

## IN THE IOWA DISTRICT COURT FOR POLK COUNTY

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|-----------------------------|---|-------------------------------------|
| TIMOTHY KONO,               | ) |                                     |
|                             | ) |                                     |
| Plaintiff,                  | ) | No. CVCV061592                      |
|                             | ) |                                     |
| vs.                         | ) |                                     |
|                             | ) | <b>DEFENDANTS’ MOTION FOR</b>       |
| D.R. HORTON, INC., and      | ) | <b>JUDGMENT NOTWITHSTANDING</b>     |
| D.R. HORTON—IOWA, LLC d/b/a | ) | <b>THE VERDICT, JUDGMENT ON THE</b> |
| CLASSIC BUILDERS,           | ) | <b>PLEADINGS, NEW TRIAL, AND/OR</b> |
|                             | ) | <b>RECONSIDERATION</b>              |
| Defendants.                 | ) |                                     |

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The Defendants, D.R. Horton, Inc. (“DRH, Inc.”) and D.R. Horton—Iowa, LLC d/b/a Classic Builders (“DRH—Iowa”) (collectively, the “Defendants”) move this Court for judgment notwithstanding the verdict under Iowa Rule of Civil Procedure 1.1003, judgment on the pleadings pursuant to Iowa Rule of Civil Procedure 1.954, a new trial pursuant to Iowa Rule of Civil Procedure 1.1004, and reconsideration pursuant to Iowa common law. In support of their motion, the Defendants state as follows:

### **INTRODUCTION**

1. In this motion, the Defendants challenge the outcome of this trial concerning a construction accident on multiple grounds. The Plaintiff, Timothy Kono, alleged that the Defendants’ negligence—in part—caused injuries he sustained when a trench caved in. After Mr. Kono settled with three fellow employees (the “Released Parties”) from his then-employer, Royal Plumbing, the jury heard his claim against the Defendants.

2. Mr. Kono's claim was tried on a single count (negligence) against the two Defendant entities, DRH, Inc. and DRH—Iowa. These companies had vastly different relationships to the incident. Indeed DRH, Inc., had no relationship to Mr. Kono or the incident whatsoever. Nonetheless, the Defendants were treated at trial, erroneously, as a single entity.

3. Considering Mr. Kono's injuries and the Defendants' relationship to them, the jury returned an astonishing verdict. It found Mr. Kono's compensatory damages were \$3,082,062.25, itself an extreme number on these facts. After assessing the comparative and contributory fault of the Released Parties and Mr. Kono, the jury found the Defendants liable for 45% of Mr. Kono's damages, or \$1,386,928.01. The jury then imposed a punitive damages judgment of \$16,180,000, nearly a dozen times the amount of the compensatory damages that the jury found the Defendants should pay.

4. The Defendants are entitled to posttrial relief on multiple theories. First, Mr. Kono's pleading against the Defendants is deficient in key respects. Those defects entitle the Defendants to judgment notwithstanding the verdict (sometimes, "JNOV") in certain respects under Rule 1.1003(1) of the Iowa Rules of Civil Procedure, as well as judgment on the pleadings (which may be asserted posttrial) under Rule 1.954 of those Rules.

5. Second, Mr. Kono's case was deficient as a matter of law because there was no factual dispute regarding key elements of Mr. Kono's claim. As a matter of law, the Defendants owed Mr. Kono no duty of a safe workplace, and that issue should resolve the entire case in their favor. There was similarly no evidence to support submission of

the case to the jury against DRH, Inc., and there was no basis to submit punitive damages to the jury. The Defendants were thus entitled to judgment notwithstanding the verdict for the entire case or, failing that, judgment notwithstanding the verdict as to DRH, Inc. and judgment notwithstanding the verdict regarding punitive damages, all under Iowa Rule of Civil Procedure 1.1003(2).

6. There are numerous respects in which the verdict was infected by jury instructional errors and the erroneous admission or exclusion of evidence. The verdict was also contrary to the great weight of the evidence and featured excessive verdicts for both compensatory and punitive damages. Those grounds each individually, but also cumulatively, entitle the Defendants to a new trial under Iowa Rule of Civil Procedure 1.1004.

