IN THE SUPREME COURT OF IOWA

NO. 22-2048

FATIMA E. BELHAK and ABDELLATIF ELFILA,

Plaintiffs-Appellees,

vs.

WOMEN'S CARE SPECIALISTS, P.C.,

Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT FOR
SCOTT COUNTY NO. LACE127225
THE HONORABLE JEFFREY D. BERT

APPELLANT'S AMENDED BRIEF

Troy L. Booher AT0015646
Beth E. Kennedy AT0015645
Zimmerman Booher
341 S. Main Street, Fourth Floor
Salt Lake City, UT 84111
Phone: (801) 924-0200
Fax: (385) 420-5576
tbooher@zbappeals.com
bkennedy@zbappeals.com

Nancy J. Penner AT0006146
Shuttleworth & Ingersoll, P.C.
500 U.S. Bank Bldg.
P.O. Box 2107
Cedar Rapids, IA 52406
Phone: (319) 365-9461
Fax: (319) 365-8443
njp@shuttleworthlaw.com

Attorneys for Appellant Women Care Specialists, P.C.

Table of Contents

Table of Authorities

Cases

Rules

Statement of Issues

I. Whether Plaintiffs' counsel's misconduct requires a new trial.

Cases

Brooks v. Gilbert, 98 N.W.2d 309 (Iowa 1959)
Bronner v. Reicks Farms, Inc.,
No. 17-0137, 2018 WL 2731618 (Iowa Ct. App. June 6, 2018)
Conn v. Alfstad,
No. 10–1171, 2011 WL 1566005 (Iowa Ct. App. Apr. 27, 2011)
Gilster v. Primebank, 747 F.3d 1007 (8th Cir. 2014)
Kinseth v. Weil-McLain, 913 N.W.2d 55 (Iowa 2018)
Kipp v. Stanford,
No. 18-2232, 2020 WL 3264319 (Iowa Ct. App. June 17, 2020)
Rosenberger Enters., Inc. v. Ins. Serv. Corp. of Iowa,
541 N.W.2d 904 (Iowa Ct. App. 1995)
Russell v. Chicago, Rock Island & Pac. R.R. Co.,
86 N.W.2d 843 (Iowa 1957)
Smith v. Haugland, 762 N.W.2d 890 (Iowa Ct. App. 2009)
State v. Johnson, 534 N.W.2d 118 (Iowa Ct. App. 1995)
State v. Thornton, 498 N.W.2d 670 (Iowa 1993)
Whitlow v. McConnaha, 935 N.W.2d 565 (Iowa 2019)

Rules

Iowa R. Civ. P. 1.1004(2)

II. Whether the court erred in denying the motion for directed verdict concerning the use of 4-0 sutures.

Cases

James ex rel. James v. Burlington N., Inc.,
587 N.W.2d 462 (Iowa 1998)
Susie v. Fam. Health Care of Siouxland, P.L.C.,
942 N.W.2d 333 (Iowa 2020)

Rules

Iowa R. Civ. P. 1.924

Routing Statement

This case involves the application of existing legal principles and is appropriate for transfer to the Court of Appeals. Iowa R. App. P. 6.1101(3).

Introduction

This case arises out of a childbirth. When Fatima Belhak delivered her baby, her doctor performed an episiotomy—a surgical cut to expand the vaginal opening. After the delivery, her doctor (Dr. Denice Smith) diagnosed a relatively minor second-degree laceration and repaired it.

Six days later, Ms. Belhak was diagnosed with a much more severe fourth-degree laceration. She also developed a rectovaginal fistula—a connection between her rectum and vagina. Although the laceration has now been repaired, Ms. Belhak suffers permanent pain and dysfunction.

At trial, the only issue was the timing of Ms. Belhak's more severe injuries. If she had the fourth-degree laceration at the time of delivery, then Dr. Smith was negligent for failing to diagnose and repair it. But if she had only a second-degree laceration at the time of her delivery (as Dr. Smith believed), then her laceration worsened after she left the hospital, and there was no negligence.

The only contemporaneous evidence about Ms. Belhak's condition at the time of delivery was Dr. Smith's medical notes documenting a second-

degree laceration. And the defendants presented expert evidence that the laceration could have expanded after Ms. Belhak was discharged.

The jury nonetheless decided that Ms. Belhak's injury existed all along and found the defendants to be liable. The jury awarded the plaintiffs $3.25 million in damages.

The jury's decision is surprising in light of the evidence. But it is unsurprising in light of Plaintiffs' counsel's misconduct throughout the trial. Counsel disregarded the rules of evidence, prompting more than 50 sustained objections, and giving the jury the impression that the defense was hiding information. And in closing, counsel violated nearly every rule in the book. Counsel repeatedly disparaged the defense expert by suggesting that he was immoral and could not be trusted. Counsel misrepresented the record, misled the jury, asked the jury to hold the doctor "accountable," and asked the jury to put themselves in Ms. Belhak's shoes—all of which not only violated Iowa law and pretrial orders, but also ensured that the jury based their decision on emotion rather than the evidence.

But that is not the only problem. The court also denied the defendants' motion for directed verdict and allowed the jury to consider a specification concerning the use of a particular strength of sutures that the doctor used

(4-0 sutures), even though there was no evidence that the sutures caused any injury.

This Court should order a new trial in which (i) Plaintiffs' counsel must play by the rules, and thereby allow the jury to base its decision on the evidence rather than emotion, and (ii) the jury considers only supported claims.

Statement of the Case

Fatima Belhak and her husband, Abdellatif Elfila, sued Dr. Smith for negligence and loss of consortium in case number LACE126908. They also sued Dr. Smith's employer, Women's Care Specialists, P.C., in a separate case, LACE127225. The cases were consolidated under LACE127225. (App. 30, Dkt 174, 3/17/22 Order.)

The case first went to trial in 2019, but it resulted in a mistrial. (3/21/22 Tr. 7:13-14, App. 219.)

This trial then began on March 21, 2022. After a seven-day trial, the defendants moved for mistrial based on Plaintiffs' counsel's improper questions (3/28/22 Tr. 1001:24-1002:3, App. 570-71) and improper closing argument (3/29/22 Tr. 1072:6-19, App. 606). The court denied the motion based on Plaintiffs' counsel's improper questions. (3/28/22 Tr. 1002:12-18, App. 571.) The court took the motion for mistrial under advisement (3/29/22

Tr. 1077:14-16, App. 611) but ultimately denied it in denying the post-trial motion (App. 134, Dkt 313, 11/17/22 Order at 18.)

The jury returned a verdict for the plaintiffs for $3,250,000. (App. 32-33, Dkt 289, 3/30/22 Verdict.)

The defendants filed a post-trial motion, based on Plaintiffs' counsel's improper conduct, errors in the jury instructions, and insufficiency of the evidence with respect to one specification. (App. 37-38, Dkt 297, 5/13/22 Brf at 1-2.) The court denied the motion. (App. 144, Dkt 313, 11/17/22 Order at 28.)

The defendants appealed from both case numbers. (App. 153, Dkt 318, 12/14/22 Notice.) The Iowa Supreme Court later concluded that it lacked jurisdiction over the appeal from LACE126908 (Supreme Court No. 23-0246). (App. 155-56, 4/14/23 Order in LACE126908 at 1-2.) The Court noted, however, that Dr. Smith was already pursuing an appeal from LACE127225, "within which all proceedings below had been consolidated." (*Id.* at 2.) Thus, the Court concluded that the consolidation issue was "moot." (*Id.*)

Statement of the facts

Ms. Belhak delivered her baby on January 27, 2014. (3/23/22 Tr. 457:15-17, App. 322.) It was her first child. (3/25/22 Tr. 823:16-824:2, App.

514-15.) Her husband, Abdellatif Elfila, accompanied her. (*Id.* 827:19-828:7, App. 516-17.)

Ms. Belhak's OBGYN was Dr. Mona Alqulali. (3/24/22 Tr. 606:6-10, App. 425.) Dr. Alqulali spoke Arabic, Ms. Belhak's native language. (*Id.* 606:11-15.) Because of a snowstorm, however, Dr. Alqulali could not get to the hospital before Ms. Belhak delivered. (*Id.* 665:16-18, App. 461.)

Dr. Denice Smith was the one who delivered the baby. (*Id.* 608:14-17, App. 427.) Mr. Elfila interpreted for Ms. Belhak at the hospital. (3/24/22 Tr. 587:21-23 (Belhak), App. 422); 3/25/22 Tr. 811:8-12, 828:14-16 (Elfila), App. 513, 517.)

The delivery.

Ms. Belhak received an epidural, and then Dr. Denice Smith delivered the baby. (3/28/22 Tr. 876:6-11, 921:14, App. 527, 546.) The baby was in mild fetal distress as his head came through the birth canal. (*Id.* 886:2-4, 16-18, App. 537.) Dr. Smith determined that Ms. Belhak's skin was too tight, so she made an incision—an episiotomy—to release the skin and allow the baby to come out. (*Id.* 886:9-12.) She attempted to make the smallest incision possible. (*Id.* 885:11-14, 886:7-8, App. 536-37.) A healthy baby, Baby Z, was born. (3/24/22 Tr. 675:7-10, App. 462.)

