IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 22-2048
(Scott County No. LACE 127225)

FATIMA E. BELHAK and ABDELLATIF ELFILA,

Plaintiffs-Appellees,

vs.

WOMEN'S CARE SPECIALISTS, P.C.,

Defendant-Appellant.

APPLICATION FOR FURTHER REVIEW
(Iowa Court of Appeals Decision of May 8, 2024)

APPLICATION FOR FURTHER REVIEW

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QUESTIONS PRESENTED FOR REVIEW

I. **DID THE COURT PROPERLY INSTRUCT THE JURY ON THE SPECIFICATION OF NEGLIGENCE RELATED TO SUTURE SIZE?**

II. **WHAT IS THE REQUIRED DEGREE OF SPECIFICITY FOR EXPERT TESTIMONY IN ORDER TO SUPPORT A PROPOSED JURY INSTRUCTION ON A SPECIFICATION OF NEGLIGENCE?**

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STATEMENT SUPPORTING FURTHER REVIEW

In the United States, nearly 20,000 medical malpractice cases are filed each year. *See,* Berxi.com *Must-Know Medical Malpractice Statistics for 2023, online at* https://www.berxi.com/resources/guides/medical-malpractice-insurance/statistics/ (accessed May 21, 2024). In each of those cases, as in all actions based on negligence, causation is the initial, and essential issue. Indeed, proof of causation is essential to all negligence claims.

This application presents the Court with the opportunity to cure uncertainty in our common law and deviation from this Court's prior holdings regarding the standards for causation evidence required to create a triable issue on a particular specification of negligence. By clarifying the evidentiary standards, the Court can ensure consistent application of the law and prevent the imposition of an overly strict standard that would undermine the jury function and lead to overuse of the appellate system.

Plaintiff Fatima Belhak seeks further review of a Court of Appeals decision that reversed and remanded a judgment in her favor for medical malpractice. The Court of Appeals held that the District Court erred when it submitted one of the specifications of negligence to the jury. The Court of Appeals held that the submission was in error "because Belhak had failed to

present any expert evidence supporting causation for that theory." *Belhak v. Smith*, No. 22-2048 (Iowa Ct. App. May 8, 2024). There are two reasons supporting Plaintiff's request for this Court to review the Court of Appeals decision.

First, the Court of Appeals decision should be reviewed and reversed because it is "in conflict with a decision of this court" on an "important matter." Iowa R. App. P. 6.1103(1) (b) (1). Namely, the decision conflicts with *Alcala v. Marriott Int'l, Inc.*, 880 N.W.2d 699, 707-08 (Iowa 2016) which reinforced that trial courts are required to give requested jury instructions that are supported by the evidence and the applicable law. The Court of Appeals decision is also inconsistent with *Hansen v. Cent. Iowa Hosp. Corp.*, 686 N.W.2d 476, 485 (Iowa 2004), where this Court held that expert testimony need not use specific buzzwords like "reasonable degree of medical certainty" to generate a jury question on causation.

In reaching its decision, the Court of Appeals relied heavily on the case of *Susie v. Family Health Care of Siouxland, P.L.C.*, 942 N.W.2d 333 (Iowa 2020). The Court's reliance on that case is misplaced, in that it involved an appeal from a grant of summary judgment, which was in turn based on the deposition testimony who characterized his own testimony as "speculative." The court in that case did not parse the witness's testimony to

make its own after-the-fact judgment on credibility: the witness himself admitted unreliability.

Second, the Court of Appeals ruling presents an issue of "broad public importance" that has not been, but that should be, settled by the Supreme Court; namely, what level of evidence and what degree of specificity is required in an expert's testimony in order to warrant a jury instruction on a specification of negligence. Iowa R. App. P. 6.1103(1) (b) (4). This issue arises in some capacity in virtually all medical malpractice cases, as well as in many more negligence cases of other varieties.

The excessively strict standard which has been promoted by Defendant and implicitly adopted by the Court of Appeals would effectively require Plaintiffs to *prove* causation (not just probability of causation) before a specification of negligence is even presented to the jury. This is not only inconsistent with the prior authority of this Court, but with the foundational structure of our court system under which the jury is the ultimate fact finder and the trial court's decisions regarding evidence are afforded deference.

Moreover, the uncertainty regarding the standards for finding evidence of causation sufficient to allow a specification of negligence to go to the jury is problematic. It creates uncertainty among counsel regarding the degree of specificity with which experts must testify. For example, if an

express, unequivocal statement that each specification of negligence was a cause of a Plaintiff's damages is required as the Court of Appeals decision implies, counsel must be aware of this so they can tailor their examinations accordingly. In contrast, if, as this Court's prior cases state, specific "buzzwords" are not required, but rather, a showing of probability is sufficient, reinforcement of these principles is needed to avoid further erroneous decisions like the Court of Appeals in this case. Allowing the Court of Appeals decision in this case to stand without insight from this Court would add to the murkiness of the law and thereby promote an environment where appeals could become a routine part of the trial process.

In the instant case, the evidence of causation was deemed by the District Court to be sufficient for the jury to render a decision. The judge (Hon. Jeffrey D. Bert) made this decision after hearing the testimony in person and making his determination on its credibility. In fact, the District Court denied a motion for a directed verdict on the issue of causation, holding that there was sufficient evidence to make the issue a question for the jury. The Court of Appeals, however, implicitly rejected this determination and substituted its own determination, based solely on a transcript of the proceedings, that the testimony on causation was "particularly 'cryptic' and 'confusing,'" that it "improperly left the jury to

speculate about the but-for causal link," and that it called for "improper speculation by the jury".

It is a foundational principle of appellate review that factual disputes that depend heavily on the credibility of witnesses are best resolved by the trial court, which has a better opportunity to evaluate credibility than does the appellate court. *Capitol Savings & Loan Assn. v. First Financial Savings & Loan Assn.*, 364 N.W.2d 267, 271 (Iowa Ct. App. 1984). Making the appellate court the arbiter of the credibility of witnesses despite the trial judge having actually been present for the production of evidence places those courts in the position of fact finder, which is not their role. In addition, appellate courts and trial courts would face a new burden from an increased number of appeals, followed by an increase in re-trials on remand.

The resolution of these issues will affect not only the outcome of the current case but will also have significant implications for all medical malpractice litigation in Iowa.

