IN THE IOWA SUPREME COURT

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 IN AND FOR POLK COUNTY THE HONORABLE MICHAEL D. HUPPERT

APPELLANT'S REPLY BRIEF

Marc S. Harding
Harding Law Office
1217 Army Post Road
Des Moines, IA 50315
T: 515-287-1454
F: 515-287-1442
e: marc@iowalawattorneys.com

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I certify that on the ___ day of May, 2014, I served this document on all parties to this appeal by electronic filing to the following counsel for the parties at the following addresses:

Robert Houghton
Jennifer E. Rinden
Shuttleworth & Ingersoll, P.L.C.
500 U.S. Bank Bldg.
P.O. Box 2107
Cedar Rapids, IA 52406
ATTORNEYS FOR DEFENDANTS
SOHIT KHANNA, M.D. and
IOWA HEART CENTER, P.C.

I further certify that on 27 of May, 2014, I will file this document by electronic filing to the Clerk of the Supreme Court, Iowa Judicial Branch Bldg., 1st Floor, 1111 East Court Ave., Des Moines, IA 50319.

Marc Hanley

HARDING LAW OFFICE
1217 Army Post Road
Des Moines, Iowa 50315

ATTORNEY'S COST CERTIFICATE

The Appellant's attorney hereby certifies that the cost of printing this document is _____.

Marc Hanley

HARDING LAW OFFICE
1217 Army Post Road
Des Moines, Iowa 50315

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ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT DENIED PLAINTIFFS THE OPPORTUNITY TO PRESENT THEIR CLAIM OF NEGLIGENT FAILURE TO OBTAIN INFORMED CONSENT REGARDING THE RISKS OF SURGERY TO THE JURY.

A. Preservation of error and standard of review

Defendants' claims to the contrary, Plaintiffs properly preserved error on this issue, as it was raised and decided by the district court during the trial and in the parties' motions and resistances, including the motion and supplemental motion for new trial. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002).

The standard of review of the district court's original grant of summary judgment is for correction of errors at law, and the appellate court will affirm "only when the entire record establishes no genuine issue of material fact." *Hlubek v. Pelecky*, 701 N.W.2d 93, 95 (Iowa 2005); Iowa R. Civ. P. 1.981; *Coralville Hotel Assocs., L.C. v. City of Coralville*, 684 N.W.2d 245, 247 (Iowa 2004)(evidence must be viewed "in the light most favorable to the non-moving party," and he must be granted all reasonable inferences).

The scope of review of the denial of the motion for new trial, raising the court's decision to exclude evidence, is reviewed for abuse of discretion. *Fry v. Blauvelt*, 818 N.W.2d 123, 128 (Iowa 2012); *Hall v. Jennie Edumndson Memorial Hosp.*, 812 N.W.2d 681, 685 (Iowa 2012)(finding an abuse occurs where the decision was based "on grounds or for reasons clearly untenable or to an extent clearly unreasonable.")

The district court's refusal to allow rebuttal evidence is also reviewed for abuse of discretion. *Carolan v. Hill*, 553 N.W.2d 882, 889 (Iowa 1996).

B. The trial court foreclosed the issue of informed consent, thus denying Plaintiffs the opportunity to present the issue during their case in chief.

On June 15, 2010, the district court, Judge Rosenberg, dismissed Plaintiffs' lack of informed consent claim in its entirety. [App. 162]

In September 2011, upon Plaintiffs' motion to reconsider, the district court, Judge Stovall, revised the earlier ruling, and stated that:

> 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]

In July 2014, the district court again re-visited the issue of Plaintiffs' lack of informed consent claim during pretrial; contrary to Defendants'

characterization, Judge Huppert did not authorize Plaintiffs' presentation of the issue of informed consent.