7. Finally, Mr. Kono is not entitled to prejudgment interest on punitive damages under long-settled law. The Court should reconsider the judgment through an appropriate procedural mechanism to correct its erroneous holding to the contrary.

8. The errors requiring post-trial relief are grouped into nine categories: (1) Defendant DRH, Inc. had no reason, either under the pleadings or the evidence, to be in this case; (2) under the governing law, the Defendants did not owe a duty regarding safety at the worksite to Mr. Kono and, alternatively, the jury instructions on that issue were erroneous; (3) the comparative fault of the Released Parties was beyond dispute, and the jury should have been so instructed instead of instructed to the contrary; (4) Mr. Kono's contributory fault was likewise beyond dispute and the jury should have been instructed accordingly; (5) the Defendants were prejudiced by multiple errors in the

admission or exclusion of evidence; (6) the size of the overall compensatory damages award was excessive and influenced by inadmissible evidence; (7) the punitive damages award was unsupported by the facts, excessive both as a constitutional matter and under Iowa law, and driven by plainly inadmissible evidence; (8) the cumulation of all of these errors entitles the Defendants to a new trial even if none of the errors individually requires a new trial; and (9) the prejudgment interest award on punitive damages is erroneous as a matter of law.

9. The Defendants' requests for relief on each of these grounds are detailed below. With this motion, the Defendants are filing a brief that explains the law supporting this motion and provides additional facts and record material (the "Brief").

**DRH, INC. DID NOT BELONG IN THIS CASE**

10. To begin with, one of the Defendants, DRH, Inc., was wrongly present at trial and certainly was wrongly named in the jury's verdict. DRH, Inc. is a national parent company that had no relationship to this case. Mr. Kono did not in his pleading allege any connection between DRH, Inc. and his claims. He did not at trial introduce any evidence to prove such a connection. This Court should grant posttrial relief to excise DRH, Inc. from this case.

**Judgment Notwithstanding the Verdict—Failure of the Pleadings**

11. Mr. Kono's pleading, the Amended and Substituted Petition, makes no allegation of fact to explain what DRH, Inc. is or that it has any relationship to this case. *See* Doc. 6. His pleading, as a matter of definition, acted as though DRH, Inc. and DRH—Iowa were the same thing and proceeded to plead a claim against the latter. The

Defendants explained this in their motion in limine and motion for judgment on the pleadings filed in advance of trial, Doc. 398, and they further explain this in their Brief. For this reason, DRH, Inc. is entitled to a judgment notwithstanding the verdict now.

12. Iowa's JNOV rule contains a provision addressing exactly this situation. It provides that a party is entitled to a judgment notwithstanding the verdict "[i]f the pleadings of the adverse party fail to allege some material fact necessary to constitute a complete claim or defense and the motion clearly specifies such failure." Iowa R. Civ. P. 1.1003(1). That "failure" is present here.

**Judgment on the Pleadings Under Rule 1.954**

13. As noted, DRH, Inc. moved for judgment on the pleadings on this same ground in advance of trial. That motion may be renewed now. The official comments to Rule 1.954 state that "[a] motion for judgment on the pleadings may be made... at any time." They contemplate the situation where such a motion is "withheld until after trial," although that did not happen here. Separate from the JNOV remedy, DRH, Inc. is entitled to judgment on the pleadings to remove it from this case.

**Judgment Notwithstanding the Verdict—Insufficient Evidence**

14. Even if Mr. Kono had properly pleaded a claim against DRH, Inc., he still needed to prove it at trial. Not only did he fail to do so, but he did also not even attempt to do so. There was no testimony at trial or documentary evidence to explain who DRH, Inc. was or what relationship, if any, it had to this jobsite. Mr. Kono tried his case the same way he pleaded it: as though any reference to "D.R. Horton" was a reference to each Defendant entity separately. No evidence at trial supported that sleight-of-hand.

Because Mr. Kono failed to create a submissible jury question on the liability of DRH, Inc., that entity is entitled to judgment notwithstanding the verdict.

