IN THE SUPREME COURT OF IOWA

NO. 22-2048

FATIMA E. BELHAK and ABDELLATIF ELFILA,

Plaintiffs-Appellees,

vs.

WOMEN'S CARE SPECIALISTS, P.C.,

Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT FOR
SCOTT COUNTY LACE127225
THE HONORABLE JEFFREY D. BERT

Women's Care Specialists, P.C.'s Resistance to Application for Further Review Court of Appeals May 8, 2024 Decision

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Resistance to Application for Further Review

Smith resists Belhak's Application for Further Review of the Court of Appeals' Decision.[1]

I. Introduction.

Belhak's Application is based on her theory that the jury should have been allowed to fill gaps in a "logical chain" and infer causation from various bits of Dr. Chen's testimony. But Iowa law does not allow the jury to speculate. This was true both before and after the Court of Appeals' Decision here—nothing has changed.

The problem is that Dr. Chen never expressed an opinion that Dr. Smith's decision to use 4-0 sutures caused Belhak's harm. It was undisputed that the causation question is beyond a lay person's common knowledge and experience. (Decision at 12.) The absence of expert opinion on point is therefore dispositive, just as the Court of Appeals concluded.

Of course, the gap in Dr. Chen's testimony is understandable. His testimony about her post-delivery sutures was based on a single line in her medical records stating that, when Belhak arrived at the University of Iowa

[1] The Court of Appeals referred to the parties as "Smith" and "Belhak" for simplicity. (Decision at 2 n.1.) This Resistance adopts the practice for the same reason and to maintain consistency with the Decision.

Hospitals and Clinics days after the delivery, the "vaginal repair site appear[ed] broken down." (3/23/22 Tr. 452:18-19.)

Dr. Chen agreed (as he must) that he does not know whether this line meant that Belhak's sutures had broken (as Belhak alleged) or instead that her laceration expanded beyond the stitches in the days after the delivery (as Smith believed). But without anyone to provide that opinion, the jury was left to speculate.

And while speculation is impermissible in any case, it is particularly problematic here, where it was undisputed that Belhak "needed to provide expert testimony that the smaller suture was a reasonably probable cause of the harm." (Decision at 12.) Thus, Belhak is mistaken (at 20-21) that the jury could possibly use "common knowledge" or "common sense" to fill the evidentiary gap.

Belhak's Application nonetheless asserts that the Decision "add[s] to the murkiness of the law," changes the standard for causation testimony, and conflicts with this Court's precedent. But as discussed below, the Court of Appeals correctly applied well-settled and unambiguous Iowa law, confirming that the parties were correct when they agreed in their briefs that "this appeal involves the application of existing legal principles and [was]

appropriate for transfer." (Smith Amended Br. at 7; Belhak Amended Br. at 11.)

II. The ruling on the specification does not warrant review.

The Court of Appeals correctly ruled that, because Dr. Chen did not testify that the use of smaller sutures was more likely than not a cause of Belhak's harm, the specification of negligence regarding the sutures should not have been submitted to the jury. Dr. Chen testified that Dr. Smith breached the standard of care in three different ways, one of which was her use of the smaller sutures. (3/23/22 Tr. 443:14-16 (use of smaller sutures); *see also* Decision at 5-6 (listing three specifications).) But Dr. Chen never connected the suture size "breach" to Belhak's subsequent harm. The specification of negligence on this point therefore required the jury to speculate and should not have been given.

Background.

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

Belhak's counsel did not call any of those doctors to testify. Instead, counsel asked Dr. Chen to read and interpret medical records that were prepared by those University hospital doctors. Counsel wanted Dr. Chen to review the records and explain whether Belhak's sutures had broken. Counsel asked Dr. Chen to focus on a line in the medical record stating that "vaginal repair site appears broken down." (3/23/22 Tr. 452:18-19.) He asked Dr. Chen, "what does that mean?" (*Id.* 452:22-24.)

But Dr. Chen did not (and could not) testify that the sutures had broken. Dr. Chen replied that "[i]t's hard to say, exactly," but that "[f]rom what my guess is, they are seeing an opening either in the perineum or in the vagina or both. . . . [B]roken down means they may see some intact stitches, but you will see tissue that is not sutured, but appears to be separated." (*Id.* 452:22-453:12.)