Dr. Smith then examined Ms. Belhak. (3/28/22 Tr. 922:5-8, App. 547.) Dr. Smith cleaned the blood to be able to see the laceration and spread the tissues apart so she could feel inside and palpate the vaginal walls. (*Id.* 922:11-20.) As she explained, the purpose of the exam is to identify the size of the laceration and any defect, and to be able to repair it. (*Id.* 922:21-23.)

During the exam, Dr. Smith identified a second-degree laceration, meaning the episiotomy had expanded beyond her initial cut during the delivery. (*Id.* 923:9-11, App. 548.) This expansion is called an extension. (*Id.* 881:8-10, App. 532.)

Dr. Smith further numbed the area and sutured the laceration with 4-0 vicryl sutures, the type of sutures she typically uses to repair vaginal lacerations. (*Id.* 923:14-23, 924:5-9, App. 548-49.) She examined the area again to ensure that the bleeding was well-controlled and then cleaned the area. (*Id.* 924:12-16, App. 549.) Dr. Smith later documented her diagnosis and treatment in her medical notes: "episiotomy and repair" with "second-degree extension." (*Id.* 918:13-919:2, App. 544-45.)

Ms. Belhak was (understandably) in pain after the delivery. (3/24/22 Tr. 610:19-20, App. 429.) Her providers told her that pain is normal and would lessen over time. (*Id.* 611:20-22, 614:8-12, App. 430, 433.)

Ms. Belhak also told her nurse that she found some small pieces of stool on the pads that she wore to collect blood. (*Id.* 611:5-15, App. 430.) The nurse told her that it is possible for stool to get caught in the stitches. (*Id.* 612:4-6, App. 431.) The nurse then examined Ms. Belhak, ensured that the stitches were still in place, and gave her an ice pack and additional medicine to lessen the pain. (*Id.* 612:16-22.)

The subsequent diagnosis, surgery, and effects.

Ms. Belhak's pain did not lessen over time, however. A few days after she was discharged from the hospital, she saw that stool was coming out of her vagina. (*Id.* 619:6-11, App. 438.) After calling her doctor, she went to the emergency room. (*Id.* 620:22-23, App. 439.)

Ms. Belhak was then sent to the University hospital in Iowa City, where she was diagnosed with a fourth-degree laceration. (3/23/22 Tr. 388:4-22, App. 253; 3/24/22 Tr. 622:2-3, App. 441.) To make this diagnosis, the University doctors had to remove Ms. Belhak's sutures, which were still intact. (3/25/22 Tr. 756:10-19, App. 486; 3/24/22 Tr. 624:11-12, App. 443.)

Ms. Belhak's condition required reconstructive surgery. (3/24/22 Tr. 626:25-627:5, App. 445-46.) But even after the surgery, the effects of the laceration and fistula were long-lasting. Ms. Belhak continues to have pain. She has difficulty walking, bending, doing chores, carrying heavy things,

sitting for long periods, and sitting or sleeping in particular positions. (*Id.* 628:5-12, App. 447.) She has to watch what she eats to avoid diarrhea, which she cannot easily control. (*Id.* 628:25-629:4, App. 447-48.) At times, she has embarrassing uncontrolled gas, making her not want to go out of the house often. (*Id.* 629:5-12, App. 448.) Her fear of reopening the wound has changed her sexual relationship with her husband. (*Id.* 643:6-12, App. 457.) She continues to receive injections and physical therapy. (*Id.* 640:16-641:25, App. 454-55.)

The evidence at trial.

Ms. Belhak sued. She alleged that her fourth-degree laceration occurred during delivery, but that Dr. Smith failed to diagnose it. (App. 7-8, 10/16/15 Pet. (LACE 126908); App. 21, 1/26/16 Pet. (LACE 127225).) By the time of trial, Ms. Belhak also alleged that Dr. Smith was negligent both in failing to perform a rectal examination and in repairing her laceration with 4-0 sutures rather than thicker sutures. (App. 150, Dkt 317, Instruction 14(1)(a)-(c).) The case therefore hinged on Ms. Belhak's condition at the time of delivery.

At trial, Dr. Smith testified that Ms. Belhak had only a second-degree laceration after the delivery. (3/28/22 Tr. 923:7-11, App. 548.) She testified that she did not perform a rectal examination, and she explained that rectal

examinations are not usually performed for second-degree lacerations. (*Id.* 924:17-21, App. 549.) Nor did Dr. Smith see or feel any defects that would necessitate a rectal exam. (*Id.* 883:9-11, App. 534.)

After reviewing the records, the defense expert, Dr. Larry Severidt, agreed. He testified that Ms. Belhak's laceration was a second-degree laceration at the time of delivery. (3/25/22 Tr. 772:7-13, App. 495.) He expressly stated that a fourth-degree laceration "was not present" at that time. (*Id.* 797:21-23, App. 508.)

Dr. Severidt also explained that a second-degree laceration could have later expanded into a fourth-degree laceration if Ms. Belhak strained those muscles. (*Id.* 797:24-798:1, 798:22-799:5, App. 508-10.) As he put it, "in this case, that a big baby, first time mom, the muscles were weakened, and then, she strained to have a stool at a later point, and that's when this thing broke through." (*Id.* 799:2-5, App. 510.)

Dr. Severidt explained that no rectal examination was required. (*Id.* 755:11-13, 764:13-19, App. 485, 492.) He also explained that it was appropriate for Dr. Smith to use 4-0 sutures, rather than thicker 3-0 or 2-0 sutures. (*Id.* 774:14-17, App. 497.) He concluded that Dr. Smith met the standard of care. (*Id.* 756:20-24, App. 486.)

Ms. Belhak's expert, Dr. Gregory Chen, reached the opposite conclusion. He opined that Ms. Belhak's fourth-degree laceration did not develop over time, but instead existed at the time of delivery. (3/23/22 Tr. 394:19-23, App. 259.) He said that it was "ridiculous" to think that a bowel movement could expand a laceration into a fourth-degree laceration. (*Id.* 512:20-24, App. 377.)

He testified that a rectal examination is required after every episiotomy. (*Id.* 401:4-7, App. 266.) And he explained that 4-0 sutures are too thin to be used on the "deep perineal tissues" that are damaged in a fourth-degree laceration. (*Id.* 443:10-16, App. 308.) Importantly, he never said that Dr. Smith's use of 4-0 sutures caused any harm to Ms. Belhak.

He also explained how the failure to immediately diagnose a fourth-degree laceration causes long-term problems. Specifically, once the patient has their first bowel movement, bacteria is introduced to the area, and doctors cannot repair the wound. (*Id.* 446:16-447:2, App. 311-12.) Instead, doctors must wait two to four months until blood vessels grow in. (*Id.* 448:6-11, App. 313.)

At the close of Plaintiffs' case, Dr. Smith moved for a directed verdict on the specification that allowed the jury to find negligence based on the use

of 4-0 sutures. (3/28/22 Tr. 999:1-13, App. 569.) The court denied the motion. (*Id.* 1001:21-23, App. 570.)

The case then went to the jury. With the evidence on both sides, the case should have hinged on the credibility of the witnesses.

Misconduct tips the scales.

Instead, the case hinged primarily on Plaintiffs' counsel's misconduct.

Throughout the trial, Plaintiffs' counsel repeatedly asked improper questions that required objections from defense counsel. Counsel's questions elicited 56 sustained objections (compared to only 4 objections made by defense counsel).[1] Defense counsel brought the problem to the court's

---

[1] Plaintiffs' counsel elicited sustained objections at the following 56 times (Appendix cites in parenthesis): 3/23/22 Tr. 374:7-11 (239), 392:22-393:3 (257-58), 394:2-6, 394:12-17 (259), 398:17-23 (263), 414:19-415:1 (279-80), 440:11-15 (305), 488:23-489:2 (253-54), 490:18-23 (355), 501:1-6 (366), 506:16-22 (371), 512:13-18 (377), 544:22-545:2 (409-10), 552:1-8, 552:10-19 (417), 3/24/22 Tr. 609:8-14 (428), 615:11-17 (434), 620:10-13 (439), 626:4-7 (445), 627:9-12 (446), 628:17-20 (447), 635:14-17 (452), 644:11-14 (458), 663:4-7 (460), 682:9-15 (463), 683:5-10 (464), 684:10-15, 684:17-22 (465), 685:20-4 (466); 3/25/22 Tr. 770:13-18 (493), 778:18-24 (499), 780:15-25 (500), 781:6-13, 781:15-22 (501), 841:18-24 (519), 844:25-845:3 (520-21), 850:18-21 (522), 854:11-15 (523); 3/28/22 Tr. 869:6-9 (524), 870:3-7, 870:14-18 (525), 871:1-8 (526), 879:10-14 (530), 882:11-16 (533), 889:22-24 (540), 892:16-19 (543), 936:7-9 (554), 937:23-938:1 (555-56), 956:11-19 (559), 958:12-19 (560), 971:21-972:1 (562-63), 972:24-973:6 (563-64), 974:10-13, 974:15-18 (565), 989:19-21 (566), 993:17-21 (568).