BRIEF

Introduction

After a week-long trial, a jury found the Defendants liable for the injuries sustained by Plaintiff Fatima Belhak and her husband as a result of Defendants' negligence. Defendants appealed, arguing, in essence, that they were entitled to a new trial because they did not agree with the decision of

the jury. The emotion behind the appeal is perhaps understandable. The jurisprudence, however, is not.

Procedural Background

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. (3/23/22 Tr. 417:15 – 17). Plaintiffs brought separate cases against Denice Smith, MD ("Dr. Smith"), the physician that delivered Zayd, and Women's Care Specialists, P.C., based on respondeat superior. The cases were consolidated. (3/17/22 Order).

Plaintiffs' case against Dr. Smith and Women's Care Specialists, P.C. was tried over the course of seven days in March of 2021. Defendants filed a post-trial motion for mistrial and new trial based on alleged misconduct during closing, misconduct leading up to closing and alleged improper jury instructions on one specification of negligence. (5/13/22 Motion). The trial court denied the motion in its entirety. (11/17/22 Order).

Defendants appealed from both case numbers. Plaintiffs opposed the appeal. The Court of Appeals reversed and remanded based solely on the ground that the jury instruction on the at-issue specification of negligence

was improper. Plaintiffs disagree with the Court of Appeals decision and now seek further review.

Factual Background

On January 27, 2014, Plaintiff Fatima Belhak gave birth to Plaintiff's first son, Zayd. (3/23/22 Tr. 457:15 – 17; 3/24/22 Tr. 604:25 – 605:4). When Fatima went into labor with Zayd, Dr. Smith was assigned as Fatima's delivering physician. (3/24/22 Tr. 608:14 – 17). Dr. Smith was employed by Women's Care Specialists, P.C. Dr. Smith delivered Zayd. She testified at trial that during the delivery, she performed an episiotomy, a surgical incision that is made in the mother's perineum, because Fatima's skin was too tight to allow Zayd to be delivered. (3/28/22 Tr. 885:18-24; 886:8-12). Dr. Smith conducted a physical vaginal examination, diagnosed a second-degree laceration, and repaired the episiotomy tear using 4-0 sutures. (3/28/22 Tr. 922:9 – 23; 923:7 – 20).

Fatima testified at trial about the events after giving birth. She testified that she reported pain in her rectum to the nurses. (3/24/22 Tr. 610:19 – 610:23). She also testified that when using the bathroom, she noticed small pieces of stool and blood on her postpartum pad. (3/24/22 Tr. 610:24 -611:14).

After returning home, Fatima had continued pain and a strange feeling in her vaginal area. 3/24/22 Tr. 618:25 – 619:9). Ultimately, she was diagnosed with a fourth-degree perineal laceration. (3/23/22 Tr. 388:4 – 22; 3/24/22 Tr. 622:2 – 3; Plaintiffs Exhibit 3). Surgery was required for anal sphincteroplasty (reconstructive surgery) and repair of fourth-degree laceration. (3/23/22 Tr. 388:18 – 389:5). The surgery could not be conducted until months later because the site had become infected. (3/24/22 Tr. 626:21 – 627:5).

The reconstructive surgery was conducted; however, Fatima was left with long-lasting adverse impacts, many of which continue through today. She has difficulty sitting for long time, walking, doing daily chores, bending and going back, carrying heavy weight, and sleeping in a particular way. (3/24/22 Tr. 628: 5 – 628:11). Sitting or lying in the same position causes her pelvic pain which spreads all the way down her legs. (*Id.* at 628:11 – 628:16). Fatima has an ongoing fear of going out in public because of her inability to control her diarrhea and gas. (*Id.* at 628:3 – 629:6).

Plaintiffs brought suit for negligence and loss of consortium for their damages. Plaintiffs alleged three specifications of negligence by Dr. Smith; namely, that Dr. Smith was negligent by: failing to perform a rectal examination after the episiotomy; failing to recognize a fourth-degree

laceration;[1] and using 4-0 Vicryl sutures to repair the episiotomy. (Jury Instruction No. 14).

At trial, the Plaintiffs' expert, Dr. Chen, testified that there was a fourth-degree laceration from the delivery and that Dr. Smith failed to identify it. (*Id.* at 394:19 – 23). He further opined that Dr. Smith's failure to perform a rectal examination after the episiotomy and use of a 4-0 vicryl each breached the standard of care. (401:4-16; 443:10-16). Dr. Chen described the importance of doing a rectal examination. Rectal examinations are crucial in order to "rule out injury to the sphincter as well as the rectum." (3/23/22 Tr. 436:16-18).

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. (3/23/22 Tr. 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. (3/23/22 Tr. 374:19- 374:23).

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

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[1] Plaintiffs' position has at all times been that the fourth-degree laceration occurred during delivery, but that Dr. Smith failed to diagnose and obtain assistance of another provider to repair it. (It is undisputed Dr. Smith was not qualified to personally repair a fourth-degree laceration). (3/25/22 Tr. 771:8-10).

between the 4-0 vicryl sutures and the injuries. (6/28/22 Tr. 999:1 – 13). The trial court denied the motion. (*Id.* at 1001:17 – 23).

On March 30, 2022, the jury returned a verdict in favor of the Plaintiffs in the amount of $3,250,000. Defendants filed a Motion for a New Trial on May 13, 2022, and the Motion was argued on September 1, 2022. The court denied the Motion by Order filed on November 17, 2022. (*Id).*

Defendants appealed, and the Court of Appeals reversed the trial court's Order and remanded the case for a new trial.

Argument

I. THE TRIAL COURT CORRECTLY ALLOWED INCLUSION OF THE SPECIFICATION OF NEGLIGENCE BASED ON SUTURE SIZE IN THE JURY INSTRUCTIONS

A. Trial Courts are Required to Give Jury Instructions that are Supported by Evidence

Trial courts are *required* to give requested jury instructions that are supported by substantial evidence and the applicable law. *Alcala v. Marriott Int'l, Inc.*, 880 N.W.2d 699, 707-08 (Iowa 2016); *Coker v. Abell-Howe Co.*, 491 N.W.2d 143, 150 (Iowa 1992). "The verb 'require' is mandatory and leaves no room for trial court discretion." *Alcala* at 707.

