IN THE IOWA DISTRICT COURT FOR POLK COUNTY

JOSEPH DUDLEY, Plaintiffs, vs. IOWA PHYSICIANS CLINIC MEDICAL FOUNDATION d/b/a UNITYPOINT CLINIC FAMILY MEDICINE/URGENT CARE-SOUTHGLEN, Defendants.	)	LAW NO. LACL138335 **DEFENDANT'S MOTION FOR NEW TRIAL PURSUANT TO IOWA RULE OF CIVIL PROCEDURE 1.1004 OR REMITTITUR**

COME NOW the Defendants, Iowa Physicians Clinic Medical Foundation d/b/a UnityPoint Clinic Family Medicine/Urgent Care-Southglen ("UnityPoint Clinic) pursuant to Iowa Rule of Civil Procedure 1.1004 and for its Motion for New Trial or Remittitur, state as follows:

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INTRODUCTION

The jury's verdict in this case is flagrantly excessive, unsupported by the evidence of trial, and represents a shocking failure to effectuate substantial justice as was the jury's duty, warranting a new trial. As demonstrated throughout this motion, UnityPoint Clinic did not receive a fair trial on the merits at issue. Rather, Plaintiff's counsel successfully tried UnityPoint

Clinic on matters not in issue. Plaintiff's counsel made inflammatory and prejudicial arguments against UnityPoint Clinic designed to inflame the passions and prejudices of the jury and view UnityPoint Clinic in a moralistic and punitive lens. Counsel then beseeched the jury to send UnityPoint Clinic a message for its perceived conduct, telling UnityPoint Clinic "that's not okay," which the jury readily obliged, rendering a **$27 million** verdict. The law does not support that such an inflamed, punitive, and excessive verdict should stand. Rather, the law, on behalf of substantial justice, demands UnityPoint Clinic be granted a new trial so it may fairly receive a trial on the merits, or instead a remittitur of the flagrantly excessive award. It is beyond dispute that this excessive verdict was rendered to punish UnityPoint Clinic for perceived wrongs that were not at issue and not in the record as opposed to compensating Plaintiff for his injuries. For all of the reasons set forth herein and set forth in UnityPoint Clinic's Motion for Judgment Notwithstanding Verdict, and because the jury's verdict fails to effectuate substantial justice, UnityPoint Clinic is entitled to a new trial. The Court must use its inherent power to correct a failure of justice and fulfill its duty to order a new trial.

STANDARD

The Iowa Rules of Civil Procedure allow an aggrieved party to receive a new trial on an adverse verdict. Iowa R. Civ. P. 1.1004, 1.1007, 1.1010. 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. *White v. Walstrom*, 118 N.W.2d 578, 582 (Iowa 1962). The trial court has broad discretion in determining whether the verdict effectuates substantial justice between the parties. *Neumann v. Serv. Parts Headquarters*, 572 N.W.2d 175, 177 (Iowa Ct. App. 1997); Iowa R. App. P.

6.904(3)(c). The Supreme Court of Iowa is less likely to interfere with the granting of a new trial than the denial of a new trial. Iowa R. App. P. 6.904(3)(d).

The trial court may grant a new trial based upon one error or ground. *Wilson v. Iowa State Highway Comm'n*, 90 N.W.2d 161, 165 (Iowa 1958). Furthermore, the trial court is not bound by the record in the same way as the appellate courts. *Loehr v. Mettille*, 806 N.W.2d 270, 278 (Iowa 2011). To justify granting a new trial, the error need not amount to reversible error. *Hartford Fire Ins. Co. v. Lefler*, 135 N.W.2d 88, 92 (Iowa 1965). Any other rule would render the trial court's power to correct a failure of justice meaningless. *Id.* In the alternative, if no single error is sufficient by itself to warrant a new trial, the accumulation of several errors is also sufficient to grant a new trial. *See State v. Carey,* 165 N.W.2d 27, 36 (Iowa 1969); *Wilson*, 90 N.W.2d at 165. If upon the whole record, the trial court believed the defendant did not receive a fair trial, it is the trial court's duty to order a new one. *See Schmitt v. Jenkins Truck Lines, Inc.*, 170 N.W.2d 632, 661 (Iowa 1969); *Snoke v. Keiser Bros. & Phillips*, 127 N.W. 1089, 1089 (Iowa 1910).

MOTION NEW TRIAL

I. THE CUMULATIVE IMPACT OF COUNSEL'S ACTIONS NECESSITATES A NEW TRIAL

UnityPoint Clinic contends that each of the issues discussed below warrant a new trial as they each amount to reversable error. However, even to the extent any one of or all of these matters alone do not constitute reversible error, a new trial is warranted due to the cumulative impact of these issues. *See Burke v. Reiter*, 241 Iowa 807, 814, 42 N.W.2d 907, 911-12 (Iowa 1950) (where search of record revealed several matters that may have contributed to jury's verdict contrary to the weight of the evidence, new trial was proper even though not one of

such matters, alone, constituted reversible error). Even if no single action is sufficiently prejudicial to warrant a mistrial on its own, a mistrial is still required if the misconduct occurring during the trial has the cumulative effect of depriving the defendant of a fair trial. *State v.* Huse, 894 N.W.2d 472, 498 (Iowa 2017). Thus, "'[W]hen a lawyer departs from the path of legitimate argument, he does so at his own peril and that of his client.'" *Gilster,* 747 F.3d at 1013 (gender changed) (quoting *Chicago & N.W. Ry. v. Kelly,* 84 F.2d 569, 573 (8th Cir. 1936)).

II. A NEW TRIAL MUST BE GRANTED BECAUSE OF THE IMPROPER ARGUMENT ABOUT DOCTORS SUPERVISING PHYSICIAN ASSISTANTS

Midway through the week, Plaintiff's trial strategy turned. The case was no longer about the proper care a physician assistant should provide, but whether the physician assistant was properly being supervised by a physician. During closing, and over objection, the Court allowed counsel to make arguments related to the resources available to Melanie Choos. (Tran Vol. V, pp. 28:10-20). 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). Counsel also had a closing slide with a picture of Melanie Choos on one side and a blank physician with a question mark on the other. (Pl. Closing, p. 14). Indeed, counsel gave the game away that this was one of the true themes of his case in a

statement he provided to the Des Moines Register (Attached). He specifically said, "Physician assistants shouldn't be running clinics on their own without any supervising physician…That shouldn't happen in Iowa, but it is happening in Iowa and because of it, people are getting hurt and people are dying." (Def. Ex. A, 11/21/22 Article, p. 3).

The problem with the arguments are twofold: first, that none of it was in evidence; and second the arguments misstate the law.

A. COUNSEL'S ARGUMENT WAS OUTSIDE THE EVIDENCE AND ISSUE

The marshalling instruction did not include any claims against UnityPoint Clinic for failing to supervise Melanie Choos with a physician. (Instruction No. 12, p. 13). The marshalling instruction likewise did not include any claim against Melanie Choos or UnityPoint Clinic for holding herself out as a physician. Plaintiff utilized an infectious disease doctor (Dr. MacArthur); an emergency room physician (Dr. Galan), a physician's assistant (PA Mooney), a neurologist (Dr. Gold), and a neuropsychologist (Dr. Paul) for expert opinions in this case. Not a single one opined on a breach of the standard of care related to supervision of a physician assistant. Moreover, not a single one properly and timely disclosed standard of care opinions in their expert disclosures regrading physician supervision of a physician's assistant. 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.

It is well settled in Iowa that expert testimony is necessary to support a *prima facie* case of standard of care, breach, causation, and damages in a medical malpractice action. *Phillips v. Covenant Clinic,* 625 N.W.2d 714, 718 (Iowa 2001), *see also Peppmeier v. Murphy,* 708 N.W.2d 57, 62 (Iowa 2005); *Cox v. Jones*, 470 N.W.2d 23, 25 (Iowa 1991). *Donovan v. State*, 445 N.W.2d 763,

766 (Iowa 1989). The general rule requires expert testimony establish specific negligence of a care provider. *See Cox*, 625 N.W.2d at 26. Plaintiff is required to identify the specific acts or omissions relied upon to generate questions for the trier of fact. *Eisenhauer ex rel. T.D. v. Henry Cty. Health Ctr.*, 935 N.W.2d 1, 10 (Iowa 2019). Because the standard of care is specific to members of the profession or occupation, "a lay person sitting as trier of fact lacks the knowledge to render a competent judgment as to negligence and proximate cause in complex matters requiring professional expertise." *Eventide Lutheran Home for the Aged v. Smithson Elec. & Gen. Const., Inc.*, 445 N.W.2d 789, 791 (Iowa 1989); *see also Susie v. Family Health Care of Siouxland, P.L.C.*, 942 N.W.2d 333, 337 (Iowa 2020), *reh'g denied* (May 13, 2020) (expert testimony required for causation). At the time of trial, the expert's testimony may not be inconsistent with or go beyond the fair scope of the previously disclosed opinions. Iowa R. Civ. P. 1.508(4).[1] Furthermore, the jury may determine the standard of professional learning, skill and care required by a physician assistant only from the opinions of the experts who testified to such standard. *See Wilson v. Corbin*, 41 N.W.2d 702, 705 (1950); *Bryant v. Rankin*, 332 F.Supp 319, 322 (S.D. Iowa 1971); *Perin v. Hayne*, 210 N.W. 2d 609, 613 (Iowa 1973); *Buckroyd v. Bunten*, 237 N.W.2d 808, 811 (Iowa 1976); *Meirick by Meirick v. Weinmeister,* 461 N.W.2d 348, 350 (Iowa

[1] Iowa Courts have routinely upheld a district court's limitation of expert testimony on this basis. *See, e.g.*, *Baltimore v. Drost*, No. 05-1595, 2006 WL 1279277, at *2 (Iowa Ct. App. May 10, 2006) (holding that trial court did not abuse its "considerable discretion" in excluding expert testimony where expert's testimony on damages was disclosed a few weeks before trial and that the expert's previously undisclosed opinions "prejudiced defendants by introducing a new issue on the eve of trial"); *Leet v. Burbridge*, No. 03-0557, 2004 WL 573798, at *2 (Iowa Ct. App Mar. 24, 2004) (holding trial court did not abuse its discretion by excluding "new" opinion from treating physician that was introduced for the first time a few days before trial and where new portion of expert testimony "injected a new issue into the case"); *Brown v. Pospisil*, No. 99-474, 2000 WL 378262, at *2–3 (Iowa Ct. App. Apr. 12, 2000) (holding that trial court did not abuse its discretion in excluding portions of two experts' testimony where one expert intended to express a previously undisclosed standard of care opinion at the time of trial and the second expert was a treating physician who intended to offer standard of care and causation opinions that he had not expressed in deposition and had never disclosed in a Rule 1.508 statement.)

App. 1990); *Kennis v. Mercy Hospital Medical Center,* 491 N.W.2d 161, 165 (Iowa 1992); *see also* (Instruction No. 18, p. 19).

Due to no disclosures, this argument came as unfair surprise to UnityPoint Clinic. The purpose of this argument was to inflame the passions and prejudices of the jury in viewing UnityPoint Clinic in a moralistic and punitive light. It was to infer (in spite of stricken testimony) Melania Choos was holding herself out as a doctor. (*See also* Part III.A.). It was also to impugn UnityPoint Clinic under the pretense that a doctor was needed on site to overlook and "supervise" the physician assistants. In other words, counsel created the image that PA's at the clinic were fraudulently holding themselves out as doctors as a presumptive cost saving mechanism, to avoid the presumptive requisite of physician oversite in treating patients in spite of the fact none of this was in evidence or in issue. (*See also* Part III.A.). This fit right in with counsel's theme representing UnityPoint Clinic as advocating for a lower standard of care, that will kill patients, while fraudulently masquerading physician assistants as doctors, and beseeching the jury to tell UnityPoint Clinic that this was not okay. (*See* Part IV, *infra*).

Iowa follows other jurisdictions and respected treatises that counsel's arguments should be confined to the evidence. *See Janvrin v. Broe*, 239 Iowa 977, 984, 33 N.W.2d 427, 432 (Iowa 1948) ("Its violation, if any, had no causal connection with the injury. It was not alleged as a ground of negligence. The collision was in the traffic lane. Whether there was another car parked between defendant's car and the south curb was unimportant under the record."); *Hoover v. First Am. Fire Ins. Co. of New York*, 218 Iowa 559, 255 N.W. 705, 707 (Iowa 1934) ("It is equally well settled that neither opening statements nor closing arguments of attorneys should go outside of the evidence."); § 36:19. Closing arguments—Scope of closing

arguments—Improper argument—Referring to matters outside the evidence, 11 Ia. Prac., Civil & Appellate Procedure § 36:19 (2022 ed.) ("It is improper in final arguments to refer to matters which are outside of the evidence or outside of the issues in the case."); *see also Rob-Lee Corp. v. Cushman*, 727 S.W.2d 455 (Mo. Ct. App. E.D. 1987) (holding that where a case was tried solely on a negligence theory and not on a warranty theory, it would be prejudicial error to permit the plaintiff's counsel to read the warranty provisions of the repair order); 75A Am. Jur. 2d Trial § 503 ("During a closing argument, counsel may not 'travel outside the record' by arguing facts or matters not included in the evidence of record…Thus, counsel may neither introduce matter relevant only to theories or issues on which the **case was not tried**... Where counsel…states facts and conclusions not supported by the evidence…the argument is improper.") (emphasis added).

It is reversible error for counsel to argue facts not in evidence or in issue. *See Young v. Washington Hosp.*, 761 A.2d 559, 563 (Pa. Super. Ct. 2000) ("It is well established that any statements by counsel, not based on evidence, which tend to influence the jury in resolving the issues before them solely by an appeal to passion and prejudice is improper and will not be countenanced."); *Stoner v. Eden*, 199 Ga. App. 135, 137, 404 S.E.2d 283, 285 (1991) (remarks had no relevance to any issue of liability or damages in the case); *Martin v. Sowers*, 231 So. 3d 559, 562–63 (Fla. Dist. Ct. App. 2017) (directed questions wholly unrelated to the issue of the spread of cancer to bones); *Maercks v. Birchansky*, 549 So. 2d 199, 199 (Fla. Dist. Ct. App. 1989) (improper remark on items when there was no claim for them as damages); *Mantz v. Follingstad*, 1972-NMCA-164, ¶ 24, 84 N.M. 473, 478, 505 P.2d 68, 73 (Ct. App. NM, 1972) ("Plaintiff's argument to the jury, objections to which were sustained, had no bearing upon the remaining

issues left in the lawsuit"); 75A Am. Jur. 2d Trial § 505 ("A statement by counsel in argument of facts not in evidence or a misstatement of the evidence is improper and is generally regarded as reversible error"); 66 C.J.S. New Trial § 60 ("A new trial may be granted where counsel…refers to matters not in evidence"); 58 Am. Jur. 2d New Trial § 118 ("Misconduct of counsel sufficient to require the granting of a new trial may consist in attempting to get before the jury matters not in issue and not properly matters for the consideration of the jury by means of asking witnesses improper questions or making improper offers of proof. A new trial may be granted where counsel for the adverse party brings in or attempts to bring in irrelevant evidence concerning collateral matters for the purpose of prejudicing, or tending to prejudice, the jury against the movant"); 88 C.J.S. Trial § 306 ("**Counsel must be confined to the issues and the evidence and will not be allowed to comment on or state facts not in evidence or within the issues.** Jury argument may refer to matters that are within the scope of the issues and the evidence, but evidence outside the record may not be suggested by any means. Counsel will also not be permitted to state facts that are not within the issues as made by the pleadings…Any statements by counsel, not based on evidence, that tend to influence the jury in resolving issues before them solely by an appeal to passion and prejudice are improper and will not be countenanced.").