First, note that the September 2011 ruling addressed what *Dr. Cuenoud* knew of Plaintiffs' increased mortality risk, not Dr. Khanna; during the final pretrial hearing, Judge Huppert in no way clarified that this was a typographical error. [App. 341-342 (Pre. Tr. p. 34-35, entire)] Rather, the parties and the court had the following conversation:

> MR. MORGAN: And I read this as if plaintiffs shall be allowed to present evidence relating to Dr. Cuenoud's awareness of plaintiff's increased mortality risk . . . . Because that does open a form of informed consent.
>
> THE COURT: So it's the plaintiffs' position that there is still some form of an informed consent claim that remains viable in this case?
>
> MR. MORGAN: Because of their own expert witness's testimony and because of this [9/2011] order – yes . . . .
>
> THE COURT: I'm guessing the defendants disagree . . . .
>
> MS. PENNER: [W]e believe informed consent is out of the case. . . .
>
> THE COURT: [H]ere's where I'm still confused . . . . 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?
>
> MR. MORGAN: Not to my knowledge.

[App. 343-344 (Pre. Tr. p. 36-37, entire)]

Shortly thereafter, during the first day of trial, the district court revisited the issue again:

> THE COURT: It looks like it was Judge Stovall in his ruling September 20th, 2011, where he addressed the defendant's second motion in limine . . . . "any reference to or evidence concerning allegations of lack of informed consent . . . . Sustained . . . . Dr. Khanna's qualification may be pursued by the plaintiffs in the context of the general negligence claim, along with the issue of informed consent, *consistent with the court's ruling on this issue on the plaintiff's' motion to reconsider*" . . . . Now, I think I am pretty well-versed on where the informed consent claim stands . . . .

[App. 351 (Tr. p. 80, l. 4-21)] (emphasis added)

Plaintiffs reiterated their objection to the court's refusal post-trial:

> MR. MORGAN: [T]here are four principal issues that we feel that the plaintiffs should have been allowed to address during trial . . . . First, that he was not told that he had an inordinately bad heart or an unusually bad heart . . . like someone that had run a marathon race . . . . And then . . . Dr. Eales, who characterized Mr. Andersen's heart as a super bad heart. Mr. Andersen was not told that he had a super bad heart . . .[or] that he had a poor chance of a successful surgery . . . .

App. 633-634 (Post Tr. p. 3, l. 18-25; p. 4, l. 1-7]

To the extent Judge Huppert allowed Plaintiffs to address informed consent, this was limited to what *Dr. Cuenoud* knew of Plaintiff's increased mortality risk. Certainly this was Plaintiffs' understanding, which is why they were so surprised when, even after Defendants opened the door to the

issue on rebuttal, the district court continued to refuse to allow any discussion of it:

> MR. MORGAN: [J]ust so the record is clear. I'm arguing he's opened the door to informed consent. I know it's a touchy subject. You don't want me going there, so I'm saying I won't go into informed consent because I'm not supposed to. But I'm not conceding that I shouldn't be allowed to, given this record.

[App. 503 (Supp. Tr. p. 50, l. 7-13)]

Even after trial, Plaintiffs continued to raise the issue:

> [W]e need to address the existence of a material risk that was unknown to the patient. And our position is we should have been allowed to present this issue to the Court that Mr. Andersen did not know he had this unusually bad or super bad heart . . . before he gave consent to have the operation. . . .

[App. 636 (Post Tr. p. 5, l. 2-9)]

Remarkably, in the post-trial Ruling, *for the first time*, Judge Huppert appeared to state that Plaintiffs actually could have brought up the issue of informed consent, but since they didn't discuss it in their case-in-chief, they were precluded from raising it in rebuttal. [App. 640] In support of this Ruling, Judge Huppert identified *for the first time* that "Judge Stovall mistakenly referred to Dr. Cuenod in this part of his ruling, when he obviously meant Dr. Khanna." [App. 640, n. 1] Note that this was *never* previously discussed, and from every hearing and document regarding this

order, it is clear that the parties thought any allowance of an informed consent claim was limited to Dr. Cuenod.