Evidence is sufficient to support an instruction when a reasonable mind would accept it as adequate to reach a conclusion. *Coker*, 491 N.W.2d

at 150. When considering whether an "instruction is supported by substantial evidence, [courts] give the evidence the most favorable construction it will bear in favor of supporting the instruction." *Asher v. OB-Gyn Specialists, P.C.*, 846 N.W.2d 492, 495 (Iowa 2014), *overruled on other grounds by Alcala*, 880 N.W.2d at 707-08; *Duncan v. City of Cedar Rapids*, 560 N.W.2d 320, 325 (Iowa 1997) ("When weighing the sufficiency of the evidence to support a requested jury instruction . . . the evidence [is viewed] in a light most favorable to the party seeking the instruction.")

B. Specifications of Negligence Supported by Evidence Must be Included in Jury Instructions

In negligence cases, including medical negligence, Plaintiffs are required to identify the specific acts or omissions relied upon to create a jury issue. Plaintiffs in a negligence case are required to identify specific acts or omissions that support their negligence claim. *Bigalk v. Bigalk*, 540 N.W.2d 247, 249 (Iowa 1995); *see also Asher, supra*, 846 N.W.2d at 495 (requiring the plaintiff to detail the acts or omissions of the doctor that established a breach of the standard of care in a medical malpractice case). "Each specification should identify either a certain thing the allegedly negligent party did which that party should not have done, or a certain thing that party omitted that should have been done, under the legal theory of negligence that is applicable." *Coker*, 491 N.W.2d at 145.

Each specification of negligence that is supported by the pleadings and substantial evidence must be included in the jury instructions. *Herbst*, 616 N.W.2d at 586. "Jury instructions should be formulated to require the jury to focus on each specification of negligence that finds support in the evidence." *Bigalk*, 540 N.W.2d at 249. The court's instructions should advise the jury concerning all of the potential ways in which the defendant was negligent. *Id.* at 587.

If substantial evidence exists to support an alleged act or omission, the trial court has no discretion to exclude the specification of negligence from the jury instructions. *Alcala*, 880 N.W.2d at 707 ("Iowa law requires a court to give a requested jury instruction if it correctly states the applicable law and is not embodied in other instructions."); *Herbst*, 616 N.W.2d at 585.

C. A Theory of Causation that is Probable is Sufficient for the Issue to go to the Jury.

For there to be substantial evidence of causation sufficient to submit the issue to the jury, "the rule is that expert testimony indicating ***probability*** or ***likelihood*** of a causal connection is sufficient to generate a question on causation." *Hansen v. Cent. Iowa Hosp. Corp.*, 686 N.W.2d 476, 485 (Iowa 2004) (emphasis added), citing *Winter v. Honeggers' & Co.*, 215 N.W.2d 316, 323 (Iowa 1974). No special language is required. "Buzzwords like 'reasonable degree of medical certainty' are therefore not necessary to

generate a jury question on causation." *Id.* In evaluating expert support for causation, the court does not require "magic words," and the evidence on causation need not be conclusive but must only show reasonable probability. *Asher v. Ob-Gyn Specialists, P.C., supra*, 846 N.W.2d at 503.

The evidence and facts of common knowledge must show the plaintiff's theory of causation is reasonably probable — not merely possible, and more probable than any other hypothesis based on such evidence. *Doe v. Central Iowa Health Sys.*, 766 N.W.2d 787, 793 (Iowa 2009). A jury is not obliged to rely wholly upon the opinions of the witnesses, but in connection with such opinions, may use and be guided by their own judgment on such matters. *Hoyt v. Chicago, Milwaukee & St. Paul Ry.*, 117 Iowa 296, 301, 90 N.W. 724, 726 (1902).

Applying this standard, this Court found that the following testimony from a medical expert was "sufficient to generate a jury question on causation:"

> [T]he history suggests a probability that there is some causal relationship between the incident she described and the pain increase, and I partially base that on the fact that there's documentation of a significant increase of pain within a fairly short time after the fall.

Hansen v. Cent. Iowa Hosp. Corp., 686 N.W.2d 476, 485 (Iowa 2004). The evidence of a probability of causation was sufficient in that case, and the evidence of causation here was likewise sufficient.

D. The Suture Size Jury Instruction Was Supported by Substantial Evidence and Common Sense

As required by Iowa law, Plaintiffs submitted specifications of negligence detailed the various ways in which Defendants breached the standard of care. *See Welte v. Bello*, 482 N.W.2d 437, 439 (Iowa 1992) ("[A] party claiming negligence must identify specifically the acts or omissions constituting negligence."). Three specifications of negligence were submitted to the jury. Specifically, the relevant jury instruction provided, in pertinent part that Plaintiffs must prove that "defendants were negligent in one or more of the following ways: a) by failing to perform a rectal examination after an episiotomy; or b) by failing to recognize a fourth-degree laceration; or c) by using 4-0 Vicryl sutures to repair the episiotomy." (Jury Instruction No. 14). The only aspect of the instruction currently at issue is the specification currently at issue is the suture size instruction.

The Court of Appeals decision is based on the erroneous conclusion that there was no "evidence from which a jury could conclude that Smith's use of smaller sutures was a cause of Belhak's injury." (5/8/2024 Decision). This assertion is undercut by the evidence. Substantial evidence was

presented at trial to support the suture specification and thus, the trial court properly allowed the suture specification to be included in the jury instructions.

There is no dispute that there was sufficient evidence, most notably, Dr. Chen's testimony, to create a triable issue regarding whether use using 4-0 Vicryl sutures to repair the episiotomy breached the standard of care. (5/8/2024 Decision). There is likewise no dispute that Plaintiffs presented evidence of their damages. (5/8/2024 Decision). Thus, these issues are not addressed herein. The only remaining disputed issue regarding the instruction is whether there was sufficient evidence of a causal connection to allow the suture specification to go to the jury.

It is undisputed that Dr. Smith used 4-0 sutures, rather than thicker 3-0 or 2-0 sutures, to repair Fatima Belhak's episiotomy laceration. (Tr. 3/28/22 923:18-23) Dr. Chen testified that the risk in using a thinner suture is that the repair would break down or fall apart because the sutures would be too weak to hold the repair together. (Tr. 441:15 – 443:13, Dr. Chen) (emphasis added). Similarly, Defendants' own expert, Dr. Severidt, similarly testified that the risk of loosened sutures is that the laceration repair could break down. (Tr. 774:24– 775:7, Dr. Severidt).

A person entering a jury room

> is not expected to banish from [their] mind knowledge gained from the experiences common to [people] generally. While the juror must fully and fairly consider all the evidence adduced in the case, and must base [their] verdict upon that only, still, in arriving at [their] conclusion, it is [their] right to so consider and apply such evidence in the light of reason and of those experiences which are common to [people] generally.

