IN THE SUPREME COURT OF IOWA

NO. 14-1682

ALAN ANDERSEN, Individually and as Injured Parent of CHELSEA ANDERSEN and BRODY ANDERSEN and DIANE ANDERSEN, Wife of Alan Andersen
Plaintiffs-Appellants,

vs.

SOHIT KHANNA, M.D., and IOWA HEART CENTER, P.C.,
Defendants-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
THE HONORABLE MICHAEL HUPPERT, JUDGE
POLK COUNTY NO. CL100171

APPELLEES DR. KHANNA & IOWA HEART'S FINAL BRIEF

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Routing Statement

Defendants/Appellees Dr. Sohit Khanna ("Dr. Khanna") and Iowa Heart Center, P.C. ("Iowa Heart") (collectively referred to as "Defendants") agree that this case concerns the application of existing legal principles and is appropriate for transfer to the Court of Appeals. *See* Iowa R. App. P. 6. 1101(3)(a).

Introduction

Two of Plaintiffs' three appeal issues concern informed consent. Plaintiffs had ample opportunity and many years to prepare their case and formulate their theories. Yet when the case was finally tried to the jury, Plaintiffs did not have the necessary evidence to support a claim based upon the nondisclosure of a material risk. Plaintiffs had chosen a different theory to pursue. In fact, Plaintiffs' theory in their case-in-chief was *contrary* to an informed consent claim and Plaintiffs only sought to submit the claim in rebuttal. The district court correctly refused to submit informed consent and excluded rebuttal testimony.

The other subject matter in Plaintiffs' appeal concerns their allegation that Dr. Khanna was inadequately experienced to perform the surgery at issue. There are a number of reasons the claims based on this allegation fail - both as an informed consent claim and as a negligence specification.

However, as a threshold matter, the jury found Dr. Khanna was not negligent in the performance of the surgery and Plaintiffs cannot show prejudice.

Statement of the Case

Nature of the case.

This is a medical malpractice case arising from a January 22, 2004 open heart surgery performed on Plaintiff Alan Andersen by Dr. Khanna at Mercy Medical Center-Des Moines ("Mercy"). Plaintiff was born with a heart abnormality. Dr. Khanna performed an aortic valve replacement with a Bentall procedure. Plaintiff suffered complications and ultimately received a heart transplant on October 21, 2006.

Plaintiffs filed their claim on September 26, 2005. App. 1 (Petition). The matter was tried from July 7 to July 21, 2014.[1] On July 22, 2014, the jury returned a verdict in favor of Defendants, finding Dr. Khanna was not negligent. App. 564, 530-31 (Verdict, July 22, 2014 Tr. 9-10). Plaintiffs filed a post trial motion, which was denied on September 17, 2014. App. 638-47. Plaintiffs filed a Notice of Appeal on October 7, 2014. App. 654.

[1]Not all of the court days between July 7 and July 21 were full days of evidence.

Course of proceedings.

The issues on appeal must be viewed in the context of the extensive procedural history of this case. The case was scheduled for trial eight times prior to the July 2014 trial date. *See generally* district court's docket. Between 2010 and 2014, the case was set for trial three times—June 20, 2011, October 31, 2011, and April 15, 2013. For each of these dates, full trial preparation was completed, including motions on some of the issues raised on appeal.

The case was tried before Judge Michael Huppert who was tasked with interpreting, applying, and sometimes reconsidering rulings previously entered by Judge Scott Rosenberg and Judge D. J. Stovall.

August 19, 2008 amended petition. On August 19, 2008, Plaintiffs filed an amended petition--the only one over the course of this case.

Plaintiffs' allegations of negligence against Dr. Khanna included that he was negligent in:

a. Failing to properly advise Andersen regarding all the risks and dangers of the procedures recommended by Khanna, and failing to obtain informed consent for the procedures actually performed;
b. Failing to properly assess, monitor, and care for Andersen before, during, and after the surgical procedure performed by Khanna on January 22, 2004;
c. Failing to properly perform the surgical procedure undertaken by him on Andersen on January 22, 2004; and

> d. Failing to advise Andersen that he [Khanna] had limited experience in performing a Bentall procedure.

App. 11 (Amended Complaint [hereinafter "Amended Petition"] ¶9). Allegation (d) was new in the amended petition. Plaintiffs did not allege Dr. Khanna was negligent based solely on his level of experience.

As to Iowa Heart, Plaintiffs alleged that it was "liable for Khanna's negligence as his employer" and "negligent in hiring, marketing, and permitting Khanna to perform Bentall procedures." App. 11 (*Id.* ¶10). Plaintiffs also alleged a credentialing claim against Mercy. App. 12 (*Id.* ¶11).

June 15, 2010 summary judgment ruling. Defendants filed motions for partial summary judgment in which Mercy sought dismissal of the negligent credentialing claim[2] and Dr. Khanna sought dismissal of the informed consent claim. Both motions were granted on June 15, 2010. As to the informed consent claim, Judge Rosenberg concluded:

> . . . The Court agrees . . . that the informed consent for patients as defined under Iowa law requires a disclosure to the patient of all known material information concerning the procedure to be performed which includes disclosing the material risks concerning a particular procedure. The Court finds that Iowa law does not include a duty to disclose personal characteristics or the

[2] Mercy's motion was based on the inadmissibility of Dr. Khanna's credentialing file, including a case log of cardiothoracic procedures. *See* App. 163 (June 15, 2010 Ruling at 3).

> experience of a physician or doctor in obtaining consent from a patient.

App. 162 (June 15, 2010 Ruling at 2).

While the court's ruling dismissed the entire claim, there was specific discussion only of allegation (d) of the amended petition, concerning a failure to disclose experience information. App 162 (*Id.*). However, as to allegation (a) of the amended petition (concerning a failure to disclose material risks), Plaintiffs never pursued that allegation with expert evidence. At no time during the long history of this case, did Plaintiffs disclose an expert opinion that would support a failure to disclose material risks.[3] As explained further below, to the extent there was ambiguity as to whether the district court dismissed the entire informed consent claim or only that pertaining to Dr. Khanna's experience, there were additional proceedings before both Judge Stovall and Judge Huppert on this issue.

Judge Rosenberg also addresses an evidentiary issue in his ruling:

> The Court does observe, however, that this ruling does not prevent Plaintiffs from introducing evidence regarding the abilities, knowledge, experience and expertise of Dr. Khanna in

[3] *See* App. 626-31 (Defendants' Resistance to Post-Trial Motion, Exh. 1, including Plaintiffs' expert reports: Feb. 28, 2008 Johnson; March 3, 2009 Peetz; undated supplements); *see also, e.g.*, *Doe v. Johnston*, 476 N.W.2d 28, 31 (Iowa 1991) ("the burden rests with the plaintiff to establish by expert testimony the nature of the risk involved and the likelihood of its occurrence.").

> performing the procedure at issue in this case. Clearly, these factors would be relevant to the issue whether or not Dr. Khanna was negligent in performing medical procedures involved in this case.

App. 162. As a result of this ruling, Plaintiffs were allowed to introduce substantial evidence at trial to support their position that Dr. Khanna lacked sufficient experience. *See, e.g.*, App. 644-45 (Post-Trial Ruling at 7-8, describing record as "replete with references to [Dr. Khanna's] lack of training and experience.")

June 2011. On June 1, 2011 Plaintiffs asked for a reconsideration of the summary judgment ruling on informed consent. In their motion, Plaintiffs articulated that new evidence was now available to support an informed consent claim. App. 165-67 (Motion). However, the *only* evidence Plaintiffs referred to was *defense* expert Dr. Henri Cuenoud's May 3, 2011 deposition testimony about Plaintiff's pre-existing heart condition as explaining the cause of his complication. *See id*.[4] Plaintiffs did not seek reconsideration of the informed consent allegations pertaining to Dr. Khanna's experience. *Id.*

[4] This makes it clear that Plaintiffs themselves viewed the June 15, 2010 Ruling as dismissing the entirety of the informed consent claim. If the material risk part of the informed consent claim had survived the summary judgment ruling, there would no reason for a motion to reconsider based on the new evidence since that ruling.

It was Defendants' position that the entire informed consent claim was out of the case. *See* App. 190-93 (Defendants' June 8, 2011 Second Motion in Limine ¶2). These motions were not ruled upon until September 2011.

Plaintiffs did not seek to add Dr. Cuenoud as a Plaintiffs' expert to testify (i.e. by deposition) in support of an informed consent claim.[5] Later, at the July 2014 trial, Plaintiffs did not request to read any portion of Dr. Cuenoud's deposition in their case-in-chief or make an offer of proof of the same.

June 20, 2011 trial date. Before the June 20, 2011 trial began, Judge Stovall ruled that Plaintiffs would not be allowed to introduce a medical expense reimbursement issue into the case. Plaintiff's employer (Syngenta) represented its intent to remove the case to federal court and, over Defendants' objection, Judge Stovall continued the trial. *See* App. 290-93 (June 20, 2011 Tr. 1, 16-17, 21-23).

September 20, 2011 ruling. In advance of a trial to begin October 31, 2011, Judge Stovall ruled on the pending motions from June, including Plaintiffs' request to revive the informed consent claim based upon defense expert Dr. Cuenoud's opinion on the cause of Plaintiff's complication.

[5] Defendants do not imply that Plaintiffs should have been allowed to do so.

Judge Stovall did *not* reverse Judge Rosenberg's summary judgment ruling but addressed the evidence:

> The Court reconsiders its June 15, 2010, ruling and enters the following ruling modifying the same *only* as follows: The Plaintiffs shall be allowed to present evidence relating to Dr. Cuenoud's awareness of the Plaintiff's increased mortality risk and apprising the Plaintiff of the same.

App. 294 (Sept. 20, 2011 Ruling at 1 Part II (emphasis added)).

This ruling on the evidence was left unchanged by Judge Huppert in the July 2014 trial. *See* App. 640 (Post-Trial Ruling at 3). However, as explained by Judge Huppert, Plaintiffs failed to offer the evidence in their case-in-chief as allowed by the above ruling. *See* App. 640-41 (*Id.* at 3-4).

