IN THE IOWA DISTRICT COURT FOR POLK COUNTY

JOSEPH DUDLEY, Plaintiff, vs. IOWA PHYSICIANS CLINIC MEDICAL FOUNDATION (d/b/a UNITYPOINT CLINIC FAMILY MEDICINE / URGENT CARE – SOUTHGLEN), Defendants.	)	Case No.: LACL138335 **PLAINTIFF'S RESISTANCE TO DEFENDANT UNITYPOINT CLINIC'S MOTION FOR NEW TRIAL AND MOTION FOR REMITTITUR**

COMES NOW the Plaintiff, and in support of his Resistance to Defendant Iowa Physicians Clinic Medical Foundation's (d/b/a UnityPoint Clinic Family Medicine / Urgent Care – Southglen) ("UnityPoint Clinic") Motion for New Trial Pursuant to Io wa Rule of Civil Procedure 1.1004 or Remittitur filed 01/05/23, states the following:

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RESISTANCE TO MOTION FOR NEW TRIAL

I. THE DEFENDANT CANNOT DEMONSTRATE PRESERVED ERROR, LET ALONE A "CUMULATIVE IMPACT" NECESSITATING A NEW TRIAL

The Defendant begins its Motion for a New Trial informing the Court that multiple errors may require a new trial whereas one error in and of itself may not justify a new trial. As a general statement, Plaintiff does not disagree with this assertion. However, as will be discussed by the remainder of this Resistance, the Defendant's specific assertions of error are simply without merit. As a result, there is no "cumulative impact" to even consider. *See State v. Montealvo*, 957 N.W.2d

328 (Iowa Ct. App. 2021) ("Because we find no individual errors, there is no cumulative error."); *Piper v. Jerry's Homes, Inc*., No. 01-2018, 2003 Iowa App. LEXIS 803, at *27 (Ct. App. Sep. 24, 2003) ("Because we have already addressed the merits of Piper's individual claims, and found them wanting, they cannot serve as a basis for granting Piper a new trial."). Notably, as will be highlighted more specifically below, the Defendant failed to preserve error on the majority of its claimed errors rendering said claimed errors irrelevant to any "cumulative impact" analysis. *See State v. Rutledge*, 600 N.W.2d 324, 326 (Iowa 1999) ("Our cases are legion that hold error is waived unless preserved by a timely trial objection.").

Finally, in order for there to be any cumulative impact necessitating a new trial, the errors must be numerous. *See e.g. Gardner v. Broadlawns Med. Ctr.,* 771 N.W.2d 652 (table), No. 08-0285, 2009 Iowa App. LEXIS 481, at *12 (Ct. App. May 29, 2009) ("Three errors during the course of a lengthy trial, all of which were corrected, even when considered together, do not lead us to the argued conclusion.") The Defendant cannot demonstrate error, let alone meet the high threshold needed to demonstrate any "cumulative impact" justifying a new trial.

II. PLAINTIFF'S COUNSEL'S COMMENTS REGARDING DOCTORS SUPERVISING PHYSICIAN ASSISTANTS WAS NOT IMPROPER AND DOES NOT WARRANT A NEW TRIAL

In its Brief Point II, the Defendant argues that a new trial is required because of "improper argument of doctors supervising physician assistants." The Defense's entire argument is as follows and based on the following passage:

> **Over objection**, counsel also made arguments related to physician supervision. (Tran. Vol. V, pp. 29:12-30:23). Specifically, counsel said:
>
> > So if you find that she remembers it clearly, then there's a discrepancy. And why would that—why would they think that Melanie is a doctor? Because they don't know. They're simple people. But we did hear that a supervising physician is required. We did. And then the witness that UnityPoint Clinic called yesterday—

> he's like, "oh, I got like 20 supervising physicians." Is that the business of medicine in Iowa? According to their expert, that he has 20 different supervising physicians, then who is supervising?

(Tran Vol. V, p. 29:12-20).

(Def. Motion, p.6). The Defendant goes on to assert that the above statement by Plaintiff's counsel inappropriately argued that PA Choos was not properly supervised by a physician. In an improper attempt to try to show motive on the part of Plaintiff's counsel, the Defendant then offers a post-trial statement contained in the Des Moines Register attempting to attribute a statement to Plaintiff's counsel (Rowley) that "physician assistants shouldn't be running clinic on their own without any supervision."[1] This is a clear attempt by the Defendant to manipulate the facts and to manufacture a false picture that in no way reflects what actually occurred at trial.

First, the context of the statement by Plaintiff's counsel must be considered as a whole and was as follows:

> Melanie Choos says she comes into every room and says, "I am the physician assistant." You choose whether you believe that or not. And you heard -- you heard from Sarah. She said that she came in and said, "I'm Melanie." She remembers, I think, clearly. Sarah does. You saw her testify. I'm not saying that she remembered it clearly. **You base that on the evidence and how she testified**.
> So if you find that she remembers it clearly, then there's a discrepancy. And why would that -- Why would they think that Melanie is a doctor? Because they don't know. They're simple people. But we did hear that a supervising physician is required. We did. And then the witness that UnityPoint called yesterday -- he's like, "Oh, I got like 20 supervising physicians." Is that -- **Is that the business of medicine in Iowa? According to their expert, that he has 20 different supervising physicians, then who is supervising?**

[1] Plaintiff objects to the inclusion in the record of some statement contained in the Des Moines Register after the trial of this case was over and after the jury had rendered its verdict in this case. The only evidence to be considered by the Court is the evidence that took place before the jury and, more importantly, before the jury rendered its verdict.

> MR. BERGELAND: Your Honor, there are no issues about this in the case. Same objection.
> MR. ROWLEY: Their expert's testimony yesterday.
> THE COURT: Why don't you approach for a moment, folks. Give us a second, folks.
> (A sidebar was held.)
> THE COURT: Thank you, folks.
> Mr. Rowley, you may proceed when ready.
> MR. ROWLEY: Thank you, Your Honor.
> So you might find that **this goes to the credibility of their expert** who testified yesterday and what he said about the standard of care is and how things are happening in Iowa. **You get to choose whether that's -- whether you believe a word of his testimony or opinions and whether you're okay with it.** That's your -- That's your power.

(Tr. Transcr. Vol. V, pp.29-30). With this context, the Plaintiff will address the arguments submitted by the Defendant.

A. THE ARGUMENT BY PLAINTIFF'S COUNSEL WAS NOT OUTSIDE THE EVIDENCE

First, the Defendant asserts that the comment by Plaintiff's counsel "was outside the evidence." (Def. Motion, p.7). The Defendant begins its argument by correctly pointing out that the Plaintiff's experts did not offer opinions regarding the supervision of physician assistants. (Motion, p. 7). The Defendant then states: "These matters, accordingly, were simply **not in issue nor in evidence at trial**, and it was improper for counsel to make any argument or reference thereto." In making its assertion, the Defendant fails to point out to the Court that the evidence being commented on by Plaintiff's counsel in closing argument was testified to in Defendant's case-in-chief and by the Defendant's own expert witness, Dr. Walz. First, Dr. Walz testified:

> Q UnityPoint, the way -- they had it set up that she did have a **supervising physician**; right?
> A I don't know the specifics of how their supervision works.
> Q **She did --**
> A Okay.
> Q -- **have a supervising physician; true?**
> A **I assume she did because it's law**.

> Q Bingo. It is the law in the state of Iowa that nurse practitioners have a supervising physician.
> MR. BERGELAND: Your Honor --
> A Physician assistant.
> MR. BERGELAND: Yeah.
> BY MR. NOVOTNY:
> Q I'm sorry.
> A Not nurse practitioner.
> Q I apologize. PAs. Thank you. **PAs have a supervising physician; true?**
> A **Correct**.
> Q **It's a requirement. It's a law. Melanie had one this night?**
> A **Yes**.

(Tr. Transcr. Vol. IV, p.145-146).[2] As the Court can see, directly contrary to the assertion by the Defendant, Plaintiff's counsel was eliciting testimony that PA Choos indeed **had** a supervising physician during the night in question. Directly contrary to the Defendant's assertion now, at no time did Plaintiff's counsel assert that PA Choos was not provided with a supervising physician. In related testimony, Dr. Walz then testified:

> Q Mr. Walz, just a few more questions, and I'll be done. We had talked about that **supervising physician**, that requirement, that state law for a physician assistant in Iowa. Just to go back to that briefly. Okay?
> A Okay.
> Q I want to make sure that you and I are using the same definition when we say "supervising physician." Let me see if you and I can agree on this definition.
> **A supervising physician means a physician who supervises the medical services provided by a physician assistant consistent with the physician assistant's education, trainings, or experience and who accepts ultimate responsibility for the medical care provided by the supervising physician -- physician assistant team**. Can we agree on that?
> A I think that is fair.

[2] This testimony was given during cross examination by Plaintiff's counsel, Ben Novotny. There was no objection by defense counsel to the testimony elicited. Defendant's counsel (Bergeland) simply intervened to correct Plaintiff's counsel's use of the term "nurse practitioner" instead of "physician's assistant."

(Tr. Transcr. Vol. IV, p.145-146).[3] In response, and in questioning elicited by Defendant's counsel directly, Dr. Walz then testified:

> Q Mr. Walz, **supervision** in the state of Iowa – just so we're clear for physician assistants. Typically you're associated with a physician; correct? As a PA?
> A Or a group of physicians, yes.
> Q Right. **I was going to ask you: How many do you have**?
> A **20, 25, 30**.
> Q Okay. And those people don't sign off on all of your medical decision-making; right?
> A No. They sign off on the chart as a whole.
> Q Right. But you don't have to consult with them before you disposition a patient; correct?
> A No. No. Most patients -- I will say most patients I see, **I do not consult with the physician**.
> Q And the **requirement for supervision is that you have somebody to contact; right**?
> A **That's correct**.
> Q All right. And I guess since we've been talking about the law, **do you think that's consistent with the state laws, so far as you understand as a provider**?
> A Yes. And I know there have been **some attempts to make some changes in that**, and I don't know what the most current changes may have been, but what you described is generally the work -- **my understanding of how supervising physicians work**.
> Q And that urge to change things is probably because those nurse practitioners -- **they don't need a supervisor, do they**?
> A I think there's some of that, yes.

(Tr. Transcr. Vol. IV, pp 152-153). None of this testimony was objected to by Defendant's counsel and was properly in the record. It is Defendant's counsel who elicited the testimony commented on by Mr. Rowley in closing argument. In fact, it was Defendant's counsel who basically offered testimony, contrary to the established law, that PA's "don't need a supervisor." (Tr. Transcr. Vol. 4, pp.152-153).

[3] This testimony was also given during cross examination by Plaintiff's counsel, Ben Novotny. There was no objection by defense counsel to the testimony elicited.

Thus, as the Court can see, there was a substantial amount of evidence offered on the issue of physician assistant supervision without objection by any party. The Defendant's assertion that the comments by Plaintiff's counsel was "outside the evidence" has absolutely no merit.

B. THE COMMENTS OF PLAINTIFF'S COUNSEL WERE DIRECTED AT THE CREDIBILITY OF THE DEFENDANT'S EXPERT AND THE TESTIMONY ELICITED BY DEFENSE COUNSEL

In an attempt to manufacture an issue for a new trial, the Defendant next argues that Mr. Rowley's comment was specifically directed at the failure of UnityPoint to properly supervise PA Choos. The record reflects that this assertion is baseless. As pointed out above, it was Defendant's counsel who elicited testimony as to the number of supervising physicians had by its own expert witness, PA Walz. Directly contrary to the current status of the law on the supervision of PAs, it was also Defendant's counsel who elicited testimony regarding what Iowa law requires and that there have been "some attempts to make some changes," apparently because of defense counsel's opinion that "they don't need a supervisor."

With this testimony submitted by Defense counsel and with the credibility of the Defendant's expert clearly fair game in closing arguments, Mr. Rowley made the following comment:

> But we did hear that a supervising physician is required. We did. And then the witness that UnityPoint called yesterday -- he's like, "Oh, I got like 20 supervising physicians." Is that -- **Is that the business of medicine in Iowa? According to their expert, that he has 20 different supervising physicians, then who is supervising?**

(Tr. Transcr. Vol. V, pp. 29-30). After an objection and a conference between counsel and the Court, Mr. Rowley was allowed to finish his comment about the testimony elicited by defense counsel from PA Walz:

> MR. ROWLEY: Thank you, Your Honor.

> So you might find that **this goes to the credibility of their expert** who testified yesterday and what he said about the standard of care is and how things are happening in Iowa. **You get to choose whether that's -- whether you believe a word of his testimony or opinions and whether you're okay with it.** That's your -- That's your power.

(Tr. Transcr. Vol. V, p.30). Mr. Rowley's entire comment was directed at the ***credibility*** of the Defendant's expert and the testimony elicited by Defendant's own counsel. It was directed to Defendant's counsel comments that, directly contrary to current Iowa law, PA's "don't need a supervisor" at all. At no time in the statement complained of did Mr. Rowley argue or assert that PA Choos was not adequately supervised. The assertion made by the Defendant is misleading, is taken out of context and is without merit.

C. BASED ON THE RECORD, PLAINTIFF'S COUNSEL'S COMMENTS WERE NOT CONTRARY TO THE LAW

After taking out of context the comments of Plaintiff's counsel, the Defendant then cites the Court to well established Iowa law with which the Plaintiff agrees with. However, the Defendant's application of the law to the facts is misguided and lacks merit.

Defendants cite to *Janvrin v. Broe*, 239 Iowa 977, 984, 33 N.W.2d 427, 432 (Iowa 1948) and *Hoover v. First Am. Fire Ins. Co. of New York*, 218 Iowa 559, 255 N.W. 705, 707 (Iowa 1934) for the proposition that no comments of counsel can go outside of the evidence. (Def. Motion, p.9).[4] However, the specific evidence commented on by Mr. Rowley was in the record and was placed there by Defendant's own counsel. It is appropriate to comment on the testimony of Defendant's experts as well as their credibility.

[4] Likewise, the Defendants cite to 75A Am. Jur. 2d Trial § 505, 66 C.J.S. New Trial § 60 and 58 Am. Jur. 2d New Trial § 118 for the proposition that it is improper for counsel to refer to "matter not in evidence." Likewise, these authorities do not support Defendants motion for new trial because the evidence referred to was "in evidence" in the case.

In its Motion point II.B, the Defendant again misstates what transpired at trial regarding the statement made by Mr. Rowley. (Def. Motion, pp.11-13). The Defendant aasserts that Mr. Rowley misstated the law when he commented that the jury could "simply decide whether they are "okay" with the care performed in a medical malpractice action." Once again the argument is misleading and boarders on the frivolous. With respect to the word "okay," Mr. Rowley stated the following:

> MR. ROWLEY: Thank you, Your Honor.
> So you might find that this goes to the **credibility of their expert** who testified yesterday and what he said about **the standard of care** is and how things are happening in Iowa. **You get to choose whether that's -- whether you believe a word of his testimony or opinions and whether you're okay with it.** That's your -- That's your power.

(Tr. Transcr. Vol. V, p. 30). This statement came after an objection by defense counsel and a side bar with the court. The court specifically allowed Mr. Rowley to continue with his comment as the comment was specifically directed to the "**credibility**" of the defense expert. When the jury was told that they had the power to decide if they were "**okay** with it," the "it" being referred to was clearly the defense experts "testimony or opinions" and whether they "believe a word" that the expert said. Once defense counsel understood that Mr. Rowley statement was directly focused to the credibility of the expert, which was fair game, there was no further objection by Defendant's counsel, nor was there a request for any curative instruction.[5] The out-of-context and manufactured grounds for a new trial have no merit and must be denied.

III. THE TESTIMONY OF DR. JANUS THAT WAS WITHDRAWN AND STRICKEN DOES NOT SUPPORT THE DEFENDANT'S REQUEST FOR A MISTRIAL

[5] Similarly, the Defendants going on the assert that "Counsel's argument further misstated the law because Iowa law precludes a jury from deciding whether they are okay or not with requirements for physician supervision. (Motion, p.12). This is not what Mr. Rowley stated and again is misleading.

In point III of its Motion, the Defendant first seeks a new trial based on what it calls the "improper testimony of Dr. Janus." Defendant's argument is threefold: [1] Dr. Janus testified towards an inflammatory issue; [2] Dr. Janus testified to a central issue in the case, and; [3] Dr. Janus' qualification rendered him the most credible witness. Although plaintiffs will address each of these assertions in turn, the circumstances surrounding Dr. Janus' testimony should first be articulated and the appropriate legal standards must be identified.

First, as discussed in more detail below, Dr. Janus was called to give testimony on behalf of the Plaintiff. He gave a significant amount of testimony that would have been admissible and to which no objections were made. [6] (Tr. Transcr. Vol. IV, pp.12-21). The areas of contention now complained of by the Defendant are the following:

> Q When you called down there to talk to the PAs or ask for PA, a physician assistant?
> A Well, I would usually get them on the phone. I had one instance where I called down there and asked to talk to a PA. I can't remember his name. What always struck me with that was that I asked for Mr. so-and-so, and the person answering the phone said, "Oh, you mean Dr. so-and-so?" And I said, "No. Mister because he's a physician assistant." And she said, "We call all of our providers down here doctor," and then got him on the phone.
> Q Are PAs, Doctor, with their education, training, and experience the same as doctors?
> MR. BERGELAND: Your Honor, relevance; beyond the scope; 404; hearsay, I guess, as to the prior comment, but --
> THE COURT: I'll overrule it for now.

[6] The Defendants cannot now use testimony that was not objected to as grounds for a new trial.

> However, "* * * it is axiomatic that counsel for a party cannot sit idly by and not attempt to direct the attention of the trial court to a possible limitation or restriction on the use of evidence and then, after an unfavorable verdict, take advantage of an error which he could and should but did not call to the court's attention. Such inaction on counsel's part weighs heavily in evaluating the right to a new trial."

Schmitt v. Jenkins Truck Lines, Inc., 170 N.W.2d 632, 659 (Iowa 1969) (citing *Wilson v. Pennsylvania Railroad Co*., 421 Pa. 419, 219 A.2d 666, 674.

(Tr. Transcr. Vol. III, pp.11-12). No further testimony was elicited from Dr. Janus regarding the distinction between PA's and doctors after the objection was made. This was an isolated statement.

The second comment complained of by Defendant is the following:

> Q And, Doctor, as Joseph's treating neurologist and based on your education, training, and experience, was Joseph Dudley's **permanent brain damage -- could that have been avoided**?
> A I think so, to a reasonable medical certainty.
> Q How --
> MR. BERGELAND: Same objections as previously urged, Your Honor.
> THE COURT: Same ruling as previously given. Thank you.
> BY MR. NOVOTNY:
> Q How so, Doctor? How could have Joseph's brain damage that we see on these films -- how could that have been prevented?
> A Well, I think if he had been **treated earlier, it might have prevented this from happening**.[7]

(Tr. Transcr. Vol. III, pp.21-22). The third comment complained of by Defendant is the following:

> Q Doctor, if you're going to turn back the clock then to February 17, 2017, was Joseph starting to experience the **signs and symptoms of bacterial meningitis**?
> MR. BERGELAND: Foundation. Beyond the scope. Same objection.
> THE COURT: Give me a moment here. Same ruling. Overruled. Thank you. You may proceed.
> A So I can answer?
> BY MR. NOVOTNY:
> Q Yes.
> A Okay. I think to a reasonable medical certainty that he had **exhibited signs** of the meningitis at that time.
> Q How so?
> A Well, from my reading of some of the depositions as well as the note there, he had **evidence of dizziness, weakness** -
> MR. BERGELAND: Your Honor, I'm going to interpose an objection and ask an opportunity to voir dire the witness
> at this time.

[7] There was no objection asserted to this last question and answer.

THE COURT: You may.

(Tr. Transcr. Vol III, pp.22-23) (highlighted areas reflect the opinions in question). No further opinions were offered by Dr. Janus on the issue of whether Mr. Dudley had signs or symptoms or meningitis when he was seen by PA Choos. Indeed, before Dr. Janus was even able to complete his testimony about what "signs or symptoms of bacterial meningitis" were exhibited on 2/17/17, his testimony was interrupted by the objection from the defense.

Although the Defense attempts to create a story that ends with the conclusion that Dr. Janus' testimony was the stake to the heart for the Defendant's case, the evidence is to the contrary. With respect to the issue of causation, Dr. Janus testified that earlier treatment "**might** have presented this from happening." In addition, Dr. Janus did not testify within a reasonable degree of medical certainty that Mr. Dudley **had meningitis** on 2/17/17, just that he "exhibited **signs** of the meningitis." *Id*. More importantly, no opinions were offered by Dr. Janus as to whether or not PA Choos violated the standard of care or even what the standard of care was on 2/17/17.

Aside from the comment about PA's vs doctors,[8] only two opinions were given by Dr. Janus that are at issue. After only giving two general opinions and before he was allowed to complete the testimony surrounding his second opinion, Dr. Janus was interrupted by Defendant's timely objection and the Court immediately allowed voir dire of the witness that did not elicit any additional expert opinions. When the voir dire added additional concern regarding the testimony given, the Court immediately sent the jury out of the room. (Tr. Transcr. Vol. III, p.25). Upon further questioning, it was apparent that Dr. Janus had received and reviewed a deposition taken

[8] The testimony regarding the Pas versus doctors was simply based on statements made to Dr. Janus by a party opponent. They did not include any improper opinion testimony. This testimony was isolated and then subsequently withdrawn. Thus, Plaintiff will focus on the opinion testimony given by Dr. Janus.

in the case. However, when asked if the opinions he had given so far were based only on the information that he originally "reviewed as a treating physician" he testified in the affirmative.[9]

Thus, it is the Plaintiffs' position that the opinions offered by Dr. Janus were not excludable based on his voir dire testimony. However, the Court did express some concern about the "melding" of Dr. Janus' "standard of care opinion with his causation opinion based upon the 17th records." (Tr. Transcr. Vol. III, p.48). During the discussion with counsel, attorney Bergeland made the following statement to the Court:

> And, frankly, unfortunately, I -- we got to this point, and I think the cat is out of the bag. I mean, I think at this point, I have to make a **motion for mistrial**. I think this jury just basically heard him **imply that my client violated the standard of care** and that the basis for that opinion was in part deposition testimony that the witness reviewed. And this does

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[9] Dr. Janus testified in voir dire:

> Q Yes. And with respect, **have you given any opinions up to this point that are based upon materials that weren't within the purview of what you had access to and what you reviewed as a treating physician**?
> A Okay.
> Q Have you given any final opinions in that regard yet?
> A **No**.

(Tr. Transcr. Vol.III, p.26). Further questioning by Defendant's counsel elicited the following:

> Q And, additionally, you just told the jury that the deposition of Walter Miro also played into your opinion about whether or not signs of meningitis were present?
> A No. My opinion at this time. Not my opinion when that was read -- when that was written.
> Q Okay. I'm saying what you just told the jury.
> A Right.
> Q I just want to confirm you said that.
> A I'm just saying. **In totality, I can certainly -- My opinion doesn't change based on his deposition**. It's simply that his deposition supports my opinion.

(Tr. Transcr. Vol. III, p.26). He further testified during voir dire:

> Q You are going to testify under oath that you remember on -- I'm sorry -- on September 26, 2017, that you reviewed his February 2017 note?
> A Well, that I can't say for assurance --
> Q Okay.
> A -- because I didn't document it, **but I'm fairly certain that I looked at it**.
> ***
> Q Okay. **Are you confident that you would have looked at the February 17, 2017, note before lawyers asked you to look at this case more thoroughly**?
> A **Yes**. And the reason I think so is when I reviewed the hospital notes and I saw the spinal fluid taps, I'm like, "Jeez. What happened here?" And then I would have gone back to see what led up to him coming into the hospital.

(Tr. Transcr. Vol. III, p.32).

> make a difference in this case. This person was employed, bias at the time.
> We did not expect we were going to walk into this courtroom and hear **implications that the standard of care was violated** based upon after-acquired evidence based upon the ruling that the Court has entered in this case. I can't unring this bell.

(Tr. Transcr. Vol. III, p.36). The only objection made and preserved as to the testimony given by Dr. Janus was that he "**implied**" that the "standard of care was violated."[10] Plaintiff disagrees.

Regardless, given the Court's concern in moving forward with additional testimony on the issues and to avoid any prejudice to the Defendant, the Plaintiff offered to withdraw Dr. Janus as a witness and not move forward with any further testimony if the Court felt that was necessary to cure or avoid any prejudice to the defense. (Tr. Transcr. Vol. III, p.49). After further conversation with counsel, the court decided to strike Dr. Janus as a witness and to give a curative instruction to avoid any prejudice.[11] (Tr. Transcr. Vol III, p.50). The jury was called back in and the Court gave the following curative instruction:

> THE COURT: Thank you, folks. Thank you for bearing with us as we were dealing with some matters outside your presence. I have -- In relation to Dr. Janus, who was previously testifying, I have an instruction for you. **Please listen carefully**.
> The plaintiff has agreed to withdraw Dr. Janus as a witness. As such, **his testimony will be stricken from the record**. You should **disregard his testimony and should not give it consideration in any way in your deliberations**. And I will give you further instruction concerning matters that that are stricken from the record at time of final instructions.