Purcell v. Tibbles, 101 Iowa 24, 27, 69 N.W. 1120, 1121 (1897). It is within common knowledge that if the thickness of a string (or, in this case, suture) used to sew something together is not strong enough, the thing sewn will fall apart. It is also common knowledge that the presence of bacteria is associated with infections. (Tr. 688 – 689 Severidt). A woman's vagina and people's intestines include dangerous bacteria (Tr. 447:13).

Expert and lay evidence was presented that showed the laceration repair did in fact fall part. Fatima testified that after giving birth, while still at the hospital, she noticed pieces of stool and blood on her postpartum pad. (Tr. 610:24 -611:14). She also testified that while still at the hospital she had pain that was so severe that she had trouble sitting when she (Tr. 610:19 – 611:5).

The University of Iowa Hospitals and Clinics ("UIHC"), medical records indicated that the repair site was, in fact, broken down, and loose sutures were identified. (Exhibit 3(d), "[V]aginal repair site appears broken

down and she does note stool in the vagina."; Plaintiff's Exhibit 3(c), "1cm tissue bridge separating the vaginal and rectum with loose approximating sutures.") Further, Dr. Chen testified that based on these medical records, at least some of the sutures were broken down. (Tr. 453:19 - 454:07). There is also no dispute that Fatima's wound site did become infected. The infection in turn, caused a delay in the reconstructive surgery she needed to repair the wound.

Importantly, in addition to all of the foregoing evidence and related evidence produced at trial, Dr. Chen *expressly* testified that Dr. Smith's breaches of the standard of care (which would include the suture strength breach), were a cause of permanent harm to Fatima Belhak. Dr. Chen also testified that within a reasonable degree of medical certainty that his interpretation was that the use of 4-0 sutures by Dr. Smith was a cause of the breakdown of the vaginal repair site. (Tr. 453:19 - 454:07).

Pulling the foregoing together, evidence and common sense demonstrated that:

- Dr. Smith used 4-0 sutures, rather than thicker 3-0 or 2-0 sutures, to repair Fatima's episiotomy laceration.
- The risk in using a thinner suture to perform an episiotomy is that the repair will break down or fall apart.

- Infection is a risk inherent in a broken down repair.
- The repair of Fatima's laceration was broken down and had at least some loose sutures by the time she went to UIHC.
- Fatima's wound was infected which resulted in delay of reconstructive surgery, pain, and other damages.

This is a well-connected and well-supported logical chain without huge leaps of logic or speculation. The suture strength specification and its causal connection to Plaintiffs harm were "reasonably probable," based on the evidence.

Significantly, at trial, Defendants did not object to Dr. Chen's testimony regarding causation based on the 4-0 sutures, nor did they attack the basis of his causation opinion during cross-examination. (*See,* Tr. 453:19 - 454:7; 373-555). Defendants had ample time and opportunity to cross-examine Dr. Chen. Defendants availed themselves of this opportunity and subjected Dr. Chen to a thorough cross-examination on a range of topics including: his hourly rates, his licensure, and his interpretation of medical records. (*See*, Tr. 517 – 543). 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., supra*, 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 [the expert] were an insufficient basis for his opinion." *Id.*]

In reversing the trial court, the Court of Appeals relied heavily on the case of *Susie v. Family Health Care of Siouxland, P.L.C.*, 942 N.W.2d 333 (Iowa 2020). That case is readily distinguishable from the instant case. First, *Susie* was an appeal from a grant of summary judgment in favor of a defendant. The trial court ruled that the deposition testimony of the plaintiffs' expert did not create a genuine issue of material fact regarding causation. 942 N.W.2d at 340. There was no live testimony presented to a finder of fact, so no jury could judge the credibility of the testimony.

Second, and more importantly, the challenges testimony did not address the issue before the court. The expert testimony proffered by the Plaintiff in *Susie* was acknowledged by the witness to be "speculative," and the witness also stated that he did not have enough information to say what should have been done in the plaintiff's case. It was also unclear whether the expert was qualified to render a causation opinion. 942 N.W.2d at 337-38.

The expert testimony given in the instant case bears no resemblance to the acknowledged speculation in *Susie.* Plaintiffs' expert, Dr. Chen,

testified that there was a fourth-degree laceration from the delivery and that Dr. Smith failed to identify it. (3/23/22 Tr. 394:19 – 23). He further opined that Dr. Smith's failure to perform a rectal examination after the episiotomy and use of a 4-0 vicryl each breached the standard of care. (401:4-16; 443:10-16). Dr. Chen described the importance of doing a rectal examination. Rectal examinations are crucial in order to "rule out injury to the sphincter as well as the rectum." (3/23/22 Tr. 436:16-18).

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. (3/23/22 Tr. 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. (3/23/22 Tr. 374:19- 374:23).

In sum, construed in Plaintiff's favor as it must be, the suture size specification of negligence was supported by jury instructions that are supported by substantial evidence and the law and it was proper for the trial court to provide the instruction. It was error for the Court of Appeals to reverse the district court's allowance of the suture size specification of negligence.

II. THE COURT OF APPEALS ERRED IN ITS FINDING REGARDING ATTORNEY MISCONDUCT.

Defendants have also alleged attorney misconduct in the closing argument at trial. The Court of Appeals agreed that there was misconduct, but declined to hold that it was sufficient grounds for reversal.

The "perfect" or error-free trial is, at best, an elusive creature. There will always be errors and missteps. Showing an error or misstep is, however, only the first stage. A party must show that they were prejudiced by the error. It is not sufficient for a party to make bare allegations of prejudice. That party must meet the burden of proof to show the Court that it was probable, not just possible, that the jury was prejudiced against the "prejudiced" party. *See, Loehr v. Mettille*, 806 N.W.2d 270, 277 (Iowa 2011). "Prejudice" is a determination left to the sound discretion of the trial court who is in the best position to make the evaluation. *Bronner v. Reicks Farms, Inc.*, 919 N.W.2d 766 (Iowa Ct. App. 2018) (District court "has before it the whole scene, the action and incidents of the trial as they occur and is in a much better position to judge whether the defendant has been prejudiced by misconduct of opposing counsel.")(citation omitted).

Even assuming arguendo that there were some technical missteps by Plaintiffs in the closing or leading up to the closing, Defendants have not and cannot show prejudice. A new trial is not warranted.