Judge Stovall also ruled on Defendants' Second Motion in Limine, where they sought exclusion of "[a]ny reference to, or evidence concerning, allegations of lack of informed consent, negligent credentialing, and that Dr. Khanna was not qualified." App. 295 (September 20, 2011 Ruling at 2 Part V ¶2). The court's ruling was:

> **"SUSTAINED** as to negligent credentialing. Dr. Khanna's qualifications may be pursued by the Plaintiffs in the context of general negligence claim, along with the issue of informed consent consistent with the Court's ruling on this issue on the Plaintiffs' motion to Reconsider."

Id. Judge Huppert's trial ruling in July 2014 made it clear he did not view Judge Stovall's rulings as reviving an informed consent claim upon which Plaintiff could recover. *See* App. 353 (Tr. 85:9-13); *see also* below.[6]

October 31, 2011 trial date. At the trial commencing October 31, 2011, Plaintiffs' former attorney represented during jury selection that Dr. Khanna had lied. Judge Stovall granted a mistrial. *See* App. 332-34 (April 17, 2013 Order at 1-3, explaining same).

March 2013. In advance of trial to commence April 15, 2013, Defendants set forth their position that the informed consent claim "was *not* reinstated by the Judge Stovall's reconsideration of that dismissal." App. 313 (Defendants' Third Motion in Limine at 12). Defendants also argued:

> Further, the evidence on Dr. Khanna's qualifications is limited to the general negligence claim . . . *Plaintiffs have never articulated a specification of negligence that Dr. Khanna was not qualified apart from Plaintiffs' informed consent allegation on that subject. It is too late now* for such a new allegation even assuming without conceding it is cognizable.

[6] In the post-trial proceeding, Plaintiffs' overriding theme was that Judge Huppert did not follow Judge Stovall's Ruling. App. 567-68 (Plaintiff's Motion for New Trial). However, Judge Huppert was required to interpret Judge Stovall's rulings and even if he modified them, "Iowa adheres to the general rule that a district court judge may review and change a prior interlocutory ruling of another district judge in the same case." *Hoefer v. Wisc. Edu. Assoc,* 470 N.W. 2d 336, 339 (Iowa 1991).

Id. at 12 note 7 (emphasis added). At trial over a year later in July 2014, Plaintiffs requested a negligence theory based on Dr. Khanna's alleged lack of experience to be submitted to the jury. However, as indicated above, such a claim had not previously been pled or raised.

Before the April 2013 trial date, Judge Huppert did not disturb Judge Stovall's rulings. *See* App. 331 (April 9, 2013 Order at 3 ¶4).[7]

April 15, 2013 trial date. During jury selection at the trial commencing April 15, 2013, the court granted a mistrial when Plaintiffs' former counsel violated an order concerning the use of medical expense evidence. App. 332-34 (April 17, 2013 Order at 1-3).

July 2, 2014 hearing. The status of Plaintiffs' informed consent claim was again discussed at the pretrial hearing before trial in 2014. App. 341-44 (July 2, 2014 Tr. 34:9-37:18). Defendants again made clear their position that the claim was out of the case based upon the June 2010 summary judgment ruling, Judge Stovall's September 2011 ruling, and Plaintiffs' lack of expert testimony. App. 341-43 (*Id.* 34:23-36:23). Plaintiffs suggested that Judge Stovall's ruling, that allowed Dr. Cuenoud's

[7] In March 2013, Judge Huppert did grant Defendants' motion to exclude evidence of the independent claim of negligence (i.e. negligent hiring) against Iowa Heart. *See* App. 329-31 (April 9, 2013 Order at 1-3). Thus, at trial in 2014, the claim against Iowa Heart was one of vicarious liability.

testimony, reopened "a form of informed consent." App. 342-43 (*Id.* Tr. 35:24-36:16). Plaintiffs did not argue, as they do on appeal, that they didn't need an expert. Nor did Plaintiffs ask for leave to use Dr. Cuenoud in their case.

Judge Huppert summarized:

> . . . There was an informed consent claim that was the subject of a summary judgment motion which was granted. Now, ordinarily that would tell me everything I need to know about the viability of the informed consent claim. Has there been any effort to re-plead another informed consent claim since Judge Rosenberg's ruling?
>
> Plaintiffs' counsel: Not to my knowledge.

App. 344 (*Id.* Tr. 37:7-15). Plaintiffs did not, at this time, inform the court of an intent or desire to re-plead their informed consent claim.

July 7, 2014—first day of trial. Outside the presence of the jury, Judge Huppert clarified his ruling on informed consent:

> Now, I think I am pretty well-versed on where the informed consent claim stands or doesn't stand based on the pleadings, . . .
>
> . . . just so it's perfectly clear, there is no issue regarding the informed consent claim based upon prior rulings.
>
> So is that helpful or clarify where the record is at this point? Mr. Morgan, any questions in that regard?

App. 351, 353 (Tr. 80:20-22; 85:9-13). Plaintiffs offered no further argument or record as to the informed consent claim but continued to seek

clarification about the admission of Dr. Khanna's qualifications and clarified that "We're not going into informed consent." App. 353-54 (Tr. 89:12-13; *see also* 85:14-92:24).

July 14, 2014—sixth day of trial. In the second week of trial, before resting on July 15th, Plaintiffs revisited the informed consent subject and sought to introduce evidence from Plaintiff about what he was told of Dr. Khanna's experience level. App. 426-27 (Tr. 823:15-828:72). Judge Huppert denied Plaintiffs' request. App. 427 (Tr. 826:17-828:12).

July 16, 2014-- eighth day of trial. After Plaintiffs had rested on July 15th, App. 438 (Tr. 953:16-24), and before the testimony of defense expert Dr. Cuenoud, Plaintiffs revisited Judge Stovall's ruling, its meaning, and the scope of the testimony they could elicit from Dr. Cuenoud. App. 449-51 (Tr. 1043:15-1054:22). Judge Huppert took a recess to review Dr. Cuenoud's deposition and Judge Stovall's ruling. App. 449 (Tr. 1044:21-1045:8); *see also* App. 449, 451 (Tr. 1044:5-20, 1052:20-1053:10) (defense counsel explaining context of Dr. Cuenoud's testimony).

Judge Huppert conveyed the quandary created by Plaintiffs' failure to present the issue of informed consent more fully in their case-in-chief and timely re-assert an attempt to put informed consent back into the case:

> . . . The parties and the Court have taken this case up to this point we're now in the waning days of trial, after a week and a

> half of trial, operating under the assumption that informed consent was out of the case. I know that there have been some issues back and forth on this topic, but in general, either in terms of offers of proof or other proffers of evidence, nothing has been presented that would suggest that informed consent was going to be a theory of liability for the jury to resolve or at least to preserve for further review. I'm not going to reopen that issue mid-trial to allow for a discussion of whether or not Dr. Khanna should be found liable or negligent for not discussing any increased risks from the surgery that the doctor may be testifying about today.

App. 450 (Tr. 1049:9-22). Judge Huppert did, however, limit Dr. Cuenoud from testifying as to a quantification of any increased risk (i.e. he could not opine Plaintiff suffered a 25% chance of certain risks). App. 451 (Tr. 1053:11-1054:22).

July 18, 2014—ninth day of trial. Near the conclusion of trial evidence on Friday, July 18th, the parties and court discussed rebuttal evidence. Plaintiffs indicated their intent to call witnesses to rebut the defense evidence that Plaintiff suffered from a "worn out" heart. App. 469-70 (Tr. 1203:1-1205:24). Defendants objected on the basis there was nothing new and explained the procedural timing of expert disclosures. App. 470-71 (Tr. 1206:2-1209:3). Judge Huppert denied the rebuttal as there was nothing new to rebut. App. 471 (Tr. 1210:3-1212:8).

July 22, 2014—jury verdict. On July 22nd, the jury returned its verdict, finding that Dr. Khanna was not negligent and never reaching the

causation question. App. 564 (Verdict). The allegations submitted to, and ultimately rejected by, the jury included that Dr. Khanna was negligent:

> a. In providing inadequate myocardial protection to Alan Andersen's heart during the Bentall procedure; or
>
> b. In improperly reattaching Alan Andersen's left main coronary artery during the Bentall procedure; or
>
> c. In taking too much time to perform the left main coronary artery bypass in response to the failure of Alan Andersen's left ventricle following the Bentall procedure.

App. 548 (Court's Instruction No. 14); *See* App. 460-61, 463-64 (Tr. 1139:16-1140:2, 1145:21-1146: 3, 1154:2-1156:24, 1161:1-1163:4, testimony of defense expert cardiac surgeon Dr. Robert Love[8] that Dr. Khanna met the standard of care, addressing each allegation above); App. 479-93 (Supp. Tr. 20:4-34:16, testimony of defense expert cardiac surgeon Dr. Frazier Eales[9] that there was nothing suggestive of negligence in Dr. Khanna's care, addressing each allegation above).

[8] Dr. Love is a professor of surgery at Medical College of Wisconsin, has done an estimated 150 Bentall procedures and 500 heart transplants over 20-25 years. App. 459 (Tr. 1131:13-1132:21).

[9] Dr. Eales is a surgeon at Abbott Northwestern Hospital in Minneapolis and has been involved with an estimated 200 heart transplants and averaged one Bentall a month at the time of trial. App. 474-78 (Supp. Tr. 13:8-17:24).

Post trial motion. Plaintiffs raised a number of issues in their post-trial motion, all rejected by Judge Huppert in a September 17, 2014 ruling as further explained below. App. 638-47.

Summary of facts--relevant expert testimony.

Prior to trial, none of Plaintiffs' experts had opinions to support an informed consent claim concerning undisclosed material risks of the Bentall procedure. *See* App. 626-29 (Defendants' Resistance to Post-Trial motion, Exh. 1, expert opinions). *At trial,* Plaintiffs' experts testified consistent with Plaintiffs' theory that there was no reason—other than Dr. Khanna's alleged negligence—for Plaintiff to suffer a complication.

Plaintiffs' expert Dr. Johnson testified that there was nothing about Plaintiff's heart condition that indicated there was an immediate need for surgery and Plaintiff was "not anywhere near what I would consider critical." App. 386-87 (Tr. 350:9-353:5, 355:17-356:9). Plaintiff's condition did not mean his heart was "worn out" or make him a bad candidate. App. 388 (Tr. 369:7-11). He went on to describe Plaintiff's heart function tests (including an ejection fraction) before surgery as in the normal range. App. 388 (Tr. 369:12-371:13). These tests were, in part, to assess "what his prognosis and risk would be." App. 388 (Tr. 372:11-15). Dr. Johnson explained Plaintiff's coronary arteries as "normal." App. 389 (Tr. 373:24-

375:18). In sum, Dr. Johnson found Plaintiff to be "in that better category for doing an operation." App. 389 (Tr. 375:19-25).