B. COUNSEL'S ARGUMENT MISSTATED THE LAW

Connected to counsel's physician supervision argument, counsel argued to the jury that what UnityPoint Clinic's expert said about the standard of care is, "and how things are happening in Iowa", the jury got to choose whether they were "okay with it." (Tran. Vol. V, p. 30:13-19). This is a fundamental misstatement of Iowa law. This argument failed to

correspond with any of the jury instructions instructed by the Court (*see* Final Jury Instructions). Nowhere does the Final Jury Instructions, nor Iowa law allow the jury to simply decide whether they are "okay" with the care performed in a medical malpractice action. Rather, the jury must determine whether Melanie Choos, PA, used the degree of skill, care and learning ordinarily possessed and exercised by other physician assistant in answering the six allegations of negligence charged against her. (*See* Instruction No.'s 12 and 13, pp. 13-14).

Counsel's arguments further misstated the law because Iowa law precludes a jury from deciding whether they are okay or not with requirements for physician supervision. The Iowa Administrative Code specifically provides for supervisory agreements between physicians and physician assistants, and these arrangements do not require supervision on site, or for each individual patient. *See* Iowa Admin. Code r. 653-21.4(148,272C). As such, the issue of whether Melanie Choos required supervision was not even remotely debatable. Iowa law literally precludes the jury's ability to "decide" whether or not they agreed with it. The jury does not get to decide if they are okay with doctors "not supervising" a physician assistant.

Counsel has no right to create evidence or to misstate the facts. *State v. Morris*, No. 98-1640, 2000 WL 381641, at *8 (Iowa Ct. App. Apr. 12, 2000) (*citing State v. Thornton*, 498 N.W.2d 670, 676 (Iowa 1993)). Misstatements of the law are impermissible during closing argument, and the Court has a positive and absolute duty, as opposed to a discretionary duty, to restrain such arguments. *See* 75A Am. Jur. 2d Trial § 531 (citing *In re Wagner*, 119 Cal. App. 3d 90, 173 Cal. Rptr. 766 (2d Dist. 1981); *Garrison v. Rich's*, 154 Ga. App. 663, 269 S.E.2d 513 (1980); *State v. Hilt*, 307 Kan. 112, 406 P.3d 905 (2017*); State v. Anderson*, 306 S.W.3d 529 (Mo. 2010); *Titsworth v. Powell*, 776 S.W.2d 416 (Mo. Ct. App. E.D. 1989); *State v. Diaz*, 100 N.M.

210, 1983-NMCA-091, 668 P.2d 326 (Ct. App. 1983); *State v. Fletcher*, 370 N.C. 313, 807 S.E.2d 528 (2017); *State v. Houston*, 688 S.W.2d 838 (Tenn. Crim. App. 1984)).

III. A NEW TRIAL MUST BE GRANTED BECAUSE UNITYPOINT CLINIC WAS ENTITLED TO A MISTRIAL DUE TO THE IMPROPER TESTIMONY OF DR. JANUS

On November 16, 2022, Plaintiff called Dr. Todd Janus, a neurologist and former treating care provider of Joseph Dudley, to testify. (Tran. Vol. III, pp. 7:24-51:12). The anticipated testimony of Dr. Janus was addressed in UnityPoint Clinic's Motion to Exclude Expert Testimony (incorporated herein by reference). At trial it became apparent that Dr. Janus provided improper expert opinions unrelated to his care and treatment which resulted in a motion for mistrial. (Tran. Vol. III, pp. 35:18-37:10). Ultimately the Court decided to strike the witness and give a curative instruction for the jury to disregard Dr. Janus's testimony and not consider it during deliberations. (Tran. Vol. III, pp. 50:5-9; 51:1-12).

While generally improper testimony is not unduly prejudicial if the jury is admonished to disregard it, Iowa law recognizes improper testimony can exist that is so prejudicial that an admonition to disregard it is an insufficient curative. *Berg v. Des Moines Gen. Hosp. Co.*, 456 N.W.2d 173, 178 (Iowa 1990). Indeed, "[t]here are matters which when put before a jury are so prejudicial that no admonition can erase them." *Lange v. City of Des Moines*, 404 N.W.2d 585, 587 (Iowa Ct. App. 1987). Improper 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. *Miller v. Town of Ankeny*, 253 Iowa 1055, 1059–60, 114 N.W.2d 910, 913 (Iowa1962) (citing authorities). Courts have long recognized that in certain scenarios, a curative instruction or admonition to the jury is simply inadequate to remove the taint of erroneously admitted

evidence or argument. *See Reed v. General Motors Corp.*, 773 F.2d 660, 664 (5th Cir. 1985) (In discussing curative instructions or admonitions to the jury, the Court noted "[t]he wisdom of experience is embodied in the aphorism that the scent of a skunk thrown into the jury box cannot be wiped out by a trial court's admonition to ignore the smell."); *United States v. Garza*, 608 F.2d 659, 666 (5th Cir. 1979) ("after the thrust of the saber it is difficult to say forget the wound."); *United States v. Lowis*, 174 F3rd 881, 885 (7th Cir. 1999) (one cannot "unring the bell").

In *Devore*, the Iowa Supreme Court held that where a doctor, who had examined plaintiff in order to testify as an expert witness, was erroneously permitted to testify as to statements made to him by plaintiff concerning the history of plaintiff's injuries, and the jury could not determine, based upon the questions and answers, what part of the doctor's opinion was based upon his own examination of plaintiff, the erroneous admission of the doctor's testimony was prejudicial notwithstanding the fact that the trial court struck all such statements and admonished the jury to ignore them and any opinions based upon them. *Devore v. Schaffer*, 65 N.W.2d 553, 556 (Iowa 1954). Further Iowa cases support erroneously admitted expert testimony can constitute prejudicial error. *Terrell v. Reinecker*, 482 N.W.2d 428, 430 (Iowa 1992) (admission of inadmissible testimony by investigating officer that, in his opinion, the plaintiff had failed to yield the right-of-way to a truck was not harmless error in a case involving a car accident, as the jury "may well have relied on a belief that the accident was caused by [plaintiff's] failure to yield, and done so on the basis of the officer's improper testimony."); *Smith v. Wright*, 851 N.W.2d 854, 2014 WL 2347388 (Iowa Ct. App. 2014) (improperly admitted

expert opinion testimony constituted prejudicial error because "the jury may well have relied on" the expert's opinions) (*citing Terrell,* 482 N.W.2d at 430).

Other cases in outside jurisdictions are likewise in accord. *People v. Uribe* involved a sexual abuse case where testimony from an expert that the victim was sexually abused without corroborating physical evidence of such abuse warranted a new trial despite the fact that a curative instruction was given. 962 N.W.2d 644, 646 (Mich. 2021). In reversing the court of appeal's decision, the Michigan Supreme Court noted that in a case involving a credibility contest, this was "far more pernicious that a mere evidentiary error." *Id.* The Court noted that in such cases the jury may credit an expert's opinion with enormous weight. *Id.* According to the Court, "[o]nce the jury heard Dr. Guertin affirmatively and repeatedly testify that it was his opinion that the complainant was sexually abused, the curative instruction was insufficient to erase the prejudice suffered by the defendant." *Id.*

In *Philip Morris USA, Inc. v. Gloger*, the trial court gave a limiting instruction for statements made by two doctors outside of trial. 273 So. 3d 1046, 1052 (Fla. Dist. Ct. App. 2019). The court of appeals found the limiting instruction was not effective "to assuage the significant prejudice to the tobacco defendants of the jury's hearing" the statements. *Id.* The statements concerned the origins of the plaintiff's cancer, which was a critical fact in issue. *Id.* at 1053. The testimony was prejudicial in part in that it bolstered the testimony of the estate's expert. *Id.*

Sutch v. Roxborough Mem'l Hosp., involved an allegation of medical malpractice for failing to warn of the discovery of a lung nodule. At trial, the defendants expert made an improper reference to the Plaintiff's smoking history that had been addressed in a pretrial ruling. No.

3246 EDA 2012, 2013 WL 11250979, *11 (Pa. Super. Ct. Nov. 4, 2013). The superior court of Pennsylvania affirmed the district court's finding a curative instruction was insufficient to cure the prejudicial impact. *Id.*

Onstad v. Wright, was a medical malpractice action where the plaintiff's attorney and expert witness both improperly referenced a "shutdown" of a medical unit after the incident in question in violation of the court's pretrial order. 54 S.W.3d 799, 806-08 (Tex. App. 2001). The district court found the harm was not one that could be corrected by an instruction. *Id.* at 809.

Other cases have likewise found the improper admission of expert testimony was not harmless error. *See Johnson v. Abdullah*, 2019-Ohio-4861, 136 N.E.3d 581, 594 (Ct. App. Ohio 2019) (In this medical malpractice action, the court's error in admitting testimony of the chief operating officer of a hospital system was not harmless given that his testimony formed the centerpiece of the defense's case and countless references to his testimony throughout the trial only magnified prejudicial effect of admitting his testimony); *Wilkes-Barre Iron & Wire Works, Inc. v. Pargas of Wilkes-Barre, Inc.*, 348 Pa. Super. 285, 502 A.2d 210, 215 (1985) (expert's testimony at trial that exceeded the scope of the expert's pretrial report was prejudicial error necessitating a new trial where the jury's verdict *may have* been based on the improperly admitted evidence); *Franklin v. Pub. Health Tr. of Dade Cnty.*, 759 So. 2d 703, 705-706 (Fla. Dist. Ct. App. 2000) (Affirming the district court's granting of Defendant's motion for new trial where the testimony of Plaintiff's expert was improperly admitted because he was not qualified to testify as to the standard of care).

The prejudice from Dr. Janus' testimony was threefold. First, Dr. Janus was allowed to testify to an improper and inflammatory issue that became a theme in Plaintiff's case. Second, Dr. Janus was allowed to testify to central issues in the case which amounted to non-designated expert opinion. Lastly, Dr. Janus' qualifications rendered his opinions more credible than the other experts who testified. Accordingly, a curative instruction was insufficient to cure the prejudice created by Dr. Janus' testimony.

A. DR. JANUS TESTIFIED TOWARDS AN INFLAMMATORY ISSUE

Dr. Janus was allowed to testify to an improper and inflammatory issue that became a theme in Plaintiff's case. Dr. Janus specifically testified that when he would call the Clinic the PA's would be referred to as doctors. (Tran. Vol III, pp. 11:20-12:2). Dr. Janus also testified that PA's were not doctors. (Tran. Vol. III, p. 12:3-19). This became an inflammatory and improper theme of Plaintiff's case where he argued and represented that the PA's at the clinic, including Melanie Choos, were holding themselves out as doctors and were not receiving the proper supervision from doctors. (*See* Part II, *supra*). This argument was irrelevant because no expert witnesses offered standard of care criticisms against Melanie Choos for allegedly holding herself out as a doctor and/or not receiving proper supervision from a doctor, and these items of negligence were not included on the marshalling instruction in the final jury instruction. (*See* Jury Instruction No. 12, p. 13). Furthermore, the argument was inflammatory as it caused the jury to look at UnityPoint Clinic through a moralistic and punitive lens by presenting the image of UnityPoint Clinic engaging in unscrupulous and partially fraudulent behavior.

Plaintiff called back to the argument several times throughout the trial. During the cross-examination of Melanie Choos, counsel asked her if UnityPoint Clinic referred to her as a doctor. (Tran Vol. III, pp. 178:19-179:4). During the direct examination of Sarah Dudley, counsel asked her if she was aware Melanie Choos was not a doctor, to which she replied she assumed Melanie Choos was a doctor. (Tran Vol. III, p. 200:13-15). Counsel harkened back to Dr. Janus twice in his closing argument. Firs, when he referred to Dr. Janus' stricken testimony. (Tran Vol V., p. 18:3-13). The main purpose of this reference would be to subtly remind the jury of the fact that Dr. Janus came in and testified. Counsel further harkened back on this notion in asking why Sarah and Joseph Dudley would think Melanie Choos was a doctor. (Tran Vol. V, p. 29:3-20). Again, it was only the testimony of Dr. Janus that supported this theory of PA's holding themselves out as doctors. The only purpose behind the rhetorical question proffered by counsel would be to subtly harken back to this prior testimony even though it was stricken, for the purpose of subversively affirming PA's were holding themselves out as doctors at the clinic.

The point remains that Dr. Janus' testimony was the only affirmative testimony on the issue of physician assistants holding themselves out as doctors, which was ultimately an irrelevant, misleading and unduly prejudicial theme. However, counsel repeatedly harkened back to this issue, which would only serve to subconsciously remind the jury of Dr. Janus' stricken testimony. Moreover, regardless of the curative instruction, with this testimony in the back of the jury's mind, they would be disinclined to believe Melanie Choos' testimony that she identified herself as a physician assistant, and believe Sarah Dudley's testimony that she believed Melania Choos was a doctor. It thereby lent credence to this inflammatory notion,

not in evidence, that physician assistants were practicing medicine and holding themselves out as doctors without proper physician supervision. As such a curative instruction was insufficient to cure the prejudice rendered by Dr. Janus' testimony.

B. DR. JANUS TESTIFIED TO CENTRAL ISSUES IN THE CASE

Prior to being cut off, Dr. Janus testified that to a reasonable degree of medical certainty Joseph Dudley's permanent brain damage could have been avoided. (Tran. Vol. III, p. 21:11-15). Dr. Janus also testified if Joseph Dudley had been treated earlier it might have prevented the brain damage from happening. (Tran. Vol. III, pp. 21:22-22:1). Dr. Janus testified to a reasonable degree of medical certainty that Joseph Dudley exhibited signs of meningitis on Friday February 17, 2017. (Tran. Vol. III, p. 22:10-25). Dr. Janus offered causation opinions to a medical degree of certainty. The testimony from Dr. Janus also created the clear implication, heard by the jury, that UnityPoint Clinic violated the standard of care because on Friday February 17, 2017, Joseph Dudley presented to UnityPoint Clinic exhibiting signs of meningitis and earlier treatment could have avoided Plaintiff's injury.

These were central issues in the case. Indeed, it is well settled law that the *prima facie* elements in a medical malpractice action are evidence of the applicable standard of care, a violation of the standard of care, and a causal relationship between the violation and the harm allegedly experienced by the Plaintiff. *Peppmeier v. Murphy*, 708 N.W.2d 57, 62 (Iowa 2005); *Phillips v. Covenant Clinic,* 625 N.W.2d 714, 718 (Iowa 2001).

It is clear and undisputed in the record that Dr. Janus' opinions constituted improperly designated and disclosed expert opinions and Iowa law precluded Dr. Janus from rendering such opinions in the presence of the jury. (*See* Motion Exclude Witness, Reply, Hearing). A

jury is less likely to follow the Court's admonition to disregard the testimony since it went to the two most important issues in the case.

C. DR. JANUS' EMPLOYMENT STATUS AND BACKGROUND AS A TREATER RENDERED HIM THE MOST CREDIBLE WITNESS

Dr. Janus testified he was a UnityPoint Clinic employee from 2007 until he left in October of 2019. (Tran. Vol. III, 11:5-6). Dr. Janus testified he was a neurologist and he treated Joseph Dudley following his acute meningitis and prolonged rehabilitation. (Tran. Vol III, pp. 8:19-9:18). Dr. Janus testified he was boarded in osteology in high school while working in an osteology lab, double major at Drake University in chemistry and biology, received his PH.D in biochemistry and molecular and cellular biology at Northwestern University, attended four years of Rush Medical College, then did an internship and residence at University of Texas in Houston and a fellowship in neuro-oncology at MD Andersen Cancer Center in Houston. (Tran Vol. III, pp. 9:19-10:8). After his education, Dr. Janus testified he was on the faculty at the University of Iowa in the department of neurology and ran the neuro-oncology service for five years, went to Abbott Labs where he did clinical trials in prostate cancer, and returned to clinical practice first in Indiana and then back to Des Moines in 2007. (Tran. Vol. III, p. 10:9-19). Dr. Janus testified throughout the course of his career he was on the faculty at the University of Iowa as an assistant professor, and taught one semester of neuroanatomy class at Drake University. (Tran. Vol. III, p. 10:20-24).

