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IN THE SUPREME COURT OF IOWA

SUPREME COURT 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

APPELLEES' AMENDED FINAL BRIEF

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TABLE OF CONTENTS

Proof of Service and Certificate of Filing…………………………………...2

Table of Contents…………………………………………………………....3

Table of Authorities………………………………………………………....6

Statement of the Issues Presented for Review………………….………….8

Routing Statement………………………………………………..……...11

Introduction……………………………………………………..........11

Statement of the Case……………………………………………..……..13

Statement of Facts…………………………………………………….....14

Summary of the Argument……………………………………………………23

I. The trial court did not abuse its discretion when it determined that there was no prejudicial misconduct and denied Defendants' motion for new trial………………………………………………...25

A. Error Preservation……………………………………………..25
B. Standard of Review…………………………………………………25
C. The trial court has broad discretion in determining whether alleged misconduct warrants a mistrial or new trial……………………...26
D. Defendants' strategy was to lodge unnecessary and unimportant objections throughout trial in order to disrupt Plaintiffs' case and in the event of an unfavorable verdict, attempt to set up a motion for a mistrial based on volume of objections alone……………………28
1. Many of Defendants' objections were nit-picky and placed form over substance…………………………………………………...29
2. Many of Defendants' objections were overruled……………..32
3. The trial court rejected the allegation that the questioning of Plaintiffs' counsel was a part of a concerted plan to require Defendants' counsel to object………………………………...33

E. Defendants' trial strategy was to spin any issue into a purported reason for a mistrial because the evidence was so strong in favor of Plaintiffs…………………………………………………………34
F. There was no prejudicial misconduct in Plaintiffs' closing argument…………………………………………………………34
   1. Counsel's closing argument constitutes zealous advocacy for which oratorical privilege exists……………………………...35
   2. Defendants attempt to manipulate the holding of *Kipp* into a "rule book" for closing arguments, but that was never the intention of the *Kipp* court……………………………………37
   3. Use of the word "betray" one time in closing argument is not misconduct and is not even remotely prejudicial……………38
   4. Counsel properly asked the jury to determine the amount of damages to compensate Plaintiffs from Plaintiffs' perspective, and contrary to Defendants' accusation, Plaintiffs never made a "Golden Rule" argument by requesting that the jury to determine what amount the jury would accept if they were in Plaintiffs' shoes……………………………………………40
G. Plaintiffs' counsel properly made arguments based on inferences from the record, and consequently, the allegation of misstating the record or misleading the jury is without merit…………………...46
   1. Counsel's critique of the credibility of Dr. Severidt, Defendants' expert witness, was based on the evidence and was reasonable…………………………………………………47
   2. Counsel's suggestion that it was character assassination for Defendants to accuse Plaintiffs of anal intercourse when Defendants knew there was no evidence of anal intercourse and knew that the trial court prohibited Defendants from asking about anal intercourse was warranted under the unique facts of the case……………………………………………………..50
   3. Counsel properly referenced medical records from the University of Iowa, which were in evidence for the jury to see, during closing argument and the allegation that the jury was misled is without merit……………………………………53
H. The trial court, who is in the best position to evaluate allegations of misconduct, determined Defendants were not prejudiced by the alleged misconduct, individually or cumulatively………………56

II. Defendants did not preserve the issue of a directed verdict as to 4-0 sutures and even if Defendants had preserved error on this issue, the trial court properly denied Defendants' motion for a directed verdict……………………………………………………..63

A. Error Preservation……………………………………………..63

B. Standard of Review……………………………………………68

C. Assuming *arguendo* that Defendants had preserved this issue, the record contains sufficient evidence to submit the specification of negligence to the jury that Dr. Smith's use of 4-0 sutures caused harm……………………………………………………………...68

1. Dr. Chen provided an expert opinion that that the use of 4-0 sutures to repair an episiotomy breached the standard of care and was a cause of harm……………………………………...70
2. Dr. Chen's expert opinions are supported by the record……..72
3. The evidence in favor of submitting the specification of negligence to the jury was so strong that Defendant agreed it should be submitted to the jury during the instruction conference……………………………………………………74

Conclusion…………………………………………………………………75

Oral Argument Statement……………………………………………..……75

Attorney's Cost Certificate of Filing…………………………………..…...76

Certificate of Compliance………………………………….………………77

TABLE OF AUTHORITIES

Cases

Althof v. Benson, 147 N.W.2d 875 (1967)……………………………………40
Baysinger v. Haney, 261 Iowa 577 (1968)……………………………...27-28
Bronner v. Reicks Farms, Inc., 919 N.W.2d 766 (Iowa Ct. App. 2018)...... 46
Brooks v. Gilbert, 98 N.W.2d 309 (1959)……………………………………31
Burke v. Brimmer, 772 N.W.2d 15 (Iowa Ct. App. 2009)…………………26
Butler v. Wells Fargo Fin., Inc., 949 N.W.2d 437 (Iowa Ct. App. 2020)….61
Clinton Physical Therapy Serv., P.C. v. John DeereHealth Plan, Inc.,
714 N.W.2d 603 (2006)……………………………………………..26
Coker v. Abell-Howe Co., 491 N.W.2d 143 (1992)………………………..68
Conn v. Alfstad, 801 N.W.2d 33 (Iowa Ct. App. 2011)……………………40
Connolly v. Des Moines Inv. Co., 105 N.W. 400 (1905)…………………..61
Corkery v. Greenberg, 14 N.W.2d 327 (1962)……………………………40
Estate of Long v. Broadlawns Medical Ctr., 656 N.W.2d 71 (2002)………26
Duitsman v. Afzal, 965 N.W.2d 208 (2021)………………………………..38
Feld v. Borkowski, 790 N.W.2d 72 (2010)…………………………………61
Fry v. Blauvelt, 818 N.W.2d 123 (2012)…………………………………...25
Giltner v. Stark, 219 N.W.2d 700 (1974)…………………………………..57
Haumersen v. Ford Motor Co., 257 N.W.2d 7, 12 (Iowa 1977)…………...72
Herbst v. State, 616 N.W.2d 582 (2000)…………………………………...68
Hoekstra v. Farm Bureau Mut. Ins. Co., 382 N.W.2d 100 (1986)………...57
James v. Burlington Northern, Inc., 587 N.W.2d 462 (1998)………… 65-66
Kinseth v. Weil-McLain, 913 N.W.2d 55 (2018)……………25-26, 32, 47, 56
Kipp v. Stanford, 949 N.W.2d 249 (Iowa Ct. App. 2020).................... passim
Knake v. King, 492 N.W.2d 416 (1992)……………………………………62
Koenig v. Koenig, 766 N.W.2d 635 (2009)………………………………...61
Loehr v. Mettille, 806 N.W.2d 270 (2011) 27, 32, 56
Ludman v. Davenport Assumption High School, 895 N.W.2d 902 (2017)...61
Mays v. C. Mac Chambers Co., 490 N.W.2d 800 (1992)…………………26
Mercy Hosp. v. Hansen, Lind, & Meyer, P.C., 456 N.W.2d 666 (1990).73-74
Mitchell v. Mystic Coal Co., 179 N.W. 428 (1920)………………………..35
Russell v. Chicago, Rock Island & Pac. R.R., 86 N.W.2d 843 (1957)…40, 43
Smith v. Ford Motor Co., 626 F.2d 784 (10th Cir. 1980)………………72-73
Sonksen v. Legal Servs. Corp., 389 N.W. 2d 386 (1986)…………………..35
State v. Burns, 94 N.W. 238 (1903)………………………………………..35
State v. Carey, 709 N.W.2d 557 (2006) 36, 46-47
State v. Graves, 668 N.W.2d 860 (2003)………………………………46-47
State v. Hiatt, 834 N.W.2d 82 (Iowa Ct. App. 2013)………………………36

State v. McPherson, 171 N.W.2d 870 (1969)…………………………….41
State v. Melk, 543 N.W.2d 297 (Iowa Ct. App. 1995)…………………35, 44
State v. Morrison, 323 N.W.2d 254 (1982)……………………………...27
State v. Perez-Castillo, 723 N.W.2d 453 (Iowa Ct. App. 2006)…………...53
State v. Peterson, 196 N.W.2d 436 (1972)………………………………27
State v. Shanahan, 712 N.W.2d 121 (2006)……………………………...54
State v. Tobin, 333 N.W.2d 842 (1983)…………………………………..64
State v. Towney, 881 N.W.2d 470 (Iowa Ct. App. 2016)…………………..46
State v. Yaggy, 810 N.W.2d 532, 19-20 (Iowa Ct. App. 2012)…………….36
Thompson v. Kaczinski, 774 N.W.2d 829 (2009)…………………………...62
Tibodeau v. CDI, LLC, 902 N.W.2d 592 (Iowa Ct. App. 2017)…………...27
Vanskike v. Union Pac. R.R., 725 F.2d 1146 (8th Cir. 1984)……………...57
Weyerhaeuser Co. V. Thermogas Co., 620 N.W.2d 819, 823 (2000)……...68
Wiar v. Wabash R. Co., 144 N.W. 703 (1913)……………………………61

Other Authorities

75 Am. Jur. 2d Trial § 234, at 313 (1974)…………………………...36, 44
Gaudineer, “Ethics: The Zealous Advocate”, 24 Drake L. Rev. 79 (1974)….35
Iowa Judicial Branch, Guide to Civil Court Procedure……………………35

Rules

Iowa R. App. P. 6.1101(3)…………………………………………………11
Iowa R. of Civ. P. 1.1004 .... 25, 58
Iowa R. Civ. P. 1.904………………………………………………………40
Iowa R. Evid. 5.703…………………………………………………….....71
Iowa R. Prof’l Cond. Preamble [9]……………………………………...35
Iowa R. Prof’l Cond. 32:1:3 (Comment 1)…………………………………35

Filings from Other Cases

Afzal’s Reply Brief, Iowa Supreme Court No. 19-1942…………………...38
Afzal’s Application for Further Review,
Iowa Supreme Court No. 19-1942……………………………………38

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the trial court, who is in the best position to evaluate allegations of attorney misconduct, acted reasonably within its broad discretion when it denied Defendants' motion for new trial.