Defense counsel elicited sustained objections at the following 4 times:

attention multiple times. (3/23/22 Tr. 423:9-20, App. 288; 3/24/22 Tr. 631:18-24, 713:7-18, App. 450, 467; 3/25/22 Tr. 783:4-18, App. 503.) Defense counsel ultimately moved for a mistrial based on this conduct. (3/28/22 Tr. 1001:24-1002:3, App. 570-71.) The court denied the motion. (*Id.* 1002:12-13, App. 571.) Indeed, during the trial, the court noted that "this case has already been mistried once" and that "obviously both parties would like a resolution and would not like another mistrial." (3/25/22 Tr. 747:16-18, App. 480.)

Then, in his closing argument, Plaintiffs' counsel repeatedly appealed to the jurors' emotions, violating not only Iowa law but also the district court's orders in limine. Counsel told a fictional story about a man coming to Ms. Belhak's home—a story that encouraged (if not required) the jury to put themselves in the Ms. Belhak's shoes. (3/29/22 Tr. 1056:14-1058:9, App. 590-92.) Counsel told the jury that Ms. Belhak felt "betrayed" by her doctor. (*Id.* 1069:15-17, App. 603.) He repeatedly asked the jury to hold Dr. Smith accountable. (*Id.* 1051:18-20, 1055:5, 1066:25-1067:7, 1067:13-16, 1071:12-14, App. 585, 589, 600-01, 605.)

3/23/22 Tr. 525:10-17 (390), 527:24-528:6 (392-93); 3/25/22 Tr. 756:1-7 (486), 798:14-20 (509).

He also repeatedly referred to "patient safety rules," and asked why Dr. Smith was not "safe" rather than sorry—language that invoked community safety rather than the real issue, the standard of care. (*Id.* 1042:20, 1046:22-23, 1054:15-16, App. 576, 580, 588.)

Plaintiffs' counsel also misstated the record and misled the jury. Every time counsel mentioned the opinions of Dr. Smith's expert (Dr. Severidt), he disparaged him by suggesting that he was immoral for performing episiotomies on mission trips to Honduras. These comments were not supported in the record. Counsel nonetheless accused Dr. Severidt of "chang[ing] his standard of care" when he goes on those trips, and that he "allows his students to go down there to Honduras and do something he knows is wrong in the United States." (*Id.* 1045:20-23, 1053:19-23, App. 579, 587.) Counsel instructed the jury that, because of Dr. Severidt's immorality, "you are allowed to question anything else he says." (*Id.* 1045:23, App. 579.)

Counsel also improperly suggested, numerous times, that the University of Iowa medical records constituted an opinion in the case regarding the time of the laceration (something the University doctors could not have known and did not purport to know). Counsel nonetheless said that "the University of Iowa said that the fourth-degree laceration was there at

the time of delivery." (*Id.* 1052:17-19, 1103:1-2, App. 586, 637.) Unfortunately, this is a theme that counsel developed throughout the course of the trial. (3/22/22 Tr. 341:12-13; 3/25/22 Tr. 761:3-4, App. 237, 491.)

Finally, counsel's closing disparaged defense counsel, accusing defense counsel of "character assassination" for asking Ms. Belhak whether she had ever had anal sex—something that could strain the muscles and extend a laceration. (3/28/22 Tr. 1055:25-1056:1, App. 589-90.)

The jury found that Dr. Smith was liable and awarded the plaintiffs $3.25 million. (App. 32-33, Dkt 289, 3/30/22 Verdict).

The court denies the post-trial motion.

The defendants filed a post-trial motion, seeking a new trial based on two arguments that are relevant here. First, they sought a new trial based on Plaintiffs' counsel's misconduct during the trial—particularly during closing argument. (App. 42-88, Dkt 297, 5/13/22 Brf at 6-52.) And second, they argued that the court erred in denying their motion for directed verdict, as there was no evidence that the use of 4-0 sutures caused any harm. (App. 109-111, *Id.* at 73-75.)

The court denied the motion. (App. 144, Dkt 312, 11/17/22 Order at 28.)

Summary of the Argument

The district court committed two errors that require a new trial.

First, the court failed to order a new trial despite Plaintiffs' counsel's copious misconduct. Most of the misconduct occurred during counsel's closing argument. There, Plaintiffs' counsel repeatedly appealed to the jurors' emotions, urging them to decide the case based on their emotions rather than the facts and law. Counsel also mischaracterized the facts and misled the jury, providing improper bases on which to doubt the defendants' credibility. And all of this was against a backdrop of a trial where Plaintiffs' counsel asked more than 50 improper questions that elicited sustained objections, giving the jury the impression that the defense was hiding information, and exacerbating the problem created in closing argument.

All of this violated Iowa law. Yet the district court found that most of the conduct was not improper. And for the few comments in closing argument that the court ruled *were* improper, the court ruled that, "standing alone," they did not prejudice the defendants.

Of course, courts do not address misconduct "standing alone." Misconduct during closing argument must be considered in the context of closing argument as a whole. Considered properly, as a whole, Plaintiffs' counsel's misconduct requires a new trial.

Second, the court erred in denying the defendants' motion for directed verdict on the plaintiffs' claim regarding the use of 4-0 sutures. Plaintiffs' counsel elicited substantial testimony about the various types of sutures that can be used to repair a laceration. But none of the testimony suggested that Dr. Smith's use of 4-0 sutures caused any harm to Ms. Belhak here. Indeed, the only people who could have determined whether Ms. Belhak's stitches held were the University hospital doctors who examined her days after her delivery. But Plaintiffs' counsel did not call any of those doctors to testify.

Instead, counsel attempted to have Dr. Chen interpret a single line in the University hospital's medical records—"vaginal repair site appears broken down." (3/23/22 Tr. 452:18-19, App. 317.) But Dr. Chen admitted that he could not tell whether the note meant that the stitches had broken, or instead whether the laceration had expanded beyond what was initially sutured (the central issue in the case).

There was therefore no evidence that the 4-0 sutures failed, and thus no evidence that the sutures caused any harm to Ms. Belhak. The district court should have granted the defendants' motion for directed verdict on that specification. Failing that, the court should have granted the defendants' post-trial motion on the same basis. Its failure to do so requires a new trial.

Argument

I. Plaintiffs' counsel's misconduct requires a new trial.

Under rule 1.1004 of the Iowa Rules of Civil Procedure, a party is entitled to a new trial if the misconduct of the prevailing party "materially affected [the] movant's substantial rights." Iowa R. Civ. P. 1.1004(2). In other words, the misconduct must have been prejudicial. *Kipp v. Stanford*, No. 18-2232, 2020 WL 3264319, at *8 (Iowa Ct. App. June 17, 2020).

To determine whether the misconduct was prejudicial, the court "consider[s] several factors, including 'the severity and pervasiveness of the misconduct, [and] the significance of the misconduct to the central issues in the case.'" *Id.* (*quoting State v. Ayabarreno*, No. 13-0582, 2014 WL 465761, at *4 (Iowa Ct. App. Feb. 4, 2014)).

Here, Plaintiffs' counsel's closing argument severely prejudiced the defendants. Counsel violated nearly every rule in the book—appealing to the jurors' emotions, invoking community safety, suggesting betrayal, and telling a story to have the jury put themselves in the plaintiffs' shoes. Worse, counsel misstated the record and the facts. All of this served to invite the jury to base its decision on things other than the evidence.

All of this was against the backdrop of counsel's improper questioning during trial, where counsel asked more than 50 improper

questions that elicited sustained objections. The jury was therefore left with the impression that the defense was immoral and seeking to hide information, while the plaintiffs sought to protect the community.

The district court should have granted a mistrial, and failing that, should have ordered a new trial. This court should reverse.

Error preservation.

The defendants preserved their argument concerning Plaintiffs' counsel's pattern of improper questions during trial (3/23/22 Tr. 423:9-20, App. 288; 3/24/22 Tr. 631:18-24, 713:7-18, App. 450, 467; 3/25/22 Tr. 783:4-18, App. 503), their resulting motion for mistrial (3/28/22 Tr. 1001:24-1002:3, App. 570-71), and in their post-trial motion (App. 78-88, Dkt 297, 5/13/22 Brf at 42-52).

The district court denied the motion for mistrial (3/28/22 Tr. 1002:12-18, App. 571) and the post-trial motion (App. 121-32, Dkt 313, 11/17/22 Order at 5-16).

The defendants preserved their argument concerning Plaintiffs' counsel's improper closing argument in a motion for mistrial prior to the submission of the case to the jury (3/29/22 Tr. 1072:6-19, App. 606) and in the post-trial motion (App. 42-78, Dkt 297, 5/13/22 Brf at 6-42). The court took the motion for mistrial under advisement (3/29/22 Tr. 1077:14-16, App.

611) but ultimately denied it in denying the post-trial motion (App. 134, Dkt 313, 11/17/22 Order at 18).

Standard of review.

