No. 15-0943

IN THE SUPREME COURT OF IOWA

SHARI KINSETH AND RICKY KINSETH, co-executors of the estate of LARRY KINSETH, deceased,
Plaintiffs-Appellees/Cross-Appellants,

v.

WEIL-MCLAIN,
Defendant-Appellant/Cross-Appellee,

and

STATE OF IOWA, ex. rel., CIVIL REPARATIONS TRUST FUND,
Intervenor.

Review of Decision of Iowa Court of Appeals
Dated April 19, 2017

AMENDED APPLICATION FOR FURTHER REVIEW

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Court of Appeals erred in holding, contrary to this Court's precedent, that Weil-McLain was not judicially estopped from appealing the compensatory damages judgment—despite its representation to the jury that it would compensate the plaintiffs "based on what you said"—because the statement was made in the same proceeding.

II. Whether the Court of Appeals erred by holding that Weil-McLain had not waived its complaint about closing argument by delaying its objections and motion for mistrial until the day after arguments concluded, thereby precluding the court from addressing the issue through admonishment or instruction.

III. Whether the Court of Appeals erred in failing to give proper deference to the trial court's findings that he could "not conclude that counsel's remarks affected the outcome of the case" and that a mistrial was not warranted.

IV. Whether the Court of Appeals erred in holding that the jury should have been permitted to apportion fault to third-party McDonnell & Miller where there was no substantial evidence of exposure for which McDonnell & Miller could be liable.

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STATEMENT SUPPORTING FURTHER REVIEW

This Court should accept the application for further review because the Court of Appeals' opinion abandoned this Court's precedents and ignored the abuse of discretion standard. If the opinion is allowed to stand, it will undermine the proper administration of justice that the Court of Appeals sought to protect. These issues are of real importance to the state's jurisprudence, the trial courts' management of litigation, and the proper deference the Court of Appeals owes to those trial courts.

First, the Court of Appeals determined that Weil-McLain could not be judicially estopped from taking a position on appeal that directly contradicted its representation to the jury because its irreconcilable positions were taken in the same proceeding. This determination conflicts with *State v. Duncan*, 710 N.W.2d 34, 43 (Iowa 2006), which held the doctrine of judicial estoppel applies when a party takes one position in the trial court and takes a contrary position on appeal *in the same case*—even if the party had been unsuccessful in its position below. *Duncan* holds parties accountable for the positions they take before Iowa's courts and juries. The Court of Appeals' ruling undermines that just policy.

Second, the Court of Appeals held that Weil-McLain had not waived its complaint about closing argument by waiting until the day after arguments had closed, even though Weil-McLain's counsel admitted its objections could no longer be repaired at that point. The Court of Appeals ignored this Court's direction in *Andrews v. Strubl* that "it is the duty of the party aggrieved to timely voice objection…. to give the trial court an opportunity to admonish counsel or instruct the jury as it may see fit." 178 N.W.2d 391, 401 (Iowa 1970). The Court of Appeals thus has issued an opinion that will result in more mistrials—frustrating the efficient administration of justice.

Third, the Court of Appeals failed to give proper deference to the trial court's findings that he could "not conclude that counsel's remarks affected the outcome of the case" and that a mistrial was not warranted. While the Court of Appeals voiced concern about the trial court receiving proper respect from counsel, it then undermined the trial court's authority by failing to defer to its evaluation of the closing argument and potential prejudice. Paying lip service to this Court's decisions granting discretion to the trial court over motions for mistrial and directing

appellate courts to review only for an abuse of that discretion, the Court of Appeals failed to apply that standard.

Finally, the Court of Appeals improperly found that the jury should have been permitted to apportion fault to third-party McDonnell & Miller. Weil-McLain presented no evidence of exposure to asbestos for which McDonnell & Miller could be liable. This Court has held that a defendant's burden in reaching the jury on a third-party's fault is the same as the plaintiff's burden, and the Court of Appeals did not properly apply that standard.

STATEMENT OF THE CASE

In January 2008, Larry Kinseth ("Kinseth") and his wife, Shari Kinseth, brought suit in the District Court for Wright County, seeking damages arising from Kinseth's diagnosis of malignant mesothelioma, a cancer uniquely caused by asbestos exposure. (App. 1, 6). They sued the manufacturers of asbestos-containing products Kinseth was exposed to during his long career as a heating and plumbing service technician, including Weil-McLain. (App. 5-6).

After Kinseth died from mesothelioma in January 2009, Shari Kinseth and Kinseth's son, Ricky Kinseth, were substituted as Plaintiffs to pursue a wrongful death claim. (2nd Am. Pet. p. 2; Order 4/10/12 pp. 1-2). The complaint was later amended to add a claim for punitive damages. (3rd Am. Pet. p. 12; Order 4/10/12 pp. 1-2).

In October 2010, Judge Stephen P. Carroll issued a combined 98-page ruling on Defendants' summary judgment motions based on Iowa's 15-year statute of repose for claims arising out of defects in improvements to real property, Iowa Code § 614.1(11) (2009). (App. 10-107). The court determined that pumps, valves, boilers, and other equipment became improvements to real property when they were

permanently attached to a building, so that claims based on Kinseth's exposure after the equipment was installed were barred. (App. 27-32, 38-39, 41-42, 50, 55, 65-66, 70, 73-74, 77-78, 81). The court distinguished exposures occurring before or during installation, however, finding injury from such exposures to be compensable. (App. 50, 61, 70, 73-75, 78, 81). The court also noted, "Under Iowa law, 'a plaintiff in a products liability case must prove that the injury-causing product was a product manufactured or supplied by the defendant.'" (App. 33).