The point is that not only did Dr. Janus have unique a unique background appearing qualified to proffer the opinions he rendered, but the fact that he was a treating care provider of the Plaintiff and a former employee of the Defendant rendered Dr. Janus with greater credibility than any other expert who testified in the case. It is not surprising that credibility

of the expert witness is one of the most fundamental central issues in a medical malpractice action. That is because it is well settled that the *prima facie* elements in a medical malpractice case can only be established through expert testimony. *See Oswald v. Legrand, 453 N.W.2d 634, 635 (Iowa 1990); see also Kennis v. Mercy Hosp. Med. Ctr.,* 491 N.W.2d 161, 165 (Iowa 1992) ("[W]hen the ordinary care of a physician is an issue, only experts can testify and establish the standard of care and the skill required."); *McCleeary v. Wirtz,* 222 N.W.2d 409, 413 (Iowa 1974) ("Causal connection is essentially a matter which must be founded upon expert evidence."); *Donovan v. State,* 445 N.W.2d 763, 766 (Iowa 1989) ("[H]ighly technical questions of diagnoses and causation which lie beyond the understanding of a layperson require introduction of expert testimony"); *Barnes v. Bovenmyer,* 122 N.W.2d 312, 317 (Iowa 1963) ("The accepted method of proving proximate cause would be by expert testimony that defendant's delay in discovering the piece of steel in the eye was the probable cause of its loss"); *Bradshaw v. Iowa Methodist Hosp.*, 101 N.W.2d 167, 170 (Iowa 1960).

The credibility of the expert then becomes the fundamental issue as to whether the jury believes the elements have been met or not. Indeed, it is because of the unique qualifications, perspectives, and opinions each expert brings that courts do not strike experts as unduly cumulative. *See Davis v. Paul,* 2012 WL 2405198 **4-5 (Iowa Ct. App. 2012) (affirming trial court's ruling to allow experts when challenged as cumulative); *Johnson,* 780 F.2d at 906 (abuse of discretion to exclude allegedly cumulative expert testimony under Rule 403 in medical malpractice case); *Kobos v. Everts,* 768 P.2d 534 (Wyo. 1989) (reversing the trial judge for, in part, excluding the opinions of two expert witnesses based upon the cumulative nature of the testimony); *Kay* v. *Lamar Advertising of South Dakota,* No. CIV. 07-5291-KES,

2009 WL 2525204 *1-2 (D.S.D. 2009) (expert testimony on liability is highly probative and even if cumulative, it is not a "needless presentation" of cumulative evidence to support exclusion under Rule 403; "the probative value of the experts' testimony is not minimal; it is substantial because it goes to the heart of the issues ...."); *Johnson v. United States,* 780 F.2d 902, 905 (11th Cir. 1986) ("If the evidence is crucial the judge would abuse his discretion in excluding it" under Rule 403)(quoting Weinstein's Evidence ¶ 403[06] at 403-59-60 (1982)).

Dr. Janus' increased credibility impacts the Plaintiff's case in two ways. First, it certainly lends more credence to the opinions he himself offers, as these opinions are not provided by some kind of "hired gun," but rather are offered by a former employee and treating care provider who presumably has no financial incentive to state anything other than what he believes. Under the façade of a hands-on treating physician, his testimony creates the impression that these are not opinions formulated for purposes of litigation, but rather formulated for purposes of medical treatment. This thereby gives his opinions more credence because it appears he "needed" these opinions to treat Joseph Dudley. The fact that Dr. Janus was a former UnityPoint Clinic employee is particularly prejudicial in that his testimony presents the image that even employees of UnityPoint Clinic, the Defendant, believe that something wrong happened in this case. In short, a jury is much more likely to agree that a breach of the standard of care occurred solely because Dr. Janus was allowed to testify and the jury knows the witness harbors those opinions.

Second, his opinions "bolster" the opinions offered by the remaining experts called by the Plaintiff. As made on the record, the remainder of Plaintiff's experts were all "remarkable in their level of professional expert witness work." (*See* Tran. Vol III, pp. 44:23-45:7). To

whatever extent a jury may have disregarded the opinions offered by Plaintiff's remaining experts, given the expert's potential for bias, the jury is more likely to agree with those opinions when they are corroborated by a more "neutral" and less "biased" appearing witness. Moreover, it is for this reason that a curative instruction is insufficient to alleviate prejudice from Dr. Janus' testimony. Again, to whatever extent a jury may have disregarded these opinions due to possible bias, a jury is likely to grant the opinions more credence, in spite of the curative instruction, because the jury knows that a more "neutral" and less "biased" witness harbors these opinions even though his testimony has been stricken from the record.

The reasoning in *Diaz v. FedEx Freight E., Inc.*, is comparable to the issue at matter here. *See* 114 So. 3d 224, 226 (Fla. Dist. Ct. App. 2012). There the court of appeals found a mistrial was required where an investigating officer testified towards his findings of fault, or lack thereof, in a motor vehicle accident. *Id.* at 226-27. The court cited the long precedent in Florida precluding an investigating officer's determination of who caused the accident. *Id.* at 226. The court explained the rational of the rule in that:

> Common sense (and experience as well) tell us that to the average juror the decision of the investigating police officer, i.e., whether to charge one driver or the other with a traffic violation based upon the result of his investigation, is very material to, if not wholly dispositive of, that juror's determination of fault on the part of the respective drivers.

Id. The court rejected the argument a curative instruction was sufficient to overcome the prejudice created by this testimony as where liability is at issue, a curative instruction is usually insufficient to cure the error. *Id.* at 227 (citing cases).

In this case, common sense and experience likewise dictate to us the average juror will grant more credence to an expert who was an independent treating physician and thereby

presenting as an independent neutral investigator, who was a former employee of the Defendant, and will find said opinions very material to, if not wholly dispositive of, the juror's determination of fault of the care giver at issue. Dr. Janus was a more credible witness who appeared as a non-interested neutral. He was allowed to improperly testify to key issues in the case. A jury is likely to find these opinions dispositive in the case, such that a curative instruction is insufficient to cure the error. UnityPoint Clinic is entitled to a new trial.

IV. A NEW TRIAL MUST BE GRANTED BASED ON COUNSEL'S MISCONDUCT DURING CLOSING ARGUMENT

Closing arguments must be based on the evidence, and arguments that are overly dramatic, not based on the evidence, or appeal to the jury's sympathies, passions, or prejudice are all improper. *See Rosenberger*, 541 N.W.2d at 908 (inflammatory argument and use of imagery to appeal to emotions, rather than the facts and evidence, is improper); *Conn,* 2011 N.W.2d 1566005 *4 ("Counsel may not use closing arguments to appeal to the passions or prejudices of the jurors."); *Lane v. Coe College*, 581 N.W.2d 214, 218 (Iowa Ct. App. 1998) ("The single purpose of closing argument is to assist the jury in analyzing, evaluating, and applying the evidence."); *Gilster,* 747 F.3d at 1011 "'[T]he cardinal rule of closing argument [is] that counsel must confine comments to evidence in the record and to reasonable inferences from that evidence.").

Iowa courts have granted mistrials or ordered new trials when faced with misconduct by counsel similar to or far less severe than the misconduct facing this Court. *See, e.g.*, *Kinseth v. Weil-McClain*, 913 N.W.2d 55, 68–73 (Iowa 2018) (reversing the district court's denial of a motion for new trial where counsel committed misconduct by violating motions in limine); *Bronner v. Reicks Farms, Inc.*, No. 17-0137, 2018 WL 2731618, at **7–9 (Iowa Ct. App. June 6,

2018) (affirming the district court's grant of a new trial where Plaintiff's counsel statements during closing argument "exceeded the bounds of proper closing argument"); *Conn*, 2011 WL 1566005, at **4–7 (affirming district court's grant of a new trial where counsel made improper comments comparing a potential verdict to "going to the casino and hitting a jackpot," stating "[i]t would change the lives of you and me or anybody in this courtroom to receive that kind of money," and referring to the whole state watching during closing argument); *Rosenberger Enters*, 541 N.W.2d at 907–909 (reversing the district court's denial of a motion for new trial where "counsel closing argument was an impassioned and inflammatory speech"); *Kipp v. Stanford*, No. 18-2232, 2020 WL 3264319 at *6–8 (Iowa Ct. App. June 17, 2020), (affirming grant of new trial where counsel's closing argument included improper comments that were "part of a theme for closing arguments that is premised on improper jury considerations"), *see also Gilster v. Primebank*, 747 F.3d 1007, 1010–13 (8th Cir. 2014) (reversing a district court's denial of motion for new trial where counsel repeatedly offered personal opinions during closing argument).

Iowa courts have also forcefully commented on the duty of counsel to refrain from improper conduct, particularly in closing argument. *Kinseth*, 913 N.W.2d at 73 (stating attorneys carry "an immense responsibility" when making closing arguments and "have a duty to refrain from crossing the admittedly hazy line between zealous advocacy and misconduct"); *Andrews v. Struble*, 178 N.W.2d 391, 402 (Iowa 1970) ("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."); *Conn*, 2011 WL

1566005, at *4 ("Counsel may not use closing arguments to appeal to the passions or prejudices of the jurors."); *Rosenberger Enters.*, 541 N.W.2d at 908 (noting "melodramatic argument [during closing arguments] does not help the jury decide their case but instead taints their perception to one focused on emotion rather than law and fact").

During his closing argument in this case, Plaintiff's counsel committed misconduct, including arguing outside of the evidence and law, violating the golden rule, violating motions in limine, and appealing to the passions and emotions of the jury. Plaintiff's counsel's repeated misconduct incurably prejudiced UnityPoint Clinic. Because of Plaintiff's counsel's misconduct, disregard of the Court's orders in limine, and transparent attempts to inflame the passions and prejudices of the jury and the resulting prejudice to UnityPoint Clinic, this Court should grant a new trial.

As will be discussed in detail below, Plaintiff's counsel's distinct acts of misconduct included:

(1) Improper use of melodramatic and emotional argument;

(2) Improper violation of the Golden Rule and its underlying rationale; and

(3) Improper use of arguments not based on the evidence at trial.

The common thread that unites this misconduct—other than its improper nature—is that it was specifically and purposely calculated to inflame the passions and prejudices of the jury and, thus, encourage the jury to base its decision on something other than the evidence in the case. Prejudice to UnityPoint Clinic was the intended and natural result of such misconduct. Under these circumstances, a new trial is the only proper remedy to cure the prejudice caused to UnityPoint Clinic.

A. COUNSEL'S IMPROPER, DRAMATIC, EMOTIONAL, AND PREJUDICIAL ARGUMENTS THAT WERE NOT BASED IN THE EVIDENCE, AND VIOLATED ORDERS IN LIMINE, NECESSITATE A NEW TRIAL

UnityPoint Clinic had concerns over a variety of improper arguments it anticipated Plaintiff's counsel making at trial and attempted to preemptively address these issues with the Court in several motions in limine. Notably, these motions sought to exclude arguments (including and without limitation) regarding: (1)-Sending a message (Def. MIL No. 8); (2)-Defendant's failure to take responsibility (Def. MIL No. 9); (3)-Jury community arguments (Def. MIL No. 11); and (4)-Defendant's truthfulness (Def. MIL No. 15).[2]

The Court likewise agreed on the impropriety of said arguments. The Court recognized that "send a message" arguments were improper as punitive damages were not being sought. (11/12/22 Order on Motions in Limine, p. 3). The Court found arguments regarding the failure to admit or accept liability/responsibility were improper as the Defendant has a right to mount a non-frivolous defense and has no obligation to accept responsibility, and that it is improper to attack the Defendant at trial for not accepting responsibility. (*Id.*). The Court ruled it was improper to reference to the juror's role as members of the community when it urges the jury to focus on the greater societal impact and context of their decision. (*Id.* at pp. 4-5).

The impropriety of these arguments comes as no surprise as they are overly dramatic, focus on issues outside the evidence, and are designed to inflame the passions and prejudices of the jury. Indeed, the Iowa Court of Appeals addressed very similar arguments in *Kipp*, and affirmed the district court's granting of a new trial based on improper arguments made at closing. 2020 WL 3264319, at *6-8. Unsurprisingly, Plaintiff's counsel's closing argument and

[2] All of which are incorporated by reference.

rebuttal touch on every single issue raised in these respective motions in limine, and addressed in *Kipp*. When viewed as a whole, counsel's argument was improper and prejudicial because these arguments were not isolated missteps, but rather an intentional theme for closing arguments conveying punitive or moralistic considerations focused on emotion rather than law and fact. *Id.* at *7–8.

Ultimately Plaintiff postured UnityPoint Clinic's defense as "frivolous", saying whatever it takes to lower the standard of care for patients and get a free pass to performing medicine in a way that would kill the Plaintiff as a member of the community, a refusal to accept responsibility for this matter, and beseeched the jury to inferentially send a message stating this was not okay. Counsel clearly intermingled arguments addressed in UnityPoint Clinic's motions in limine which inflamed the jury.

Specifically, counsel requested the jury "effectuate a change," back in the jury room. Counsel specifically said, "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." (Tran. Vol. V, p. 18:20-24). Counsel also 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 and not performing necessary steps to prevent a patient from dying. Counsel contextualized a finding for the defense as the jury's affirmation as follows:

> 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.

> Sure hope that doesn't happen. Sure hope we don't see "No's" on that verdict form. Sure hope UnityPoint Clinic isn't told that this is all okay. With the overwhelming evidence that we have put on compared to theirs, when weigh it, can you—can you see how it's even possible to go their way on this?

(Tran. Vol. V, pp. 44:16-45:5). Counsel concluded this thought by saying he hoped UnityPoint Clinic was not told this was "all okay", which carried the inference that in contrast the jury should send a message by telling UnityPoint Clinic this all was not okay. It certainly played on the jurors' notions of justice only if they found in favor of Plaintiff. *See Kipp*, 2020 WL 3264319, at *6.

Furthermore, in rebuttal, counsel attacked the merits of UnityPoint Clinic's defense by inserting 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. *See Kipp*, 2020 WL 3264319, at *7. Counsel specifically accused UnityPoint Clinic as follows: "What would Melanie Choos and Mr. Walz say? Well, I think we know. They're going to say whatever is needed for UnityPoint Clinic to get off the hook." (Tran. Vol. V, p. 87:12-14); "What Melanie would say, I—whatever it takes." (Tran. Vol. V, p. 88:4-5).

In a direct violation of the Court's order (11/12/22 Order, p.3), counsel attacked UnityPoint Clinic's defense for not accepting responsibility. Counsel specifically attacked Melanie Choos not accepting responsibility and failing to admit she could have done more. *See Kipp*, 2020 WL 3264319, at *7. Counsel specifically said:

> But she's the corporate representative for UnityPoint Clinic, and she's an expert designated, and she's in the hot seat. But, you know, do you think that—you know, we didn't hear from her.

> We didn't hear, you know, "I—yea. Looking back—looking back, I—I wish I would—I—if I could go back, I'd do a CBC. If I would go back that Friday night as we're closing shop, I would have sent him to the emergency room department. If I could go back, I would document that I had a differential diagnosis of meningitis. If I could go back, I would have done more." This man was dizzy. He got hauled out in a wheelchair with a gait belt because he couldn't even—he couldn't even stand. And his wife screamed, yelled out the door of the clinic room and said, "Help." If I could back, I would have done—but we didn't hear that from her.
>
> What she said, and she looked me in the eye and she said, "I'd do it the same, exactly the same." She had an opportunity to answer that question differently. She had an opportunity to say, "You know, I could have done more." That's not what we heard. What we have heard is emboldened defense. What we have heard is a failure, during this trial, to accept any responsibility, and there have been no smoke and mirror from us.

(Tran. Vol. V, pp. 88:13-89:11).

Counsel further attacked the merits of UnityPoint Clinic's defense by creating a false equivalency that the jury must find either the Plaintiff brought a frivolous case, making up her story, or that UnityPoint Clinic mounted a frivolous defense. Counsel specifically said:

> And you heard from Sarah. Do you think she's making it up that he was—he would fall asleep and come back? Think Sarah came in here to make that up? Is this—Is this a case where we just made stuff up? Just—Just came in with a made-up story?
>
> If you think that Joe Dudley, Sarah Dudley, and these experts, these people that have testified and taken an oath, if you believe that this is all made up, then answer "No" to Question 1 and 2. And that will tell us, "You know what? This is just all made up. This is one of those frivolous cases." If you answer Question 1 and 2 "Yes," this is a case of frivolous defenses. This is a case of frivolous defenses. This is a case where we assume and an entire trial and it was deny, deny, deny, defend, look over here, not there.