The denial of a motion for mistrial and a motion for new trial are both reviewed for an abuse of discretion. *Whitlow v. McConnaha,* 935 N.W.2d 565, 569 (Iowa 2019) (motion for mistrial); *Rosenberger Enters., Inc. v. Ins. Serv. Corp. of Iowa*, 541 N.W.2d 904, 906 (Iowa Ct. App. 1995) (motion for new trial).

A. Counsel's closing argument was replete with misconduct.

While all misconduct is troubling, Iowa law recognizes that misconduct during closing argument is particularly troubling. *Kinseth v. Weil-McLain*, 913 N.W.2d 55, 73 (Iowa 2018). As the Iowa Supreme Court has explained, "juries are often tasked with deciding questions of fact and law that involve innately vague and difficult considerations." *Id.* And when making these challenging decisions, "juries will inevitably take cues from attorneys during their respective closing arguments." *Id.*

Thus, Iowa courts "observe a heightened sensitivity to inflammatory rhetoric and improper statements" in closing arguments because improper comments in that setting "may impress upon the jury that it can look beyond the facts and law to resolve the case." *Id.*

Here, as discussed below, Plaintiffs' counsel's closing argument broke nearly every rule in the book.

1. Counsel improperly appealed to the jurors' emotions.

In closing argument, Plaintiffs' counsel repeatedly appealed to the jurors' emotions, urging them to decide the case based on their emotions rather than the facts and law. But Iowa law is clear: "Counsel may not use closing arguments to appeal to the passions or prejudices of the jurors." *Conn v. Alfstad*, No. 10–1171, 2011 WL 1566005, at *4 (Iowa Ct. App. Apr. 27, 2011).

Iowa appellate courts order a new trial where improper comments during closing argument, taken as a whole in the context of closing, deprive the opposing party of a fair trial. *Kipp*, 2020 WL 3264319, at *8 (affirming order of new trial); *Bronner v. Reicks Farms, Inc.*, No. 17-0137, 2018 WL 2731618, at *7 (Iowa Ct. App. June 6, 2018) (same); *Kinseth*, 913 N.W.2d at 73 (reversing and ordering a new trial based on improper comments).

For example, in *Kipp v. Stanford*, the plaintiff's counsel broke each of these rules. 2020 WL 3264319, at *6-7. Counsel repeatedly referenced accountability, including by telling the jurors that they held "an awesome power" that included the power to hold the defendant accountable. *Id.* at *1. Counsel also repeatedly referenced the community and the social

consequences of the jury's decision. *Id.* at *7. Counsel referred to the defendant's actions "as a 'betrayal.'" *Id.* And counsel made a "golden rule" argument in which he asked the jury to put themselves in the shoes of the plaintiff: "We have to think about what's the most valuable thing to us. . . . What would we trade for [the plaintiff's] experience?" *Id.* at *2, 7.

The appellate court agreed that a new trial was required because these improper comments prejudiced the defendants. *Id.* at *6. The court declined to consider each comment in isolation, instead explaining that the court "necessarily consider[s] them in the context of the closing arguments as a whole." *Id.*

The same is true here. Plaintiffs' counsel appealed to the jurors' emotions and violated multiple aspects of Iowa law. The district court abused its discretion in ruling that none of counsel's comments were improper.

(a) Suggesting betrayal

First, counsel must not characterize the defendant's actions as a "betrayal." *Kipp*, 2020 WL 3264319, at *7. Such comments "improperly focus[] the jury's attention on the moral quality of [the] alleged misconduct." *Id.*

Here, just as in *Kipp*, Plaintiffs' counsel also characterized the defendants' actions as a betrayal. And just as in *Kipp*, that comment improperly focused the jury's attention on the moral quality of the defendants' conduct:

- Ms. Belhak "asked Latif to buy a mirror, so she could see with her own eyes, stool coming out, and when she did, she felt betrayed by her doctor who spoke the same language and who saw her every prenatal visit." (3/29/22 Tr. 1069:13-17, App. 603.)

This comment was an attempt to have the jury decide the case based on emotion rather than facts. And just as in *Kipp*, it warrants a new trial—particularly when it is viewed in the context of all of the other improper comments in closing argument.

(b) Making golden rule arguments

Second, counsel must not make so-called "Golden Rule" arguments. Golden rule arguments "ask[] the jurors to put themselves in the place of a party or victim." *Kipp*, 2020 WL 3264319, at *7. And it is well-settled that "[d]irect appeals to jurors to place themselves in the situation of one of the parties, to allow such damages as they would wish if in the same position, or to consider what they would be willing to accept in compensation for similar injuries are condemned by the courts." *Russell v. Chicago, Rock Island & Pac. R.R. Co.*, 86 N.W.2d 843, 848 (Iowa 1957).

But here, just as in *Kipp*, Plaintiffs' counsel made a golden rule argument, asking the jury to put themselves in the shoes of the plaintiffs. Plaintiffs' counsel actually told a golden rule story about a "man at the door," asking the jury to envision whether Ms. Belhak would have accepted $7 million dollars in exchange for enduring the injuries she sustained:

> - "[I]magine the day before Baby Z*** was born . . . Latif and Fatima have a knock on the door. At the door is a man in a suit, and he has a briefcase, and he asked to talk to Latif and Fatima in the house. He is invited in. The man sits down. On the kitchen table, he puts a big briefcase, and he opens it up: seven million dollars. Seven million dollars. And says, 'Latif, Fatima, this money, it's yours, but there's a catch. Tomorrow Baby Z*** is going to be fine, but Fatima, you are not going to be. You are going to have a cut and ripping and tearing in one of the most sensitive areas of your body, and that's going to cause you pain. . . . [Describing injuries and effects of Ms. Belhak's laceration and fistula].' So before the man in the suit and his briefcase goes on and on . . . what will they tell him? They would tell him, 'No. Fatima's health and family is the most important thing there is,' and they would tell him to get out of their house." (3/29/22 Tr. 1056:15-1058:9, App. 590-92.)

This narrative was far worse than the single sentence that constituted an improper golden rule argument in *Kipp*: "We have to think about what's the most valuable thing to us. . . . What would we trade for [the plaintiff's] experience?" *Kipp*, 2020 WL 3264319, at *7.

The narrative also violated the court's ruling granting the defendants' motion in limine no. 12, which expressly requested that Plaintiffs would be

prohibited from making golden rule arguments. (Dkt 170, 3/14/22 Mot. at 11-12; 3/18/22 Tr. 37:16 (granting motion).)

Yet the district court ruled that there was no problem. (App. 129, Dkt 313, 11/17/22 Order at 13.) The court ruled that "[t]he problems Plaintiffs' counsel described in the story were consistent with the testimony of [the plaintiffs]" and that "Plaintiffs' counsel did not ask the jury to consider the situation from . . . a personal perspective." (*Id.*)

But there was no other reason to tell the story. Its sole purpose was to ask the jury to put themselves in Ms. Belhak's shoes. It was as improper as the golden rule argument was in *Kipp*.

2. Counsel misstated the record and misled the jury.

In closing argument, Plaintiffs' counsel also mischaracterized the facts and misled the jury. But again, Iowa law is clear: "counsel has no right to create evidence or to misstate the facts." *State v. Thornton*, 498 N.W.2d 670, 676 (Iowa 1993). Counsel also may not disparage the opposing party or opposing counsel in an effort to bolster his own case. *Bronner v. Reicks Farms, Inc.*, No. 17-0137, 2018 WL 2731618, at *8 (Iowa Ct. App. June 6, 2018).

Yet Plaintiffs' counsel did all of that. And even though the district court found that two of counsel's comments were improper, the court ruled

that, "standing alone," neither of them warranted a new trial. The court abused its discretion in considering the comments in isolation rather than in the context of the closing as a whole, and also in declining to order a new trial.

(a) Disparaging the defense expert

First, counsel disparaged the defense expert to discredit him. The defense expert, Dr. Severidt, was unequivocal that Dr. Smith did not breach the standard of care. (3/25/22 Tr. 756:20-24, App. 486.) Specifically, he testified that Dr. Smith did not need to do a rectal exam, and that Ms. Belhak's laceration expanded *after* she was discharged from the hospital. (*Id.* 797:17-25, App. 508.)

Plaintiffs' counsel dealt with this problem in closing argument by suggesting that the jury could discredit Dr. Severidt because he was immoral. Indeed, both times that Plaintiffs' counsel referenced Dr. Severidt's opinions, he claimed that Dr. Severidt could not be trusted because he and his medical residents perform inappropriate episiotomies while on mission trips in Honduras.

To be clear, Dr. Severidt did no such thing in Honduras. Instead, as Dr. Chen explained, episiotomies are no longer routinely performed in the U.S. (3/23/22 Tr. 391:4-11, App. 256) But Dr. Severidt explained that, in

Honduras, he and his residents "are asked to do them," so they comply. (3/25/22 Tr. 728:16-20, App. 471.) As he put it, "in Honduras, where they are not necessarily completely up to date, they still routinely do episiotomies, so when I go to Honduras, the residents are doing them because they are asked to do them, and then, we repair them. So of late, that's where I've had more episiotomy experience." (*Id.* 728:16-20.)