Cases

Althof v. Benson, 147 N.W.2d 875 (1967)……………………………………40
Baysinger v. Haney, 261 Iowa 577 (1968)……………………………...27-28
Bronner v. Reicks Farms, Inc., 919 N.W.2d 766 (Iowa Ct. App. 2018)…...46
Brooks v. Gilbert, 98 N.W.2d 309 (1959)……………………………………31
Burke v. Brimmer, 772 N.W.2d 15 (Iowa Ct. App. 2009)…………………26
Butler v. Wells Fargo Fin., Inc., 949 N.W.2d 437 (Iowa Ct. App. 2020)….61
Clinton Physical Therapy Serv., P.C. v. John DeereHealth Plan, Inc., 714 N.W.2d 603 (2006)……………………………………………..26
Conn v. Alfstad, 801 N.W.2d 33 (Iowa Ct. App. 2011)……………………40
Connolly v. Des Moines Inv. Co., 105 N.W. 400 (1905)…………………..61
Corkery v. Greenberg, 14 N.W.2d 327 (1962)……………………………40
Duitsman v. Afzal, 965 N.W.2d 208 (2021)………………………………..38
Estate of Long v. Broadlawns Medical Ctr., 656 N.W.2d 71 (2002)………26
Feld v. Borkowski, 790 N.W.2d 72 (2010)…………………………………61
Fry v. Blauvelt, 818 N.W.2d 123 (2012)…………………………………...25
Giltner v. Stark, 219 N.W.2d 700 (1974)…………………………………..57
Hoekstra v. Farm Bureau Mut. Ins. Co., 382 N.W.2d 100 (1986)………...57
Kinseth v. Weil-McLain, 913 N.W.2d 55 (2018)……………25-26, 32, 47, 56
Kipp v. Stanford, 949 N.W.2d 249 (Iowa Ct. App. 2020).................... passim
Knake v. King, 492 N.W.2d 416 (1992)……………………………………62
Koenig v. Koenig, 766 N.W.2d 635 (2009)………………………………...61
Loehr v. Mettille, 806 N.W.2d 270 (2011) 27, 32, 56
Ludman v. Davenport Assumption High School, 895 N.W.2d 902 (2017)...61
Mays v. C. Mac Chambers Co., 490 N.W.2d 800 (1992)…………………26
Mitchell v. Mystic Coal Co., 179 N.W. 428 (1920)………………………..35
Russell v. Chicago, Rock Island & Pac. R.R., 86 N.W.2d 843 (1957)....40, 43
Sonksen v. Legal Servs. Corp., 389 N.W. 2d 386 (1986)…………………..35
State v. Burns, 94 N.W. 238 (1903)………………………………………..35
State v. Carey, 709 N.W.2d 557 (2006) 36, 46-47
State v. Graves, 668 N.W.2d 860 (2003)………………………………46-47
State v. Hiatt, 834 N.W.2d 82 (Iowa Ct. App. 2013)………………………36
State v. McPherson, 171 N.W.2d 870 (1969)……………………………...41
State v. Melk, 543 N.W.2d 297 (Iowa Ct. App. 1995)…………………35, 44

State v. Morrison, 323 N.W.2d 254 (1982)…………………………………...27
State v. Perez-Castillo, 723 N.W.2d 453 (Iowa Ct. App. 2006)…………...53
State v. Peterson, 196 N.W.2d 436 (1972)…………………………………27
State v. Shanahan, 712 N.W.2d 121 (2006)………………………………...54
State v. Towney, 881 N.W.2d 470 (Iowa Ct. App. 2016)…………………..46
State v. Yaggy, 810 N.W.2d 532, 19-20 (Iowa Ct. App. 2012)…………….36
Thompson v. Kaczinski, 774 N.W.2d 829 (2009)…………………………...62
Tibodeau v. CDI, LLC, 902 N.W.2d 592 (Iowa Ct. App. 2017)…………...27
Vanskike v. Union Pac. R.R., 725 F.2d 1146 (8th Cir. 1984)……………...57
Wiar v. Wabash R. Co., 144 N.W. 703 (1913)………………………………61

Other Authorities

75 Am. Jur. 2d Trial § 234, at 313 (1974)……………………………...36, 44
Gaudineer, "Ethics: The Zealous Advocate", 24 Drake L. Rev. 79 (1974)….35
Iowa Judicial Branch, Guide to Civil Court Procedure…………………….35

Rules

Iowa R. of Civ. P. 1.1004 .... 25, 58
Iowa R. Civ. P. 1.904…………………………………………………….40
Iowa R. Prof'l Cond. Preamble [9]………………………………………...35
Iowa R. Prof'l Cond. 32:1:3 (Comment 1)………………………………….33

Filings from Other Cases

Afzal's Reply Brief………………………………………………………36
Afzal's Application for Further Review……………………………………36

II. Whether Defendants failed to preserve error when they agreed a jury specification of negligence should be given to the jury and then failed to discuss issue relating to directed verdict in post-trial motions and during oral arguments in front of the trial court; or assuming *arguendo* that this issue was preserved, whether there was sufficient evidence in the record to deny Defendant's motion for directed verdict on a specification of negligence when Plaintiffs presented expert testimony to support that specification of negligence.

Cases

Coker v. Abell-Howe Co., 491 N.W.2d 143 (1992)………………………68
Haumersen v. Ford Motor Co., 257 N.W.2d 7, 12 (Iowa 1977)…………72
Herbst v. State, 616 N.W.2d 582 (2000)…………………………………68
James v. Burlington Northern, Inc., 587 N.W.2d 462 (1998)…………65-66
Mercy Hosp. v. Hansen, Lind, & Meyer, P.C.,
456 N.W.2d 666 (1990)…………………………………………73-74
Smith v. Ford Motor Co., 626 F.2d 784 (10th Cir. 1980)…………… 72-73
State v. Tobin, 333 N.W.2d 842 (1983)………………………………...64
Weyerhaeuser Co. V. Thermogas Co., 620 N.W.2d 819, 823 (2000)……..68

Rules

Iowa R. Evid. 5.703……………………………………..……………71

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 appeal follows a medical malpractice verdict in favor of Plaintiffs against Women's Care Specialists, P.C., and its employee, Dr. Denice Smith, MD. Plaintiffs presented strong evidence throughout the seven-day trial. Recognizing the strength of Plaintiffs' case, Defendants' trial strategy was reduced to lodging inappropriate objections to innocuous questions, sometimes not even waiting until the question was fully asked before interrupting. Defendants' strategy was to complain about every little thing, including when their own expert engaged in misconduct with a juror. Defendants' strategy was designed to disrupt Plaintiffs' case and in the event of an unfavorable verdict, set up a motion for a mistrial based on the volume of objections alone.

Defendants have conceded the strength of Plaintiffs' case in numerous ways. Defendants have never argued that the verdict had excessive damages appearing to have been influenced by passion or prejudice. That is because Defendants know that Fatima has significant injuries that she will have to live with for the rest of her life.

Additionally, Defendants agreed that certain specifications of negligence should be submitted to the jury. During trial, Plaintiffs presented expert testimony that Dr. Smith violated the standard of care when she chose to use weak sutures (4-0) in an attempt to close the episiotomy. Plaintiffs presented evidence that this violation of the standard of care was a cause of damages. This evidence was so strong that Defendants' counsel agreed that this theory of negligence should be presented in the jury instruction. App. 572, 1016:20-25.

After seven days of trial, the jury determined that Dr. Smith was negligent, and Dr. Smith's negligence was a cause of life-altering injuries to Fatima such as fecal incontinence and chronic vaginal pain. These injuries have caused Fatima and Latif needless pain and suffering, loss of enjoyment of life, and other permanent damages.

On appeal, Defendants continue their strategy of attempting to make Plaintiffs' counsel the scapegoat for the jury's verdict. Defendants made numerous allegations of misconduct, but it is important to remember that they are *just* allegations. The trial judge was present throughout the proceedings and interacted with counsel, witnesses, and jurors. The trial judge, who is in the best position to evaluate allegations of misconduct, found none of Defendants' ongoing complaints sufficient, either in isolation,

or cumulatively, to warrant a new trial. The Court should affirm the trial judge's decision.

STATEMENT OF THE CASE

This case arises out of injuries Plaintiff Fatima Belhak ("Fatima"), and her husband, Abdellatif Elfila ("Latif") ("Plaintiffs"), suffered as a result of the medical care Fatima received on January 27, 2014 after giving birth to Plaintiffs' son Zayd. Plaintiffs brought suit against Denice Smith, MD ("Dr. Smith"), the physician that delivered Zayd, for negligence and loss of consortium. App. 012-19. They also brought suit against appellant, Women's Care Specialists, P.C., based on respondent superior. App. 020-25. The cases were consolidated. App. 030-31.

In addition to the statement of the case in Defendants' brief, Plaintiffs add the following:

In 2019, the case went to trial, but there was a mistrial. During voir dire, one of the potential jurors had inquired about whether there was medical malpractice insurance and made comments about insurance. As a result, the trial judge determined there should be a mistrial.

The case went to trial again on March 21, 2022. During closing argument, Plaintiffs' counsel asked the jury to return a verdict of $7 million dollars. After nearly two days of deliberations, the jury returned a verdict of

$3.25 million, less than half of what Plaintiffs' counsel requested. App. 638, 1104:13; App. 032-33.

STATEMENT OF THE FACTS

On January 27, 2014, Fatima gave birth to Plaintiff's first son, Zayd, a child whose name she had decided on when she was around 13 years old. App. 322, 457:15-17; App. 423-24, 604:25-605:4. The birth should have been the start of a realized dream but instead, it was the start of a physically and emotionally painful journey that fundamentally and permanently altered Plaintiffs' lives.

Fatima chooses Dr. Mona.

While pregnant, Fatima found a medical provider, Dr. Mona Alqulali ("Dr. Mona"), who spoke Arabic, Fatima's native language. App. 425, 606:1-5. Fatima felt lucky she was able to talk directly to Dr. Mona every pre-natal visit leading up to the day of her baby's delivery. App. 425-26, Tr. 606-07.

Fatima goes into labor.

When Fatima went into labor, Dr. Mona was unable to make it to the hospital before Fatima delivered. App. 426, 607:10-12; App. 461, 665:14-17. Dr. Smith, an employee of Women's Care Specialists, P.C., was instead assigned as Fatima's delivering physician. App. 427, 608:14-17. Dr. Smith

was not an obstetrician or gynecologist. App. 525, 870. Dr. Smith did not have the training or skill to perform obstetric procedures like repair a deep laceration following delivery. App. 525-26, Tr. 870-71.

During Fatima's delivery, Dr. Smith performed an episiotomy into the vaginal opening of Fatima. Supp. App. 19, 872:12-17. An episiotomy is a surgical cut that is made in the mother's perineum during birth. Episiotomies were once performed prophylactically in the US, but today, medical providers do not perform them unless necessary. App. 256-57, 391:04-392:03; App. 468-69, 721:14-722:3.

Dr. Smith made this surgical cut with scissors. Supp. App. 19, 872:12-17. During the two years working for Dr. Mona, Dr. Smith had done only one episiotomy before Fatima's delivery. Supp. App. 19-20, 872:22-873:21. Dr. Smith was not qualified to repair deep lacerations like third- and fourth-degree lacerations. App. 526, 871:10-16. After delivery, Dr. Smith conducted a physical vaginal examination, diagnosed a second-degree laceration, and repaired the episiotomy using 4-0 sutures. App. 547, 922:9-23; App. 548, 923:7-20.

Fatima was ultimately diagnosed with a fourth-degree perineal laceration. App. 253, 388:4-22; App. 162-63. A fourth-degree laceration is the deepest laceration; it occurs when the laceration has gone through the skin,

vaginal muscles, and anal sphincter muscles and has reached the rectum. App. 265, 400. Third- and fourth-degree lacerations can be devastating injuries if not properly diagnosed and timely repaired. App. 300, 435; App. 419-20, 554-55.

Fatima alerted her medical providers that something was wrong.

Fatima testified that after giving birth, she reported pain in her rectum to the nurses. App. 429, 610:19-610:23. She also testified that when using the bathroom, she noticed small pieces of stool and blood on her postpartum pad. App. 429-30, 610:24-611:11. She showed Latif who then "went to speak with the registered nurse." App. 430, 611:12-15. Fatima also showed the registered nurse who came into the bathroom and told the nurse about her pain. App. 420, 611:16-20.

Fatima directly asked the nurse, "is it possible that this stool that came with the blood that came from that opening that was made by the cut?" and "told her maybe it's possible that the stitches were loose." App. 430-31, 611:23-612:25. The nurse rejected Fatima's concerns, but after Fatima insisted that something was not right, conducted a visual examination. *Id.* The nurse told her everything was normal and gave her an ice pack for the pain. *Id.* Fatima also reported her concerns to Dr. Mona, who assured her things were normal. App. 433, 614:1-21.