(Tran. Vol V, p. 90:2-16). This false equivalency prejudiced the defense in that UnityPoint Clinic never questioned the veracity of Sarah Dudley. UnityPoint Clinic never called her a liar. Yet then this argument created the false impression that if the jury believed counsel and Sarah

Dudley, then UnityPoint Clinic must be lying and mounting a frivolous defense, which certainly was not the case and antithetical to the evidence. 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. *See Kipp*, 2020 WL 3264319, at *7 (quoting *Rosenberger Enters.*, 541 N.W.2d at 908).

Also, counsel's repeated references to the standard of care and the "community" improperly inferentially urged the jury to focus on the greater societal impact and context of their decision and the reaction the community will have to the jury's decision, rather than focusing the jury's attention on the facts before it. *See Kipp*, 2020 WL 3264319, at *7 (affirming impropriety of counsel's argument to the jury that the defense's position "can't be the standard here in this community."). Plaintiff's counsel told the jury they were to decide not the standard of care for Joseph Dudley on that particular day, but the overall level of the standard of care in this community. Plaintiff's counsel said, "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." (Tran. Vol. V, p. 22:16-19). Plaintiff's counsel improperly argued that finding a lower standard of care kills the Plaintiff. "If we follow that, standard of care is here. That standard of care—that standard of care, it kills Joe Dudley. That standard of care kills this man. This man would be dead." (Tran. Vol. V, pp. 22:24-23:2).

Counsel referred to the jury as the conscience of the community in a manner focusing on the greater societal impact and context of their decision, and played on the juror's notions

of justice only if they found in favor of Plaintiff. *See Kipp*, 2020 WL 3264319, at *7. Counsel specifically said, in the context of the jury's determination, "You know what? 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. We are the conscience of the community. That's what—That's what we're going to do." (Tran. Vol. V, p. 27:17-22). This argument specifically violated the Court's Order in limine. (11/12/22 Order, p. 4 ("it is improper to urge the jury to focus on the greater societal impact and context of their decision.").

Counsel inferentially drew upon the societal impact, the context of their decision, and the reaction the community would have in arguing: "And you can say 'yes.' You can say 'yes," and hold your head high. And you can hold your head high and say 'No. No, we did not evaluate this or these damages as being cheap.' 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." (Tran. Vol. V, p. 56:5-15). Counsel's argument was also inflammatory in that it again played on the juror's notions as the conscience of the community only if they found in favor of Plaintiff and did not view him as "being cheap." Counsel doubled down stating only the jury had the power to put a great value on that "which was taken" from the Plaintiff. Counsel said, "And if we're going to put a value on that, then it ought to be great. We're going to be brutally honest about the value of that, which was taken from this man. And you have the power to do it. Only you." (Tran. Vol. V, pp. 57:24-58:2).

Finally, in counsel's closing argument in rebuttal, he once again affirmed the jury's power to award a high amount, and beseeched the jury, as Iowans, to tell UnityPoint Clinic

the standard of care it "peddled" was "not okay." Specifically, counsel said:

> 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. 25 or more is the right amount, and that is justice, and you have the power, the ability, to do it.
>
> The standard of care—and whether it's the UnityPoint Clinic's standard of care that they have—have peddled to you in this case and said it is, you, as Iowans, get to tell them what the standard of care is. You. You get to say, "That's not okay."

(Tran. Vol V, pp. 96:20-97:4).

The prejudice resulting from counsel's argument is plain on its face as well as the ultimate result. When viewed in its totality, counsel's arguments in his closing and rebuttal were not "isolated missteps" but clearly calculated efforts to frame and denigrate UnityPoint Clinic in a punitive and moralistic light, thereby inflaming the passions and prejudices of the jury and focusing them on emotion as opposed to the law and facts of the case, and call upon the jury to send a message to UnityPoint Clinic as to the levels of acceptable standards demanded by the community. These arguments were successful and the jury obliged, as born out by the $27 million verdict the jury rendered and the jury's request to add a statement to their verdict. (11/21/22 Verdict); (11/21/22 Question from Jury and Judge's Answer). It is clear from both the Jury heeded counsel's arguments and desired to "send a message" to UnityPoint Clinic. These arguments (in conjunction with the arguments discussed in Parts B and C below), repeatedly made throughout both closing and rebuttal, were severe and pervasive as they went to the central and primarily disputed issues in the case. Absent the improper comments it is probable a different result both as to liability and damages would have occurred. *See Kipp*, 2020 WL 3264319, at *6-8.

B. COUNSEL'S IMPROPER "TRADE" AND "VALUE" ARGUMENTS PLACED THE JURY IN THE POSITION OF A PARTY, IMPLICITLY OR EXPLICITLY, VIOLATED THE GOLDEN RULE, INFECTED THE JURY'S OBJECTIVITY, AND WERE IMPROPER APPEALS TO SYMPATHY, PASSION, AND PREJUDICE, AND A REQUEST TO CONSIDER MATTERS OUTSIDE OF EVIDENCE

Arguments about what one might "trade" for the experience, or comparisons and analogies to rare and luxurious items of value (that are not proper items of damages) are improper. These arguments are used to desensitize the jury to the amount of money for which counsel will ask the jury, and are appeals to have the jury decide the case on something other than the evidence presented in court.[3] In making these arguments, counsel invited the jury to place themselves in the place of the plaintiff and are improper golden rule arguments. They are further improper in that they do not properly correspond to the evidence and instructions on damages and are outside the experience of the lay juror. Iowa R. Evid. 5.401—5.403. To the extent such arguments may be proper in some other context (though disputed by UnityPoint Clinic), what is incontrovertible is that counsel's value and trade arguments made during closing and rebuttal were improper and necessitate a new trial.

1. Counsel's Trade Arguments Violated the Golden Rule

Counsel's arguments were improper in that they violated the "Golden Rule".[4] Iowa's prohibition on golden rule arguments is broader than a narrow prohibition on expressly asking the jury to place themselves in a party's position and award damages as they would wish in that position. The arguments in this case, characterized as golden rule arguments below, were

[3] UnityPoint incorporates all authority and argument made in its Motions in Limine as well as during the pretrial hearing.

[4] UnityPoint's Motion in Limine precluding "Golden Rule" arguments (Def Mil No. 12) was granted in full by the Court. (11/12/22 Order, p. 2).

improper attempts to have the jury place themselves in the position of the Plaintiff as if they were the plaintiff and award damages on that basis, rather than on an objective consideration of the evidence.

A "golden rule" argument is:

> the "suggestion by counsel that jurors should place themselves in the position of a party, a victim, or the victim's family members." Such arguments are generally improper and not permitted "because they encourage the jury to depart from neutrality and to decide the case on the improper basis of personal interest and bias."

State v. May, 2005 WL 3477983 *8 (Iowa Ct. App. 2005) (citation omitted); *State v. Musser*, 721 N.W. 2d 734, 755 (Iowa 2006) (describing rules against such arguments are to "ensure the case is decided solely on the evidence."); *Russell v. Chicago, Rock Island and Pacific R.R. Co.,* N.W.2d 843, 848 (Iowa 1957) (golden rule arguments "are condemned by the courts"); *Conn v. Alfstad*, 801 N.W.2d 33 (Table), 2011 WL 1566005 *4 (Iowa Ct. App. 2011) ("The rationale for the golden-rule doctrine is to discourage improper arguments that play on juror's emotions and sympathies").[5]

It is not required that counsel use certain words or specifically urge the jury to consider the issues as if they personally were involved. Instead, an improper argument may be a

[5]***See also*** Blevins *v. Cessna Aircraft Co.,* 728 F.2d 1576, 1580 (10th Cir. 1984) (argument invoking the Golden Rule "'is universally recognized as improper, because it encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence'") (quoting *Ivy v. Sec. Barge Lines, Inc.,* 585 F.2d 732, 741 (5th Cir. 1978)); *Lovett v. Union Pac. R.R. Co.,* 201 F.3d 1074, 1083 (8th Cir. 2000) (same); *Seabury-Peterson v. Jhamb,* 15 A.3d 746, 751 (Me. 2011) ("It is impermissible for a party to 'encourage the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence.' The use of such arguments, commonly called Golden Rule arguments, is 'universally condemned' because it threatens the essence of a fair trial.") (quoting *Forrestal v. Magendantz,* 848 F.2d 303, 309 (1st Cir. 1988)); *People v. Vance,* 116 Cal. Rptr. 3d 98, 110 (Cal. Ct. App. 2010) ("The condemnation of Golden Rule arguments in ... civil [] cases, by both state and federal courts, is so widespread that it is characterized as 'universal.'").

"suggestion." *May*, 2005 WL 3477983 *8. "A 'golden rule' argument 'is one which, either directly **or by implication**, tells the jurors that ... they should put themselves in the injured person's place and render such a verdict as they would wish to receive were they in the (injured person's) position.'" *Jackson v. State*, 651 S.E.2d 702, 707 (Ga. 2007) (emphasis added). Even "inferentially" urging jurors to place themselves in a plaintiff's position is improper. *See State v. Vickroy,* 205 N.W.2d 748, 751 (Iowa 1973) ("Additionally, the prosecutor undertook to inflame the fears, passion and prejudice of the jury as against defendant. This was done by inferentially urging the jurors to place themselves and members of their families in a hypothetical position of peril created by a drunken, car operating defendant."); *Kipp v. Stanford,* 949 N.W.2d 249 (Table), 2020 WL 3264319 *7 (Iowa Ct. App. 2020). Indeed, "[e]ven when an attorney does not explicitly ask the jurors how much money they would wish to receive in the plaintiff's position, comments may violate the Golden Rule if they implicitly suggest that the jury place itself in the plaintiff's position." *SDG Dadeland Assocs., Inc. v. Anthony*, 979 So. 2d 997, 1003 (Fla. Dist. Ct. App. 2008).

A court found counsel's pretending to be a human fetus and speaking to the jury as a fetus was improper. The jury returned a verdict, which was overturned by the Ohio Supreme Court due to these antics. *Harris v. Mt. Sinai Med. Ctr.,* 876 N.E.2d 1201 (Ohio 2007) (*see also* those portions of the trial record set forth in *McLeod v. Mt. Sinai Med. Ctr.,* 852 N.E.2d 1235, 1260 (Ct. App. Ohio 2006)). This is one example of an inappropriate Golden Rule argument: the jury was encouraged to imagine themselves as the fetus. Golden Rule arguments or references are highly prejudicial and have no probative value. Iowa Rules 5.401; 5.402; 5.403 (2022).

These types of arguments are so prejudicial that they "strike at the very heart of our justice system":

> It is hard to conceive of anything that would more quickly destroy the structure of rules and principles which have been accepted by the courts as the standards for measuring damages ... than for the juries to award damages in accordance with the standard of what they themselves would want if they or a loved one had received the injuries suffered by a plaintiff**. In some cases, indeed, many a juror would feel that all the money in the world could not compensate him for such an injury.... Such a notion as this—the identifying of the juror with a plaintiff's injuries—could hardly fail to result in injustice under our law....**

Id. (emphasis added).

In this case during rebuttal (where UnityPoint Clinic had no more opportunity to respond to this argument), counsel set up an imaginary scenario where Plaintiff was presented a hypothetical trade on February 17, 2017. (Tran. Vol V, pp. 94:19-96:19).[6] The hypothetical posited that on February 17, 2017, UnityPoint Clinic knocked on Plaintiff's door and offered Plaintiff $100,000 a year for the rest of his life in exchange for contracting meningitis. (*Id.*, 94:19-95:10). It was specifically couched as:

> "Hey. Hey, Joe. Got something to tell **you**. Got something to give **you**. **You're** going to get $100,00. $100,000." Joe's like, "Wow. Okay. Okay. But I didn't do anything to earn that. I am not entitled to that. I'm not—I mean—"
>
> "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."

[6] This scenario tracked remarkably closely to the scenario Defendant anticipated and alerted the Court towards during the hearing on motions in limine. (Tran. Pretial Motions 11/10/22, pp. 41:20-42:21).

> "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 Clinic goes, "Hold on. Hold on, Joe. Hold on. A million dollars. A million dollars for this year. It's a million. 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** were 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."

(Id. 95:6-96:19) (emphasis added); (*see also* Def. Ex. B). This lengthy scenario is not based on the evidence in this case or in the world. It is a completely imaginary, magical scenario designed to infect the jurors' objectivity by making the jurors contemplate rejection of any amount of money offered for the injuries alleged in this case as being insufficient compensation rather than have the jurors objectively evaluating reasonable compensation for the actual elements of damages supported by the evidence as defined in the jury instructions.

The imaginary scenario counsel conjured up for the jury in this case is strikingly similar to an argument an appellate court in Florida found to be improper in a wrongful death case involving a child. *Bocher v. Glass*, 874 So. 2d 701, 703 (Fla. Dist. Ct. App. 2004). In *Bocher*, the plaintiff's counsel told the jurors that if both a magic button and six million dollars was placed in front of them, the plaintiffs would walk past the $6 million dollars and push the magic

button to bring their son back. *Id.* The district court allowed the argument. *Id.* The appellate court disagreed with the trial court and recognized that while

> the 'magic button' argument **did not explicitly ask the jurors** how much they would want to receive had their own child died in an accident…it was nonetheless improper. The only conceivable purpose behind counsel's argument was to suggest that jurors imagine themselves in the place of [plaintiff's] parents.

Id. (emphasis added). The court then addressed the rationale behind the golden rule prohibition as applied to the case and stated:

> 'Golden rule' arguments are improper because they depend upon inflaming the passions of the jury and inducing fear and self interest…The 'magic button' argument had the same effect. If jurors are to remain fair decision-makers, **the trial court must guard against a deliberate act of counsel that serves to put the jury center stage in the drama** that should be the trial.

Id. (emphasis added). Here, the "knock at the door argument", complete with repeated use of the pronoun "you", placed the jury at center stage in the drama that should be the trial.

Similarly, the court in *SDG Dadeland Assocs., Inc. v. Anthony*, 979 So. 2d 997, 1000-03 (Fla. Dist. Ct. App. 2008), a case involving a leg injury as a result of a slip and fall, held that a story involving a boy with an injured leg choosing a puppy with an injured leg instead of a healthy puppy because that puppy would need somebody that knows what it is like to feel that bad was an improper golden rule argument. The Court acknowledged that the "Puppy Story" did not directly ask the jury to place itself in plaintiff's position but that "the only conceivable purpose behind the story was to have the jury imagine themselves in the place of the injured party." *Id.* at 1003. The court noted that even implicitly suggesting that the jury place itself in the plaintiff's position violates the golden rule. *Id.* The court also found it significant that, as

in the instant case, counsel launched immediately into the damages discussion following the improper argument. *Id.* at 1003-04

Additionally, in this case within the span of 39 transcript lines, counsel used the term "you", "you're", or "your" around 40 times. (Tran. Vol V, pp. 95:6-96:19). The pervasive use of the pronouns "you", "you're", and "your" in this scenario alone further confirms the intent to have the jury place themselves in Plaintiff's shoes. *See, e.g, State v. McDaniel*, 462 S.E.2d 882, 884 (S.C.Ct.App.1995) (prosecutor's use of "you" or a form of "you" forty-five times during closing arguments, asking the jury to put themselves in the place of the victim warranted a new trial).

Such improper argument was addressed by the court in *Myrick v. Stephanos*, 472 S.E.2d 431, 435 (Ga. Ct. App. 1996) which found the following argument improper:

> You're going to have to be willing to undergo essentially a head-on crash with a tractor-trailer. You are going to have to have so many bones in your body broken that it's going to require pins, screws and plates to put you back together. You're going to be in intensive care for three days, you're going to be in a hospital for three weeks. You're going to be in a hospital bed for four months…[y]ou cannot enjoy the pleasures life has to offer. You are deprived of the ability to be the father that you want to be with your children and the lover that you want to be with your high school sweetheart.