Summary judgment was denied or granted in whole or in part depending on whether Kinseth had exposure to a defendant's product before or after installation. (App. 105-06). As to Weil-McLain, Plaintiffs' claims based on Kinseth's exposure from tearing out old Weil-McLain boilers were barred, but Plaintiffs could proceed with claims involving asbestos exposure during installation. (App. 77-78, 106).

After a three-and-a-half week trial in April 2014, the jury awarded the Kinseths $4 million in compensatory damages, apportioning 25% fault to Weil-McLain, the sole trial defendant. (App. 676-706). The jury also made a punitive damages finding against Weil-McLain, and awarded $2.5 million in punitive damages, but did not find that Weil-McLain's

conduct was directed at Kinseth. (App. 707-09). Thus, the Iowa Civil Reparations Trust Fund would receive 75% of that award. Iowa Code § 668A.1(2)(b).

Judgment was entered against Weil-McLain for $3.5 million, plus interest and costs. (App. 738-39). Weil-McLain's post-trial motions were denied, with one exception: the court granted a remittitur of medical expenses from $500,000 to $131,233.06, the amount stipulated by the parties. (App. 809, 822).

Weil-McLain timely appealed. (App. 824-28). After full briefing and oral argument, the Court of Appeals reversed and remanded for a new trial. A copy of the Court of Appeals' opinion is attached.

STATEMENT OF FACTS

Kinseth began installing Weil-McLain boilers in 1953. (App. 743-44, 869-70, 882, 884-85, 905, 925). He worked on the installation crew of his family's plumbing and heating business from 1957 to 1963 (App. 884-86, 908-10), installing "hundreds" of boilers. (App. 901-02; *see also* App. 891, 903, 917). He later bought the business and continued work hands-on installing boilers until he retired in 1987. (App. 886-90, 898-900, 904, 906-07, 911, 926, 933, 949-50).

Weil-McLain was a "real popular" brand of boiler. (App. 876; *see also* App. 873-74, 903, 925, 1088-90). Until the 1980s, Kinseth primarily worked installing residential sectional boilers, and Weil-McLain was the largest supplier of such boilers. (App. 923-24, 505, 928-29).

Weil-McLain sectional boilers used asbestos rope and/or asbestos cement as sealants between the sections to prevent the escape of hot, combustible gases. (App. 491-494, 514-16). Most Weil-McLain commercial boilers manufactured in the 1950s, 1960s, and 1970s required both asbestos rope *and* asbestos cement. (App. 853).

Kinseth installed asbestos rope in Weil-McLain boilers, which was supplied by Weil-McLain with the boiler. (App. 876-77, 918-22, 939, 951).

Weil-McLain's rope contained asbestos from the mid-1950s until 1983. (App. 367, 853, 863). But Weil-McLain first used asbestos rope as a sealant in 1955, and even then, rope was used on "very few" Weil-McLain boilers in the late 1950s. (App. 862).

Kinseth personally used asbestos-containing cement products to install boilers. (App. 398-99, 921-22, 931, 963). From 1953 to 1955, Kinseth installed Weil-McLain boilers using only asbestos cement as a sealant. Until 1977, Weil-McLain supplied bags of asbestos cement or powdered asbestos for use in installation of its boilers. (App. 367, 481, 516, 844, 847). One type of powdered asbestos did not have a brand name. (App. 883). Weil-McLain's corporate representative Schuelke admitted that Weil-McLain sold Johns-Manville asbestos cement until 1977, but it repackaged it into unmarked bags. (App. 510, 520, 844, 847). Schuelke confirmed that some of the boilers Kinseth identified used asbestos cement as a sealant, supplied by Weil-McLain. (App. 512-13). Further, for years when Kinseth was installing Weil-McLain boilers, most used asbestos cement. (App. 514). One model Kinseth identified was manufactured from 1953 until 1972 and always used asbestos cement. (App. 856, 862).

Plaintiffs' expert Brodkin testified that Kinseth was regularly exposed to insulating cement used to seal boilers during installation. (App. 372-75, 381-82, 399-400, 403-04, 445). The 100% chrysotile asbestos cement that Weil-McLain supplied with its boilers was essentially raw asbestos, which exposed Kinseth primarily when mixed with water. (App. 375, 378-79). Defense expert Rasmuson also admitted that Weil-McLain boilers contained both asbestos rope and asbestos cement. (App. 541).

Weil-McLain both knew and should have known that its asbestos products could cause fatal disease. As of 1939, Weil-McLain had *actual knowledge* that asbestos exposure causes disease. (App. 845-46). Weil-McLain's expert Rasmuson admitted, for example, that it has been known since the 1930s that inhaling asbestos dust could lead to disabling and fatal lung disease and that it was firmly established by the 1950s that asbestos exposure increases the risk of lung cancer. (App. 548-49). The evidence also showed that asbestos rope and cement have been known to be hazardous since the 1930s. (App. 318, 321-22, 338, 349-51).

Weil-McLain claimed it began placing warnings on its asbestos rope and asbestos cement products in 1974. (App. 517, 857). But this evidence was contradicted, as neither Kinseth nor his brother ever saw asbestos

warnings on Weil-McLain products. (App. 482-83, 964-68). Schuelke himself never saw a warning on Weil-McLain products between 1975 and 1978, and he conceded that a warning no one sees is not a reasonable warning. (App. 517-18, 521-22).