Plaintiffs' expert Dr. Peetz testified that Plaintiff was an "excellent candidate" for the Bentall procedure and the risk of surgery "was low enough that he should have had the operation." App. 413 (Tr. 572:21-573:10). In response to questions from Plaintiffs' counsel as to "a claim of the defense," Dr. Peetz testified that the reduction in Plaintiff's ejection fraction was *not* an explanation for his complication, it was still within normal range, and "it's not a significant risk factor." App. 414 (Tr. 576:5-577: 22). Dr. Peetz testified that the mortality rate for Plaintiff's surgery was 3-5%. App. 418 (Tr. 598:23-599:9).

Plaintiffs also elicited testimony in their case-in-chief from Dr. Khanna's partner, Dr. Jenson, that Plaintiff's heart was "fairly normal" and "pretty good." App. 404 (Tr. 479:3-480:19).[10]

Plaintiffs' experts testified that the alleged breaches of the standard of care caused Plaintiff's complication—not his preexisting heart condition.

[10] Defense experts agreed that Plaintiff was a good candidate for the surgery as he needed the surgery. App. 461 (Tr. 1147:17-19, Dr. Love); App. 456 (Tr. 1103:16-23, Dr. Cuenoud). They also expected him to survive. App. 465 (Tr. 1165:7-11, Dr. Love); App. 456 (Tr. 1103:24-1104:1, Dr. Cuenoud, agreeing he would expect "a good result."). On cross-examination, Dr. Love testified he believed Andersen had "minimal risk factors for undergoing [] surgery." App. 465 (Tr. 1167:17-22).

See App. 379-80 (Tr. 304:4- 307:23, Dr. Johnson); App. 407-08, 412 (Tr. 518:25-519:18, 568:8-570:23, Dr. Peetz).

Defense expert Dr. Henri Cuenoud[11] disagreed with Plaintiffs' experts that the ejection fraction was in the normal range. App. 454 (Tr. 1072:16-1073:25). He explained that Plaintiff's difficulty during the surgery was because "his heart was not a normal heart, was a heart that was tired." App. 455 (Tr. 1075:10-17) ; *see also* App. 461-62 (Tr. 1146:7-1149:19, Dr. Love describing condition of Plaintiff's heart going into surgery as explanation for complications); App. 494-95 (Supp. Tr. 35:22-36:7, Dr. Eales explaining the effect of Plaintiff's heart condition as impacting "how much reserve, how much reserve strength there is . . . following the injury of cardiopulmonary bypass.").[12]

[11] Dr. Cuenoud is a cardiologist and cardiac pathologist and practiced in that dual role for 30 years at the University of Massachusetts Medical School. App. 452 (Tr. 1056:14-1058:25). Dr. Cuenoud actually evaluated Plaintiff's heart after it was explanted for his heart transplant. App. 453 (Tr. 1064:2-5).

[12] *See also* App. 467-68 (Tr. 1192:4-1193:16, Dr. Love explaining that inadequate myocardial protection can occur without any negligence); App. 490-91 (Supp. Tr. 31:23-32:1, Dr. Eales agreeing one can have an unwanted outcome even with appropriate protection strategies). Plaintiffs' expert agreed that complications such as that suffered by Plaintiff can occur in the absence of negligence. App. 400-01 (Tr. 442:17-443:11, Dr. Johnson).

Argument

This Court is "reluctant to interfere with a jury verdict or the district court's consideration of a motion for new trial made in response to the verdict." *Estate of Long v. Broadlawns Medical Center*, 656 N.W.2d 71, 88 (Iowa 2002) (citations omitted). "A litigant is entitled to a fair trial, but only one." *Thornberry v. State Board of Regents*, 186 N.W.2d 154, 161 (Iowa 1971). "Verdicts should not be set aside lightly and the court, in granting a new trial, must be sure there exists sufficient cause to support the exercise of such discretion." *Id.*

To establish that a new trial is warranted, Plaintiffs must establish not only that the court abused its discretion or committed a legal error but also that Plaintiffs' substantial rights were materially affected as a result. *See* Iowa R. Civ. P. 1.1004. A jury verdict should not be reversed unless "justice would not be served by allowing the trial court judgment to stand." *Shawhan v. Polk County*, 420 N.W.2d 808, 810 (Iowa 1988); *see also Baysinger v. Haney*, 155 N.W.2d 496, 499 (Iowa 1968) ("A judgment should not be reversed and litigation prolonged unless error appears which we may reasonably suppose affected the result to the prejudice of the losing party.").

I. Plaintiffs are not entitled to a new trial on their informed consent claim.

Plaintiffs argue they were entitled to two different informed consent claims: 1) that a material risk arising from Plaintiffs' preexisting heart condition or his "super weak heart" was not disclosed (hereinafter the "material risk allegation"), and 2) that Dr. Khanna's level of experience was not disclosed (hereinafter the "lack of experience allegation").

It is somewhat unclear from which order or ruling Plaintiffs appeal. While Plaintiffs refer to Judge Rosenberg's grant of summary judgment in 2010, they rely upon *trial* evidence and offers of proof from 2014 as supporting their right to submit an informed consent theory to the jury. Further, Plaintiffs' prayer for relief seeks reversal of Judge Huppert's denial of Plaintiffs' motion for a new trial. *See* Plaintiffs' Brief at 38.

Regardless, Plaintiffs are not entitled to a new trial on informed consent.

A. Error preservation.

This is not a case where a claim dismissed in a summary judgment ruling was never addressed again by the parties or court until the completion of the case and then that dismissed claim is addressed on appeal. Instead, as summarized above, there were numerous motions, requests of

reconsideration, and rulings on informed consent after the initial summary judgment ruling in June, 2010.

Defendants do not agree that Plaintiffs preserved error on either informed consent allegation.

First, when Judge Huppert ruled on the first day of trial that informed consent was out of the case based upon the status of the pleadings, *see* App. 351, 353 (Tr. 80:20-22, 85:9-13), Plaintiffs made no attempt to reassert or replead the claim at that time. Nor did they later seek to amend to conform to proof after making offers of proof. The trial transcript reflects that Judge Huppert was exceedingly patient with Plaintiffs' repeated re-urging of theories and attempts to introduce evidence. Yet, when the basis for Judge Huppert's ruling to exclude informed consent from the case was made clear, Plaintiffs did not attempt to cure the pleading deficiency that he identified. *See Wolbers v. The Finley Hospital*, 673 N.W.2d 728, 732 (Iowa 2004) ("Proposed instructions must be supported by the pleadings" and evidence).

Second, as Judge Huppert himself observed in his post-trial ruling, Plaintiffs failed to take advantage of a ruling that was in their favor on related subject matter. In the post-trial ruling, Judge Huppert restated his incorporation of Judge Stovall's ruling on the evidence that:

> The Plaintiffs shall be allowed to present evidence relating to Dr. Cuenod [sic] [or Dr. Khanna's][13] awareness of the Plaintiffs' increased mortality risk and apprising the Plaintiff of the same.

App. 640 (Post-Trial Ruling at 3). Judge Huppert went on:

> During plaintiffs' case-in-chief, neither the plaintiffs nor Dr. Khanna were asked regarding any conversation covered by Judge Stovall's ruling on the motion to reconsider. It was not until Dr. Cuenod [sic], as well as Dr. Robert Love and Dr. Frazier Eales testified in defendants' case-in-chief that the plaintiffs first sought the opportunity to present such evidence in rebuttal, through the testimony of the plaintiffs and another of plaintiffs' experts (Dr. Aroesty).
> . . . .
> . . . Counsel offers no explanation as to why efforts were not made in plaintiffs' case-in-chief to develop the issues afforded them as a result of Judge Stovall's ruling on their motion to reconsider. . . .

App. 640, 642 (*Id.* at 3, 5).

Third, the offers of proof Plaintiffs chose to make were not sufficient to preserve error. Plaintiffs submitted offers of proof to support some (but not all) parts of the dismissed informed consent claim. The only offers of proof on the material risk allegation (assuming they were otherwise sufficient) were in the defense case—not Plaintiffs' case-in-chief. *See* App. 457, 507-09 (Tr. 1121:16-1122:17, Supp. Tr. 87:9-89:22).[14]

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[13] Judge Huppert viewed Judge Stovall's ruling as mistakenly referring to Dr. Cuenoud, instead of Dr. Khanna. App. 640 (Post-Trial Ruling at 3, n. 1).

[14] Plaintiffs rested on July 15, 2014. App. 438 (Tr. 953:16-24).

Specifically, as to the material risk allegation, as explained below expert evidence is required. Plaintiffs have always relied upon *defense* expert evidence. Defendants located no authority, and Plaintiffs cite none, that a plaintiff can rely exclusively upon evidence presented in the defense case for their burden of proof on an element of a claim. Plaintiffs did not attempt to introduce defense expert evidence (i.e. Dr. Cuenoud's deposition), or make an offer of proof, in their case-in-chief. Nor did Plaintiffs designate or cross-designate the defense experts in their Iowa Code §668.11 expert designations—or ever attempt to do so.[15]

The offer of proof Plaintiffs did make in their case-in-chief on informed consent only pertained to the lack of experience allegation, not to the material risk allegation. *See* App. 434 (Tr. 895:12-897:9).[16] In fact, Plaintiffs' theme and evidence in their case-in-chief supported the *opposite* of the material risk allegation that they sought to submit in rebuttal. In their

[15] *See* App. 320-23 (Defendants Third Motion in Limine Exh. 11, expert designation).

[16] The other offer of proofs in Plaintiffs' case-in-chief concerned medical expenses (App. 433-34, Tr. 893:23-894:6) and the fact that Dr. Khanna relocated (App. 434, Tr. 894:7-25). The only other offer in the case-in-chief pertained to the same evidence concerning lack of experience. *Compare* App. 428 (Tr. 847:10-849:4, offer that Dr. Chawla told Plaintiff the physicians were all experienced and that Plaintiff trusted Dr. Khanna) *with* App. 434 (Tr. 895:12-897:9, same).

case-in-chief, Plaintiffs' experts' testimony supported that there was nothing about Plaintiff's heart that placed him at a higher risk. *See* summary of facts above. Their informed consent claim in rebuttal was based upon the assumption that Plaintiff's heart placed him at a 25% chance of serious complication and he had a super bad heart. App. 457, 507-09 (offers of proof: Tr. 1121:16-1122:13; Supp. Tr. 87:9-89:22).[17] This fundamental problem with Plaintiffs' informed consent claim explains why Plaintiffs had no supportive evidence and it should not have been submitted.