In other words, the medical record established that, by the time Belhak arrived at the University hospital (days after the delivery), part of her wound was not sutured. But the record did not establish whether that happened because any of the sutures came loose, or instead because the laceration expanded after the sutures were placed.

Counsel then asked Dr. Chen directly whether the medical record established that the use of 4-0 sutures caused harm to Belhak. Dr. Chen's

answer confirmed that he could not tell whether the unsutured portion of the laceration had ever been sutured to begin with:

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

(*Id.* 453:19-454:7.)

This was the closest Belhak's counsel came to eliciting any testimony that the use of 4-0 sutures caused Belhak's harm.

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

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

The Decision.

The Court of Appeals reversed. The Court held (at 14) that Dr. Chen's testimony was "cryptic," "confusing," and insufficient to support the specification of negligence. As the Court put it, "[w]ithout 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." (Decision at 15.)

The Court identified two separate evidentiary failures. First, Dr. Chen did not testify that the size of the sutures caused them to break down: "he never agreed that the 4-0 sutures were likely the cause of anything—the breakdown of the repair site or otherwise." (Decision at 14.) And second, Dr. Chen did not testify that the breakdown of the sutures caused 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 cause Belhak harm." (Decision at 15.) The Court therefore concluded that the specification should not have gone to the jury. (Decision at 15.)

In reaching this conclusion, the Court relied on two of this Court's prior decisions: *Doe v. Central Iowa Health Systems*, 766 N.W.2d 787 (Iowa

2009); and *Susie v. Fam. Health Care of Siouxland, P.L.C.*, 942 N.W.2d 333, 338 (Iowa 2020).

In *Doe*, this Court clarified the burden of proof that plaintiffs bear in a tort case where expert testimony is required. 766 N.W.2d at 794. This Court held that, "unless the causation is so obvious that it is within the common knowledge and experience of a layperson," proving causation requires the expert to testify that the defendant's conduct was "probably" the cause of the injury. *Id.* at 793-94.

In *Doe*, the plaintiff claimed he suffered emotional distress from the improper disclosure of his medical records. *Id.* at 788. He presented evidence that he suffered emotional distress, but he did not present any expert testimony that his distress was caused by the disclosure. *Id.* at 794-95.

This Court held that the absence of causation testimony was dispositive. *Id.* The Court noted that, where causation cannot be shown with "common knowledge," an expert must testify that the conduct *probably* caused the harm. *Id.* at 793-94.

The Court was clear that it is not enough for an expert to say that the conduct *possibly* caused the injury. *Id.* Nor is an inference enough. If an expert is required on an issue, it is because the issue is not within the "common knowledge and experience of a layperson." *Id.* at 793. Thus, for

the same reason an expert was required in the first place, the jury could not use their common sense to fill in the evidentiary gap. *Id.* at 793-94.

In *Susie*, this Court reaffirmed *Doe*. 942 N.W.2d at 337. In *Susie*, the plaintiff's arm and toes were amputated due to a rare disease. *Id.* at 335. She claimed the amputations would have been avoided if her doctor had given her the appropriate medication sooner—i.e., that the doctor's delay caused her injury. *Id.* But her expert did not opine that receiving the medication sooner would have prevented the amputations. *Id.* at 337-38. Instead, her expert explained only that "the faster you get care when you're sick, the better off you are." *Id.* at 337.

This Court held that the plaintiff's claim failed because the expert's testimony was insufficient to prove causation. The court noted that expert testimony was required because the causal connection (the link between the amputation and the timing of the medication) was not within the knowledge and experience of an ordinary layperson. *Id.* at 337. But her expert's testimony "[did] not rise above the level of speculation" because he did not "provide the causal link" between the alleged conduct and the injuries. *Id.*

The expert's opinions therefore "provide[d] no guidance for the jury on how or if [the] outcome would have been different." *Id.* at 338. And

"[t]he jury cannot be left to speculate about the but-for causal link." *Id.* at 338-39.