Kinseth died of mesothelioma at the age of 69. (App. 285, 288-91, 422). Plaintiffs' medical experts attributed his disease to his asbestos exposure from Weil-McLain boilers and other asbestos products. (App. 294-99, 410-13, 416-17, 419-21).

ARGUMENT

I. THE COURT OF APPEALS ERRED IN HOLDING WEIL-MCLAIN WAS NOT JUDICIALLY ESTOPPED FROM CHALLENGING COMPENSATORY DAMAGES BECAUSE IT PROMISED THE JURY THAT IT WOULD PAY PLAINTIFFS BASED ON THE VERDICT.

Weil-McLain is judicially estopped from challenging the judgment on compensatory damages because it represented to the jury during the punitive damages phase that it would pay the jury's compensatory damages award. Every issue the Court of Appeals found problematic arose before Weil-McLain promised the jury to pay Plaintiffs based on the compensatory damages verdict.[1] Attempting to discourage a large punitive damages award, defense counsel assured the jury:

> [t]he people at Weil-McLain understand what you have said here.... ***they're going to compensate these folks*** based on what you said....

(App. 726). Weil-McLain's counsel also said that Mr. Kinseth has "been compensated now and his family has been compensated." (Transcript at

[1] The Court of Appeals suggested Plaintiffs' judicial estoppel argument was limited to Weil-McLain's challenge regarding apportionment of fault. Op. at 21-22 n.8. However, Plaintiffs repeatedly argued that "Weil-McLain waived its right to seek a new trial on liability." App. Br. at 23, 51, 60. Estoppel applies to *all* challenges to the compensatory damages judgment.

2562). Weil-McLain is therefore judicially estopped from now contesting liability for the judgment it promised the jury it would pay.

The doctrine of judicial estoppel—or preclusion of inconsistent positions—provides that "[a] party who has, with knowledge of the facts, assumed a particular position in judicial proceedings is estopped to assume a position inconsistent therewith to the prejudice of the adverse party." *State v. Duncan*, 710 N.W.2d 34, 43 (Iowa 2006).

Because Weil-McLain has contended on appeal it is not liable for the jury's verdict, the unmistakable conclusion is that it intentionally misled the jury when it stated that it would pay compensatory damages to the Kinseths based on that verdict. Certainly, Weil-McLain's new position prejudices the Kinseths. Weil-McLain should be judicially estopped from reversing its position on appeal.

The Court of Appeals rejected this argument on the mistaken belief that judicial estoppel does not apply when the representation is made in the same judicial proceeding. Op. at 21-22 n.8. However, in *Duncan*, this Court held that estoppel applies when a party takes one position in the trial court and takes a contrary position on appeal *in the same case*. 710

N.W.2d at 43. In fact, judicial estoppel applied *even though the party had been unsuccessful in the position it took before the lower court. Id.*

This issue is not important merely to the Kinseths, but to the courts:

> More recently, we have described the doctrine as a "'common sense' rule, designed to protect the integrity of the judicial process by preventing deliberately inconsistent—and potentially misleading—assertions from being successfully urged in succeeding tribunals."

Id. at 43 (citation omitted). Inconsistent positions are precluded at different stages of a lawsuit "to protect the courts rather than the litigants, [so that] an appellate court may raise estoppel on its own motion." *Id.* at 43-44.

Weil-McLain staked out a position it hoped would depress the punitive damages award. Whether its promise had the desired effect *or not*, the Court of Appeals' holding that judicial estoppel did not apply conflicts with this Court's precedent and the policy behind it. The ruling should not stand.

II. THE COURT OF APPEALS ERRED IN HOLDING THAT THE TRIAL COURT ABUSED ITS DISCRETION IN DECLINING TO GRANT A MISTRIAL BASED ON PLAINTIFFS' COUNSEL'S CLOSING ARGUMENT.

A. The Court of Appeals erred in holding that a motion for mistrial based on improper argument is timely so long as it is made before the case goes to the jury.

The Court of Appeals found Weil-McLain's motion for mistrial timely simply because it was raised before the case went to the jury. But this Court's precedent mandates that the motion be made at the close of argument *and* before submission to the jury. In *Andrews v. Strubl*, this Court wrote, "objection to the remarks of counsel during final argument *urged at the close of the argument* in a motion for mistrial made before submission to the jury is timely." 178 N.W.2d 391, 401 (Iowa 1970) (emphasis added).

Five years later, in *Rosenberger Enterprises v. Insurance Service Corporation*, the Court did write that "a motion for mistrial is considered timely if made prior to the submission of the case to the jury." 541 N.W.2d 904, 907 (Iowa 1975). But in *Rosenberger*, the defendant informed the court *during closing arguments* that it wanted to make a motion concerning improper argument, and *the court* determined when it would hear that motion (which was actually *after* the case was submitted to the

jury). Moreover, *State v. Nelson*, on which *Rosenberger* relied, is consistent with *Andrews*: "objections to remarks of counsel during final jury argument are timely *if urged at close of argument and* in a motion for mistrial made before submission to the jury." 234 N.W.2d 368, 371 (Iowa 1975) (emphasis added).

Here, Plaintiffs' counsel gave her closing argument the morning of April 24. (App. 594-95). . After more than an hour's break in which to consider Plaintiffs' counsel's argument, (App. 632-33), Weil-McLain said nothing. It did not move for mistrial, seek a curative instruction, or ask the court for guidance. Weil-McLain gave its own closing argument, and Plaintiffs' counsel gave her rebuttal. (App. 633, 638). Still, Weil-McLain said nothing about improper argument, and the court adjourned. (App. 644-45).