### **New Trial**

15. As an alternative to judgment notwithstanding the verdict, DRH, Inc. is entitled to a new trial. First, DRH, Inc. is entitled to a new trial as an alternative remedy for its JNOV grounds, because any issue giving a party a right to a JNOV under Rule 1.1003 automatically provides a ground for a new trial. Iowa R. Civ. P. 1.1004(9). Second, a new trial is warranted where, as here, “the verdict . . . is not sustained by sufficient evidence.” Iowa R. Civ. P. 1.1004(6). Third, Jury Instruction 14 told the jury to treat DRH, Inc. and DRH—Iowa “as a single party” when they are plainly not. This was an erroneous instruction entitling the Defendants to a new trial. *See* Iowa R. Civ. P. 1.1004(1) (irregularity in the proceedings of the court), 1.1004(8) (errors of law occurring in the proceedings).

### **THE DEFENDANTS DID NOT OWE A DUTY TO MR. KONO**

16. The Defendants did not owe a duty to Mr. Kono. Under “law [] of long standing in Iowa,” “employers of independent contractors do not owe a general duty of due care.” *McCormick v. Nikkel & Assocs., Inc.*, 819 N.W.2d 368, 371-72 (Iowa 2012). Mr. Kono failed to prove his entitlement to any exception to the general rule.

### **Judgment Notwithstanding the Verdict—Insufficient Evidence**

17. In opposition to Defendants’ motion for a directed verdict, Mr. Kono raised four theories of duty. All of them fail.

18. First, Mr. Kono argued that trenching work is inherently dangerous. This argument is foreclosed by precedent. *See Robinson v. Poured Walls of Iowa, Inc.*, 553 N.W.2d 873, 876-78 (Iowa 1996) (no inherent danger duty as a matter of law on materially identical facts).

19. Second, Mr. Kono argued that OSHA standards created a duty. Again, this argument is foreclosed by precedent. *See, e.g., Lunde v. Winnebago Indus.*, 299 N.W.2d 473, 478 (Iowa 1980) (holding OSHA standards are irrelevant to duty).

20. Third, Mr. Kono argued that he is a third-party beneficiary of contracts between DRH—Iowa and Royal Plumbing. Two of those contracts explicitly delegate any duty to Royal Plumbing. *See* Exs. 46, 47. The others were not contracts at all. *See* Exs. 22, 56. Moreover, DRH, Inc. was not a party to any of the disputed contracts and cannot be bound by them, so this theory could at most support a duty of DRH—Iowa.

21. Fourth, Mr. Kono argued that the Defendants directed Royal Plumbing's work. This argument could, at most, show a duty of DRH—Iowa. But in any case, abundant Iowa case law holds that run-of-the-mill, big-picture supervision of subcontractors does not give rise to a duty in the general contractor. *See, e.g., Hernandez v. Midwest Gas Co.*, 523 N.W.2d 300, 303 (Iowa Ct. App. 1994) (contrasting situations in which the general contractor "instructed [subcontractor] employees on the mechanics" of their work in detail). The evidence showed no detailed, abnormal control by either of the Defendants.

**New Trial—Insufficient Evidence**

22. For the same reasons that the Defendants are entitled to a JNOV regarding their putative duty to Mr. Kono, they are also entitled to a new trial. *See* Iowa R. Civ. P. 1.004(6) & (9).

**New Trial—Erroneous Jury Instructions**

23. In addition to being entitled to a judgment notwithstanding the verdict or a new trial based upon insufficient evidence establishing a duty to Mr. Kono, the Defendants are entitled to a new trial because the jury was erroneously instructed on this issue. Contrary to the law, the jury instructions told the jury that a general contractor always owes a duty to provide a safe place to work to employees of its subcontractors. *See* Jury Instruction 19. That instruction, and Jury Instruction 20, went on to make extensive factual findings that were purportedly binding on the jury about the nature of the evidence supporting the putative duty of the Defendants. The instructions misstated the applicable law and entitle the Defendants to a new trial. *See* Iowa R. Civ. P. 1.1004(1) (irregularity in the proceedings of the court), 1.1004(8) (errors of law occurring in the proceedings).

