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.

APPLICATION FOR FUTHER REVIEW

(Iowa Court of Appeals decision of January 25, 2017)

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QUESTIONS PRESENTED FOR REVIEW

I. DID THE COURT OF APPEALS ERR WHEN IT FAILED TO REVERSE THE DISTRICT COURT'S SUMMARY JUDGMENT OF AN INFORMED CONSENT CLAIM BASED ON WHETHER PLAINTIFF WAS APPRISED OF THE RISKS OF SURGERY?

II. DID THE COURT OF APPEALS ERR WHEN IT FAILED TO REVERSE THE DISTRICT COURT'S SUMMARY JUDGMENT OF AN INFORMED CONSENT CLAIM BASED ON DEFENDANT NOT REVEALING HIS LEVEL OF EXPERIENCE?

III. DID THE COURT OF APPEALS ERR WHEN IT FAILED TO REVERSE THE DISTRICT COURT'S ORDER PRECLUDING TESTIMONY ON REBUTTAL THAT PLAINTIFF WAS NOT INFORMED OF THE RISKS OF SURGERY?

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STATEMENT SUPPORTING FURTHER REVIEW

COMES NOW Plaintiffs Alan Andersen, Individually and as Injured Parent of Chelsea Andersen and Brody Andersen, and Diane Andersen, his Wife (Plaintiffs), pursuant to Iowa Rule of Appellate Procedure 6.1103, seeking further review of the Court of Appeals decision in *Andersen v. Sohit Khanna, M.D. et al.*, No. 14-1682 (January 25, 2017). For the following reasons, Plaintiffs-Appellants request further review:

1. The Court of Appeals' decision to affirm the trial court's summary judgment of Plaintiffs' lack of informed consent claim, arising from a failure to apprise of a weakened condition and substantially greater risk of surgical failure, is in conflict with other decisions of this Court and the Court of Appeals. Iowa R. App. P. 6.1103(1)(b)(1).

2. The Court of Appeals' decision to affirm the trial court's refusal to allow Plaintiffs to rebut previously undisclosed defense-expert testimony that raised informed consent, with testimony of a lack of informed consent, is in conflict with other decisions of this Court and the Court of Appeals. Iowa R. App. P. 6.1103(1)(b)(1).

3. The Court of Appeals has decided an important question of law that has not been, but should be, settled by the supreme court, namely,

whether Iowa patients have the right to informed consent as to their surgeon's experience and training. Iowa R. App. P. 6.1103(1)(b)(2)

BRIEF

Course of Proceedings and Disposition Below

Plaintiffs' petition was filed on September 26, 2005 against, in relevant part, Defendants Sohit Khanna and Iowa Heart Center. An amended petition was filed on August 19, 2008 to add Plaintiff Alan Andersen's employer in response to an order regarding subrogation. [App. vii]

Defendants' motion for partial summary judgment on Plaintiffs' informed consent claim was granted on June 15, 2010. [App. viii]

In that June 15, 2010 order, the Polk County District Court, Judge Rosenberg, held that Iowa informed consent law does not require disclosure of the personal characteristics or experience of the physician, but does require "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." [App. 162]

The parties sought clarification of this Order, and on September 20, 2011, the district court, Judge Stovall, confirmed only that 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]

Plaintiffs' previous attorneys caused two mistrials in this matter: the first on October 31, 2011 and the second on April 15, 2013. [App. ix]

Immediately prior to the third trial, based on the district court's earlier orders, Judge Huppert ruled that all reference to any informed consent claim was prohibited. [App. 341-344] After a jury trial, on July 22, 2014, the Polk County District Court entered judgment in favor of Defendants, and on July 23, 2014, entered the verdict. [App. ix] Plaintiffs filed a motion for new trial on July 31, 2014, and a supplemental motion for new trial on August 7, 2014. [App. x] Defendants filed a resistance on August 22, 2014; the court denied Plaintiffs' motion for a new trial on September 17, 2014, and Plaintiffs filed their notice of appeal on October 7, 2014. [App. x]

Both parties filed their final briefs on May 27, 2015, and oral argument was held on January 10, 2017. The Court of Appeals issued its decision affirming the district court's judgment on January 25, 2017.

Statement of the Facts

Plaintiff Alan Andersen (Alan), who was aware he suffered from a congenital bicuspid aortic valve from his birth on May 12, 1952, suffered few symptoms from the condition until the early 2000's. [App. 375 (Tr. p.