The Court of Appeals correctly concluded that the same was true here. Belhak provided evidence that she was harmed by a fourth-degree laceration. And as all parties agreed, expert testimony was required because the causal connection (the link between the laceration and the suture size) is not within the knowledge and experience of an ordinary layperson. (Decision at 12.) But Belhak's expert's testimony did not rise above the level of speculation because he did not provide the causal link between the suture size and Belhak's injury. For the same reason an expert was required in the first place, the jury could not use their common sense to fill in the evidentiary gap. (Decision at 15.)

A. There was no causation evidence.

In the Application, Belhak argues the Decision is wrong because, she argues, she *did* present the required expert testimony, either directly or inferentially.

Direct testimony. First, she asserts (at 24) that Dr. Chen did, in fact, opine that (i) Dr. Smith's use of 4-0 sutures caused the repair site to break down, and (ii) as a result of the suture breakdown, Belhak suffered permanent harm. Neither statement is accurate.

Dr. Chen never opined that the use of 4-0 sutures caused anything to happen. Admittedly, he opined that using 4-0 sutures presented a risk that the wound would re-open. (3/25/22 Tr. 442:12-23.) But he did not say that Belhak's did reopen. He therefore also did not—and could not—say that the suture size is what *caused* the wound to reopen. As the Court of Appeals put it, "he never agreed that the 4-0 sutures were likely the cause of anything—the breakdown of the repair site or otherwise." (Decision at 14.)

Nor did Dr. Chen ever opine that the sutures' breaking down is what caused Belhak's harm. At most, he agreed that Dr. Smith's general "breaches" caused harm. But during his testimony, he identified different breaches—including not performing a rectal examination and using 4-0 sutures. (3/23/22 Tr. 408:4-8; 415:3-6; 490:25-491:10; 492:20-493:5 (failure to perform rectal exam); 443:14-16 (use of smaller sutures).)

Contrary to Belhak's assertion (at 21), these general statements about "breaches" were not enough because they did not link the sutures to any harm. His opinion may very well have been that Belhak's harm was caused only by Dr. Smith's failure to perform a rectal exam.

Indeed, he discussed the failure to perform a rectal exam several times and linked it to Belhak's harm—the "delayed closure" of her laceration. (3/23/22 Tr. 419:15-25; 421:6-16; 449:2-11.) In contrast, he identified the

suture size as a breach only once and never connected it to any result, let alone harm.

As the Court of Appeals noted, he was never even asked whether a suture breakdown caused anything to happen. He never suggested that a suture breakdown is what caused the months-long delay in repairing the episiotomy, that they caused the fourth-degree laceration to occur, or that they made any harm Belhak suffered worse. (Decision at 15.) In short, he never provided any testimony linking the sutures to Belhak's harm.

Logical chain. Next, Belhak argues (at 21-22) that the jury should have been allowed to use their "common knowledge" to put together a "logical chain" and find that the suture size caused harm. But that is not allowed under Iowa law. *Doe*, 766 N.W.2d at 794.

Indeed, "unless the causation is so obvious that it is within the common knowledge and experience of a layperson," proving causation requires the expert to testify that the defendant's conduct was probably the cause of the injury. *Id.* at 793-94. It is not enough if the evidence shows only that the conduct *possibly* caused the harm. *Id.*

Here, it is undisputed that causation was not within the jury's common knowledge and experience—expert testimony was required. (Decision at 12.) And the evidence showed only that using a too-small suture could

possibly cause a laceration to reopen. That is not enough. For the same reason an expert was required in the first place, the jury could not use their common sense to fill in the evidentiary gap. *Id.* at 793-94.

Evidentiary burden. Finally, Belhak argues that any evidentiary problem was the fault of Dr. Smith, not Belhak. Specifically, Belhak argues (at 22) that if Dr. Smith "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."

But the problem is the *absence* of an opinion, not a lack of support for one. Dr. Chen never said the sutures caused harm. There was therefore nothing on that point to cross-examine.

Further, as the Court of Appeals stated, "Belhak is wrong to try to shift the burden for developing the causation record onto Smith" as the "burden of presenting substantial evidence on all required elements of a plaintiff's claim . . . remains at all times on the plaintiff." (Decision at 12, n.7.)