Fatima is discharged and discovers her injury.

After returning home, Fatima self-inspected her vaginal area with a mirror. App. 437-38, 618:21-619:16. It was undeniable – just as she suspected, and just as she had alerted providers to – Fatima saw stool coming out of her vagina. *Id.*

Fatima and Latif called Dr. Mona's clinic and were immediately connected to Dr. Smith. App. 438-39, 619:16-620:09. Dr. Smith was concerned that Fatima's sutures were tearing. Supp. App. 23, 895:01-03. Instead of telling Fatima and Latif to go directly to the emergency room, Dr. Smith wanted to talk with Dr. Mona first. After talking with Dr. Mona, Dr. Smith called back and told Fatima and Latif that they did not have to go to the emergency room, and they could wait until the clinic opened a couple days later. Supp. App. 22-24, 894:01-896:18.

Fatima went to the emergency room and then was transferred to the University of Iowa Hospitals and Clinics ("UIHC"). Upon arrival at UIHC, she was diagnosed with a fourth-degree perineal laceration. App. 253, 388:4-22; App. 162-63. Surgery was required for anal sphincteroplasty (reconstructive surgery) and repair of fourth-degree laceration, but could not be conducted immediately because the site had become infected. App. 253-54, 388:18-389:5; App. 445-46, 626:21-627:5.

While Fatima waited for the surgery, she had to undergo sitz baths, which took about thirty minutes and required Fatima to fully undress from the waist down, after each bowel movement. App. 444-45, 625:4-625:20. Fatima "did what [she] was told . . . because [she] wanted to keep [her] uterus." *Id.* Even after the surgery, the pain continued and she worried about her ability to care for Zayd. App. 446, 627:6-8.

Today, Fatima struggles with the effects of her injury.

Despite the reconstructive surgery, Fatima was left with numerous long-lasting adverse impacts, which continue through today. She continues to have difficulty sitting for long time, walking, doing daily chores, bending, carrying heavy weight, and sleeping in a particular way. App. 447, 628:3-16. Sitting or lying in the same position causes her pelvic pain which radiates down her legs. *Id.* Her conditions require ongoing management including physical therapy and at-home exercises. *See, e.g.* App. 454–57, 640:14-643:3.

In addition to the physical toll, Fatima has suffered emotionally. One of her fears is going out to meet people because she can have uncontrollable diarrhea and gas. App. 447-48, 628:22-629:12. As a result of her fears, she restricts her diet to avoid accidents. *Id.* Her fears have a valid basis:

> We were at my son's doctor . . .then, the stool started coming out – gas sound, and the sound came out very strange. . . . It was very audible, and somebody sitting in the back is able to hear this strange sound. . .At this moment, I was very embarrassed, and I started moving. . . my feet with my heels, so it can make a sound, so the doctor can think that the sound is coming from my shoes.

App. 448-49, 629:13-630:11. Latif also testified to the ongoing nature of these issues and a recent incident where Fatima had uncontrollably defecated herself after eating some sweets. Supp. App. 16, 851:3-13. Additionally, Fatima and Latif's sexual relationship has been impacted. App. 457, 643:4-22.

Although he does not complain, Latif, too, has suffered. He testified to the impacts on his life including having to take on household chores, helping Fatima with her vaginal therapy, taking her to appointments, and taking on more child-care responsibilities, especially on Fatima's bad days. Supp. App. 9-12, 814:12-819:19; Supp. App. 17-18, 852:23-853:25. When asked about his favorite chores, Latif responded "None, but I don't mind doing it though. . .[b]ecause I love her [ ]. She is my wife. I do it for her. I do everything for her." Supp. App. 9, 814:10-22. Suffice it to say, ample evidence of Fatima and Latif's damages was presented at trial.

At Trial

Plaintiffs alleged three specifications of negligence by Dr. Smith: failing to perform a rectal examination after the episiotomy; failing to recognize a fourth-degree laceration; and using 4-0 Vicryl sutures to repair the episiotomy. App. 150. It was undisputed that the standard of care required Dr. Smith to identify a fourth-degree laceration. App. 495, 772:3-6; App. 262, 397:3-6.

At trial, the parties presented dueling expert opinions. Plaintiffs' expert, Dr. Chen, testified that there was a fourth-degree laceration from the delivery and that Dr. Smith failed to identify it. App. 259, 394:19-23. He further opined that Dr. Smith's failure to perform a rectal examination after the episiotomy and use of 4-0 vicryl sutures each breached the standard of care. App. 266, 401:4-16; App. 308, 443:10-16.

Dr. Chen opined within a reasonable degree of medical certainty that the use of 4- 0 sutures by Dr. Smith was a cause of the breakdown of the vaginal repair site. App. 318-19. 453:19-454:03. He further opined that as a result of Dr. Smith's breaches of the standard of care, Fatima Belhak suffers permanent harm. App. 239, 374:19-374:23.

During cross-examination, Defendants' counsel asked Dr. Chen whether anal sex could disrupt an episiotomy repair. App. 406-07, 541:12-

542:10. Plaintiffs' counsel objected on the ground that questions about anal intercourse were prohibited by a pre-trial motion in limine. *Id.* The objection was sustained. *Id*. After clearing it with the court, Plaintiffs' counsel briefly asked Fatima whether she had ever engaged in anal intercourse. App. 442, 623:4-10. Plaintiffs' counsel also noted the improper question in his closing remarks. App. 589-90, 1055:22-1056:4.

Defendants' expert, Dr. Severidt, offered a competing opinion, opining that Dr. Smith did not breach the standard of care. App. 497, 774:1-774:4. He testified that the standard of care did not require a rectal examination after every episiotomy and opined that Dr. Smith's use of 4-0 sutures met the standard of care. App. 485, 755:11-13; App. 497, 774:14-17.

In discussing his background, Dr. Severidt testified that he supervises medical students on mission trips to Honduras where they routinely conduct prophylactic episiotomies even though that is no longer the accepted medical practice in the United States. App. 468-69, 721:14-722:3; App. 470, 727:8-23.

At the close of evidence, Defendants moved for a directed verdict on the ground that based on the evidence presented there was no causal link between the 4-0 vicryl sutures and the injuries. App. 569, 999:1-13. The trial court denied the motion. App. 570, 1001:17-23. Subsequently, during the

jury instruction conference, Defendants agreed to the inclusion of a specification based on use of a 4-0 suture. App. 572, 1016:20-24. Defendants opposed other jury instructions during the conference. App. 572, Tr. 1016:16-1017:23.

Post-Trial

Despite agreeing to the instruction, Defendants challenged the inclusion of the specification of negligence based on Dr. Smith's use of 4-0 Vicryl sutures in their post-trial Motion for a New Trial or Directed Verdict. App. 109-11. The trial court denied the challenge because Defendants had waived the challenge by explicitly agreeing that the instruction should be submitted to the jury. App. 143. In the instant appeal, Defendants concede that the issue was waived:

> 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.

Appellants' Brief at p. 53.

SUMMARY OF THE ARGUMENT

The true basis of Defendants' appeal is that it disagrees with the jury's decision. Of course, an unfavorable verdict is not a valid ground for an appeal, so Defendants go through great lengths to try to manufacture a ground for appeal. Defendants overcomplicate the issues, brush over the deferential standards of review, and ignore the obvious reality that a proper closing argument is going to be adverse to another party's position. Defendants now seek to overturn the diligent work of the jury on the baseless grounds of: (1) attorney impropriety; and (2) sufficiency of the evidence regarding causation.

First, the trial court correctly denied Defendants' motion for a new trial on the grounds of alleged attorney misconduct during Plaintiffs' closing argument and questioning. The trial judge, who is in the best position to evaluate allegations of misconduct, carefully reviewed and analyzed Defendants' claims of alleged misconduct. The trial judge found that none of the allegations, either independently or cumulatively, were prejudicial. *Prejudicial* misconduct is required to warrant a new trial and the trial judge correctly denied Defendants' motion for a new trial.

Such decisions are reviewed under the very deferential abuse of discretion standard. The trial judge's ruling was reasonable and supported by

logic and the law. Consequently, the trial judge did not abuse its discretion and the Court of Appeals should affirm the decision.

Second, Defendants failed to preserve their second issue for appeal. The trial court found, and Defendants subsequently *conceded*, that Defendants waived their ability to challenge the jury instruction related to use of a 4-0 suture when they affirmatively agreed that the instruction *should* be included. Defendants' argument on appeal is merely a repacking of the same argument that claims it is based on a denial of a motion for directed verdict, rather than jury instructions. Defendants should not be permitted to avoid their consensual waiver simply by using different language, as they are attempting to do. Even if the merits of the second issue are considered, Defendants' argument fails. There is sufficient evidence, when looking in the light most favorable to Plaintiffs, from which a reasonable jury could find on causation and consequently, the trial judge correctly denied Defendants' motion for a new trial.

ARGUMENT

I. The trial court did not abuse its discretion when it determined that there was no prejudicial misconduct and denied Defendants' motion for new trial.

To be entitled to a new trial based upon alleged misconduct, the moving party must establish: (1) misconduct; and (2) actual prejudice. *See Fry v. Blauvelt*, 818 N.W.2d 123, 130 (Iowa 2012) ("[A] district court should only grant a new trial if one of the grounds listed in [Iowa Rule of Civil Procedure 1.1004] applies and the movant's substantial rights were materially affected."); *see also Kinseth v. Weil-Mclain*, 913 N.W.2d 55, 68 (Iowa 2018). Here, Defendants cannot establish either misconduct or actual prejudice. Accordingly, the Court should reject the Defendants' appeal and affirm the trial court's decision.

A. Error Preservation

Plaintiffs agree that Defendants preserved error on the issues of whether Defendants are entitled to a new trial based upon an alleged "pattern" of improper questioning during trial and based upon alleged arguments made by Plaintiff's counsel in closing argument.

B. Standard of Review

Abuse of discretion is the standard of review for the trial court's denial of Defendants' motion for a mistrial and motion for a new trial.

Kinseth, 913 N.W.2d 55, 66; *Clinton Physical Therapy Serv., P.C. v. John DeereHealth Plan, Inc.*, 714 N.W.2d 603, 609 (Iowa 2006). "An abuse of discretion occurs when the court exercises its discretion on grounds for reasons *clearly untenable* or to an extent *clearly unreasonable*." *Burke v. Brimmer*, 772 N.W.2d 15, 2009 WL 1676894 at *1, 2009 Iowa App. LEXIS 621 at *2 (Iowa Ct. App.) (emphasis added).

In reviewing discretionary matters, the appellate court will give "significant deference to the district court's decision whether to grant the motion." *Estate of Long v. Broadlawns Medical Ctr*., 656 N.W.2d 71, 88 (Iowa 2002). The decision must not be arbitrary and "must have some support in the record." *Id.*

Here, Defendant's appeal should be denied because Defendant cannot meet the extremely high burden of proving that the trial court was clearly unreasonable and made an arbitrary decision. Moreover, the trial court was in the best position to evaluate allegations of misconduct and the decision has support in the record.

C. The trial court has broad discretion in determining whether alleged misconduct warrants a mistrial or new trial.

It is well-established that the trial court is in the best position to evaluate allegations of misconduct by counsel. *Mays v. C. Mac Chambers Co.*, 490 N.W.2d 800, 803, 1992 Iowa Sup. LEXIS 368, *9. Due to being in

the superior position to evaluate allegations of misconduct in the context of the trial, “great deference” is afforded to “the district court's denial of motion for mistrial and motion for new trial.” *Tibodeau v. CDI*, *LLC*, 902 N.W.2d 592, 2017 Iowa App. LEXIS 624, *13, 2017 WL 2665107 (Iowa Ct. App.). An abuse of this discretion is shown only where “such discretion was exercised by the court on grounds or for reasons clearly untenable or to an extent clearly unreasonable.” *State v. Morrison*, 323 N.W.2d 254, 256 (Iowa 1982).