CONCLUSION

The Court of Appeals erred in finding that the trial court should not have submitted the suture size specification of negligence to the jury. The standard used by the Court of Appeals contradicts existing law. If the Court's opinion is not reversed, the standard relied upon should be clarified, not only for the purposes of this case, but to provide future guidance to courts and litigants. Plaintiffs request further review by the Iowa Supreme Court and for such other and further relief as this Court deems just as proper.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

The undersigned certifies a copy of this application for further review was filed with the Clerk of the Iowa Supreme Court via EDMS and served upon the following persons by EDMS on the 28th day of May, 2024.

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CERTIFICATE OF COMPLIANCE

This application for further review complies with the typeface and type-volume requirements of Iowa R. App. P. 6.1103 because:

[ ] this application has been prepared in a proportionally space typeface using Times New Roman in 14pt, and contains 4709 of words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(5).

/s/ William J. Bribriesco
Signature

5-28-24
Date

IN THE COURT OF APPEALS OF IOWA

No. 22-2048
Filed May 8, 2024

FATIMA E. BELHAK and ABDELLATIF ELFILA,
Plaintiffs-Appellees,

vs.

DENICE SMITH, M.D., and WOMEN'S CARE SPECIALISTS, P.C.,
Defendants-Appellants.

Appeal from the Iowa District Court for Scott County, Jeffrey D. Bert, Judge.

A doctor and her employer appeal a jury verdict finding them liable for medical malpractice. **REVERSED AND REMANDED.**

Troy L. Booher and Beth E. Kennedy of Zimmerman Booher, Salt Lake City, Utah, and Nancy J. Penner of Shuttleworth & Ingersoll, P.C., Cedar Rapids, for appellants.

Anthony J. Bribriesco and William J. Bribriesco of Bribriesco Law Firm, PLLC, Bettendorf, for appellees.

Heard by Bower, C.J., and Badding and Langholz, JJ.

LANGHOLZ, Judge.

Fatima Belhak and her husband sued her doctor, Denice Smith, and the doctor's employer for medical malpractice over the care that she received following an episiotomy performed during the birth of her first child.[1] The court instructed the jury on three alternative specifications of negligence. And the jury returned a general verdict that Smith was negligent and her negligence caused damages to Belhak—awarding $3.25 million in damages.

Smith seeks a new trial, arguing that the court should not have submitted one of the specifications of negligence—that Smith used the wrong size of sutures—to the jury because Belhak had failed to present any expert evidence supporting causation for that theory. She also argues that a new trial is warranted because Belhak's counsel made improper statements in closing argument and asked more than fifty improper leading questions throughout the trial.

Because Belhak's expert did not testify that the use of smaller sutures was more likely than not a cause of Belhak's harm, that specification should not have been submitted to the jury. And Smith properly preserved error on this issue by moving for a directed verdict and raising it again in her posttrial motion for a new trial. It matters not that she agreed to the jury instruction. So she is entitled to a new trial on this basis alone, and we need not address whether the conduct of Belhak's counsel would also warrant a new trial. We thus reverse and remand to the district court for a new trial.

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[1] Because the arguments on appeal do not vary between the coplaintiffs and codefendants, we will generally refer only to Belhak and Smith for simplicity. But both defendants appealed the verdict against them and both plaintiffs were awarded damages and have participated in the appeal as the appellees.

I.

Belhak and her husband, Abdellatif Elfila, welcomed their first child in January 2014. Belhak's regular obstetrician with Women's Care Specialists was unavailable when she went into labor, so Smith covered the delivery. As the baby's head began crowning, Smith decided she needed to perform an episiotomy because Belhak's skin around her vagina was "very tight around the baby's head," impeding the baby's outward progress. To perform an episiotomy, a doctor makes a small incision with a special pair of scissors from the vagina into the mother's perineum—the area between the vagina and the anus. After performing the episiotomy, the baby was successfully delivered without issue. And there appears to be little dispute about the need for the episiotomy or the way it was performed. The parties' dispute starts with what happened next.

After the birth, Smith conducted a vaginal examination, which included checking out the episiotomy incision to see how far it went and how deep it went towards the anus and rectum. Smith diagnosed a second-degree laceration with an extension up into the vaginal area. And Smith repaired the laceration with 4-0 vicryl sutures—the suture she "typically" used for vaginal laceration repairs—rather than larger 3-0 or 2-0 sutures. Smith did not perform a rectal exam. And she did not diagnose that Belhak had a fourth-degree laceration—an extension of the laceration into the lining of the rectum.

While still in the hospital, Belhak felt pain in her rectum and noticed small pieces of stool and blood on her postpartum pad after birth. She reported this to her medical providers. After a nurse conducted a visual examination and saw nothing out of the ordinary, the nurse gave her an ice pack to ease the pain.

Belhak went home. And a few days later, she self-inspected her vaginal area. She was still in pain and saw stool coming from her vagina. After calling Smith and her regular medical provider, she went to the emergency room, which sent her to the University of Iowa Hospitals and Clinics. The University doctors diagnosed Belhak with a fourth-degree laceration. They also diagnosed a rectovaginal fistula—essentially a hole between the rectum and the vagina that allowed stool and gas to pass from the rectum to the vagina and then come out of Belhak's body either or both ways. Because the area became infected—as typically happens if not repaired within twenty-four hours of the injury—Belhak had to wait about five months to repair the injuries with reconstructive surgery.

From February until the reconstructive surgery in June, Belhak had to bathe for thirty minutes in a sitz bath after every bowel movement to disinfect the wound. Even after her reconstructive surgery, she suffers pain. She has trouble walking, carrying heavy objects, and sitting or sleeping in certain positions. Sometimes this pain radiates from her pelvis down her legs. She does physical therapy and at-home exercises to alleviate the pain as much as possible. She cannot be around other people too long for fear of uncontrollable bowel movements and gas, and she has to restrict her diet to avoid accidents. Her relationship with her husband has struggled because of her injury. And he has taken on more responsibilities in raising their children, caring for Belhak, taking her to appointments, and helping her with therapy.

In 2016, Belhak and her husband sued Smith and Smith's employer over her care following the episiotomy.[2] Belhak claimed that Smith's care was medical malpractice that caused her physical and mental injury and pain and suffering. And her husband claimed loss of consortium.