During the pretrial hearing when this provision was specifically discussed, Defendants claimed their understanding of that September 2011 ruling was that "Judge Rosenberg granted summary judgment on the informed consent claim back in 2010 . . . but indicated in that ruling that plaintiffs can put on evidence of the *qualifications*," of Dr. Khanna, for their negligence claim, but nothing could be introduced with regard to the informed consent claim, and the Court, at least seemed to, agree. [App. 341-342 (Pre. Tr. p. 34, l. 25; p. 35, l. 1-6)](emphasis added)

Seeking clarification, shortly before trial, the issue was discussed:

> MR. MORGAN: I just want to make sure I'm understanding correctly is . . .the context was *Dr. Cuenoud* came in . . . and testified in his deposition that in his opinion the probability of surviving the Bentall procedure in Andersen's case . . . .
>
> And I read this as if the plaintiffs shall be allowed to present evidence relating to *Dr. Cuenoud's* awareness of the plaintiff's increased mortality risk . . . Because that does open a form of informed consent.
>
> THE COURT: So it's the plaintiffs' position that there is still some form of an informed consent claim that remains viable in this case?
>
> MR. MORGAN: Because of their own expert witness's testimony and because of this order, yes . . . .

[App. 342-343 (Pre. Tr. p. 35, l. 24-25; p. 36, l. 1-16)](emphasis added)

There was nothing said or written in the record prior the district court's post-trial ruling to indicate that Plaintiffs were allowed to present evidence during their case-in-chief with regard to what Dr. Khanna knew of Alan's increased mortality risk pre-surgery, but failed to tell him. This was error. *See Pauscher v. Iowa Methodist Medical Center*, 408 N.W.2d 355, 359-360 (Iowa 1987)("the decision to consent to a particular medical procedure is not a medical decision [but i]nstead . . . is a personal and often difficult decision *to be made by the patient*. . . .")(emphasis added).

Plaintiff presented sufficient evidence at trial, including their offers of proof as well as the testimony of the witnesses, including those called by Defendants, to establish a claim for negligent failure to provide informed consent, as argued in Appellants' Brief.

Plaintiffs have met their burden of establishing a genuine issue of material fact on the issue of informed consent, such that the district court's initial grant of summary judgment was error, and its refusal to allow evidence of it at trial, or grant Plaintiffs' motion for new trial, were an abuse of discretion. *See Hlubek*, 701 N.W.2d at 95; *Hall*, 812 N.W.2d at 685.

C. Even had the trial court not foreclosed the issue of informed consent, Plaintiffs could not have addressed in their case-in-chief the contention that they were informed that Plaintiff had an unusually bad, "worn-out heart," "super bad heart," because they were not aware that this would be the experts' testimony prior to hearing it at trial.

As Plaintiffs' attorney noted during trial, shortly after Dr. Eales first made his incendiary statement:

> MR. MORGAN: Dr. Eales also before coming into court has never revealed that he thought that this candidate had a worn-out heart. . . .
>
> [H]e is assuming the role of educating the jury on points that were never disclosed in disclosure . . . .

[App. 497 (Supp. Tr. p. 39, l. 4-6); App. 502 (Supp. Tr. p. 49, l. 7-9)]

Rather, as Plaintiffs identified after reciting from Dr. Eales deposition:

> MR. MORGAN There's nothing in here . . . in any of this deposition or disclosure . . . any revelation that he didn't have a customary situation for an elective surgery, that he had some unusually difficult operation. And they are emphasizing this now, and it's just not fair that we can't deal with it . . . .
>
> I don't see how it's even remotely fair for him to come in here and say he has a super bad heart, this was not a usual elective surgery, when it's the first time that this doctor has ever said such a thing. . . .I can't imagine that it is fair to the plaintiff that he can't either have that stricken from the record or rebutted . . . .

[App. 499 (Supp. Tr. p. 43, l. 9-15); App. 503 (Supp. Tr. p. 50, l. 14-25); Supp. Tr. p. 51, l. 1-2]

Plaintiffs' counsel then requested that either the jury be instructed to strike the incendiary statement or the court allow Plaintiffs to present rebuttal testimony:

> Otherwise, they get to run over us with these new theories, which are surprise theories, while we can't even rebut it.