Litigants are entitled to a fair trial, not a perfect trial. *State v. Peterson*, 196 N.W.2d 436, 438 (Iowa 1972); *Baysinger v. Haney*, 261 Iowa 577, 582, 155 N.W.2d 496, 499 (1968). A new trial is only appropriate when an attorney’s misconduct, viewed cumulatively, is prejudicial to the complaining party and a different result would have likely occurred but for the misconduct. *Id.* It is insufficient to simply allege prejudice; rather, the moving party must show that it was *probable*, not just possible, that the jury was prejudiced against the Defendants. *See, Loehr v. Mettille*, 806 N.W.2d 270, 277 (Iowa 2011).

In the instant case, Plaintiffs’ counsel’s closing argument and questioning during trial were proper. Even assuming *arguendo* that some technical defaults could be found, the errors were not prejudicial and

Defendants received a fair trial. *See Baysinger*, *supra* at 582. Defendants did not, and cannot, prove how a different result would have occurred but for any alleged technical violation by Plaintiffs' counsel.

D. Defendants' strategy was to lodge unnecessary and unimportant objections throughout trial in order to disrupt Plaintiffs' case and in the event of an unfavorable verdict, attempt to set up a motion for a mistrial based on volume of objections alone.

Defendants chose to object relentlessly as a part of their trial strategy. The sheer number of objections by Defendants, many of which were based on "leading" or "asked and answered" or "relevance", reflects Defendants' strategy of aggressively objecting in order to interrupt the flow of questioning and/or set up a motion for a mistrial based on volume of objections alone. Defendants' attempts were so transparent that it was brought to the court's attention early on, outside the presence of the jury:

> [E]very time we have a hearing, [defense counsel] brings up how he has been making objections, and from the plaintiffs' perspective, it has been disruptive to our witnesses and our testimony . . . I [ ] want this to be reflected in the record that his objections have been disruptive, and so, if that is his strategy, that's fine, and if the Court sustains an objection, we will live with it, but I'm bringing it up to the Court that it is not just somehow defendants who are only being prejudiced by [defense counsel]'s choices to object; plaintiffs are also being, by the disruptive nature and flow of our testimony.

App. 505-06, 785:23-786:11.

Defendants resorted to this strategy of aggressive objections to interrupt the flow of questioning and set up a motion for a mistrial because Defendants knew how strong the evidence was in favor of Plaintiffs.

1. Many of Defendants' objections were nit-picky and placed form over substance.

Defendants chose to object to almost anything they could, as demonstrated in the following examples. During Fatima's testimony, Plaintiffs' counsel asked: "So once you were removed from the delivery room to the other room at the hospital, no medical provider inserted a finger into your vagina or your rectum; is that correct?" App. 434, 615:11-14. Even though the parties knew the answer to this question, and it was something that would come out eventually anyway, Defendants chose to object. Although the objection was sustained as leading, the objection was still nit-picky because it was unnecessary.

Similarly, Defendants objected when Plaintiffs' counsel asked Fatima what she and Latif did in the days after being discharged from the hospital following the delivery. App. 436-37, 617:16-618:16. There was no need to object to this line of questioning, especially since Defendants' theory was that Fatima somehow caused her own fistula, yet Defendants objected anyway, based upon relevance. *Id.* Defendants' objection was overruled. *Id.*

Likewise, when Plaintiffs' counsel questioned Fatima about damages, asking "Did you miss out on opportunities to bond with Baby Zayd?" App. 445, 626:04-10. Defendants objected that the question was leading. *Id*. The question was rephrased to, "Did you miss out on anything while you were in the bathroom doing this procedure (sitz bath)?" *Id*. The irony is that by forcing Plaintiffs' counsel to rephrase the question, Fatima was able to detail the losses she had from having to cleanse herself each time she used the bathroom. If counsel was allowed to ask the first question, Fatima's answer likely would have been shorter and less detailed.

Some of the most nit-picky and useless objections included Defendants' objections to whether Fatima had difficulty passing gas after surgery, App. 446, 627:09-12 (leading, sustained), and whether Fatima and Latif attempted to care for baby Zayd themselves, App. 452, 635:14-17 (leading, sustained). The answers to these questions were obviously relevant and would come into evidence anyway, yet Defendants insisted on objecting.

Most of Defendants' other objections are in line with the above examples. These examples show that Defendants allegations that they were "forced" to object is without merit. This was plainly part of the Defendants' trial strategy, as none of the objections were made in an effort to prevent the

answer from being divulged to avoid prejudice because Defendants and Plaintiffs already knew the answer to the questions. Consequently, Defendants' reliance on *Brooks v. Gilbert*, 250 Iowa 1164, 98 N.W.2d 309 (1959), is misplaced.

Brooks involved repetition of substantially *the same question*, asked with different phrasing, thirteen times. 250 Iowa at 1169, 98 N.W.2d at 312. The questions related to a fundamental fact (the point of impact in an automobile case) that the witness did not have personal knowledge of. *Id.*

In the instant case, the objections at issue were very different. Many of the objections were based on form (*i.e.* "leading"), not substance. Additionally, the objections were to questions across different subjects. Unlike in *Brooks*, Plaintiffs' counsel in the instant case did not repeatedly attempt to introduce the same question after a sustained objection. To the contrary, Plaintiffs' counsel showed deference to and abided by the court's decisions. The holding of *Brooks* was case specific and did not purport to adopt a numerical threshold of sustained objections upon which counsel is deemed to have engaged in misconduct, as Defendants' argument implies.

Defendants clearly disagree with Plaintiffs' counsel's style of questioning, but Defendants make no complaint about the substance of the testimony that actually came out at trial. Defendants' disagreement of style

does not mean that counsel's questions were tantamount to attorney misconduct or prejudicial to Defendants such that Defendants are entitled to a new trial. Defendants cite no law that holds that a party's successful objections to an opposing party's witness questions mean that opposing counsel has committed misconduct. Indeed, such a rule would be nonsensical. It would mean that only "objection-proof" questions are permitted and that a mistrial would result *any* time counsel triggered an objection during questioning from the opposing side. Rather, the applicable law states that a new trial is warranted only if attorney misconduct is "prejudicial to the interest of the complaining party." *Kinseth, supra*, 913 N.W.2d at 68 (citation omitted). It is insufficient for Defendants to baldly allege *possible* prejudice: in order to prevail, Defendants must show *probable* prejudice. *See Loehr*, *supra* at 277.

2. Many of Defendants' objections were overruled.

Defendants assign great prejudice to the number of objections lodged that were sustained, but they fail to attribute any prejudice to their objections which were overruled. Defendants' objections were overruled twenty-two times. App. 357, Tr. 492:04-25; App. 428, 609:10-14 & 609:18-19; App. 452, 635:22-23; App. 453: 639:02-03; App. 456, 642:14-15; App. 463, 682:03-07; App. 494, 771:11-12; App. 518, 831:09-15; App. 522 & Supp.

App. 16, 850:25-851:01; App. 524, 869:19-20; App. 526, 871:24-25; App. 529, 878:15-16; App. 541, 890:12-13; App. 550, 928:03-08; App. 551, 929:01-02; App. 551, 929:11-17; App. 552, 932:02-09; App. 553, 935:17-18; App. 558, 953:14-17; App. 561, 966:14-15; App. 564, 973:10-11; and App. 567, 992:01-02. Accordingly, if Defendants' argument is that objecting, by itself, unfairly leads a jury to conclude that Defendants must be trying to hide something, it is an inescapable conclusion that a great deal of that harm, perhaps all of it, was self-induced.

3. The trial court rejected the allegation that the questioning of Plaintiffs' counsel was a part of a concerted plan to require Defendants' counsel to object.

The trial court found this allegation unpersuasive and meritless. App. 131-32. The trial court was in the best position to evaluate the allegations of prejudicial questioning, as it had a first-hand view of each counsel's conduct in the context of the entire proceedings. During trial, the court noted that the jury had been admonished that no conclusions should be drawn from objections and went on to state "I think both counsel are doing their jobs by objecting, and so, that's what I have to say on that topic." App. 507, 787:03-05.

E. Defendants' trial strategy was to spin any issue into a purported reason for a mistrial because the evidence was so strong in favor of Plaintiffs.

Defendants sought a mistrial when Defendants' expert, Dr. Severidt, engaged in misconduct by violating a motion in limine. App. 472-84, 739:16-751:04; App. 485, 754:19-755:01. While at a side-bar, counsel and the trial court were discussing the motion in limine violation, Dr. Severidt communicated directly with a juror. App. 476-78, 743:17-745:16. Dr. Severidt answered questions from the juror even though Dr. Severidt has testified in many trials and knew it was inappropriate for him to do so. *Id.* He admitted, under oath, that he "should know better" and "shouldn't have responded." App. 476-77, 743:25-744:08; App. 478, 745:06-10.

Plaintiffs' counsel had nothing to do with Dr. Severidt's misconduct, yet Defendants asserted they were entitled to a mistrial – demonstrating their strategy was to spin any issue into a purported reason for a mistrial.

F. There was no prejudicial misconduct in Plaintiffs' closing argument.

Plaintiffs' counsel stayed within the wide latitude allowed during closing argument and the arguments had a basis in the record and the law. Plaintiffs' counsel was a zealous advocate for his clients. Defendants' arguments to the contrary rely on thin-slicing of statements and "gotcha"

tactics that fail to consider the context of the arguments or the latitude given to counsel, both of which must be taken into account.

1. Counsel's closing argument constitutes zealous advocacy for which oratorical privilege exists.

Counsel is ethically required to zealously advocate on behalf of their clients. *See* Iowa R. Prof'l Cond. Preamble [9]; Iowa R. Prof'l Cond. 32:1:3 (Cmt 1) Creative argument is one of the foundational tools of a zealous advocate. Gaudineer, "Ethics: The Zealous Advocate", 24 Drake L. Rev. 79 (1974) ([L]awsuits have not been tried under laboratory conditions, nor in a sterile vacuum stripped of all human or emotional appeals.")

Iowa has long recognized that "[w]ithin reasonable limits, the language of counsel in argument is privileged, and he is permitted to express his own ideas in his own way, so long as they may fairly be considered relevant to the case which has been made." *State v. Burns*, 94 N.W. 238, 241 (Iowa 1903); *Mitchell v. Mystic Coal Co*., 179 N.W. 428, 1023 (Iowa 1920); *Sonksen v. Legal Servs. Corp*., 389 N.W. 2d 386, 389 (Iowa 1986).

Closing argument is a particularly appropriate time for counsel to exercise zeal and creativity in advocacy. The purpose of closing argument is to summarize the evidence for the jury and *persuade* the jury to find in favor of a party. (Iowa Judicial Branch, Guide to Civil Court Procedure, last accessed June 19, 2023); *See also State v. Melk*, 543 N.W.2d 297, 300, 301

(Iowa Ct. App. 1995) (Closing "is a time for counsel to draw conclusions from the evidence introduced at trial and argue all permissible inferences.").