The *Myrick* court further explained that the reason this type of argument is improper is because it asks the jurors to consider the case, not objectively as fair and impartial jurors, but rather "from the biased, subjective standpoint of a litigant." *Id.* Asking the jurors to view the case from the biased, subjective standpoint of a litigant infects their objectivity and is exactly the problem with the "knock on the door" scenario counsel conjured up in this case, and by directly placing the jurors into the shoes of Plaintiff and asking what it would be worth. The

magical scenario has no basis in the evidence and therefore the only way the jury can think about the scenario is to put themselves in the place of Joseph Dudley.

The arguments outlined above were intended to get the jury to "consider the case…from the biased, subjective standpoint of a litigant" and have the jury place themselves in the Plaintiff's shoes. Counsel expressly set up a scenario going back in time to 2017 and **knocked on the table while facing the jury** as if it was the Plaintiff's door. An argument involving knocking on table as if UnityPoint Clinic was showing up at the door with 25 million dollars and using some form of the pronoun "you" 39 times during the portion of argument involving the imaginary scenario alone, has the effect and intent of putting the jury in the Joseph Dudley's position.

The entire point of these arguments was to not have the jury objectively value the damages based on the evidence in this case; it was to get the jury to view the case directly from the Plaintiff's viewpoint as if they were Joseph Dudley and as one where there is no amount of money to fairly compensate Joseph Dudley, with the goal of making the jury view as reasonable any amount which Plaintiff's counsel requested.

In sum, these arguments were solely intended to infect the jury's objectivity, to convince the jury that no amount of money is full justice for the loss, and to convince the jury that neither they nor Joseph Dudley would accept 25 million in a trade if offered. In reality, there are no magic buttons offering the ability to make this type of trade, and therefore the only purpose of this argument is to evoke the sympathy passion and prejudice of the jury and infect their objectivity by allowing the jurors' minds to wander away from the facts of the case and allow them to imagine UnityPoint Clinic knocking at the door and making a hypothetical

payment for a parade of consequences. Counsel has no right to create evidence through argument through use of this type of imagery and such melodramatic argument does not help the jury decide the case but taints their perception to focus on emotion rather than fact and precludes objectivity. *See Rosenberger Enters.*, 541 N.W.2d at 908.

2. Counsel's Trade and Valuation Arguments Were Otherwise Improper

In addition to these arguments violating the golden rule, counsel's trade and valuation arguments are improper as overly dramatic, as outside the evidence, and as likely to infect the jury's objectivity by having the jurors view the evidence as if they were the Plaintiffs as opposed to an objective and impartial decision-maker. *See, e.g., Conn v. Alstad*, 2011 N.W.2d 1566005 *5 (Iowa Ct. App. 2011) (particular word choice did not matter to court's analysis as counsel's "statement was aimed at inflaming the passions of the jurors").

Aside from the "knock on the door" scenario previously addressed, during closing, counsel also made valuation comparisons to paintings or a jet.[7] Counsel specifically said:

> Okay. What's the dollar value? That's the only remedy. That's the only thing that a patient is entitled to, a person is entitled to, in a negligence case.
> So when you think about that, when you think about these numbers, think about, "Well, there are a lot of things out there that are priceless." There was a—maybe a Monet painting or the Mona Lisa, that one with the American with the pitchfork, his wife, and farmer. $50 million for a painting because it's one of a kind, can't be replaced.
> …
> Made by a master. Someone negligently, you know, tore that up, nobody would hesitate in a civil case and say, "Well, value that. It's a hundred million dollar painting," or whatever it is. Or it's a—it's a jet. Well, the human being in the jet is worth so much more than the piece of metal.

[7] For all of the reasons previously asserted, in this motion or in Defendant's Motion in limine, UnityPoint asserts this argument equally violates the golden rule argument as its only purpose is to request the jury consider how they value other items in comparison to a human's injury.

> And Joe Dudley was made by a master. 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.

(Tran. Vol V, p. 53:20-54:19).

Just like improper Golden rule arguments, these arguments compel jurors to decide a case based on potential harms and incomparable economic valuations rather than the evidence presented at trial and as instructed by the Court. It is also an improper reframing of the events at hand. Such statements and arguments are irrelevant to the actual damages alleged and would unfairly prejudice the jury because they would encourage the jury to render a verdict based on personal interest and bias rather than on the evidence. These have no probative value to the jury's determination of this case, but creates a significant risk that the jury will decide the case based upon unfair prejudice and irrelevant considerations. As a result, such arguments are improper. Iowa Rules 5.401; 5.402; 5.403 (2022).

Indeed, several courts in outside jurisdictions have found such arguments to be improper, even beyond golden rule considerations. In *Carnival Corp. v. Pajares*, plaintiff's counsel asked the jury to place monetary value on the plaintiff's life by comparing a $20 million Van Gogh painting "created by one of the greatest artists in history," to the plaintiff's life which "was created by the greatest creator there is." 972 So. 2d 973, 978 (Fla. Dist. Ct. App. 2007). The court found this argument was "clearly improper." *Id.*

In *Fasani v. Kowalski*, plaintiff's counsel made the following arguments to the jury:

> Now, members of the jury, you've got to understand that the brain is what separates people from animals. It's what makes us human. I mean I'm sure you've all hear the expression, well, he may be old but he still has his mind or memories are what make us who we are. If that was a Picasso painting that was

> in the elevator and it got ripped, no one would argue with paying $80 million to replace it. Why is it any different when it's a man's brain?
> …
> [W]hat's it worth to go from a normal person to a retarded person for the rest of your life? What's that worth? ... [A] man that went from normal, social, making friends to a retarded person now? ... Because I would submit that having a stone fall on someone's head because you want a pretty elevator and then when he gets seriously hurt to the point he's retarded, you just kick him out and say we're giving you nothing.

43 So. 3d 805, 810-811 (Fla. Dist. Ct. App. 2010) The court ruled that comparing the plaintiff's head to a Picasso painting constituted improper argument. *Id.*

In *Chin v. Caiaffa*, plaintiff's counsel implored the jury that "we can't feel [plaintiff's] pain, and to guess and imagine his pain. 42 So. 3d 300, 309 (Fla. Dist. Ct. App. 2010). Counsel stated "[s]cars are only tiny on somebody else's face." *Id.* In finding these were improper arguments, the court found the only purpose behind these arguments was to suggest "the jurors place themselves in the claimant's shoes in this case and thwart a fair consideration." *Id.*

In *Pub. Health Tr. of Dade Cnty. v. Geter*, plaintiff's counsel argued during final argument that the jury should place a monetary value on the life of the plaintiff's decedent just as monetary value is placed on an eighteen million dollar Boeing 747 or an eight million dollar SCUD missile. 613 So. 2d 126, 127 (Fla. Dist. Ct. App. 1993). The court found such argument was improper, highly inflammatory, and deprived the defendant of a fair trial on the issues of damages. *Id.* On this issue alone, the district court erred in failing to grant in part defendant's motion for mistrial. *Id.*

Additionally, what a party, lawyer, or juror would agree to trade in exchange for a certain harm is not an element of damage. *See e.g. DeJesus v. Flick*, 7 P.3d 459, 464 (Nev. 2000) (*overruled* on other grounds) (holding argument where counsel stated he would not trade ten

million dollars for the use of his fingers violated the golden rule); *Philip Morris USA, Inc. v. Ledoux*, 230 So. 3d 530, 537 (Fla. Dist. Ct. App. 2017) (argument that plaintiff would not take $10 million dollars to watch his wife choke, struggle, and die from smoking was improper where the argument was presented in an overly-dramatic manner such that it could evoke the jury's sympathy); *Featherly v. Cont'l Ins. Co.*, 243 N.W.2d 806, 814 (argument that plaintiff would pay half a million dollars to get in the condition he was in prior to injury if he had it was improper); *see Martinez*, (App. 0118, 0131) (arguments that plaintiff would not trade 30 million dollars for his brain and that plaintiff was frozen in time and that was worth 200 million in Los Angeles county both held to be inappropriate or misconduct as outside the evidence and designed to inflate the jury award). A Prominent legal treatise perfectly encapsulates the distinction, and thereby demonstrating why such comparisons are improper:

> Pain and suffering have no market price. They are not capable of being exactly and accurately determined, and there is no fixed rule or standard whereby damages for them can be measured. Hence, the amount of damages to be awarded for them must be left to the judgment of the jury, subject only to correction by the courts for abuse and passionate exercise. One of the most difficult decisions facing the jury in a personal injury case is the size of the monetary award for pain and suffering, since there is no objective method of evaluating such damages**. The question in any given case is not what sum of money would be sufficient to induce a person to undergo voluntarily the pain and suffering for which recovery is sought or what it would cost to hire someone to undergo such suffering, but what, under all the circumstances, should be allowed the plaintiff in addition to the other items of damage to which he or she is entitled, in reasonable consideration of the pain and suffering necessarily endured or to be endured.** The amount allowed must be fair and reasonable, free from sentimental or fanciful standards, and based upon the facts disclosed.

2 *Stein on Personal Injury Damages,* § 8:8, at 8–19 (3d ed.1997) (emphasis added).

The arguments are further improper because there was no testimony or other evidence in the record allowing the jury to make such a comparison. Market valuations of rare works of

art, or expensive luxury machines (such as private jets) are based on objective yet complex schemes driven by a number of forces through subsets of supply and demand. The simple fact that though complicated, these valuations are objective, while noneconomic damages are notably "subjective" (and there is no objective measuring mechanisms) demonstrates the impropriety of such comparisons. Moreover, simply making the comparison calls upon the jury to reach outside of the record in making such assessments. Nothing in these arguments directs the jury back to the instructions on these items of damages. Nothing about these arguments provides any true guidance as to how the jury are supposed to affix a value to those damages based on the Court's instructions. Nothing in the record assisted the jury in recognizing how these complex valuations are made for these rare artifacts, and nothing in the record assisted the jury in translating how these same valuations are/are not comparable to personal injuries, and more specifically noneconomic damages. Such valuations are likewise outside the common experience of most jurors, and simply an invitation to engage in rampant and fallacious speculation.

Counsel's specific reference to UnityPoint Clinic in his hypotheticals was particularly prejudicial in light of the other improper arguments made by counsel. (See Parts IV.A. *supra* and IV.C. *infra*). More specifically, Plaintiff's "knock on the door" argument created the impression that UnityPoint Clinic wanted to injure Plaintiff as opposed to provide medical care. It created the impression that UnityPoint Clinic intentionally harmed the Plaintiff. This only inflamed the jury and fell in line with counsels overall argument that UnityPoint Clinic was advocating for a lower standard of care designed to cut corners and kill patients, and

assisted in persuading the jury to look at UnityPoint Clinic through a punitive and moralistic lens.

Plaintiff's counsel's arguments were not based on the jury instructions or evidence, sought to convince the jury that no amount of money is enough, and was misleading, confusing, and prejudicial. The effect of this argument is grossly prejudicial (particularly when combined when other similar arguments), because if the jury is convinced based on this type of magical, hypothetical argument that no amount of money is sufficient to compensate for the loss, then any amount Plaintiff's counsel suggests is plausibly reasonable. This argument was particularly prejudicial because it occurred during closing arguments, when the jury looks to the attorneys for proper guidance. *see Kinseth*, 913 N.W.2d at 73.

Ultimately, the consistent theme of Plaintiff's closing argument was to interfere with the jury's ability to objectively view the evidence and instructions in the case and to prejudicially view UnityPoint Clinic through a punitive and moralistic lens.

C. COUNSEL'S CLOSING ARGUMENT CONTAINED INFLAMMATORY REMARKS OF DANGER AND IMPROPERLY SPECULATED ON THE IMPACT OF INCREASED RISKS

During closing, counsel made numerous inflammatory danger arguments on the standard of care and improper arguments speculating on the impact of increased risks to the Plaintiff. These arguments went beyond the evidence at trial and prejudiced UnityPoint Clinic by inflaming the jury against it and increasing the acceptable range of damages.

First, counsel made repeated references to the term "danger" and argued UnityPoint Clinic advocated for a standard of care designed to kill the patient. In discussing the opinions of an expert, counsel argued, "To build a structure, whether it's a shed or a barn or a house, a

cabin, a structure has to have a foundation, doesn't it? And the foundation has to be built strong and solid. Otherwise, what you try to put on top of it, it's just going crumble. It's going to be dangerous." (Tran. Vol. V, pp. 20:22-21:3). In contextualizing the standard of care offered by UnityPoint Clinic, counsel said, "If we follow that, standard of care is here. That standard of care—that standard of care, it kills Joe Dudley. That standard of care kills this man. This man would be dead." (Tran. Vol. V, pp. 22:24-23:2). Counsel further referenced Plaintiff's condition as killing him saying, "And the experts who you heard from said that bacteria would have been there on Friday. It just wouldn't have been invested throughout his whole body as bad as it was to where it was killing the man." (Tran. Vol. V, p. 42:8-12).

Further, counsel exceeded the evidence in speculating on the increased risks to the Plaintiff. Counsel said:

> 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 the 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. This is end-of-life damage with what's happened to his 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.

(Tran. Vol. V, pp. 54:14-55:8). Further, counsel displayed slides of "Life, Liberty, and the Pursuit of Happiness", implying UnityPoint Clinic deprived Plaintiff of his constitutional rights. (Pl. Closing, pp. 33, 35).

None of the evidence in the case supported counsel's assertions. First and most obvious, the care in this case did not result in the death of the Plaintiff and so it is outside the scope of the evidence to argue the standard of care advocated by UnityPoint Clinic "kills" Joseph Dudley. Plaintiff's inflammatory argument prejudiced UnityPoint Clinic by creating a greater sense of danger around the care provided to the Plaintiff in order to arouse the passions and fears of the jury. (*See* Def. MIL No.'s 22-4; *see also* Def. Brief on Reptile Theory). In short, this argument is designed to convince jurors that harm will result if they fail to protect the community by rendering a verdict that will reduce or eliminate "unsafe" or "dangerous" conduct. (*Id.*). Such trial tactic is improper for all the reasons laid out in the respective motions in limine and supporting brief, but certainly contributed to inflaming the passions and prejudices of the jury into viewing UnityPoint Clinic through a punitive and moralistic lens.

Further, no medical evidence supported counsel's attempt to contextualize Plaintiff injury as "end-of-life." No medical care provider testified Joe Dudley experienced a life-ending injury. No medical care provider testified that Plaintiff would get dementia. The evidence indicated Plaintiff could participate with his family, go on vacations, work full time, do hobbies, and do activities with people. As counsel's arguments were not supported by the evidence, they amounted to mere speculation. Closing argument must be based on evidence, not speculation. Further, counsel's arguments invited the jury to speculate on Plaintiff's injuries. Counsel's argument prejudiced UnityPoint Clinic in creating the auspices supporting an inflated verdict amount not supported by the evidence.

D. COUNSEL'S CLOSING ARGUMENT IN TOTALITY NECESSITATES A NEW TRIAL

Here, as in *Rosenberger*, "[w]hen viewed in its entirety, [the court should] conclude the cumulative effect of [] counsel's closing argument was an impassioned and inflammatory speech that likely caused severe prejudice to the defendant." 541 N.W. 2d at 909; *see also Fasani v. Kowalski*, 43 So. 3d 805, 811 (Fla. 3d Ct. App. 2010) ("cumulative effect" of "numerous improper comments and arguments" deprived defendants of a fair trial). Indeed, in determining whether an improper argument requires a new trial, the court considers the severity and pervasiveness of the misconduct. *See State v. Graves*, 668 N.W. 2d 860, 869 (Iowa 2003); *see also Gilster,* 747 F.3d at 1011 (remanding for new trial in part because counsel's improper argument was "a deliberate strategic choice to make emotionally-charged comments" and her improper argument "permeated" the argument); *State v Green*, 592 N.W.2d 24, 32 (Iowa 1999) ("Whether the incident was isolated or one of many is also relevant; prejudice results more readily from persistent efforts to place prejudicial evidence before the jury."); *Kinseth v. Weil-McLain Co.*, 2017 WL 1400801 *7 (Iowa Ct. App. 2017) (quoting *Green*); *see also Kipp*, 2020 WL 3264319, at *8 (affirming district court's finding likely a different result would have occurred on review of the closing arguments in their entirety).