Particularly under the circumstances of this case where informed consent was repeatedly revisited throughout the trial and Plaintiffs made *some* offers of proof in their case-in-chief, Plaintiffs should have made offers of proof fully sufficient for their affirmative claim of informed consent in their case-in-chief to provide Judge Huppert with an adequate opportunity to re-evaluate that claim. In fact, during the defense case, Judge Huppert expressed that Plaintiffs' failure to present their offers and arguments in their case-in-chief created an insurmountable problem in his ability to reconsider the claim during the defense case. *See* App. 450 (Tr. 1049:9-1050:11). It is clear that Judge Huppert –as the trial judge making

[17] While Plaintiffs' offer of proof assumed a 25% chance of complication, no physician testified to this 25% figure as Judge Huppert restricted this evidence *See* App. 451 (Tr. 1053:11-1054:22).

the determination as to the admissibility of evidence and submission of claims—did not believe Plaintiffs had provided sufficient record in their case-in-chief for him to consider the informed consent claim. *See DeVoss v. State*, 648 N.W.2d 56, 60 (Iowa 2002) ("'[t]rial courts must be afforded the opportunity to avoid . . . error in judicial proceedings.'"). Plaintiffs essentially had *no* evidence in their case-in-chief, by offer of proof or otherwise, to support the material risk allegation.

In addition, even if this Court considers offers of proof made in the defense case as supportive of an affirmative claim, Plaintiffs' offers are insufficient. As to the material risk allegation, Plaintiffs' offers include that had Plaintiff been told of what the defense experts opined about the condition of his heart, he would have asked for a second opinion and would have involved his treating cardiologist at the University of Iowa. *See* App. 457, 507-09 (Tr. 1121:16-1122:16, Supp. Tr. 87:9-89:22). However, Plaintiffs did not offer any evidence as to what the second opinion or the advice from the cardiologist would have been or how the outcome would have been any different. The jury would have to speculate as to what else Plaintiff would have been told and any change in the outcome. Neither treating cardiologist Dr. Chawla nor University of Iowa cardiologist Dr. Brown were called to testify. *See Wall v. Jacob North Printing Co.*, 618

N.W. 2d 282, 284 (Iowa 2000) ("the proof in any case must be such that the fact finder is not left to speculate . . .").

A fourth error preservation problem arises in Plaintiffs' argument that no expert testimony was needed on the materiality of the risk. *See* Plaintiffs' Brief at 23-24. This argument, raised on appeal for the first time, was never presented to or ruled upon by the district court. It was not preserved for review. *See DeVoss v. State*, 648 N.W.2d 56, 63 (Iowa 2002).

Finally, as to both informed consent allegations, Plaintiffs did not object to the district court's failure to include the claim in the jury instructions. App. 510-12 (Supp. Tr. 101:8-103:11, objection to instructions).

B. Standard of review.

Most of Plaintiffs' argument centers on Judge Huppert's trial rulings and post-trial ruling. *See* Plaintiffs' Brief at 2 (arguing trial court erred in refusing to allow them to try the informed consent issue, including the erroneous exclusion of rebuttal evidence); *id* at 22-26 (citing the trial transcript); *id.* at 19 (referencing issue as raised in their motion for a new trial).

This Court's "review of rulings on motions for new trial depends on the grounds for new trial asserted in the motion and ruled upon by the

district court." *Hansen v. Central Iowa Hosp. Corp*., 686 N.W.2d 476, 480 (Iowa 2004) ("If the motion and the ruling are based on a discretionary ground, we review the ruling for abuse of discretion.") (citation omitted). Plaintiffs' motion for a new trial raised the informed consent claim in the context of Judge Huppert's exclusion of rebuttal evidence. *See* App. 638 (Post-Trial Ruling at 1). The admissibility of evidence is reviewed for an abuse of discretion. *See Graber v. City of Anke*ny, 616 N.W.2d 633, 638 (Iowa 2000) Thus, because Plaintiffs' motion for a new trial on informed consent was based on a discretionary ground, this Court should review for abuse of discretion.

To the extent that Plaintiffs' appeal is considered to be from Judge Rosenberg's grant of summary judgment, the scope of review is for correction of errors at law. *See* Iowa R. App. Proc. 6.907. The standard of review is to determine "'whether a genuine issue of material fact exists and whether the law was correctly applied.'" *Adam v. Mt. Pleasant Bank & Trust Co.*, 355 N.W.2d 868, 872 (Iowa 1984) (citation omitted). Where the dispute "concerns legal consequences flowing from undisputed facts . . . review is limited to whether the district court correctly applied the law." *Baker v. City of Ottumwa*, 560 N.W.2d 578, 582 (Iowa 1997).

C. The district court was correct in not submitting the material risk allegation.

1. This was not Plaintiffs' theory but an effort to rebut the causation defense.

In preparing their case, Plaintiffs had to choose whether to introduce evidence that Plaintiff was at an undisclosed high risk given the condition of his heart (so as to support an informed consent claim) *or* to introduce evidence that Plaintiff did not have a condition that placed him at high risk and he should have come through the surgery successfully (so as to rebut the defense causation theory). Plaintiffs chose the latter for their case-in-chief and their experts testified *contrary* to an informed consent claim—essentially explaining there was no reason (but for the alleged negligence) that Plaintiff should not have come through surgery with flying colors.[18] Then, after resting, Plaintiff attempted to change theories with rebuttal evidence of lack of informed consent. Plaintiffs can't have it both ways – they chose *not* to try their case as an informed consent case and must live with that choice.

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[18] Plaintiffs' closing argument sets forth their theory in their case-in-chief – and it was *not* a theory that Plaintiff suffered an undisclosed material risk. Their theory was that the material risk of a super bad or worn out heart was not true:

> [The defense position is that] It's his heart's fault. And there's no truth in it…

App. 519-20 (Supp. Tr. 135:21-136:17); *see also* summary of facts.

Plaintiffs cite no authority, Iowa or otherwise, supporting the notion that a defense expert position at trial on the cause of a patient's complication can form the basis of an informed consent claim for substantive relief for the patient. Instead, it is the plaintiff who bears the burden of proof of establishing the elements of a cause of action in their case-in-chief. *See Foggia v. Des Moines Bowl-O-Mat, Inc.*, 543 N.W.2d 889, 893 (Iowa 1996); *Doe v. Johnston*, 476 N.W.2d 28, 31 (Iowa 1991) ("the burden rests with the plaintiff to establish by expert testimony the nature of the risk involved and the likelihood of its occurrence.").

Further, Iowa law requires a plaintiff to timely and properly designate expert testimony on the nature and likelihood of the risk to be presented in the plaintiff's case-in-chief. *See Doe*, 476 N.W.2d at 31; Iowa Code §668.11(1)(2). Plaintiffs cite no evidence offered in support of the material risk allegation from their own experts. They cite no pleading, discovery response, expert designation, or summary judgment filing to support that had the right to introduce defense expert testimony in their own case. They did not attempt to do so.

To allow defense evidence to act as a substitute for evidence the Plaintiffs had the burden to offer in their case-in-chief would not only defeat Iowa Code §668.11, it would tie the hands of medical malpractice

defendants. They could not put on defense medical causation evidence without risking the creation of informed consent claims for Plaintiffs.[19]

2. Plaintiffs did not have the necessary expert evidence.

The risk that Plaintiffs argue should have been disclosed was the risk created by Plaintiff's preexisting heart condition (i.e. he had a "super bad heart" or had "potentially insufficient 'reserves' to survive the procedure."). Plaintiffs' Brief at 20. These risks are medical issues and Plaintiffs needed an expert.

Notwithstanding "the patient rule," informed consent claims are established with expert testimony. *See Doe*, 476 N.W.2d at 31; *Pauscher v. Iowa Methodist Med Ctr*, 408 N.W.2d 355, 360 (Iowa 1987) ("the patient ordinarily will be required to present expert testimony relating to the nature of the risk and the likelihood of its occurrence, ..."). There is no dispute that Plaintiffs had no such expert on the materiality allegation. They have never argued otherwise.

Acknowledging this problem for the first time on appeal, Plaintiffs argue no expert is needed as even lay persons would know the risk was

[19] In fact, Defendants hands were somewhat tied in this case as to consent. All open heart surgery obviously carry certain risks. Yet Defendants were unable to develop what information and risks were communicated to Plaintiff for fear of arguments they opened the door to a consent claim.

material. As stated above, this argument was not preserved. Further, Plaintiffs' own experts testified to the contrary. They testified Plaintiff did not have a bad heart and did not face high risk for complication. If the experts disagree about the condition of Plaintiff's heart and the risk it posed, how could it possibly be an issue the jury to determine on its own? *See also Kennis v. Mercy Hosp. Medical Center*, 491 N.W.2d 161, 166 (Iowa 1992) ("We do not believe that the likelihood of occurrence, and materiality of a cystostomy are factors within the common experiences of laypersons."); *Cox v. Jones*, 470 N.W.2d 23, 26 (Iowa 1991) ("Knowledge of the nature, likelihood of occurrence, and materiality of retinal detachment certainly are not factors within the common knowledge of laypersons and require the introduction of expert evidence. . . . Therefore, without expert evidence, plaintiffs cannot show that defendants did not inform Cox of the existence of a material risk before undergoing the cataract removal operation.").

3. Plaintiffs cannot show prejudice.

Plaintiffs' claim that they were prejudiced by the inability to respond to Defendants' medical causation position lacks merit. The response to medical causation opinions that the patient's preexisting condition caused a complication is medical causation opinions that something else caused the

complication. That is precisely the subject of Plaintiffs experts' testimony.[20] Plaintiffs knew the defense causation evidence long before trial and elicited their response at trial. Plaintiffs weren't prejudiced.