The use of creative, colorful, and even flamboyant language in argument has long been considered an appropriate exercise of the trial attorney's latitude, especially during closing argument. Storytelling, personal anecdotes, provocative remarks, exaggeration, severe criticism, unprofessional remarks, allegory, and metaphor have all been found to be within permissible bounds of closing arguments. *See*, *State v. Carey*, 709 N.W.2d 557, 558 (Iowa 2006) (Referring to the Defendants' version of events as "ridiculous" and "unbelievable" does not rise to the level of impermissible inflammatory language); *Kipp v. Stanford*, 949 N.W.2d 249 (Iowa Ct. App. 2020) ("We are not suggesting attorneys are not allowed to tell stories as part of closing argument."); *State v. Yaggy*, 810 N.W.2d 532, 19-20 (Iowa Ct. App. 2012) ("Although more professional terminology could have been used by the prosecutor, the oratorical freedom afforded during closing argument does not foreclose such language in all instances."); *State v. Hiatt*, 834 N.W.2d 82 (Iowa Ct. App. 2013) (Personal anecdote that was analogized to the victim in the case was a "harmless anecdote"); 75 Am. Jur. 2d Trial § 234, at 313 (1974) (It is permissible for counsel to indulge in illustrations and metaphorical allusions during closing argument).

2. Defendants attempt to manipulate the holding of *Kipp* into a "rule book" for closing arguments, but that was never the intention of the *Kipp* court.

Defendants attempt to use *Kipp* as a "rule book," where certain words and arguments have been banned by the Court. This is untrue. The *Kipp* court found the key consideration is context, not specific words:

> Assessing the propriety of arguments is inherently contextual and case-specific. **A comment or argument made one time may or may not be proper in one case, which would shed little light on whether a similar comment or argument would be proper in a different case** or if repeated in either case. While we will endeavor to address all arguments at issue, we necessarily consider them in the context of the closing arguments as a whole and recognize **the district court was in a much better position than we are in assessing the impact on the jurors and the trial**. This is why the district court is given broad discretion in ruling on the motion for a new trial.

Kipp v. Stanford, 949 N.W.2d 249 (Iowa Ct. App. 2020) (emphasis added.) Clearly, the *Kipp* Court never intended its holding to be used as a rule book with per se bans on certain words and arguments.

It is also important to put the holding of the *Kipp* court into context of the standard of review from which it was decided, namely that the *Kipp* court affirmed the trial court's decision because the trial court had not abused its broad discretion.

In *Duitsman v. Afzal*, a medical malpractice case, the defendants argued that plaintiffs' counsel made improper closing arguments, including derogatory characterizations of the defense. 2021 Iowa App. LEXIS 493, 965 N.W.2d 208, 2021 WL 2453985 at *12-16. Defendants argued that under Iowa law, certain themes and words have been banned by the appellate courts. *Afzal*'s Reply Brief, pp. 28-34. The *Duistman* court rejected the invitation to adopt this view of the law. Instead, the court found that the statements came within the wide latitude given during closing arguments and held that the trial court did not abuse its discretion.

The *Duitsman* defendants filed an application for further review claiming that the decision conflicted with *Kipp*. *Afzal*'s Application for Further Review, pp. 4-5. The Iowa Supreme Court declined to accept the application.

3. Use of the word "betray" one time in closing argument is not misconduct and is not even remotely prejudicial.

Defendants have cited no legal authority, and Plaintiffs are aware of none, that provides a ban on using the word "betray," or a variation thereof, during closing. Yet, Defendants claim that Plaintiffs' counsel's statement during closing that Fatima "felt betrayed" by Dr. Mona "improperly focused the jury's attention on the moral quality of defendants' conduct," and

"warrants a new trial." Appellants' Brief, pp. 26 – 27. This argument lacks merit. It narrowly and improperly focuses on a single phrase ("felt betrayed") within an entire closing argument, ignoring context entirely.

The only citation provided for Defendants' betrayal argument is *Kipp*. Appellants' Brief, p. 26. As noted above, Defendants misconstrue that holding to support their argument. In *Kipp*, the trial court granted a new trial because plaintiff's counsel's characterization of the doctor's negligence as a betrayal combined with pervasive themes of accountability and heroism, *as a whole*, played on the jury's emotions. *Kipp*, *supra.* The Court of Appeals held, "[t]he district court did not abuse its discretion in finding it improper for counsel to utilize the theme of "betrayal." *Id.*

Here, unlike *Kipp*, the trial court was underwhelmed by Defendants' allegation that a new trial is warranted based on a single utterance that Fatima "felt betrayed." In fact, Defendants made a motion for mistrial before presenting their own closing argument and *never brought up this complaint to the Court*. App. 606-12, 1072:06-1078:09. In response to voluminous briefing of the parties, the trial court wrote a 29-page Ruling and Order where it looked at the closing argument as a whole and assessed the impact on the jurors and the trial. The trial court felt that it had such little impact that it did not explicitly address this complaint. At the time of post-trial

motions, Defendants thought so little of this particular complaint that they chose not to file a motion to enlarge findings and rulings. *See* Iowa R. Civ. P. 1.904. Using the phrase "felt betrayed" is not misconduct and is not even remotely prejudicial.

4. Plaintiffs' counsel properly asked the jury to determine the amount of damages to compensate Plaintiffs from Plaintiffs' perspective, and contrary to Defendants' accusation, Plaintiffs never made a "Golden Rule" argument by requesting that the jury to determine what amount the jury would accept if they were in Plaintiffs' shoes.

Plaintiffs' counsel properly asked the jury to assess damages to compensate Plaintiffs during closing argument. The Iowa Supreme Court has affirmed that counsel can assist the jury by suggesting a course of reasoning for the amount asked during closing argument. *Corkery v. Greenberg,* 114 N.W.2d 327, 332 (Iowa 1962); *Althof v. Benson,* 147 N.W.2d 875, 878 (Iowa 1967). In closing, counsel has the wide latitude to use storytelling, allegory, and metaphors. *See,* Section I. F. 1, above.

An improper "Golden Rule" argument is when the jury is directly asked to put themselves in the position of the plaintiff to determine the amount of damages. *See Russell v. Chicago, Rock Island & Pac. R.R.*, 86 N.W.2d 843, 848 (Iowa 1957); *Conn v. Alfstad*, 801 N.W.2d 33 (Iowa Ct. App. 2011) (unpublished). This is a narrow and specific rule. *See, e.g. State*

v. McPherson, N.W.2d 870, 873-74 (Iowa 1969) (Declining to extend the rule to bar closing argument that "invited the jury to put themselves in the position of the witnesses at the time of the events about which they were testifying.").

Here, it was perfectly proper in this case for Plaintiffs to point out the losses that Plaintiffs have suffered; that is after all, what compensatory damages are designed to remedy and thus, a perfectly appropriate consideration for the jury and topic for closing argument.

Plaintiffs' counsel never requested that the jury determine the amount the jury would accept if they were in Plaintiffs' shoes. Defendants' allegation regarding "Golden Rule" arguments is one of many examples of Defendants attempting to infringe on counsels' oratorical privilege and zealous advocacy.

Counsel prefaced the "Man at the Door" story by explaining that in civil cases, monetary damages are the method through which the jury compensates litigants for the harm they have suffered:

> So the next question, it involves money in exchange for the harm, the losses, the loss of enjoyment of life, the mental anguish, and so if my hands were the scale of justice, what you do is you put on one end everything that Fatima has gone through because of Dr. Smith's choices, and what does that weigh? And the only thing that you can put in the other side is money to weigh that out (indicating).

App. 590, 1056:05-12. This introduction provided context – the man at the door argument that followed was designed to serve as a "tool" to help assess the harm *Fatima* has suffered. App. 590, 1056:12-14. It also clearly framed the issue as evaluating what *Plaintiffs* should be awarded for the harm Plaintiffs suffered as a result of the negligent care Fatima received, *i.e.* Plaintiffs' damages.

The man at the door argument itself likewise was at all points framed from the perspective of *Plaintiffs'* perspective. Plaintiffs' invite the Court to review the argument in full but provide the following excerpt for purposes of brevity:

> One way to think about this is, to imagine the day before Baby Zayd was born -- the day before Baby Zayd was born, and 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 Zayd 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. It's going to cause you discomfort for the rest of your life. When you come home from the hospital" -- I'm sorry -- "When you are in the hospital, you are going to have stool pass through your vagina. And when you come home from the hospital, for months, you

> are going to have the same thing. You're going to spend 20 to 40 minutes in the bathroom, instead of being able to spend time with your baby, your mom and your husband.
>
> . . .
>
> Your husband, now, of course, he is going to love you no matter what, but sexual intercourse -- intercourse, it's going to be painful. It's going to be different. Because of the scar tissue and where the tear is, you are going to have uncontrollable gas. If you are out in public, maybe you can try and distract by (indicating), hitting your foot on the ground, but -- and diarrhea and stool, you are going to have very little warning." So before the man in the suit and his briefcase goes on and on and on, Latif and Fatima, 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.

App. 590-92, 1056:14-1058:9.

At no time during the argument did Plaintiffs' counsel ask 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," which is not allowed by the courts." *See, Russell*, *supra*. Instead, it provided an anecdote from the perspective of *Plaintiffs*, and consequently, it falls within the wide latitude afforded to Plaintiffs' counsel during closing argument.

Counsel's argument was a permissible mechanism to help remind jurors of the evidence presented and help them make a damages award based on the evidence in this case. It asked jurors to consider, or "weigh," what amount would compensate *Plaintiffs* for the harm *Plaintiffs* suffered based on evidence presented at trial. The damages discussed, e.g. passing stool through the vagina, scarring, incontinence, flatulence, do not ask the juror to speculate, they are all supported by evidence presented at trial.

The jury was instructed to consider the following items in assessing damages: (1) past loss of function of the body and mind; (2) past physical and mental pain and suffering, which includes but is not limited to, mental anguish and loss of enjoyment of life; (3) future loss of functions of the body and mind; and (4) future physical and mental pain and suffering, which includes but is not limited to, mental anguish and loss of enjoyment of life. App. 152. Counsel's argument summarized the evidence of damages related to the foregoing items and illustrated how the facts support Plaintiffs' damage request. *See, State v. Melk*, 543 N.W.2d 297, 301 (Iowa Ct. App. 1995) (Purpose of closing argument is to assist the jury in analyzing, evaluating and applying the evidence). There is nothing improper about using an illustration to effectuate an evidence-based argument during closing. *See* 75 Am. Jur. 2d Trial § 234, at 313 (1974). Moreover, following

the challenged argument, Plaintiff's counsel went on to discuss in more detail the different categories in damages and highlight evidence of each. App. 592-601, 1058:10-1067:1.

Plaintiffs' argument is not, as Defendants argue, analogous to *Kipp*. The Golden Rule statement at issue in *Kipp* was framed explicitly in terms of what *the jurors* themselves would want in Plaintiff's shoes: "We have to think about what's the most valuable thing to us . . . What would we trade for [the plaintiff's] experience?" *Kipp*, 949 N.W.2d at 2. In contrast, Plaintiffs' counsel in the instant case, never requested that the jury decide based on what the jury would want if they were in Plaintiff's shoes. As correctly found by the trial court, the focus was on what harm Plaintiffs suffered from *Plaintiffs'* perspective:

> Plaintiffs' counsel used the man at the door story to introduce the concept of damages. The man at the door described the pain and suffering that Fatima would endure. **With the story, counsel did not suggest that the jury put themselves in the shoes of his clients**.

App. 128, emphasis added.

G. Plaintiffs' counsel properly made arguments based on inferences from the record, and consequently, the allegation of misstating the record or misleading the jury is without merit.