Yet in closing, Plaintiffs' counsel twice misrepresented this testimony to disparage and discredit Dr. Severidt.

The first time was when Plaintiffs' counsel was attacking Dr. Severidt's opinion that a rectal examination was not required. Counsel instructed the jury that, because Dr. Severidt performed inappropriate episiotomies in Honduras, "you are allowed to question anything else he says":

- "So here is where we get into the disagreement. So if a doctor suspects an extension from an episiotomy, the doctor must do a rectal examination? So Dr. Severidt said, 'No.' What else did Dr. Severidt tell us? Dr. Severidt told us that he takes his students down to Honduras, and he allows them to get experience doing episiotomies automatically or prophylactically. What did Dr. Severidt also tell you? That in 2000 -- that in the United States, you don't do that. You don't automatically do an episiotomy because it could bring harm to a woman. So what is the difference between the mothers in the United States and the mothers in Honduras? Well, Dr. Severidt allows his students to go down there to Honduras and do something he knows is wrong in the United States, and you are allowed to question anything else he says." (3/29/22 Tr. 1045:9-23, App. 579.)

The second time counsel misrepresented Dr. Severidt's testimony and disparaged him was when counsel was attacking Dr. Severidt's opinion that Ms. Belhak's laceration worsened after Dr. Smith sutured her, likely from a bowel movement. Counsel recounted Dr. Severidt's opinion and then asked the jury to "remember" that Dr. Severidt "changes his standard of care, and when it's right and wrong, when he goes to Honduras":

- "What did Dr. Severidt tell you about a monster caca causing a second-degree extension to go into the fourth-degree extension? He said, 'It's a possibility.' Well, anything is possible, but do you know what he didn't say? He didn't say that he has ever seen it before. He didn't say he has ever even heard of it before. He said, 'It's possible.' And, remember, Dr. Severidt, he had -- Even though he swore the Hippocratic oath to do no harm, and he knows not to do episiotomies prophylactically in the United States, he changes his standard of care, and when it's right and wrong, when he goes to Honduras." (*Id.* 1053:12-23, App. 587.)

These comments mischaracterized Dr. Severidt's testimony. Worse, they misled the jury into believing that they could discredit his testimony based on his allegedly immoral conduct in Honduras.

The district court agreed. The court found that "the comments from Plaintiffs' counsel critical of Dr. Severidt's work in Honduras were not based on fact or evidence, and were improper." (App. 123, Dkt 313, 11/17/22 Order at 7.)

But the court nonetheless found that counsel's misconduct caused no prejudice. (*Id.*) To reach that conclusion, the court considered these two statements "[s]tanding alone." (*Id.*) Of course, that alone is error, as counsel's misconduct must be considered in the context of closing argument as a whole. *E.g.*, *Kipp*, 2020 WL 3264319, at *8; *Kinseth*, 913 N.W.2d at 67.

The district court also suggested that the jury would not have believed Plaintiffs' counsel's insult, noting that "[a]ll medical witnesses testified that episiotomies remain appropriate in the United States" and that the court had "advised the jury that arguments of counsel are not evidence." (App. 123, Dkt 313, 11/17/22 Order at 7.) And the court suggested that the comments were beside the point, noting that "[t]he issue in this case was not the performance of the episiotomy, but rather, the standard of care for proper diagnosis and repair of the episiotomy." (*Id.*)

But that question—the standard of care—was exactly the disagreement between the plaintiffs' and the defense's experts. Plaintiffs' counsel tipped the scale by instructing the jury that Dr. Severidt's word could not be trusted because he is immoral. This warrants a new trial on its own, and particularly when it is considered in the context of closing as a whole.

(b) Disparaging defense counsel

Second, Plaintiffs' counsel inappropriately accused defense counsel of "character assassination" for asking the plaintiffs' expert whether anal sex could have caused Ms. Belhak's injuries. That question was directly relevant to the defendants' theory of the case, that Ms. Belhak's rectum was somehow strained after the delivery, worsening her laceration. Yet Plaintiffs' counsel attacked the question as "character assassination" in an attempt to discredit the defendants.

During trial, the defense expert, Dr. Severidt, explained that the injuries to Ms. Belhak's rectum did not occur at the time of delivery, but instead "broke through" at a later point. (3/25/22 Tr. 800:22-25, App. 511.) As he put it, "I think it was due to hard stools and straining and constipation." (*Id.* 801:1-2, App. 512.) He was clear that his theory was only a "presumption," though. (*Id.* 801:12.)

Based on that presumption, defense counsel asked the plaintiffs' expert whether vaginal sex or anal sex could damage tissues after the repair of an episiotomy. (3/23/22 Tr. 541:7-20, App. 406.) Plaintiffs' counsel objected based on an order in limine preventing any suggestion that Ms. Belhak ever had anal sex, and defense counsel withdrew the question. (*Id.*

541:24-542:5, 576:1-8, App. 406-07, 421.) The district court also admonished the jury to disregard the question. (*Id.* 542:6-10, App. 407.)

Despite that ruling, Plaintiffs' counsel chose to revisit the issue with Ms. Belhak directly (something that defense counsel had not done). He asked whether she had sex between the time of delivery and the time she was admitted to the University Hospital. (3/24/22 Tr. 623:11-14, App. 442.) Ms. Belhak answered that she did not. He also asked whether she had ever had anal sex before. (*Id.* 623:5-6.) Ms. Belhak answered that she had not and that it was contrary to her faith. (*Id.* 623:5-9.)

Thus, Plaintiffs' counsel was the only one who asked Ms. Belhak about anal sex. In contrast, defense counsel had only asked a *doctor* whether anal sex is something that could damage tissues after an episiotomy. This was a medical question and did not implicate Ms. Belhak's character.

Yet in closing, Plaintiffs' counsel asserted that defense counsel had "accused" Ms. Belhak of having anal sex, insisted that "[t]hat's character assassination," and invited the jury to question the defendants' case:

- "Do you know what is not funny? When [defense counsel] accused Latif and Fatima of having anal sex within days of delivering their baby with no proof. That's not funny. That's character assassination, running Latif and Fatima's name through the mud on such an outrageous accusation without any proof. So you have got to ask, 'Is that all they got? Is that all they got?'" (3/29/22 Tr. 1055:22-1056:4, App. 589-90.)

The district court agreed that defense counsel's "character assassination" comment was improper. (App. 125, Dkt 313, 11/17/22 Order at 9.) But the court ruled that, "[s]tanding alone," the comment "does not warrant a new trial." (App. 126, *Id.* at 10.)

But the comment went to the heart of the case. The question before the jury was whether she injured her rectum at some point after the delivery. Defense counsel's question went to that exact topic. When Plaintiffs' counsel told the jury that the question was "character assassination," he effectively told the jury that they did not need to listen to the evidence or consider the defendants' theory of the case. The comment is enough, standing alone, to warrant a new trial.

Regardless, "standing alone" is not the standard. The comment must be considered in the context of the closing argument as a whole, along with all of the other misconduct. In that context, it is clear that this comment is one of many that require a new trial, particularly when considered together.

(c) Misleading the jury about the University records

Third, Plaintiffs' counsel misled the jury by telling them that the University of Iowa medical records resolved the ultimate issue in the case—the timing of Ms. Belhak's injuries. Specifically, in the University's assessment of Ms. Belhak, the records note that her problems include a

"[f]ourth degree perineal laceration not repaired at the time of delivery." (App. 166, Pl. Ex. 10(a).)

But the University doctors saw Ms. Belhak for the first time on February 3, days after she had been discharged after her delivery. (3/24/22 Tr. 463:6-12, App. 328.) They therefore could not—and did not purport to—identify the timing of her injuries. And no University employee or doctor testified at trial to explain the purpose of the assessment note.

Yet Plaintiffs' counsel twice told the jury that the University of Iowa concluded that the injuries occurred at the time of delivery:

- "The fourth-degree laceration we showed you at the University of Iowa, a well-recognized and respected institution. . . . The University of Iowa said that the fourth-degree laceration was there at the time of delivery." (3/29/22 Tr. 1052:13-19, App. 586.)

- "The University of Iowa records from February 3rd on says that it happened at the time of delivery. They are a neutral institution, not involved in this lawsuit. They say it repeatedly, that it happened at the time of delivery." (*Id.* 1103:1-5, App. 637.)

These comments misstate the facts. They told the jury that the issue in the case—the timing of Ms. Belhak's injuries—had already been resolved by the University. That is false. The University was not tasked with and did not purport to identify the timing of the injuries.

These comments also told the jury that the University's conclusion should be believed because it is "a well-recognized and respected institution," a "neutral institution not involved in this lawsuit." Those adjectives vouched for the truth of the University's conclusion, something that is particularly problematic where the University made no such conclusion.

The district court agreed that these comments were improper. (App. 127, Dkt 313, 11/17/22 Order at 11.) But the court again viewed the comments in isolation and ruled that, "standing alone," they did not prejudice the defendants. (*Id.*) This was an abuse of discretion. Telling the jury that a reputable institution had already decided the central issue in the case is deeply troubling and, even standing alone, is sufficient to warrant a new trial.