**COMPARATIVE FAULT OF ROYAL PLUMBING EMPLOYEES**

24. The jury was instructed incorrectly in its evaluation of the comparative fault of the Released Parties in two respects, described below.

**New Trial—Erroneous Jury Instructions**

25. The Defendants are entitled to a new trial regarding comparative fault because the jury was instructed erroneously in two respects. First, the jury was



erroneously instructed to the degree that Jury Instructions 14 and 15 and the Verdict Form gave the jury the option and the mistaken impression that a zero percent contributory fault verdict for any of the Released Parties was supportable under the facts of the case. The jury should instead have been directed to find that the Released Parties were each comparatively at fault in some measure.

26. Second, the jury instructions and verdict form repeatedly conveyed an incorrect statement of the law in that they told the jury that the Defendants needed to prove the Released Parties were guilty of “gross negligence” in the determination of the amount of fault to be assessed to the Released Parties. *See* Jury Instructions 12, 24-27, and Verdict Form. Doc. 432 at 14, 26, 29, 31, 32; Doc. 433 at 1-2. As is described in more detail in the Brief, that is not the law. By giving the jury the wrong standard of gross negligence, the erroneous instruction improperly heightened the Defendants’ burden to prove contributory fault. The result was that the jury allocated too little fault to the Released Parties and too much to the Defendants.

27. Because of these jury instruction errors, the Defendants are entitled to a new trial. *See* Iowa R. Civ. P. 1.1004(1) (irregularity in the proceedings of the court), 1.1004(8) (errors of law occurring in the proceedings).

### **New Trial—Judicial Estoppel**

28. At trial, Mr. Kono claimed that two of the Released Parties—Ernest and Travis Landwehr—were not at fault and should have no comparative fault assessed against them. That was improper. Mr. Kono from his initial pleading, Doc. 6 at 14-19, until his settlement with the Released Parties shortly before trial, claimed that the

Released Parties caused his injuries. Principles of judicial estoppel prevented him from reversing that position at trial.

29. Mr. Kono's about-face regarding the Released Parties allowed him to mislead the jury and prejudiced the jury's consideration of comparative fault. The Defendants are thus entitled to a new trial under multiple rules. *See* Iowa R. Civ. P. 1004(1) (irregularity in the proceedings of the court or prevailing party), 1.1004(2) (misconduct of the prevailing party), 1.1004(8) (error of law occurring in the proceedings).

#### **MR. KONO'S CONTRIBUTORY FAULT**

30. The trial evidence showed that Mr. Kono was at fault, to some extent, for his own injuries. The testimony of Mr. Kono's own expert about employee responsibility and protections under OSHA, combined with Mr. Kono's own training and knowledge, show as a matter of law that he bears some fault for his injuries.

#### **New Trial—Erroneous Jury Instructions**

31. The jury instructions regarding the comparative fault of Mr. Kono also were erroneous because they gave the jury the ability to allocate no fault to him. *See* Jury Instructions 15 and 21 and Verdict Form. Docs. 432 at 17, 23 and 433 at 3. That direction was contrary to the undisputed facts and entitles the Defendants to a new trial. *See* Iowa R. Civ. P. 1.1004(1) (irregularity in the proceedings of the court), 1.1004(8) (errors of law occurring in the proceedings).

**THE DEFENDANTS ARE ENTITLED TO A NEW TRIAL BASED ON  
EVIDENTIARY ERRORS**

32. Mr. Kono was a weekly marijuana user, and his medical records showed that he tested positive for THC. *See, e.g.*, D0430, Tr. 48:4–8. Even so, the Court erroneously excluded evidence of Mr. Kono’s positive THC tests and marijuana use. Evidence of Mr. Kono’s drug usage was relevant to his fault for the injuries he sustained, and a reasonable juror could have inferred that his admitted marijuana usage impaired his judgment. Moreover, the evidence of Mr. Kono’s drug usage would have shown that Mr. Kono was not truthful to his medical providers, *see* D0430, Tr. 49:14–20, and undercut his credibility—a fighting issue at trial. Because the Court erroneously excluded that evidence, the Defendants are entitled to a new trial.