Weil-McLain did not move for mistrial—or indicate in any way that it intended to—until the morning of April 25. (App. 710). By this time, it was too late for the trial court to effectively address any concerns through admonishment and/or a curative instruction. Defense counsel acknowledged as much, stating "none of these things can be repaired at this time." (App. 713).

But it was Weil-McLain's duty to raise objections early enough that the court could address and attempt to cure them:

> When an improper remark is made by counsel in the course of jury argument, ***it is the duty of the party aggrieved to timely voice objection.*** This is to ***give the trial court an opportunity to admonish counsel or instruct the jury*** as it may see fit.

Andrews, 178 N.W.2d at 401 (emphasis added).

Weil-McLain gave the trial court no opportunity to cure any prejudice—a fact the Court of Appeals ignored. Weil-McLain's failure to address its concerns at the close of argument undermined any attempt to cure and avoid mistrial, and the Court of Appeals' decision—finding that a motion for mistrial any time before submission of the case to the jury is timely—will only encourage gamesmanship and result in more mistrials. Again, the Court of Appeals defied this Court's direction by not acknowledging Weil-McLain's duty to "timely voice objection [that would] give the trial court an opportunity to admonish counsel or instruct the jury as it may see fit." *Andrews*, 178 N.W.2d at 401.

B. The Court of Appeals failed to properly defer to the trial court.

"The trial court has broad discretion in passing on the propriety of jury argument and [the appellate court should] not reverse unless there has been a clear abuse of such discretion." *Rasmussen v. Thilges*, 174

N.W.2d 384, 391 (Iowa 1970). The trial court is granted "considerable discretion" in determining whether any alleged conduct was so prejudicial it affected the outcome. *Mays v. C. Mac Chambers Co.*, 490 N.W.2d 800, 803 (Iowa 1992); *Smith v. Haugland*, 762 N.W.2d 890, 900 (Iowa Ct. App. 2009). Broad discretion is appropriate because the trial court has the advantage of being present to evaluate the effect of any improper statements. *Mays*, 490 N.W.2d at 803 (citing *Baysinger v. Haney*, 261 Iowa 577, 582, 155 N.W.2d 496, 499 (1968)). The appellate court "will not interfere with the court's determination of such a question unless it is reasonably clear discretion has been abused." *Baysinger*, 261 Iowa at 581, 155 N.W.2d at 498.

The Court of Appeals acknowledged that "[a] district court has broad discretion in ruling on a motion for mistrial," ostensibly recognizing "the trial court's better position to appraise the situation in the context of the full trial." Op. at 7. But while the Court of Appeals purported to apply an abuse of discretion standard, it did not actually defer to the district court's determinations. The Court of Appeals focused instead on its own evaluation of prejudice:

> In ***considering the closing arguments*** in their entirety, ***we conclude*** it appears quite probable a different result would

> have been reached but for the misconduct of plaintiffs' counsel, and therefore, Weil-McLain was prejudiced.

Op. at 16 (emphasis added).

Moreover, in determining prejudice, the appellate court is to consider whether a curative instruction was requested or given. *Smith v. Haugland*, 762 N.W.2d at 900-01. By Weil-McLain's own admission, its delay in moving for mistrial prevented any curative instruction. (App. 713; *see also* App. 821). But the Court of Appeals ignored this issue entirely.

The trial court made the rulings on the motions in limine, heard the arguments, was aware of the opportunities for Weil-McLain to raise objections to Plaintiffs' counsel's closing argument—and its delay in doing so. Given this perspective, the trial court "carefully reviewed the transcript of the closing argument" and, based "[o]n this voluminous record, [found he could] not conclude that counsel's remarks affected the outcome of the case." (App. 820-21). In its concern that "the power and leadership of the trial is [being] taken away," the Court of Appeals did just that—by failing to give the trial court's own evaluation of the closing argument and potential prejudice the deference it was due.

C. Plaintiffs' counsel's closing argument did not require reversal.

The Court of Appeals clearly found statements in Plaintiffs' counsel's closing argument objectionable and an affront to the trial court's authority. Again, the trial court did not respond with the same indignation, (App. 820-22), underscoring the importance of perspective when reviewing the propriety of attorney argument. The trial court perceived no pervasive misconduct that infected the trial and required reversal, notwithstanding the Court of Appeals' re-assessment based on the transcript.

1. Plaintiffs' counsel did not make a rich vs. poor argument.

The Court of Appeals determined that Plaintiffs' counsel repeatedly violated motions in limine prohibiting discussion of the amount Weil-McLain spent on its defense and the relative wealth of Weil-McLain—primarily by discussing the amount defense experts were paid in litigation. Op. at 8-10. However, at the pre-trial hearing, Plaintiffs' counsel clarified that she was *not* agreeing to restrict evidence concerning amounts paid to expert witnesses, which evidence is critical to the issue of bias. (App. 130-32). Weil-McLain did not contest this, and the court recognized the motion as agreed. (App. 132).

Both parties explored the amount paid to Weil-McLain's experts. (App. 300-01, 316-17, 439-40, 529-31). Defense counsel first asked Weil-McLain's expert Rasmuson how much he had been paid to test Weil-McLain products, and Rasmuson testified it was "approximately $540,000 for the study that was released." (App. 528). That sum had not previously been disclosed to Plaintiffs. (App. 533).