279, l. 21-25; p. 280, entire); App. 431 (Tr. p. 878, l. 10-13, 23-25); App. 432 (Tr. p. 885, l. 7-17); App. 434 (Tr. p. 897, l. 12-21)]

In 2003, Alan's cardiologist, whom he visited annually at the University of Iowa, Dr. Brown, informed him he would need surgery to repair the valve, but that the elective procedure could be done closer to Alan's home in Des Moines, and Dr. Brown referred him to the Iowa Heart Center (IHC). App. 435 (Tr. p. 898, l. 1-25; p. 899, l. 1-7)]

At Alan's initial consultation with the IHC, he met with Dr. Chawla who informed Alan that "all of my doctors here are experienced and done hundreds of these surgeries." [App. 434 (Tr. p. 895, l. 14-25)][1]

Alan was assigned to IHC's Dr. Khanna, who (unbeknownst to Plaintiffs) in fact, had never previously performed the Bentall procedure required, had never received any training regarding it and had never even seen anyone else perform it. [App. 444 (Tr. p. 1008, l. 13-16); App. 439 (Tr. p. 958, l. 6-8)] Not surprisingly, Alan's experts uniformly agreed that this was far below the standard of care, as each of them had identified they had received extensive training prior to conducting the procedure themselves. [App. 373 (Tr. p. 271, l. 23-25; p. 272, l. 1-9); App. 409-410 (Tr. p. 544, l.

[1] This, along with most testimonial evidence regarding informed consent, was entered under an offer of proof.

3-15; 545, entire; p. 546, l. 1-7; p. 548, l. 7-18); App. 466 (Tr. p. 1169, l. 25; p. 1170 entire; p. 1171, l. 1-4)]

After meeting with IHC's surgeons, neither Alan nor his wife, Diane Andersen (Diane) thought the procedure was anything more than a "routine surgery," and they anticipated he would be out of the hospital within a week. [App. 430 (Tr. p. 858, l. 23-25; p. 859, l. 1-3); App. 436 (Tr. p. 902, l. 15-21); App. 435 (Tr. p. 899, l. 2-22; p. 900, l. 7-9); App. 436 (Tr. p. 902, l. 15-21); App. 507 (Supp. Tr. p. 87, l. 18-25); App. 508 (Supp. Tr. p. 88, l. 1-5, 21-25)]

No one prior to the surgery, including Dr. Brown, Dr. Khanna or Dr. Chawla, ever indicated to Alan that his heart was in a very weakened state that made it much less likely he would have a successful surgery as compared with others who required a Bentall procedure. [App. 457 (Tr. p. 1121, l. 25; p. 1122, l. 1-11); App. 507-508 (Supp. Tr. p. 87, l. 18-25; p. 88, l. 1-12)]

Ignorant of Dr. Khanna's lack of necessary training and experience, Alan had the surgery on January 22, 2004. [App. 397 (Tr. p.416, l. 17-22)] Dr. Khanna chose to perform it alone, a decision that Plaintiffs' experts agreed was also below the standard of care, particularly given his

inexperience. [App. 377 (Tr. p. 294, l. 4-19); App. 417 (Tr. p. 593, entire; p. 594, l. 1-11)]

The procedure was so spectacularly unsuccessful that Alan lost his heart, spent months in the hospital, lived with an artificial heart for years, and finally received a heart transplant 2.5 years after the surgery. [App. 385 (Tr. p. 347, l. 14-21); App. 398-399 (Tr. p. 426, l. 10-25; p. 427, 1-8; p. 429, l. 3-10); App. 429 (Tr. p. 856, l. 1-3); App. 442 (Tr. p. 997, l. 7-11); App. 443 (Tr. p. 1003, l. 8-14; p. 1004, l. 7-15)]

Defendants' experts blamed the failure on Alan's "super bad heart," a fact of which, if true, Alan had never been informed. [App. 452 (Tr. p. 1056, l. 14-17); App. 455 (Tr. p. 1075, l. 2-17); App. 486 (Supp. Tr. p. 27, l. 3-7); App. 494-496 (Supp. Tr. p. 35, l. 22-25; p. 36, l. 1-7; p. 37, l. 3-4) App. 498 (Supp. Tr. p. 40, l. 1-16); App. 506 (Supp. Tr. p. 77, l. 2-9)]