The case was eventually tried to a jury in March 2022—after the first attempt a couple of years earlier ended with a mistrial during jury selection. Over seven days, the jury heard from Belhak and her husband, Belhak's original obstetrician who could not make the birth, and Smith. The jury also heard from two competing expert witnesses—one testifying for Belhak and the other for Smith. Belhak's expert was Dr. Gregory Chen, an experienced obstetrician and gynecologist who also served on the clinical faculty of Northwestern University.

After the close of Belhak's case, Smith moved for a direct verdict on the specification of negligence that Smith used the wrong size of sutures, arguing that "there has not been any testimony that the use of 4-0 vicryl sutures caused any of the injuries to the plaintiffs."[3] The court denied the motion, reasoning that Smith "has put forth sufficient evidence on both of those issues to make this a jury question."

The court then submitted the case to the jury with a marshaling instruction that included three specifications of negligence, instructing that "[t]he plaintiffs must prove" that Smith was "negligent in one or more of the following ways:"

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[2] Belhak originally filed two suits—one against Smith and a second against Smith's employer, Women's Care Specialists. The cases were consolidated together with all filings after consolidation made in the case originally brought only against Women's Care Specialists.

[3] Smith also made a second motion for directed verdict applicable to all the specifications of negligence that is not at issue on appeal.

(1) "by failing to perform a rectal examination after an episiotomy; or" (2) "by failing to recognize a fourth-degree laceration; or" (3) "by using 4-0 Vicryl sutures to repair the episiotomy." Smith agreed that the second and third specifications "should be submitted." But she argued that the first specification—and others the court decided not to submit—were "duplicative" and "unduly emphasized plaintiffs' case."

The jury found that Smith was negligent and her negligence caused damages to Belhak.[4] And the jury awarded $3.25 million in damages. The verdict form did not require the jury to specify which of the three specifications of negligence were proved.

Smith moved for a new trial for a host of reasons. Among other arguments not relevant to this appeal, she again argued that the suture specification of negligence should not have been submitted to the jury because there was insufficient evidence of causation. Smith also argued that Belhak's counsel made at least six arguments during closing argument that constituted misconduct and prejudiced Smith. And she argued that Belhak's counsel's repeated use of leading questions during the trial—over fifty in total that Smith successfully objected to—was also prejudicial misconduct because "the jury was left with the impression that defense counsel was attempting to withhold relevant evidence from its consideration by having to make repeated objections."

The court denied Smith's motion. The court held that Smith had failed "to preserve error" on her argument that the suture specification should not have been

[4] While the verdict form mentioned only Smith, the parties agreed that her employer was also liable for any verdict.

submitted to the jury, reasoning that "[w]hile another objection to preserve error is unnecessary, a party cannot agree to specification, only to later argue it was given in error." Alternatively, the court concluded that "a review of the record shows sufficient evidence regarding harm to Fatima Belhak to allow the jury to decide causation without speculation," pointing mostly to evidence of the many harms Belhak has suffered since the episiotomy.

On Smith's claims of misconduct during closing argument, the court agreed that Belhak's counsel engaged in three instances of misconduct. But the court concluded that these improper arguments—standing alone or collectively—did not warrant a new trial. The court reasoned that it had given curative instructions to the jury, Belhak's "evidence could be characterized as strong," and "[n]one of the alleged misconduct surrounded [the] central factual dispute." The court also rejected Smith's argument based on Belhak's counsel's leading questions during trial, explaining that it was "not convinced the questioning by [Belhak's] counsel was part of a concerted plan to require defense counsel to object" and that "not all of defense counsel's objections were sustained." Smith now appeals.[5]

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[5] The parties' appellate filings suggest some confusion about whether Smith has been dismissed from this appeal by the supreme court. So to be clear, both Smith and her employer—Women's Care Specialists, P.C.—properly appealed the verdict against them and remain as appellants. Because the appellants at first attempted to appeal from both the consolidated district court proceeding—in which the verdict was entered—and the dormant case that had been originally filed against Smith alone, our supreme court dismissed the appeal from the dormant case for lack of jurisdiction. And the supreme court also dismissed a second independent appeal that Smith then filed—again from the dormant case—for lack of jurisdiction. *See Belhak v. Smith*, No. 23-0246 (April 14, 2023). But the court never dismissed Smith from the appeal. Indeed, it noted as much in the second dismissal, stating that Smith "is pursuing an appeal in appeal number 22-2048, which was taken from Scott County case number LACE127225, within which all the proceedings below had been consolidated."

II.

As with any claim, to submit a particular theory of negligence—often called a specification of negligence—to the jury, there must be substantial evidence in the record supporting the specification. *See Alcala v. Marriott Int'l, Inc.*, 880 N.W.2d 699, 708 (Iowa 2016). For a medical malpractice specification, that means evidence that establishes "the applicable standard of care, a violation of that standard, and a causal relationship between the violation and the injury." *Susie v. Fam. Health Care of Siouxland, P.L.C.*, 942 N.W.2d 333, 337 (Iowa 2020). And when multiple specifications are submitted to the jury and "[t]he jury return[s] a general verdict without specifying which" specifications the plaintiff proved, "[a] new trial is required . . . if the evidence was insufficient to submit one of" them. *Alcala*, 880 N.W.2d at 710. We review the decision to submit a specification to the jury for correction of errors at law. *Id.* at 707–08.

Smith argues that a new trial is required because Belhak failed to present sufficient evidence of causation for one of her three specifications of negligence—that Smith used sutures that were too small for the repair of Belhak's episiotomy. But before we can reach the merits of that argument, we must decide whether Smith has preserved error for our consideration of this issue on appeal. Belhak contends that Smith did not because Smith agreed to the jury instruction containing the suture specification and did not adequately argue the issue in her posttrial motion for a new trial. We disagree.

"It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal." *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). Moving for a

directed verdict on a specification of negligence is a proper way to raise the issue that a plaintiff has introduced insufficient evidence supporting the specification. *See James ex rel. James v. Burlington N., Inc.*, 587 N.W.2d 462, 464 (Iowa 1998). And when the district court denies a directed verdict, the party need not object again to the jury instruction submitting the specification to the jury. *See id.* Indeed, this has been the rule in Iowa for nearly a century. *See Heavilin v. Wendell*, 241 N.W. 654, 658 (Iowa 1932) ("[T]o the end that there may be no misunderstanding about this matter, we now fix the ruling to be that, where a party makes a motion for a directed verdict and the court overrules the same, the person against whom such ruling is made does not waive the error, if there is one, in the court's ruling on a motion to direct a verdict by asking instructions which correctly state the law of the case as fixed by the court's ruling on the motion to direct a verdict.").