When a product manufacturer has sponsored studies of its own product, that "bring[s] their objectivity into question." *Int'l Rehab. Sciences, Inc. v. Sebelius*, 688 F.3d 994, 1002 (9th Cir. 2012). Courts routinely permit cross-examination of expert witnesses with evidence that they relied on studies funded by the party hiring them, including the amounts spent on the studies in question. *See In re Welding Fume Prods. Liab. Litig.*, 534 F. Supp. 2d 761, 763, 769, 771 (N.D. Ohio 2008); *Boren v. BOC Group, Inc.*, 895 N.E.2d 53, 63-64 (Ill. App. 2008).

Defense witness Smith agreed it is important to know if a scientific study has a non-scientific purpose or motivation. (App. 575). When Rasmuson was cross-examined, Weil-McLain never mentioned its motion in limine. (App. 533). Without objection, both defense experts acknowledged that Weil-McLain funded the only two studies supporting

their opinion that asbestos rope and asbestos cement are not hazardous. (App. 535, 543-44, 563). This was a factor the jury was entitled to consider in evaluating the validity of the studies and the experts' opinions. This argument was not an improper comment on Weil-McLain's spending in litigation; it was a proper exploration of defense experts' potential bias.

The Court of Appeals also noted a comment by Plaintiffs' counsel that numbers discussed at trial—for example, money spent on experts and brake literature—were so large they would seem insane to the average person. (App. 628-29). This comment was not a comparison of the parties' relative wealth. In fact, shortly thereafter, Weil-McLain objected that money paid for brake literature was not relevant to this litigation, which was sustained. (App. 643).

2. Weil-McLain was not prejudiced by Plaintiffs' counsel's statement that the jury should "send a message."

Plaintiffs' counsel made a statement about "sending a message" to Weil-McLain in her closing argument—a statement she had agreed she would not make. (App. 133, 189, 628). This was a mistake, but it was an isolated statement and not representative of Plaintiffs' closing statement as a whole, much less representative of the way Plaintiffs' counsel presented the case generally. Shortly after making the statement,

Plaintiffs' counsel told the jury that, aside from punitive damages, all other damages "are what we need to do to make this family whole." (App. 630).

Rather than object, move for mistrial, or request a curative instruction, Weil-McLain repeatedly emphasized the idea of sending (or not sending) a message in its own closing, a fact also ignored by the Court of Appeals:

- "This case is what happened back then, because let's also keep in mind we don't use asbestos in this country anymore. It's just that simple, so we're not *sending messages* about asbestos, because we don't use it." (App. 634).

- "Weil hasn't used the asbestos rope in over 30 years and the cement, cement in over 40 years, so we're *sending messages* about something that just doesn't exist anymore." (App. 634-35).

- "This isn't some global, you know, we need to do this for mankind, we need to *send a message* to America, we need to do all this other stuff, that's not here. This is about what happened 40, 50, and 60 years ago." (App. 636)

- "This is not some global case about *sending messages*, but about asbestos because we don't even use asbestos in this country. This case is about the '50s and the '60s and what happened then." (App. 637).

Plaintiffs' counsel made a single comment about sending a message; Weil-McLain raised the same idea four separate times. The trial court

concluded, "[T]he record reflects that defendant's counsel responded with cogent argument about why the case was not about sending a message." (App. 821). This determination was within the trial court's discretion, but the Court of Appeals does not *mention* Weil-McLain's comments or the trial court's level-headed basis for finding no prejudice. This omission does not reflect proper deference to the trial court.

3. Reference to Weil-McLain's litigation history could not be prejudicial because Weil-McLain's corporate representative volunteered the testimony.

The Court of Appeals also pointed to Plaintiffs' counsel's comment recognizing Weil-McLain's 30 years of asbestos litigation as an improper closing argument, violating the trial court's order in limine. But Weil-McLain's corporate representative volunteered that Weil-McLain first became involved in asbestos litigation in the 1980s! (App. 520). He also acknowledged that Weil-McLain only hired experts to study asbestos exposure from its boilers after it was sued. (App. 506). Given that the evidence was introduced by Weil-McLain, Plaintiffs' counsel's passing reference to it in closing argument cannot have resulted in such prejudice as to require reversal.

4. There was no "jury nullification" argument.

The Court of Appeals found that Plaintiffs' counsel invited jury nullification by discussing the statute of repose in closing argument. "Jury nullification exalts the goal of particularized justice above the ideal of the rule of law." *State v. Hendrickson*, 444 N.W.2d 468, 473 (Iowa 1989). During opening, Plaintiffs' counsel explained the statute of repose and informed the jurors that they could consider evidence of tear-out exposure, but not in allocating fault. (App. 280-81). No objection. Thereafter, Plaintiffs carefully asked their experts about Kinseth's exposure to asbestos from Weil-McLain boilers only during installation. (App. 294-96, 397, 404). In closing, Plaintiffs' counsel again explained that only exposures during installation were compensable. Again, no objection. She never invited the jury to ignore the law, questioned its application, or, for example, asked jurors to follow their own conscience rather than the law. (App. 609-10). Plaintiffs' counsel's comments were no invitation to jury nullification.

The trial court instructed the jury that it could consider Kinseth's total asbestos exposure but that tear-out exposures could not be used to allocate fault. (App. 394-96, 813). The jury is presumed to have followed

the court's instructions absent evidence to the contrary. *State v. Morrison*, 368 N.W.2d 173, 176 (Iowa 1985). There is no evidence—and the Court of Appeals pointed to none—that the jury did not follow the court's instructions. Comments about the statute of repose did not cause prejudice to Weil-McLain.