In *Kinseth*, while examining whether misconduct by counsel prejudiced Defendants, the Iowa Supreme Court commented:

> When attorneys approach the jury box to present their closing arguments, they carry with them an immense responsibility. Evidence has been received, witnesses have been heard, and counsel may now speak directly to the jury and tell the story of the case, from beginning to end, largely free from interruption. . . .
>
> Yet, juries are often tasked with deciding questions of fact and law that involve innately vague and difficult considerations. For example, juries often

> consider and valuate how much pain and suffering a plaintiff has experienced. When making challenging decisions about potentially nebulous concepts, juries will inevitably take cues from attorneys during their respective closing arguments. In such instances, we observe a heightened sensitivity to inflammatory rhetoric and improper statements, which may impress upon the jury that it can look beyond the facts and law to resolve the case. Attorneys have a duty to refrain from crossing the admittedly hazy line between zealous advocacy and misconduct.
>
> Relatedly, attorneys may occasionally make one or more isolated missteps during closing arguments and thereby violate a pretrial order. It is a wholly distinct act of misconduct, however, to develop and present a theme for closing arguments that is premised upon improper jury considerations.

Id. at 73. Similarly, the Eighth Circuit Court of Appeals found prejudicial attorney misconduct where "[c]ounsel made a deliberate strategic choice to make emotionally-charged comments." *Gilster*, 747 F.3d at 1011.

Here, counsel committed misconduct, when considered individually and cumulatively, that severely prejudiced Defendants. As detailed above, counsel's committed misconduct on a number of fronts, argued outside the evidence and law, violated several motions in limine, disregarded the Court's instructions and, and engaged in a sustained campaign to embolden the jury to base its decision on emotion rather than the evidence in the case. Counsel's misconduct was not simply a series of "isolated missteps"; rather, Plaintiff's counsel's actions amounted to "a theme for closing arguments that [was] premised upon improper jury considerations." *See Kinseth*, 913 N.W.2d at 73; *Kipp*, 2020 WL 3264319, at *8. The sheer volume and degree of counsel's misconduct indicates "a strategic choice" to inflame the passions of the jury with emotionally-charged comments and depictions. *See Gilster*, 747 F.3d at 1011. Under these circumstances, UnityPoint Clinic was incurably prejudiced and did not receive a fair trial. Accordingly, this Court should grant a mistrial.

In addition, while UnityPoint Clinic asserts that all or most of the above improper arguments are sufficient on their own to warrant a mistrial, to the extent any one specific improper argument is viewed by the Court as insufficient for a mistrial, the Court may (and should) review the cumulative effect of the improper arguments:

> We have said further, that even though no single one of [the grounds for a new trial is] sufficient in itself, yet, when they are *all* considered together, they can reasonably support the conclusion of the trial court that *a fair trial has not been had*, the order for a new trial will be sustained.

Wilson v. Iowa State Highway Comm'n, 90 N.W.2d 161, 165 (1958) (emphasis added); *see also Rosenberger*, 541 N.W.2d at 909 (considering cumulative effect of improper conduct combined with the jury's exposure to improper evidence left "the integrity of the jury's verdict in doubt"); *State v. Carey*, 165 N.W.2d 27, 36 (Iowa 1969) ("We find some merit in each of defendant's assigned errors. Perhaps none alone is sufficient to require a new trial but upon a careful consideration of the whole record, we are convinced the cumulative effect has been to deny defendant a fair trial."); *Kinseth*, 2017 WL 1400801 *7 (remanding for new trial, viewing closing argument in its entirety, noting multitude of improper statements and persistent violations of limine orders, which were not "'a slip of the tongue'" or isolated incident); *Rosenberger Enters.*, 541 N.W.2d at 907 ("When viewed in its entirety, we conclude the cumulative effect of [counsel's] closing argument was an impassioned and inflammatory speech that likely caused severe prejudice to the jury.").

V. A NEW TRIAL MUST BE GRANTED BECAUSE UNITYPONT WAS DENIED THE RIGHT TO REFUTE ARGUMENT OFFERED BY THE PLAINTIFF RELATED TO PLAINTIFF'S ABILITY TO WORK

During closing argument, when discussing damages, counsel framed Plaintiff's damages as "end-of-life". (Tran Vol. V, pp. 54:22-55:8). In the context of that argument,

counsel rhetorically asked the jury if the Plaintiff should even be working, in spite of the fact lost wages or inability to work were not in evidence , and Plaintiff did not seek any damages for past lost wages or loss of future earning capacity. (Tran. Vol. V, p. 55:10). This line of argument was part of the grander scheme to present Plaintiff's damages as worse than what the evidence showed to inflame the jury. (*See* Part IV *Supra*, and Part VII, *infra*). In an effort to respond to this line of argument, defense counsel in closing said, "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?" (Tran. Vol. V, 83:21-25). At this point the Court sustained Plaintiff's objections and admonished the jury to disregard the argument. (Tran. Vol. V, 84:10-13).

Plaintiff opened the door to this line of argument by questioning whether or not he should in fact be working. Once counsel made this statement, Defendant had a right to refute the argument made by counsel. That right should not have been denied, especially here where the argument tended to refute the argument made by counsel.

The doctrine of **c**urative 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).

In some circumstances, under the doctrine of curative admissibility, the district court errs in refusing to allow a party to introduce evidence in rebuttal to the evidence introduced by the opposing party. For example, in *Iowa Power & Light Co. v. Stortenbecker*, an eminent domain case, the plaintiff contended that the trial court erred in permitting the defendant to interject the issue of construction damages into evidence while excluding evidence plaintiff attempted to present in rebuttal. 334 N.W.2d 326, 332 (Iowa Ct. App. 1983). According to the Iowa Court of Appeals, once the defendant introduced inadmissible evidence regarding construction damages, the doctrine of curative admissibility required that the court allow the plaintiff to introduce rebuttal evidence regarding that issue. *Id.* As described by the Court,

> In the instant case, after agreeing not to raise the issue of construction damages, defendants inquired of one of the landowners whether there would be a dispute if Iowa Power damaged his property, and whether he had previous experience dealing with Iowa Power "regarding those types of damages." After the witness responded, the trial court excluded testimony Iowa Power attempted to introduce concerning its good settlement record for construction damages. Under the doctrine of curative admissibility, this evidence should have been admitted.

Id. The Court therefore reversed and remanded for a new trial.

Similarly, in *Basch v. Iowa Power & Light Co.*, the Iowa Supreme Court held that the trial court erred in sustaining objections to several questions asked of a witness by Defendant's counsel on a certain subject given that evidence regarding that subject had been introduced by the plaintiff. 250 Iowa 976, 95 N.W.2d 714, 717 (1959). According to the Court, the defendant had a right to refute the evidence offered by the plaintiff, and such right "should not be denied a litigant where the questions asked and the evidence offered fairly tends to refute the evidence received on behalf of the other party." *Id.*

Other Iowa cases are in accord with this principle. *See Shankle v. Armour Spray Sys., Inc.*, 672 N.W.2d 334, 2003 WL 22438869, *3 (Iowa Ct. App. 2003) (holding that the trial court did not abuse its discretion by concluding that the plaintiff opened the door to certain testimony and allowing the defendant to respond accordingly, citing the doctrine of curative admissibility); *Mercer v. Chi*, 282 N.W.2d 697, 701 (Iowa 1979) (in a medical battery case where the plaintiff alleged that she did not consent to the hospital's administration of a venogram test, the Court held that since the plaintiff testified to her physical resistance to the venogram, the hospital was entitled to present rebuttal evidence regarding a lack of physical resistance and therefore the trial court did not err in admitting such evidence).

Under another analogous principle, when a plaintiff seeks to garner sympathy from the jury and inflate their damage claims by suggesting that they are financially unstable or cannot afford certain goods or services, the defendant is allowed to offer rebuttal evidence regarding the plaintiff's financial situation or receipt of benefits from collateral sources. Courts have held that "[w]hen a party testifies about his or her financial condition in a false or misleading

manner, he or she opens the door for the introduction of evidence which might otherwise be inadmissible under the collateral source rule." *Babbitt v. Quik–Way Lube & Tire, Inc.*, 313 Ark. 207, 210, 853 S.W.2d 273, 275 (1993). Stated another way, where a plaintiff "falsely conveys to the jury that he or she is destitute or in dire financial straits, the admission of evidence of collateral source payments received by the plaintiff is permitted." *Kroning v. State Farm Auto Ins. Co.*, 567 N.W.2d 42, 46 (Minn. 1997).

Thus, if a plaintiff seeks to inflate their damages by suggesting that they are not receiving funds from another source, the defendant is entitled to introduce evidence as to the plaintiff's other sources of income in order to provide the jury with the whole picture. *See Johnson v. Weyerhaeuser Co.*, 134 Wash. 2d 795, 953 P.2d 800, 804 (1998) (evidence of collateral source benefits was admissible because plaintiff opened the door by testifying that the family did not "have as much money as [it] used to...."); *Evans v. Scanson*, 2017 MT 157, 388 Mont. 69, 396 P.3d 1284, 1290 (Following the admission of testimony from the plaintiff that she could not afford her child's medical expenses and therefore had to sue to recover from her healthcare providers and counsel's opening statements informing the jury that, "[plaintiff and her husband] can't afford that type of extraordinary care that a child would need," the district court properly allowed defense counsel to introduce evidence regarding the plaintiff's insurance coverage); *Babbitt v. Quik–Way Lube & Tire, Inc.,* 313 Ark. 207, 210, 853 S.W.2d 273, 275 (1993) (plaintiff's testimony that she did not go to a doctor because she didn't have the money could have misled the jury given the fact she had medical insurance, thus opening the door for defendant to elicit evidence regarding insurance coverage); *Haley ex rel. Haley v. Brown*, 36 Kan. App. 2d 432, 140 P.3d 1051, 1059 (2006) (Collateral source evidence in medical

malpractice action that infant's parents had a "change in circumstances" that would allow them to afford to purchase certain devices for infant's care was admissible under the curative admissibility doctrine to negate any prejudice that resulted from mother's testimony regarding her inability to pay for equipment).

Here, Plaintiff improperly introduced argument suggesting he should not be working and likely would not be able to work in a short amount of time. Defendant should have been allowed to rebut this argument demonstrating Plaintiff can work and was not seeking lost wages or loss of future earning capacity. This argument directly refuted Plaintiff's argument. UnityPoint Clinic should not have been denied the right to refute Plaintiff's argument.

VI. A NEW TRIAL MUST BE GRANTED BASED ON THE IMPROPER DISPLAY OF MATERIALS DURING OPENING THAT WERE NOT ENTERED INTO EVIDENCE

A new trial must be granted based upon counsel's improper display of material during opening statement that were not entered into evidence. During opening statement, plaintiff's counsel displayed anticipated evidence including medical imaging as well as recordings of deposition excerpts of PA Jill Ferry and Dr. David Stilley. (Tran. Vol. II, pp. 69:12-70:3). Ultimately, this material was never entered into evidence, and as such, unduly prejudiced UnityPoint Clinic.

Iowa Rule of Civil Procedure 1.919 allows the parties to make brief opening statements demonstrating the party's claim and by what evidence the party expects to prove it. Iowa R. Civ. P. 1.919(1)-(2). As a prominent legal treatise has explained:

> The fundamental purpose of opening statements is to do no more than inform the jury in a general way of the nature of the action, to advise them of the facts relied on by the party to make up his or her right of action or defense, to define the nature of the questions involved, and to advise the jury of the issues to be

> tried and provide an outline of what counsel expects admissible evidence at trial to show so that the jury may be better prepared to understand such evidence.

88 C.J.S. Trial § 261. As such, the proper function of the opening statement is not to introduce actual evidence to the jury nor to test the sufficiency of anticipated evidence. *Id.*

In Iowa counsel has wide latitude during opening statement to reference what he expects to prove, provided it is made in good faith. *See Mead v. Scott,* 256 Iowa 1285, 1293, 130 N.W.2d 641, 645 (Iowa 1964). However, there is a significant difference between telling the jury what a party expects to prove as opposed to specifically displaying it. *See Wielgus v. Ryobi Techs., Inc.*, No. 08 CV 1597, 2012 WL 1853090, at *3 (N.D. Ill. May 21, 2012). The former is permissible because the party is merely commenting on what the party intends to show during the trial, while the latter is not permissible because the party is offering evidence." *Id.*

It is important to distinguish between the display of imaging as opposed to the display of testimony during opening. It is improper to display items to the jury not in evidence. *See Cheatham v. State*, 1995 OK CR 32, 900 P.2d 414, 424 (OK 1995); *Bell v. State*, 2007 OK CR 43, ¶ 13, 172 P.3d 622, 627 (OK 2007). Courts that have allowed the display of anticipated evidence found no error or harmless error where the items was ultimately admitted into evidence. *See People v. Harmon*, 284 P.3d 124, 130 (Colo. App. 2011) (citing cases). However, the undersigned is unaware of any case affirming the display of evidence during opening statement that was never admitted into evidence.

As to the display of testimony during opening, the overwhelming majority of courts to discuss the issue are in agreement that it is improper to display testimony during opening. A federal court recognized the prejudice with videotaped testimony:

> Videotaped testimony may seem more believable or important to the lay jury

> because it can both see and hear the witness. During argument, Rambus submitted that it cannot "preview" what its live witnesses will look like and testify to; it can only generally describe what it hopes to elicit. On the other hand, if unrestricted, a video deposition can be shown once in opening, again during trial (at least once), and in closing in the exact same form. Repeatedly showing the same few deposition segments seems to exalt the relevance of those videotaped shreds of evidence over live testimony. *Cf* Federal Judicial Center, *Effective Use of Courtroom Technology: A Judge's Guide to Pretrial and Trial,* 156 (2001).

Hynix Semiconductor Inc. v. Rambus Inc., 2008 WL 190990 * 1 (N.D. Cal. Jan. 21, 2008). As to opening statements, the *Rambus* court heeded the Federal Judicial Center Guide's warning that: "[t]he most significant risk with respect to graphics used in an opening statement is posed by the generic category of things that 'move.' This includes videotapes[.]" *Id.* (quoting Federal Judicial Center, *Effective Use of Courtroom Technology: A Judge's Guide to Pretrial and Trial,* 156 (2001)); *see also Bannister v. Town of Noble,* 812 F.2d 1265, 1269 (10th Cir. 1987) (acknowledging "dominating nature of film evidence" as a "legitimate concern;" discussing concern that jury will give greater weight to film).

As noted by the *Rambus* court, an issue presented with videotaped depositions is repetition. Thus, their use should be limited under Rule 5.403. *Cf United States v. Dennis,* 625 F.2d 782, 797 (8th Cir. 1980) ("prior consistent statement may not be introduced, however, simply to bolster the testimony of the witness at trial"); *Daggett v. Webster,* 190 F.R.D. 12, 14 (D. Me. 1999) ("It is better-if the option exists-simply not to create the occasion for unnecessary repetition in the first place."); *see also Wyatt Technology Corp. v. Malvern Instruments, Inc.,* 2010 WL 11505684 *22 (C.D. Cal., 2010) (precluding use of videotaped depositions in opening statements as the "lay jury would put undue weight on that testimony" given it may be shown multiple times "in the exact same form."); *Id*

("[O]pening arguments is not the time to play excerpts of video-taped depositions."); *see also In re C.R. Bard, Inc., Pelvic Repair Sys. Prod. Liab. Litig.,* 2013 WL 3282926 *8 (S.D.W. Va. 2013) (subsequent history on other matters omitted) (precluding the parties from using video deposition clips during opening statements).