Smith urged the district court that Belhak had failed to submit sufficient evidence of causation on her suture specification in her directed verdict and again in her posttrial motion for a new trial. Yet when the court considered the jury instructions—mere moments after considering her argument and denying the directed verdict—Smith did not again contest including the suture specification in the marshalling instruction. Rather, she agreed it "should be submitted," and instead challenged other specifications as "duplicative" and "unduly emphasiz[ing] plaintiffs' case." Consistent with our century of precedent, Smith preserved error and was not required to again remind the district court that she still disagreed with its decision that there was enough evidence to submit the specification to the jury.

Belhak tries to distinguish that precedent because Smith agreed to the jury instruction rather than merely failing to object to it. But that is a distinction without

a difference. We see little daylight between the lack of an objection—which is functionally agreement—and Smith's statement of agreement. And the precedent establishes no such distinction—making clear that there is no waiver from "agreeing to jury instructions," *Holdsworth v. Nissly*, 520 N.W.2d 332, 335 (Iowa Ct. App. 1994), or even "asking [for] instructions," *Heavilin*, 241 N.W. at 657, just the same as failing to "object to the instructions," *James*, 587 N.W.2d at 464. What's more, we see nothing in Smith's challenge to other specifications on other grounds that could "be taken as an abandonment of [her] clear position that, as a matter of law, the [specification] should not have been submitted to the jury at all." *Id.*

Belhak also contends that Smith did not properly raise the issue again in her posttrial motion for a new trial. But Smith had a three-page section of her new-trial brief devoted to arguing that the district court "erred denying Defendants' directed verdict motion relating to the use of sutures to repair [Belhak's] laceration" and in "submitting a specification of negligence instruction regarding the size of suture used because that specification required the jury to speculate as to causation." While Belhak makes much of the reference to submission of the specification instruction, this is just another way to say the same thing Smith argued in the directed verdict motion and now on appeal—that Belhak introduced insufficient evidence on causation to support a jury verdict on the suture specification. And the court ruled on Smith's argument, rejecting it both on the merits and because the court found it had been waived by failing to object to the instruction too. Because the issue was raised in and decided by the district court, it was preserved. So we go to the merits.

Causation is a necessary element of a medical malpractice claim. *See Susie*, 942 N.W.2d at 337. This will typically require expert testimony to create a jury question because "a plaintiff needs expert testimony to prove causation unless the causation is so obvious that it is within the common knowledge and experience of a layperson." *Doe v. Cent. Iowa Health Sys.*, 766 N.W.2d 787, 794 (Iowa 2009). *Compare Stickleman v. Synhorst*, 52 N.W.2d 504, 507 (Iowa 1952) (holding that no expert testimony was required on causation where evidence showed that patient began bleeding profusely from the neck after doctor inserted needle into the throat, apparently missing the intended mark and hitting a blood vessel), *with Bradshaw v. Iowa Methodist Hosp.*, 101 N.W.2d 167, 171 (Iowa 1960) (holding that plaintiff failed to prove causation without expert testimony that his back injury was caused by fall in the hospital rather than a previous workplace injury).

While the evidence "need not be conclusive," it "must show the plaintiff's theory of causation is reasonably probable—not merely possible, and more probable than any other hypothesis based on such evidence." *Doe*, 766 N.W.2d at 793 (cleaned up). If the evidence before the jury does not meet this standard, then there is not substantial evidence supporting submitting the claim to the jury. *See id.* at 792–95; *see also Susie*, 942 N.W.2d at 337–340. "The jury cannot be left to speculate about the but-for causal link." *Susie*, 942 N.W.2d at 338–39.

Smith challenges the causation evidence of only one of Belhak's specifications of negligence—that Smith was negligent "by using 4-0 Vicryl sutures to repair the episiotomy" rather than larger 3-0 sutures. And to be clear, Smith only challenges the causation link for this specification. She does not challenge that Belhak presented expert testimony that using smaller 4-0 sutures violates the

standard of care for repairing an episiotomy.[6] Nor does she challenge that Belhak presented evidence that Belhak and her husband suffered physical and emotional injuries after the episiotomy. The narrow question is the causal link between the two—whether the use of smaller 4-0 suture was the cause of any of Belhak's claimed harm.

Because the answer is not "so obvious that it is within the common knowledge and experience of a layperson," Belhak needed to provide expert testimony that the smaller suture was a reasonably probable cause of the harm. *Doe*, 766 N.W.2d at 794. And Belhak does not argue otherwise. We thus focus on the testimony of Belhak's expert witness, Dr. Chen, to see whether it provides the jury a basis to find the required causal link without speculation. *See Susie*, 942 N.W.2d at 338–39.[7]

Belhak first points us to a general conclusion that Dr. Chen offered at the opening of his testimony. He was asked, "And we are going to get into more details later, but as a result of Dr. Smith's breaches of the standard of care, were they a cause of permanent harm to Fatima Belhak?" And Dr. Chen answered, "Yes." But

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[6] Of course, this does not mean that Smith agrees that using 4-0 sutures violates the standard of care—her own expert witness provided a contrary opinion.

[7] Again, the issue before us is whether Dr. Chen's testimony provides "substantial evidence support[ing] the submission of the causal relationship between" Smith's use of the smaller sutures and Belhak's injury. *Doe*, 766 N.W.2d at 792. It is not—as Belhak frames it in her brief—whether "Dr. Chen's expert opinions are supported by the record." So Belhak is wrong to try to shift the burden for developing the causation record onto Smith based on cases challenging the admissibility of an expert's opinion. *See Mercy Hosp. v. Hansen, Lind & Meyer, P.C.*, 456 N.W.2d 666, 671 (Iowa 1990). The burden of presenting substantial evidence on all required elements of a plaintiff's claim—so that it may be submitted to the jury—remains at all times on the plaintiff. *See Doe*, 766 N.W.2d at 792–93; *see also* Iowa R. Civ. P. 1.945 (authorizing motion for directed verdict "[a]fter a party has rested," and "no right to relief has been shown, under the law or facts.").

this alone—without any explanation about what standards of care Dr. Chen was referring to or how any particular breach caused harm—does not move a jury out of speculative territory. And it is apparent from this introductory comment that Belhak's counsel as well understood that "more details" were needed and expected to come to give a basis for the conclusion.