III. THE COURT OF APPEALS ERRED IN HOLDING THAT THE FAULT OF THIRD-PARTY MCDONNELL & MILLER SHOULD HAVE BEEN SUBMITTED TO THE JURY WHEN THERE WAS NO SUBSTANTIAL EVIDENCE OF COMPENSABLE EXPOSURE.

The Court of Appeals largely affirmed the trial court's ruling on the inclusion of third parties for allocation of fault. However, the Court of Appeals held that the fault of McDonnell & Miller should have been submitted to the jury for allocation. This decision conflicts with multiple decisions of this Court because it does not hold a defendant to the same standard as a plaintiff to show substantial evidence of fault to justify submission of the issue to a jury.

A. Weil-McLain had the burden of establishing the fault of third parties with substantial evidence.

The jury does not automatically consider the fault of settled parties. *See Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854, 863-64 (Iowa 1994). Instead, a comparative fault instruction must be supported

by substantial evidence in the record. *See Wolbers v. Finley Hosp.*, 673 N.W.2d 728, 731-732 (Iowa 2003); *Vasconez v. Mills*, 651 N.W.2d 48, 52 (Iowa 2002). An instruction should be refused if it rests on speculation. *Thompson v. City of Des Moines*, 564 N.W.2d 839, 846 (Iowa 1997). "Evidence is substantial if a reasonable person would accept it as adequate to reach a conclusion." *Vasconez*, 651 N.W.2d at 52. There is no "principled distinction" for treating causation differently when a defendant seeks to prove it. *Greenwood v. Mitchell*, 621 N.W.2d 200, 207 (Iowa 2001). A released party's fault should only be submitted when there is sufficient evidence to support it. *See Smith v. Air Feeds*, 556 N.W.2d 160, 164 (Iowa Ct. App. 1996).

As the Court of Appeals implicitly found, fault cannot be allocated to an entity with a complete defense to the claim. In *Pepper v. Star Equipment*, this Court wrote:

> [I]f a defendant or third-party defendant has a defense to the plaintiff's claim, that party's fault is not to be considered in the allocation of aggregate causal fault by the trier of fact.
>
> The rule … has not been limited to situations in which there is an absence of causal fault on the part of the extra party. It also applies when that party has a special defense to the plaintiff's claim, irrespective of fault.

484 N.W.2d 156, 157-58 (Iowa 1992) (internal citations omitted).

The comparative fault statute, Iowa Code § 668.3, does not provide that fault must be allocated to all categories of parties in all cases, regardless of the state of the evidence. The district court carefully studied the evidence of third-party fault presented by Weil-McLain and correctly determined that Weil-McLain failed to provide sufficient evidence that McDonnell & Miller could be submitted to the jury for allocation of fault. (App. 592, 706).

B. The evidence of exposure during refurbishment of McDonnell & Miller valves was irrelevant.

Weil-McLain and other defendants successfully invoked the statute of repose, convincing the trial court that recovery for exposures from the removal of asbestos materials was barred because the attached products had become improvements to real property. (App. 35-42, 50-55, 58, 73-74, 77-78).[2] That ruling applies equally to Weil-McLain concerning the apportionment of third-party fault. Just Plaintiffs' claims against pump and valve manufacturers based on refurbishment work were barred by the statute of repose, Weil-McLain's attempt to apportion fault to pump

[2] Plaintiffs resisted summary judgment on the statute of repose, arguing that Iowa law does not bar recovery for claims based on exposure from ordinary repair work that does not enhance the capital value of real property. (App. 37-41). *See also St. Paul's Evangelical Lutheran Church v. City of Webster City*, 766 N.W.2d 796, 799-800 (Iowa 2009).

and valve manufacturers based on refurbishment work was similarly barred and evidence of exposure during refurbishment was irrelevant.

C. McDonnell & Miller could not be held liable for any exposure to asbestos during installation.

Weil-McLain cited no testimony from Kinseth concerning his installation of McDonnell & Miller valves. The Court of Appeals, however, was persuaded by evidence that the valves contained asbestos packing and gaskets. Op. at 23.[3] But the uncontradicted evidence reflects that Kinseth had no contact with those components at the point of installation; in fact, he recognized those components as asbestos only because he saw them when the valves were later taken apart during repair or refurbishment. (Kinseth Depo., Vol. V, at 1085:22-1088:12).

The Court of Appeals also noted that Kinseth sometimes had to "cut an asbestos gasket to fit the valve." Op. at 23. However, Kinseth's only contact with gaskets during installation was with the flange gaskets: "The only asbestos I would have had [during installation] is in the

[3] The trial court found insufficient evidence to support submission of McDonnell & Miller, but did not articulate reasoning. (App. 592). Plaintiffs have consistently argued that the record does not contain substantial evidence of compensable exposure to McDonnell & Miller valves. This Court must "affirm an appeal where any proper basis appears for a trial court's ruling, even though it is not one upon which the court based its holding." *Citizens First Nat'l Bank v. Hoyt*, 297 N.W.2d 329, 332 (Iowa 1980).

flanges." (Kinseth Depo., Vol. I, at 224:18-23). Sometimes McDonnell & Miller provided precut flange gaskets, (Kinseth Depo., Vol. V, at 1089:3-20, 1090:5-1091:12), but Weil-McLain's expert testified that installing precut gaskets would not have exposed Kinseth to significant asbestos. (App. 571-72, 574). Kinseth did cut some flange gaskets, but these were generally manufactured by Garlock or John Crane—not McDonnell & Miller. (Kinseth Depo. Vol. 1, at 223:2-225:3, 290:2-5, 291:25-292:6; Kinseth Depo., Vol. II, at 290:2-5, 291:25-292:6).