Further, the jury didn't reach the causation issue. Given this informed consent theory was offered by Plaintiffs to rebut causation – an issue the jury never reached – there is no prejudice. *See Bingham v. Marshall Huschart Machinery Co., Inc.*, 485 N.W.2d 78, 82 (Iowa 1992) ("even if the court improperly excluded evidence offered to prove damages, it is not reversible error where the jury finds in favor of the defendant on the issue of liability").

D. The district court was correct in not submitting the lack of experience allegation.

Plaintiffs' informed consent claim based on experience was that Dr. Khanna was negligent in:

> Failing to advise Andersen that he had limited experience in performing a Bentall procedure.

App. 11 (Amended Petition ¶9). As set forth above, Judge Rosenberg granted summary judgment on this claim but allowed evidence of experience under Plaintiffs' general negligence allegations. App. 162 (June 15, 2010 Ruling at 2).

[20] *See* summary of facts.

1. Plaintiffs cannot show prejudice.

Consistent with Judge Rosenberg's ruling that evidence of Dr. Khanna's experience was admissible to Plaintiffs' negligence claim, Plaintiffs were allowed to introduce evidence of their theory that Dr. Khanna was *not* sufficiently qualified or experienced in the Bentall surgery. In fact, the record was "replete with references to [Dr. Khanna's] lack of training and experience." App. 644-45 (Post-Trial Ruling at 7-8).[21]

Plaintiffs introduced evidence from their experts that in their opinion Dr. Khanna's lack of experience led to his negligence in performing the procedure. *See* App. 394 (Tr. 405:1-406:7, Dr. Johnson explaining criticism of cardiac preservation as related to his inexperience concerns); App. 396-97 (Tr. 414:1-415:22, Dr. Johnson explaining role of judgment, experience, and training in surgery, including in timing); App. 409 (Tr. 543:3-546:7, Dr.

[21] This evidence was introduced over Defendants' objection given that the allegations concerning Dr. Khanna's experience arose from an inadmissible peer review case log. *See* App. 352, 365-67 (Tr. 82:18-83:2, 192:7-193:13, 198:22-199:24); App. 357-59 (July 8, 2014 Brief at 3-5); *see also* App. 295 (Sept. 20, 2011 Ruling ¶V(1), granting motion as to "any reference to or evidence concerning or arising from" the Case log."); App. 326 (April 8, 2013 Order at 1, "The cardiothoracic log at issue was the subject of a prior motion in limine, which resulted in a ruling precluding the plaintiffs, their counsel as well as their witnesses from making any reference to the document. . . "); App. 346 (July 2, 2014 Order at ¶5, "the court's prior rulings regarding the inadmissibility of the cardiothoracic case log remain in full force and effect.").

Peetz explaining initial concern with case as with "experience of the surgeon and the way this procedure was done"); App. 411 (Tr. 560:11-561:7, Dr. Peetz, linking artery reattachment to "a reflection of being unqualified to do this operation"); App. 419 (Tr. 602:18-603:2, Dr. Peetz, linking reattachment issue to "experience factor").[22]

Plaintiffs' opening and closing arguments also linked Dr. Khanna's alleged inadequate experience with the alleged surgical negligence. *See* App. 370 (Tr. 211:18-23, Plaintiff's opening, "I'm going to go through how a novice that's never done it before can botch the surgery," objection to argument sustained); App. 518, 521 (Plaintiffs' closing, Supp. Tr. 131:20-24, 139:7-10); *see also generally* App. 514-18 (Supp. Tr. 127:16-131:10, Plaintiffs' closing argument on lack of experience).[23]

Thus, assuming without conceding that this informed consent claim was otherwise viable under Iowa law, the risk at issue is that Dr. Khanna's

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[22] In contrast, defense expert Dr. Love testified in cross-examination that a surgeon with Dr. Khanna's same background would be "more than qualified" to do a Bentall procedure. App. 466 (Tr. 1169:25-1171: 25); *see also* App. 504-05 (Supp. Tr. 67:24-68:17, Dr. Eales disagreeing on cross-examination with Plaintiffs' experts on experience issue).

[23] Parts of Plaintiffs' closing argument drew objection and a motion for mistrial, *see* App. 522-27 (Supp. Tr. 156:1-161:15), as did Plaintiffs' prior examination of a witness during trial where inadmissible hearsay that was subject to a limine order was elicited, see App. 421-22, 424-26 (Tr. 799:25-801:2, exam; 814:4-823:9, oral motion for mistrial and court rulings).

lack of experience would led to surgical negligence. Yet, whether or not Dr. Khanna committed any negligent act or omission in connection to the surgery *was* submitted to, and rejected by, the jury.

The very risk allegedly not disclosed to Plaintiff under this informed consent theory did not materialize and any risk created by Dr. Khanna's alleged lack of experience did not occur. Plaintiffs cannot establish they were prejudiced by the district court's failure to submit the claim. *See Canterbury v. Spence*, 464 F.2d 772, 790 (D.D. C. 1972) ("An unrevealed risk that should have been made known must materialize, for otherwise the omission, however unpardonable, is legally without consequence. Occurrence of the risk must be harmful to the patient, for negligence unrelated to injury is nonactionable."); *K.A.C. v. Benson*, 527 N.W.2d 553, 561-62 (Minn. 1995) (claim failed because nondisclosed risk did not materialize); *Howard v. University of Medicine and Dentistry*, 800 A.2d 537, 549 (NJ 2002) (plaintiff must prove "'undisclosed risk occurred and harmed the plaintiff'") (citation omitted); *see also Pauscher*, 408 N.W.2d at 362 (citing *Canterbury* on other issues).

2. The theory is not supported by Iowa law.

To establish an informed consent claim, a plaintiff must prove "the existence of material information concerning the (name of procedure or

treatment)." Iowa Uniform Jury Instruction 1600.10; *see also Kennis v. Mercy Hosp. Med. Center*, 491 N.W.2d 161, 166 (Iowa 1992). Plaintiffs' position would require that Iowa law be expanded to impose a duty upon physicians to also disclose personal information.

The Iowa Supreme Court has looked to Iowa Code §147.137 as "the most definitive statement of public policy on [the] issue" of what information should be disclosed during the informed consent process. *See Pauscher,* 408 N.W.2d at 360.[24] Iowa Code §147.137 sets forth what written information would create a presumption that informed consent was obtained. It does *not* require that a physician disclose his or her personal information, such as experience in a particular procedure. *See* Iowa Code §147.137(1); *see also Bray v. Hill*, 517 N.W.2d 223, 226 (Iowa Ct. App. 1994) ("A physician has a duty to disclose only those material risks involved in the medical procedure.").

Section 147.137(1) provides:

> A consent in writing to any medical or surgical procedure or course of procedures in patient care which meets the requirements of this section shall create a presumption that informed consent was given. A consent in writing meets the requirements of this section if it:

[24] *Pauscher* held that the "patient rule" applies to elective and nonelective procedures. *See* 408 N.W.2d at 359, 362. The patient rule requires disclosure of what "a reasonable person, in what the physician knows or should know is his patient's position," would find material. *Id.* at 361 (citation omitted).

> 1. Sets forth in general terms the nature and purpose of the procedure or procedures, together with the known risks, if any, of death, brain damage, quadriplegia, paraplegia, the loss or loss of function of any organ or limb, or disfiguring scars associated with such procedure or procedures, with the probability of each such risk if reasonably determinable.
> . . .

In *Pauscher*, -- a case where a written consent was not at issue -- the Court still found that "in our view, [§147.137] is a plain statement of the requirements of the patient rule." 408 N.W.2d at 361. The statute does *not* require disclosure of physician-specific information as Plaintiffs' claim in this case would require.[25] Instead, medical complications are listed in the statute.

Given the Iowa legislature has spoken on the information to be disclosed for informed consent, any expansion of the requirements should come from the legislature. *See State v. Rhomberg*, 516 N.W.2d 803, 805 (Iowa 1994) *overruled on other grounds by State v. Heemstra*, 721 N.W.2d

[25] While no Iowa case has dealt squarely with the issue at hand, several cases have considered a physician's personal information need not be disclosed. *See Slutzki v. Grabenstetter*, 2002 WL 31114657 *2 (Iowa Ct. App. 2002) (affirming trial court's refusal to submit an informed consent theory to the jury when the allegation was that the surgeon had a medical condition (herniated disc in her neck)); *Bray*, 517 N.W.2d at 224, 226 (affirming exclusion of physician's probationary status with the Iowa Board of Medical Examiners for an informed consent claim).

549 (Iowa 2006) ("A proposed change in the law [i.e. Iowa Code §147.137], if desired, is in the province of the legislature.").

Other courts have disagreed with expansion of informed consent to include physician personal information. “The traditional view is that material facts are those that relate to the proposed treatment.” *Whiteside v. Lukson*, 947 P.2d. 1263, 1265 (Wash. Ct. App. 1997) (applying the objective reasonable patient standard). “[W]e conclude that a surgeon’s lack of experience in performing a particular surgical procedure is not a material fact for purposes of finding liability predicated on failure to secure an informed consent.” *Id.*

See also Duttry v. Patterson, 771 A.2d 1255, 1257-59, 1259 n. 2 (Penn. 2001) (declining to adopt expansive view of informed consent under patient rule, holding that information personal to the physician, including surgery experience, was irrelevant to informed consent); *Ditto v. McCurdy*, 947 P.2d 952, 958-59 (Ha. 1997) (holding surgeon did “not have an affirmative duty to inform [patient] of his qualifications or the lack thereof”); *Foard v. Jarman*, 387 S.E. 2d 162, 167 (N.C. 1990) (“statute imposes no affirmative duty on the health care provider to discuss his or her experience”); *Abram v. Children’s Hospital of Buffalo*, 151 A.D.2d 972 (Sup. Ct. N.Y. 1989) (qualification of personnel need not be disclosed under

New York statute and common law); *see also Wlosinski v. Cohn*, 713 N.W.2d 16, 21 (Mich. Ct. App. 2006) (holding surgeon did not have duty to disclose statistical history of procedure); *Howard*, 800 A.2d at 82 (N.J. 2002) ("Our case law never has held that a doctor has a duty to detail his background and experience as part of the required informed consent disclosure; nor are we called on to decide that question here.").

There are problems inherent in the expansion of the informed consent theory to require disclosures of physician specific information. Numerical information such as procedure experience and complication values present complex issues. Indeed a case upon which Plaintiffs rely for this expanded duty to disclose, *Johnson v. Kokemoor*, has been criticized for its failure to consider the implications of its holdings. In *Johnson v. Kokemoor*, 545 N.W.2d 495 (Wisc. 1996), the court held that certain evidence about a surgeon's experience and morbidity and mortality rates was admissible for an informed consent claim. *Id.* at 498.