Dr. Chen then provided those added details for the causation of Belhak's other theories of negligence aside from the suture size. He opined that Smith's failure to conduct a rectal examination or to recognize a fourth-degree laceration caused a multi-month delay in properly repairing the episiotomy. And he explained that this delay resulted in harms—both while waiting for treatment and permanently. But when it came time to testify about the 4-0 sutures, Dr. Chen was asked little about the causal link between the 4-0 sutures and Belhak's harm. And what he did say does not provide the required support to find that link.

True, in explaining his opinion that using 4-0 sutures violates the standard of care, Dr. Chen said that he thought using those smaller sutures "would increase the risk of the wound breaking down or not have enough strength to hold it together." But he did not testify that Belhak's sutures did not actually hold together or that her wound broke down because of the sutures.

Much of Dr. Chen's testimony focused on interpreting medical records from the University of Iowa Hospitals and Clinics when Belhak was treated there by specialists who diagnosed her with the fourth-degree laceration and observed the status of Smith's original repair with the 4-0 sutures. Belhak did not call those specialists to testify directly, so the medical records and Dr. Chen's interpretation of them were the only evidence of their conclusions. One note in those records

said that the "vaginal repair site appears broken down." When asked what this note means, Dr. Chen answered, "It's hard to say, exactly. From what my guess is, they are seeing an opening either in the perineum or in the vagina or both." Belhak's counsel then pressed Dr. Chen further. And because this exchange is key to understanding our resolution of the case, we quote it in full:

> Q. When you are looking at this record, what does it mean to you? A. So broken down means they may see some intact stitches, but you will see tissue that is not sutured, but appears to be separated.
>
> Q. And so, you said, "appears to be separated," so— A. Correct, whether it's a millimeter separated or fa[r]ther, just not touching each other like they should be; that there is still a defect, I guess, for lack of a better term.
>
> Q. Within a reasonable degree of medical certainty, that being more likely true than not, was Dr. Smith's breach of the 4-0 sutures that she used a cause of the vaginal repair site breaking down? A. My interpretation, also, they may think it was broken down, meaning they assume, for example, a fourth degree was repaired, and they see a defect in the perineum and don't see sutures there, so they are assuming some of the sutures were dissolved versus it not being repaired at all.
>
> Q. Sure. So you can't tell whether—which circumstance, but you know that whatever sutures that this medical provider is looking at has been broken down? A. Some of the suture, yes.

After starting to ask another follow-up, Belhak's counsel then instead moved on to covering other topics.

It is tough to know what Dr. Chen was trying to say during this exchange. His answer as to whether the use of 4-0 sutures was "a cause of the vaginal repair site breaking down" was particularly "cryptic" and "confusing." *Susie*, 942 N.W.2d at 338. And he never agreed that the 4-0 sutures were likely the cause of anything—the breakdown of the repair site or otherwise. Indeed, from the exchange it is not clear that he even agreed it is more likely than not that the observed breakdown was of the 4-0 sutures rather than just the fourth-degree

laceration that he believed Smith had missed diagnosing—which, again, was one of the alternative specifications of negligence not challenged here. This testimony thus improperly left the jury to speculate about the but-for causal link. *See id.* at 338–39.

But there is another problem. Even if Dr. Chen had answered the question and agreed that the 4-0 sutures caused a breakdown at the repair site, that testimony still would not have completed the causal link between the sutures and Belhak's harm. Dr. Chen was never asked—and thus never explained—whether any breakdown in the repair site caused by the sutures in turn caused Belhak harm. Unlike his testimony on the other alleged acts of negligence, he never opined that the use of the sutures caused the multi-month delay in properly repairing the episiotomy or the related concrete harms from that delay. For example, he never opined that the sutures likely caused the fourth-degree laceration or that they likely made any harm Belhak suffered worse. So any attempt to complete that last causal link would require improper speculation by the jury too. *See id.* at 338–39.

Without any evidence from which a jury could conclude that Smith's use of smaller sutures was a cause of Belhak's injury, it was error for the district court to submit the suture specification of negligence to the jury. And because the general verdict does not tell us which of the specifications the jury found to be proven, Smith is entitled to a new trial. We thus reverse the district court judgment and remand this case for a new trial consistent with this opinion.

III.

Because a new trial is required due to the improper submission of the suture specification, we need not decide whether the conduct of Belhak's attorney during

closing arguments also warrants a new trial. But since the new trial will again require the parties' counsel to engage in proper closing arguments, we find it appropriate to offer some guidance to prevent these issues from arising again.

The district court concluded that Belhak's counsel engaged in three instances of misconduct during closing arguments. Belhak's counsel improperly attacked defense counsel by accusing him of "character assassination" of Belhak during defense counsel's questioning of Dr. Chen. He improperly attacked the defense's expert witness by suggesting—without any basis in evidence—that the expert had violated his Hippocratic oath when performing episiotomies in Honduras. And he improperly mischaracterized Belhak's medical records from the University of Iowa Hospitals and Clinics by saying, "The University of Iowa said that the fourth-degree laceration was there at the time of delivery," when that conclusion is nowhere in the records or any other trial evidence.

"Attorneys have a duty to refrain from crossing the admittedly hazy line between zealous advocacy and misconduct." *Kinseth v. Weil-McLain*, 913 N.W.2d 55, 73 (Iowa 2018). And our decision not to decide whether this conduct would independently warrant a new trial should not be interpreted as any disagreement with the district court's well-reasoned conclusions that this conduct by Belhak's counsel crossed that line.

"When attorneys approach the jury box to present their closing arguments, they carry with them an immense responsibility." *Id.* While "[w]e presume juries follow [their] instruction and do not consider closing statements to be evidence," we recognize that they "will inevitably take [their] cues from attorneys during their respective closing arguments." *Id.* And so, "we observe a heightened sensitivity

to inflammatory rhetoric and improper statements, which may impress upon the jury that it can look beyond the facts and law to resolve the case." *Id.* Engaging in unwarranted personal attacks against opposing counsel and the opposing party's expert witness and misstating key evidence are violations of this responsibility we entrust to Iowa attorneys as officers of the court.

Of course, "attorneys may occasionally make one or more isolated missteps during closing arguments," particularly in the heat of zealous advocacy. *Id.* But we caution that "repeated" and "deliberate" misconduct is another matter entirely—more likely to require a new trial. *Id.* And so, Belhak's counsel would be wise to take care that his misconduct does not repeat.

REVERSED AND REMANDED.

State of Iowa Courts

Case Number	Case Title
22-2048	Belhak v. Smith

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