During closing, counsel may make arguments "based on a legitimate assessment of the evidence," and observations regarding credibility. *Carey*, 709 at 555. Attorneys are free "to craft an argument that includes reasonable inferences based on the evidence and ... when a case turns on which of two conflicting stories is true, [to argue that] certain testimony is not believable." *State v. Graves*, 668 N.W.2d 860, 876 (Iowa 2003) (quotation omitted). Counsel is expected to advocate for his client during closing and in doing so, *may* make arguments based on counsel's view of the evidence. *Bronner v. Reicks Farms, Inc.*, 2018 Iowa App. LEXIS 541, *23, 919 N.W.2d 766, 2018 WL 2731618 (Iowa Ct. App.) The line into impermissible conduct is crossed where the opinion expressed is "based on any ground other than the weight of evidence in the trial," or "call[s] the defendant a liar, state[s] the defendant is lying, or [] make[s] similar disparaging comments." *Id.* at 874, 876. The governing principle "merely precludes those [personal remarks] that do not appear to be based on the evidence." *State v. Towney*, 881 N.W.2d 470 (Iowa Ct. App. 2016) (quotation omitted).

Here, Defendants fail to appreciate the difference between advocacy and misconduct. Drawing an inference from the facts presented at trial and highlighting a credibility issue is not misconduct, it is permissible advocacy.

1. Counsel's critique of the credibility of Dr. Severidt, Defendants' expert witness, was based on the evidence and was reasonable.

It is permissible and expected that an attorney will challenge the credibility of an opposing expert. It is proper for counsel to discuss "whose testimony was most believable based on reasonable inferences from the evidence" and to argue that "certain testimony is not believable." *State v. Graves*, 668 N.W.2d at 876 (quotation omitted). In fact, in order to prevail in the "battle of the experts," casting doubt upon the credibility the opposing expert is critical. *Kinseth v. Weil-Mclain*, 913 N.W.2d 55, 69 (Iowa 2018). Even "sarcastic and snide" comments are permissible when based on a legitimate assessment of the evidence and of witness credibility. *State v. Carey, supra*, 709 at 555 (Three allegedly "sarcastic and snide" comments, including "what games are [sic] the defendant playing with you?" were not misconduct because they "were based on a legitimate assessment of the evidence and especially of the Defendants' credibility").

Here, Dr. Severidt was the Defendants' expert witness. Dr. Severidt testified that when he was in medical school and for the first few years

afterwards (*i.e.*, the late 1970's), episiotomies were done prophylactically, but that practice changed because research showed that episiotomies were not the better approach. App. 468-69, 721:14 – 722:3. He testified that pre-pandemic he would take "residents in training" whom he supervised down to Honduras to deliver babies. App. 470, 727:8-23. He acknowledged that *his* residents perform episiotomies in Honduras because the country still engages in the *outdated* practice of routine episiotomies:

> [I]n 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.

App. 471, 728:16-19.

During closing, Plaintiffs' counsel briefly highlighted Dr. Severidt's testimony and the credibility implications:

> What did Dr. Severidt also tell you? That in 2000 – that in the United States…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.

App. 579, 1045:15-23.

> Even though he swore the Hippocratic Oath, 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.

App. 587, 1053:19-23. Defendants did not object during trial, however, in post-trial motions, claim that the argument "disparages" Dr. Severidt and "misrepresents" his testimony. Appellant's Brief, p. 31.

Counsel did not quote Dr. Severidt verbatim, but he did accurately restate what Dr. Severidt testified to; namely, that prophylactic episiotomies are no longer the standard of practice in the US, but that until the pandemic, Dr. Severidt's residents (from the US and under his supervision) would conduct routine episiotomies on mission trips to Honduras. *See*, App. 468-69, 721:14-722:3; App. 470, 727:8-23. It was proper to remind the jury of this testimony and advise them that they could consider it when evaluating Dr. Severidt's credibility.

Assuming *arguendo* that this was improper criticism, the jury also heard that Dr. Severidt testified several times for the defense firm in the past, a critique not applicable to Plaintiff's expert, Dr. Chen. App. 488-89, 758:22-759:09. This goes to Dr. Severidt's bias. In addition, Dr. Severidt never examined the Plaintiff, while Dr. Chen, did. App. 489, 759:15-16. This goes to the quality of Dr. Severidt's opinions. There were many criticisms regarding Dr. Severidt's testimony and the trial court correctly

concluded that the closing argument regarding Dr. Severidt was not prejudicial.

2. Counsel's suggestion that it was character assassination for Defendants to accuse Plaintiffs of anal intercourse when Defendants knew there was no evidence of anal intercourse and knew that the trial court prohibited Defendants from asking about anal intercourse was warranted under the unique facts of the case.

Pursuant to an order on Plaintiffs' motion in limine, defense counsel was prohibited from introducing "any testimony, discussion, statements, or innuendo that Plaintiff, Fatima Belhak had anal intercourse with her husband before or after the delivery of their baby." App. 027-28; App. 421, 576:1-4. Despite this order, defense counsel directed questions about the subject to Plaintiffs' expert, Dr. Chen:

> Q. Sorry. What was the question again? Is it possible that penile/vaginal intercourse could disrupt a repair?
>
> A. Yes. So that is one of the reasons that I recommend six weeks of pelvic rest. I don't want anyone messing up my handiwork.
>
> Q. Understood. And the same thing with anal intercourse; is that right?
>
> A. Not necessarily.
>
> Q. Well, anal intercourse is awful close to the perineum and vaginal repair; is that right?

App. 406, 541:12-542:23. Plaintiffs' counsel promptly objected and the objection was sustained with an admonition to the jury to disregard the questions. App. 406-07, 541:12-542:10.

Plaintiffs' counsel took two actions to remedy the harm done by the questioning: (1) succinctly asked Fatima whether she had ever had anal sex and whether it was contrary to her faith, App. 442, 623:4-10; and (2) during closing, criticized Defendants for raising the issue, App. 589-90, 1055:22-1056:4.

In a truly brazen approach, Defendants have tried to spin their own misconduct into a reason for granting a new trial, arguing:

> 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.

Appellant's Brief, p. 35. This argument ignores context and reason.

The only reason Plaintiffs' counsel asked Fatima about anal intercourse was because Defendants had violated the motion in limine order and raised the issue with Dr. Chen:

> [A]s to the issue regarding "anal sex", it was defense counsel who initially violated the motion in limine with the question to Dr. Chen. Had defense counsel not asked that question, Plaintiffs' counsel would have had no reason to question his clients about anal sex.

App. 130. Due to the highly inflammatory nature of the questions, an admonishment was necessary but not sufficient. Asking Fatima the question head-on was the only way counsel could ensure that the jury didn't base any portion of its decision on the incorrect assumption that Plaintiffs had engaged in anal sex close to the Zayd's birth.

Second, contending that the question was "a medical question and did not implicate Ms. Belhak's character," is disingenuous. Anal intercourse is a taboo topic that carries negative stigma. The question suggested to the jury the possibility that the harm Fatima suffered was because she engaged in anal sex within days of delivering a baby and having an invasive surgery. The implicit allegation was highly inflammatory, impermissibly cast blame on Fatima, and was harmful to Plaintiffs' reputations.

Plaintiffs' counsel's argument on this topic was brief:

> Do you know what is not funny? When Mr. Russell 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 much on such an outrageous accusation without any proof.

App. 569-90, 1055:21-1056:4. The criticism was warranted if for no other reason than to make it abundantly clear Fatima had not engaged in anal sex closely following Zayd's birth. *See Kipp v. Stanford,* 949 N.W.2d 249 (Iowa Ct. App. 2020) ("In evaluating whether prejudice has occurred, factors the

court may consider include. . . the extent to which the defense invited the improper conduct."). Far more aggressive arguments and direct accusations have been found permissible. *See State v. Perez-Castillo*, 723 N.W.2d 453 (Iowa Ct. App. 2006) (prosecutor arguing Defendants' statements were "not true," "a story," "didn't happen," "amazing," "an insult to your intelligence," and "the only thing with more bullet holes than the bodies of the victims.").

Here, given the inflammatory nature of Defendants' own misconduct, Plaintiffs' counsel's argument must be given reasonable leeway. It was appropriate and necessary to rehabilitate Fatima through questioning and remind the jury in closing that the Defendants' insinuation was nothing other than an attempt to assassinate her good name.

3. Counsel properly referenced medical records from the University of Iowa, which were in evidence for the jury to see, during closing argument and the allegation that the jury was misled is without merit.

Defendants claim that Plaintiffs' counsel essentially lied about the medical records from the University of Iowa Hospitals and Clinics ("UIHC"). Appellant's Brief, pp. 36-37. Since the medical records were admitted into evidence, it is hard to imagine any prejudice to Defendants because the jury could see for itself what the records said. In the records from February 3, 2014, the UIHC documented a "[f]ourth degree perineal

laceration *not repaired at the time of delivery*." App. 166, emphasis added. Other notes from UIHC noted a fourth-degree perineal laceration was identified and that Fatima's delivery was complicated by a breakdown of a 4th degree tear. App. 163 ("Complete fourth degree perineal laceration"); App. 178 ("episiotomy in 1/2014, complicated by a breakdown of fourth degree tear and rectovaginal fistula."); *see, also* App. 160-61; App. 162-64.

Plaintiffs' closing twice drew the jury's attention to the UIHC's notes regarding the laceration. There is nothing improper about this. Counsel "is allowed to draw conclusions and argue permissible inferences that may be reasonably derived from the evidence." *State v. Shanahan*, 712 N.W.2d 121, 139 (Iowa 2006). The very purpose of closing arguments is to remind the jury of the evidence and for each side to advocate for how the evidence supports their position. Plaintiffs' closing argument about the UIHC records flowed from the evidence in the record and was thus, proper.

Moreover, as the trial court correctly held, even assuming misconduct, there was no prejudice:

> The jury was advised that arguments of counsel are not evidence. And the jury had the medical records available for review during their deliberations. The average juror is capable of understanding that the University of Iowa records were treatment records generated contemporaneously with the treatment provided to Fatima Belhak. The jurors would also understand the records did not testify and make the

> statements attributed to them by counsel for plaintiff. Finally, the defense never challenged the degree of laceration diagnosed in Iowa City. For these reasons, the Court cannot find prejudice attached from counsel's argument.

App. 127.

It is ironic that Defendants accuse Plaintiffs of taking liberty with the meaning of the University's medical records when Defendants argued in their own closing argument what was meant by medical records, including the University's records. *Defendants* argued, "And then, the next day, the University of Iowa says, '[t]he defect was apparent after removing the sutures.' Now, I don't want to dwell on this, but if you have to remove the sutures, that means they are holding." App. 619, 1085:2-5. Defendants also provided their interpretation of medical records from Trinity arguing that the fact that stool passing through the vagina was not noted in the medical records meant it did not occur. App. 623-24, 1089:16-1090:16. Despite being allegedly prejudiced by Plaintiffs' argument about what the University's records showed, Defendants' counsel did not mention those parts of the records in his closing argument. App. 613-29, 1079:04-1095:14. Defendants could have further argued their own interpretation of the records but chose not to. Also telling, Defendants did not object to Plaintiffs'

characterization of the University's records when they were made during Plaintiffs' closing argument. App. 586, 1052:13-19; App. 637, 1103:1-5.

H. The trial court, who is in the best position to evaluate allegations of misconduct, determined Defendants were not prejudiced by the alleged misconduct, individually or cumulatively.