[App. 498 (Supp. Tr. p. 40, l. 14-15)]

The district court refused to do so, saying these claims did not "open the door on the issue of informed consent." [App. 500 (Supp. Tr. p. 46, l. 21-25)]

Plaintiffs then requested the opportunity to voir dire Dr. Eales:

> MR. MORGAN: I can voir dire him on the issue of is he saying . . . there's no question about this is not a usual elective surgery for a Bentall, because if that's what he's implying, that's what he's saying, then we certainly ought to be able to bring Alan in on rebuttal and say, Nobody ever told me that. I would have gone and gotten other opinions if they said, you know, you've got a rare heart here. You've got a super worn-out heart. . . . what the doctor said. He said this was not your typical worn heart. . . . . I'm interested in being able to have Alan say, If I had known that I had a super bad heart . . . I would have gotten other opinions . . . .

[App. 501-502 (Supp. Tr. p. 48, l. 20-25; p. 49, l. 1-13]

Again the court refused. During the post-trial hearing, Plaintiffs again raised the issue:

> MR. MORGAN: I believe the testimony of the doctors saying that he had an unusually bad heart or a super bad heart was clearly covered in Judge Stovall's order . . . the plaintiffs shall

> be allowed to present evidence relating to Dr. Cuenoud's awareness of the plaintiff's decreased mortality risk and apprising plaintiff of the same . . . .

[App. 636-637 (Post Tr. p. 5, l. 24-25; p. 6, l. 1-12]

Where the defendant party first introduces new matters, evidence presented on rebuttal is the proper method for challenging it. *See Carolan v. Hill*, 553 N.W.2d 882, 889 (Iowa 1996); *see also Solbrack v. Fosselman*, 204 N.W.2d 891, 895 (Iowa 1973)(noting rebuttal testimony is allowed for "the meeting of new facts put in evidence by an opponent in reply.") *citing* 6 Wigmore on Evidence § 1873. It is particularly appropriate where, as here, the subject of the evidence is "a new issue [that had not] been raised throughout pretrial discussions and depositions." *Carolan,* 553 N.W.2d at 889; *see also Solbrack*, 204 N.W.2d at 895-896 (noting that any legal prohibition against testimony, in that case a statute, may be waived when a party presents evidence during its reply that "lifted the prohibition [and] opened the door.")

Note that, for the most part, trial courts tend to refuse to allow rebuttal evidence in only a few situations, such as when the evidence is cumulative and "identical to that elicited from another witness in plaintiff's case-in-chief," or when it is not an "attempt to disprove any of the matters introduced by defendant." *Hanrahan v. St. Vincent Hosp.*, 516 F.2d 300, 302

(8th Cir. 1975); *Crane v. Cedar Rapids & I.C. Ry. Co.*, 160 N.W.2d 838, 847 (Iowa 1968)

In the present case, Plaintiffs never had an opportunity to present evidence on this issue because they were not aware it was one – until the experts testified to it during the defense's case; thus, the first situation is not present here. *See Hanrahan*, 516 F.2d at 302.

In addition, the testimony included in the offer of proof, that Plaintiffs were never informed that Alan had a super bad or weak heart and was at a greater risk of an unsuccessful surgery, is an attempt to directly challenge, and disprove, the issue, such that this evidence does not fit the second criteria for excluding rebuttal evidence, either. *See Crane,* 160 N.W.2d 847.

Note, too, that although Defendants attempt to make much of the idea that Plaintiffs could have presented this evidence in their case-in-chief, which of course they couldn't, even had the trial court allowed the evidence, it needn't be offered then. *See Burkis v. Contemporary Indus. Midwest, Inc.*, 435 N.W.2d 397, 400 (Iowa Ct. App. 1988)("[t]he trial court has discretion . . . to permit rebuttal evidence which might have ben offered in chief."); *see also State v. Miller*, 229 N.W.2d 762, 770 (Iowa 1975)(allowing the State to introduce the evidence of a cashier on rebuttal, to "explain the significance of a receipt dated the day after the robbery.")