[10] Plaintiff disagrees that Dr. Janus "implied" in anyway that PA Choos violated the standard of care. In fact, he was not even asked what the standard of care was for a Physician's Assistant under the circumstances. As will be discussed later, Plaintiff objects to any attempt by Defendant to broaden its objection to anything more than the "standard of care" objection asserted by attorney Bergeland.

[11] It is assumed that in doing so, the Court was declining the Defendant's Motion For a Mistrial. With this assumption, the Plaintiff will address below the "abuse of discretion" standard that the Defendant needs to prove in asserting its motion for new trial.

(Tr. Transcr. Vol. III, p.51). At the end of the case the Court instructed the jury as follows: "You shall base your verdict only upon the evidence and these instructions. *** The following are not evidence: ... 3. **Testimony I told you to disregard**." (Jury Instr. No. 3). The Court did not stop there. The Court also instructed the Jury:

> In this case, there has been certain testimony that the Court struck from the record. In your jury room **you must not refer to or give consideration to any testimony which was given but then stricken by the court** and where you have been admonished to disregard it.

(Jury Instr. No. 10). As discussed in more detail below, given the limited testimony objected to, the immediate action to cure any prejudice, and the other evidence in the case, a new trial on the grounds asserted is unwarranted.

A. Legal Standard When Testimony Is Withdrawn and Stricken and Curative Instruction Given

The Defendant begins its argument in Point III, correctly acknowledging that "generally improper testimony is not unduly prejudicial if the jury is admonished to disregard it." (Def. Motion, p.13). The defense then spends 3 ½ pages trying to convince the Court that this is one of those rare cases where the evidence was so prejudicial that a curative instruction would have no effect. In doing so, not only does the Defendant fail to cite one similar case where the testimony was both withdrawn and stricken by the court, but it fails to even discuss the elements required to carry the "heavy burden" of showing prejudice as a result of the evidence placed before the jury.

In *State v. Brown*, 397 N.W.2d 689 (Iowa 1986), the court was confronted with testimony offered in front of the jury that violated a previous court order. The district court immediately struck the testimony and gave a curative instruction to the jury to disregard the testimony. The district court refused to grant a motion for a mistrial. The appellate court affirmed the trial court's denial of a new trial:

> Trial court, after a discussion outside the jury's presence, agreed that the response violated its previous order, but rejected Brown's motion.
>
> When the jury returned, the court ordered Daws' response stricken from the record and directed the jury "to totally disregard [the response] and to wipe it from your memories." Trial court's later instructions further informed the jury, "You must not consider for any purpose any offer of evidence that was rejected or any evidence that was stricken out by the court; such matter is to be treated as though you never heard it."
>
> Trial court has broad discretion in ruling on motions for mistrial. *State v. Washington*, 308 N.W.2d 422, 424 (Iowa 1981); *State v. Trudo*, 253 N.W.2d 101, 106 (Iowa), *cert. denied*, 434 U.S. 903, 54 L. Ed. 2d 189, 98 S. Ct. 299 (1977). **Generally, trial court's quick action in striking the improper response and cautioning the jury to disregard it, coupled, when necessary, with some type of general cautionary instruction, will prevent any prejudice**. A defendant who asserts these actions were insufficient bears the **heavy burden of demonstrating a clear abuse of discretion on the part of trial court**. *State v. Staker*, 220 N.W.2d 613, 617 (Iowa 1974).
>
> Brown has made no showing trial court's actions failed to remove any potential prejudice he might otherwise have suffered had the offending response not been stricken. We find no error in this regard.

Id. at 698-699 (emphasis added); see also *State v. Keyes*, 56356 N.W.2d 783, 785-786 (Iowa App. 1995) ("Generally the striking of an improper response, and an instruction to the jury to disregard the response, will prevent prejudice. A defendant who asserts such actions were insufficient bears a **heavy burden of demonstrating a clear abuse of discretion** on the part of the trial court."). Similarly, in the case at bar, the Defendant has made no showing, other than speculation or inuendo, that prejudice resulted from Dr. Janus testimony. Thus, Defendant has failed to carry its "heavy burden" in showing a "clear abuse of discretion" by this Court when it refused to grant a mistrial and, instead, found that a curative instruction would be sufficient.

In *State v. Rosales-Martinez*, 2003 Iowa App. LEXIS 445 Iowa App. 2003), the court was also confronted with inappropriate testimony that was stricken by the trial court and a curative instruction given. In upholding the denial of a new trial, the appellate court held:

> We conclude the district court did not abuse its discretion in denying the **motion for mistrial**. As our supreme court observed in *State v. Peterson*, 189 N.W.2d 891, 896 (Iowa 1971), **when improper evidence has been promptly stricken and the jury admonished to disregard it, there has been no erroneous ruling by the district court**. Consequently, a reversal may only be predicated on the proposition that the matter forbidden by the ruling was so prejudicial that its effect upon the jury could not be erased by the trial court's admonition. *See State v. Jackson*, 587 N.W.2d 764, 766 (Iowa 1998). In addition, ordinarily the striking of improper testimony cures any error. *See Peterson*, 189 N.W.2d at 896. **Only in extreme instances where it is manifest that the prejudicial effect of the evidence on the jury remained, despite its exclusion, and influenced the jury is the defendant denied a fair trial and entitled to a mistrial**. *Id.*
>
> In light of the substantial testimony offered, and the fleeting nature of the question and answer, together with the court's curative instructions, we conclude the court did not abuse its discretion in denying defendant's motions for mistrial.

Id. at 4-5 (emphasis added). It is only in "extreme instances where it is manifest that the prejudicial effect of the evidence on the jury remained," that a new trial is warranted. The case at bar is not such an extreme case. More importantly, the Defendant has presented no evidence proving that some prejudice on the jury remained.

Lastly, in *State v. Johnson*, 2020 Iowa App. LEXIS 913 *, 952 N.W.2d 893, 2020 WL 5650731 (Iowa App, 2020), improper evidence of PBT test results were submitted to the jury. The court sustained an objection, struck the testimony and gave a curative instruction. In upholding the trial court's refusal to grant a new trial, the *Johnson* court stated:

> If a trial court moves swiftly to strike an improper response, cautions the jury to disregard it, and provides a cautionary instruction, generally **it will prevent prejudice against a defendant**. *State v. Brown*, 397 N.W.2d 689, 699 (Iowa 1986). "A defendant who asserts such actions were insufficient bears a **heavy burden** of demonstrating a **clear abuse** of discretion on the part of the trial court." *State v. Keys*, 535 N.W.2d 783, 785 (Iowa Ct. App. 1995).
>
> So does the court's statement to the jury to disregard the evidence immediately after it was introduced and again in a curative written jury instruction cure the prejudice from disclosure of the PBT results? In *State v. Belieu*, the supreme court **[*7]** provided **several factors to consider in determining whether the prejudicial impact of inadmissible evidence can be sufficiently cured by a cautionary instruction**: **1)** the defendant's ability "to **protect himself against the prejudicial impact**"; **2)** the **extensiveness of the challenged testimony** and the

> promptness with which the court deals with it; and **3)** the **strength of the** State's **evidence on the matter**, which reduces its prejudicial value. 288 N.W.2d 895, 901-02 (Iowa 1980).
>
> Here, the inadmissible reference to the PBT result was **very brief and occurred only once**. The court immediately sustained Johnson's objection and **admonished the jury not to consider "any reference to numbers" it heard**. It also told **the jury in a written instruction that the "certain evidence [the court struck] from the record" was not evidence to be considered**. **We assume juries follow the instructions given to them by the court**. *State v. Hanes*, 790 N.W.2d 545, 552 (Iowa 2010). And the State's case against Johnson was strong. The portions of Officer Spencer's bodycam footage played to the jury corroborate his testimony that Johnson showed signs of impairment. The jury could view the footage and reasonably find Johnson was impaired at the time of his arrest based on his speech and his field sobriety **[*8]** test performance. The relative **strength of the State's case** against Johnson **reduces the prejudicial impact** of the inadmissible reference to the PBT result. *See Belieu*, 288 N.W.2d at 901. In sum, the trial court acted quickly and took proper measures to reduce the prejudicial impact of disclosure.

Id. at 6-8 (emphasis added). Like the court in *Johnson*, this Court took immediate steps to rectify any perceived prejudice from the testimony of Dr. Janus. The challenged testimony of Dr. Janus was not extensive at all and likely was admissible at the time. In addition, the strength of the testimony from Plaintiff's expert witnesses was strong and was extensive regarding the meningitis, the evidence of a severe infection (as evidenced by SIRS) on 2/17/17 and the causal effect on Mr. Dudley's outcome and permanent injuries. Lastly, the Defendant had three designated expert witness identified and ready to testify at trial. If the defense really believed that the prejudicial effect of Dr. Janus' testimony was significant, it could have protected itself by offering the witnesses to testify in a manner contrary to the testimony of Dr. Janus. Although the defense called PA Walz in its case in chief, the defense failed to call Dr. Stilley (Emergency Medicine) or Jill Ferry (Physician Assistant), both of which were certified as experts in the case and were identified as witnesses to testify at trial. The defense simply chose not to call these experts. Such failure cannot now be grounds for the Defendant to claim foul and to seek a new trial.

The Defendant relies on *Devore v. Schaffer*, 65 N.W.2d 553 (Iowa 1954) in support of its Motion, claiming that it stands for the proposition that improper expert testimony is grounds for a new trial, even if stricken by the Court. A review of Devore reveals that it does not quite stand for the proposition asserted by the defense. In *Devore*, a physician was allowed to give testimony and opinions that were later stricken by the court. The appellate court determined that the testimony was prejudicial, but not for the reasons asserted by the Defendant. In *Devore*, after the district court struck ***certain testimony***, it gave a curative instruction to the jury that was not clear and would be difficult for the jury to follow. *Id*. at 555-556 ("The admonition (not repeated in the instructions) placed upon the jury the duty of making a distinction which the witness himself did not make and was not asked to make."). In a statement more on point with what occurred in the case at bar, the *Devore* court recognized:

> Had the court **stricken all opinion testimony of the witness** we would then have to appraise the situation to determine whether the prejudice was thereby removed. **But this the court did not do**. Every opinion the doctor expressed was based in part at least on incompetent evidence and was therefore entitled to no consideration. *Switzer v. Baker, 178 Iowa 1063, 1079, 160 N.W. 372*.

Id. at 556 (emphasis added). The *Devore* court makes it clear that the result may have been different had the district "court stricken all opinion testimony of the witness." *Id*. That is exactly what happened in the case at bar. When an issue with the opinion testimony of Dr. Janus came up, Plaintiff's counsel knew that one way to avoid error was to withdraw **all of the testimony** of Dr. Janus and have **all of the testimony stricken**. This is what was done and, directly in accord with *Devore*, all of the testimony of Dr. Janus was stricken. Thus, *Devore* does not support the granting of a new trial in this case.

The Defendants also rely on *Terrell v. Reinecker*, 482 N.W.2d 428 (Iowa 1992) and *Smith v. Wright* 851 N.W.2d 2014 WL 2347388 (Iowa C. App. 2014) for the proposition that the

admission of improper expert testimony is prejudicial. However, both *Terrell* and *Smith* are inapplicable here because the offered testimony was not stricken and was allowed to be considered by the jury in each case.

The Defendant cites the court to *Lange v. Des Moines*, 404 n.w.2D 585, 587 (Iowa App. 1987) for the proposition that "[t]here are matters which when put before a jury are so prejudicial that no admonition can erase them." (Def. Motion, p. 13). Defendant fails to point out that *Lange* upheld the denial of defendant's request for a new trial and stated:

> When counsel makes an improper remark in the course of the closing argument, it is the duty of the aggrieved party to object and thereby provide the trial court with an opportunity to admonish counsel or instruct the jury as it may see fit. *Andrews v. Struble*, 178 N.W.2d 391, 401 (Iowa 1970). Here, city's counsel correctly objected to the line of questioning and alerted the court to plaintiff's counsel's transgressions. "Ordinarily where a trial court in response to requests promptly **admonishes the jury to disregard** an improper argument **there is not prejudicial error**."
> ***.
> Misconduct consisting of misstatements, or improper remarks or arguments, **may be cured through the action of the offending counsel by promptly withdrawing or correcting the improper remarks or misstatements**. 88 C.J.S. Trial § 198 (1955); *see also Evans v. Roberts, 172 Iowa 653, 666, 154 N.W. 923, 928 (1915)*; *Atlanta Joint Terminals v. Knight, 98 Ga. App. 482, 491, 106 S.E.2d 417, 425 (1958)*; and *Adair v. Cloud, 354 S.W.2d 866, 871-72 (Mo. 1962)*.

Id. at p.7. Since Plaintiff's counsel (Rowley) immediately withdrew the entire testimony of Dr. Janus once the issue came up and the court struck the testimony, *Lange* does not support Defendant's request for a new trial.

Defendant also cites the Court to *Miller v. Town of Ankeny*, 253 Iowa 1055, 1059–60, 114 N.W.2d 910, 913 (Iowa 1962) for the proposition that "[i]mproper testimony may leave such strong impression on the jury that its withdrawal and instruction to disregard it does not cure the error in admitting it." (Def. Motion, p.13). In *Miller*, inappropriate testimony was admitted as to the value of land. "At the conclusion of all the evidence plaintiff moved the court to strike and withdraw from jury consideration the first mentioned answer of Finch and to admonish the jury to

disregard it." *Id*. at 1058. As in the case at bar, the trial court "sustained the motion, struck the evidence and directed the jury to disregard it. The instructions to the jury reminded it of this admonition and again directed that the evidence be ignored." *Id*. The defendant argued that it was error to receive the evidence at all and "the error was not cured by its withdrawal and the admonition to the jury to disregard it." *Id*. After citing well established Iowa law that "[o]rdinarily error in admission of evidence is cured **by its withdrawal** and **instructing the jury to disregard** it" *Id*. at 1059 (citation omitted), the *Miller* court affirmed the district court's denial of defendant's motion for a new trial.

In the end, the Defendant fails to cite any Iowa case where a motion for new trial was granted after improper evidence was withdrawn by the offering party and entirely stricken from the record by the trial court. Finding no Iowa case law supporting its position, the Defendant attempts to find cases from other jurisdictions. The first is *People v. Uribe* , 962 N.W.2d 644 (Mich 2021), in which an examining physician "***repeatedly*** testified to the ultimate issue in the case – whether the complainant was ***sexually abused*** – and this testimony lacked physical corroboration." *Id*. at 900. The majority found the curative instruction by the trial court would not erase the prejudice because the testimony "vouche[d] for the complainant's credibility and veracity and invade[d] the province of the jury to determine this issue." *Uribe* is distinguishable in that the expert's entire testimony was not stricken, as it was in the case at bar. More importantly, the physician's testimony improperly vouched for the complainant's testimony and veracity and this could not be undone. In the case at bar, this did not occur.

The Defendant cites a host of other cases from other jurisdictions, but as the Court will see, none of these cases involve facts similar to the case at bar. Plaintiff could not find any case where the witness' testimony was withdrawn by the offering party in its entirety and then the entire

testimony stricken, but yet a new trial was granted. These facts alone distinguish all of the cases cited by the Defendant.

B. EVEN IF THE EVIDENCE WAS IMPROPERLY ADMITTED, THE DEFENDANT HAS FAILED TO SHOW PREJUDICE

Even if the testimony of Dr. Janus was inappropriately admitted, which Plaintiff disagrees with, the Defendant needs to prove prejudice. The Defendant fails to even discuss the issue of prejudice or the factors considered by the court when analyzing whether evidence of prejudice in the jury existed. Likely because any evidence of prejudice is nonexistent, and the Defendant simply hopes that the verdict amount alone will show that prejudice must have existed. Based on the test offered in *State v. Johnson*, prejudice cannot be shown in this case.[12]

1. The Challenged Evidence Was Not Extensive and the Court Took Steps to Immediately Protect the Defendant from Any Potential Prejudice

One of the tests for prejudice enunciated in *State v. Johnson* is "the **extensiveness of the challenged testimony** and the **promptness with which the court deals with it**." *State v. Johnson*, 2020 Iowa App. LEXIS 913 *, 952 N.W.2d 893, 2020 WL 5650731, p.7 (Iowa App, 2020). As pointed out above, the testimony of Dr. Janus actually objected at trial was likely admissible, but in the end, minimal.[13] He offered no standard of care opinions nor did he opine that there was a

[12] By arguing this point, the Plaintiff does not concede that the testimony offered by Dr. Janus was improper based on the testimony elicited. He never offered opinions on the standard of care and, based on his testimony, the opinion that he did offer was based on the medical record in the Epoch system that he reviewed during his care and treatment of Mr. Dudley. Thus, if the testimony was properly admitted, the Court should never even reach the issue of "prejudice." Plaintiff continues to submit that the testimony offered by Dr. Janus was admissible and at no time violated an order from the Court or the Iowa Rules of evidence surrounding the admissibility of lay expert testimony from a treating physician. With respect to the testimony regarding PAs being referred to as doctors, an objection was made and overruled by the Court. (Tr. Transcr. Vol. III, pp.11-12). Plaintiff asserts that the Court's ruling was appropriate. Similarly, with respect to Dr. Janus' testimony on the cause of Mr. Dudley's brain injury being "avoidable," an objection was made and overruled by the Court. (Tr. Transc. Vol. III, pp.21-22). Once again, Plaintiff agrees that the ruling was appropriate.

[13] Indeed, as pointed out above, two of the objections were overruled as the Court found the testimony surrounding PAs being referred to as doctors (Tr. Transcr. Vol. III, pp.11-12) and whether or not the brain injury to Mr. Dudley was avoidable (Tr. Transcr. Vol. III, pp.21-22), both relevant and properly offered through the testimony of Dr. Janus.

breach in the standard of care by PA Choos. His testimony on meningitis was simply that there were "**signs**" of it on 2/17/17. More importantly, before his testimony was ever completed, the issue of the objectionable testimony was raised by the defense, the entire testimony of Dr. Janus was withdrawn by the Plaintiff and a curative instruction given by the Court. Dr. Janus was not allowed to complete his testimony. Subsequently, in final jury instructions, the Court instructed the jury that stricken testimony is not evidence and cannot be considered. (Jury Instruction No. 3). The Court further instructed the jury to disregard any evidence stricken by the Court. (Jury Instruction No 10). Based on this element of the test, the presumption is that there is no prejudice to the Defendant as a result of Dr. Janus' withdrawn and stricken testimony.

2. Evidence Similar to the Testimony Given by Dr. Janus Was Strong and Offered by Other Witnesses

Another part of the test enunciated in *State v. Johnson* is the strength of the testimony related to the complained of testimony. As pointed out above, the complained of testimony by Dr. Janus was that Mr. Dudley's brain injury could have been "avoided" with timely treatment and that there were "signs" of meningitis ("dizziness, weakness") on 2/27/17. On these two opinions, the expert testimony offered by the Plaintiff was strong and extensive. Plaintiff offered the testimony of four (4) highly qualified experts: Gayle Galan, MD, Rodger MacArthur, MD, Michael Gold, MD and Ray Mooney, PA-C. They all uniformly testified that Mr. Dudley had signs of a serious infection on 2/17/17, including SIRS (Systemic Inflammatory Response Syndrome) and meningitis. (See, Dr. Galan testimony, Vol. IV, pp. 20-23; Dr. MacArthur's testimony, Court Exhibit No. 1; Dr. Gold's testimony, Vol. III, pp. 57-84; and PA Mooney's testimony, Court Exhibit No. 4). For example, relating to the dizziness and weakness testified to by Dr. Janus, Infectious Disease expert Dr. Roger MacArthur testified to the following regarding his conclusion that PA Choos violated the standard of care:

> Q And what is your conclusion, Doctor?
> A That the care delivered to Mr. Dudley **fell below the standard of care** in a number of different ways.
> Q Explain those to us.
> A So it **fell below the standard of care**. He came in complaining of a high fever and some **neurologic findings, specifically dizziness and weakness.** He was found to have a very high temperature, a very elevated heart rate, very elevated respiratory rate, and there was -- and this was in February of 2017. And there was consideration given for whether or not this could be, for instance, influenza. A lot of the symptoms and signs that he had are in the category of nonspecific, but **they were concerning for something very serious**. The elevated heart rate, the elevated respiratory rate, the very high fever, **something very bad is likely going on**. In fact, we code it in a certain way.
>
> There is an entity -- an acronym that stands – that is SIRS, S-I-R-S, for the systemic inflammatory response system, and there are four criteria. There's a heart rate or pulse criterion, respiratory rate criterion, a white cell count criterion and a temperature criterion. They didn't measure his white blood cell count, but they got the other ones, and all three of them were elevated, which needs to be factored in and weighed for consideration of some **very serious infectious process, which can be caused by bacteria or viruses**. He met -- and as long as somebody has at least two of these, there has to be **consideration for sepsis**, which is a **very, very serious condition**.

(Court Exhibit, No. 1, MacArthur Depo., pp.21-22). He further testified that Mr. Dudley's record on 2/17/17 "lists **dizziness and weakness**" which are referrable to an issue with the brain. *Id* at p. 34. He also testified:

> Q But on a go-forth basis, you believe that not in hindsight, prospectively from Melanie Choos's perspective, she should have recognized this patient had an **altered mental status**, true?
> A It is hard to know a person's baseline. She should have been, in my opinion, concerned about the neurologic findings, or at least the **neurologic symptoms, which we've talked about, dizziness and weakness,** and she certainly should have been concerned about sepsis.

(*Id*. at p. 55). Similarly, expert PA Mooney testified:

> Q Can you, please, explain to the members of the jury why her conduct **violated the standard of care**?
> A Because Mr. Dudley came into the urgent care center somewhere around 7:00 -- well, he was seen somewhere around 7:30. And he had, you know, complaints of fever, chills, malaise, fatigue, myalgias, **dizziness, weakness**. He also while he was there experienced episodes of confusion and agitation. And the **differential diagnosis**, according to

> the P.A. who examined him, included – **included meningitis**. And without excluding that as a diagnosis, she discharged him from the emer- -- or from the urgent care.
> Q So if in her own mind her **differential included meningitis**, but she discharged the patient, why would that be a violation of the standard of care?
> A You can't have the **diagnosis of meningitis** on your differential and exclude it -- and not exclude it. Because if you do that and you happen to -- or it happens to be meningitis, the patient's condition will **worsen and he will die**.

(Court Exhibit 4, Depo. PA Mooney, pp. 16-17) (emphasis added). PA Mooney further testified that PA Choos never properly ruled out meningitis. (*Id*. at p. 28). Thus, the relationship of "dizziness and weakness" to meningitis offered by Dr. Janus, was also testified to by PA Mooney.

Although Dr. Janus testified that early treatment "**might have**" made a difference, expert neurologist, Michael Gold, MD, made it clear for the jury that it **would have** made a difference. He testified that Mr. Dudley was "suffering from a bacterial infection and required emergent treatment. It was an emergency to receive antibiotics." (Tr. Transc. Vol. III, p.62). He then testified:

> Q **Would treatment with antibiotics, you know, Friday night even Saturday, even Sunday, have prevented this bad outcome for Joseph Dudley**?
> A **Yes. I think it would have treated his infection, cured his infection**, and prevented brain -- subsequent brain injury.

(Tr. Transcr. Vol. III, p.62-63)[14] (emphasis added). Identical to the stricken testimony of Dr. Janus, Dr. Gold further testified:

> We subsequently learned, of course, that that infection was an infection in his blood and the lining of his brain and within the brain substance itself. And had that been recognized and **he had received antibiotics**, the events that occurred and the **brain damage that he suffered would have been prevented**, had the **infection been treated early**.

[14] Defendant also asserts that there was no evidentiary support for the Courts' jury instruction on the failure to give antibiotics. This testimony by Dr. Gold, along with other testimony, directly refutes this assertion. This issue is addressed *infra*.

(Tr. Transcr. Vol. III, p.64) (emphasis added). With respect to the "dizziness and weakness," Dr. Gold also testified that no appropriate neurological exam was performed on 2/17/17 to evaluate these complaints. (*Id*. at p. 64). Finally, Dr. Gold testified:

> Q **Did Melanie Choos fall below the standard of care** with respect to her evaluation, diagnosis, and treatment plan for Mr. Dudley?
> A In my opinion, **yes**.
> Q Is that negligence?
> A Is that negligence, was your question?
> Q Yes.
> A Yes. Yes, it is negligent.
> Q **Did that negligence by PA Choos**, who is UnityPoint's person in charge there that day, **cause Mr. Dudley to suffer permanent damage to his brain and life**?
> A **Yes**.