Regardless, again, that is not the standard. The comments must be viewed in the context of closing arguments as a whole. In that context, the comments are two of many that warrant a new trial.

The court also reasoned that the medical records were available during the deliberations, and that "[t]he average juror is capable of understanding that the University of Iowa records were treatment records generated contemporaneously with the treatment provided to Fatima Belhak." (*Id.*) In

other words, the district court ruled that the average juror could probably understand that Plaintiffs' counsel was being misleading.

But again, that is not the standard. In every case where counsel misrepresents the evidence in closing, the average juror is probably capable of understanding that counsel has misled them. The rule nonetheless prohibits counsel from misstating the evidence.

B. Counsel prejudiced the defense by asking more than 50 improper questions during trial.

Plaintiffs' counsel's misconduct did not begin at closing argument. As discussed above, counsel used the trial to lay the groundwork for many of his improper comments. Equally problematic, counsel's method of questioning witnesses was replete with improper questions throughout the seven-day trial. This, too, requires a new trial.

The supreme court has recognized that counsel's improper questioning can cause prejudice—and require a new trial—even where objections to the questions were sustained. *Brooks v. Gilbert*, 98 N.W.2d 309, 313 (Iowa 1959). For example, in *Brooks*, the plaintiff's counsel asked a total of 17 improper questions during trial, each of which prompted an objection, and each of which objection was sustained. *Id.* at 312-14. Based in large part on this misconduct, the supreme court found prejudicial error, reversed, and ordered a new trial. *Id.* at 315.

Brooks explained that the prejudice arose out of the impression that objections likely gave to the jury. *Id.* at 313. As the court put it, the defendants were "prejudiced by the fact that their counsel was forced to make numerous objections. To a layman that may indicate an attempt by defendants to unduly keep some fact from the jury; clearly to the prejudice of defendants." *Id.*

During the trial here, Plaintiffs' counsel asked 56 questions that elicited sustained objections.[2] Defense counsel repeatedly brought the problem to the court's attention.

On the third day of trial, defense counsel told the court that "[t]here's been a lot of leading questions, and I've let a lot of it go. I don't want to have to continue to object. I think that's unduly prejudicial to my client." (3/23/22 Tr. 423:9-12, App. 288.)

On the fourth day of trial, defense counsel again told the court, "I would just add that is a continuing -- the leading questions are a continuing issue. It started yesterday with the first question and continued throughout the day, and my having to continuously object to questions that are not just suggesting the answer, but giving the answer to the witness, is unduly

---

[2] *See supra* note 1.

prejudicial to my client." (3/24/22 Tr. 631:18-24, App. 450.) Later that same day, defense counsel again insisted that "my client is being prejudiced by these repeated things that I need to object to." (*Id.* 713:16-18, App. 467.)

And on the fifth day, counsel told the court, "I have to keep objecting, and I look like the bad guy in front of the jury for these questions that are so clearly improper." (3/25/22 Tr. 783:9-11, App. 503.)

These are precisely the concerns identified by the supreme court in *Brooks*—that being forced to repeatedly object could give the impression that the defense is hiding something.

Yet the district court found no problem. At trial, the court ruled that "I think both counsel are doing their jobs by objecting, and so, that's what I have to say on that topic." (*Id.* 787:3-5, App. 507.) And in denying the motion for mistrial, the court ruled that the defendants' argument was "without merit." (App. 131, Dkt 313, 11/17/22 Order at 15.) The court ruled that the repeated sustained objections could not have caused prejudice because the jury was instructed to decide the case based on the evidence, not the objections, and that "attorneys are sometimes required to make objections and that jurors should not draw any conclusions or inferences from the objections." (App. 131-32, *Id.* at 15-16.)

But while cautionary instructions may be sufficient to cure any prejudice by an isolated improper question or two, they are insufficient where, like here, the improper questions were repeated and persistent. Indeed, in *Brooks*, the district court had given a cautionary instruction, but the supreme court nonetheless reversed. 98 N.W.2d at 313.

This court should do the same here.

C. The cumulative effect of counsel's misconduct was prejudicial.

As mentioned above, under Iowa law, a party is entitled to a new trial if the misconduct of the prevailing party "materially affected [the] movant's substantial rights." Iowa R. Civ. P. 1.1004(2). In other words, the misconduct must have been prejudicial. *Kipp v. Stanford*, No. 18-2232, 2020 WL 3264319, at *8 (Iowa Ct. App. June 17, 2020). And to determine whether the misconduct was prejudicial, the court "consider[s] several factors, including 'the severity and pervasiveness of the misconduct, [and] the significance of the misconduct to the central issues in the case.'" *Id.*

In so doing, a reviewing court does not consider each improper statement in isolation. Instead, the court considers the "cumulative effect" of all of counsel's improper statements. *Id.* As the supreme court has recognized, "[i]t could well be that any one improper statement would not constitute prejudicial error, while the cumulative effect of several would

give rise to a claim of prejudice." *Kinseth v. Weil-McLain*, 913 N.W.2d 55, 67 (Iowa 2018).

The cumulative effect of misconduct during closing is particularly prejudicial because it occurs "at a time when defense counsel was not afforded an opportunity to respond and when the statements would be fresh in the jury's mind for deliberations." *Bronner v. Reicks Farms, Inc.*, No. 17-0137, 2018 WL 2731618, at *9 (Iowa Ct. App. June 6, 2018); *see also Gilster v. Primebank*, 747 F.3d 1007, 1011 (8th Cir. 2014) ("Counsel made a deliberate strategic choice to make emotionally-charged comments at the end of rebuttal closing argument, when they would have the greatest emotional impact on the jury, and when opposing counsel would have no opportunity to respond.")

When Plaintiffs' counsel's misconduct is viewed as a whole (as it must be), it becomes clear that the jury's decision was likely based on things other than the evidence in the case.

1. Additional misconduct

The conduct described above lists only a portion of counsel's misconduct. To consider counsel's misconduct as a whole, this Court also should consider two additional categories of misconduct—counsel's asking for accountability and invoking community safety.

When this additional misconduct is viewed in the context of the closing argument as a whole (as it must be), the additional misconduct contributes to the cumulative effect of the misconduct and confirms that a new trial is required. This is true even if the additional misconduct, standing alone, would not warrant a new trial.

Asking for accountability – First, Plaintiffs' counsel asked the jury to hold the defendant accountable. This is improper under Iowa law. *Gilster v. Primebank*, 747 F.3d 1007, 1011 (8th Cir. 2014) (applying Iowa law). Such comments are "no different than a prosecutor urging the jury at the end of a criminal case 'to be the conscience of the community,' an improper argument that, in a close case, may warrant a new trial." *Id.* Asking the jury to hold the defendant accountable can focus the jury on a "punitive or moralistic consideration" of the defendant's liability, rather than applying the facts and the law. *Kipp*, 2020 WL 3264319, at *6.

Plaintiffs' counsel nonetheless made persistent and repeated references to accountability and asked the jury to hold the defendants accountable—including by telling the jury that they held an "amazing power," just as counsel did in *Kipp*:

- "This case is about accountability . . . ." (3/29/22 Tr. 1051:18, App. 585.)

- "Dr. Smith must be held accountable, and the only ones who can do it is you." (*Id.* 1051:20-21.)

- "There is accountability, and the only thing that we can ask for -- the only thing – is money." (*Id.* 1055:5-6, App. 589.)

- "You get to decide as a group. It's your -- a power that is only given to you. No one else has this power." (*Id.* 1066:25-1067:2, App. 600-01.)

- "This is the one chance, right here and right now, to get justice." (*Id.* 1067:13-14, App. 601.)

- "[Y]ou have the power to decide what is right and wrong in this case, and it is an amazing power." (*Id.* 1071:12-14, App. 605.)

The district court, however, ruled that these comments did not constitute misconduct. (App. 128, Dkt 313, 11/17/22 Order at 12.) The court ruled that Plaintiffs' counsel used "accountability" to mean "holding the defendants responsible for their negligence, not as a means of punishing the defendants." (*Id.*) The court also noted that it had instructed the jury that arguments of counsel were not evidence, and that the jury was attentive. (*Id.*) And as the court put it, "[s]imilar arguments were made in *Smith v. Haugland*" but "the court of appeals found no abuse of discretion" in that case. (*Id.*)

There are three problems with the district court's ruling.

First, the *Smith* case involved an improper comment about community safety, not accountability. *Smith v. Haugland*, 762 N.W.2d 890, 898 (Iowa Ct. App. 2009). The arguments in that case therefore were not similar.

Second, unlike here, the *Smith* case concerned only a single improper comment during closing: "Your decision will make a statement to this community and all of the patients—all of the many, many, many patients who have this [problem]." *Id.* The appellate court therefore, understandably, held that because that comment stood in isolation, the "cumulative effect" of the closing argument did not prejudice the defendants. *Id.* at 901. In contrast, here, Plaintiffs' counsel's improper comment was not in isolation.