For example, in *Karr v. Samuelson, Inc.*, 176 N.W.2d 204 (Iowa 1970), testimony was proffered by the plaintiffs during their case-in-chief from a police officer who claimed to have found a windshield at the scene of an accident. *Karr*, 176 N.W.2d at 211. The defendants presented the testimony of a second officer that contradicted the first officer's testimony, and the plaintiffs attempted to present the evidence of a witness who would corroborate the first officer's testimony. *Id.* The trial court excluded the witness' testimony, and the plaintiffs made an offer of proof. *Id.*

In reversing the trial court and remanding the case, the appellate court determined that the rebuttal witness' testimony, which could have been offered during the case-in-chief, would not have been appropriate then (because it was cumulative), but that they "should have been allowed to produce what . . . evidence they had to meet defendants' testimony" in rebuttal *Id.* at 212. In fact, as the court said, "[t]he mere fact the evidence would have been admissible on the main case does not, of itself, bar admission on rebuttal." *Id.*

Likewise in the present matter, even had the trial court allowed Plaintiffs to present evidence on their lack of informed consent (which it didn't), and they had known that Defendants' experts were going to testify that Alan had a super-weak heart and was at a greater risk for not surviving

the procedure, and he had been so informed, Plaintiffs *still* were entitled to present evidence on this issue on rebuttal, in order "to meet defendants' testimony." *See Karr*, 176 N.W.2d at 211.

In any event, the trial court's refusal to allow Plaintiffs the opportunity to rebut Defendants' experts testimony, of which they were neither provided notice or details during discovery, with their own, was an abuse of discretion, and its denial of Plaintiffs motion for new trial should be reversed. *See Carolan*, 533 N.W.2d at 889.

D. Even had the trial court not foreclosed the issue of informed consent, Plaintiffs could not have addressed the contention that they were properly informed, as in the manner testified to by Defendants' expert, because they were not aware that he would provide testimony on this issue prior to hearing it at trial.

As Plaintiffs' attorney noted during trial, shortly after Dr. Eales first made his incendiary statement:

> MR. MORGAN: Dr. Eales also before coming into court has never revealed . . . so that's also new . . . and the third [new] point that he brought out here . . . is he says, I'll have a conversation with the . . . patient. I'll tell them . . . they need to have reserve capacity. . . . So if they get the right to tell the jury that's what I tell my patients and then he has a bad heart and he needs reserve capacity . . . . And it implies that that was told to Mr. Andersen. And I believe we need to figure this out, either we strike this testimony . . . [or] you allow me to go into the informed consent issue on rebuttal.

[App. 497-498 (Supp. Tr. p. 39, l. 4-25; p. 40, l. 1-16]

For the same reasoning that Plaintiffs should have been allowed to present rebuttal evidence to challenge Defendants' novel contention (disclosed for the first time at trial) that Alan had a super-bad heart that was at a greater risk of not surviving the procedure, Plaintiffs also should have been allowed to present rebuttal evidence to challenge their novel testimony (also disclosed for the first time at trial) of Dr. Eales' usual practice for obtaining informed consent; Dr. Eales' testimony regarding his process for getting informed consent, combined with Plaintiffs' silence, could have led the jury to infer that Plaintiffs were informed of the risks and chose to take them.

Therefore, the only way for Plaintiffs to have overcome the prejudicial nature of this testimony was for them to present their own evidence on rebuttal. *See U.S. v. Delgado*, 631 F.3d 685, 706 (5th Cir. 2011); *Carolan*, 553 N.W.2d at 889; *Solbrack*, 204 N.W.2d at 895; *Salami v. Von Maur, Inc.*, NO. 3-346/12-0639, at *17 (Iowa Ct. App. 2013)(noting that rebuttal evidence is particularly appropriate where the evidence presented by the other party renders plaintiffs' allegation "less probable than it would be without the evidence.")

Thus, as Defendants raised the issue of informed consent, "[a]t that point, the plaintiff should have been allowed to respond with evidence

contradicting [defendants' witness'] testimony." *Id.* The trial court's refusal to allow the rebuttal testimony, and refusal to grant Plaintiffs' motion for new trial thereon, were an abuse of discretion and it should be reversed. *See Carolan*, 533 N.W.2d at 889.

E. The evidence Plaintiffs rely on to support their lack of informed consent claim is relevant and admissible, and altogether satisfies Plaintiffs' burden of production.

In their brief, Defendants make the bare assertion, without citation to any authority for the proposition, that Plaintiffs are precluded from using Defendants' witness' testimony. This is contrary to well-established law.