(Tr. Transcr. Vol. III, p.67)[15] In testimony relating to PA Choos breach in failing to properly evaluate Mr. Dudley's complaint of dizziness, Dr. Gold testified:

> Q If a patient walks in with his wife into an examination room and then a health care provider, the PA, comes in after the flu test has been done and asks the patient, "What's going on?" And the patient says, "**I'm dizzy. I'm weak**. I have pain throughout my whole body." We've got a fever of 103.6. We've got tachycardia. We've elevated respirations. What does the standard of care require to be done with respect to evaluating the patient's mental status?
> A Well, **it requires a more detailed mental status examination** and also cries out for a **comprehensive neurologic examination** –

(Tr. Transcr. Vol. III, pp.73) (emphasis added).

[15] Dr. Gold testified that he was familiar with the standard of care for any frontline worker, including PA Choos, and emergency room physician or even himself when working in that environment. (Vol. 3, pp. 65-66). He further testified that he ahs worked in the "in the emergency room for I guess I'll call it **over 40 years**, including my residency, as a neurologist **seeing people with neurologic problems**." (Vol. 3, pp. 65-66).

Plaintiff's expert neuropsychologist, Dr. David Paul, confirmed that "fever of 103.6, tachycardia, **dizziness**, **weakness**" did not reflect "normal mental status" in a patient like Mr. Dudley. (Tr. Transcr. Vol. III, p.142).

The above are just some of the excerpts from the testimony offered by the Plaintiff's expert witnesses. As the Court can see, the evidence was replete with testimony about dizziness, weakness, meningitis, and the cause of Mr. Dudley's brain injury. With the strength of the Plaintiff's expert testimony on these issues, the testimony of Dr. Janus could not be seen as prejudicial to the Defendant or the ultimate outcome of this case.

More importantly, although Dr. Janus's testified that Mr. Dudley "exhibited **signs of the meningitis**" on 2/17/17 based on "evidence of dizziness, weakness ---", similar testimony was offered by PA Choos. She acknowledged she was aware of the dizziness, weakness, and other significant vital signs that placed meningitis on her "differential" of possible diagnoses on 2/17/17. (Tr. Transcr. Vol. II, p.107 – Choos testimony). She testified:

> Q On your differential, you had **meningitis**, **bacterial meningitis on your differential**; correct?
> A On my initial differential, that is **correct**.
> Q Was that before you walked in the room?
> A Yes.

(Tr. Transcr. Vol. II, p.107). She further testified:

> Q You saw **dizziness**; correct?
> A Correct.
> Q **Weakness**; correct?
> A Correct.
> Q All of that. So when you went in with that **differential of bacterial meningitis**, you never wrote that down in your medical record anywhere as a differential diagnosis, did you?
> A It's not mandatory to write down **your initial differential** in a SOAP note. It's –

(Tr. Transcr. Vol. II, p.121)[16] The following testimony was also read into the record from the deposition of PA Choos:

> Question: What are the **symptoms of bacterial meningitis**?
> Answer: Confusion, headache, **dizziness**, neck pain, or meningeal signs. It can include vomiting, and it can include **fever** and body aches and chills.
> ***.
> Question: I think it feels the same to me. But so he did have **neurological signs** that you recognized as positive, and that was **dizziness and weakness**; correct?
> Answer: Correct.

(Tr. Transcr. Vol. IV, pp.37; 42) (emphasis added). PA Choos admitted herself that she was aware of the "neurological signs" of dizziness and weakness on 2/17/17 and that bacterial meningitis was on her differential diagnosis. Dr. Janus' stricken testimony that Mr. Dudley "exhibited **signs** of meningitis" on 2/17/17, with evidence of "dizziness, weakness," is virtually no different than the testimony offered by PA Choos herself. Indeed, it was virtually undisputed throughout the trial

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[16] Other testimony offered by Melanie Choos, PA, included:

> Q You **suspected meningitis**; true?
>
> A When he first arrived, **it was on my differential**,
>
> yes.

(Tr. Transcr. Vol. II, p. 107).

> Q So if you're thinking about it -- if you're thinking about it, and **it's a differential**, you go in and you see the patient who has the **dizziness**; has the **weakness**; has the high temperature; has the elevated pulse; has the elevated respiratory rate, and you go in and you spend some time in there with the patient, maybe ten minutes.
>
> If you feel he doesn't have, you know, **meningitis** anymore, then -- then you don't -- then you don't have to do anything else. Is that your testimony as an expert witness on the standard of care of what medical care ought to be and should have been in this community?
>
> A If tests are not clinically indicated, they're not necessarily falling below the standard of care just because they're not ordered.

(Tr. Transcr. Vol. II, p. 123).

that "dizziness" and "weakness" on 2/17/17, along with other clinical signs and symptoms, placed meningitis on the list of potential diagnoses. Thus, it is virtually impossible to conclude that Dr. Janus' limited statement was so manifestly prejudicial that no curative instruction could have wiped it from the minds of the jury.

3. The Defendant Had the Opportunity to Take Steps to Protect Itself

Another part of the test for prejudice enunciated in *State v. Johnson,* was the defendant's ability to protect itself from the alleged improper evidence. Dr. Janus' stricken testimony was offered early on in the case. The Defendant had an opportunity to discuss whether or not Mr. Dudley had "exhibited **signs** of the meningitis" on 2/17/17 with numerous witnesses throughout the trial, including its own experts. Indeed, Defendant's expert, David Walz, PA, testified:

> Q Is there anything in his history or even anything -- or in the medical record or even anything that you have learned since that would **suggest that Mr. Dudley had some bacterial source of an infection on the 17th**?
> A **There's not anything that I can recall** reviewing in the records that would suggest that he had a bacterial source of infection.
> Q **Altered mental status** is one of these symptom that's more highly associated with **meningitis**; is that true?
> A It's part of the triad. Yes, it's a part of the more common symptoms.
> Q Do you believe this patient was experiencing **mental status changes caused by meningitis on Friday, the 17th**?
> A **I do not**.

(Tr. Transcr. Vol. IV, p.103). Regarding the dizziness, PA Walz further testified:

> Q The kind of person that might need to be helped back to the car in a wheelchair?
> A Sure. Absolutely.
> Q Would they be **dizzy with a high fever**?
> A Very likely. What happens when they have a high fever is your body tries to get rid of the excess heat. So in order to do that, it shunts blood to the surface of your skin in order to -- that when you

> sweat, the absorption of the sweat will pull some of that heat off or conduction of the heat away from your body.
>
> When you shunt blood away from the core to the skin, you're not getting as good of blood flow to your brain. So if you move from a lying to a standing position, and you have high fever and your body is trying to get rid of that heat by shunting the blood to the skin, all of a sudden you're not going have good blood flow to your brain, and **you're going to feel lightheaded and dizzy**.
>
> ***.
>
> Q Do you consider **dizziness** in this setting to be a mental status change or **a sign that there's inflammatory process going on in the brain**?
>
> A **I do not**. I think it's more a symptom of his fever.

(Tr. Transcr. Vol. IV, p.105). The Defendant's expert commented directly on whether or not the dizziness commented on by Dr. Janus could be a "sign" of an infectious process (meningitis). This addressed directly the complained of testimony by Dr. Janus. PA Walz then went on to admit that Mr. Dudley had at least one symptom of meningitis on 2/17/17, but did not believe that he actually had meningitis.[17] Although PA Walz could have commented on whether or not "weakness" could have been a "sign" of meningitis as stated by Dr. Janus, the Defendant failed to ask PA Walz anything about this.

[17] PA Walz testified:

> Q Did he have symptoms -- **symptoms of meningitis** --
>
> A He had a --
>
> Q -- on Friday?
>
> A **He had a fever**. So he didn't have any other supportive symptoms that would make you think that he had meningitis.
>
> Q Do you think he had meningitis on the 17th?
>
> A I do not.

(Tr. Transcr. Vol. IV, p. 113).

The Defendant also had the option to call Dr. Stilley, its Emergency Medicine expert, and Jill Ferry, its Physician Assistant expert, to testify further on this issue if the Defendant or its counsel believed that Dr. Janus' testimony would somehow taint the jury and would unduly influence the outcome. The Defendant chose not to call either of these expert witnesses. This was likely because Defendant's counsel did not believe they needed the testimony to offset Dr. Janus' stricken testimony. The Defendant could have called either or both of these witnesses to testify to whether or not "dizziness" or "weakness" was a "**sign**" of meningitis" as testified to by Dr. Janus. They chose not to do so. The Defendant cannot now be heard to complain of the unduly prejudicial effect of Dr. Janus stricken testimony when it failed to call additional experts that Defendant could have called to lessen any perceived prejudice effect.

Based on well-established Iowa law and the testimony given in this case, the testimony of Dr. Janus was admissible and was proper. Regardless, to avoid any appealable issue, the Plaintiff withdrew the testimony of Dr. Janus in its entirety and allowed the Court to strike the testimony. The jury was admonished a number of times not to consider Dr. Janus' testimony as evidence in its deliberation. With these proper admonishments and instructions, the Court erased any potential prejudice to the Defendant. Even if it did not, the Defendant has failed to prove any prejudice based on the test enunciated in *State v. Johnson*. Therefore, Defendant's Motion on this ground must be denied.

IV. DEFENDANT'S ASSERTION THAT PLAINTIFF'S COUNSEL'S CLOSING ARGUMENT DEMANDS A NEW TRIAL IS MISPLACED AND LACKS MERIT

The Defendant completely fails to address whether or not it preserved error on all of its claims of misconduct by Plaintiff's counsel. This failure to address the preservation issue is glaring since there was a wholesale failure on the part of defense counsel to object to many of the assertions

it now makes regarding the closing argument of Plaintiff's counsel. A review of the well-established law is clear – if a proper objection is not made and the court provided an opportunity to address the issue before it is sent to the jury for deliberations, then the error is waived.

In *State v. Davis*, 240 N.W.2d 662 (Iowa 1976), the court was confronted with a potential violation of a limine order during trial and a defendant's failure to object at the time the evidence was presented. In ruling that the defendant failed to preserve error on the alleged error, the court stated:

> We have consistently said the primary purpose of a motion in limine is to avoid disclosing to the jury prejudicial matters *which may compel declaring a mistrial*. *Twyford v. Weber*, supra, 220 N.W.2d at 923; *State v. Hinsey*, 200 N.W.2d 810, 817 (Iowa 1972); *State v. Johnson*, 183 N.W.2d 194, 197 (Iowa 1971). Assuming, arguendo, Frisbie's cross-examination testimony fell within the prohibition of the limine motion ruling, we hold **defendant was obligated to afford trial court an opportunity to act**. Here something occurred at trial to change the "posture of the parties", *Garrett*, supra. Still pursuing the same dubious assumption, **an objection favorably ruled on followed by a jury admonition may have left no "remaining prejudicial effect"**, *State v. Jensen*, 216 N.W.2d 369, 374 (Iowa 1974); *State v. Peterson*, 189 N.W.2d 891, 896 (Iowa 1971). As a final resort, a successful **motion for mistrial would have prevented the additional time and money expended in trial court** and on appeal. And an unfavorable ruling on either the objection or motion (still making the same assumption) would have provided a definitive erroneous ruling from which to appeal.
>
> But as we have already noted, **defendant made no objection, requested no jury admonition or instruction, and offered no mistrial motion**. His **motion to direct verdict made no mention of this "error" now asserted**. We hold he complains too late and **preserved no error for review**.
>
> To hold otherwise would permit a defendant to take a chance with the jury, holding a claimed error in reserve in case of conviction. Such a course of action where a mistrial is warranted, would lead to a waste of time for the court, witnesses, and parties. See *United States v. Carter*, 448 F.2d 1245, 1246 (8 Cir. 1971), cert. denied, 405 U.S. 929, 92 S. Ct. 981, 30 L. Ed. 2d 802 (1972); *State v. Dahlstrom*, 224 N.W.2d 443, 449 (Iowa 1974).

Id. at 663-664 (emphasis added); *See also, State v. Latham*, 366 N.W.2d 181, 183 (Iowa 1985) (citing *State v. Davis* as authority when no objection made that would have preserved error.)

In *Kinseth v. Weil-Mclain*, 913 N.W.2d 55 (Iowa 2018), the court was confronted with allegations of improper closing argument and the defense counsel's failure to object during closing arguments. In relieving counsel from continuous objections during closing remarks, but requiring, at a minimum, a motion for mistrial explaining the issues **prior to** jury deliberations, the court held:

> However, a party does not necessarily waive an objection to a remark made in a closing argument if the party fails to make a contemporaneous objection. *Id.* In *Andrews*, we highlighted the sound reasoning of the Nebraska Supreme Court, which explained,
>
> > It could well be that any one improper statement would not constitute prejudicial error, while the cumulative effect of several would give rise to a claim of prejudice. Continued objections by counsel to prejudicial statements of opposing counsel in his argument to the jury could place the former in a less favorable position with the jury, and thus impose an unfortunate consequence upon his client which was actually caused by the wrongful conduct of opposing counsel. This he is not required to do. Attorneys engaged in the trial of cases to a jury know or ought to know the purposes of arguments to juries. When they depart from the legitimate purpose of properly presenting the evidence and the conclusions to be drawn therefrom, they must assume the responsibility for such improper conduct. They are in no position to demand that opposing counsel shall jeopardize his position with the jury by constant objections to their improper conduct.
>
> *Id.* at 402 (quoting *Sandomierski v. Fixemer*, 163 Neb. 716, 81 N.W.2d 142, 145 (Neb. 1957)); *see also State v. Romeo*, 542 N.W.2d 543, 552 n.5 (Iowa 1996) ("It is not always essential that opposing counsel interrupt closing argument with an objection . . . ."). Thus, our rule instructs that "**[w]here the closing arguments are reported**," a party's "objection to the remarks of counsel during final jury argument urged at the close of the argument **in motion for mistrial made before submission to the jury is timely**." *Andrews*, 178 N.W.2d at 401-02. The district court therefore erred in requiring defense counsel to make numerous, contemporaneous objections during closing arguments.
>
> Kinseth seizes upon the phrase "at the close of the argument" and asks that we require parties to move immediately for mistrial once the final jury argument has finished. Kinseth argues that defense counsel should have moved for a mistrial before or after the noon recess and, instead, waited almost a full day to make the motion, which diminished the curative abilities of the district court.

> **We require counsel to move for a mistrial before the case is submitted to the jury to ensure that the court has ample opportunity to "admonish counsel or instruct the jury" before deliberations begin**. *Id.* at 401. Here, the court had the same opportunity at 9:02 a.m. as it did at 4:30 p.m. the day before to weigh the prejudicial nature of the statements and determine how best to proceed. Because defense counsel's **motion for mistrial was made before the case was submitted to the jury**, and the court had time to weigh the motion and instruct the jury if necessary, the motion for mistrial was timely.

Id. at 67-68 (emphasis added). Thus, if closing argument is reported and if objections are not made contemporaneously during closing, the objections and motion for a mistrial **must** be made "**before** the case is submitted to the jury." If no contemporaneous objections are made and no appropriate motion for a mistrial follows, then error has not been preserved.

Most recently, in *State v. Wemark*, 2023 Iowa App. LEXIS 138, 2023 WL 1812841, the court addressed a failure of the defendant to object to arguments or violations of limine orders during closing arguments. In finding that appropriate objections were not made, and therefore were waived, the court stated:

> "The preservation of error doctrine is grounded in the idea that a **specific objection** to the admission of evidence **be made known**, and the **trial court be given an opportunity to pass upon the objection** and **correct any error**." *State v. Brown*, 656 N.W.2d 355, 361 (Iowa 2003). "The doctrine is rooted in principles of fairness where neither the state nor the defendant can raise a new claim or defense on appeal that could have been, but failed to be, raised at trial." *State v. Dessinger*, 958 N.W.2d 590, 598 (Iowa 2021). As error was not preserved below, we do not consider Wemark's hearsay claims. *See id.* at 599.
>
> *C. Limine order*. Wemark's final argument is the district court erred in admitting testimony in violation of a motion in limine. To establish reversible error, Wemark "**must show the violation of the limine order resulted in prejudice that deprived her of a fair trial**." *State v. Frei*, 831 N.W.2d 70, 80 (Iowa 2013), *overruled on other grounds by Alcala v. Marriott Int'l, Inc.*, 880 N.W.2d 699, 708 n.3 (Iowa 2016).
>
> During trial, Wemark made **no objection** to the officer's testimony **or the State's closing** and **rebuttal arguments**. Wemark **did not move for a mistrial based on violation of the limine before the case was submitted to the jury**. She did not ask for a jury instruction or admonition.

Id. at 6-7 (emphasis added). *Wemark* confirmed that if contemporaneous objections are not made and a motion for mistrial not lodged before jury deliberations begin, then any alleged misconduct in making statements during closing arguments are waived. For the reasons set out below, the Defendant waived any objections to many of the statements by Plaintiff's counsel now complained of in its Motion for New Trial.

A. THE STATEMENTS COMPLAINED OF WERE PROPER, AND THE DEFENDANT FAILED TO OBJECT OR PRESERVE ERROR

In section IV.A of its Motion, the Defendant asserts for the first time that a number of comments made by Plaintiff's counsel in closing argument amounted to "misconduct" and requires a new trial. Since no contemporaneous objections were made nor a motion for mistrial lodged, error was not preserved on many of the statements complained of. Plaintiff will address each assertion by the Defendant in turn.

Defendant first complains that Plaintiff's counsel made the following statement: "we hope your voices carry that truth back to—back to the jury room; that that truth ends up on the verdict form; and that that truth effectuates a—effectuates a change, a change in what happened to Mr. Dudley and the way it went and the way it should have been." (Vol. V, p. 18). There was no objection to the comment and no opportunity for the court to address it if it was improper. In addition, after closing argument, there was no motion for mistrial based on the statements. Thus, error was not preserved and the statement cannot now be used to obtain a new trial. *Kinseth v. Weil-Mclain*, 913 N.W.2d 55 (Iowa 2018); *State v. Davis*, 240 N.W.2d 662, 663-664 (Iowa 1976).

Second, the Defendant asserts that Plaintiff's counsel "improperly contextualized a finding for UnityPoint Clinic as a finding for a lower standard of care whereby the jury was "fine" with essentially cutting corners..." (Def. Motion, p. 28). As the Court can see from the record, Plaintiff's

counsel was commenting on the evidence in the case and what the jury believed the standard of care was:

> There's things you can do. If something looks the same, then **that's more the reason to do more testing and to not just send a patient out** -- after minutes out with instructions that could kill him. **Do more testing**. **Figure out what it is**. And if you answer "No" to those questions, answer "No" for UnityPoint on Question No. 1 and Question no. 2, you don't have to -- you know, like, listen.
>
> You didn't have to in this case. **You didn't have to with a patient like Joe Dudley**. It's fine. It's okay with us. **Met the standard**. Weren't sure what it was. You know, called it this, even though it was that. Didn't give him broad-spectrum antibiotics. Didn't get a CBC. Didn't send him to the ER. Didn't phone a friend. Didn't do all the different things you could have done. Just after minutes, you know, sent him off. **It's okay with us. The standard of care**.

(Tr. Transcr. Vol. V, p.44). Not only was the argument appropriate because it was directed towards the evidence and what the jury believed the standard of care was, but there was no objection by the Defendant. If the Defendant truly believed that the comments were inappropriate, it was required to object or move for a mistrial prior to jury deliberations so the court could address the issue. The Defendant did not and therefore any such objection has been waived.

Third, the Defendant attempts to assert for the first time that Plaintiff's counsel improperly asserted "personal opinions improperly focusing the jury's attention on the moral quality of UnityPoint Clinic's alleged negligence, suggesting UnityPoint Clinic was being dishonest or deceitful, saying anything to get off the hook." (Def. Motion, p. 29). The Defendant points to two statements in support of its morality argument. *Id.* In context, the statements complained of (highlighted in green) are as follow:

> What would Melanie Choos and Mr. Walz say? Well,I think we know. They're going to say whatever is needed for UnityPoint to get off the hook. Walz has been groomed by this firm. He has had case after case after case after case after case after case, and he's only done defense work for this firm, except when the Finley Firm, the med mal firm in Iowa, shared him with another defense lawyer. So we know what Mr. Walz is going to say. But why couldn't he answer Mr. Novotny's questions? Why didn't he review the records from Monday, the 20th? Why didn't

> he review the sworn testimony? Because he was looking at the evidence through a lens -- that helps UnityPoint because he's got a relationship with them. And when he was cross-examined, the foundation crumbled. So we know what he would say. And in terms of what -- what Melanie would say, I -- whatever it takes. Going to go so far as to say, "I do a gait examination on every single patient, and the way I do it is when they're walking in the room." That's how I do it always. All the patients. I'm going to say whatever it takes, and she did.
>
> Well, and, you know, I always do it this way, that way, and that's -- I mean, I'm -- **we don't need to be upset with her for that, or it doesn't mean, you know, she's bad**.

(Tr. Transcr. Vol. V, pp.87-88). Plaintiff's counsel clearly stated that PA Choos was not a bad person and not to be upset with her." This is directly contrary to Defendant's assertion that Plaintiff's counsel was attacking PA Choos' morality. The comment was an attempt to focus on the bias of the expert testimony offered in the case by both of these witnesses. This was especially acceptable in rebuttal after defense counsel unabashedly went after the credibility of each of Plaintiff's experts, including Dr. Galan, where Defense counsel stated:

> Dr. Galan is somebody who we've established has testified a lot. Every time she sat in the courtroom in Iowa, she's testified that the provider has violated the care.
>
> She's paid $6,000 to talk into her Zoom camera to you yesterday from Ohio, and I really want you all to know that that's not somebody that we see in every case, a true professional expert witness. This is what she does. So when she's congratulated for her delivery and her -- the way that she rapid fire, gave all of her opinions at the beginning, there's a reason for that. She's a possessional expert. You got to meet one.

(Tr. Transcr. Vol. V, p.63). Plaintiff's counsel comments were in rebuttal, after Defendant's counsel attacked the credibility of Dr. Galan and others.[18] There can be no doubt, but that defense

[18] At one point Defendant's counsel even attempted to comment on evidence not in the record in an attempt to disparage another one of Plaintiff's experts, PA Mooney:

> Now, since we've gotten to the point where there's been this insinuation that the expert witness that we called is somehow in cahoots with us and he'll do whatever we say, I did want to bring up one thing that occurred during Dr. Mooney's deposition. Do you remember when he was sharing his screen? You know, we've all done this with Zoom from time to time, but he's got these -- these files on the bottom of his browser window that shows you the things that he's been downloading. One of these those things is a Word document, that direct exam. It says: **Direct exam been sent to him by his attorney who is going to be asking him questions**.
>
> MR. ROWLEY: Your Honor, I need to approach.
>
> THE COURT: You may. Give us a moment, folks. (A sidebar was held.)

counsel was implying that Dr. Galan was saying whatever she needed to say because she was a "professional expert" being paid thousands of dollars. This of course was appropriate because the bias and credibility of an expert is appropriate for comment. The comments by Defendant's counsel were no different than saying that the expert opinions offered by PA Walz and PA Choos were essentially "biased" and whatever was necessary to get UnityPoint off the hook.

If it was so improper as to amount to misconduct, it is assumed that Defendant's counsel would not have done the same thing. More importantly, if it had been improper or amounted to misconduct, it is assumed that Defendant's counsel would have objected to the comments. Defendant's counsel did not object and did not timely raise the issue so the court could address it. In addition, after closing argument, there was no motion for mistrial based on the statements. Therefore, the failure to object to the statements has waived error and such comments cannot be used as ground for a new trial. *Kinseth v. Weil-Mclain*, 913 N.W.2d 55 (Iowa 2018); *State v. Davis*, 240 N.W.2d 662, 663-664 (Iowa 1976).

Fourth, the Defendant asserts that Plaintiff's counsel violated the Court's 11/12/22 limine order by "attack[ing] UnityPoint Clinic's defense for not accepting responsibility." (Def. Motion, p. 29). Although the Defendant cites a portion of the transcript from which this allegation is drawn, the Defendant fails to point out that it did not object to the statements when made, did not move for a mistrial surrounding the statements and did not give the Court an opportunity to address the issue or give a curative instruction if necessary before jury deliberations. Although Plaintiff contends that the comments were appropriate and did not violate the Court's limine Order, there

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> THE COURT: To the extent that there was an objection, I will sustain the objection, and move on, Mr. Bergeland.

(Vol. 5, pp. 74-75). Certainly, with tactics like the above, it was appropriate for Plaintiff's counsel, in rebuttal, to comment on the credibility and bias of Defendant's expert witness testimony.

was no objection made before jury deliberations began and error was not preserved. Since error was not preserved, the comments cannot now be used to obtain a new trial. *Kinseth v. Weil-Mclain*, 913 N.W.2d 55 (Iowa 2018); *State v. Davis*, 240 N.W.2d 662, 663-664 (Iowa 1976).