Plaintiffs' experts, not surprisingly, said Alan's heart was fine pre-surgery, and the cause of the injury was completely due to Dr. Khanna's failure to perform the procedure properly. [App. 378 (Tr. p. 297, l. 14-19; p. 298, l. 4-21; p. 299, l. 10-15); App. 378-379 (Tr. p. 299, l. 12-15, 22-24; p. 300, l. 4-25; p. 301, l. 4-5, 12-21); App. 381 (Tr. p. 313, l. 6-25; p. 314, l. 1-9; p. 315, l. 1-20); App. 391-392 (Tr. p. 394, l. 2-3; p. 395, l. 24-25; p. 396, l. 1-3, 10-25); App. 393 (Tr. p. 399, l. 3-10, p. 400, l. 23-25; p. 401, l. 1-19);

App. 394 (Tr. p. 404, l. 24-25; p. 405, l. 1-9); App. 406 (Tr. p. 513, l. 3-21; p. 514, l. 10-18); App. 407 (Tr. p. 515, l. 1-20); App. 408 (Tr. p. 521, l. 22-25; p. 522, l. 1-12); App. 410 (Tr. p. 549, l. 7-20); App. 453 (Tr. p. 1065, l. 13-19);App. 467 (Tr. p. 1189, l. 9-16)]

At trial Defendants' expert, Dr. Cuenoud, testified that Alan had a "weak" or "weaker" heart "like a marathon runner," and Defendants' Dr. Eales testified that there was "no question this was a higher risk operation" because Alan had a "super bad heart;" these opinions by Dr. Eales had not previously been disclosed. [App. 452 (Tr. p. 1056, l. 14-17); App. 455 (Tr. p. 1075, l. 2-17); App. 494-496 (Supp. Tr. p. 35, l. 22-25; p. 36, l. 1-7; p. 37, l. 3-4) App. 498 (Supp. Tr. p. 40, l. 1-16); App. 503 (Supp. Tr. p. 50 l. 7-24); App. 506 (Supp. Tr. p. 77, l. 2-9)]

Importantly, Dr. Eales had never previously disclosed that he would give this testimony, which was admitted at trial: "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. 495 (Supp. Tr. p. 36, l. 8-22)]

The trial court refused Plaintiffs' attempt to rebut this testimony by Dr. Eales' testimony, and the absence of any testimony from Alan left the jury free to make the inference that he was informed before the surgery that he

had a "super bad heart" with a significantly higher risk of an unsuccessful operation, but chose to proceed anyway. [Trial Supplemental Transcript (7/21/14) 50:7-51:8]

Argument

I. THE COURT OF APPEALS ERRED WHEN IT FAILED TO REVERSE THE DISTRICT COURT'S SUMMARY JUDGMENT OF AN INFORMED CONSENT CLAIM BASED ON WHETHER PLAINTIFF WAS APPRISED OF THE RISKS OF SURGERY.

Standard of Review: A grant of a motion for summary judgment is reviewed for correction of errors at law. *Hlubek v. Pelecky*, 701 N.W.2d 93, 95 (Iowa 2005)

Preservation of Error: This issue was raised by Plaintiffs, resisted by Defendants, and decided by the district court several times. [App. 270-296, 567-583, 638-653] Therefore, it has been preserved for review. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002)

Discussion:

In its decision, the Court of Appeals determined that the trial court never precluded Plaintiffs from pursuing a claim of lack of informed consent based on Alan having a super-bad heart, but rather that Plaintiffs "misinterpreted" Judge Stovall's September 20, 2011 order; and further, the Court held that Plaintiffs' "misinterpretation" was not reasonable, and

therefore they must bear the brunt of their own mistake. [Opinion (1/25/17 p. 16, 18]

To reach this conclusion, the Court of Appeals gave short shrift to a few significant facts of the trial court's proceedings, including (1) that one judge entered the order and another interpreted it over two years later; and (2) ***everyone***, including both parties and Judge Huppert, interpreted Judge Stovall's order to preclude informed consent prior to and during the trial. Consider this exchange of July 7, 2014, at the beginning of trial when Plaintiffs were trying to have Judge Stovall's order revisited:

> MR. MORGAN: [T]here's been a lot of motion practice on the issue of informed consent, and I'm looking at the ruling on pretrial motions filed 9-20-2011. . . . The Court . . . enters the following ruling . . . 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. And so my appreciation of that is unless he testifies . . . we're not to go into the issue of informed consent. . . .
>
> MS. PENNER: It's our position that Judge Rosenberg granted summary judgment on the informed consent claim back in 2010 . . . . the evidence they were relying on for informed consent does not support an informed consent claim . . . .
>
> MR. MORGAN: [T]he context was Dr. Cuenoud came in and testified . . . . And I read this as . . . allowed to present evidence relating to Dr. Cuenoud's awareness . . . and apprising the plaintiff. That's all I'm asking. 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 . . . .?

MR. MORGAN: Because of their own expert witness's testimony . . .

THE COURT: I'm guessing the defendants disagree . . . .

MS. PENNER: [W]e believe informed consent is out of the case. . . .

THE COURT: [H]ere is where I'm still confused . . . from a lack of sustained involvement in this case . . . . 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 . . . Has there been any effort to replead another informed consent claim since Judge Rosenberg's ruling?

MR. MORGAN: Not to my knowledge.

THE COURT: Okay. All right. Anything else . . . ?

[App. 341 (Tr. p. 34, l. 9-25); App. 342 (Tr. p. 35 l. 1-18, 25); App. 343 (Tr. p. 36 l. 1-25); App. 344 (Tr. p. 47 l. 7-16]

It is clear from this exchange that Judge Huppert, like both parties' attorneys, believed, or at least ruled, that all informed consent claims were precluded, and they were to conduct the trial accordingly. [Id.]

Thus, on both September 20, 2011 and July 2-22, 2014, the Polk County District Court precluded Plaintiffs from raising *any* informed consent claim, including whether Alan was informed he had a "super bad heart" and had a greater risk for a failed surgery; this was clear error, justifying reversal. *See* I.C.A. § 147.137(1)(identifying that informed

consent requires informing of "the known risks, if any, of . . . the loss or loss of function of any organ . . . associated with such procedure . . . [and] the probability of each such risk if reasonably determinable.") *See also 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.") The Court of Appeals' refusal to reverse the trial court conflicts with this Court's decision, justifying further review. Iowa R. App. P. 6.1103(1)(b)(1).

Moreover, even were the Court of Appeals correct, and Judge Stovall never actually precluded the "super bad heart" informed consent claim, as the parties, and the court, all proceeded as if he had because they were all under the same misapprehension of the scope of the judgment, it would be prejudicial and inequitable to place the entire burden of the participants' mutual mistake on Plaintiffs.

It is difficult to find authority directly on point, where the parties and the judge all complied with an earlier judge's order under a mistaken interpretation of it, and the Court of Appeals provided none in its opinion. In other areas of the law, however, and particularly the law of contracts, when all parties operate under a "mutual mistake," none is required to bear the

burden of that mistake, alone. *See Iowa Dept. of Human Services ex rel. Palmer v. Unisys Corp.*, 673 N.W.2d 142, 150 (Iowa 2001) (identifying that "when the parties [to a contract] are mistaken on a basic assumption," it is voidable); *C & J Vantage Leasing Co. v. Wolfe*, 795 N.W.2d 65, 81(Iowa 2011)("The proper remedy for a mutual mistake in the formation of a contract is avoidance"). The Court of Appeals' refusal to reverse the trial court, once again, conflicts with this Court's previous decisions, thus justifying further review. Iowa R. App. P. 6.1103(1)(b)(1).

II. THE COURT OF APPEALS ERRED WHEN IT FAILED TO REVERSE THE DISTRICT COURT'S SUMMARY JUDGMENT OF AN INFORMED CONSENT CLAIM BASED ON DEFENDANT NOT REVEALING HIS LEVEL OF EXPERIENCE.

Standard of Review: A grant of a motion for summary judgment is reviewed for correction of errors at law. *Hlubek v. Pelecky*, 701 N.W.2d 93, 95 (Iowa 2005)

Preservation of Error: This issue was raised by Plaintiffs, resisted by Defendants, and decided by the district court. [App. 20-165] Therefore, it has been preserved for review. *Meier*, 641 N.W.2d at 537.