Johnson "did not address how such statistics are to be gathered or offer guidance on how they would be used ,. . . Countless questions have been left in the wake of *Johnson v. Kokemoor*. Should the physicians provide statistics concerning all similar surgeries he or she has performed, or should the physician restrict the analysis to his or her experience with

patients of similar age, health or attendant medical complications? . . .". Jennifer Wolfberg, Comment, *Two Kinds of Statistics, The Kind You Look Up and the Kind You Make Up: A Critical Analysis of Comparative Provider Statistics and the Doctrine of Informed Consent*, 29 Pepp. L. Rev. 585, 596 (2002).[26]

Even if physician experience and complication statistics were maintained and disclosed, it is not at all certain the information would be in a form suitable for patient decision-making. There would be no standardization between physicians which would completely undermine the value of the information provided to patients.

Another issue created by an expanded duty to disclose physician specific information is that such information is often maintained in privileged peer review records. Indeed, in this case, Dr. Khanna's case log that documented his surgical experience was inadmissible under Iowa Code §147.135(2). *See, e.g.,* App. 326 (Order, April 8, 2013, denying Plaintiffs' motion to reconsider admissibility of log, noting it "is undisputed that the log came to light as part of the credentialing file"); *see also* Iowa Code

[26] *See also Arato v. Avedon*, 858 P.2nd 598, 607 (Calif. 1993) ("statistical morbidity values . . . are inherently unreliable and offer little assurance regarding the fate of the individual patient."; declining to endorse mandatory disclosure of life expectancy probabilities).

§135.40-.42 (providing that hospital information used to reduce morbidity and mortality "shall not be used or offered or received in evidence in any legal proceedings"). Thus, Plaintiffs are attempting to fashion a claim by which a physician may have to choose between disclosing protected peer review information or run the risk of an informed consent claim for failing to do so.[27]

II. The exclusion of rebuttal evidence was not an abuse of discretion.

Plaintiffs argue the district court should have allowed rebuttal evidence as to whether Plaintiff was informed that he had a "super bad heart." Plaintiffs' argument is, in large part, directed again to the informed consent claim. Yet for the reasons explained above, that claim was not properly before the jury. As such, Plaintiffs were not entitled to rebuttal evidence to support such a claim. The request for informed consent rebuttal fails for additional reasons as explained below.

To the extent that Plaintiffs argue they were entitled to rebuttal evidence as to defense causation evidence, that too fails. As Judge Huppert held, there was nothing new or surprising to warrant rebuttal. In addition the

[27] *See Carolan v. Hill*, 553 N.W. 2d 882, 886-87 (Iowa 1996) (describing peer review privilege in §147.135(2) as broad, to "encourage an effective review of medical care."); *Burton v. Univ. of Iowa Hosp. & Clinics*, 566 N.W.2d 182, 187-88 (Iowa 1997) (finding Iowa Code §135.40-.42 was supported by the same public policy as in §147.135(2)).

jury found in favor of Defendants before reaching causation and Plaintiffs cannot show prejudice.

A. Error preservation.

Defendants do not agree that Plaintiffs preserved error.

First, as to rebuttal evidence from Dr. Aroesty, Plaintiffs made no offer of proof and do not even explain on appeal what Dr. Aroesty was expected to say if allowed to testify. There is no basis for this Court to determine if it was an abuse of discretion to exclude his testimony. *See Johnson v. Interstate Power Co.,* 481 N.W.2d 310, 317 (Iowa 1992) (party failed to preserve error by failing to make an offer of proof of evidence excluded by trial court's ruling as "there is nothing preserved to review on appeal.").

Second, in addressing Plaintiffs' complaint in the post-trial stage about rebuttal evidence, Judge Huppert found that Plaintiffs failed to take advantage of the evidence they *could* have introduced:

> During plaintiffs' case-in-chief, neither the plaintiffs nor Dr. Khanna were asked regarding any conversation covered by Judge Stovall's ruling on the motion to reconsider. It was not until Dr. Cuenod, as well as Dr. Robert Love and Dr. Frazier Eales testified in defendants' case-in-chief that the plaintiffs first sought the opportunity to present such evidence in rebuttal, through the testimony of the plaintiffs and another of plaintiffs' experts (Dr. Aroesty).
> . . . .

> . . . Counsel offers no explanation as to why efforts were not made in plaintiffs' case-in-chief to develop the issues afforded them as a result of Judge Stovall's ruling on their motion to reconsider.

App. 640, 642 (Post-Trial Ruling at 3, 5). Given Plaintiffs' failure to introduce evidence in their case-in-chief that they *could* have introduced, their complaint about rebuttal on related subject matter lacks merit and was not properly preserved.

Third, Plaintiffs argue they were greatly prejudiced when the defense experts testified about the condition of Plaintiff's heart. *See* Plaintiffs' Brief at 32. Yet, as explained below and as Judge Huppert found, the defense experts' testimony was not new and could hardly be described as surprising. Plaintiffs knew the defense position going into trial and knew the status of the informed consent claim. If Plaintiffs believed that the defense testimony about causation was so overwhelmingly prejudicial that they were denied a fair trial, Plaintiffs should have objected to that evidence under Iowa Rule of Evidence 5.403.[28] They did not.

[28] In response to a question about his opinion on the condition of Plaintiff's heart and its effect on the heart in surgery, Dr. Eales testified that: "It has a huge effect. . . When I operate on somebody, I frequently tell them this . . . The fact we can do this successfully depends on whether the people have reserve capacity in their heart." App. 494-95 (Supp. Tr. 35:22-36:22).

Further, Plaintiffs complain that defense expert Dr. Eales couched his testimony about the condition of Plaintiffs' heart in terms of informed consent. Plaintiffs' Brief at 32. While Defendants do not agree that an isolated and unsolicited comment from a defense expert in the context of causation testimony[29] prejudiced Plaintiffs, if Plaintiffs thought so they could have and should have moved to strike the testimony and ask the court to instruct the jury to disregard the testimony. They did not. *See State v. Washington*, 356 N.W.2d 192, 194 (Iowa 1984) ("In order to properly preserve error in the trial court as to the introduction of evidence, objections to evidence must be made at the earliest time after the grounds for objection become apparent. If the objection to a question is late and follows the answer, then a motion to strike, coupled with an application to have the objection precede the answer or an excuse for tardiness, must be made.")(citations omitted).

B. Standard of review.

Defendants agree that the admissibility of rebuttal evidence is reviewed for an abuse of discretion. *See Carolan v. Hill*, 553 N.W.2d 882,

[29] In response to a question about his opinion on the condition of Plaintiff's heart and its effect on the heart in surgery, Dr. Eales testified that: "It has a huge effect. . . When I operate on somebody, I frequently tell them this . . . The fact we can do this successfully depends on whether the people have reserve capacity in their heart." App. 494-95 (Supp. Tr. 35:22-36:22).

889 (Iowa 1996). "Rulings within the trial court's discretion are 'presumptively correct, and a party challenging the ruling has a heavy burden to overcome the presumption.'" *Williams v. Dubuque Racing Ass'n*, 445 N.W.2d 393, 394 (Iowa Ct. App. 1989) (citation omitted).

A court is deemed to have abused its discretion only if its decision was "based on a ground or reason that is clearly untenable or when the court's discretion [was] exercised to a clearly unreasonable degree." *Pexa v. Auto Owners Ins. Co.*, 686 N.W.2d 150, 160 (Iowa 2004).

C. Plaintiffs cannot show prejudice.

Plaintiffs cannot establish they were prejudiced by the exclusion. "'Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected. . . .'" *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 183 (Iowa 2004).

First, as explained above, Plaintiffs did not have a viable informed consent claim. Plaintiffs were not prejudiced by the exclusion of rebuttal evidence that was relevant to a claim that was correctly not submitted.

Second, when the evidence is viewed as offered to rebut Dr. Cuenoud and Dr. Eales on the condition of Plaintiff's heart—that does not help Plaintiffs either. The testimony from those physicians about the condition of

Plaintiff's heart was offered as to causation.[30] But the jury never reached the causation issue and Plaintiffs cannot show prejudice by the exclusion of evidence that would have been admitted—if at all—on causation. *See, e. g., Bingham v. Marshall & Huschart Machinery Co., Inc.*, 485 N.W.2d 78, 82 (Iowa 1992) ("even if the court improperly excluded evidence offered to prove damages, it is not reversible error where the jury finds in favor of the defendant on the issue of liability").

Third, as to Plaintiffs' need to rebut the defense position on the condition of Plaintiff's heart—Plaintiffs did so in their case-in-chief. There was nothing new in the defense testimony. Plaintiffs were fully prepared to introduce evidence from their own medical experts in their case-in-chief that responded to, and rebutted, the defense position. And Plaintiffs did so. *See, e.g.*, Plaintiffs' Brief at 10-11 (explaining Plaintiffs' experts disagreed with defense experts and summary of Plaintiffs' evidence on condition of heart). Thus, to the extent Plaintiffs suggest Dr. Aroesty would rebut medical causation, such excluded evidence would have been cumulative of admitted testimony. *See Taylor v. State*, 352 N.W.2d 683, 687 (Iowa 1984)

[30] *See* App. 494-95 (Supp. Tr. 35:22-36:22, Dr. Eales); App. 447-48 (Tr. 1038:4-1039:11, defense response to Plaintiffs' objection regarding Dr. Cuenoud, explaining Dr. Cuenoud was only a causation witness).

("withholding of cumulative testimony will not ordinarily" establish prejudice, addressing claim of ineffective counsel).