Fifth, the Defendant attempts to obtain a new trial by asserting that Plaintiff's counsel set up a "false equivalency" asserting that "either the Plaintiff brought a frivolous case ... or that UnityPoint mounted a frivolous defense." (Def. Motion, p. 30). The Defendant goes on to assert that "Counsel had no right to create evidence with his arguments, nor inject personal beliefs into arguments, and such melodramatic argument did not help the jury decide the case, but tainted their perception to one focused on emotion rather than law and facts." Although the Plaintiff disagrees with the description provided by the defense of the statements made, once again the Defendant did not object to the contested statement before jury deliberations. Nor did the Defendant afford the Court the opportunity to rule on a proper objection and issue a curative instruction if needed before the jury began to deliberate. Since no timely objection was made and error was not preserved, the comments cannot now be used to obtain a new trial. *Kinseth v. Weil-Mclain*, 913 N.W.2d 55 (Iowa 2018); *State v. Davis*, 240 N.W.2d 662, 663-664 (Iowa 1976).

Sixth, the Defendant asserts that Plaintiff's counsel's reference to the jury as the "conscience of the community" improperly focused the jury "on the greater societal impact" and gave rise to grounds for a new trial. (Def. Motion, p. 31). In support, the Defendant cites the court to the Iowa Court of Appeals decision in *Kipp v. Standford, 2020 Iowa App.*, 2020 WL 3264319. However, *Kipp* does not support the Defendant's request for a new trial because the references by Plaintiff's counsel in the case at bar were not pervasive and were not an attempt to inflame the jury. First, to put the issue into perspective, below are the comments containing the word "community" in the transcript of the closing arguments in this case:

By Attorney Rowley:

Statement No. 1: "We are here to make a **factual decision about what was done in the care** that was delivered on a certain day and whether that standard of care -- whether that standard of care is here or if it's here in **this community**." (Vol. 5, p. 22).

Statement No. 2: "We're going -- We're going to come down on the side of Joseph Dudley on this one. The evidence and the law justifies it's the right thing to do. It's the right things to do. We are the **conscience of the community**. The **conscience of the community**. That's what -- That's what we're going to do." But there's one person who won't. Then you need to come back on Monday. And come back on Monday, and then you can make a decision without that person, and then it's not a unanimous verdict. Does that make sense?" (Vol. 5, p. 27).

Statement No. 3: "It is not just millions of dollars if we're going to be brutally honest about the value of what happened to him. And the value of what's been lost and what will happen to him. That amount of money you can say is just -- is just for this **patient in this community**. Yes. Yes. 2.5 for the past loss of mind and body, everything he's gone through, for that part; 10 for the future, the rest of his life, the 27 years; 2.5 for his past pain and suffering, what he's lost as a -- what he's gone through, what he continues to go through. And for the future, what he's going to go through, that's how it adds up. That's how you say it's reasonable." (Vol. 5, p. 27).

By Attorney Bergeland:

Statement No. 4: "So this effort to identify things that we don't have a relationship with, like priceless works of art, like things that are extraordinarily expensive and have market value in the **world community** that, of course, are not things that we commonly know or encounter. It's an effort to make $25 million seem normal or small. (Vol. 5, p. 84).

In Statement No. 1, Plaintiff's counsel was simply explaining to the jury that the jury was here to determine the "factual decision" as far as what the standard of care was in the community. In Statement No. 2, Plaintiff's counsel was simply explaining how the unanimous verdict instruction applied and if one juror disagreed how that would work. In Statement No. 3, Plaintiff's counsel was simply telling the jury that their verdict was just indicating what the value of damages to Mr. Dudley was in this community, as opposed to the value of damages in the State of Iowa as

a whole or even in the United States or the world community. Lastly, in direct response, Defendant's counsel's use of the same word was intended to assert that the value of things in the "world community" should not be used by the jury in arrive at a value of the damages in this case.

There was no attempt to use the term repeatedly or to play on the jury's obligation to be the conscience of the community. Likewise, there was also no attempt to use the term "community" to inflame the passion or prejudice of the jury. *See, Kiene v. Wash. State Bank*, 955 N.W.2d 203, 213 (Iowa 2021) ("... questions of capacity or undue influence can be decided by a jury as the ***conscience of the community***."); *United States v. Grauer*, 701 F.3d 318, 323 (8th Cir. 2012) ("**Unless calculated to inflame**, an appeal to the jury to act as the ***conscience of the community*** is not impermissible." (internal quotation marks omitted) (quoting *United States v. Sanchez-Garcia*, 685 F.3d 745, 753 (8th Cir. 2012))); *see Garcia v. Trenton*, 348 F.3d 726, 729 (8th Cir. 2003) (noting that the jury "represents the ***conscience of the community***"). There was nothing improper about counsel's statements to the jury that included community. Certainly there is no indication of an attempt to "inflame" the jury by use of the word in such a limited fashion. Indeed, the jury was informed in a video that they were the "conscience of the community."[19]

Although the Defendant attempts to reply on *Kipp v. Standard*, 2020 WL 3264319 (Iowa App. 2020) in support, *Kipp* is in no way similar to the facts in this case. In *Kipp*, counsel's reference to the word "community" was repeated. In analyzing one argument complained of, the *Kipp* court noted:

> Counsel referred to **accountability** and **community** again near the end of his closing argument:
>
> > What they're saying is medicine is hard, and our devices go in the belly, and we can't actually see the tip of the device anymore, so **don't hold us accountable**. Don't make us do things the right way. Don't make us meet the standards of care because we can't see the tip of the tool.

[19] https://www.iowacourts.gov/for-the-public/educational-resources-and-services/videos-and-brochures/we-the-jury/

> When you apply your common sense, **that can't be the standard here in this community**. In **our communities**, doctors are excepted [sic] to do things in a way that is safe, that puts the patient safety first, that avoids known and preventable
> complications, and that's even when they do their first cut. Because if the defense argument was right, then every person who has that initial cut is at risk of a serious, life-changing injury.
>
> Counsel also **evoked a theme of responsibility** while telling the jury a personal anecdote:

Id. at 3-4 (emphasis added). The *Kipp* court went on to give numerous examples of plaintiff's counsel using the word "community," "responsibility" and "accountability." *Id*. The use of these terms was significant and permeated the closing argument and rebuttal. In the case at bar, the word "community" was used just three (3) times by Plaintiff's counsel. The term "responsibility" was used once (1) by Plaintiff's counsel.[20] Lastly, the word "accountable" or "accountability" was not used at all by Plaintiff's counsel. The case at bar is in no way similar to the missteps of counsel in *Kipp*.

The Defendant repeatedly asserts, based on the language of *Kipp*, that Plaintiff's counsel attempted to "inflame the passions and prejudices of the jury in viewing UnityPoint Clinic in a **moralistic and punitive lens**." (Def. Motion, pp. 4, 9, 17, 28, 33, 47, 49, 66, 77 and 79). Since the very basis of Defendant's assertion comes from *Kipp*, and since the holding in *Kipp* is being improperly compared to the circumstances in the case at bar, the discussion in *Kipp* is particularly enlightening:

> Turning to the arguments at issue, the first category of alleged improper statements is Kipp's counsel's **repeated references to accountability**. The district court found these references "conveyed a different meaning or theme than the legal concept of negligence and **suggested to the jury a punitive or moralistic consideration of the potential liability of the Defendant**." Kipp counters that "**accountability**" is synonymous with "liability," and it was permissible for counsel to adopt

[20] "What we have is heard is a failure, during this trial, to accept **any responsibility**, and there have been no smoke and mirrors from us." (Vol. 5, p. 89).

> "**accountability**" as a term for the concept of negligence and liability. While Kipp's claim of the two terms being synonyms may be technically true, we find no abuse of the district court's discretion in finding the manner in which counsel **repeatedly referenced accountability suggested the term meant something other than legal negligence**. Plaintiff's counsel began his closing argument by telling the jurors they held an "awesome power" that included the power to hold Stanford **accountable** for Kipp's injuries. Counsel then explained that "awesome power" also included the power "to be a **hero**." While we express no opinion on whether it is proper to suggest jurors are heroes by performing their civic duties in general, we note the reference in this case suggested the jurors were only heroes if they found in favor of Kipp. It was not an abuse of discretion for the district court to conclude playing on the jurors' notions of pride of being a hero only if they found in favor of Kipp was improper.

Id. at 18-19 (emphasis added). In *Kipp*, it was the "repeated" use of the term "accountable" that potentially injected into the case a "punitive or moralistic" standard different than "legal negligence." As noted, Plaintiff's counsel in the case at bar **never** used the term "accountable" or "accountability" in his closing argument. Thus, the "punitive and moralistic" language relied on by the Defendant and drawn from *Kipp* is misleading and has no applicability to the case at bar.

B. THE DEFENDANT HAS FAILED TO SHOW ANY PREJUDICE FROM STATEMENTS THAT WERE PROPERLY OBJECTED TO AND PRESERVED AS ERROR

To the extent that error was preserved and any comments inappropriate, the Defendant must first show that the comments by Plaintiff's counsel caused prejudice. In *Lange v. Des Moines*, 404 N.W.2d 585 *; 1987 Iowa App. LEXIS 1547, cited by the defense as authority, the court stated the following regarding the issue of alleged improper conduct in closing arguments:

> A trial court has broad discretion in deciding on the propriety of closing arguments to the jury and an appellate court will not reverse unless there has been a clear abuse of this discretion. *Rasmussen v. Thilges, 174 N.W.2d 384, 391 (Iowa 1970)*; *Carter v. Wiese*
> *Corp., 360 N.W.2d 122, 131 (Iowa Ct. App. 1984)*. "**Before a new trial will be granted for misconduct in argument it must appear prejudice resulted or a different result could have been probable but for such misconduct**." *Laguna v. Prouty, 300 N.W.2d 98, 102 (Iowa 1981)* (citing **[**7]** *Rasmussen v. Thilges, 174 N.W.2d at 391*).

> Misconduct consisting of misstatements, or improper remarks or arguments, may be cured through the action of the offending counsel by promptly withdrawing or correcting the improper remarks or misstatements. 88 C.J.S. Trial § 198 (1955); *see also Evans v. Roberts, 172 Iowa 653, 666, 154 N.W. 923, 928 (1915)*; *Atlanta Joint Terminals v. Knight, 98 Ga. App. 482, 491, 106 S.E.2d 417, 425 (1958)*; and *Adair v. Cloud, 354 S.W.2d 866, 871-72 (Mo. 1962)*.
>
> After a careful review we find no abuse in the **trial court's broad discretion** in deciding the propriety of closing arguments. No prejudice resulted from plaintiff's counsel's alleged misconduct in addressing the jury. Defendant argues this claimed "misconduct" overinflated the damage award and therein provided the difference required to grant a new trial. We find the jury award to be reasonable and in no way affected by any misconduct. Further, we note, in response to counsel's objection plaintiff's counsel withdrew and attempted to cure the offending portion of argument. These actions
> were sufficient to cure any possible misconduct.

Id. at 587.

1. The Defendants Have Failed to Show the Elements Necessary to Prove Prejudice

As discussed in Section III.B, in order to show prejudice, the Defendants carry the burden of discussing and proving the elements set forth in *State v. Johnson*, 2020 Iowa App. LEXIS 913, 952 N.W.2d 893, 2020 WL 5650731, p.7 (Iowa App, 2020). The Defendants fail to even address the elements because they reveal that the prejudice is minimal if any. On element one, as discussed above, the "extensiveness of the challenged" conduct or statements were minimal. On element 2, the evidence of liability, causation and damages submitted by the Plaintiff was strong and in some respects, unrebutted by the Defendant. As the Court recalls, the evidence was so strong that the Defendant failed to even call its last two designated expert witnesses. If the Defendant was truly worried about prejudice, it could have done so. Similarly, on element 3, the Defendant had the opportunity to protect itself from the comments it now complains of. It could have objected, moved for a curative instruction and moved for a mistrial. It did none of these.

Regardless, it is important to note here that some of the comments of Plaintiff's counsel were a result of the improper statements by defense counsel when discussing damages and

violating the Golden Rule explicitly. If there were prejudice in the record regarding community and violating the Golden Rule, it was initially placed there by the defense.

In Plaintiff's closing argument, Mr. Rowley suggested a number of $1,000,000 per year to compensate Mr. Dudley for the injuries he had suffered and will suffer in the future. This would equate to 27,000,000. (Vol. 5, pp. 53-56). In closing argument, Defendant's counsel stated the following in suggesting a number for damages:

> **I'm going to suggest an alternative thought process**. I'm going to suggest a number that potentially is at least comprehensible in terms of what impact it would have on an annual basis in a person's life. Because if you did the math from about the time this started -- and I'm not going to put the chart up and go through it because I'm bad at math, and I would fumble that.
> But essentially if you said: We recognize that Mr. Dudley has an injury and we want to compensate him for it, and we do that only because we found that this injury is caused not by meningitis, but by the negligence of an individual, if you found all those things, **$100,000 a year for the time before and his life expectancy comes out to be about $3 million**.
> That's something that I think, in common experience **in your own lives**, **you could at least contemplate** the impact of what that would be. At least contemplate something different than essentially having somebody drop a million dollars a **year onto you**, which I don't think is anything **anybody could commonly say that they've experienced**.

(Tr. Transcr. Vol. IV, pp.85-86). In direct violation of the Golden Rule, Defendant's counsel asked the jury what $100,000 a year would mean based in "common experience in **your own lives**." He then asked them to consider having some drop a million dollars a year "onto you." *See Conn v. Alfstad*, 2011 Iowa App. LEXIS 1090, at p. 5 (violation of golden rule and prejudicial for defense counsel to state: "It would change the lives of **you** and me or anybody in this courtroom to receive that kind of money.") "Plaintiff submits that this is not only close to the line, it steps over it in dramatic fashion.[21] Then and only then did Plaintiff's counsel offer rebuttal argument as to whether or not Mr. Dudley would accept the $100,000 commented on by Defendant's counsel:

[21] Defendants counsel later stated: "This idea of priceless artwork and putting out a huge number, $100 million, $50 million, it provides an opportunity to **ask some questions of yourself.**" (Tr. Transcr. Vol. 5, p. 83).

"No. **You get $100,000**, Joe. But there's a catch, you see. There's bacteria growing in your -- in your body right now, and it's spreading bit by bit. They're going to divide. They're going to multiply. They're going to make you septic. They're going to get into your lungs, everywhere. They're going to beat you down. It's going to permanently damage your brain. You're going to have strokes. It's going to be a real -- real tough year. Actually, you know what? A real tough five and a half years, so I'm going to give you $550,000." "Oh, my God. No way." "It's going to affect your family. It's going to affect how you love and treat your wife. You're going to become isolated. You're not going to think the same. You're going to have nervousness, paranoia, think people are out to get you. It's going to be bad. And then as you age, you're going to lose your mind because of this severe permanent brain damage. But -- And **we're going to give you that for another 27 years too**."

Joe would say, "Get off my front steps and get out of here. Get out of here." UnityPoint goes, "Hold on. Hold on, Joe. Hold on. **A million dollars**. A million dollars for this year. It's a million. Can't -- Joe, you're not going to be able to -- not going to be able to take care of your family and protect your family the way that you can now. You're going to walk with pain. You're never going to sleep the same, never going to think the same. And I promise remembering things -- you're going to end up not knowing where you are or not knowing where you where in your 50s. It's going to just -- going to change your life. And eventually -- but the thing is, Joe, after, you know, a number of years in the future, you're not even going to know because the damage that's done to your brain, but you get a million a year."

If we did a million a year, it would be 27 million plus five and a half, so it would be over 30 million. **So the way he just broke that down shows how unreasonable that number is**.

(Tr. Transcr. Vol. V, pp.95-96). The argument by Plaintiff's counsel was clearly and unmistakably in response to Mr. Bergeland's argument that $100,000 year would be enough in the jury's "own lives." Plaintiff submits the argument was appropriate given the conduct of Defendant's counsel and that Defendant certainly cannot claim prejudice as a result.

2. The Jury Was Properly Instructed to Disregard Counsel's Arguments as Evidence or as the Law of the Case

Prior to Closing arguments, the Court instructed the Jury as follows:

The attorneys for each party will be commenting upon the testimony and exhibits that have been presented during the trial. They will be recalling the evidence now, as you will do later in the jury room during deliberations. They will not intentionally try to mislead you, but if their recollection of the testimony is different than yours, **then you must rely upon your own recollection of the – when deliberating**.

> Again, **closing arguments are not evidence**. Also, **any statements the lawyers make concerning the law are not to be considered by you as the law of the case** since the law is in the instructions I just gave you. The summations are intended to help you understand the contentions of each of the parties, explain the facts in combination with the law. As such, please give them your full attention. Also, folks, just so you know, because I only allow you to take notes during the evidentiary portion of the trial, that's why you don't have your notepads with you currently. When you are taken back to deliberate, you will be given those notepads again.

(Tr. Transcr. Vol. V, pp.15-16). As is customary, the jury was not allowed to have their notepads during closing. This is in accord with the instruction to the Jury that closing arguments are not evidence, do not reflect the law and are simply counsels' recollection of the facts and summation of each parties contention. The Court also properly instructed the jury in its final instructions relating to the fact that counsel's remarks are not evidence. The presumption is that the jury follows the instructions of the Court.

There is simply no evidence or indication that any statements during closing arguments, that were properly preserved by timely objection, caused prejudice to the Defendant. As stated above in *Lange*, the burden is on the Defendant to prove that "prejudice resulted" and that but for the statements, a different result was "probable." There has been no such showing in Defendant's Motion and therefore such Motion must be denied.

V. THE COURT PROPERLY SUSTAINED PLAINTIFF'S OBJECTION TO DEFENDANT'S LOST WAGES ARGUMENT

In Section V of its Motion for a New Trial, the Defendant complains it was not allowed to offer argument regarding the absence of a lost wage claim from Mr. Dudley. During closing, defense counsel started down this line:

> It was stated earlier: Should he really be working? Well, why is he not asking for lost wages? He missed three months of work. Why is he not asking for money that he would have been able to earn otherwise but for these injuries?

(Tr. Transcr. Vol V, 83:21-25). An objection to this argument was sustained. Now, pointing to Plaintiff's counsel rhetorically asked question "Should he even be working?"[22], the Defendant asserts this argument should have been allowed based on the doctrine of curative admissibility.

The Defendant's request for a new trial on this basis must fail for at least three reasons. First, Plaintiff's counsel's rhetorical question was part of a larger line of argument directed towards supporting Plaintiff's future loss of function and pain and suffering claims. It had nothing to do with some "grander scheme to present Plaintiff's damages as worse than what the evidence showed to inflame the jury." *See* Def. Motion for New Trial, p.53. Second, the doctrine of curative admissibility is applicable to *evidence* and closing argument is decidedly not evidence. The doctrine is simply irrelevant. And finally, a new trial is not warranted because defense counsel failed to properly respond or rebut the comment.

A. PLAINTIFF'S COUNSEL'S RHETORICAL QUESTION WAS PART OF A LARGER LINE OF ARGUMENT AIMED AT PLAINTIFF'S FUTURE LOSS OF FUNCTION CLAIM

At all times, this case was tried without any claim by Mr. Dudley for economic damages, including lost wages or loss of earning capacity. At no point did Plaintiff present evidence of Mr. Dudley's lost income due to his hospitalization or brain injury, nor did the Plaintiff offer any testimony that Mr. Dudley has sustained a reduction in his power to earn income in the future. There were no dollar signs or numbers ever discussed regarding these issues. That said, Plaintiff

[22] In context, as discussed in more detail below, the statement by Plaintiff's counsel acknowledged that Joe was working, but that he had risks associated with his physical injuries and loss of function, for which a claim was being made:

> What's he left with? **Deafness**. He has **pain**. Talked about the pain. Should he even be working? I mean, he's got to provide for his family. Does his best, but you heard **he falls.** He's had **so many falls**. Well, falling when you get older? Falls -- Falls are dangerous, aren't they? He has a **fall risk**.

(Tr. Transcr. Vol V, 55:9-14). Joe was a hard-working man that needed to support his family and was doing that. So no wage loss claim was made. But he did have loss of function and risk of future injury as a result that would be part of the claims that were actually being submitted to the jury.

did make past and future loss of function of full mind and body claims, plus past and future pain and suffering claims. *See* Jury Instruction No.19.

As described by the Iowa Supreme Court:

> The element of loss of function of the body is broadly inclusive of various physical injuries. We are convinced, however, that this element of damage relates to functional impairment as opposed to structural impairment of the body. It is the inability of a particular body part to function in a normal manner.

Brant v. Bockholt, 532 N.W.2d 801, 804-805 (Iowa 1995). For better or worse, the evidence for this particular item of damage is closely related to the evidence underlying a claim for loss of future earning capacity. "Impairment of physical capacity creates an inference of lessened earning ability in the future." *Bergquist v. Mackay Engines*, 538 N.W.2d 655, 659 (Iowa Ct. App. 1995) (citing *Holmquist v. Volkswagen of America*, 261 N.W.2d 516, 525 (Iowa App. 1977)).

> Physical pain and suffering includes bodily suffering, sensation, or discomfort. Mental pain and suffering includes mental anguish, anxiety, embarrassment, loss of enjoyment of life, a feeling of uselessness, or other emotional distress. Damages for physical and mental pain and suffering cannot be measured by any exact or mathematical standard and must be left to the sound judgment of the jury.

Estate of Pearson ex rel. Latta v. Interstate Power & Light Co., 700 N.W.2d 333, 347 (Iowa 2005) (internal citations omitted).

To support its claims, Plaintiff offered testimony of Mr. Dudley's condition prior to the injury, plus his physical and mental impairments after the injury, including post-injury issues that he has encountered as a drywall installer. For example, his spouse, Sarah, testified to how Mr. Dudley still works and does everything he can to provide for the family, but he cannot do it the way he used to. As a result, she has had to step up and do more herself. (Tr. Transcr. Vol. III, 207:11-22). A co-worker, Mr. Robert Johnson, testified to many changes in Mr. Dudley, including his inability to work at any height and how the movement of hanging plastic makes him dizzy. (Ct. Ex. 3, 13:13-14:7). Mr. Johnson also described for the jury how Mr. Dudley has told him he feels

bad about his work limitations, and it bothers him that he cannot do things. (Ct. Ex. 3, 16:1-17; 17:21-18:6). Plaintiff also presented a significant amount of expert testimony regarding Mr. Dudley's physical and mental impairments. Plaintiff's expert neuropsychologist testified to how Mr. Dudley demonstrates the following impairments which will likely get worse as he ages:

- Impaired ability to understand spoken information
- Impaired ability to learn tasks
- Impaired auditory memory
- Impaired problem-solving skills
- Impaired working memory (ability manipulate information in his mind)
- Impaired ability to express ideas
- Triggered by fast-moving stimuli
- Decreased visual activity
- Emotional problems, including mood swings, yelling and difficulty sleeping
- Requiring frequent reminders, forgetfulness
- Dizziness
- Inability to sustain focus

(Tr. Transcr. Vol. III, 122:23-123:14; 125:10-126:21); *See also* Plaintiff's Resistance to Defendant's Motion for Remittitur. All of this evidence, and more, was necessary to support Mr. Dudley's claims for functional impairment, bodily suffering, mental anguish, anxiety, embarrassment, feeling of uselessness, etc.

Within this context, Plaintiff's closing argument included a line of reasoning regarding Mr. Dudley's loss of health, mind and body:

> Joe Dudley is irreplaceable. Joe Dudley is a human being. And what he has lost and what his damages are, those are the most precious assets that he had. A lot of people might say, you know, precious assets -- **health, person's mind, mind and body**. And the Iowa law recognizes that, and the **instruction on damages says "Loss of mind and body,"** and he has loss of his mind, and he will have loss of his mind.
>
> And **maybe in ten years**, he doesn't even remember anymore because he has **severe permanent brain damage**. You might, back there in the jury room, say that this is an **end-of-life injury**.[23] This is end-of-life damage with what's happened to his

[23] In its Motion, the Defendant takes out of context the "end-of-life" comment and attempts to make it about Joe's loss of wages and failure to make a claim. However, when seen in context, the "end-of-life" comment was made regarding what could happen "in ten years" if Joe "doesn't remember anymore because he has severe permanent brain damage." This comment was in no way intended to refer to the present or Joe's ability to work. Defendant's attempt to take

> brain. It's bad. It was the most precious thing he had because that's how he takes care of his family; that's who he is. And it's been tore up, and it's only going to get worse. Not a single witness that the defense called -- that it's not going to get worse. It's going to get worse. We have heard that evidence. So that $25 million isn't an unreasonable number, you might say. You might say it ought to be more.
>
> What's he left with? **Deafness.** He has **pain**. Talked about the pain. Should he even be working? I mean, he's got to provide for his family. Does his best, but you heard he **falls**. He's had so many falls. Well, falling when you get older? Falls -- Falls are dangerous, aren't they? He has a **fall risk**.