B. The ruling does not change the law.

In addition, Belhak argues that the Court of Appeals' Decision conflicts with this Court's precedent. Belhak characterizes the Decision as

requiring a heightened, "excessively strict standard" of proof that "effectively require[s] Plaintiffs to *prove* causation (not just probability of causation) before a specification of negligence is even presented to the jury." (Application at 7.) Belhak concludes that the Decision creates "murkiness" in the law and "uncertainty among counsel regarding the degree of specificity with which experts must testify." (Application at 7.)

Belhak provides a handful of arguments to support these assertions, but none is correct.

Heightened standard. First, Belhak asserts that—contrary to precedent—the Decision requires an expert to provide an "express, unequivocal statement that each specification of negligence was a cause of a Plaintiff's damages." (Application at 8.)

But that requirement is not in the Decision. Instead, the Court of Appeals relied on this Court's precedent in *Doe* and *Susie*. The Court explained that, "[w]hile 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. (Decision at 11 (quoting *Doe*, 766 N.W.2d at 793).) And "[i]f the evidence before the jury does not meet this standard, then there is not

substantial evidence supporting submitting the claim to the jury." (Decision at 11 (citing *Doe*, 766 N.W.2d at 792-95; *Susie*, 942 N.W.3d at 338-39).)

And the Court of Appeals applied that precedent. The Court discussed Dr. Chen's testimony for more than three pages before concluding that he did not provide the requisite testimony.

***Susie*.** Second, Belhak argues (at 6-7 and 23) that the Decision erroneously relied on this Court's *Susie* opinion. Specifically, Belhak notes that the situation in *Susie* was different because the case was on summary judgment, the expert admitted that his testimony was speculative, and it was "unclear whether the expert was qualified to render a causation opinion."

But none of those differences matter because none of them affected the outcome of the case. The expert's testimony was insufficient to establish causation because the expert "was unable to provide the causal link between defendants' alleged violation of the standard of care and [plaintiff's] injuries." *Susie*, 942 N.W.2d at 337.

The reversal did not hinge on his admission that he was speculating. Nor did it hinge on any problem with his qualifications. And it does not matter that the case was on summary judgment rather than at trial. The legal standard applies equally to evidence in both contexts.

Regardless, even if the *Susie* opinion had never been issued, the Court of Appeals' Decision here would still be correct. Indeed, the reversal is required under *Doe*, which predates *Susie*. Belhak's Application does not mention *Doe*.

Other precedent. Third, Belhak argues that the Decision conflicts with two opinions from this Court. The first is *Alcala v. Marriott Int'l, Inc.*, 880 N.W.2d 699 (Iowa 2016). Belhak notes (at 6) that *Alcala* "reinforced that trial courts are required to give requested jury instructions that are supported by the evidence and the applicable law."

But the Decision faithfully applies that precedent. The Court of Appeals specifically and thoroughly analyzed whether the jury instruction was supported by the evidence. In concluding that the jury instruction was not supported, the Court concluded—consistent with *Alcala*—that the instruction should not have been given. There is no conflict.

The second opinion is *Hansen v. Central Iowa Hospital Corp.*, 686 N.W.2d 476 (Iowa 2004). Belhak notes (at 6) that in *Hansen*, this Court "held that expert testimony need not use specific buzzwords like 'reasonable degree of medical certainty' to generate a jury question on causation."

Under the Decision, that principle remains true. The problem with Dr. Chen's testimony was the absence of causation testimony, not any

particular buzzword or phrase. If Dr. Chen wished to opine about causation, he could have used whatever words he wished. There is no conflict.

Standard of review. Fourth, Belhak suggests (at 8) that the Court of Appeals erroneously "substituted its own determination" on the specification question, "based solely on a transcript of the proceedings." Belhak argues that this is problematic because "factual disputes" that depend on witness credibility are best resolved by the trial court, who has the opportunity to evaluate credibility.