Other courts are likewise in accord that videotaped depositions should not be displayed during opening states. *See In re Ethicon, Inc.*, 2014 WL 505234, at *8 (S.D. W. Va. Feb. 5, 2014) ("[T]he use of video clips during opening statements is precluded as to all parties ....") (quoting *In re Bard, Inc.*, 2013 WL 3282926, at *8 (S.D. W. Va. June 27, 2013)); *Carpenter v. Forest Meadows Owners Ass'n*, 2011 WL 3207778, at *7 ("Video recordings of the deposition will not be permitted.") (emphasis in original); *Chopourian v. Catholic Healthcare W.*, No. 09–2972 KJM, 2011 WL 6396500, at *7 (E.D. Cal. Dec. 20, 2011) (denying the plaintiff's motion to use portions of videotaped depositions during opening statement); *M.A.C. v. City of Los Angeles*, No. CV164477DMGAJWX, 2018 WL 6174741, at *1 (C.D. Cal. Feb. 16, 2018) (refusing to permit parties to display or use evidence that has not yet been admitted during opening statement); *Beem v. Providence Health & Servs.*, No. 10-CV-0037-TOR, 2012 WL 13018728, at *2 (E.D. Wash. Apr. 19, 2012) (refusing to allow the display of evidence during opening statement and noting courts specifically addressing the use of video depositions in opening statements have found such use inappropriate as unduly emphasizing the testimony).

The presentation of medical imaging and testimony that ultimately was never entered into evidence prejudiced UnityPoint Clinic. Plaintiff utilized the photographs to unduly emphasize his damages early in the case stating that was the "tip of the iceberg." (*See* Tran. Vol II., p. 12:6-23). Similarly, Plaintiff relied on the testimony excerpts to place UnityPoint

Clinic's experts in a negatively, and improperly comment on the sufficiency of the anticipated evidence. (Tran. Vol. II., pp. 33:12-36:18);*See* 88 C.J.S. Trial § 261 (not proper function of opening statement to test the sufficiency of anticipated evidence).

The fact that this occurred during the opening statement only emphasizes the prejudice. The Iowa Practice Series, in recognizing the importance of opening statement, states:

> The importance of opening statement cannot be over-emphasized. A well-publicized University of Chicago Law School study found that jurors' conclusions on the issue of liability after hearing opening statements corresponded with their ultimate verdict on that issue in the vast majority of instances.

§ 63:1. Purpose and importance, 8 Ia. Prac., Civil Litigation Handbook § 63:1. Indeed, the jury improperly had the opportunity to see evidence and hear testimony at the time it was most likely to shape their opinions. It certainly would have been inappropriate for counsel to stop in the middle of his opening statement and ask a witness to stand up and begin testifying to the jury. It can be no more appropriate then to display recorded deposition testimony to the jury in opening statement, especially where here the testimony ultimately was never received in evidence.

Numerous case law and respected legal treatises all support that a party is prejudiced where the jury is allowed to view evidence that is never ultimately admitted over the objection of counsel. *See Carr v. Boyd*, 123 Colo. 350, 359, 229 P.2d 659, 664 (Co. 1951) (improper to describe testimony of witness during opening statement and then refusing to call witness during trial when witness was present); *see also Maercks v. Birchansky*, 549 So. 2d 199, 199 (Fla. Dist. Ct. App. 1989) (displaying items not in evidence); *Brackett v. Builders Lumber Co. of Decatur, Ill.*, 253 Ill. App. 107, 110 (Ill. App. Ct. 1929); *Maher v. Roisner*, 239 Minn. 115, 117, 57 N.W.2d

810, 811 (Min. 1953); 58 Am. Jur. 2d New Trial § 125 (prejudice from improper use of material not in evidence where counsel objected and was overruled); 88 C.J.S. Trial § 262 ("It is, however, improper for counsel to describe the testimony to be given by a witness, who is present at the trial, and then fail to call such witness to testify. It is also improper for counsel to describe what certain exhibits would establish if introduced where such items are not offered in evidence."); 75 Am. Jur. 2d Trial § 420 ("Convictions or judgments have been reversed where, notwithstanding a timely objection, the trial court failed to give the jury curative instructions to eliminate the effect of counsel's or the prosecuting attorney's misconduct in improperly exhibiting items or objects not in evidence"); 75 Am. Jur. 2d Trial § 419 ("The reading to the jury of paper writings not in evidence, for the purpose of impeachment, the reading to the jury from the unproven transcript, and the use of depositions that have not been introduced in evidence, are improper, as are statements purporting to reveal what would have been shown if certain writings had been introduced in evidence.").

VII. A NEW TRIAL MUST BE GRANTED FOR ALL GROUNDS ASSERTED IN UNITYPOINT CLINIC'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

Iowa Rule of Civil Procedure 1.1004(9) states that an aggrieved party is entitled to a new trial on any ground raised by said party in a motion for judgment notwithstanding the verdict pursuant to Iowa Rule of Civil Procedure 1.1003. UnityPoint Clinic has moved for a judgment notwithstanding the verdict pursuant to Iowa Rule of Civil Procedure 1.1003. UnityPoint Clinic hereby incorporates each of those grounds so stated within its Motion for a New Trial.

VIII. JURY INSTRUCTIONS ON NEGLIGENCE REQUIRE REVERSAL

Regarding jury instructions, the Iowa Supreme Court has stated, "prejudicial error results when instructions materially misstate the law or have misled the jury…We assume prejudice unless the record affirmatively establishes that there was no prejudice." *Haskenhoff v. Homeland Energy Sols.*, LLC, 897 N.W.2d 553, 570 (Iowa 2017). Where one or more specifications of negligence are unsupported by substantial evidence in the record, and where the jury returns a general verdict, reversal is required. *Alcala v. Marriott Int'l., Inc.*, 880 N.W.2d 699, 710 (Iowa 2016) ("We hold it was error to submit negligent training as one of the specifications of Marriott's negligence. The jury returned a general verdict without specifying which grounds of fault Alcala proved. A new trial is required after a general verdict is returned for the plaintiff if the evidence was insufficient to submit one of several specifications of negligence."); *Asher v. OB-Gyn Specialists., P.C.*, 846 N.W.2d 492, 497 (Iowa 2014) ("Where the district court submits to the jury a specification of negligence not supported by the evidence and the jury returns a general verdict, reversal is required."); *Nichols v. Westfield Indus.*, 380 N.W.2d 392, 397 (Iowa 1985) ("Where, as here, the forms of verdict do not reveal the basis on which the jury finds a defendant to be negligent, the submission of a specification which is without support in the evidence requires reversal.").

The Court instructed on six claims of negligence. (Instruction No. 12, p. 13). As discussed in UnityPoint Clinic's JNOV motion, there was insufficient evidence in the record supporting Plaintiff's claims of negligence in total. Specifically, and without limitation, there was insufficient evidence to instruct on claim (e)-regarding the alleged failure to prescribe antibiotics. 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. There also was not substantial evidence to support instructing on claim (f)-regarding the alleged improper discharge instructions. The evidence at trial demonstrated the discharge instructions instructed Joseph Dudley to immediately seek out a healthcare provider if he continued feeling unwell, which he followed the following Monday. Additionally, there was no evidence indicating what instructions should have given instead, nor any competent testimony that such instructions would have prevented Plaintiff's injuries. Therefore, neither of these two specifications of negligence submitted to the jury are supported by substantial evidence in the record. However, even if only one specification were deficient, UnityPoint Clinic is entitled to a new trial under the authority set forth in the preceding paragraph.

Additionally, error in instructing the jury arose from giving the specification of negligence (a)-(b), and (d)-(f). 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. *See Haskenhoff v. Homeland Energy Sols.*, LLC, 897 N.W.2d 553, 570 (Iowa 2017) (stating, "prejudicial error results when instructions materially misstate

the law or have misled the jury…We assume prejudice unless the record affirmatively establishes that there was no prejudice.").

XI. IMPROPERLY ALLOWING THE CUMULATIVE READING OF MELANIE CHOOS PA DEPOSITION TESTIMONY

On November 16, 2022, Plaintiff completed his examination of Melanie Choos and released her as a witness. (Tran. Vol. III, p. 190:13-18). However, over objection, on November 17, 2022, Plaintiff was allowed to read the excerpts of deposition testimony of Melanie Choos, in spite of the cumulative rehash of prior testimony. (Tran. Vol. IV, pp. 34:20-47:12). Plaintiff's counsel should not have needlessly presented cumulative evidence when he had already released the witness.

X. THE VERDICT AS A WHOLE FAILED TO EFFECTUATE SUBSTANTIAL JUSTICE

The trial court should grant a new trial where it clearly appears that the verdict does not effectuate substantial justice. *White*, 118 N.W.2d 578, 582 (Iowa 1962). The trial court has broad discretion in determining whether the verdict effectuates substantial justice between the parties. *Neumann*, 572 N.W.2d at 177. The Court has both the inherent power and the **duty** to grant a new trial where the verdict fails to effectuate substantial justice. *Tedrow*, 117 N.W.2d at 68 ("Courts have not only the right but the duty to disturb verdicts which appear unconscionable or clearly not warranted by the record."); *Spaur,* 510 N.W.2d at 869. (holding that if a verdict "fails to do substantial justice between the parties, we **must** either grant a new trial or require a remittitur") (emphasis added).

Here, as described in UnityPoint Clinic's Motion for Judgment Notwithstanding Verdict and in this Motion for New Trial, the verdict failed to effectuate substantial justice in

numerous ways, entitling UnityPoint Clinic to a new trial. Allowing UnityPoint Clinic 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 fails to effectuate substantial justice. Rather, substantial justice necessitates UnityPoint Clinic be tried on what this case is actually about, i.e. the care provided by a physician assistant on Friday February 17, 2017. Because the jury's verdict as a whole failed to effectuate substantial justice, UnityPoint Clinic is entitled to a new trial. UnityPoint Clinic also incorporates all arguments set forth in their Motion for Judgment Notwithstanding Verdict, filed contemporaneously herewith.

MOTION REMITTITUR

Iowa Rule of Civil Procedure 1.1010 provides the court the power to remit the verdict,[8] and remittitur rulings fall within the discretion of the court. *See Kuta v. Newberg*, 600 N.W.2d 280, 284 (Iowa 1999). "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 v. O'Malley*, 461 N.W.2d 833, 840 (Iowa 1990). Remittitur is required when a jury award is "(1) flagrantly excessive or inadequate; (2) so out of reason as to shock the conscience; (3) a result of passion, prejudice, or other ulterior motive; or (4) lacking in evidentiary support." *Id.* The Iowa Supreme Court has "emphasized that a clearly excessive verdict gives rise to a presumption that it was the product of passion or prejudice." *Jasper v. H. Nizam, Inc.*, 764 N.W.2d 751, 771 (Iowa 2009); *see also WSH Properties, L.L.C. v. Daniels*, 761 N.W.2d 45 , 50

[8] Alternatively Iowa Rule of Civil Procedure 1.1004(4) provides for a new trial in the event of "[e]xcessive or inadequate damages appearing to have been influenced by passion or prejudice." UnityPoint requests the Court either remit the excessive verdict, or grant it a new trial.

(Iowa 2008) ("We begin our analysis with the proposition that a flagrantly excessive verdict raises a presumption that it is the product of passion or prejudice."). When a verdict meets that standard "or fails to do substantial justice between the parties," either a new trial or remittitur **must** be granted. *Spaur v. Owens–Corning Fiberglas Corp.*, 510 N.W.2d 854, 869 (Iowa 1994).

In *Tedrow v. Fort Des Moines Cmty. Servs., Inc.*, 117 N.W.2d 63 (Iowa 1962), the Iowa Supreme Court ordered a remittitur following a jury verdict of $22,500 in a wrongful-death action brought by the estate of estate of a 12-year-old girl who died in a fire. *Id.* at 63, 66–68. On appeal, the defendant challenged the damages award, asserting: "the evidence was insufficient to support the damages awarded"; the verdict did not effectuate substantial justice between the parties, and the award was excessive and clearly affected by the passions and prejudices of the jury. *Id.* at 66–68. The Court reviewed the evidence in the record regarding damages, then engaged in a lengthy analysis regarding whether the award was excessive. *See id.*

Initially, the Court noted that while the amount of damages is normally a question for the jury and there is no "rule of thumb" regarding damages amounts, the award "must be such sum as can reasonably be justified by the evidence in the case." *Id.* at 67. In evaluating whether a verdict is excessive, "it is incumbent upon the courts to see that [the award is] kept within the bounds of reasonable support in the evidence." *Id.* "Courts have not only the right but the duty to disturb verdicts which appear unconscionable or clearly not warranted by the record." *Id.*

Ultimately, while the Court found no evidence that the passions or prejudices of the jury contributed to the amount of the award, it did conclude the amount was not justified by the record. *Id.* The Court also compared the damages award with awards in similar cases and concluded the award was larger than any comparable cases. *Id.* at 67–68. Based on its conclusion, the Court ordered remittitur to $15,000 within 20 days or a new trial be ordered. *Id.* at 68.

In *Sallis v. Lamansky*, 420 N.W.2d 795 (Iowa 1988), the jury awarded $626,000 in damages in a personal injury action on behalf of the plaintiff who suffered cervical hyperextension (whiplash) following a car accident, including for pain and suffering and lack of future earning capacity. *Id.* at 796. The district court denied the defendant's motion for new trial on the issue of remittitur. *Id.* at 798–99. On appeal, the Iowa Supreme Court observed: "The court should interfere only when the damage award is 'flagrantly excessive or inadequate, so out of reason so as to shock the conscience, the result of passion or prejudice, or lacking in evidentiary support.' . . . We have stated that the most important of these reasons is whether there is support in the evidence." *Id.* at 799 (quoting *Harsha v. State Sav. Bank*, 346 N.W.2d 791, 799 (Iowa 1984)). After reviewing the evidence regarding damages, the Court concluded: "When, as here, a verdict is so flagrantly excessive that it goes beyond the limits of fair compensation for the injuries shown and fails to do substantial justice between the parties, it is our duty to correct the error." *Id.* at 800. The Court denied the defendants' request for remittitur and instead ordered a new trial noting the plaintiff denied permanent injuries following automobile accident when asked and there was "little in the record" to establish loss of future earning capacity claim. *Id.* at 800–01.

Consistent with its decision in *Sallis*, the Iowa Supreme Court analyzed the framework for adjudicating the excessiveness of damage awards for pain and suffering in the context of a wrongful termination claim in *Jasper v. H. Nizam, Inc.*, 764 N.W.2d 751 (Iowa 2009). In that case, the director of a day-care facility was terminated after less than four months of employment after several disputes with the owner. *Id.* at 758–59. After a trial, the jury awarded the plaintiff $100,000 for past emotional distress. *Id.* at 760. Following the defendant's motion for new trial, the district court determined the emotional distress award was excessive due to passion and prejudice and was not supported by the evidence and reduced it to $20,000. *Id.*

After the Iowa Court of Appeals affirmed the district court's grant of remittitur, the Iowa Supreme Court granted further review. *Id.* The Court began by stating that while pain and suffering are awards are generally "highly subjective, . . . an award for emotional-distress damages is not without boundaries but is limited to a reasonable range derived from the evidence." *Id.* at 772. The Court then analyzed a series of cases to establish parameters for similar cases and awards and compared to the case in front of it. *Id.* at 772–73. 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.").

In *Kuta v. Newberg*, 600 N.W.2d 280 (Iowa 1999), the jury awarded $1,250,000 in damages in a wrongful-death action on behalf of the estate of a twenty-year-old man killed

when he was struck by a vehicle the defendant was driving. *Id.* at 283. Specifically, the jury awarded: "$260,030 for the present value of [the decedent]'s estate, $3055 for funeral expenses, $4915 for predeath medical expenses, $582,000 for predeath physical and mental pain and suffering, and $400,000 for predeath loss of function of the mind and body." *Id.* at 283–84. The award was reduced by twenty percent based on the jury's allocation of fault to the decedent. *Id.* at 283.