33. The Court also excluded evidence of both Mr. Kono’s criminal convictions and the school from which he obtained his high school degree—the State Training School at Eldora. That evidence was admissible for two independent purposes. As Kim Rehn, the Defendants’ expert occupational therapist, testified, Mr. Kono’s criminal history affected his employability and wage-earning capacity. By excluding Mr. Kono’s criminal history, the Defendants were hamstrung in defending against his claim for \$960,000 in lost wages. Mr. Kono’s criminal convictions were independently admissible as crimes of dishonesty. In particular, Mr. Kono was convicted of theft in December 2020, and the jury should have been permitted to hear about that conviction in deciding his credibility.

34. Finally, the Court permitted Mr. Kono to bring his emotional-support animal in the courtroom, which prejudiced the Defendants. While Iowa law authorizes a

person to bring a service animal into a courthouse, Mr. Kono's dog was emotional-support animal, not a service animal. The Defendants plainly prejudiced by the presence and mischaracterization of the animal.

35. These evidentiary errors, individually but also cumulatively, entitle the Defendants to a new trial. *See* Iowa R. Civ. P. 1.1004(1) (irregularity in the proceedings of the court), 1.1004(8) (errors of law or mistakes of fact by the court).

**THE DEFENDANTS ARE ENTITLED TO A NEW TRIAL BECAUSE OF  
ERROR IN THE COMPENSATORY DAMAGES AWARD**

36. The compensatory damages award was a result of evidentiary error and was substantively excessive. The Defendants are entitled to a new trial regarding compensatory damages on either or both grounds.

37. The evidentiary error is simple: Mr. Kono was permitted to present financial information of DRH, Inc., the national company, that should not have been a Defendant. That financial evidence influenced the compensatory damages award.

38. Alternatively, the Court should have insulated the jury's compensatory damages consideration from influence from the DRH, Inc. finances by bifurcating the liability and compensatory damages phase of the trial from the punitive damages phase of the trial. The Defendants moved for that bifurcation before trial, but this Court denied the motion. The excessive compensatory damages award reflects the prejudice from that decision.

39. On top of all this, the compensatory damages award in toto of over \$3 million was excessive on these facts. Whether this was driven by evidence of DRH,

Inc.'s finances or something else, the jury's award exceeded the bounds of reasonableness.

40. For these reasons, the Defendants are entitled to a new trial regarding compensatory damages. *See* Iowa R. Civ. P. 1.1004(1) (irregularity in the proceedings of the court), 1.1004(4) (excessive damages appearing to have been influenced by passion or prejudice), 1.1004(8) (error of law occurring in the proceedings).

**THE PUNITIVE DAMAGES AWARD WAS ERRONEOUS IN MULTIPLE RESPECTS**

41. The punitive damages award lacked substantial evidence and was substantively excessive, the result of evidentiary errors, and unconstitutionally disproportionate to the compensatory damages and the allegations of wrongdoing. Each of these errors alone would entitle the Defendants to judgment notwithstanding the verdict, a reduction in the punitive damages judgment, or at minimum a new trial.

**Judgment Notwithstanding the Verdict—Insufficient Evidence**

42. Mr. Kono failed to present substantial evidence of “willful and wanton disregard for the rights or safety of another.” Iowa Code § 668A.1(a). DRH—Iowa properly delegated job site safety responsibilities to Royal Plumbing. *See* Exs. 46 & 47. Consistent with that delegation, DRH—Iowa provided Royal Plumbing neither direction about how to perform its work nor job site safety equipment. As a specialty subcontractor, Royal Plumbing had that equipment, and Released Parties Travis Landwehr, Ernest Landwehr, and Russell Hall agreed that DRH—Iowa was not at fault for the cave-in.

43. Mr. Kono presented no evidence that DRH—Iowa was aware of any previous cave-ins involving Royal Plumbing or that such a cave-in had ever occurred. No evidence suggested that Royal Plumbing had received a single OSHA excavation safety violation, much less that DRH—Iowa knew about any such violation. Nor did any evidence show that DRH—Iowa knew about a single OSHA complaint against Royal Plumbing. And even though the evidence confirmed that Iowa OSHA knew that DRH—Iowa was the general contractor on this project, Iowa OSHA issued citations—after an investigation—only to Royal Plumbing. The evidence was insufficient to submit the punitive-damages question to the jury.