Evidence presented at trial may be used by either party regardless of who introduced it:

> Neither the Rules nor the decisions require that the evidence discharging either burden shall have been introduced by the party having the burden. The burden is not that of producing evidence . . . but merely the burden of . . . the *risk* of non-production or of non-persuasion. The burden bearer must see to it that the evidence is *before the trier* . . . but the evidence discharging the . . . burden may have been offered by the other party . . . .

Wigmore on Evidence § 2485 n. 2 (4th ed. Supplement 2015-2) *citing American Law Institute Model Code of Evidence* (1942) Rule 1 comment ¶¶ 2, 3.

Iowa courts have long followed this precept, including when it comes to expert witnesses. For example, in *Wiles v. Myerly*, 210 N.W.2d 619 (Iowa

1973), the trial court allowed the plaintiffs to rely on testimony provided by the defendant's witness (as well as a defendant) to satisfy any requirement for expert testimony.

In *Wiles*, the plaintiff (like Alan) was injured due to a physician's negligent performance of open heart surgery; during the procedure, plaintiff was burned by the improper handling of a cauterizing instrument. *Id.* at 622-623.

At one point, one of the defendant surgeons testified that the injury was "a burn and treated as such," although he later changed his story. *Id.* at 623. Likewise, one of his assistants (who was not a party to the action but whose statements were characterized as "admissions") testified that he believed the injuries were "burns at the time of his discharge." *Id.*

Despite the fact that these "admissions" were statements made by a defendant and its agent, including merely in deposition testimony, the Iowa Supreme Court agreed with the trial court that they were sufficient to satisfy any requirement for expert testimony. *Id.* at 628 ("If . . . plaintiff required expert testimony to establish that a burn was inflicted, the admissions of [Defendant surgeon] and [witness surgeon] that the decedent had received a burn . . . fulfilled this need.")

This holding and the general proposition are both consistent with common practice, and common sense. Were the opposite to be true, than parties would be forced to elicit cumulative evidence, simply to meet an unnecessary requirement that it be produced by that party. *See* Iowa R. Evid. 403.

Note, too, that Defendants are not prejudiced by Plaintiffs' use of the testimony given by their expert. Defendants had complete notice of the expert, his qualifications and his intended testimony, as they had designated him pursuant to Iowa Code § 668.11; likewise, they were aware that Plaintiffs may call him and rely on his expertise (since, as a non-treating physician, his expertise was the only reason he would testify) as they designated this in their pre-trial pleadings. [App. 344 (Pre.Tr. p. 37)]

Defendants' reliance on *Kush v. Sullivan*, 836 N.W.2d 152, NO. 3-366/12-1292 (Iowa Ct. App. 2013), is misplaced. In *Kush*, the physician Plaintiff had thought would provide expert testimony refused, and absolutely no opinion was in evidence as to the relevant standard of care. *Id.* at *2.

In the present case, Dr. Eales not only introduced the issue of informed consent, he testified as to the standard of care for getting it:

> DR. EALES: 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. You know, you don't need to have it working at a hundred percent of

> possible output in order to do well. And we rely on every patient to have enough reserve there to get through the injury of the heart, the surgery itself, and recover . . . .

[App. 495 (Supp. Tr. p. 36, l. 8-21)] Dr. Eales then continued to testify that Alan didn't have this reserve capacity:

> DR. EALES: Mr. Andersen came to surgery with *severe* aortic stenosis, *severe* aortic insufficiency, *severe* left ventricular hypertrophy . . . . there's no question that this was a higher risk operation than the standard elective short procedure.

[App. 495-496 (Supp. Tr. p. 36, l. 23-25; p. 37, l. 1-4)s](emphasis added)

Clearly, therefore, Dr. Eales' testimony (that the proper thing for a physician to do in a case like Alan's, where the patient is a "higher risk," is to discuss the need for, and potential for lacking, reserve capacity), was an opinion as to the standard of care for obtaining informed consent. *See Kush*, 836 N.W.2d at *6.

Therefore, Plaintiffs met their burden of establishing a genuine issue of material fact on the issue of informed consent, such that the district court's initial grant of summary judgment was error, and its refusal to allow evidence of it at trial, or grant Plaintiffs' motion for new trial, were an abuse of discretion. *See Hlubek*, 701 N.W.2d at 95; *Hall*, 812 N.W.2d at 685.