On the defendant's motion for new trial, the district court concluded the award for pain and suffering was "'shock[ing to the] court's conscience and sense of justice' and unsupported by the evidence because [the decedent] remained conscious for only a few minutes after the accident." *Id.* at 284. The Court also found the jury's award could have been driven by passion at the gruesomeness of the injuries and prejudice towards the defendant. *Id.* Based on those conclusions, the court ordered a new trial or remittitur of the total pain and suffering award from $982,000 to $300,000 and the loss of function award from $400,000 to $40,000. *Id.* On appeal, the Iowa Supreme Court affirmed the remittitur, concluding the district court was in the best position to judge the evidence on damages. *Id.* at 285.

Similarly, in *Giarratano v. Weitz Co.*, 147 N.W.2d 824 (Iowa 1967) abrogated on other grounds by *Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689 (Iowa 2009), the Iowa Supreme Court ordered a remittitur following a jury verdict of $75,000 in a wrongful-death action brought by the estate of an 18 year old man who fell from a roof under construction. *Id.* at 826–27, 836–37. The Court reviewed the evidence in the record regarding items of damage, including funeral expenses and pre-death pain and suffering and concluded "the verdict is clearly above what the record justifies." *Id.* at 837. The Court ordered remittitur to

an award of $50,000 to be filed within 30 days or a new trial. *Id.*; *see also Rees v. O'Malley*, 461 N.W.2d 833 (Iowa 1990) (reversing district court's denial of remittitur and remanding for retrial in case of alleged slander where the plaintiff was awarded $250,000 but "did not demonstrate that his reputation has been injured or that he has suffered any significant emotional distress"); *Hurtig v. Bjork*, 138 N.W.2d 62, 66 (Iowa 1965) (affirming the trial court's grant of remittitur in a case involving the wrongful death of a five year old girl); *Ferris v. Riley*, 101 N.W.2d 176, 184 (Iowa 1960) (stating "If, although passion and prejudice does not appear, the verdict is so large that it appears to be beyond the limits of fair compensation for the injuries shown, it is within our power, in fact it is our duty, to correct the error by requiring a remittitur on pain of a grant of a new trial" and reversing the trial court's refusal to grant remittitur in a case involving injuries sustained in an automobile accident).

In this case, the jury awarded the Plaintiff $27 million dollars solely for noneconomic damages (past/future loss of function, and past/future pain and suffering). The evidence, discussed in detail below, falls far short of supporting such a flagrantly excessive award. The total amount of damages as determined by the jury are unsupported by the evidence, flagrantly excessive, so out of reason as to shock the conscience, potentially a result of passion, prejudice, or other ulterior motive, and lacking in evidentiary support, mandating a new trial.

1. THE VERDICT OF $27 MILLION IS FLAGRANTLY EXCESSIVE

While there is no mathematical formula to measure noneconomic damages, it cannot be reasonably disputed that the jury's verdict of $27 million is flagrantly excessive. 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.

In the realm of personal injuries, one would expect that such rare and extreme verdicts correlate to the grossest and most debilitating personal injuries. Yet such is not the case in this matter. UnityPoint Clinic does not deny Plaintiff experienced an injury from his bout with meningitis. However, the evidence established that in context, Plaintiff experienced a relatively good outcome. He is independent with his ADL's. He is able to fully participate with his family. He is able to attend vacations with his family. He is able to work full time. He is capable of driving, even if his vertigo prevents him from riding motorcycles. He performs hobbies, and does activities with people. There were no corroborating economic injuries of any kind. The fact that Plaintiff did not seek future loss earning capacity indicates there was no true "risk" that Plaintiff would suddenly become incapable of working full time. There was no competent or credible evidence that Joseph Dudley will develop dementia or otherwise lose his mind. The expert testimony did not support viewing the injury as "life-ending." (*See* Part 4 *infra*). Indeed, under the mortality instruction submitted by the Court, Joseph Dudley is expected to live another 27 years.

Cases are in accord that a remittitur or new trial is appropriate in matters involving brain injuries and comparable verdicts where the plaintiff is still able to relatively "function" (for lack of a better word) in society and experience his life. The matter of *Bilyeu v. Cowgill*, is remarkably comparable to this case. No. B213939, 2011 WL 2936420, *16-17 (Cal. Ct. App. July 20, 2011). That matter involved the plaintiff suffering a traumatic brain injury. The trial

court reduced the damages awarded to the plaintiff for past non-economic loss (physical pain and mental suffering) from $1.5 million to $1 million, and reduced damages for future non-economic loss from $8.5 million to $2.5 million. *Id.* at *16. The plaintiff had mild memory loss and mildly impaired language skills, primarily expressive aphasia, and difficulty in articulation and finding words to speak. *Id.* at *17. He also complained about not being able to smell and numbness in his right hand. *Id.* The plaintiff was not in pain and found to have a moderate limitation and to be capable of sedentary, clerical or administrative work. *Id.* The plaintiff had no diminished judgment, impaired attention, impaired visual skills, or problem solving deficits. *Id.* His motor skills were normal and there was no paralysis. *Id.* The plaintiff had obtained his driver's license and drove short distances. *Id.* He was described as "very handy" around the house, although not in the same way as before his injury. *Id.* Approximately 18 months before trial, the plaintiff had taken a five-day vacation to Central California, during which he and his wife visited wineries and looked at properties for sale *Id.*. He had a life expectancy of 19.7 remaining years. *Id.* According to the Court, "[g]iven [plaintiff's] level of functioning and lack of pain, the trial court did not abuse its discretion in finding the jury's $10 million award of damages excessive and in reducing that award to $3.5 million." *Id.* Other cases are likewise in accord. *See Lindenman v. Kreitzer*, 105 A.D.3d 477, 964 N.Y.S.2d 87, 88 (2013) (Holding that the trial court's award of $5,500,000 for past and future pain suffering deviated materially from reasonable compensation because although the plaintiff suffered a brain injury, he did not undergo surgery and was able to continue to engage in activities such as driving and playing tennis).

Indeed, a new trial/remittitur has been held appropriate with comparable verdict numbers when the injuries were much more extreme and debilitating. *See Turturro v. City of New York*, 127 A.D.3d 732, 739, 5 N.Y.S.3d 306 (2015), *aff'd*, 28 N.Y.3d 469, 68 N.E.3d 693 (2016) (in a case where a 12 year old was struck by an automobile while riding his bicycle and suffered a severe head and brain injury, including extensive fractures to the skull, subdural hematomas, and intracranial hypertension, which caused permanently diminished cognitive and motor functioning, the Court concluded that the jury's award of $6 million for past pain and suffering and $15 million for future pain and suffering "deviated materially from what would be reasonable under the circumstances."); *Palanki ex rel. Palanki v. Vanderbilt Univ.*, 215 S.W.3d 380, 388-389 (Tenn. Ct. App. 2006) (upholding trial court's remittitur which reduced the plaintiff's verdict from $16 million to $6.5 million in a medical negligence case involving the negligent removal of 90% of an infant's bladder where $15 million was awarded in noneconomic damages and the evidence suggested that physical and mental pain and suffering would be relatively minor and plaintiff's injuries would not prevent him from engaging in normal life activities such as having friends, getting married, having a normal sex life, fathering children, receiving an education, or earning a living); *Okraynets v. Metropolitan Transp. Authority*, 555 F. Supp. 2d 420 (S.D. N.Y. 2008) (Jury's aggregate pain and suffering award of $20 million to a carpenter who was rendered a paraplegic in a construction accident (past ward of $5 million, future award of $15 million) was excessive under New York law because it deviated materially from what would be reasonable compensation, and maximum awards that would not be excessive for past and future pain and suffering were $2.5 million and $8 million, respectively; among his injuries, the plaintiff suffered a burst fracture at the T12/L1 vertebra

causing paraplegia, collapsed lung, several rib fractures, numerous surgeries, infection, urinary and fecal incontinence, loss of sexual function; cognitive defects, chronic pain, depression, and emotional trauma for which he took medication, and due to his injuries, plaintiff had to use a wheelchair, was unable to perform sexually and was unable to control his bowels or bladder); *Hughes v. Ford Motor Co.*, 204 F.Supp.2d 958, 966 (N.D.Miss. May 24, 2002) (Jury award of $4,000,000 for injuries driver sustained as result of fire in her vehicle was excessive, and remittitur was required to reduce award to $2,500,000, where the driver was 31 years old at time of her accident, she sustained approximately 20 percent total body service area burns and also sustained fracture to her spine, had burns on half of her back, her right forearm and hand and left arm and hand, while also suffering burns to her left leg and right knee and requiring a 47 day hospital stay, three surgeries and rehabilitation therapy, and was left with a lifetime of disfigurement but was eventually able to return to her daily activities with little or no disability); *Bissell v. Town of Amherst*, 56 A.D.3d 1144, 867 N.Y.S.2d 582, 585-586 (4th Dep't 2008) (Jury's awards of damages of $5 million and $15 million for past and future pain and suffering of construction worker, who sustained back injuries which left him with paralysis, incontinence, and sexual dysfunction, were excessive; $3 million for past pain and suffering and $7 million for future pain and suffering were maximum amounts jury could have awarded).

2. THE VERDICT OF $27 MILLION IS SO OUT OF REASON IT SHOCKS THE CONSCIENCE

Similarly, the verdict of $27 million is so out of proportion with the damages that it shocks the conscience. Once again, this is a rare and extreme figure to be awarded by a jury that does not properly correspond to the Plaintiff's injuries. Once again, other cases involving more extreme damages have found similar verdicts of comparable numbers shocking to the

conscience. *See Barba v. Bos. Sci. Corp.*, No. CV N11C-08-050 MMJ, 2015 WL 6336151, *13-14 (Del. Super. Ct. Oct. 9, 2015) ($25 million verdict was "sufficiently out of proportion to the injury so as to shock the Court's conscience and sense of justice" in a pelvic mesh injury case where the Plaintiff suffered past and future physical and mental pain and suffering due to recurrent bladder infections, surgeries, pelvic and abdominal pain, and inability to have sexual relations); *Advocat, Inc. v. Sauer*, 353 Ark. 29, 111 S.W.3d 346, 357 (2003) (granting remittitur and reducing a verdict from $15 million to $5 million in a nursing home negligence case because the amount of the verdict shocked the conscience of the court despite the fact that the verdict was based on ample evidence that the plaintiff was not properly cared for in that she was severely dehydrated and malnourished due to lack of care, was rarely bathed, and had several infected bed sores from not being moved often enough, which was all due to the nursing home's emphasis on profit over quality of care).

Further, for the many reasons discussed above, there is a serious concern that the verdict of $27 million is based more out of the jury's attempt to punish UnityPoint Clinic for its "negligence" as opposed to compensating Joseph Dudley. (*See* Part 3 *infra*). In *Chase v. Thompson*, where a 61 year old man suffered a permanent brain injury and other permanent physical injuries, which caused him to no longer be able to perform the normal duties required by his farming operation or perform his duties as a member of the local board of supervisors, the court held that that the jury's award of $11.6 million shocked the conscience of the court. 47 Va. Cir. 511, 1998 WL 34169767, *4 (1998). The court had a "substantial concern" the jury's decision was a result of an attempt to punish the defendants for their negligence rather than to compensate the plaintiff. *Id.*

3. THE VERDICT WAS A RESULT OF PASSION, PREJUDICE, OR OTHER ULTERIOR MOTIVE

As previously mentioned, under Iowa law, a clearly excessive verdict creates the presumption the verdict was a result of the jury's passions or prejudice. There is also evidence that an impassioned jury awarded excessive noneconomic damages. As has been outlined in great detail in UnityPoint Clinic's motion for new trial (in particular but without limitation Parts II-IV *supra*), throughout trial plaintiff's counsel submitted irrelevant and inflammatory evidence and argument designed for the jury to castigate UnityPoint Clinic in a moralistic and punitive light. By way of summation, counsel submitted irrelevant evidence (which was ultimately stricken) that UnityPoint Clinic was unscrupulously and fraudulently holding its PA's out as doctors. Counsel further argued UnityPoint Clinic's PA's were not being supervised by the requisite physicians as a cost saving mechanism as part of the "business of medicine" in Iowa. (Tran Vol. V, p. 29:18-19). Counsel postured UnityPoint Clinic as mounting a frivolous defense, refusing to accept responsibility, willing to say and do whatever it takes for the jury to essentially let it off the hook, whilst advocating for a lower standard of care designed to kill patients. Counsel beseeched the jury, essentially as the conscience of the community, to tell UnityPoint Clinic (thereby sending a message) that "that's not okay."

Such inflammatory remarks clearly succeeded in stoking the passions and prejudices of the jury, for the jury clearly obliged counsel's request. The jury requested the opportunity to add a statement to their verdict in order to add context. (11/21/22 question from Jury). Given that the jury awarded a verdict in the amount of $27 million, it is clear what the jury wished to say. The jury wished to send a message to UnityPoint Clinic, just as counsel beseeched them to do. Clearly this verdict arose out of the desire to punish UnityPoint Clinic for its perceived

negligence as opposed to compensating Joseph Dudley for his injuries. *See Bilyeu v. Cowgill*,. No. B213939, 2011 WL 2936420, *16-17 (Cal. Ct. App. July 20, 2011) (evidence of an impassioned jury award of noneconomic damages where counsel gave evidence and argument that would impassion the jury causing it to "punish" the defendant by awarding excessive damages); *Chase v. Thompson*, 47 Va. Cir. 511, 1998 WL 34169767, *4 (1998) (verdict indicates it was not the product of a fair and impartial decision and court's concern jury's decision was the attempt to punish rather than compensate).

4. THE VERDICT LACKS IN EVIDENTIARY SUPPORT

As outlined in UnityPoint Clinic's Motion for Judgment Notwithstanding the Verdict, and elsewhere in its Motion for New Trial, the evidence does not support construing Joseph Dudley's injuries as "life-ending." Plaintiff's experts offered only generic and nonspecific testimony about how individuals with a brain injury can depreciate over time. However, there was no testimony which offered the jury guidance as to how that would manifest in Joseph Dudley's case. Certainly no expert testified that Joseph Dudley would or was likely to develop dementia. As previously noted, in order to recover for future damages plaintiff must present evidence showing such damages are reasonably certain. *See Mercer*, 218 N.W.2d at 627 ("Relied on by defendant in support of this issue is our rule there can be no recovery for future pain and suffering unless reasonably certain to result from the injury."); *Shuck*, 218 N.W. at 34. ("There can be no quarrel with the rule that recoverable damages for permanent injury or for future pain and suffering must be such only as are reasonably certain."). Loss of function is a separate and distinct element of recovery from pain and suffering. *See Brant v. Bockholt*, 532 N.W.2d 801, 804–05 (Iowa 1995) (comparing loss of function with pain and suffering). It is

important to guard against the award of duplicate damages. *Poyzer v. McGraw*, 360 N.W.2d 748, 753 (Iowa 1985).

Asking the jury to view Plaintiff's injury as "end-of-life" was merely an invitation for the jury to speculate. This was improper. Likewise, without any proper evidence to posture this case as "end-of-life", there is no evidence to support such an extreme and excessive verdict.

CONCLUSION

In sum, substantial justice necessitates UnityPoint Clinic receive a fair trial on the merits. The transcript of the record indisputably reveals UnityPoint Clinic was not tried on the matters at issue, but tried on matters outside of issue. Plaintiff's inflammatory arguments clearly ignited the passions and prejudices of the jury to view UnityPoint Clinic in a moralistic and punitive light. The excessive verdict can only be construed as the jury's efforts to punish UnityPoint Clinic and send a message as opposed to compensating the Plaintiff for his injuries. Under these circumstances, substantial justice and law demand UnityPoint Clinic be granted a new trial.

WHEREFORE UnityPoint Clinic respectfully requests this Court grant its Motion for New Trial and grant any other such relief as the Court deems just and proper .

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing instrument was served upon one of the attorneys of record for all parties to the above-entitled cause by serving the same on such attorney at his/her respective address/fax number as disclosed by the pleadings of record herein, on the 5th of January, 2023 by:

- ☐ U.S. Mail
- ☐ FAX
- ☐ Hand Delivered
- ☐ UPS
- ☐ Federal Express
- ☒ Electronic Filing
- ☐ Other _____

/s/ Aaron Redinbaugh