Finally, Plaintiffs' suggestion that they were prejudiced as the jury would have "the impression that Mr. Andersen knew all of the risks, and simply chose to take those risks with his super bad heart,"[31] does not withstand scrutiny. Plaintiffs' theme at trial was that Plaintiff did not believe there was anything urgent or alarming with his condition. He testified about his regular annual visit with his physician Dr. Brown in Iowa City in 2003 in which Plaintiff reported that he was "a little more short of breath during hunting." App. 434 (Tr. 897:8-22). He and Dr. Brown "talked about [it] and . . . I knew that a surgery was going to be inevitable . . . And being proactive, I thought, well, let's go ahead and get it done." App. 435 (Tr. 898:1-4). He also testified in Plaintiffs' case-in-chief that no one (including Dr. Chawla, Dr. Brown, or Dr. Khanna) told him that he was at risk of dying if he didn't have the surgery immediately or that it was imperative that he have it immediately. App. 435-36 (Tr. 901: 3-902:10). Plaintiff expected to be in the hospital only five to seven days. App. 436 (Tr. 902:15-21); *see also* App. 430 (Tr. 858:23-859:3, Mrs. Andersen also understood the surgery was

[31] *See* Plaintiffs' Brief at 32.

"a routine surgery" and her husband would be in the hospital five to seven days).

Given this evidence, there is no support for Plaintiffs' claim they were prejudiced as the jury would assume Plaintiff assumed the risk of having a "super bad heart."

D. The district court did not abuse its discretion.

Judge Huppert rejected Plaintiffs' argument that the evidence they sought to admit was proper rebuttal evidence:

> . . . The condition of Mr. Andersen's heart going into surgery, as described by Drs. Cuenod [sic], Love and Eales, was by no means a "new matter" or a surprise to the plaintiffs. Plaintiffs knew this at the time they sought reconsideration of the court's ruling on the informed consent issue after Dr. Cuenod's [sic] deposition; in that motion (filed in June of 2011), counsel for plaintiffs made the following observation:
>
> > By way of summary, it is Dr. Cuenod's [sic] opinion that Mr. Andersen's heart was in such bad shape prior to the surgery that he, Alan Andersen, had a significantly increased of complications during the surgery. It is also Dr. Cuenod's [sic] opinion that Dr. Khanna was aware of the poor condition of Alan Andersen's heart.
>
> The "marathon" analogy claimed as a surprise when testified to in the defendants' case-in-chief was utilized by Dr. Cuenod [sic] in his deposition taken in May of 2011. Dr. Cuenod [sic] testified in that deposition that Mr. Andersen's condition prior to surgery was "terrible," "in very bad shape," and "very sick."
>
> To now claim that the trial testimony of Drs. Cuenod [sic], Love and Eales was a surprise is incredible at best and disingenuous at worst. . . The court did not abuse its discretion in

> refusing plaintiffs' request to offer rebuttal evidence in response to the testimony of Drs. Cuenod [sic], Love and Eales, either through the testimony of the plaintiffs or through Dr. Aroesty.

App. 641-42 (Post-Trial Ruling at 4-5)(citations to the record omitted); *See also* App. 165-84 (June 2011 Motion to Reconsider with Exhibit).

1. Rebuttal evidence from Plaintiff.

Informed consent evidence does not rebut medical causation evidence. The evidence sought to be rebutted was medical causation evidence. Plaintiffs' argument seems to suggest that evidence relevant to an informed consent claim is admissible to *rebut* medical causation evidence.

Indeed, Plaintiffs play a game of "mix and match" with theories and evidence. Plaintiffs argue that the testimony about Plaintiffs' condition from Dr. Cuenoud and Dr. Eales was unfairly prejudicial as Plaintiff was not allowed to explain that he was not told this information. But Drs. Cuenoud and Eales were not testifying in response to an informed consent claim. There was no such claim, evidence, or theory. The defense experts' testimony did not pertain to informed consent—instead it pertained to medical causation.

Defense medical causation evidence as to what caused Plaintiff's complication would not be rebutted by the Plaintiff's testimony that he didn't know about his condition before the complication. The proffered

evidence from Plaintiff as a layperson does not explain, controvert, or disprove the medical causation evidence as to what caused his complication.[32] *See Carolan*, 553 N.W.2d at 889 ("Rebuttal evidence is that which explains, repels, controverts, or disproves evidence produced by the opposing party.").

Medical causation was not a new issue that supported rebuttal evidence. Plaintiffs had the burden of proving causation in their case-in-chief. *See Foggia*, 543 N.W.2d at 893. Medical causation was not a new issue raised by the defense that would open the door to rebuttal evidence—even assuming Plaintiffs' offer of proof actually rebutted medical causation.

As Judge Huppert found, Plaintiffs failed to identify anything unexpected or new that would warrant a rebuttal witness. "Generally, rebuttal evidence is confined to new matters first introduced by the opposing party." *Carolan*, 553 N.W.2d at 889; *see also Spahr v. Kriegel*, 617 N.W.2d 914, 917 (Iowa 2000).

[32] "[C]ausal connection is essentially a matter which must be founded upon expert evidence." *McCleeary v. Wirtz*, 222 N.W.2d 409, 413 (Iowa 1974). "More specifically, common knowledge and everyday experience would not suffice to permit a layman's expression of opinion" as to whether a physician's alleged negligence caused the injury. *Id.; see also 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.").

The fact there was nothing new is also illustrated by the fact that Plaintiffs' experts actually *did* rebut the defense causation position in Plaintiffs' case-in-chief.

Any informed consent evidence belonged in Plaintiffs' case-in-chief. Plaintiffs' argument focuses upon the excluded evidence in the context of their informed consent claim. But "'[r]ebuttal is not intended to give a party an opportunity to . . . present evidence that was proper in the case in chief.'" *Carolan*, 553 N.W.2d at 889 (citation omitted); *see also Daddona v. Thind*, 891 A.2d 786, 814 (Pa. Cmwlth. 2006) ("'It is an elementary proposition that the plaintiff must prove during his case in chief all essential elements of his action as to which he has the burden of proof, and that he may not as a matter of right introduce evidence in rebuttal which is properly part of his case in chief.'") (citation omitted).

2. Rebuttal evidence from Dr. Aroesty.

Dr. Aroesty has been known to this case for years. When the October 2011 trial was continued, there were several pending motions as to Plaintiffs' attempt to rely upon Dr. Aroesty as an expert, including as a rebuttal expert. *See* App. 299-300 (Sept. 25, 2012 Ruling at 1-2). Yet, Plaintiffs never provided an expert report for Dr. Aroesty under Iowa Rule of Civil Procedure 1.508(3). Nor did Plaintiffs set forth for Judge Huppert at

trial the substance of Dr. Aroesty's proffered testimony. Assuming without conceding there was anything new in the defense case that warranted rebuttal, it is simply impossible to address with any specificity Dr. Aroesty's proposed rebuttal testimony.

In addition, Judge Stovall also explained in September 2012 that if allowed to testify, Dr. Aroesty would be limited to damages and prognosis. App. 299-300 (Sept. 25, 2012 Ruling at 1-2); *see also* App. 297 (May 1, 2012 Order at 1, limiting future discovery in case to "accommodating the possibility of the Plaintiffs' updating their evidence relating to damages and the Defendants' right to discovery such evidence."). Particularly under the procedural history of this case with multiple trial start-ups and detours, Judge Stovall's May 1 and September 25, 2012 Orders can only be read as prohibiting a reopening of discovery and expert opinions with the exception of prognosis and damages. Under this procedural history, it was not an abuse of discretion to refuse to allow Plaintiffs to rely on Dr. Aroesty for an informed consent claim in 2014.

III. Refusing to submit a specification on the alleged lack of experience was not an abuse of discretion.

Plaintiffs requested that the district court include as a specification of negligence, that Dr. Khanna was negligent:

> In performing the Bentall procedure on Alan Andersen without being properly trained or without the experience to do so.

App. 510 (Supp. Tr. 101:10-16, requesting addition to Court's Instruction No. 14).

In addition to the fact that this theory was never pled by Plaintiffs, they cannot establish that they were prejudiced by the failure to instruct on this theory. Further, the district court correctly ruled that "a physician's lack of experience or training in a given procedure, standing alone, does not justify a separate specification of negligence for the jury to consider." App. 644 (Post-Trial Ruling at 7).

A. Additional procedural summary.

Plaintiffs did not allege this theory in their amended petition. *See* App. 9-16 (Amended Petition). Until the first day of trial, a theory of negligence based upon Dr. Khanna's experience alone had not been raised. Instead, Plaintiffs asserted the lack of experience in the context of informed consent, a negligent credentialing case against Mercy (dismissed on June 15, 2010, App. 163), and a negligent hiring claim against Iowa Heart (all related evidence excluded on April 9, 2013, App. 329-31). In their proposed instructions filed in March 2013 and June 2014, Plaintiffs did not submit this theory. *See* App. 325, 338 (Plaintiffs' 2013 and 2014 Instruction No. 13).

Plaintiffs' attempt to add this theory as an independent basis for liability was conveyed on the first day of trial. *See* App. 353-54 (Tr. 88:6-89:25). This was late and unfairly prejudicial. Defendants relied upon this theory of negligence *not* being part of the case in prior briefings and positions as to other claims. *See* App. 313 (Defendants' March 21, 2013 Third Motion in Limine at 12, n. 7); App. 191-92 (Defendant's June 8, 2011 Second Motion in Limine at 7-8). Further, Defendants were unable to move for summary judgment on the claim given it was not raised until the first day of trial.

After Plaintiffs raised the issue on the first day of trial, Defendants addressed it with the court before opening statements. App. 365-66 (Tr. 192:7-193:13); App. 355-63 (Defendants' July 8, 2014 Brief). Judge Huppert distinguished qualifications as admissible for Plaintiffs' traditional negligence allegations versus as a specification of negligence: "I understand the distinction between qualifications generally being part of any medical negligence case, but in terms of a specification of negligence . . . that Dr. Khanna was unqualified to perform this procedure on Mr. Andersen, has that been pled . . . ?" App. 366 (Tr. 195:11-17). Plaintiffs were unable to demonstrate to the court any such pleading. App. 366-68 (Tr. 196:3-201:21).

Ultimately, Judge Huppert allowed Plaintiffs to introduce evidence of

Dr. Khanna's experience and reserved ruling on whether it would be a specification of negligence. App. 367-68 (Tr. 199:20-201:18). Plaintiffs responded to this ruling with: "That's fine with us." App. 368 (Tr. 201: 20).

When finalizing the jury instructions Judge Huppert refused to submit a specification based solely on the alleged lack of experience:

> I am not going to add the proposed specification regarding allegations that lack of training or lack of experience is a separate specification of negligence. I think that issue is embedded within all of the specifications and is a proper topic of argument from both sides and has been dealt with by the experts on both sides. But I'm not going to make any separate specification of negligence.