(Tr. Transcr. Vol. V, 54:8-55:14) (emphasis added).

The full context makes it clear that Plaintiff's counsel "Should he even be working?" comment came within the broader context of discussing Joe's subjective damage claims – referencing how the mind is a precious asset and now, due to his injury, his life will never be the same (i.e. end of life *as he knew it* injury), discussing how Joe now has pain, and is a fall risk. Rhetorically asking whether Joe should be working was an attempt to highlight the progressive nature of Joe's brain injury (as testified to by the experts) and the dangers he now faces in the form of dizziness, loss of balance and thus falls. The five words of "Should he even be working?" was clearly just a small line in a larger argument aimed at Joe's loss of function and his regrettably dim future.

> The single purpose of closing argument is to assist the jury in analyzing, evaluating, and applying the evidence. *State v. Melk*, 543 N.W.2d at 301. Thus, when exercising its discretion in determining the proper scope of closing argument, the trial court should give counsel the latitude to make comments and arguments within the framework of the legal issues and evidence introduced at trial. *Id*.; *State v. Veal*, 564 N.W.2d 797, 811 (Iowa 1997). This latitude is compatible with effective advocacy. *Id*.

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statements out of context and mix and match them in a way that fits its agenda and argument should be rejected by this Court.

Lane v. Coe Coll., 581 N.W.2d 214, 218 (Iowa Ct. App. 1998). The comment was well within the evidence introduced at trial, and given that counsel is afforded wide latitude in analyzing, evaluating and applying the evidence, there was nothing improper about the rhetorical question.

Conversely, it takes some creativity to imagine the "Should he even be working?" comment as any sort of attempt to make a backdoor loss of past wages or future earning claim. Plaintiff never shied away from the evidence that Mr. Dudley was a hard-working individual that *continued* to work. Moreover, there was no effort to offer evidence or argument of Joe's worsened financial status or inability to pay bills or decreased earnings. Finally, Plaintiff's closing did not include a recurring theme or emphasis on Joe's inability to work. As a result, it is difficult to understand how the Defendant concludes Plaintiff was improperly backdooring a loss of future earning claim. This assertion simply has no basis when the record is considered as a whole.

B. THE DOCTRINE OF CURATIVE ADMISSIBILITY IS INAPPLICABLE TO CLOSING ARGUMENTS

In seeking a new trial based on the rhetorical question in Plaintiff's closing, and the Court's sustaining an objection to its attempted rebuttal argument, the Defendant relies almost exclusively on the doctrine of curative admissibility. Its own Motion explains the doctrine as follows:

> The doctrine of curative admissibility applies when an adversary has introduced "door opening" **evidence**. *State v. Turecek*, 456 N.W.2d 219, 225 (Iowa 1990). "The rule in Iowa is that when one party introduces inadmissible **evidence**, with or without objection, the trial court has discretion to allow the adversary to offer otherwise inadmissible **evidence** on the same subject when it is fairly responsive." *Vine St. Corp. v. City of Council Bluffs*, 220 N.W.2d 860, 864 (Iowa 1974). In other words, "when one party introduces inadmissible **evidence** the opponent under proper circumstances may be entitled to rebut this proof by other inadmissible **evidence**." *Id.*; *Iowa Power & Light Co. v. Stortenbecker*, 334 N.W.2d 326, 332 (Iowa Ct. App. 1983) (Once inadmissible **evidence** is admitted, "under the doctrine of curative admissibility the opponent is entitled to rebut the **evidence** by introducing other inadmissible **evidence**."); *Shankle v. Armour Spray Sys., Inc.*, 672 N.W.2d 334, 2003 WL 22438869, *3 (Iowa Ct. App. 2003) ("[O]ne who induces a trial court to let down the bars of a field of inquiry that is not competent or relevant to the issues cannot complain if his adversary was also allowed to avail himself of

> the opening."). "In theory, the admission of inadmissible **evidence** allows the injured party to cure the problem and "clear up the false impression" or to "clarify or complete an issue opened up by [opposing] counsel." *United States v. Womochil*, 778 F.2d 1311, 1315 (8th Cir.1985).

Def. Motion for New Trial, pp.53-54. (emphasis added). It is axiomatic that Plaintiff's closing argument was not evidence and quite simply, the doctrine is wholly inapplicable.

C. Defense Counsel Failed to Properly Respond to the Rhetorical Question and Instead Made an Improper Argument of His Own

When Plaintiff's counsel rhetorically asked "Should he even be working?", defense counsel had several proper options available to him, none of which were elected. If defense counsel truly thought the statement was directed to a lost earning claim that was not being asserted, he could have immediately objected to Plaintiff's counsel's argument and identified it as violating the Court's order in limine. Although this was the route taken by Plaintiff's counsel during Defendant's closing argument, defense counsel chose not to object. Alternatively, or in conjunction with a timely objection, defense counsel could have also requested a curative instruction from the Court following Plaintiff's closing directing the jury to disregard any argument about economic damages. *See Kipp v. Stanford*, 949 N.W.2d 249 (Iowa Ct. App. 2020) ("…the district court gave a curative instruction following plaintiff's counsel's closing argument…"); *Morrison v. Grundy Cnty. Rural Elec. Coop*., 927 N.W.2d 675 (Iowa Ct. App. 2019) (citing *Kinseth v. Weil-McLain*, 913 N.W.2d 55, 73 (Iowa 2018)) ("We presume juries follow their instructions."). Defendant's counsel did not request such an instruction.

If the defense counsel did not wish to take either of these routes, defense counsel could have also *properly* rebutted the "Should he even be working?" comment by responding with relevant and nonprejudicial argument of his own. Defense counsel could have explained to the jury what damages the Court was allowing it to award, highlighting that economic damages were not allowed to be awarded. Similarly, defense counsel could have kept his argument within the

evidence and highlighted the testimony that Mr. Dudley was continuing to maintain his employment. Defense counsel did none of these things and instead immediately tried to prejudice the Plaintiff by highlighting Mr. Dudley's lack of a past lost wage claim; an argument he knew violated a motion in limine. For all these reasons it was proper to sustain Plaintiff's objection and a new trial is not warranted.

VI. THERE WAS NO IMPROPRIETY DURING PLAINTIFF'S OPENING ARGUMENT AND A NEW TRIAL IS NOT WARRANTED

In seeking a new trial, the Defendant complains that Plaintiff's opening argument included (1) the display of MRI stills taken from brain imaging performed on Mr. Dudley, and (2) short excerpts of sworn testimony provided by Defendant's retained or designated expert witnesses. These complaints continue to be without merit, were properly overruled, and in some instances error was never preserved. As the Court noted on the record at trial, (1) the Plaintiff had a good faith belief that the evidence was going to be admissible without objection, and (2) there was no surprise or prejudice as the information had previously been exchanged. (Tr. Transcr. Vol. II, 72:11-73:1). The Court's ruling was well within its wide discretion:

> Our supreme court has stated that "[t]he **scope of opening statements lies within the discretion of the trial court**; we review for abuse of discretion." *State v. Veal*, 564 N.W.2d 797, 803 (Iowa 1997), overruled on other grounds by *State v. Hallum*, 585 N.W.2d 249, 253-54 (1998). Counsel may only refer to evidence that he or she believes has **a good faith belief will be offered and admitted**. *Id*. at 797.

State v. Hoosman, No. 09-0067, 2010 Iowa App. LEXIS 303, at *20 (Ct. App. Apr. 21, 2010) (emphasis added).

In *State v. Miller*, the Iowa Court of Appeals had an opportunity to address the purpose of opening statements. 359 N.W.2d 508 (Iowa Ct. App. 1984). A defendant convicted of 2nd degree murder appealed from the trial court decision barring his counsel from mentioning the victim's

propensity for violence during opening statements. *Id*. at 509-510. On appeal, the defendant argued this information, though formally in evidence, was clearly admissible and thus ripe for comment during opening. *Id*. at 510. The *Miller* court agreed, stating:

> The purpose of the opening statement is to allow the defendant to state the nature of his defense and the evidence he intends to offer in support of it. *United States v. Freeman*, 514 F.2d 1184, 1192 (10th Cir.1975). Its scope and extent rests within the discretion of the trial court. *Id*.; 23A C.J.S. Criminal Law § 1086 at 109-110 (1961). In *State v. Clark*, the supreme court recognized that **"counsel are not held to the utmost strictness"** when giving opening statements. 160 Iowa 138, 144, 140 N.W. 821, 823 (1913). The court reasoned:
>
> > [counsel] may have been misinformed or deceived by their witnesses, and are not expected to be able to forsee, in all cases, what the ruling of the court will be when the evidence is offered; the court is not familiar with the case at the commencement of the trial, and may not know the bearing of the evidence until the case develops.
>
> *Id*.
>
> In light of these principles, this court believes that defendant should have been able to discuss prior violent acts of the victim. The record reflects that defendant fully intended to introduce such evidence at trial to show his state of mind at the time the crime was committed. Furthermore, the evidence was extremely relevant to the defendant's claim of self-defense.
>
> The State argues that the admissibility of the evidence during trial was uncertain and, therefore, any references thereto should properly have been avoided during opening statement. In this respect, the supreme court has stated: "If it is doubtful whether evidence referred to in the opening statement is admissible, the better rule is to withhold the statement or so much as is doubtful until the court can determine." *Id*. **While recognizing the propriety of this principle, we are of the opinion that there was little uncertainty as to the admissibility of the evidence in this particular case**.

Id. (emphasis added).

In sum, in Iowa, the trial court is awarded wide discretion with respect to opening arguments, and moreover, counsel is afforded wide latitude to apprise the jury of evidence that is assuredly *admissible* (as opposed to admitted). Here, there was no indication that the Defendant had any objection to the admissibility of the MRI still images or the sworn deposition testimony.

Regarding the MRI stills, medical imaging is clearly a part of a patient's medical records. See 45 C.F.R. §164.501 ("[T]he term record means any item, collection, or grouping of information that includes protected health information and is maintained, collected, used, or disseminated by or for a covered entity.") The Defendant in this matter identified Mr. Dudley's medical records as a potential exhibit. At no point was there any indication that Defendant harbored any identification, foundation, or any other admissibility objection to the MRI stills. Indeed, Dr. Janus initially referred to the MRI in his testimony when looking at the areas of Mr. Dudley's brain that had been damaged. (Tr. Transcr. Vol. III, 15:14-23). When Plaintiff's counsel went to publish the scans before the jury and further question Dr. Janus, there was no objection by Defendant's counsel. (Tr. Transcr. Vol. III, 16:12-23). This is definitive proof that all counsel clearly believe that the actual MRI images would be admitted into evidence. At this point, Plaintiff's counsel "good faith belief" that the evidence would be admitted was confirmed.[24]

Regardless of whether the imaging was ultimately formally admitted, there was little uncertainty about its admissibility. Moreover, Plaintiff's counsel certainly had a good faith basis *at the time of opening statements* to believe the imaging would be offered and accepted. Indeed, the brain strokes undisputedly visible on the imaging and unrelated to the undisputed meningitis were central to this brain injury case and were specifically discussed in medical records identified in Defendant's proposed Exhibit B[25].

[24] As discussed above in section III of this Resistance, Plaintiff ultimately agreed to withdraw Dr. Janus' testimony and the actual MRI imaging was not admitted. However, this does not affect the analysis at the time of opening statements and the "good faith belief" that the MRI was admissible and would be given to the jury.

[25] See *Defendant's First Amended Witness and Exhibit Lists*, filed 11/7/22 containing Exhibit B: "Iowa Methodist Medical Center, pages 1-2011. Exhibit B, p. IMMC 104 specifically contained the 3/1/2017 written report of the MRI of the Brain. Clearly, all parties expected this information to come in during trial.

Regarding the use of video deposition excerpts of Defendant's experts, the Plaintiff asserts that error was not properly preserved. Four short video clips were played, with the first one being from PA Choos. (Tr. Transcr. Vol.II, 33:17- 36:13). The Defendant did not object to the playing of the video clips or raise the issue at the time so that the Court could address it. To the extent that it was error, an objection was required and the Court given the ability to address it at the time. More importantly, when the video clips containing testimony of Defendant's expert witnesses were played, Defendant's counsel was the only person in that Courtroom who would have known of the possibility that the expert might not be called to testify. Even so, no objection was made at the time so that the Court could be made aware of the possible issue. The proper action would have been for the Defendant to object and alert the Court that there was a possibility that these experts might not be called to testify. Instead, the Defendant allowed the Court and Plaintiff's counsel to continue to believe that these witnesses would be called to testify and that Plaintiff's counsel's "good faith belief" was well-founded. Instead, Defendant said nothing. Not until the end of the opening statements did Defendant's counsel make the following statement:

> MR. BERGELAND: Thank you, Your Honor.
>
> During opening statement of the plaintiff very early in the presentation, there was a -- **MRI cuts** were shown on the screen. **I objected to those** as substantive evidence in a case and objected generally. **I want the record to reflect to evidence being shown** into the case that also included the evidence that we would have then went on to see **in a form of deposition excerpts**. **I didn't feel the need**, given the Court's ruling, to specifically make additional **objections** to those.

(Tr. Transcr. Vol.II, 69:12-21). Defendant's counsel never objected to the video clips. Even in the above statement there was no objection made and no ruling by the Court. At that point, if the Defendant truly felt an objection was necessary, one should have been made and a curative instruction requested. That was not done, and error was not preserved.

In addition, the Defendant simply ignores the Iowa Rules of Civil Procure when it claims videotaped depositions are prejudicial, or that repetition of testimony is prejudicial. The use of depositions at trial is governed by Iowa R. Civ. P. 1.704, which states in relevant part:

> **Rule 1.704 Use of depositions**. Any part of **a deposition**, so far as admissible under the rules of evidence, **may be used upon the trial** or at an interlocutory hearing or upon the hearing of a motion in the same action against any party who appeared when it was taken, or stipulated therefor, or had due notice thereof, to do any of the following:
> **…**
> **1.704(4) For any purpose, if it was taken of an expert witness specially retained for litigation**; or the deponent was a health care practitioner offering opinions or facts concerning a party's physical or mental condition.
> …

Iowa R. Civ. P. 1.704 (2022) (emphasis added).

Clearly, under certain circumstances, a deposition – recorded as allowed by the rules – can be used "For any purpose…" upon the trial of the matter. Based on these rules, and the Defendant identifying Jill Ferry, PA and Dr. David Stilley as testifying experts on its witness list as "witnesses to be offered at trial," Plaintiff's counsel had a good faith belief the video testimony of Defendant's expert would be admissible since Plaintiff's counsel fully intended to use it in cross-examining Defendant's listed experts. Based on this, and well-established Iowa law, the Court made the following ruling on Defendant's objection:

> THE COURT: Sure. Let me address that – just both issues. There are two issues rolling around. One is the issues as far as what was shown to the jury. We had a sidebar and discussed that briefly. The Court overruled that objection in part -- in two parts -- just so it's clear for purposes of the record.
>
> One, I believe that if **there is a good faith belief that the exhibit is going to be admissible over any objection**, it can be used. Secondly, it was the understanding of the Court in that discussion of the bench conference that, in fact, **there had been some exchanges of that information**. So as far as that objection, the Court overruled it. And, quite frankly, the remainder of it, again, I believe were offered -- were exhibits and things that were going to be **coming in without really any objection**.

At no time did Defendant's counsel indicate that the Defendant may not call experts who had been designated under *Iowa Code* §668.11 and who were listed as experts to testify before the jury. The fact that Defendant ultimately decided to pull their identified witnesses does not alter the analysis of what Plaintiff's counsel believed at the time of his opening statement and how the Court ruled.

Furthermore, this Court should take note that the Defendant cites no Iowa caselaw for its position, but instead relies upon selected old, out-of-state opinions to support its argument that the Court erred in allowing Plaintiff to show the MRI images and play the short expert clips. More recent, modern case law contradicts Defendant's statement that "the overwhelming majority of courts to discuss the issue are in agreement that it is improper to display testimony during opening." *See* Def. Motion for New Trial, p.58. For example, a Kentucky federal district court rejected the Defendants' primary authority – *Hynix Semiconductor Inc. v. Rambus, Inc*., 2008 W.L. 190900 *1 (N.D. Cal. Jan. 21, 2008) – stating:

> The Court is cognizant of the *Hynix* court's concern that the **use of videotaped deposition excerpts during opening statements or closing arguments** could emphasize testimony by sheer repetition. However, **the Court is aware of no authority prohibiting such a practice**. In fact, the district court in *Hynix* acknowledged that "[t]here is sparse case law on whether a court should permit parties to play portions of video depositions in their opening statements." 2008 U.S. Dist. LEXIS 51006, 2008 WL 190990, at * 1. The *Hynix* court even referred to "one respected treatise [that] recommends the practice as 'very effective' advocacy." *Id.* (referencing Jones, Rosen, Wegner, & Jones, *Rutter Group Practice Guide: Federal Civil Trials* & Evidence ¶¶ 6:272-6:275 (2007)). Moreover, **it appears that other courts have condoned the practice.** *See MBI Acquisition Partners, L.P. v. Chronicle Publ'g Co.*, 2002 U.S. Dist. LEXIS 28458, 2002 WL 32349903, *1 (W.D. Wis. Oct. 2, 2002).

Sadler v. Advanced Bionics, LLC, No. 3:11-CV-00450-TBR, 2013 U.S. Dist. LEXIS 46637, at *8-9 (W.D. Ky. Apr. 1, 2013) (emphasis added).

Another example comes from Mississippi in 2019:

> **The "general rule ... followed in the majority of federal and state jurisdictions" is that an attorney is "entitled to read from or display documents and other exhibits that you expect to be admitted into evidence**." Joel Simberg, Displaying Digital Media During Opening Statements: Tactics, Techniques, and Pitfalls, 60 DEPAUL L. REV. 789, 790-91 (2011). As Kelli is entitled to display the video as an exhibit—assuming it is admitted into evidence—the Court concludes that her counsel will be permitted to play it during her opening statement.

Goode v. City of Southaven, No. 3:17-CV-60-MPM-RP, 2019 U.S. Dist. LEXIS 36828, at *9 (N.D. Miss. Mar. 7, 2019) (emphasis added). Other courts have held similarly:

> "[N]o statute, rule of procedure, or case law in Pennsylvania specifically precludes a [party] from displaying a tangible piece of evidence to the jury during an opening statement as long as that evidence will eventually be admitted without objection." *Id*. at 537-38, 919 A.2d at 950. Therefore, our Supreme Court determined, "[W]here the tangible piece of evidence falls within the scope of material the [party] intends to introduce at trial and its display during the opening argument does not inflame the passions of the jury, **the display of that piece of evidence is wholly proper."** *Id*. at 538, 919 A.2d at 950.

Commonwealth v. Hatcher, No. 27 WDA 2013, 2013 Pa. Super. Unpub. LEXIS 2393, at *5 (Nov. 6, 2013) (emphasis added).

> We are persuaded by the reasoning of these cases and thus conclude, on the facts presented here, that **the trial court did not abuse its discretion in allowing the prosecution to show the photograph at issue during its opening statement**. The primary purpose of an opening statement is to provide the jury with a brief introductory outline of what counsel expects the evidence will show, and **the photograph at issue illustrated what the prosecution intended to show here**. *See Bustos*, 725 P.2d at 1177. Moreover, Harmon has not demonstrated that the photograph was so inflammatory that the trial court's decision to allow the prosecution to use it during opening statement was an abuse of discretion.

People v. Harmon, 284 P.3d 124, 129-30 (Colo. Ct. App. 2011) (emphasis added).

Finally, even if the Court reverses course and concludes it abused its discretion in allowing the MRI stills and sworn testimony excerpts during Plaintiff's opening, the Defendant simply cannot show prejudice warranting a new trial. In the matter of *Gray v. Council Bluffs Cmty. Sch. Dist.*, 725 N.W.2d 659 (table), 2006 Iowa App. LEXIS 1971 (Iowa Ct. App., Nov. 16, 2006) (unpublished), the parents of a minor student sued the school nurse for nursing malpractice. *Id*. at

*1. After a defense verdict, the parents appealed, in part, on the basis that defense counsel improperly read a portion of an expert report during his opening statement; a report that was not admitted into evidence. *Id*. at *10. The *Gray* court summarized the plaintiff's argument as follows:

> During his opening statement, defense counsel briefly mentioned a report prepared by one of the plaintiffs' witnesses, Dr. Joseph Evans. The report indicated Joshua was born prematurely, had a number of severe diabetic reactions throughout his life, and has intellectual deficits. Defense counsel said Dr. Evans concluded it was not possible "to single out any one episode as a cause of his limited intellectual functioning." **The report from Dr. Evans was never admitted into evidence, and the plaintiffs contend defense counsel improperly provided the jury with information regarding causation that the jurors should not have heard**.

Id. (emphasis added). This is essentially the same argument made by the Defendant in the case at bar. The Defendant complains that the jury saw MRI images that were not admitted to evidence, and/or the jury heard expert opinions not admitted into evidence. In *Gray*, the request for a new trial was quickly rejected:

> We review the district court's ruling on allegedly improper comments made by legal counsel during opening statements for abuse of discretion. *Moore v. Vanderloo*, 386 N.W.2d 108, 116 (Iowa 1986). Before we will grant a new trial for misconduct in argument, it must appear that prejudice resulted or a different result would have been probable but for the misconduct. *Id*. at 116-17.
>
> The defendants contend the Grays failed to preserve error regarding this issue. They note that Dr. Evans's report was exchanged by the parties during discovery and was referred to in the doctor's pretrial deposition. They also note the report was listed as a trial exhibit for which foundation was waived, and no objections to the report were made prior to trial. **Even if we assume without deciding that the reference to Dr. Evans's report in opening statement was an error which was properly preserved, we conclude the plaintiffs failed to demonstrate any prejudice.**
>
> The trial court informed the jury that the **statements of the attorneys were not to be considered as evidence**. Dr. Evans's report was mentioned briefly at the very beginning of a four-week trial. The report did not come into evidence as an exhibit, so the jury never saw the language of which the plaintiffs complain. In addition, both sides presented several other witnesses in support of their respective positions regarding medical causation. …

Id. at *10-12.

In the case at bar, there are many similarities to the *Gray* matter. Here, the "allegedly improper" information presented during opening argument was exchanged by the parties during discovery and not a surprise. Moreover, the information was clearly admissible, with objection either being waived or meritless. In addition, the "allegedly improper" information was shown to the jury at the very beginning of trial and several other witnesses covered the same ground. Specifically, Plaintiff had multiple expert witnesses testify to both the standard of care and brain damage visible on MRI. Finally, the Court in this matter appropriately cautioned the jury on the record regarding opening statements and it is presumed the jury followed the Court's instructions. *See State v. Sanford*, 814 N.W.2d 611, 620 (Iowa 2012) ("Jurors are presumed to follow instructions"). As in *Gray*, the Court instructed the jury:

> THE COURT: With that, that completes the preliminary instructions. Give me one moment here. At this time, the parties will proceed with their opening statements.
>
> As I said previously, an opening statement is basically a summary of what the attorneys believe that the evidence will present, they will present to you, and what the evidence will show to you during the course of the trial. It's intended to give you an overview of the evidence so that you can put things in context later as you hear the evidence.
>
> Again, as I have said multiple times, the statements of the attorneys during these opening statements and closing statements are not evidence in and of themselves. They are merely the statements of the attorneys. They are not the law because I will give you the law later on.

(Tr. Transcr. Vol.II, 6:1-17). Further, the Court did not allow the jury to have their notebooks during opening statements, since evidence was not being presented. The Defendant simply cannot show any prejudice from the opening statements and a mistrial on this ground would not be proper.

VII. THE DEFENDANT WAS NOT ENTITLED TO A DIRECTED VERDICT, AND CANNOT BE ENTITLED TO JUDGMENT NOTWITHSTANDING THE VERDICT

The Defendant seeks a new trial based "on any ground raised" in its Motion for Judgment Notwithstanding the Verdict. *See* Def. Motion, p.62. Plaintiff has fully resisted the Defendant's Motion for Judgment Notwithstanding the Verdict and hereby incorporates by reference all arguments asserted within said Resistance. In short, Defendant was not entitled to a directed verdict at trial, and since the Court did not make a mistake in denying the Motion for Directed Verdict, the Defendant is not entitled to judgment notwithstanding the verdict.

VIII. DEFENDANT'S ASSERTION THAT THE COURT'S JURY INSTRUCTIONS REQUIRE REVERSAL LACKS MERIT AND NO REVERSAL IS REQUIRED

In point VIII of its Motion, Defendant asserts that the verdict must be reversed and the case retried because the Court allegedly erred in instructing the jury on negligence. The instruction given by the Court was as follows:

> 1. Melanie B. Choos, PA-C. was negligent in providing medical care to Mr. Dudley in one or more of the following manners:
>
> a. Failing to conduct a proper and complete examination; or
> b. Failing to order a CBC blood test; or
> c. Failing to refer the Mr. Dudley to the Emergency Room or physician for further evaluation or testing; or
> d. Failing to properly diagnose Mr. Dudley; or
> e. Failing to prescribe antibiotics; or
> f. Discharging Mr. Dudley with the discharge instructions that he was given.