Discussion:

In its opinion, the Court of Appeals upheld the district court's decision that a surgeon's failure to obtain informed consent regarding his lack of experience is not a basis for recovery. [Opinion (1/25/17) p. 20] As this

presents an important question of law that has not been, but should be, decided by the supreme court, this court should grant further review on the issue. Iowa R. App. P. 6.1103(1)(b)(2).

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).

In the present matter, not only had Dr. Khanna no training in the Bentall procedure and zero experience, Plaintiffs were falsely told the exact opposite of this fact when Dr. Chawla said: "all of my doctors here are experienced and done hundreds of these surgeries." [App. 434 (Tr. p. 895, l. 14-25)] As such, Alan agreed to the procedure believing his surgeon had sufficient experience to perform it properly. App. 434 (Tr. p. 896, l. 4-11)

It is precisely to address such misrepresentations and misapprehensions that courts in other states that also follow the "patient rule" have held that a physician's training and experience is the proper subject of an informed consent claim. *See e.g. Goldberg v. Boone*, 912 A.2d 698 (Md. Ct. App. 2006).

In *Goldberg*, a Maryland doctor had only performed a complex procedure once over the past three years, but did not inform his patient of this. *Id.* at 702. The court determined the doctor's inexperience created a duty to inform his patient "that there were other more experienced surgeons" available. *Id.* (noting that it was "for the jury to determine whether a reasonable person . . . would have deemed this information material.")

Similarly, when a doctor misrepresented his qualifications, by falsely inflating his experience by 600% and not disclosing that he had never performed the procedure in a situation as complex as that presented by that plaintiff, a Wisconsin 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).

In the present case, the Court of Appeals reasoned that as Iowa Code § 147.37 is silent as to any physician-specific information that must be

disclosed, it does not support such an informed consent claim. [Opinion (1/25/17) p. 20]

However, the statute does identify 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 heart surgery such as the Bentall procedure is clearly a known risk that there is a greater likelihood of an unsuccessful surgery, and thus that risk, under the statute, should have been disclosed. *Id.*

While there is no Iowa authority directly on point, none of it clearly prohibits the kind of informed consent claim sought by Plaintiffs either. *See e.g. Pauscher*, 408 N.W.2d at 361(citing the statute with approval but not limiting "known risks"); *cf. Bray v. Hill*, 517 N.W.2d 223 (Iowa Ct. App. 1994)(excluding a physician's probationary status that was due to the "activity of a physician's assistant," but also noting, "[t]he probation did not relate to Dr. Gregory's qualifications as a surgeon.")

Moreover, Plaintiffs experts, Dr. Johnson and Dr. Peetz, both testified that in their opinions 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)]

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, and in particular on his *heart*, had no experience with the procedure. 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, as the Court of Appeals has articulated a previously undecided but important question of law, this Court should grant Plaintiffs' application for further review, in order to settle the issue. Iowa R. App. P. 6.1103(1)(b)(2).

III. THE COURT OF APPEALS ERRED WHEN IT FAILED TO REVERSE THE DISTRICT COURT'S ORDER PRECLUDING TESTIMONY ON REBUTTAL THAT PLAINTIFF WAS NOT INFORMED OF THE RISKS OF SURGERY.

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

Preservation of Error: This issue was raised by Plaintiffs at trial and in their motion and supplemental motion for new trial, resisted by Defendants, and

decided by the district court. [App. 500 (Tr. p. 46 l. 15-22); App. 503 (Tr. p. 50 l. 7-24); App. 567-583, 638-653] Therefore, it has been preserved for review. *Meier*, 641 N.W.2d at 537.

Discussion:

As identified above, the Court of Appeals held that Plaintiffs had never been precluded from presenting evidence in their case-in-chief as to their not being informed of the risks of surgery, and reiterated this point with regard to the trial court's refusal to allow it on rebuttal. [Opinion (1/25/17) p. 22] Plaintiffs rely on their argument, above, and again assert that prior to and during trial, any reasonable interpretation of the trial court's orders was that the court had precluded all informed consent claims, including those of Plaintiffs not being apprised of the risks of surgery.