Belhak is correct that appellate courts should defer to factfinders on factual disputes. But there was not a factual dispute here. The Court of Appeals correctly noted that its review of the issue (a decision to submit a particular specification to the jury) was for correction of errors at law. (Decision at 8 (citing *Alcala*, 880 N.W.2d at 707-08).) And to review whether the district court correctly applied the law, the Court of Appeals needed to determine whether the evidence was sufficient to support the specification. *E.g.*, *Doe*, 766 N.W.2d at 793. The transcript is where the evidence is recorded. The Court of Appeals therefore correctly evaluated this case based on the testimony presented at trial, as recorded in the transcript.

II. The misconduct ruling does not warrant review.

The Court of Appeals also correctly warned that, in the new trial, Belhak's "counsel would be wise to take care that his misconduct does not repeat." (Decision at 17.)

Background.

The only contemporaneous evidence about Belhak's condition at the time of delivery were Dr. Smith's medical notes documenting a second-degree laceration. Dr. Smith presented expert evidence that the laceration could have expanded after Belhak was discharged. The jury nonetheless decided that Belhak's injury had existed all along and found Dr. Smith to be liable for it. The jury awarded Belhak $3.25 million in damages.

The jury's decision is surprising in light of the evidence. But it is unsurprising in light of Belhak's counsel's misconduct throughout the trial. Counsel disregarded the rules of evidence, prompting more than 50 sustained objections, and giving the jury the impression that the defense was hiding information. And in closing, counsel violated nearly every rule in the book. Counsel repeatedly disparaged the defense expert by suggesting that he was immoral and could not be trusted. He disparaged defense counsel,

claiming that defense counsel "assassinat[ed]" Belhak's "character" when defense counsel asked a medical question to Dr. Chen.

Belhak's counsel misrepresented the record, telling the jury that the University medical records resolved the case—he said "The University of Iowa said that the fourth-degree laceration was there at the time of delivery," something that was patently false. (3/29/22 Tr. 1052:17-19, 1103:1-2.) He misled the jury, asked the jury to hold the doctor "accountable," and asked the jury to put themselves in Ms. Belhak's shoes—all of which not only violated Iowa law and pretrial orders, but also ensured that the jury based their decision on emotion rather than the evidence.

Dr. Smith raised many of these problems during trial and then repeated the concerns in a post-trial motion. But to no avail. The trial court agreed that Belhak's counsel engaged in misconduct, but ruled that the misconduct did not warrant a new trial. (D0313, 11/17/22 Order.)

The Decision.

Dr. Smith raised the misconduct as an additional reason that the Court of Appeals should order a new trial. But the Court declined to reach the issue. The Court held that, because the Court already ordered a new trial on the specification issue, the Court "need not decide" whether the misconduct also warrants a new trial. (Decision at 15-16.)

But, recognizing that the misconduct was likely to reoccur in the new trial, the Court addressed it to "offer some guidance to prevent these issues from arising again." (Decision at 16.) The Court briefly discussed the highly-sensitive nature of misconduct that occurs during closing arguments. The Court then concluded that "Belhak's counsel would be wise to take care that his misconduct does not repeat." (Decision at 17.)

In the Application, Belhak does not mention any of the misconduct. Nor does she attempt to explain why the misconduct was permissible. Instead, she asserts (at 26) only that "[e]ven 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."

Belhak does not identify any holding to review, let alone an error in a holding or something that warrants review under Rule 6.1103. And her statement that "a new trial is not warranted" seems to be at odds with the Court of Appeals' conclusion that it "need not decide" whether a new trial is warranted. There is nothing to review. At best, Belhak seeks an advisory opinion, which is something that this Court "has repeatedly held that it neither has a duty nor the authority to render." *Hartford-Carlisle Sav. Bank v. Shivers*, 566 N.W.2d 877, 884 (Iowa 1997).

Conclusion

For the reasons set forth above, Women's Care Specialists, P.C. requests that the Court deny Belhak's Application.

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/s/ Nancy Penner
Signature

June 7, 2024
Date

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The undersigned certifies this resistance was electronically filed and served on the 7th day of June, 2024, upon the following persons and upon the Clerk of the Supreme Court using the Electronic Document Management System, which will send notification of electronic filing (constituting service):

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