As the trial court recognized, "Under Iowa law, 'a plaintiff in a products liability case must prove that the injury-causing product was a product manufactured or supplied by the defendant.'" (App. 33, citing *Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854, 858 (Iowa 1994) (quoting *Mulcahy v. Eli Lilly & Co.*, 386 N.W.2d 67, 76 (Iowa 1986). *See also Huber v. Watson*, 568 N.W.2d 787, 790 (Iowa 1997)). Because McDonnell & Miller did not manufacture or supply flange gaskets that could have exposed Kinseth to asbestos during installation, the evidence did not support attributing fault to McDonnell & Miller. The Court of Appeals' determination that the fault of McDonnell & Miller should have

been submitted to the jury is without support, conflicts with this Court's decisions and creates confusion on the apportionment of fault issue.

CONCLUSION

Therefore, Petitioners/Appellees respectfully request the Supreme Court grant further review and, upon such review, vacate the Court of Appeals' opinion and affirm the trial court's judgment.

Respectfully submitted,

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CERTIFICATE OF COST

Pursuant to Iowa R. App. P. 6.702 and Iowa R. Elec. P. 16.1221, Petitioners/Appellees Application for Further Review was filed and served electronically via the EDMS system. The cost of duplication was $0.

/s/Misty A. Farris
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May 10, 2017
Date

CERTIFICATE OF COMPLIANCE

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

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/s/Misty A. Farris
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May 10, 2017
Date

CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies that on May 10, 2017, the above and foregoing Amended Application for Further Review was electronically filed with the Clerk of Court for the Supreme Court of Iowa using the EDMS system and electronically served on the following:

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IN THE COURT OF APPEALS OF IOWA

No. 15-0943
Filed April 19, 2017

SHARI KINSETH and RICKY KINSETH, Co-executors of the Estate of Larry Kinseth, Deceased, and SHARI KINSETH, Individually,
Plaintiffs-Appellees/Cross-Appellants,

vs.

WEIL-McLAIN COMPANY,
Defendant-Appellant/Cross-Appellee,

and

STATE OF IOWA, ex. rel. CIVIL REPARATIONS TRUST FUND,
Intervenor.

Appeal from the Iowa District Court for Wright County, Stephen P. Carroll, Judge.

Defendant appeals the jury's award of damages and punitive damages to plaintiffs on theories of negligence, product liability, and breach of implied warranty of merchantability, and plaintiffs cross-appeal. **REVERSED AND REMANDED FOR NEW TRIAL ON THE APPEAL, AFFIRMED ON THE CROSS-APPEAL.**

Richard C. Godfrey, Scott W. Fowkes, Howard M. Kaplan, and Ryan J. Moorman of Kirkland & Ellis L.L.P., Chicago, Illinois;, William R. Hughes Jr. and

Robert M. Livingston of Stuart Tinley Law Firm, L.L.P., Council Bluffs; and Edward J. McCambridge and Jason P. Eckerly of Segal McCambridge Singer & Mahoney, Ltd., Chicago, Illinois; for defendant-appellant/cross-appellee.

Misty Farris and Lisa W. Shirley of Simon Greenstone Panatier Barlett, P.C., Dallas, Texas, and James H. Cook of Dutton, Braun, Staack & Hellman, P.L.C., Waterloo, for plaintiffs-appellees/cross-appellants.

Thomas J. Miller, Attorney General, and Richard E. Mull, Assistant Attorney General, for intervenor.

Heard by Mullins, P.J., and Bower and McDonald, JJ.

BOWER, Judge.

Weil-McLain Company appeals the jury's award of damages and punitive damages to plaintiffs on theories of negligence, product liability, and breach of implied warranty of merchantability arising from the death of Larry Kinseth as a result of exposure to asbestos, and plaintiffs cross-appeal. We find the district court abused its discretion in denying Weil-McLain's motions for mistrial due to statements of plaintiffs' counsel during closing arguments, in violation of the court's motion in limine order. We affirm the district court's rulings on the admissibility of evidence. We conclude the district court erred by not including McDonnell & Miller valves on the special verdict form, but otherwise affirm the court's determination of which entities should be included in the special verdict form for the allocation of fault. Due to our decision reversing and remanding for a new trial, we make no ruling on the award of punitive damages. We reverse and remand for new trial on the appeal and affirm on the cross-appeal.

I. Background Facts & Proceedings

Kinseth worked in the heating and plumbing industry beginning in 1957. As part of his work, he tore out old boilers and installed new boilers, both in residential and commercial applications. At the time Kinseth was working in the heating and plumbing industry, boiler manufacturers sealed their products with asbestos as it was a fire retardant, and Kinseth was exposed to asbestos dust. Some of the boilers Kinseth installed were manufactured by Weil-McLain.