**New Trial—Insufficient Evidence**

44. For the same reasons that the Defendants are entitled to a JNOV regarding punitive damages, they are also entitled to a new trial. *See* Iowa R. Civ. P. 1.004(6) & (9).

**Reduction—The Punitive Damages Award Is Unconstitutionally Excessive**

45. The punitive damages verdict against the Defendants is nearly twelve times larger than the compensatory damages verdict against them. That disparity violates the Due Process Clause of the United States Constitution. It also independently violates the Iowa Constitution. *See Thornton v. Am. Interstate Ins. Co.*, 940 N.W.2d 1, 38 n.7 (Iowa 2020) (expressly reserving whether the Iowa Constitution limits punitive damages).

46. Even if Plaintiffs’ case were correct, Defendants’ conduct was not “extraordinarily reprehensible,” which is “the most important factor” in the due process

analysis. *Id.* at 39. For example, Defendants are accused of a “mere accident,” not “intentional malice, trickery, or deceit,” let alone an “extensive pattern and practice of deceit.” *Id.* at 40-41. The other relevant considerations also do not favor permitting a large award. *See id.* at 39-42. For example, the Defendants were not primarily at fault for the accident, and DRH, Inc., the Defendant that self-evidently drove the punitive damages award, had no role whatsoever.

47. The Defendants are thus entitled to a reduction in punitive damages as a matter of law. *See id.* at 42 (directing entry of a reduced punitive damages judgment).

**New Trial—The Punitive Damages Award Is Excessive**

48. The punitive damages award, a massive multiple, was grossly excessive. Punitive damages may be appropriate when, for example, a plaintiff proves particularly egregious misconduct or an ongoing pattern that has been underdeterred. But Mr. Kono alleged a merely negligent, one-time lapse that did not directly implicate DRH—Iowa, and that did not implicate DRH, Inc. even indirectly.

49. As noted above, Mr. Kono presented no evidence at all that Defendants knew about a single previous OSHA excavation safety complaint against or violation by Royal Plumbing. That is because he presented no evidence that such complaints or violations occurred. Nor did Mr. Kono present any evidence that Defendants had previous excavation safety complaints or ignored safety requirements at the job site. To the contrary, the evidence confirmed that those safety responsibilities were contractually assumed by Royal Plumbing. *See Exs. 46 & 47.* And Royal Plumbing had a trench box;

Russell Hall just chose not to use it. No wonder even the Released Parties agreed that the Defendants were not at fault.

50. The clearest sign that the punitive-damages award is excessive, however, is the jury verdict itself. *See* Verdict Form No. 11. Even though Mr. Kono had asked the jury to find Defendants 75% at fault, it did not find that Defendants were even 50% at fault for Mr. Kono's injuries. Instead, it allocated a total of 55% percent to Mr. Kono and the Released Parties, assigning just 45% to Defendants. Despite finding others collectively were more responsible for Kono's injuries than Defendants, the jury awarded Kono every single penny of the punitive damages he requested. That is precisely the type of excessive award that "shocks the conscience" and should be set aside. *Cf. Econ. Roofing & Insulating Co. v. Zumaris*, 538 N.W.2d 641, 654 (Iowa 1995) ("[I]f the verdicts were the result of passion and prejudice, and intended by the jury as punishment, it is likely the jury would have awarded the full amount" requested (citation omitted)).

51. The punitive damages award was also inflated by the evidentiary and legal errors discussed herein regarding DRH, Inc.'s status in the case. Mr. Kono emphasized DRH, Inc.'s size and resources in his request for punitive damages, and the jury responded with a punitive damages award directly reflecting those factors.

52. For these reasons, the Defendants are entitled to a new trial regarding punitive damages. *See* Iowa R. Civ. P. 1.1004(1) (irregularity in the proceedings of the court), 1.1004(4) (excessive damages appearing to have been influenced by passion or prejudice), 1.1004(8) (error of law occurring in the proceedings).