The law in Iowa requires misconduct to be "prejudicial to the interest of the complaining party." *Kinseth* at 68. It is insufficient for Defendants to allege *possible* prejudice; in order to prevail, Defendants must show *probable* prejudice. *See Loehr* at 277 ("[U]nless a different result would have been probable in the absence of misconduct, a new trial is not warranted").

Here, the trial judge correctly found that there was no prejudicial misconduct. At all stages of trial, the court gave cautionary and curative instructions that fully remediated the impact of any alleged misconduct. For example, the trial court repeatedly gave clear jury instructions that:

- the jury must decide the case based on the evidence, App. 146-147; App. 149; App. 220, 15:22-24; App. 231, 311:13-16;
- objections and rulings on objections are not evidence, App. 148; and
- Statements, comments, and arguments by the lawyers are not evidence, App. 148; App. 230, 310:20-21.

The following two instructions were given just before closing and between Plaintiffs and Defendants' closing, respectively:

> [In their closing arguments], [t]hey are merely recalling the evidence, as you will later. They will not intentionally try to mislead you, and if their recollection of the testimony is not the same as yours, you must follow and rely on your own recollection. The summations of counsel are merely that, summations. They are not evidence.

App. 575, 1041:4-9.

> Remember, statements of counsel during closing argument are not evidence. They are merely each attorney's recollection of the evidence and what they believe it shows.

App. 612-13, 1078:24 -1079:2.

These jury instructions undercut Defendants' argument that the jury's decision was based upon prejudice. Our judicial system trusts that juries will follow instructions given by the courts. *Giltner v. Stark*, 219 N.W.2d 700, 704 (Iowa 1974); *Hoekstra v. Farm Bureau Mut. Ins. Co*., 382 N.W.2d 100, 110 (Iowa 1986); *Vanskike v. Union Pac. R.R*., 725 F.2d 1146, 1149 (8th Cir. 1984) ("This court holds the fundamental belief that jurors are intelligent, discerning people and that they can usually sort out emotional and passionate arguments and follow what the court tells them to do).

Second, "Plaintiffs' evidence could be characterized as strong". App. 131. Defendants have made numerous complaints on appeal, however, Defendants don't even attempt to argue that the jury awarded "[e]xcessive or inadequate damages appearing to have been influenced by passion or

prejudice" under Iowa R. Civ. P. 1.1004(4), or that the "verdict, report or decision is not sustained by sufficient evidence, or is contrary to law" under Iowa R. Civ. P. 1.1004(6).

The trial court expressly reviewed and found none of the instances where it found misconduct were independently prejudicial. App. 123 ("Standing alone, however, the Court cannot find the jury would have reached a different verdict absent the improper criticism of Dr. Severidt."); App. 125-26, (Closing argument "that defense counsel assassinated the character of Plaintiffs by questioning Plaintiff's expert about anal sex, was improper. . .[s]tanding alone, the Court finds this conduct does not warrant a new trial."); App. 127 (Finding the statement regarding University of Iowa records saying there was a 4th degree laceration, standing alone did not prejudice the defense.) The court supported each conclusion with well-reasoned analysis.

After analyzing each individual claim of alleged misconduct, the trial court also analyzed the cumulative impact of the misconduct and explicitly held "the cumulative effect of any misconduct does not warrant a new trial." App. 130. Thus, any argument that the trial court did not consider the cumulative effect of any misconduct is without merit. *See* Appellants' Brief, p. 20.

In addition to attempting to mischaracterize the trial court's ruling, Defendants attempt to concoct prejudice by throwing in "two additional categories of misconduct – [Plaintiffs'] counsel's asking for accountability and invoking "community safety". Appellants' Brief, p. 43. This is clearly a part of Defendants' strategy of throwing as many arguments out as possible with the hope of creating the impression of cumulative misconduct and thus, prejudice. However, when the curtain is pulled back, there is nothing there.

First, as to "asking for accountability," in Iowa, there is no prohibition on using the term "accountable," or "accountability." In *Kipp*, which Defendants rely on, the Court declined to broadly rule that particular language is impermissible, noting instead that the same statement may be proper in one case and improper in another, depending on context.

In *Kipp*, the references to accountability were found improper because the term was used in a manner that "conveyed a different meaning or theme than the legal concept of negligence and suggested to the jury a punitive or moralistic consideration of the potential liability of the Defendant." 949 N.W. 2d 249.

In contrast, Plaintiffs' counsel's use of the word accountability was within the acceptable scope of a closing argument. The terms "accountability" and "accountable" were used in a manner that means

“liability” and “liable,” which is what medical malpractice litigation is about. For example, read fairly, the statement “[t]his is about accountability for when you don’t do your job, when you don’t follow the standard of care checklist,” App. 585, 1051:18-20, means “this is about liability for when you don’t do your job,” which is exactly what this case is about. The trial court, which was in the best position to evaluate the use in context, agreed that the use of the term was not misconduct or prejudicial:

> “Accountability” was used in a manner to mean holding the defendants responsible for their negligence, not as a means of punishing the defendants.
>
> . . .
>
> When considered in context of the evidence in the case and the totality of Plaintiffs’ closing argument, the Court cannot find Plaintiffs’ counsel used “accountability” as an improper theme, or that prejudice attached from use of that term.

App. 128.

Second, Defendants take issue with Plaintiffs’ counsel’s use of the terms “patient safety rules” and a “standard of care checklist” during closing argument. *See* Appellants’ Brief, pp. 47 – 50. Their argument lacks merit.

Defendants did not object to use of this language during trial. Plaintiffs questioned Dr. Smith about a standard of care checklist, App. 532, 881:15-19; App. 556-57, 938:25-939:4., and Dr. Chen about a safety checklist, App. 266,

401:3-6; App. 272, 407:11-14. Defendants did not object to any of these questions during trial. Plaintiffs also questioned Dr. Severidt about a safety checklist. App. 497, 774:5-13. Defendants did not object. Instead, Defendants' counsel adopted the language in his own questioning of Dr. Severidt. App. 508, 797:2-5. Given the foregoing, it is no surprise that the trial court failed to find prejudice.

Additionally, concepts of safety and of reducing the risk of harm are an integral part of tort law. Defendants' attempt to spin safety into an impermissible topic is inconsistent with well-established principles of negligence law. The Iowa Supreme Court has long explained that "the duty of exercising reasonable care for the *safety* of the public is an absolute duty..." *Connolly v. Des Moines Inv. Co*., 105 N.W. 400, 401 (1905) (emphasis added); *Wiar v. Wabash R. Co*., 144 N.W. 703, 706 (1913); *Koenig v. Koenig*, 766 N.W.2d 635, 645 (Iowa 2009).

The Iowa Supreme Court has consistently held that, "[n]egligence is conduct that falls short of the standard of care established by law for the protection of others against unreasonable risks of harm." *Butler v. Wells Fargo Fin., Inc*., 949 N.W.2d 437 (Iowa Ct. App. 2020) (Unpublished) (citation omitted); *Ludman v. Davenport Assumption High School*, 895 N.W.2d 902, 911 (Iowa 2017); *Feld v. Borkowski*, 790 N.W.2d 72, 75 (Iowa

2010); *Thompson v. Kaczinski*, 774 N.W.2d 829, 834 (Iowa 2009); *Knake v. King*, 492 N.W.2d 416, 417 (Iowa 1992)

Finally, Plaintiffs' counsel's description of the standard of care is based on the evidence in this case. Plaintiffs' expert, Dr. Chen, provided expert testimony that certain actions *must* be taken by medical providers, like Dr. Smith, after an episiotomy, in order to meet the standard of care. App. 262, 397:3-6; App. 401, 401:3-7; App. 272, 407:18-22. Thus, Plaintiffs' counsel's use of the term "standard of care checklist" to refer to these actions was a logical and appropriate choice of language.

The term "patient safety rules" was likewise an appropriate term to succinctly refer to the actions required under the standard of care in treating a patient in the medical context. It should also be noted that despite the emphasis Defendants put on it, the phrase was used only *once* during Plaintiffs' more than an hour-long closing argument. App. 576, 1042:20.

The trial court carefully reviewed Defendants' argument regarding community safety and found no misconduct:

> Plaintiffs' counsel used the terms "standard of care checklist" and "patient safety rules" to summarize the testimony of his expert and to draw a contrast with the testimony of the defense expert. Considered in the context of the testimony, Plaintiffs' counsel's argument did not suggest a strict liability standard. The "standard of care" checklist he referenced were the opinions Dr. Chen

> offered for examining patients after an episiotomy, not a general strict liability standard.
>
> . . .
>
> When considered in light of the evidence, the Court finds Plaintiffs' counsel's use of the term "standard of care" checklist was not improper. The terms were used as a reference to the opinions offered by Dr. Chen regarding the standard of care.

App. 122.

In sum, there was no abuse of discretion. The trial court issued a well-reasoned ruling and order that addressed each of Defendants' allegations. The trial court found that most of complaints did not constitute misconduct and that where there was some, it was not prejudicial, either standing alone or considered cumulatively. Accordingly, the Court should affirm the trial court's denial of Defendants' motion for a new trial.

II. Defendants did not preserve the issue of a directed verdict as to 4-0 sutures and even if Defendants had preserved error on this issue, the trial court properly denied Defendants' motion for a directed verdict.

A. Error Preservation

First, Defendants failed to preserve the issue by waiver of this issue in front of the trial court. The Iowa Supreme Court has stated the following about the requirement for error preservation: "The orderly, fair and efficient administration of the adversary system requires that litigants not be

permitted to present one case at trial and a different one on appeal. *State v. Tobin*, 333 N.W.2d 842, 844 (Iowa 1983).

Here, Defendants waived this issue when they explicitly and affirmatively consented to inclusion of the use of 4-0 sutures as a specification of negligence in the jury instructions:

> **We agree that the following two specifications should be submitted. The first one is negligent by failing to recognize a fourth-degree laceration or by using a 4-0 vicryl suture in attempting to repair the episiotomy**.

App. 572, 1016:20-24, emphasis added. Reading the transcript, it is apparent that Defendants intended to agree that this issue go to the jury because Defendants had objected to other specifications of negligence going to the jury. App. 572-73, 1016:24-1017:23.

Even presuming Defendants did *not* waive review of the trial court's denial of their Motion for Directed Verdict by agreeing to the jury instructions, Defendants failed to preserve error on that issue by not including this issue in their Motion for a New Trial. The denial of Defendants' motion for directed verdict was not listed as a ground in Defendant's motion for new trial. *See* App. 034-035. The supporting brief only mentions the directed verdict on this issue once - in a header - with no supporting argument. App. 109.

The trial court denied the Motion for New Trial, reasoning that:

> Defendants spent time objecting to other specifications in the jury instructions and then explicitly agreed to the specification regarding the type of sutures. While another objection to preserve error is unnecessary, a party cannot agree to a specification, only to later argue it was given in error. Such a rule would lead to unnecessary appeals.

App. 143.

Defendants concede that by affirmatively consenting to inclusion of the jury instruction, Defendants waived the issue. Appellants' Brief, p. 53. Relying on *James ex rel James v. Burlington N. Inc.*, Defendants attempt to circumvent their waiver of the issue by arguing that the issue is not with the jury instruction, but rather, whether the trial court correctly denied their motion for a directed verdict on the issue of 4-0 sutures. Appellants' Brief, p. 52.