And third, the presumption that juries follow instructions cannot cure all misconduct as the district court seemed to suggest. The district court's reasoning would make sense in a case where there was a single improper comment in closing argument, as was the case in *Smith*. But where the improper conduct is "repeated" and "deliberate"—as it was here—then the presumption is not dispositive. *See Kinseth v. Weil-McLain*, 913 N.W.2d 55, 73 (Iowa 2018).

Indeed, in *Kinseth*, even though the supreme court acknowledged the presumption, the court nonetheless reversed the denial of a motion for new trial based on the plaintiff's counsel's misconduct in closing argument. *Id.*

The court explained that, "[b]ased on our review of the entire content of the closing arguments . . . . we must conclude that counsel's rhetoric prejudiced the defendant, and a new trial is warranted." *Id.*

Other Iowa cases are in accord and demonstrate that trusting the jury to follow the instructions is not a cure for counsel's persistent misconduct during closing. For example, the court of appeals has held that cautionary instructions cannot always cure counsel's improper arguments. *Bronner v. Reicks Farms, Inc.*, No. 17-0137, 2018 WL 2731618, at *7 (Iowa Ct. App. June 6, 2018).

Similarly, in *Kipp*, the district court had expressly instructed the jury that "your job is to decide this matter based upon" the plaintiff's damages alone." 2020 WL 3264319, at *3. The court of appeals nonetheless agreed that a new trial was required based on counsel's misconduct. *Id.* at *8.

The same is true here.

Invoking community safety – Second, Plaintiffs' counsel also urged the jury to decide the case based on the potential impact that the decision may have on the community. This, too, is improper under Iowa law. *Kipp*, 2020 WL 3264319, at *7; *State v. Johnson*, 534 N.W.2d 118, 127–28 (Iowa Ct. App. 1995). Indeed, such comments and themes are "an improper

emotional appeal designed to persuade the jury to decide the case on issues other than the facts before it." *Id.* at 128.

Plaintiffs' counsel nonetheless introduced several themes suggesting that this case was about safety, including the safety of the community. Counsel referred to the standard of care as "patient safety rules," phrasing that suggests that the "rules" affect the community as a whole:

- "There are certain patient safety rules that are the standard of care that every single doctor agrees." (3/29/22 Tr. 1042:20-21, App. 576.)

Counsel laid the groundwork for this improper theme during his opening statement, repeatedly referencing "patient safety rules" there as well. (3/22/22 Tr. 322:13, 15; 325:1, App. 232, 235.)

Counsel's closing also repeatedly referred to a "standard of care checklist," a theme he developed throughout the trial[3] to imply that there was only one accepted standard of care. More importantly, this phrase

[3] To lay the groundwork for this improper theme, Plaintiffs' counsel asked prospective jurors whether they followed a checklist at work. (3/21/22 Tr. 80:13-14, 147:3-4, 229:11-13, App. 227-29.) Counsel then referenced the "standard of care checklist" four times during his opening statement, and nine times during his examinations of witnesses. (3/22/22 Tr. 323:20; 324:16, 20; 337:2, App. 233-34, 236 (opening); 3/23/22 Tr. 401:5, 14; 407:11, 21; 3/25/22 Tr. 774:6; 797:4; 3/28/22 Tr. 881:16-17, 21-22; 939:1-2, App. 266, 272, 497, 508, 532, 557 (examinations).)

suggested that the jury and the community would be safer if they adopted the plaintiffs' view of the standard of care:

- "There are certain patient safety rules that are the standard of care that every single doctor agrees." (3/29/22 Tr. 1042:22, App. 576.)
- "I want to talk about that standard of care checklist . . . ." (*Id.* 1043:1, App. 577.)
- "This is to demonstrate on why a rectal examination is an absolute requirement on that standard of care checklist." (*Id.* 1044:3-4, App. 578.)
- "That's what he teaches every single one of his students and residents; that the standard of care checklist is, not only do you look with your eyes, but you feel with your fingers . . . ." (*Id.* 1046:24-1047:2, App. 580-81.)
- "It's talking about not following that standard of care checklist." (*Id.* 1051:25-1052:1, App. 585-86.)
- "That is something on the checklist after each and every episiotomy." (*Id.* 1052:9-10, App. 586.)

Finally, counsel's closing twice asked the jury why Dr. Smith didn't choose to be "safe rather than sorry," another theme that suggested that the jury should focus on safety rather than the standard of care:

- "So why wouldn't you just be safe than sorry . . . ." (*Id.* 1046:22-23, App. 580.)
- "Why wouldn't you be safe than sorry . . . ." (*Id.* 1054:15, App. 588.)

This was, again, a deliberate theme developed in Plaintiffs' opening statement (3/22/22 Tr. 324:24-25, App. 234) and during witness examination. (3/28/22 Tr. 883:7-8, App. 534.)

The district court ruled that these comments were not improper. (App. 122, Dkt 313, 11/17/22 Order at 6.) The court ruled that the statements were used to "summarize" and to "reference" the opinions of Plaintiffs' expert. (*Id.*)

But the statements did more than that. The only question before the jury was whether Dr. Smith met the standard of care. By linking the expert's opinions to safety and checklists, Plaintiffs' counsel suggested that the case was about the safety of the community in the future, not just the dispute at issue here. The comments invited the jury to decide the case based on the potential impact that the decision may have on the community, in violation of Iowa law. *Kipp*, 2020 WL 3264319, at *7; *Johnson*, 534 N.W.2d at 127-28.

2. Prejudicial effect

Plaintiffs' counsel's misconduct materially affected the defendants' substantial rights. It ensured that the jury would believe the plaintiffs' witnesses (and disbelieve the defense witnesses). Counsel misrepresented the facts to the jury, telling them that a respected and neutral institution—the University of Iowa—had already decided the issue and concluded that Ms. Belhak was injured at the time of delivery. And to deal with the unequivocal expert testimony that contradicted that conclusion, Plaintiffs'

counsel told the jury that they did not have to listen to him because he performed immoral medical procedures on mission trips in Honduras. This misconduct went to the central issue in the case, making reversal appropriate. *See Kipp*, 2020 WL 3264319, at *8.

Counsel's misconduct also was pervasive, another basis on which reversal is appropriate. *Id.* Indeed, Plaintiffs' counsel repeatedly invited the jury to base its decision on moralistic considerations, stating that Ms. Belhak felt betrayed and asking the jury to hold Dr. Smith accountable. He tapped into the jury's fears, making comments that invoked community safety and telling a "man at the door" story designed to put themselves in Ms. Belhak's shoes. All of this was against the backdrop of forcing defense counsel to object 56 times during the trial, giving the jury the impression that the defense was hiding information from them. And to top it off, Plaintiffs' counsel told the jury that defense counsel had "assassinated" Ms. Belhak's character by asking the expert whether anal sex could cause her injuries.

The district court disagreed and ruled that the cumulative effect of the misconduct did not warrant a new trial. (App. 130-32, Dkt 313, 11/17/22 Order at 14-16.) The court acknowledged that the timing of Ms. Belhak's injuries was the central issue in the case and identified the evidence that supported the plaintiffs' case. (App. 131, *Id.* at 15.) But the court concluded

that "none of the alleged misconduct surrounded this central factual dispute." (*Id.*)

In fact, however, *all* of the alleged misconduct surrounded the central factual dispute. This was a close case. It hinged entirely on the timing of Ms. Belhak's injuries, but there was no physical evidence establishing that fact. Instead, each side presented first-hand witnesses (Ms. Belhak and Dr. Smith) who disagreed about the state of Ms. Belhak's condition when she was discharged. Each side also presented experts (Dr. Chen and Dr. Severidt) who reviewed the records and reached opposite conclusions about the same issue. Thus, for the jury to answer the question before it, the jury had to decide who to believe—the plaintiffs' witnesses or the defense witnesses. The misconduct went directly to this central issue.

The misconduct was repeated, pervasive, and went to the heart of the question for the jury. This Court should order a new trial.

II. The court erred in denying the motion for directed verdict concerning the use of 4-0 sutures.

Plaintiffs' counsel elicited substantial testimony about the various types of sutures that can be used to repair a laceration. But none of the testimony suggested that Dr. Smith's use of 4-0 sutures caused any harm to Ms. Belhak here. The only people who could have determined whether Ms. Belhak's stitches held were the University hospital doctors who

examined her days after her delivery. But Plaintiffs' counsel did not call any of those doctors to testify.

Instead, counsel attempted to have Dr. Chen interpret a single line in the University hospital's medical records—"vaginal repair site appears broken down." (3/23/22 Tr. 452:18-19, App. 317.) But Dr. Chen admitted that he could not tell whether the note meant that the stitches had broken, or instead whether the laceration had expanded beyond what was initially sutured (the central issue in the case). (*Id.* 452:25.)

There was therefore no evidence that the 4-0 sutures failed, and thus no evidence that the sutures caused any harm to Ms. Belhak. The district court should have granted the defendants' motion for directed verdict on that specification. Failing that, the court should have granted the defendants' post-trial motion for a new trial on the same basis.