App. 513 (Supp. Tr. 114:7-14).

B. Error preservation.

Defendants do not agree Plaintiffs preserved this issue.

The fact that this theory of negligence had not been pled by Plaintiff or asserted until the first day of trial, alone, supports that the Court was well within its discretion to refuse to submit this claim as a specification of negligence. "Proposed instructions must be supported by the *pleadings* and substantial evidence in the record." *Wolbers v. The Finley Hospital*, 673 N.W.2d 728, 732 (Iowa 2003) (emphasis added); *see also* Plaintiffs' Brief at 36 (citing similar authority); *Michael Eberhart Construction v. Curtin*, 674 N.W.2d 123, 128 (Iowa 2004) (holding it was an abuse of discretion to allow

a workers compensation claimant to amend his petition to assert the odd-lot doctrine given the unfair and prejudicial surprise to the other party).

It was too late for Plaintiffs to assert this theory at trial, particularly under the long procedural history of this case. There were numerous motions, hearings, and rulings on whether Dr. Khanna's experience could support an informed consent claim, a negligent hiring claim, or a negligent credentialing claim. Yet Plaintiffs failed to ever raise experience as an independent stand-alone theory. The theory implicated the scope and source of Plaintiffs' expert opinions as well as legal defenses that could have been addressed in a dispositive motion. Had the theory of experience as a stand-alone basis for liability been timely raised it would have impacted multiple prior motions and rulings. At the very minimum, it would have been fully and fairly addressed prior to trial.

Further, given that Plaintiffs did not assert this theory until the first day of trial, they have never before set forth the legal basis to support it. The authority set forth in Plaintiffs' appeal brief, including reliance on Restatement (Second) of Torts §300, is raised for the first time on appeal.[33]

[33] Plaintiffs cite no cases applying this Restatement section under any facts or even allegations similar to those in this case and Defendants located none.

C. Standard of review.

Defendants agree that the refusal to give a party's requested instruction is reviewed for an abuse of discretion. *See Summy v. City of Des Moines*, 708 N.W.2d 333, 340 (Iowa 2006) ("We review the . . . claim that the trial court should have given the defendant's requested instructions for an abuse of discretion."); *id.* at 343 (finding "trial court did not abuse its discretion by refusing to instruct the jury on the defendant's sole-proximate-cause defense").

D. Plaintiffs cannot show prejudice.

"Error in giving or refusing to give instructions is reversible, only if prejudicial." *Olson v. Prosoco, Inc.*, 522 N.W.2d 284, 287 (Iowa 1994). Even assuming the district court erred, there was no prejudice.

The jury found that Dr. Khanna was not negligent in how he performed the surgery. *See* App. 548, 564 (Court's Instruction No. 14; Verdict Form). Plaintiffs do not appeal this finding--- there is no appeal issue about the sufficiency of evidence, the jury instructions, or argument.

Assuming without conceding that a claim of inadequate experience against a physician him or herself is otherwise viable, such a claim would require proof of an underlying negligent act as well. Lack of experience *standing alone* would not cause injury. As explained further below, only if

lack of experience led to a negligently performed surgery or care could it support recovery (i.e. as in a negligent hiring or credentialing claim). The jury found against Plaintiffs on the alleged underlying negligent acts and the failure to submit a lack of experience claim cannot support a new trial even if it were otherwise a viable legal theory.

Judge Huppert agreed:

> Even assuming this refusal [to instruct] was in error, the plaintiffs must still establish prejudice in order to obtain a new trial. . . . This they cannot do, in light of the jury's rejection of the other specifications of negligence directly associated with various aspects of the Bentall procedure. In other words, since the jury found that Dr. Khanna was not negligent in the manner specified (with the record already replete with references to his lack of training and experience), it remains to be seen how that lack of training and experience would have change the outcome of the jury's deliberations.

App. 644-45 (Post-Trial Ruling at 7-8).

E. The district court's ruling was correct.

Alleged lack of experience or the number of times a physician has done a procedure, in and of itself, is not a proper specification of negligence against the physician. Judge Huppert explained his ruling:

> . . . The court remains convinced that a physician's lack of experience or training in a given procedure, standing alone, does not justify a separate specification of negligence for the jury to consider. . . . Just as an intoxicated driver is not negligent merely by virtue of that intoxication absent "outward conduct which is negligent," so too an inexperienced physician is not negligent simply as a result of that inexperience; that lack of

> training or experience must translate into a deviation of the standard of care in performing the procedure in question.

App. 644 (Post-Trial Ruling at 7, citing *Yost*); *see also Yost v. Miner*, 163 N.W.2d 557, 561 (Iowa 1968) ("Before a drunken driver can be held liable for injuries to another or barred from recovering for his own injuries, his intoxicated condition must be translated into outward conduct which is negligent and bears a causal relationship to the injury.").

Plaintiffs' proposed instruction on the lack of experience presented the specification as one of four alternatives for negligence. *See* App. 581 (Plaintiff's motion for new trial exh. B). Thus, under Plaintiffs' position, lack of experience *alone* was sufficient for liability—*even if* the jury had found the surgery was performed perfectly. This cannot be.

In addition to the authority concerning intoxication cited by Judge Huppert, there are additional legal theories that are instructive in determining whether a lack of experience allegation can stand alone as a theory of recovery. Contrary to how Plaintiffs submitted their theory, as in a negligent credentialing claim brought against a hospital or a negligent hiring claim against an employer, if an inadequate experience claim against a physician himself is viable at all, it must also require a finding of a specific negligent act or omission.

In other words, even if there was an independent duty on the part of a physician to act as his or her own credentialer or employer[34] (that is separate from the duty to act as reasonable physician in the same or similar circumstances), any breach of that duty would not be the cause of any harm unless the plaintiff also establishes the physician beached the standard of care in providing treatment. *See, e.g. IMT Insurance Co. v. Crestmoor Golf Club*, 702 N.W.2d 492, 496 (Iowa 2005) ("A necessary element of a claim for negligent supervision or retention is an underlying tort or wrongful act committed by the employee."); *Kiesau v. Bantz*, 686 N.W.2d 164, 172 (Iowa 2004) (for negligent hiring, supervision, or retention claim, plaintiffs must prove underlying wrongful act by employee, "In other words, the injured party must prove a case within a case."); *Rule by Rule v. Lutheran Hospitals & Homes Soc. Of America*, 835 F. 2d 1250, 1253 (8th Cir. 1987)(Nebraska law) (approving jury instructions in credentialing claim that required finding that physician committed malpractice); *Hiroms v. Scheffey*, 76 S.W.3d 486, 489 (Tex. Ct. App. 2002) (plaintiffs must establish physician negligence in negligent credentialing claim); *Ratliff v. Morehead* , 1998 WL 254031 at *6

[34] In fact, the allegation against Dr. Khanna was just a late repackaging of a negligent credentialing and negligent hiring claim—claims that had been dismissed in this case.

(Ohio Ct. App. 1998) (patient must prove underlying medical malpractice of physician in negligent credentialing claim).[35]

As illustrated by the above, without a finding that Dr. Khanna negligently performed the surgery, any allegation that he was inexperienced lacks a causal link to the injury.[36] Yet Plaintiffs did not propose their theory in this manner and Judge Huppert did not abuse his discretion in refusing to submit it.

Further, to allow the theory as submitted by Plaintiffs—that Dr. Khanna was negligent for the sole reason that he had never performed the

---

[35] As observed in *Johnson v. Misericordia Community Hosp.*, 301 N.W.2d 156, 158 (Wis. 1981), the physician's negligence who settled prior to a negligent credentialing trial "remained an issue at trial, as it was incumbent upon the plaintiff to prove that [he] was negligent in this respect to establish a causal relation between the hospital's alleged negligence in granting [him] orthopedic surgical privileges and [Plaintiff's] injuries." *See also Bendedict v. St. Luke's Hospitals*, 365 N.W.2d 499, 505 (N.D. 1985) ("if the jury found . . . that the emergency room physician exercised the care and skill ordinarily possessed, exercised by, and expected of other emergency room physicians, then the hospital's failure to exercise reasonable care in selecting the doctor . . . could not be a proximate cause of [plaintiffs'] injuries.").

[36] *See also Van Iperen v. Van Bramer*, 392 N.W.2d 480, 484-85 (Iowa 1986) (affirming trial court's refusal to submit specifications given lack of sufficient causation evidence); *Cagle v. Pilot Travel Ctrs., L.L.C.*, 2012 WL 3026403 *2 (Iowa Ct. App. 2012) (affirming refusal to submit specification, "We agree, particularly since the record does not show evidence that any of the additional alleged negligent acts had a causal relationship to Cagle's fall or injury.").

procedure before would essentially make the surgeon strictly liable for any adverse outcomes in such first surgeries.

Alternatively, and as Judge Huppert found, under the facts of this case, the lack of experience allegations were embedded within the other specifications. *See* App. 513 (Supp. Tr. 114:7-14). There was ample evidence of Dr. Khanna's experience level and Plaintiffs' position on that subject. *See* App. 644-45 (Post-Trial Ruling at 7-8, "the record [was] replete with references to his lack of training and experience."). Thus Dr. Khanna's experience and Plaintiffs' position was subsumed in the other specifications. S*ee Van Iperen v. Van Bramer,* 392 N.W.2d 480, 485 (Iowa 1986) (affirming trial court's refusal to submit specifications in part because they were subsumed in specification given); *Schuller v. Hy-Vee Food Stores, In*c., 328 N.W.2d 328, 332 (Iowa 1982) (affirming decision to submit one specification of negligence: "[The] concept was adequately incorporated in the single submitted specification. The court is entitled to choose its own language in submitting an issue and need not adopt the form requested by a party."); *see also Cagle v. Pilot Travel Ctrs., L.L.C.*, 2012 WL 3026403 *2 (Iowa Ct. App. 2012) (specification not submitted was encompassed by specification that was given, "Therefore, failure to give the supervision and inspection specifications constituted no error.")

Conclusion

For the reasons set forth above, Defendants request that Plaintiffs' request for a new trial be denied in its entirety and that the district court's rulings at issue in this appeal be affirmed.

Request for oral argument

Defendants further request oral argument.

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The undersigned certifies this Final Brief was electronically filed and served on the 28th day of May, 2015, upon the following persons and upon the Clerk of the Supreme Court using the Electronic Document Management System, which will send notification of electronic filing:

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