II. THE TRIAL COURT ERRED WHEN IT REFUSED TO ALLOW PLAINTIFFS TO PRESENT A CLAIM FOR LACK OF INFORMED CONSENT REGARDING THE SURGEON'S EXPERIENCE AS THIS CLAIM IS NOT, AND SHOULD NOT BE, PRECLUDED UNDER IOWA LAW.

A. Preservation of error and standard of review

Again, Defendants' are mistaken, and Plaintiffs properly preserved error on this issue, as it was raised and decided by the district court during the trial and in the parties' motions and resistances, including the motion and supplemental motion for new trial. *Meier*, 641 N.W.2d at 537.

The standard of review of the district court's grant of summary judgment is for correction of errors at law. *Hlubek*, 701 N.W.2d at 95; Iowa R. Civ. P. 1.981; *Coralville*, 684 N.W.2d at 247. The scope of review of the district court's denial of the motion for new trial is for abuse of discretion. *Fry*, 818 N.W.2d at 128; *Hall*, 812 N.W.2d at 685.

B. A physician's lack of training and experience is material to a patient's decision and properly supports an informed consent claim.

Objective, peer-reviewed studies have demonstrated that patients place a surgeon's specialized training and significant experience as the most important factors when choosing one. *See* Aslam Ejaz, MD, MPH, et al., *Choosing a Cancer Surgeon: Analyzing Factors in Patient Decision Making Using a Best-Worst Scaling Methodology*, 21 Annals of Surgical Oncology (12)(No. 2014).

Likewise, other objective, peer-review studies have shown that the more times a physician performs a surgery, the better the patient outcomes. Vivian Ho, PhD and Martin J. Heslin, MD, *Trends in Hospital and Surgeon Volume and Operative Mortality for Cancer Surgery*, 13 Annals of Surgical Oncology (6) (June 2006).

As such, other courts that also follow the "patient rule" have found that misrepresentations and omissions regarding a physician's training and experience will support an informed consent claim.

For example, where a Maryland doctor had only performed a complex procedure once over the past three years, that court held it "gave rise to [the doctor's duty] to inform [the patient] that there were other more experienced surgeons . . . [and this presented] a factual issue for the jury to determine whether a reasonable person in [plaintiff's] position would have deemed this information material . . . ." *Goldberg v. Boone*, 912 A.2d 698, 702 (Md. Ct. App. 2006)

Similarly, when a doctor misrepresented his qualifications, by falsely inflating his experience by 600%, and despite the fact that he had never performed the procedure in a situation as complex as that presented by that plaintiff, the court held that "a reasonable person in the plaintiff's position would have considered such information material in making an intelligent

and informed decision about the surgery." *Johnson by Adler v. Kokemoor*, 545 N.W.2d 495, 499, 505 (Wis. 1996).

Defendants' point to Iowa Code § 147.37 for the proposition that since the statute that creates a presumption doesn't specifically require a physician's experience and training, the legislature has affirmatively decided that those qualifications are not material for purposes of informed consent; however, Defendants have cited no other authority to support this claim.

Rather, the statute itself states that the "known risks . . . of . . . the loss of function of any organ," must be given. I.C.A. § 147.31(1). Having no training or experience with a complex surgery such as the Bentall procedure is clearly a known risk that the physician may be unqualified, and the organ will fail – which is precisely what happened here.

Likewise, the remaining authority cited by Defendants is also silent regarding a physician's training and experience; for example, in *Pauscher,* the court simply cited the statute with approval, but in no way limited "known risks" in such a manner that it couldn't be read to include an utter lack of training or experience in a particular procedure. *Pauscher*, 408 N.W.2d at 361.

On the other hand, language in other authority cited by Defendants, such as *Bray v. Hill,* 517 N.W.2d 223 (Iowa Ct. App. 1994) actually

supports Plaintiffs' position. In holding that the district court had not abused its discretion in excluding evidence of a physician's probationary status, the court said:

> A physician has a duty to disclose only those material risks involved in the medical procedure. Dr. Gregory's probationary status was due to the activity of a physician's assistant in his employ. *The probation did not relate to Dr. Gregory's qualifications as a surgeon* . . . .