(Instruction No. 12). Defendant's Motion asserts that the Court erred:

1. in giving instruction 1(e) regarding the failure to give antibiotics;
2. in giving instruction 1(f) regarding the improper discharge instructions;
3. in giving instructions (a)-(b) and (d)-(f), since the failure to refer to the ER was the main claim.

(Def. Motion, pp. 63-64). The Defendant's Motion contains these broad claims and then fails to discuss the evidence at all. More importantly, the Defendant fails to even address whether or not error was preserved on the now asserted grounds for a new trial. Plaintiff will address these in turn.

Defendant also cherry picks its recitation of the law and inadequately provides the Court with the full citation of the law as applicable to it's assertion.

A. APPLICABLE IOWA LAW ON THE GIVING OF JURY INSTRUCTIONS AND PRESERVATION OF ERROR

In *Alcala v. Marriott Int'l Inc.*, 880 N.W.2d 699 (Iowa 2016), the court recently addressed both the giving of instructions as well as the trial court's refusal to give instructions, as well as the standard of review for both. With respect to the "requirement" to give an instruction when the evidence supports it, the *Marriott* court stated:

> "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." *Sonnek v. Warren, 522 N.W.2d 45, 47 (Iowa 1994)*; *accord Weyerhaeuser Co. v. Thermogas Co., 620 N.W.2d 819, 823-24 (Iowa 2000)*; *Herbst v. State, 616 N.W.2d 582, 585 (Iowa 2000)*. **The verb "require" is mandatory and leaves no room for trial court discretion**. Thus, we clarify today that absent the discretionary component present in *Langlet*, we review **refusals to give a requested jury instruction for correction of errors at law**. [*string cite omitted*]

Id. at 707-708 (emphasis added). When a party claims error in the instructions, it must show that its preserved error by making a specific objection sufficient to alert the court to the error. As stated in *Olson v. Sumpter*, 728 N.W.2d 844 (Iowa 2007):

> Generally, under Iowa Rule of Civil Procedure 1.924, **error in jury instructions is waived if not raised before closing arguments are made to the jury**. *See* Iowa R. Civ. P. 1.924 (stating that objections to jury instructions must be made and ruled on before arguments to the jury and that "**[n]o other . . . objections shall be asserted thereafter, or considered on appeal**"); *Julian v. City of Cedar Rapids*, 271 N.W.2d 707, 708-09 (Iowa 1978) (reversing the district court's grant of a new trial on grounds not raised before submission of instructions to the jury); *Peterson v. First Nat'l Bank of Iowa*,392 N.W.2d 158, 161 (Iowa Ct. App. 1986) (same).
> ***.
> Even a **timely objection to jury instructions will not avoid waiver of error if the objection is not sufficiently specific**. The objecting party **must "specify [ ] the matter objected to and on what grounds.**" Iowa R. Civ. P. 1.924. The objection must be "'**sufficiently specific to alert the trial court to the basis of the complaint so that if error does exist the court may correct it before placing the**

> **case in the hands of the jury**.'" *Boham v. City of Sioux City*, 567 N.W.2d 431, 438 (Iowa 1997) (quoting *Moser v. Stallings*, 387 N.W.2d 599, 604 (Iowa 1986)).

Id. at 848-849 (emphasis added). "Jury instructions must be considered as a whole, and if the jury had not been misled, then there is not reversible error. *Thavenet v. Davis*, 589 N.W.2d 233, 236 (Iowa 1999). "When the objection is to the sufficiency of the evidence supporting an instruction, the complaining party **must specify** that portion of the instruction **lacking evidentiary support and the particular factual deficiency**." *Boham v. City of Sioux City*, 567 N.W.2d 431, 438 (Iowa 1997). "A party **may not amplify or change an objection** on appeal." *Id*. (citing Moser v Stallings, 387 N.W.2d 599, 604 (Iowa 1986). It is true, of course, that "[e]rrors in jury instructions are presumed prejudicial unless 'the record affirmatively establishes there was no prejudice.'" *State v. Murray*, 796 N.W.2d 907, 908 (Iowa 2011) (quoting *State v. Hanes*, 790 N.W.2d 545, 551 (Iowa 2010)). However, the presumed-prejudice standard **applies to preserved errors** in jury instructions. *See Hanes*, 790 N.W.2d at 548-49, 553, 555-56 (distinguishing between standards for preserved and unpreserved error).

Plaintiff submits that the Defendant failed to preserve error on some of the grounds now asserted to the Court. On the grounds objected to at trial (PA Choos failure to give antibiotics), the Defendant's assertion is without merit as sufficient evidence existed in the record.

B. DEFENDANT FAILED TO PRESERVE ERROR ON SOME OF THE GROUNDS NOW ASSERTED

The Defendant's Motion asserts that the Court erred:

1. in giving instruction 1(e) regarding the failure to give antibiotics;
2. in giving instruction 1(f) regarding the improper discharge instructions;
3. in giving instructions (a)-(b) and (d)-(f), since the failure to refer to the ER was the main claim.

Prior to the jury being instructed, the Defendant provided the following objections and exceptions to the instructions proposed by the Court:

> MR. BERGELAND: In light of the Court's ruling that they will be given, I think our exceptions are to subparts of the marshalling instruction, which we believe are **duplicative** or antecedent to the real claims in the case. Currently, **subpart C indicates**, one, specification of negligence or failing to refer Mr. Dudley to the emergency room or a physician for further evaluation or testing. We think that really is the alleged violation of standard of care in the case and **that all the others collapse within it and are, therefore, somewhat duplicative**. Additionally, we don't think that **E, failing to prescribe antibiotics, was fully offered to this jury** through the requisite expert testimony, and that's our -- our record on the marshalling instructions.

(Tr. Transcr. Vol. V, pp.8-9).

1. Defendant Failed to Preserve Error on Subparagraph F.

As the Court can see, there was no objection to instruction subpart (f) regarding the improper discharge instructions given by PA Choos to Mr. Dudley. There was no specific discussion of subparagraph (f) and no factual discussion at all of how the record did not support the giving of that instruction.[26] Therefore, the objection was waived and cannot now be asserted as a ground for a new trial. *Olson v. Sumpter*, 728 N.W.2d 844, 848-849 (Iowa 2007); *Boham v. City of Sioux City*, 567 N.W.2d 431, 438 (Iowa 1997) ("When the objection is to the sufficiency of the evidence supporting an instruction, the complaining party must specify that portion of the instruction lacking evidentiary support and the particular factual deficiency.").

2. Defendant Failed to Preserve Error on Sub-Paragraph C to the Extent that the Defendant Now Seeks to Amplify and Expand on its Stated Objection

With respect to "subpart C" the Defendant objected arguing that it was "somewhat duplicative." (Tr. Transcr. Vol V, pp.8-9). The Defendant provided no facts to the Court or any

[26] To the contrary, as discussed below, Plaintiff submitted expert testimony that the discharge instructions violated the standard of care and mislead Mr. and Mrs. Dudley.

further argument as to which of the other subparts, if any, were being duplicated. More importantly, now the Defendant attempts to "amplify" or expand on its objection by now asserting that "instructing on these other items of negligence **was misleading to the jury** because if Melanie Choos was not negligent in failing to refer Plaintiff for additional care, she could not be negligent under the other counts, yet the instructions were phrased otherwise." A "misleading" objection was not made nor was the factual argument now being asserted. At stated by the court in *Moser v. Stallings*, 387 N.W.2d 599 (Iowa 1986):

> "... the only grounds or objections that may be asserted or considered on appeal are those specified in the objections to the trial court. Iowa R. Civ. P. 196. If the defendant makes an objection to an instruction at the trial court, he is bound by that objection on appeal. *State v. LeCompte*, 327 N.W.2d 221, 223 (Iowa 1982). Consequently, a defendant **cannot amplify or change the objection** on appeal. *Id*.

Id. at 604 (emphasis added). The Defendant is impermissibly attempting to "amplify or change" the objection that was made at trial. This is impermissible. Plaintiff will only address below the "duplicative" objection, to the extent that the Court concludes that this objection was specific enough to preserve error.

3. Defendant Failed to Preserve Error on Sub-Paragraph E to the Extent that the Defendant Now Seeks to Amplify and Expand on its Stated Objection

With respect to subpart E, the failure to prescribe antibiotics, the Defendant argues:

> The testimony was insufficient to establish prescribing antibiotics on Friday February 17, 2017 would have done anything, or that antibiotics would have specifically prevented the injuries experienced by Joseph Dudley caused by the development or advancement of meningitis."

(Def. Motion, p.63-64). The objection before the Court was: "we don't think that E, failing to prescribe antibiotics, was fully offered to this jury through the requisite expert testimony." This objection was to the marshalling instruction on "negligence" – meaning standard of care. There

was nothing mentioned about "causation," which now appears to be the entire thrust of the assertion in Defendant's Motion. This was not specifically articulated or brought to the attention of the Court so that it could address the issue. Since the Defendant impermissibly attempts to "amplify" or expand on its objection to subpart E, it must be rejected by the Court. Even if the issue is entertained, as discussed next, it has no merit.

C. THE COURT'S INSTRUCTION ON THE FAILURE TO PROVIDE ANTIBIOTICS WAS APPROPRIATE

As just discussed above, the Defendant asserts that "[t]he testimony was insufficient to establish prescribing antibiotics on Friday February 17, 2017 would have done anything or that antibiotics would have specifically prevented the injuries experienced by Joseph Dudley…" Although error has not been preserved, the Defendant's assertion is without merit. Directly contrary to the assertion made by the Defendant, Plaintiff submits that there was sufficient evidence to submit the question of antibiotics to the jury. The record was replete with discussion of antibiotics, broad spectrum antibiotics and that antibiotics given on 2/17/17 would have avoided the injuries suffered by Mr. Dudley. The Plaintiff presented the testimony of Dr. Michael Gold, a board-certified neurologist and a certified medical examiner. On the issue of antibiotics and causation, Dr. Gold testified:

> Q What could have been done on **Friday the 17th of February 2017 to prevent Mr. Dudley from ending up with the permanent damage to his brain** that we see on those MRIs?
> A When he presented to Urgent Care that evening, he had signs of very severe illness. He had a very high fever for an adult. His temperature was 103. He had a very rapid heart rate, and he had a very rapid breathing rate, a respiratory rate. All indicative of the serious infection. I think if that infection had been further evaluated with appropriate blood work, more detailed neurologic determination, that it would be recognized that **he was suffering from a bacterial infection and required emergent treatment. It was an emergency to receive antibiotics**.
> Q He didn't even get a CBC, which could have been drawn right then and there. Would that have been helpful?

> A Yes. A CBC is a complete blood count. And so the criteria many people use to assess critical illness would be his body temperature, whether he had a fever or not; heart rate, whether it was elevated or not; his breathing rate or respiratory rate, whether it was elevated or not; and a white blood cell count. When all of those are present, it's considered indicative of a systemic inflammation response, which makes it clear of the data that it's a medical emergency. I believe if he had a blood count on that date, he would have had a markedly elevated white blood cell count indicative of an infection.
> Q **Would treatment with antibiotics, you know, Friday night even Saturday, even Sunday, have prevented this bad outcome for Joseph Dudley**?
> A **Yes. I think it would have treated his infection, cured his infection**, and **prevented brain -- subsequent brain injury**.

(Tr. Transcr. Vol. III, p.62-63) (emphasis added). This evidence alone justified the giving of the instruction and directly contradicts the assertion made by the Defendant. Dr. Gold further testified: "We subsequently learned, of course, that that infection was an infection in his blood and the lining of his brain and within the brain substance itself. And had that been recognized and **he had received antibiotics**, the events that occurred and **the brain damage that he suffered would have been prevented**, had the infection been treated early." (Tr. Transcr. Vol. III, p.64) (emphasis added).

Plaintiff's expert, Dr. MacArthur, testified "a reasonably prudent, reasonably trained health care provider would have admitted for further diagnostic studies **and treatment with antibiotics**, rather than anchoring to the diagnosis of influenza during flu season. (Court Exhibit No. 1 – Depo. MacArthur, p.38). On the issue of causation, Dr. MacArthur testified to the following when discussing the restrictions of Mr. Dudley: "He can't do that now because of the brain damage that he has sustained, as a result of **allowing the bacteria to go untreated with antibiotics** and the Prednisone **for a few days**." (Court Ex. 1, Depo. MacArthur, pp.43-44).

Defendant Choos testified that she knew what broad spectrum antibiotics were and that she could have prescribed them to Mr. Dudley on 2/17/17 had she chosen to do so. (Tr. Transcr. Vol I, p.126). In addition, the Defendant's own expert, Dr. David Walz, acknowledged that "… the

standard is to **give the antibiotics**, antivirals **as soon as you're suspicious** that someone has **meningitis**." (Tr. Transcr. Vol. IV, p. 156). Even PA Choos acknowledged that meningitis was on her differential diagnosis. (Tr. Transcr., Vol. II, 107:21-22). Plaintiff's experts testified that Mr. Dudley's presentation was certainly suspicious for meningitis, was clearly on the differential and was never properly ruled out by PA Choos. The giving of the instruction on antibiotics was proper.

D. THE COURT'S INSTRUCTION ON THE FAILURE TO SEND MR. DUDLEY TO THE EMERGENCY ROOM WAS NOT "DUPLICATIVE" OF OTHER INSTRUCTIONS

As discussed above, Defendant's objection to the Court prior to the jury being instructed was that "subpart C" and other instructions on negligence were "somewhat duplicative." Defendant now asserts:

> The **failure to refer** Plaintiff for additional care **was the true and real claim of negligence** in the case. The other allegations of negligence were merely subsets of this overall claim, i.e. if they had been performed, then Melanie Choos ultimately would have referred Plaintiff on for additional care. Instructing on these other items of negligence was misleading to the jury because **if Melanie Choos was not negligent in failing to refer Plaintiff for additional care, she could not be negligent under the other counts**, yet the instructions were phrased otherwise.

(Def. Motion, p. 64). Although these specific grounds were not articulated to the Court and error not preserved, Plaintiff disagrees with Defendant's assertion.

First, the Defendant's entire argument was that Mr. Dudley did not need to be referred to another physician or the emergency room based on the facts available to PA Choos. The Defendant further asserted that no additional testing needed to be done and that a proper physical examination was performed by PA Choos. Plaintiff's experts disagreed and opined that Mr. Dudley should have been sent to the emergency room based on the information available to PA Choos. (i.e. PA Mooney: "to be compliant or be in accordance with the standard of care" Mr. Dudley "should have been sent immediately to the emergency room.") (Court Ex. 4, Depo. Mooney, p.17). This is a

distinct claim. However, what if the jury believed that the information "available" to PA Choos was not "enough" to send him to the ER – that more information was needed.

Instruction 12(1)(b) was proper: If that were so, the Plaintiff submitted that PA Choos breached the standard of care in failing to obtain that additional information. In Instruction 12(1)(b), the Plaintiff asserted that PA Choos breached the standard of care in "failing to order a CBC blood test." This could have and should have provided her additional information about Mr. Dudley's condition. Although PA Choos had the ability to order a CBC in the clinic and have it resulted within an hour, she failed to do so. Plaintiff's expert, Dr. Gayle Galan testified:

> Q So let's stick with the **CBC**. Melanie testified that she could have done a CBC and you can order the results stat, get it back in an hour. **Is the failure to do that negligence**?
> A **It is**. And as I said, it is coupled with an inability to recognize that even beyond that, **diagnostic testing needed to be done**.
> Q But just -- just the CBC, not getting that when he met three out of the four criteria for SIRS, with the CBC being the fourth criteria, **was that negligence, not ordering a CBC**?
> A **Yes**.
> Q Yes. **Did that cause injury to the patient**?
> A **It did**.
> Q Did each of the -- each of the things that you have told us about that were standard-of-care violations negligence, did each of those things **cause Mr. Dudley to end up with permanent damage to his brain**?
> A **Yes**.

(Tr. Transcr. Vol. IV, p. 21). The evidence was specifically that the failure to order a CBC was negligent and that the negligence caused injury. With this testimony, the Court was required to give the instruction contained Instruction No. 12(1)(b).[27] *Alcala v. Marriott Int'l Inc.*, 880 N.W.2d 699, 707-708 (Iowa 2016) ("Iowa law **requires** a court to give a requested jury instruction if it

[27] This warranted the following instruction given by the Court: "failing to order a CBC blood test." (Instruction No. 12(1)(b)).

correctly states the applicable law *** The verb "require" is **mandatory** and leaves no room for trial court discretion.").

Instruction 12(1)(a) was proper: With respect to the examination performed by PA Choos on Mr. Dudley, the defense asserted that she performed an appropriate and complete physical examination of Mr. Dudley. The Plaintiff's experts disagreed. Dr. Michael Gold testified:

> Q If a patient walks in with his wife into an examination room and then a health care provider, the PA, comes in after the flu test has been done and asks the patient, "What's going on?" And the patient says, "I'm dizzy. I'm weak. I have pain throughout my whole body." We've got a fever of 103.6. We've got tachycardia. We've elevated respirations. **What does the standard of care require to be done** with respect to evaluating the patient's mental status?
> A Well, **it requires a more detailed mental status examination** and also **cries out for a comprehensive neurologic examination** –

(Tr. Transcr. Vol. III, pp.73). Dr. Gold further testified:

> Q Neurological evaluation. Is there anything in that medical record that -- from the 17th that shows you that **an adequate neurological examination was done to assess Mr. Dudley's dizziness and weakness**?
> A In essence, **no neurologic examination was done**. The most basic examination was done where the examiner describes that he was awake and alert. That would be one small part of a comprehensive neurologic examination.
> ***.
> Q Did you see documentation in the medical records of any specific test that PA Choos said she did to rule out meningitis, that gave her the confidence that this was not meningitis?
> A **There was no** physical examination -- or I should say **neurologic examination nor blood testing that would rule out or exclude the diagnosis of meningitis** or even systemic infection.

(Tr. Transcr. Vol. III, pp.64-65). Dr. Gold also was critical of PA Choos failure to properly evaluate Mr. Dudley's gait. (Vol.3, pp. 89-90). Ultimately Dr. Gold testified:

> Q Did Melanie Choos **fall below the standard of care with respect to her evaluation**, diagnosis, and treatment plan for Mr. Dudley?
> A **In my opinion, yes**.
> Q Is that negligence?
> A Is that negligence, was your question?
> Q Yes.
> A Yes. **Yes, it is negligent**.

> Q Did that negligence by PA Choos, who is UnityPoint's person in charge there that day, **cause Mr. Dudley to suffer permanent damage to his brain and life**?
> A **Yes**.

Similarly, Plaintiff's expert PA Mooney testified that PA Choos failed to properly evaluate Mr. Dudley and to rule out meningitis. He testified:

> Q Just to be sure. Is there any way to **exclude or rule out meningitis** that Melanie said was on her differential diagnosis **purely by what she did in this case**?
> A **No. There's no way**. And I'm firmly committed that no reasonable and prudent practitioner would say otherwise.

(Court Exhibit No. 4, Depo. Mooney, p.30). This was in accord with PA Mooney's testimony that meningitis could not be ruled out by a physical examination and a lumbar puncture was required. (Court Exhibit No. 4, Depo. Mooney, p.28). PA Mooney further testified:

> Q If meningitis was on your differential, would you feel comfortable treating the patient as a flu patient **without ruling out meningitis**?
> A I would never do something like that. It would be **below the standard of care**.
> Q Is that exactly what Melanie Choos did in this case?
> A Yes, it is.
> Q Is that a violation of the standard of care?
> A Yes, it is.

(Court Exhibit No. 1, Depo. Mooney, pp.55-56). There was clearly sufficient evidence that PA Choos failed to perform a proper evaluation, neurological evaluation or tests to rule out meningitis. Thus, the giving of Instruction No. 12(1)(a) ("Failing to conduct a proper and complete examination") was proper and required by Iowa law. *Alcala,* 880 N.W.2d at 707-708.

Instruction 12(1)(f) was proper: With respect to the discharge instructions that were given, the Defendant, for the first time, objects to the instruction. As noted above, this argument was not preserved and was waived. Regardless, Plaintiff's expert, Dr. Gayle Galan testified:

> Q Were the **discharge instructions that Melanie Choos and UnityPoint gave to the patient negligent**?
> A **Yes**.
> Q How so?

> A Melanie Choos actually, by prescribing Tamiflu, **misled the Dudleys** by saying that despite the fact that the influenza test is negative, **this is just the flu**. Take this and go home. **This is a miseducation**. **It is improper education because then what happened was, as a result of these discharge instructions, Mrs. Dudley was trying to control Mr. Dudley's fever with ibuprofen and the like**. And that was, in fact, doing nothing for his underlying infection that had already started by the time he was in the emergency department and was worsening until he arrived at the -- on the 20th to the emergency department.

(Tr. Transcr. Vol. IV, pp.16-17). Directly contrary to the Defendant's assertion, there was evidence that the discharge instructions were negligently given, that they improperly mislead the Plaintiff into believing it was just the flu, causing him to go home and treat with Tamiflu and ibuprofen over the weekend, further delaying treatment. Thus, the giving of Instruction No. 12(1)(f) ("Discharging Mr. Dudley with the discharge instructions that he was given") was proper and required by Iowa law. *Alcala,* 880 N.W.2d at 707-708.

Instruction 12(1)(e) was proper: In addition, as discussed above with respect to the failure to administer antibiotics, there was specific testimony that the "standard" of care required PA Choos to administer antibiotics as soon as there was a suspicion for meningitis. (Tr. Transcr. Vol. IV, Dr. David Walz, p. 156). There was further evidence that timelier antibiotics would have prevented the brain injury. (Tr. Transcr. Vol. III, p.62-63). Since there was evidence of the standard of care, and its breach and causation, the Court was required to give Instruction No. 12(1)(e) ("failing to prescribe antibiotics."). *Alcala,* 880 N.W.2d at 707-708.

The above are all separate and distinct breaches in the standard of care with supporting evidence in the record and the Plaintiff was entitled to an instruction on each. The Defendant's objection that they were all "somewhat duplicative" of subpart C has no merit and cannot be used as the basis for a new trial.

IX. COUNSEL'S READING OF THE DEPOSITION TESTIMONY OF PA CHOOS WAS PROPER AND CANNOT BE GROUNDS FOR GRANTING A NEW TRIAL

In section XI of its Motion, the Defendant asserts that a new trial must be granted because Plaintiff's counsel was "... allowed to read the excerpts of deposition testimony of Melanie Choos, in spite of the cumulative rehash of prior testimony." (Def. Motion, p.65). Defendant then asserts that "Plaintiff's counsel should not have needlessly presented cumulative evidence when he had already released the witness." *Id*. Defendant provides no case law in support of its broad assertion and even fails to point out what evidence it claimed was cumulative.

It is clear that the reading of the deposition testimony of PA Choos as a party opponent and as the representative of UnityPoint was allowed as statements against interest. Iowa R. Evid. 5.801(d)(2); *State v. Hanes*, 790 N.W.2d 545, 553 (Iowa 2010). It is also clear that whether it was by deposition, or by recalling PA Choos, Plaintiff was not limited simply because PA Choos had once been "released ... as a witness." *See State v. Ivy*, 300 N.W.2d 310, 311 (Iowa 1981) (within trial court discretion to allow the recalling of a witness to provide additional testimony when the "state had not yet rested'); *State v. Folken*, 281 N.W.2d 1, 6 (Iowa 1979) ("Recalling a witness is largely in the discretion of the trial court.").

During the reading of PA Choos deposition excerpts, there were two relevant objection made by the Defendant:

> MR. BERGELAND: I'm sorry. Just briefly, Your Honor, I think this has become a cumulative rehash of the cross-examination that the jury has already heard, so my objection is to cumulative.
> THE COURT: Overruled. Go ahead
>
> ***.
> MR. BERGELAND: Yeah. I object to this. This specific portion was read to the witness during cross-examination, so same objection.
> MR. ROWLEY: I don't recall, so it's very short.

> THE COURT: It was -- It was reading from something else into the deposition. Is there then a response to that, that reading? So was it part of a question, I guess for lack of a better way of putting it?
> MR. BERGELAND: Yes. Yes, Your Honor.
> THE COURT: Okay. I'll overrule the objection.

(Tr. Transcr. Vol. IV, pp.39; 43). The objections were appropriately overruled. The first objection was not specific and did not indicate what piece of testimony was cumulative. More importantly, most of the reading of the deposition excerpts went in without any objection. Specific objections must be made when the evidence is offered or error is waived. *See State v. Howard*, 509 N.W.2d 764, 768-769, (Iowa 1993) ("If counsel objects prematurely to the introduction of evidence, the objection must be repeated at the time the evidence is introduced or the objection to the error in admitting the evidence will be waived."). Only two pieces of evidence out of the thirteen (13) pages of transcript now complained of were objected to. Error was not preserved as required.