To be clear, the defendants' argument on appeal is not based on the jury instructions. That argument is waived, but the challenge to the directed verdict is not.

The defendants' motion for directed verdict made it clear that there was no evidence to support the specification about the 4-0 sutures. But the district court disagreed, ruling, "I think the plaintiff has put forth sufficient

evidence. . . to make this a jury question, so the motion will be denied." (3/28/22 Tr. 1001:21-23, App. 570.)

Based on that ruling, defense counsel thereafter stipulated to the submission of the related specification to the jury. (*Id.* 1016:20-24, App. 572; App. 150, Dkt 317, Instruction 14(1)(c).) In stipulating to the specification, the defense waived its ability to challenge the submission of that specification on appeal. Iowa R. Civ. P. 1.924 & cmt ("all objections to giving . . . any [jury] instruction must be made in writing or dictated into the record," and "[m]oving for directed verdict does not constitute objection to an instruction on the issues").

But that stipulation did not affect the defendants' ability to challenge the denial of their motion for directed verdict. Under Iowa law, a motion for directed verdict preserves for appeal the issue of whether a theory should have gone to the jury, even in the absence of a subsequent challenge to the jury instructions. *James ex rel. James v. Burlington N., Inc.*, 587 N.W.2d 462, 464 (Iowa 1998). As the *James* court explained, "[t]he [defendant] was not required, in order to preserve error, to also object to the instructions. The record made regarding instructions cannot be taken as an abandonment of the [defendant's] clear position that, as a matter of law, the case should not have been submitted to the jury at all." *Id.*

Thus, on appeal, the defendants challenge the denial of the motion for directed verdict.

Error preservation.

The defendants preserved this argument in their motion for directed verdict (3/28/22 Tr. 999:1-13, App. 569), in their post-trial motion (App. 109, Dkt 297, 5/13/22 Brf at 73), and at the hearing on their post-trial motion (9/1/22 Tr. 48:18-21, Amended Supp. App. 28).

The court denied the motion for directed verdict (3/28/22 Tr. 1001:21-23, App. 570) and the post-trial motion (App. 144, Dkt 313, 11/17/22 Order at 28).

Standard of review.

The denial of a motion for directed verdict is reviewed for correction of errors of law. *James*, 587 N.W.2d at 464. The court "review[s] the evidence in the light most favorable to the nonmovant and determine[s] whether sufficient evidence existed to warrant submission of the issues to a jury." *Id.*

There was no evidence that the use of 4-0 sutures caused harm.

The district court ruled that there was sufficient evidence for the jury to consider whether the use of 4-0 sutures caused harm. (3/28/22 Tr. 1001:21-23, App. 570; App. 144, Dkt 313, 11/17/22 Order at 28.) Specifically, the court ruled that Dr. Chen testified "regarding the harm

suffered by Fatima as a result of the incorrect sutures." (App. 144, Dkt 313, 11/17/22 Order at 28.)

The district court is mistaken. The evidence presented on this issue is as follows.

Several witnesses testified about the different types of sutures that can be used to repair lacerations. Dr. Chen explained the different calibers of sutures, ranging from 0-0 (the largest and strongest) to 4-0 (the smallest and weakest). (3/23/22 Tr. 441:18-442:1, App. 306-07.)

Dr. Smith testified that, during her residency, she learned to use 4-0 sutures to repair episiotomies. (3/28/22 Tr. 923:24-924:9, App. 548-49.) She also confirmed that she used 4-0 sutures to repair Ms. Belhak's laceration. (*Id.* 923:18-23, App. 548.)

Dr. Severidt agreed that it was appropriate for Dr. Smith to use 4-0 sutures in this case. (3/25/22 Tr. 774:14-17, App. 497.) As he put it, "I personally use 3-0, . . . and I've seen people use 2-0 and 4-0, and I actually don't think it makes much difference." (*Id.* 755:20-23, App. 485.)

Dr. Chen disagreed. He opined that Dr. Smith should have used something stronger than 4-0 sutures. (3/23/22 Tr. 441:18-19, 443:10-16, App. 306, 308.)

Both experts agreed on the risk, however. They both explained that using sutures that were too fine for a particular injury would increase the risk of the sutures breaking apart and the wound opening up. (*Id.* 442:12-20, App. 307 (Chen); 3/25/22 774:18-775:7, App. 497-98 (Severidt).)

And here, that risk did not occur. Indeed, the medical records showed that, when Ms. Belhak arrived at the University of Iowa hospital, the sutures were still intact. (3/25/22 Tr. 756:10-19, App. 486.) Specifically, the records confirm that the doctors had to remove the sutures to be able to examine Ms. Belhak. (*Id.*)

There was no evidence that any of the sutures had broken. Plaintiffs' counsel did not call anyone from the University hospital to testify about the condition of Ms. Belhak's stitches when she arrived there. This failure is dispositive for Plaintiffs' claim that the 4-0 sutures caused any harm.

Instead, counsel asked Dr. Chen whether the medical records show that Ms. Belhak's sutures had broken. But Dr. Chen did not (and could not) testify that the sutures had broken.

Counsel first focused on a line in the medical record stating that "vaginal repair site appears broken down." (3/23/22 Tr. 452:18-19, App. 317.) He asked Dr. Chen, "what does that mean?" (*Id.* 452:22-24.) Dr. Chen replied that "[i]t's hard to say, exactly," but "[f]rom what my guess is, they

are seeing an opening either in the perineum or in the vagina or both. . . . [B]roken down means they may see some intact stitches, but you will see tissue that is not sutured, but appears to be separated." (*Id.* 452:22-453:12, App. 317-18.)

In other words, the medical record established that part of Ms. Belhak's wound was not sutured. But the record did not establish whether that happened because any of the sutures came loose, or instead because Ms. Belhak's laceration expanded after the sutures were placed.

Counsel then asked Dr. Chen directly whether the medical record established that the use of 4-0 sutures caused harm to Ms. Belhak. Dr. Chen's answer confirmed that he could not tell whether the unsutured portion of the laceration had ever been sutured to begin with:

> Q. Within a reasonable degree of medical certainty, that being more likely true than not, was Dr. Smith's breach of the 4-0 sutures that she used a cause of the vaginal repair site breaking down?
>
> A. My interpretation, also, they may think it was broken down, meaning they assume, for example, a fourth degree was repaired, and they see a defect in the perineum and don't see sutures there, so they are assuming some of the sutures were dissolved versus it not being repaired at all.
>
> Q. Sure. So you can't tell whether -- which circumstance, but you know that whatever sutures that this medical provider is looking at has been broken down?
>
> A. Some of the suture, yes.

(*Id.* 453:19-454:7, App. 318-19.)

This was the closest Plaintiffs' counsel came to eliciting any testimony that the use of 4-0 sutures caused any harm to Ms. Belhak. And it was insufficient. It was Plaintiffs' obligation to establish causation for each of its specifications of negligence. *Susie v. Fam. Health Care of Siouxland, P.L.C.*, 942 N.W.2d 333, 338 (Iowa 2020). And "[t]he jury cannot be left to speculate about the but-for causal link." *Id.*

But here, the jury would have had to speculate that Ms. Belhak's sutures failed. Thus, the jury would have had to speculate that Dr. Smith's use of 4-0 sutures caused any harm. And because the court submitted the specification, the jury may have nonetheless speculated about causation and found liability based on this specification alone.

The district court erred in denying the defendants' motion for directed verdict on Plaintiffs' theory that the sutures caused harm. The district court therefore also erred in denying the defendants' motion for a new trial on that basis. This Court should therefore order a new trial where that specification is not submitted to the jury.

Conclusion

This court should reverse and order a new trial.

Oral Argument Statement

Appellants respectfully request oral argument.

/s/Troy Booher/n.penner
TROY L. BOOHER AT0015646
BETH E. KENNEDY AT0015645
for
ZIMMERMAN BOOHER
341 S. Main Street, Fourth Floor
Salt Lake City, UT 84111

and

NANCY J. PENNER AT0006146
for
SHUTTLEWORTH & INGERSOLL, PLC
500 U.S. Bank Bldg., P.O. Box 2107
Cedar Rapids, IA 52406

Attorneys for Appellants

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

   [x] this brief contains 11,636 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1) or

   [ ] this brief uses a monospaced typeface and contains _____ lines of text, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(2).

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:

   [x] this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14 point, or

   [ ] this brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

/s/Nancy Penner
Signature

9/18/23
Date

Certificate of Filing and Service

The undersigned certifies this brief was electronically filed and served on the 18th day of September, 2023, upon the following persons and upon the Clerk of the Iowa Supreme Court using the Electronic Document Management System, which will send notification of electronic filing (constituting service):

William J. Bribriesco
Anthony J. Bribriesco
Andrew W. Bribriesco
BRIBRIESCO LAW FIRM, PLLC
2407 18th Street, Suite 200
Bettendorf, IA 52722
Bill@bribriescolawfirm.com
Anthony@bribriescolawfirm.com
Andrew@bribriescolawfirm.com

/s/Haley Fauconniere