable share."

Here is what that means in the normal course: If Tortfeasors A and B injured Plaintiff, and before trial Plaintiff releases Tortfeasor A from liability in exchange for $1 million, then if the jury awards $10 million of economic damages against Tortfeasor B, Tortfeasor B has no right of contribution against Tortfeasor A for any amount of damages, *even if* the jury assigns 50% fault to non-defendant Tortfeasor A. But because Tortfeasor B cannot seek contribution from Tortfeasor A, Tortfeasor B is only responsible for 50% of the economic

damages and Plaintiff's verdict is reduced by $5 million. It's somewhat complicated, but the purpose of the rule is to allow a defendant to enter a full release without fear that any joint tortfeasors will someday come back and sue them for contribution.

But that is not what happened here. In the high-low agreement between the Conservator and Mercy, the Conservator agreed to release Mercy from claims that were *not* "submitted to the jury and contemplated by the verdict." App. 180. Instead, any "matters submitted to the jury and contemplated by the Verdict" were not released and were "specifically excluded from the Release Claims." *Id.* The Conservator did agree that it would not seek to collect more than $7 million from Mercy, no matter how much the jury awarded, but Mercy also agreed that this collections cap "shall not in any way effect joint and several liability claims that are made against" the P.C. and for "any remaining joint and several liability sums owing above the amount paid by this agreement." *Id.*

Because the Conservator did not release Mercy from the claims submitted to the jury, and because Mercy agreed that the contract's terms would not "in any way" effect the principles of joint and several liability, Mercy is not protected from a right of contribution from the P.C. under section 668.7. And because the P.C. still has a right of contribution against Mercy, *if* the P.C. pays the Conservator more than 50% of the economic-damage judgment, that means

section 668.7 does not apply and the P.C. remains liable for the entire economic damage award.

The P.C. claims that "high-low agreements are settlement agreements" and that section 668.7 therefore applies. But that is not necessarily true. The applicability of section 668.7 depends not on the label of the contract but on what the parties are settling and what the terms of the agreement say. Mercy entered into an agreement with the Conservator, to be sure, but that agreement only released claims that were ***not*** submitted to the jury and, with respect to the claims that ***were*** submitted to the jury, Mercy agreed that complete joint and several liability would still apply—meaning that Mercy left open the risk that the P.C. would seek contribution.

For that reason, section 668.7 does not apply and the P.C. remains jointly and severally liable for the economic damage award.

CONCLUSION

The district court should be affirmed.

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PROOF OF SERVICE

I hereby certify that on the 5th day of May, 2023, I electronically filed the foregoing Appellee's Brief with the Clerk of the Supreme Court by using the Iowa Electronic Document Management System which will send notice of electronic filing to the following. Per Rule 16.317(1)(a), this constitutes service of the document for purposes of the Iowa Court Rules.

/s/ Ryan Koopmans

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 13,985 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Word 2007 in Garamond 14 pt.

Dated: 5/5/23

/s/ Ryan Koopmans