Even if the evidence were cumulative, appropriately admitted evidence is not "prejudicial" if it is merely cumulative. *See, e.g., State v. Hildreth*, 582 N.W.2d 167, 170 (Iowa 1998) (holding no prejudice would be found due to erroneously admitted hearsay where it was merely cumulative); *O'Bryan v. Henry Carlson Co.*, at p. 12 ("**As a general rule, cumulative evidence is non-prejudicial,**" citing *Kuta v. Newberg*, 600 N.W.2d 280, 289-90 (Iowa 1999).) Even if the admission of the evidence amounted to an abuse of discretion by the trial court, the Defendant cannot show the required prejudice to justify the granting of a new trial.

X. THE JURY'S VERDICT EFFECTUATES SUBSTANTIAL JUSTICE BASED ON THE MERITS OF THE CONTROVERSY

In section X of its Motion, the Defendant asserts that the jury's verdict failed to effectuate substantial justice. In this section of the Motion, the Defendant appears to just simply incorporate

all other arguments under the "substantial justice" argument. The Plaintiff disagrees that substantial justice was not done in this case.

First, as discussed previously, the Defendant has failed to preserve error on most of the assertions now being made. The only articulated ground asserted under this section of the Motion is the assertion that "substantial justice" was not done because the Court "[a]llow[ed] UnityPoint to be tried on inflammatory matters not in issue causing the jury to view UnityPoint Clinic through a moralistic and punitive lens resulting in an excessive verdict thereby "sending a message" to UnityPoint Clinic." (Def. Motion, p. 66). Although the Defendant cites some cases in support, the Defendant fails to discuss the law surrounding "substantial justice" or apply it to the facts of this case. Likely because to do so shows that the jury did do "substantial justice" based on the facts and evidence and not from a "moralistic or punitive lens."

As stated in *White v. Walstrom*, 1 N.W.2d 578, 582 (Iowa 1962) cited by the defense, the court recognized that "the trial court should grant a new trial where it **clearly appears** that the verdict does not effectuate substantial justice or that the jury from any cause clearly has **failed to respond to the real merits of the controversy**."

In *Nguyen v. Ewers*, 2013 Iowa App. LEXIS 330, 2013 WL 988923 (Iowa App. 2013) the court in a medical negligence case was confronted with a district courts grant of a new trial based on a finding that the verdict did not do substantial justice. *Id*. at 3-4. The district court stated that it "was shocked at the jury's verdict" and the "verdict does not do substantial justice between the parties." *Id*. at 4. After looking at the evidence supporting the verdict, the *Nguyen* court reversed the district court's grant of a new trial stating:

> **It is not for us to invade the province of the jury**. In fact a verdict will not be set aside or altered unless it is (1) flagrantly excessive or inadequate; or (2) so out of reason as to shock the conscience or sense of justice; or (3) raises a presumption it is the result of passion, prejudice or other ulterior motive; or (4) is lacking in

> evidential support. *Schmitt*, 170 N.W.2d at 659. If the verdict is the result of passion and prejudice a new trial should be granted. *Id*. We must also give weight to the fact the trial court, with the benefit of seeing and hearing the witnesses, observing the jury and having before it all incidents of the trial, saw fit to interfere. *See id*. at 660.
>
> Even assuming misconduct occurred, **there has been no prejudice shown because of the substantial evidence presented to the jury supporting the verdict**. As acknowledged by the district court, there was conflicting testimony from the experts. [conflicting evidence cited by the court omitted]
>
> ***
>
> **It was properly the jury's duty to reconcile the conflicting testimonies, not the role of the district court**. *See Hagedorn*, 690 N.W.2d at 88. Here, **there was sufficient evidence to support the jury's verdict**. The Nguyens's focus on Ewers's "near admission" that he likely caused the nick in the bowel. This, however, was not the basis for the negligence claim; the claim was for failure to timely discover and diagnose the post-surgical problem, not for causing this known risk to occur.
>
> The record before us reveals the jury was presented with disputed facts and opinions as testified to by multiple experts. **It was for the jury to sort out the opinions and make both factual findings and credibility calls**. *See Lantz v. Cook*, 256 Iowa 409, 127 N.W.2d 675, 676-77 (Iowa 1964). **This is not a case wholly lacking evidentiary support**, but in fact, **sufficient evidence supports the defense verdict**. We find Ewers has established the **district court's grant of a new trial rested upon clearly untenable or unreasonable grounds, unsupported by the record and we must reverse its grant**. *See Loehr*, 806 N.W.2d at 282 (finding reversal of a grant of a new trial is appropriate when the grounds for the grant are "clearly untenable" to amount to an abuse of discretion).

Id. at 11-14 (emphasis added); *see also Swantz v. Colby*, 2007 Iowa App LEXIS 1325 (district court's grant of new trial on "substantial justice" reversed because "there [was] sufficient evidence to sustain the jury's verdict."). The fact is, the Defendant cannot show, based on this record, that the jury was not responding "to the real merits of the controversy" or that its verdict was not based on the evidence.

As discussed above in section IV of this Resistance, there was a substantial disagreement between the parties as to the value of Mr. Dudley's future damages. In closing, Defendant's counsel specifically argued that **$100,000 per year** for 27 years would be appropriate

compensation. (Vol. 5, pp. 85-86). To the contrary, Plaintiff's counsel asserted that the value of the damages should be **$1,000,000 per year** for 27 years, or $27,000,000. (Tr. Transcr. Vol. V, pp.95-96).[28] This was the exact controversy being placed before the jury by the parties on the issue of damages. Ultimately, the jury agreed with the value asserted by the Plaintiff. The jury the unanimously agreed on a verdict of the following with a total of $27,000,000:

1. Past Loss of Function of Full Mind and Body	$ 2,500,000.00
2. Future Loss of Function of Full Mind and Body	$ 12,000,000.00
3. Past pain and suffering	$ 2,500,000.00
4. Future pain and suffering	$ 10,000,000.00

Directly contrary to the assertion of the defense, the jury "responded to the real merits of the controversy." *White v. Walstrom*, 1 N.W.2d 578, 582 (Iowa 1962) (new trial appropriate when "the jury from any cause clearly has **failed to respond to the real merits of the controversy**."). In fact, the jury's verdict form demonstrates "structure rather than passion or prejudice." *See Gray v. Hohenshell*, 2019 Iowa App. LEXIS 71; 2019 WL 325015, pp. 22-23 (Iowa App. 2019) (Where plaintiff's counsel requested $30,000,000 in damages and the jury awarded $50,000,000, "the jury exercised judgment in determining the damages, demonstrating structure rather than passion or prejudice."). Just because the Defendant disagrees with the jury's response to the merits of the controversy, it does not mean that the jury did not respond. As the record shows, the jury addressed the merits of the controversy, there was substantial evidence to support the jury's response and a new trial is not warranted.

RESISTANCE TO MOTION FOR REMITTITUR

[28] "**If we did a million a year, it would be 27 million** plus five and a half, so it would be over 30 million." (Tr. Transcr. Vol. V, p. 96:20-21).

I. THE JURY'S DAMAGES DETERMINATION WAS NOT THE PRODUCT OF PASSION OR PREJUDICE BUT WAS BASED ON THE UNREBUTTED EVIDENCE OF A PERMANENT AND PROGRESSIVELY WORSENING BRAIN INJURY CAUSED BY BACTERIAL MENINGITIS

A. GENERAL LEGAL PRINCIPLES

The Supreme Court of Iowa and other Iowa Courts "have been ***loath*** to interfere with a jury verdict." *Sallis v. Lamansky*, 420 N.W.2d 795, 799 (Iowa 1988) (emphasis added); *see also Triplett v. McCourt Mfg. Corp*., 742 N.W.2d 600, 602 (Iowa Ct. App. 2007) ("Because fixing the amount of damages is a function for the jury, we are 'loath to interfere with a jury verdict.'"). Moreover, Iowa courts are not allowed to set aside a jury's determination for damages simply because it would have reached a different conclusion.

> In jury trials controverted issues of fact are for the jury to decide. That is what juries are for. To hold that a judge should set aside a verdict just because he would have reached a different conclusion would substitute judges for juries. It would relegate juries to unimportant window dressing. **That we cannot do.**

Delaney v. Bogs, 873 N.W.2d 301 (table), Iowa App. LEXIS 1059, *6-7 (Iowa Ct. App. 2015) (citing *Lantz v. Cook*, 127 N.W.2d 675, 577 (Iowa 1964)) (emphasis added); *See Kiner v. Reliance Ins. Co*., 463 N.W.2d 9, 15 (Iowa 1990) (reversing district court's order for remittitur when the only basis for remittitur was that the jury verdict was "merely excessive").

> The assessment of damages is traditionally a jury function. Its decision should be disturbed **only for the most compelling reasons**. We will reduce or set aside a jury award only if it (1) is flagrantly excessive or inadequate; or (2) is so out of reason as to shock the conscience or sense of justice; or (3) raises a presumption it is a result of passion, prejudice or other ulterior motive; or (4) is lacking in evidentiary support.
> . . .
> **The most important of the above enumerated tests is support in the evidence**. **If the verdict has support in the evidence the others will hardly arise**, if it lacks support they all may arise.

> *Olsen v. Drahos*, 229 N.W.2d 741, 742 (Iowa 1975). In reviewing the evidence, "**we view the evidence in the light most favorable to the verdict and need only consider the evidence favorable to the plaintiff** whether contradicted or not." *Id.*

Rees v. O'Malley, 461 N.W.2d 833, 839 (Iowa 1990) (emphasis added).

"In determining whether the damage award is excessive, we must abide by the principle that each case depends upon its own facts, and **precedents are of little value**." *Rees*, 461 N.W.2d at 840 (citing *Ferris v. Riley*, 101 N.W.2d 176, 183 (Iowa 1960)).

Put simply, the primary inquiry for this Court is to review the evidentiary support for the verdict, which must be viewed in the light most favorable to the verdict and plaintiff. If there is evidentiary support, then it is unlikely that the jury's verdict was a result of passion and prejudice, or that it was flagrantly excessive, or some other basis requiring a new trial or remittitur. *See WSH Props. L.C.C. v. Daniels*, 761 N.W.2d 45, 51 (Iowa 2008) ("We think the evidentiary basis for the jury's assessment of damages dispels any presumption that the excessiveness of the verdict was motivated by passion.").

In this matter, the jury awarded non-economic damages; specifically, past and future loss of function of full mind and body plus past and future pain and suffering. These damage categories have been described by the Iowa Supreme Court as follows:

> The element of loss of function of the body is **broadly inclusive** of various physical injuries. We are convinced, however, that this element of damage relates to functional impairment as opposed to structural impairment of the body. It is the inability of a particular body part to function in a normal manner.

Brant v. Bockholt, 532 N.W.2d 801, 804-805 (Iowa 1995).

> Physical pain and suffering includes bodily **suffering**, **sensation**, or **discomfort**. Mental pain and suffering includes **mental anguish, anxiety, embarrassment, loss of enjoyment of life, a feeling of uselessness, or other emotional distress**. Damages for physical and mental pain and suffering cannot be measured by any exact or mathematical standard and **must be left to the sound judgment of the jury**.

Estate of Pearson ex rel. Latta v. Interstate Power & Light Co., 700 N.W.2d 333, 347 (Iowa 2005) (internal citations omitted). Iowa courts have noted these damages are "highly subjective" and properly left to the "sound judgment of the jury." *Alcala v. Marriott Int'l, Inc*., 941 N.W.2d 359 (table), 2019 Iowa App. LEXIS 1058, *9 (Iowa Ct. App. 2019).

Significant to this case, a jury is allowed to award future damages, including subjective damages, for issues which may not be present at the time of trial, but which are likely to be suffered by the Plaintiff *in the future*. In *Delaney*, a student was injured during a school bus rollover. 2015 Iowa App. LEXIS 1059, at *2-3. The student suffered a wedge compression fracture in his spine, but he recovered well, and returned to sports the next school year. *Id*. at *3-4. At trial, the Plaintiffs presented expert testimony regarding complications not presently an issue, but likely to be experienced by the student in the future (*e.g*. arthritis). *Id*. at *13-14. The jury awarded future pain and suffering, future loss of earning capacity, and future loss of function of body damages. *Id*. at *5. Similar to the Defendant in this matter, the *Delaney* defendants challenged the jury's verdict, claiming there was insufficient evidence and the jury was required to speculate about future issues and damages. *Id*. at *5-6. In upholding the verdict, the *Delaney* court explained:

> In Iowa, the plaintiff bears the burden of establishing a claim for damages with some reasonable certainty and for demonstrating a rational basis for determining their amount. *Conley v. Warne*, 236 N.W.2d 682, 687 (Iowa 1975); *Hammes v. JCLB Props., LLC*, 764 N.W.2d 552, 558 (Iowa Ct. App. 2008). Yet, Iowa courts "**take a broad view in determining the sufficiency of evidence of damages**." *Westway Trading Corp. v. River Terminal Corp*., 314 N.W.2d 398, 403 (Iowa 1982). **We also recognize a distinction between proof of the fact that damages have been sustained and proof of the amount of those damages**. *Olson v. Nieman's Ltd*., 579 N.W.2d 299, 309 (Iowa 1998). As our supreme court observed in *Northrup v. Miles Homes, Inc*., 204 N.W.2d 850, 857 (Iowa 1973): "If it is speculative and uncertain whether damages have been sustained, recovery is denied. **If the uncertainty lies only in the amount of damages, recovery may be had** if there is proof of a reasonable basis from which the amount can be inferred or approximated." "**Some speculation is thus acceptable**." *Olson*, 579 N.W.2d at 309. While a loss may be hard to ascertain "with preciseness and certainty, the wronged party should not be penalized because of that difficulty." *Id*.

Id. at *10. (emphasis added). Reviewing the record, the *Delaney* court noted that the student's damages may be more difficult to ascertain, but since there was a reasonable basis – generally provided by expert testimony – for the jury to approximate future damages, the court concluded there was sufficient evidence in the record to allow the verdict to stand. *Id*. at *21-22.

Similar to the *Delaney* defendants, the Defendant in this matter ignores expert testimony which informed the jury that Mr. Dudley's brain injury, and resulting impairments, was likely to worsen as he ages. Similar to the *Delaney* defendants, the Defendant in this matter next decries any speculation by the jury as to Mr. Dudley's future damages. However, as discussed below, there was ample evidence in the record allowing the jury to reasonably conclude that Mr. Dudley's life has been turned upside down *and* that it will only get worse with time. The jury had a reasonable basis to award the damages it did.

B. THE RECORD IS FULL OF EVIDENTIARY SUPPORT FOR THE JURY'S DAMAGE AWARD

As discussed above, the primary inquiry is the sufficiency of the evidence in the record. The Defendant's Motion for Remittitur states: "The evidence, discussed in detail below, falls far short…" and "The total amount of damages as determined by the jury are unsupported by the evidence." *See* Def. Motion for Remittitur, p.71. After this opening, the Defendant gives the actual evidence very little attention, summarizing that Mr. Dudley has had a "relatively good outcome" and listing a handful of activities in which Mr. Dudley participates *at the moment*. *See* Def. Motion for Remittitur, p.72. The Defendant makes no mention of Mr. Dudley's many limitations (except balance), nor his mental or physical changes. The Defendant also makes no mention of the specific evidence regarding Mr. Dudley's likely future problems – how his brain injury is likely to worsen and how he now has an elevated risk for certain conditions and problems (*e.g.*, dementia, falls).

Instead, the Defendant uses sweeping generalizations and cherry-picked citations to obscure out-of-state case law from decades past to conclude the verdict is excessive.

Notably, in its Motion for Remittitur section purportedly aimed at the lack of evidence underlying the damages award, the Defendant simply asserts in one, singular paragraph that "Plaintiff's experts offered only generic and nonspecific testimony about how individuals with a brain injury can depreciate over time" and then complained that the jury was never given "guidance as to how that would manifest in Joseph Dudley's case." *See* Def. Motion for Remittitur, Sec. 4, p.78. This is a gross disregard and/or mischaracterization of the actual evidence – all of which was completely unrebutted by the Defendant.

Before turning to the evidence in the record, it is necessary to point out that the Defendant cites Mr. Dudley's lack of future economic damages as support for its position that future noneconomic damages should be minimal. *See* Def. Motion for Remittitur, p.72. This line of argument has been specifically rejected by Iowa's courts since economic damages do not always inform the appropriate measure of noneconomic damages. *See e.g. Triplett v. McCourt Mfg. Corp*., 742 N.W.2d 600, 603 (Iowa Ct. App. 2007) ("We also find the limited award for future medical expenses should not restrict her recovery for future pain and suffering.")

1. Lay Witnesses, and Mr. Dudley, All Testified to Mr. Dudley Being a Completely Different Person Post-Brain Injury

Mrs. Sarah Dudley, spouse of Mr. Dudley, is likely the person that knows him the best in this world. Contrary to the Defendant's rosy characterization of Mr. Dudley's outcome, Sarah testified extensively to the many negative effects of Mr. Dudley's brain injury:

Q Is he the same person now?

A No, he's not the same person now.

Q What's different about your husband?

A He gets angry easier. His emotions. I can cry in front of him. His emotions – My emotions don't bother him. He can't walk straight. He's got permanent nerve damage in his right side, so -- which caused him to be permanently deaf in his right ear and then permanent nerve damage in his right leg.

Q How's his thinking, word processing?

A His thinking is not the same. It takes him a lot longer to process something, and he gets angry easier. It could be a human error, and in his mind, we did it on purpose. Someone's after him.

Q Does he hear voices? Think people are out to get him?

A Yeah. He's paranoid.

…

Q Does he isolate himself? Sorry.

A He does. He will isolate himself in the garage or upstairs in the bedroom sometimes away from us.

Q Did he isolate himself before?

A No. He's a family guy.

Q Is his sleep pattern the same?

A No. Not at all. He wakes up more. He tosses and turns in the middle of the night.

Q Can your husband protect you the way that he used to?

A No, not at all.

Q Who's become more of the caregiver?

A I have been.

Q How is his relationship with his children different?

A His relationship with his children is really different. It's more arguing. It's more bickering. They kind of keep their distance a little bit more. We don't see them often. We don't see the grandkids very often.

Q It was different before?

> A It was different before. I had grandkids almost every weekend. We had family get-togethers. We had cookouts.
>
> Q Called him a big -- your big teddy bear?
>
> A He was my big teddy bear, yes. I used to call him that, sweet teddy bear.

(Tr. Trasncr. Vol. III, 205:14-207:8).

Angry, isolated, paranoid, argumentative, half-deaf, slow to process, permanent nerve damage, cannot walk straight, insomnia, driven his kids away. This sounds like a completely different person than the one described by Defendant's motion. When viewing this evidence in the light most favorable to the verdict and Plaintiffs, it is easy to see how a jury valued this case in line with Plaintiffs' suggestion of $1,000,000 per year for the remainder of Mr. Dudley's life expectancy vs. the $100,000 per year for the remainder of Mr. Dudley's life expectancy suggested by defense counsel.

Sarah also explained to the jury how after the brain injury Mr. Dudley has essentially lost his previously "very close" relationship with his oldest daughter, JaeLyn, who moved out "because of the anger, because of the screaming" and who now "pretty much stays away." (Tr. Transcr. Vol. III, 211:11-212:1). And as to those vacations that Mr. Dudley still takes, and which Defendant relies on to complain about the damage award, Sarah told the jury this:

> Q Is he the same husband and dad that he was when he goes on these trips?
>
> A No, he's not. He can't get out there and run and play with the kids. And my son is in football. He can't go out there and play football with him. I mean, he can stand and watch. He gets angry easier. He loses his patience with the kids. I pretty much deal with the kids 99 percent of the time.

(Tr. Transcr. Vol. III, 209:2-9).

Disinterested lay witnesses also testified to the regrettable differences they have seen in Mr. Dudley after his brain injury. Mr. Dudley's brother-in-law, Mr. Randy Van Tassel, testified

how Mr. Dudley used to be an energetic, outcoming always-on-the-go guy. (Ct. Ex. 2, 6:2-23). Mr. Van Tassel testified that Mr. Dudley is now "the shell of who he used to be" (Ct. Ex. 2, 7:4-9) and how his "temper is a lot shorter than it used to be." (Ct. Ex. 2, 8:13-15). Mr. Dudley's co-worker, Mr. Robert Johnson, also testified to Mr. Dudley simply not being the person he was before. He has to be very careful to avoid physical altercations with Mr. Dudley due to Mr. Dudley's increased arguing. (Ct. Ex. 3, 11:22-12:13). Mr. Johnson used to laugh and joke with Mr. Dudley, but he has since learned not to joke with Joe as he takes it personally. (Ct. Ex. 3, 14:20-15:8). He recalls Mr. Dudley confiding in him that he now feels like a monster:

> Q. Okay. Do you ever remember him talking to you about how he felt like people thought he was a monster?
>
> A. Yes. He -- Him and Sarah, they -- **their arguments** and things like that. And he didn't -- it bothered -- everything – **it bothered him a lot**. And **the monster word came a few times**. And I try - - when I can see him getting quiet, then I'll say, "Hey, Joe, are you okay?" or I try to make him laugh. And he -- he just -- it's -- it's hard to explain. It's just not -- It's not the same guy. He -- He -- I can't explain it. I mean, it's -- to put it into words, it's - - he gets just off, quiet, you know, and he just doesn't want to -- you know, he just doesn't want to be bothered, and I know that's time to leave him alone.

(Ct. Ex. 3, 17:3-20) (emphasis added).

Mr. Dudley himself testified to the numerous problems he continues to experience on a daily basis which have totally upended his life. He might be at a location on a Friday, but to return on Monday, he will need to use GPS because he cannot remember things. (Tr. Transcr. Vol. IV, 61:1-11). It is "embarrassing" and "scary" for him to admit that his memory is not the same. (Tr. Transcr. Vol. IV, 61:22-62:14). Mr. Dudley is embarrassed by his word-finding difficulties; he'd rather have a facial scar which could be hidden from strangers. (Tr. Transcr. Vol. IV, 65:8-23). Sadly, Mr. Dudley knows that his relationship with his children has worsened, and he copes by

isolating himself. (Tr. Transcr. Vol. IV, 69:2-18). And yet, the Defendant has the gall to tell this Court that Mr. Dudley is able to fully participate with his family.

Keeping in mind that anxiety is an element of mental pain and suffering, Mr. Dudley wrestles with very real and very deep fears every day:

> Q Well, some say that anger is a surface emotion and what's underneath it is fear. Is there anything you're afraid of?
>
> A I'm afraid of losing my other hearing, me being completely deaf. I'm afraid of losing my balance and not being able to make it, you know? And really actually hurting myself without -- If one day I don't focus really, really hard, what's going to happen then?
>
> Q You afraid of not being able to provide for your family?
>
> A Oh, yeah. That will happen if -- if -- if I don't focus. So I put a lot of stress on myself to focus on everything to make it through my day.
>
> Q Are you afraid of mistreating your family?
>
> A Oh, you know, I don't know. How things happened, you know, I mean, anger is different. You know, I don't know. Am I angry today? **I isolate myself to keep from that anger**. I don't think that they're in any kind of harm's way. I don't think. I don't know. But how my brain works and how things happen, I don't know. I get angry a lot, and I'm short-tempered. But I don't see myself, you know, being in any kind of -- I just don't know.

(Tr. Transcr. Vol. IV, 69:19-70:15) (emphasis added).

Mr. Dudley also suffers from physical problems every day, including an inability to just hop out of bed due to ongoing numbness. (Tr. Transcr. Vol. IV, 63:11-64:4). He has permanent pain in his leg and foot which "has never stopped." (Tr. Transcr. Vol. IV, 73:25-74:4). He explained to the jury the frustrating cycle of how his one-sided deafness leads to frustration which leads to anger. (Tr. Transcr. Vol. IV, 64:7-65:5). Mr. Dudley's sleep has worsened due to racing thoughts. (Tr. Transcr. Vol. IV, 66:20-67:15). Mr. Dudley has "permanent vertigo" and as a result, he has to alter how he works (which he does to provide for his six-year-old), has to limit his

activities, and simply be careful in the shower each morning. (Tr. Transcr. Vol. IV, 72:3-73:3). He has lost much of what previously brought him joy in life.

When the actual evidence in the record is reviewed, the Defendant's rosy characterization of Mr. Dudley falls apart. Mentally, physically, socially, Mr. Dudley leads a difficult and very different life than he did prior to February 17, 2017. But significantly, the testimony of the lay witnesses provided evidence only of Mr. Dudley's *current* life. The expert testimony established the reasonable basis for the jury to conclude (1) Joe's issues are permanent, and (2) his issues will most likely get worse as he ages.