In its analysis on this point, the Court of Appeals identified that "the district court made it clear that it believed the ruling . . . applied to what Dr. Khanna knew." [Opinion (1/25/17) p. 22] However, the Court of Appeals failed to identify that this clarification of the record came, in the first instance, on September 17, 2014 – two months after the trial. [App. 640]

Rather throughout the trial, including on July 21, 2014 with regard to addressing informed consent to rebut Dr. Eales' testimony, the district court continued to speak of the issue as being precluded in the broadest terms: "I

don't believe that the testimony . . . opens the door to address claims or issues that have already been resolved by the Court. I don't believe it does open the door on the issue of informed consent." [App. 500 (Tr. p. 46 l. 15-22)]

It should also be noted that this was a third attempt at a trial, with the first two mistrials caused by Plaintiffs' previous counsel, and as such Plaintiffs' trial counsel had to be excessively cautious when it came to matters that had been prohibited; consider this statement by Plaintiffs' counsel when he tried to broach the subject of raising informed consent on rebuttal: "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 . . . ." [App. 503 (Tr. p. 50 l. 7-10]

So even if it could be said that the trial court was never mistaken, it certainly was not clear as to the scope of its prohibition, and as such it cannot be said that the Plaintiffs were unreasonable in their interpretation of its words. [App. 341 (Tr. p. 34, l. 9-25); App. 342 (Tr. p. 35 l. 1-18, 25); App. 343 (Tr. p. 36 l. 1-16); App. 344 (Tr. p. 47 l. 7-16); App. 500 (Tr. p. 46 l. 15-22)]

As such, as with its case-in-chief, Plaintiffs should have been allowed to present rebuttal testimony on the issue of a "super bad heart," at least with

regard to Dr. Eales' testimony. *See Carolan*, 553 N.W.2d at 889, 895-896 (when a party presents evidence during its reply, this "lift[s] the prohibition [and] open[s] the door."); *Solbrack v. Fosselman*, 204 N.W.2d 891, 895 (Iowa 1973)(noting rebuttal testimony is allowed to "meet[] new facts put in evidence by an opponent in reply).

On this point, it must be reiterated that while Dr. Cuenoud had previously disclosed his opinion that Alan had a weak heart, Dr. Eales had not. [App. 503 (Tr. p. 50 l. 7-24)] Nonetheless, in his post-trial order, Judge Huppert ignored this distinction and simply lumped all of Defendants' experts together, glossing over the fact that Dr. Eales gave testimony that was never previously disclosed, both as to Alan's "super bad heart" as well as his procedure for getting informed consent. [App. 640-641]

Moreover, this same cursory treatment was mimicked in the Court of Appeals' opinion, where it ignored Dr. Eales' testimony and focused instead on Dr. Cuenoud, even though it was Dr. Eales' testimony that once again brought informed consent back into the proceedings.[2] [Opinion (1/25/17) p. 17-18, 21-23]

Finally, and as argued above, as Dr. Eales' unanticipated testimony about his method of obtaining informed consent, when combined with

[2] Upon a diligent search, Appellants' have been unable to find Dr. Eales' name in the Court of Appeals' opinion. [Opinion (1/25/17) entire]

Plaintiffs' silence, could easily have been inferred by the jury that Alan had been fully apprised of his "super bad heart" and the greater risk of failure because of it, but chose to proceed anyway. And this is precisely why rebuttal testimony should have been allowed. *See Hanrahan v. St. Vincent Hosp.*, 516 F.2d 300, 302 (8th Cir. 1975)(noting rebuttal testimony is proper when it is an "attempt to disprove any of the matters introduced by defendant.")

Therefore, as the Court of Appeals' decision conflicts with earlier Iowa decisions, this Court should grant further review. Iowa R. App. P. 6.1103(1)(b)(1).

Conclusion

For the reasons aforesaid, Plaintiffs-Appellants respectfully request that this Court reverse the Court of Appeals' decision and the judgment of the Polk County District Court and grant Plaintiffs-Appellants a new trial.

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PROOF OF SERVICE AND CERTIFICATE OF FILING

I certify that on the 14 day of February, 2017, I served this document on all parties to this appeal by e-mailing the appropriate number of copies thereof to the following counsel for the parties at the following addresses:

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I further certify that on 14 of February, 2017, 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.

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ATTORNEY'S COST CERTIFICATE

The Appellant's attorney hereby certifies that the cost of printing this document is 0.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) and 6.1103(4) because:

[x] this brief contains **4,551** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1) and 6.1103(4)

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because:

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Marc S. Harding, by John S. Harding — 2/14/17

Signature — Date