As the trial court found, *James* is not analogous:

> Under Iowa law, a party is not required to object to a proposed jury instruction when their motion for a directed verdict has been denied. *James ex rel. James v. Burlington N., Inc.*, 587 N.W.2d 462, 464 (Iowa 1998). However, in this case, the Defendants did not just not object to the proposed instructions, they explicitly agreed they should be submitted to the jury. In the same argument, they objected to other specifications in the marshalling instructions . . .

App. 143, emphasis original. In *James,* the litigant raised the claim in the "trial motion for directed verdict *and again* in its posttrial motion for a new trial." *Id.* at 464 (emphasis added). Defendants did not.

In this case, Defendants' argument that the directed verdict issue was preserved is undercut by the filings below. Defendants' motion for a new trial did not raise the denial of their motion for directed verdict as a ground for a new trial or mistrial. App. 034-035. Nor did the Defendants adequately raise the issue in their supporting briefs. Their initial brief included the following argument header:

> The Court erred denying Defendants' directed verdict motion relating to the use of sutures to repair Fatima's laceration after the birth at issue. Likewise, the Court erred submitting a specification of negligence instruction regarding the size of suture used because that specification required the jury to speculate as to causation.

App. 109 (emphasis removed). Despite the header, Defendants did not argue the issue. The *entire* argument section under the header relates to whether the trial court erred in including the 4-0 suture jury instruction. App. 109-11. In their Reply Brief, Defendants addressed the motion for directed verdict exclusively as a mechanism of arguing they had preserved their argument as to submission of the jury instruction. App. 115.

Defendants also failed to address this issue in their oral argument. During the hearing, Defendants agreed that their argument was that the jury instruction related to suture size should not have been given:

> THE COURT: On the Vicryl issue, Mr. Bribriesco as I understand the defense argument – and that would be 1(c) of Instruction 14, it's that the instruction – that particular specification of negligence should not have been given because there was no causation evidence that use of improper strength of suture caused any damage.
>
> Is that your argument, essentially?
>
> MR. BARNETT [Defendants' Counsel]: Yes, Your Honor.

Supp. App. 26-27, 46:20-47:02. The focus of the argument was without question on whether the jury instruction should have been given and *not* whether the trial court should have directed verdict in Defendants' favor. Supp. App. 26-31, 46:20-51:19. Defendants claim that they nonetheless preserved error through the following quick reference to their motion for directed verdict:

> Without competent evidence, the expert testimony to support the theory of negligence, the Court should have granted our directed verdict motion.

Supp. App. 28, 48:18-21.

Whether considered a challenge to the jury instructions or the denial of their motion for directed verdict, the issue was not preserved; allowing

them to pursue it would be inconsistent with the letter and underlying rationale for error preservation rules. Even if this Court finds that Defendants preserved error, the trial court should still be affirmed because there was sufficient evidence to submit the issue of the 4-0 sutures to the jury.

B. Standard of Review

Defendants correctly state that a motion for directed verdict is reviewed for correction of errors of law. *Weyerhaeuser Co. v. Thermogas Co*., 620 N.W.2d 819, 823 (Iowa 2000). In conducting such a review, the evidence is reviewed "in the light most favorable to the party against whom the motion was directed," in this case, Plaintiffs. *Id.*

C. Assuming *arguendo* that Defendants had preserved this issue, the record contains sufficient evidence to submit the specification of negligence to the jury that Dr. Smith's use of 4-0 sutures caused harm.

Evidence is substantial enough to support a specification when a reasonable mind would accept it as adequate to reach a conclusion. *Coker v. Abell-Howe Co*., 491 N.W.2d 143, 150 (Iowa 1992). When making this evaluation, the evidence must be viewed in a light most favorable to the party requesting the instruction." *Herbst v. State*, 616 N.W.2d 582, 585 (Iowa 2000). Here, trial court correctly held there was sufficient evidence in the record from which the jury could conclude "Fatima Belhak sustained

injuries and damages related to Dr. Smith's use of 4-0 vicryl sutures." App. 144.

Expert testimony established that the standard of care required Dr. Smith to use 2-0 sutures, that Dr. Smith breached that standard (among other negligence), and that as a result of her negligence, Fatima suffered permanent harm. Plaintiff submitted expert testimony from Dr. Chen, a board-certified obstetrics and gynecologist. Dr. Chen began working for Northwestern University following residence, and 29 years later continues to work for the institution. App. 243, 378:4-11. In his position as Clinical Assistant Professor of Obstetrics and Gynecology, Dr. Chen serves as an educator teaching about 48 residents at a time while continuing to run his medical practice. App. 243-44, 378:12-379:14. In his role, one of the many things Dr. Chen teaches is episiotomies. App. 245, 380:3-5. Dr. Chen has delivered close to 6,000 babies in his career. App. 244-45, 379:25-380:2. There is no doubt that Dr. Chen was qualified to provide expert opinions that Dr. Smith breached the standard of care, and the breaches were a cause of harm to Fatima.

Dr. Chen's expert opinions are supported by the record. Dr. Chen reviewed medical records, including medical records from the UIHC, as well as conducted an examination of Fatima. In fact, the support in the record to

submit this specification of negligence is so strong that Defendants agreed it should be submitted during the jury instruction conference. App. 572, 1016:20-24.

1. Dr. Chen provided expert opinions that that the use of 4-0 sutures to repair an episiotomy breached the standard of care and was a cause of harm.

Dr. Chen testified that Dr. Smith breached the standard of care when she used a 4-0 suture to attempt to repair the episiotomy. App. 308, 443:14-16. Dr. Chen opined that the standard of care requires a doctor to use sutures with the tensile strength of 2-0 or 3-0 to properly repair an episiotomy. App. 307, 442:07-09.

Further, 4-0 sutures are too weak because 4-0 suture is "too fine a suture … [i]t would increase the risk of the wound breaking down or not have enough strength to hold it together." App. 307, 442:14-22. The 4-0 suture also comes with a finer needle and are typically used to repair small vaginal lacerations around the urethra. App. 308, 443:05-07. 4-0 sutures should not be used to repair deep perineal tissues or episiotomies. App. 308, 443:10-13. That is because the finer needle does not allow a surgeon to take the "larger bites" of tissue to bring everything together and because the fine suture might break down or be too weak to hold the repair together. App. 308, 443:02-22.

The jury heard from both experts, Dr. Chen and Dr. Severidt, that the risk of using too weak or fine a suture is that the repair would "break down" or "fall apart" because the sutures would be too weak "to hold it together." App. 308, 442:12 – 443:13 (Dr. Chen); App. 497-98, 774:18-775:7 (Dr. Severidt).

Dr. Chen opined within a reasonable degree of medical certainty that the use of 4-0 sutures by Dr. Smith was a cause of the breakdown of the vaginal repair site. App. 318-19, 453:19 - 454:07. Dr. Chen further opined that as a result of Dr. Smith's breaches in the standard of care, Fatima Belhak suffers permanent harm. App. 239, 374:19-374:23.

Any argument that only the UIHC's doctors could testify as to causation is wholly inconsistent with the purpose of expert testimony. Experts do not need to have personally witnessed an event in order to provide an opinion within a reasonable degree of medical certainty. "An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed." Iowa R. Evid. 5.703. In medical malpractice cases, experts routinely provide opinions based on their review of medical records. Dr. Chen did exactly this when he reviewed the medical records of the UIHC and then provided his expert opinion that Dr.

Smith's choice to use weak sutures breached the standard of care and resulted in harm to Fatima.

2. Dr. Chen's expert opinions are supported by the record.

The Iowa Supreme Court has identified a minimal factual threshold for admissibility of expert evidence:

> [A]lthough admission of his opinion went to the outer limits of the trial court's discretion, we are unwilling to hold that the trial court abused its discretion. The evidence did provide some basis for a **rational belief** that the conditions Talbott related were present at the time of the accident; thus **the facts on which he based his opinion were sufficient to enable him to express an opinion which was more than mere conjecture.**

Haumersen v. Ford Motor Co., 257 N.W.2d 7, 12 (Iowa 1977) (citation omitted) (emphasis added)

Here, there was ample factual support for Dr. Chen's opinions. The vaginal repair site was deemed "broken down" by the time Fatima arrived at UIHC and "loose approximately sutures" were identified upon examination. App. 165 ("[V]aginal repair site appears broken down and she does note stool in the vagina."); App. 162 ("1cm tissue bridge separating the vaginal and rectum with loose approximating sutures.") Fatima testified that she asked a nurse whether the sutures were loose. App. 431, 612:9-10. Dr. Smith admits that one of her concerns was that her sutures were tearing. Supp.

App. 23, 895:01-03. The above facts allowed Dr. Chen to express an opinion that the loose sutures meant that the repair had “broken down” and/or “fallen apart.”

Defendants may quibble about whether there was a *complete* breakdown or a *partial* breakdown of Dr. Smith’s sutures; however, it is clear that Dr. Chen provided an expert opinion that *some* of Dr. Smith’s sutures had broken down by the time Fatima was being examined at the UIHC. App. 318-19, 453:19-454:07. Dr. Chen opined within a reasonable degree of medical certainty that the use of 4-0 sutures by Dr. Smith was a cause of the breakdown of the vaginal repair site. App. 239, 374:19-374:23.

Once again, Defendants failed to timely address complaints that they now raise on appeal. The rules of expert testimony "place the full burden of exploration of the facts and assumptions underlying the testimony of an expert witness squarely on the shoulders of opposing counsel's cross-examination." *Mercy Hosp. v. Hansen, Lind & Meyer, P.C.*, 456 N.W.2d 666, 671 (Iowa 1990) (quoting *Smith v. Ford Motor Co.*, 626 F.2d 784, 793 (10th Cir.1980)). If Defendants believed that Dr. Chen’s testimony lacked a proper factual basis, they bore the responsibility of objecting to it, asking probing questions on cross-examination, or introducing contrary evidence. *See Id.* (observing that the burden of exploration of facts and

assumptions underlying expert testimony rests on opposing counsel's cross examination);

At trial, Defendants neither objected to Dr. Chen's testimony regarding causation based on the 4-0 sutures or attacked the basis of his causation opinion during cross-examination. *See,* App. 238-420, 373:18-555:06. Defendants had ample time to cross-examine Dr. Chen and subjected him to thorough cross-examination on a range of topics including: his hourly rates, his licensure, and his interpretation of medical records. *Id.* If Defendants wanted to show that Dr. Chen's opinion "was not supported by the facts and data which he stated that he reviewed in formulating the opinion," they "should have brought [that information] out on cross-examination." *Mercy Hosp.,* 456 N.W.2d at 672. Having failed to do so, they should "not now be heard to complain that the facts relied upon by [] were an insufficient basis for his opinion." *Id.*

3. The evidence in favor of submitting the specification of negligence to the jury was so strong that Defendant agreed it should be submitted to the jury during the instruction conference.

Defendants subsequent consent to allowing a jury instruction regarding the 4-0 suture is wholly inconsistent with its current position that there was inadequate evidence to support a finding of causation on that basis.

Looking at the evidence in the light most favorable to Plaintiffs, the trial court properly held that there was sufficient evidence to deny Defendants' motion for directed verdict and the Court should affirm.

CONCLUSION

For the foregoing reasons, Appellees-Plaintiffs Fatima E. Belhak and Abdellatif Elfila respectfully request that this Court AFFIRM the trial court's Ruling and Order denying Defendants-Appellants' request for Motion for Mistrial and New Trial.

ORAL ARGUMENT STATEMENT

Appellees do not request oral argument.

Respectfully Submitted,

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We hereby certify that the costs paid for printing Plaintiffs'-Appellees' Proof Brief was the sum of $0.00.

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