**New Trial—Inadmissible Evidence of DRH, Inc.’s Financial Status**

53. The jury evidently calculated the punitive damages verdict by assessing a percentage of the net income of DRH, Inc. But since the Court erred in including DRH, Inc. in the case at all, it necessarily erred in admitting evidence of DRH, Inc.’s financial status. Evidence of a defendant’s financial worth may be relevant and admissible evidence as to punitive damages, but evidence of a non-defendant’s is not. *See* Iowa R. Evid. 5.402, 5.403.

54. The Defendants suffered prejudice from the admission of the irrelevant evidence. DRH, Inc. is a far larger concern than DRH—Iowa, and the jury’s consideration of its financial worth resulted in a far larger punitive damages verdict.

55. The same fundamental error led to other evidentiary errors affecting the punitive damages verdict. In particular, the district court should not have admitted Plaintiff’s Exhibit 56, a safety manual associated with DRH, Inc. that was at the core of Mr. Kono’s argument.

56. This evidentiary error entitles the Defendants to a new trial. *See* Iowa R. Civ. P. 1.1004(1) (irregularity in the proceedings of the court), 1.1004(8) (errors of law or mistakes of fact by the court).

**THE CUMULATIVE ERRORS IN THIS CASE ENTITLE THE  
DEFENDANTS TO A NEW TRIAL**

57. This Court possesses the inherent authority to grant a new trial when the jury’s verdict fails to administer substantial justice. *See, e.g., Loehr v. Mettille*, 806 N.W.2d 270, 279 (Iowa 2011) (*quoting Lehigh Clay Products, Ltd. v. Iowa Dep’t of Transp.*, 512 N.W.2d 541, 543-44 (Iowa 1994)). In so doing, this Court is not bound by

the grounds for new trial contained in Iowa Rule of Civil Procedure 1.1004. *See, e.g., id.* Because the outcome under this jury verdict is not substantial justice, the cumulation of errors alleged in this motion and described in greater detail in the Brief entitle the Defendants to a new trial even if, viewed individually, those errors do not require a new trial.

**PREJUDGMENT INTEREST IS NOT AVAILABLE ON PUNITIVE DAMAGES**

58. The Court entered a judgment including prejudgment interest on punitive damages despite that Mr. Kono himself conceded that such interest is not available under binding Iowa Supreme Court precedent.

59. Iowa law is not uncertain, but straightforward: “[P]rejudgment interest cannot be applied to punitive damages.” *Wilson v. IBP, Inc.*, 589 N.W.2d 729, 731 (Iowa 1999) (collecting cases so holding despite that the prejudgment-interest “statute makes [no] exception for punitive damages”); *see also Nassen v. Nat’l States Ins. Co.*, 494 N.W.2d 231, 239 (Iowa 1992) (noting that the legislature has acquiesced in the Court’s longstanding interpretation).

60. Lower courts must follow Iowa Supreme Court precedent unless and until it is overruled. *See, e.g., State v. Beck*, 854 N.W.2d 56, 64 (Iowa Ct. App. 2014).

61. For these reasons, the Defendants are entitled to reconsideration, *see Iowa Elec. Light & Power Co. v. Lagle*, 430 N.W.2d 393, 395-96 (Iowa 1988), reconsideration, enlargement, or amendment of the judgment, *see Iowa R. Civ. P. 1.904(2)*, and/or vacatur or modification of the judgment, *see Iowa R. Civ. P. 1.1012, 1.1013*, to correct the erroneous prejudgment interest calculation.

WHEREFORE, the Defendants, DRH, Inc. and DRH—Iowa, LLC d/b/a Classic Builders, pray this Court for an order granting them a judgment notwithstanding the verdict and/or judgment on the pleadings and/or a new trial and/or correction of the judgment on each of the grounds urged in this motion.

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HORTON, INC. AND D.R. HORTON—

IOWA, LLC d/b/a CLASSIC BUILDERS

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon the parties to this action by serving a copy upon each of the attorneys of record on October 31, 2023 by EDMS.

Bruce Braley

R. Saffin Parrish-Sams

Signature: /s/ Maura McNally-Cavanagh

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