Bray, 517 N.W.2d at 226. Clearly, the court included Dr. Gregory's qualifications as a surgeon in the category of material risks, as opposed to the activity of his affiliated P.A., who presumably was not even involved in the surgery.

Defendants' reliance on *Slutzki v. Grabenstetter*, No. 2-255/01-1482 (Iowa Ct. App. Sept. 25, 2002) is misplaced, as this case is easily distinguishable. In *Slutzki*, Dr. Grabenstetter had been suffering from a herniated disc in her neck at the time she performed surgery on Ms. Slutzki; however, no evidence was produced at trial that Dr. Grabenstetter's neck condition affected her performance. *Id.* at 5.

On the contrary, in the present case, both Dr. Johnson and Dr. Peetz testified as to their expert opinions that Dr. Khanna had breached the standard of care when he performed the Bentall procedure without any experience or particular training, or arranging for an experienced surgeon to

assist. [App. 371 (Tr. p. 249, l. 4-19); App. 374 (Tr. p. 276, l. 1-13); App. 409 - 410 (Tr. p. 545, entire; p. 546, l. 1-7; p. 548, l. 7-18); App. 416-417 (Tr. p. 592, l. 1-25; p. 593, entire; p. 594, l. 1-11)]

Note, too, that Defendants' argument that requiring physicians to disclose statistics of their surgeries is inapposite to the present case, since it's not Dr. Khanna's success *rate* that's at issue, but the fact that he had never performed the surgery, and had never even trained formally for it.

Likewise, Defendants' argument regarding the information maintained in privileged peer review records is specious: a physician can easily disclose his level of training and experience to a patient without being compelled to turn over privileged documents. Even were the physician to refer to his own privileged records, that presents him with little burden, as is shown by the fact that so many of the physicians who testified at trial in the present case were able to disclose this information to the jury, the parties and the court with little effort.

Dr. Johnson testified as to the level of training on the Bentall procedure he received (and provided to young heart surgeons), as did Dr. Peetz. [App. 372-373 (Tr. pp. 265-267, 269, 270-272); App. 409 (p. 544)]

Likewise, Dr. Love testified that he had participated in 10-15 Bentall procedures during his residency, Dr. Zeff testified he had performed

between 100-150 by the time of Alan's surgery, and Dr. Johnson testified he had performed around 180. [App. 374 (Tr. p. 276, l. 4-5); App. 402 (Tr. p. 463, l. 8-11); App. 466 (Tr. p. 1170, l. 23-25; p. 1171, l. 1-4)] The number of times a surgeon has performed a particular procedure is not privileged.[1]

It strains credulity to think that any intelligent adult, lay or otherwise, would find it immaterial that the person who was going to operate on him had no experience with the procedure, it would be equally incredible for a patient who was intending to undergo a serious procedure, like the Bentall, would find the fact that his surgeon had no training for the difficult surgery immaterial. Thus, the fact that Dr. Khanna had no training in, or experience in performing, the Bentall procedure was material, and as such, under the patient rule, he should have obtained Plaintiffs' informed consent about this risk prior to the surgery. *See Pauscher*, 408 N.W.2d at 359.

Therefore, Plaintiffs met their burden of establishing a genuine issue of material fact on the issue of informed consent, such that the district court's initial grant of summary judgment was error, and its refusal to allow evidence of it at trial, or grant Plaintiffs' motion for new trial, were an abuse of discretion. *See Hlubek*, 701 N.W.2d at 95; *Hall*, 812 N.W.2d at 685.

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[1] Defendants' argument regarding the wrongful production of Dr. Khanna's privileged case log is equally specious; simply because these Defendants mistakenly disclosed a privileged case log in this case does not mean future Defendants would be equally careless.

CONCLUSION

For the reasons aforesaid, Plaintiffs-Appellants request this Court to enter an Order reversing the trial court and granting Plaintiffs-Appellants' motion for a new trial.

Marc S. Harding
Harding Law Office
1217 Army Post Road
Des Moines, IA 50315