2. Plaintiff's Expert Witnesses Laid a Sufficient Foundation for the Jury to Infer Future Damages, and Approximate an Appropriate Award

Plaintiffs' first expert witness was Dr. Rodger MacArthur, M.D., an internal medicine physician with an infectious disease specialty. His testimony established for the jury that Joe's brain injury is permanent.

> Q And, Doctor, in your opinion to a reasonable degree of medical certainty, are Mr. Dudley's injuries permanent or, you know, is he going to regain brain cells from the stroke or anything like that?
>
> A In my opinion they are **permanent**.
>
> Q How so?
>
> A He is not going to regain the brain cells. **He will always have some degree of emotional lability, anger, depression, sadness. He will always have a difficulty concentrating**. He may -- it won't -- he may learn some workarounds, he may learn to better cope with some of these, but the damage has been done.
>
> Q Will he live with it for the rest of his life?
>
> A Yes, sir, unfortunately he will.

(Ct. Ex. 1, Depo. MacArthur, 44:22-45:13) (emphasis added).

The permanency of Mr. Dudley's severe brain injury was confirmed by Dr. Michael Gold, a neurology expert.

> Q Is the severe damage to his brain permanent?
> A It is.
> Q Is it irreversible?
> A It is not reversible.
> Q Will it ever get better?
> A **These are permanent injuries. They will not improve**.

(Tr. Transcr. Vol. III, 84:9-15) (emphasis added).

Plaintiffs' expert neuropsychologist, Dr. David Paul, provided the jury with a rational basis to presume Mr. Dudley's future is dark, and thus award meaningful future damages. Dr. Paul explained:

> Q Can brain damage, in terms of the impairment of the quality of life, change as the brain ages?
>
> A Certainly.
>
> Q And you have seen patients with permanent brain damage that as they age, they get into their, you know, mid 50s, 60s, that **things get a lot worse?**
>
> A Yeah, **oftentimes**. People who have sustained any type of cerebral brain damage, you know, they'll -- initially after the injury, they'll -- they might see some improvements, but as the brain is naturally aging as well, they might actually be thrown into an early onset of dementia or **they're at high risk of developing dementia**.
>
> Q Because of the brain damage that they suffered?
>
> A Right. Yeah. And the -- that coupled with the natural progression of just the aging brain.

(Tr. Trasncr. Vol.III, 120:21-121:10) (emphasis added). This testimony established for the jury that Mr. Dudley is certainly "at high risk of developing dementia." This is directly contrary to the Defendant's position that the record contains no competent or credible evidence regarding Mr. Dudley and dementia. *See* Def. Motion for Remittitur, p.72.

But regardless of the relatively ancillary issue of dementia, Dr. Paul's testimony established a several important unrebutted facts for the jury. Mr. Dudley was cognitively average prior to the injury but he is now below average. (Tr. Transcr. Vol. III, 122:17-22). Mr. Dudley also suffers from several impairments or symptoms which include:

- Impaired ability to understand spoken information
- Impaired ability to learn tasks
- Impaired auditory memory
- Impaired problem-solving skills
- Impaired working memory (ability manipulate information in his mind)
- Impaired ability to express ideas
- Triggered by fast-moving stimuli
- Decreased visual activity
- Emotional problems, including mood swings, yelling and difficulty sleeping
- Requiring frequent reminders, forgetfulness
- Dizziness
- Inability to sustain focus

(Tr. Transcr. Vol. III, 122:23-123:14; 125:10-126:21).

Per Dr. Paul, these impairments and symptoms are permanent and "probably as good as it will be" for Mr. Dudley. (Tr. Transcr. Vol. III, 124:20-25). Moreover, these impairments will probably – *i.e.* more likely than not – get worse with time. (Tr. Transcr. Vol. III, 125:1-9). Again, these opinions were not rebutted by the Defense at trial.

The Defendant's Motion for Remittitur goes to great lengths to minimize Mr. Dudley's damages, but based on the actual evidence, which is the court's primary inquiry, it is not unreasonable for the jury to have concluded Mr. Dudley suffered a devastating brain injury – multiple strokes in multiple brain spheres – which has left him with daily pain, daily limitations, daily frustrations, and daily fear for the rest of his life – 27 years. Furthermore, the jury heard from unrebutted experts that more likely than not, Mr. Dudley's injury and impairments will only deteriorate as he ages. The defense did not present a single witness supporting the assertion that Mr. Dudley has had a good outcome. It's no wonder that defense counsel told the jury during

closing arguments that this was a multi-million-dollar case if the issue of damages was reached. (Tr. Transcr., Vol. V, 85:13–19).

II. DEFENDANT'S SELECTIVE CITATION TO CASES FROM THE PAST FIFTY YEARS, AND ALL AROUND THE NATION, SHOULD BE REJECTED

The vast majority of the Defendant's Motion for Remittitur is a review of appellate opinions from Iowa and around the country reaching as far back as 1962 – sixty-one years ago! – to conclude that the jury's award must be rejected as flagrant and excessive. First, as noted above, in Iowa each case must turn on its own set of facts and evidence, and therefore, "precedents are of little value." *See Rees v. O'Malley*, 461 N.W.2d 833, 840 (Iowa 1990) (citing *Ferris v. Riley*, 101 N.W.2d 176, 183 (Iowa 1960) ("In determining whether the damage award is excessive, we must abide by the principle that each case depends upon its own facts, and **precedents are of little value**."). Second, the Defendant's selective citations do not help as much as Defendant may attempt to lead this Court to believe.

The first case cited by the Defendant in support of its claim that the jury's verdict must be remitted is *Tedrow v. Fort Des Moines Cmt. Servs., Inc*., 117 N.W.2d 63 (Iowa 1962). *Tedrow* arose from the death of a 12-year-old girl in 1956. *Id*. at 63. The Defendant points out that a damage award of $22,000 was ordered remitted to $15,000. The obvious point of citing this case is to type "wrongful death" and quote the very low dollar figures. But the Defendant fails to point out that the only available item of damage half a century ago was lost accumulation of estate and that the girl's own parents described her as less than ambitious. *Id*. at 66. The circumstances – both legally and societally – were so incredibly different 60+ years ago that this case is of absolutely no utility.

The Defendant next cites *Sallis v. Lamansky*, 420 N.W.2d 795 (Iowa 1988). In *Sallis*, the plaintiff suffered a whiplash injury having been struck from behind by a vehicle travelling 15-20

mph. *Id*. at 799. The jury awarded $626,000 in large part based on a loss of future earnings claim, but the *Sallis* court found the verdict was excessive due to insufficient evidence supporting the verdict. *Id*. at 800. The *Sallis* court noted:

> While plaintiff testified that he quit his over-the-road trucking job in 1980 because of his wife's death, he did so at a time when he was in trouble with his employer. He made no effort to acquire similar employment until 1983. Plaintiff's employment record showed thirteen jobs in seventeen years and average annual earnings in the $10,000-$11,000 range. There was little in the record to indicate that he would be willing to keep a trucking job even if he were to find one.

Id. Again, the Defendant's cite to *Sallis* has little utility to the facts present in the case at bar.

The Defendant next cites to *Jasper v. H. Nizam, Inc*., 764 N.W.2d 751 (Iowa 2009). However, Defendant's own explanation of Jasper reveals why this Court can safely disregard it as any sort of useful precedent. The Defendant writes:

> Ultimately, the Court affirmed the grant of remittitur. *Id.* at 773. The Court summarized its basis, focusing on the lack of medical evidence of distress, the existence of only "general descriptive observations," and the short period of alleged distress. *Id.* ("[T]he evidence of emotional distress was not supported by medical testimony and was largely nonspecific. Most of the evidence was confined to general descriptive observations, restricted to the first days and months following the termination.").

Def. Motion for Remittitur, p.69. The evidence in the present matter is the exact opposite of the evidence in *Jasper*. Instead of a lack of medical evidence, the record was replete with unrebutted expert testimony (and unrebutted lay testimony) regarding Mr. Dudley's injuries and impairments. Instead of being "nonspecific", the evidence of Mr. Dudley's brain injury was extensive, including analysis of his brain scans and a discussion of a multitude of neuropsychological testing. Finally, instead of being "restricted to the first days and months", Mr. Dudley's injuries and limitations are undisputedly ***permanent*** and ***progressive*** over his lifetime.

The Defendant's citation to *Kuta v. Newberg*, 600 N.W.2d 280 (Iowa 1999) is of interest. This case involved remitting predeath physical and mental pain and suffering, and predeath loss

of function damages. *Id*. at 283-284. The verdict for pain and suffering was reduced from $582,000[29] to $300,000, and the verdict for loss of function was reduced from $400,000 to $40,000. *Id*. However, the key here is that the plaintiff only suffered these damages for a short time; he **died within an hour** after the crash. *Id*. at 283. If the $340,000 is converted to today's dollars[30], that means the award was approximately **$600,000** for no more than **an hour of severe pain**. In the case at bar, Mr. Dudley has roughly 27 years of life expectancy remaining, or approximately 236,000 hours. The jury's future damage award of less than $100 an hour seems quite reasonable. The fact is, Mr. Dudley must live with his worsening impairments for many, many, many years and it's not "flagrant" or excessive or some sort of failure to effectuate justice for the jury to grasp this concept and award damages correspondingly.

Moving outside of Iowa, the Defendant cites the California case of *Bilyeu v. Cowgill* as "remarkably comparable" to the case at bar. No. B213939, 2011 Cal. App. Unpub. LEXIS 5355 (July 20, 2011). First, the Defendant fails to note that this opinion from over a decade ago is unpublished, and under California rules, parties are prohibited from citing to it as it holds zero precedential value. Second, to the extent it holds any persuasive authority, it is certainly not "remarkably comparable." The plaintiff in the case was punched in the face by the defendant. *Id*. at *8. This is quite different than having multiple strokes throughout the brain due to severe bacterial meningitis. The plaintiff in *Bilyeu* also had no ongoing pain, whereas Mr. Dudley testified to pain every day. *Id*. at *45. Significantly, the *Bilyeu* court noted "Bilyeu had no diminished judgment, impaired attention, impaired visual skills, or problem-solving deficits." *Id*. This is

[29] The Defendant's Motion for Remittitur erroneously states the initial pain and suffering award was $982,000. Def. Motion for Remittitur, p.70.

[30] All adjustments to monetary value in this Resistance were calculated using this CIP Inflation Calculator: https://www.officialdata.org/us/inflation

extremely different than the unrebutted expert testimony related to Mr. Dudley wherein the jury was told of numerous impairments that will only get worse with time. Finally, and most significantly, there was evidence that the verdict was actually a result of the jury attempting to punish the defendant's "intentional and criminal act." *Id*. at 47. No such basis to question the jury's judgment exists in the case at bar. Everyone agrees that PA Choos did not intentionally injury Mr. Dudley or commit a crime.

Rather than address each and every citation of Defendant's, and explain how each case is different, it is more efficient to simply point out that appellate decisions can be found around the country leaving large verdicts untouched, including here in Iowa. In the matter of *Tarbox, et al. v. Obstetric and Gynecologic Associates of Iowa City and Coralville*, Johnson Co. Case No. LACV081421, the district court left intact a verdict totaling $97,402,549 - $43,500,000 being allocated to past and future pain and suffering and loss of mind and body. Though the facts were obviously different, the award certainly reflects juries' recognition of the seriousness of life-altering brain injuries and Iowa court's hesitancy to disturb the damage assessments. In rejecting the Defendants' claims that the verdict "shocked the conscious" and required a remittitur, Judge Kevin McKeever wrote:

> At the outset the Court admits that the damage award was much higher than expected. If the Court had been the fact finder, it is unlikely that it would have found damages in the amount that the jury found. However, the question the court must answer in deciding whether or not to reduce the damages is: 1) was it 'flagrantly excessive or inadequate,' 2) 'so out of reason as to shock the conscience or sense of justice,' 3)'a result of passion, prejudice or other ulterior motive,' or 4) 'lacking in evidentiary support.' The Court cannot find that any of the criteria for reducing the damages has been met. The verdict was not so out of reason that it shocks the conscience or sense of justice, it did not appear to be the result of passion or prejudice and it was not lacking in evidentiary support. While the verdict was extremely high compared to most, the Plaintiff provided evidence at trial to support all of their requests for damages. It is up to the jury to determine what evidence it finds to be most convincing. It is apparent by the jury award, that they found the Plaintiff's evidence and argument regarding damages to be more persuasive than

> the Defendants' evidence and argument for damages. Although the Court may have reached a different result, it would be improper for the Court to substitute its judgment for the judgment of the jury. In the final analysis, the criteria provided by the Iowa Supreme Court leads the Court to conclude that damage award was supported by the evidence in the record and should not be reduced.

(*See* ***Exhibit A***, p.7; Copy of Judge McKeever's Order attached as a courtesy).

In the matter of *GMC v. Burry*, 203 S.W.3d 514 (Tex. App. 2006), a verdict of $19.1 million was held not to be excessive. For reference, that is approximately $28.1 million in today's dollars. In *Burry*, the defendants complained that the brain injured plaintiff was "independent in all the activities of daily living" and did not require supervision due to physical limitations. *Id*. at 555. Therefore, the defendant asserted the damages were excessive. *Id*. The *Burry* court disagreed:

> But the evidence at trial showed that Stacey continued to suffer from physical limitations such as blurred vision, light sensitivity, abnormal voice tenor, loss of flexibility and balance, weakness on the right side of her body, and spasticity. As a result of these problems in addition to her mental impairments, she could not read to her children, drive a car, or live without supervision. As one of appellees' experts stated, "Every aspect of her experience in the world has been altered as a result of this injury to the brain." All of appellees' experts agreed that Stacey had reached maximum improvement and would continue to have these problems and more throughout the rest of her life. Based on the record evidence and the applicable standard of review, we hold that the jury's award for future physical impairment was not excessive.

Id.

Similar to the *Burry* plaintiff, Mr. Dudley has documented decreased visual activity, loss of balance, weakness and numbness on the right side of his body, issues with communication, and numerous other permanent impairments that will alter his experience in this world for the rest of his life. He can drive his car, but due to his memory impairments, he frequently gets lost. He can read to his children, but he must forgo many other interactions with his children such as rollerblading and swimming and any other activity that might exacerbate his vertigo. Significantly, one child has moved out and now keeps her distance due to Mr. Dudley's post-injury anger.

In the matter of *Berthelsen v. URS Corp*., No. WD 66837, 2007 Mo. App. LEXIS 1576 (Ct. App. Nov. 20, 2007), the jury awarded $25,000,000 – approx. $36.7 million in today's dollars – to a minor that sustained a significant brain injury as a result of a motor vehicle collision. The district court denied the defendant's motion for new trial and its motion for remittitur. *Id*. at *2. In considering the excessiveness of the verdict, the *Berthelsen* court stated as follows regarding the noneconomics:

> Concerning Berthelsen's age and the nature and extent of her injuries, the evidence supported the $ 25 million award. Berthelsen is a young girl who suffered severe and permanent injuries. She was seven-years-old when the accident occurred. As a result of her injuries, **she was in a coma** for two days. When she regained consciousness, she **did not recognize her parents** and **could not use her legs or left arm**. She spent the next 31 days in the hospital in intense physical therapy relearning how to use her legs and left arm. We have already noted the injury to her brain. The **brain injuries are permanent, irreversible, and not expected ever to improve**. Because of the injuries, she has **poor organizational, auditory, and visual skills**. She has lost significant I.Q. points and suffered a **dramatic decline in her memorization skills**. She has **difficulty processing** basic information, and this problem will **worsen with time**. Because of the injuries, she walks with a severe limp and **fatigues easily**, and this condition, too, **will worsen with time**. The evidence established that she **will never be able to do many normal activities** like jogging, skiing, or dancing. She is also **at a higher risk** for developing Parkinson's disease, Alzheimer's disease, depression, and arthritis.
> …
> Although Berthelsen's award is on the high end of the spectrum of cases cited by the parties, we cannot say that the facts of this case do not justify the award. From its superior vantage point, the circuit court declined to remit the jury's compensatory damage award. Given Berthelsen's age, her life expectancy, and her permanent, life-altering injuries, we cannot say that the circuit court abused its discretion in refusing to remit the jury's award.
>
> We, therefore, affirm the circuit court's judgment.

Id. at *18-19; 21. (emphasis added).

The description of the *Berthelsen* plaintiff sounds eerily similar to Mr. Dudley. Recall, Sarah testified that Mr. Dudley was not in his right mind in the hospital and thought he was in an alien spaceship. (Tr. Transcr. Vol. III, 208:4-10). He had to re-learn how to feed himself and bathe

himself. He could not initially walk and had to re-learn how to walk. (Tr. Trasncr., Vol. III, 208:4-10). Additionally, the unrebutted testimony from expert neuropsychologist Dr. David Paul was that Mr. Dudley suffers from numerous impairments which will likely worsen with age, including:

- Impaired ability to understand spoken information
- Impaired ability to learn tasks
- Impaired auditory memory
- Impaired problem-solving skills
- Impaired working memory (ability manipulate information in his mind)
- Impaired ability to express ideas
- Triggered by fast-moving stimuli
- Decreased visual activity
- Emotional problems, including mood swings, yelling and difficulty sleeping
- Requiring frequent reminders, forgetfulness
- Dizziness
- Inability to sustain focus

(Tr. Trasncr. Vol. III, 122:23-123:14; 125:10-126:21). The Defendant in this matter wishes to paint a positive picture and convince this Court that Mr. Dudley's bout with bacterial meningitis was merely a minor speed bump in his life. However, the jury was free to consider the evidence and conclude the exact opposite: This incident ended life as Mr. Dudley knew it and created a whole new, horrific reality for him which will only worsen with time.

In sum, the Defendant's extensive efforts to compare this case to others should be rejected. For one, the cases cited by Defendant – especially the Iowa cases – are largely distinguishable when the actual evidence in the record is considered. Second, to the extent the Court finds value in comparing cases, there are certainly cases around the nation similar to the case at bar wherein verdicts were left undisturbed because courts have recognized the seriousness of brain injuries.

III. THE DEFENDANT'S EFFORT TO USE IOWA CODE §147.136 AS A FRAMEWORK FOR DAMAGES MISSES THE MARK

In support of its request for remittitur, the Defendant makes the following argument:

> The Iowa legislature has recently taken steps as to how noneconomic damages should be valued by placing a statutory cap on them in the amount of $250,000 (unless the jury makes a finding an exception applies). *See* Iowa Code § 147.136A(2). This statute was passed along with others in a tort reform package designed to protect medical care providers, and is a clear proscription from the legislature as to how these types of damages are to be viewed.

See Def. Motion for Remittitur, p.71-72.

This argument is severely flawed. First, it is undisputed that Mr. Dudley suffered permanent injuries and as a result, the statutory cap is wholly inapplicable to the case at bar. Moreover, the cap on temporary injuries is a result of many factors and not a valuation of injury or life. Second, the proper inquiry before the Court is: Did the jury have a reasonable basis for their approximation of the damages based on the presented evidence? Instead of properly confining itself to the record, the Defendant is urging the Court to look outside the record and impose a *de facto* application of an inapplicable statute.

IV. THERE IS ABSOLUTELY NO EVIDENCE OF PASSION, PREJUDICE, OR ULTERIOR MOTIVE – ONLY DEFENDANT'S OWN SPECULATION

To recap the law, since the record in this case supported the verdict and dispelled any presumption of prejudice, the Defendant must prove there is evidence of passion and prejudice in the record before the Court. Iowa courts have explained:

> "[A] flagrantly excessive verdict raises a presumption that it is the product of passion or prejudice." *WSH Props.*, 761 N.W.2d at 50. **Where the verdict is not excessive and prejudice is not presumed, "passion or prejudice must be found from evidence appearing in the record."** *See Jasper v. H. Nizam, Inc.*, 764 N.W.2d 751, 771 (Iowa 2009); *WSH Props.*, 761 N.W.2d at 50 (finding within the meaning of rule 1.1004(4), "passion" includes **anger**, **rage**, **sudden resentment**, or **terror**, among similar sentiments). Under the facts presented in this case, we find the jury award not so flagrantly excessive as to raise a presumption of prejudice. Thus, we must look to the record for evidence of passion or prejudice.

O'Bryan v. Henry Carlson Co., 828 N.W.2d 326 (table), 2013 Iowa App. LEXIS 8, *13-14 (Iowa Ct. App. 2013) (emphasis added). "Once the presumption of passion . . . is dispelled, we must look

for some other indication in the proceedings that would support a finding the jury was angry with the defendants and motivated to punish them." *Alcala*, 2019 Iowa App. LEXIS 1058, at *12.

Moreover, the Defendant does not get to argue the number is large, therefore it is an improper verdict:

> On the issue of compensatory damages, the jury was additionally instructed its "judgment must not be exercised arbitrarily, or out of sympathy or prejudice, for or against the parties." Again, we assume the jury followed the court's instructions, and we are therefore satisfied its verdict was not the result of passion or prejudice against *Hohenshell*. *Id*. **Furthermore, "the fact that a damage award is large does not in itself . . . indicate that the jury was motivated by improper considerations in arriving at the award."** 58 Am. Jur. 2d New Trial § 276 (Nov. 2018 update); *see also Daniels*, 761 N.W.2d at 50 (quoting 58 Am. Jur. 2d New Trial § 313, at 313 (2002)).

Gray v. Hohenshell, 927 N.W.2d 680 (table), 2019 Iowa App. LEXIS 71, *21 (Iowa Ct. App. 2019) (emphasis added).

In support of its argument that the jury acted with “anger”, “rage”, or “sudden resentment”, the Defendant points to alleged misconduct by Plaintiffs’ counsel. These allegations are specifically resisted elsewhere and are without merit. Suffice it to say, Plaintiffs’ counsel disagrees (1) error was preserved, and/or (2) there was any misconduct on the part of Plaintiffs’ counsel. Absent counsel’s allegedly “inflammatory remarks,” the Defendant offers absolutely nothing in the record suggesting the jury did anything but value Mr. Dudley’s damages differently than Defendant who suggested three-million-dollar verdict. *See Gray*, 2019 Iowa App. LEXIS 71, at *22. (“The district court specifically noted in its ruling on the new trial motion that it "did not observe actions or reactions by any juror that evidenced or appeared to raise a concern that passion or prejudice was in any way influencing jurors individually or collectively at any point in time."). Notably, the record reflects the opposite of a fired-up jury in this case. The Court had to remind the jury to stay awake and pay attention during trial. (Tr. Transcr. Vol. II, 100:11-101:8).

The Defendant does indicate that the jury "obliged counsel's request" with their jury verdict, and therefore counsel "clearly succeeded in stoking the passions and prejudices" of the jury. *See* Def. Motion for Remittitur, p.77. Presumably, the Defendant is referring to the fact that the jury gave a verdict similar to what was requested by Plaintiffs' counsel.[31] Interestingly enough, Iowa's appellate courts have found that when this happens, the jury is actually demonstrating structure rather than passion or prejudice. *See Gray*, 2019 Iowa App. LEXIS 71 at *22-23 (finding when the jury followed counsels' damage guidance with small adjustments, it was exercising judgment and demonstrating structure as opposed to passion or prejudice).

Finally, the Defendant points to the jury's request to add a statement to the verdict form as evidence of passion, prejudice, or ulterior motive. *See* Def. Motion for Remittitur, p.77-78. For a party so fearful of any potential speculation, it is surprising to see the Defendant engage in rampant speculation as to what statement the jury wished to add to the verdict form. There is absolutely no evidence that "clearly this verdict arose out of the desire to punish UnityPoint Clinic…" *See* Def. Motion for Remittitur, p.76. It is quite possible the jury wished to write a message indicating that they felt sorry for Ms. Melanie Choos and UnityPoint, but this was a fair valuation of Mr. Dudley's damages. Or perhaps the jury wanted to clarify that the entire amount was meant to compensate him for the remainder of Mr. Dudley's life and a reflection of their belief that his permanent brain injury will worsen with time. The point is that the Defendant can only speculate that the jury wanted to punish UnityPoint – there is *zero* evidence to that effect. And without evidence, it is improper to remit the jury's verdict.

[31] As pointed out in section IV of this Resistance, Defendant's counsel recommended that Mr. Dudley's significant injuries should be compensated at $100,000 per year for roughly 27 years with a total verdict of "about 3 million." (pp.10-11, supra) (Tr. Transcr. Vol. V, pp. 85-86). To the contrary, Plaintiff's counsel argued that the compensatory damages award should be $1,000,000 per year for 27 – totaling $27,000,000. (pp. 11-12, supra) (Tr. Transcr. Vol. V, pp. 95-96). The jury accepted Plaintiff's counsel's amounts and rejected the Defendant's counsel suggestion. This is not evidence of passion or prejudice.

WHEREFORE, for the reasons set out, Plaintiff requests that the Court enter an order denying Defendant UnityPoint Clinic's Motion for New Trial Pursuant to Iowa Rule of Civil Procedure 1.1004 or Remittitur filed 01/05/23. Plaintiff requests any other and further relief as the court deems just and equitable.

Respectfully,

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