Kinseth developed mesothelioma, a type of cancer caused by exposure to asbestos. On January 7, 2008, Kinseth and his wife, Shari Kinseth, filed suit against forty-two companies he claimed were involved in his exposure to

asbestos, including Weil-McLain, on theories of negligence, product liability, and breach of an implied warranty of merchantability. Due to Kinseth's poor health, his testimony was preserved in an extensive videotaped deposition. Kinseth died in 2009, and his wife and son continued the action as co-executors of his estate.[1]

The district court determined Kinseth's claims arising from tearing out old boilers were barred by the Iowa statute of repose, Iowa Code section 614.1(11) (2007). The court determined, "once the boiler was installed, complete with the asbestos rope sealing, it became an improvement to real estate within the meaning of the Iowa statute of repose."[2] On the other hand, the court concluded Kinseth's exposure to asbestos before and during the installation process was not barred by the statute of repose. Based on this reasoning, the court granted partial summary judgment to Weil-McLain. Several defendants were removed from the case through summary judgment, and others settled with Kinseth; eventually, only Weil-McLain remained as a defendant.

Prior to trial, Weil-McLain filed a motion in limine. The district court ruled Kinseth could not refer to the amount of money Weil-McLain spent on its defense or make any argument about the need for the jury to send the defendant a message through its verdict. Weil-McLain received a citation in 1974 from the Occupational Safety and Health Administration (OSHA) for asbestos exposure at its manufacturing plant in Indiana. After the citation, Weil-McLain began attaching a warning to its asbestos-containing products. The district court determined the OSHA citation was not relevant on the issue of causation but was

[1] Kinseth's wife also continued her claim for loss of consortium. We will refer to plaintiffs collectively as "Kinseth."
[2] The parties have not appealed the district court's ruling on this issue.

relevant to punitive damages on the issue of the company's failure to warn prior to the citation and plaintiffs' expert could discuss it as "reliance" material.

The case proceeded to a jury trial. Plaintiffs claimed Kinseth had been exposed to asbestos rope and asbestos cement used in installing Weil-McLain boilers and dust arising from these products caused him to contract mesothelioma. Plaintiffs claimed Weil-McLain should have provided a warning that exposure to asbestos was dangerous. Weil-McLain claimed the evidence showed Kinseth only installed Weil-McLain boilers using asbestos rope, which contained chrysotile asbestos, and this type of asbestos did not cause mesothelioma. The company also claimed Kinseth was exposed to asbestos dust from the products of several other manufacturers and the other manufacturers did not provide warnings during the time period in question.

After closing arguments, Weil-McLain filed a motion for a mistrial, claiming counsel for Kinseth violated the court's rulings on the motion in limine in statements to the jury. The court denied the motion. After arguments on punitive damages, Weil-McLain filed a new motion for mistrial, and this motion was also denied by the court.

The jury returned a verdict awarding Kinseth $4 million in compensatory damages. Weil-McLain was found to be twenty-five percent at fault.[3] Additionally, Kinseth's wife was awarded $1 million for loss of consortium, and Weil-McLain was ordered to pay her $250,000. The jury also found Weil-McLain should pay $2.5 million in punitive damages. Kinseth's estate was awarded

[3] The judgment order states Weil-McLain was responsible to pay Kinseth's estate $875,000.

twenty-five percent of this amount, $625,000, and the remainder, $1,875,000, is to be paid to the Iowa Civil Reparations Trust Fund.

Weil-McLain filed motions for a new trial and for judgment notwithstanding the verdict. Kinseth also filed a contingent motion for new trial. The district court issued a combined ruling on these post-trial motions, finding: (1) the jury instructions were not improper; (2) there was not substantial evidence in the record to show Kinseth was exposed to asbestos from products manufactured by Peerless Pump Co., McDonnell & Miller, Bell & Gossett, Hoffman, and DAP, Inc., and the court did not submit these companies for consideration of fault; (3) the jury properly considered the fault of two bankrupt companies, Hercules, Inc. and Johns-Manville Corp.; (4) there was not sufficient evidence to submit a jury instruction on the comparative fault of Kinseth; (5) the award for medical expenses should be reduced from $500,000 to $131,233, based on the parties' stipulation;[4] (6) Weil-McLain was not entitled to pro tanto credit for plaintiffs' settlements with other companies; (7) due to the statute of repose, although Kinseth could not be compensated for exposure during tear outs of boilers, this did not preclude the jury from hearing evidence of such exposure; (8) the award of punitive damages was not excessive; (9) there was evidence to support punitive damages because Weil-McLain delayed issuing warnings and it did not test its products for asbestos exposure; and (10) remarks by plaintiffs' counsel during closing arguments did not affect the outcome of the case.

[4] Based on the court's ruling reducing the amount of the award for medical expenses, the award for compensatory damages was reduced from $4 million to $3,631,233.

Weil-McLain has appealed, claiming the district court should have granted its motions for mistrial due to the statements of plaintiffs' counsel during closing arguments, the court abused its discretion in admitting certain evidence, the jury should have considered the fault of three additional entities, and punitive damages were improper. Kinseth has cross-appealed, claiming the court should not have permitted the jury to apportion fault to two bankrupt entities.

II. Motions for Mistrial

Weil-McLain claims the district court should have granted its motions for mistrial because counsel for plaintiffs repeatedly violated the court's rulings during closing arguments.

"The primary purpose of a motion in limine is to avoid disclosing to the jury prejudicial matters which may compel declaring a mistrial." *Heldenbrand v. Exec. Council of Iowa*, 218 N.W.2d 628, 636 (Iowa 1974) (citation omitted). Where there has been a violation of a motion in limine, a motion for mistrial may be granted. *See Twyford v. Weber*, 220 N.W.2d 919, 923 (Iowa 1974). A party seeking a mistrial must show the opposing counsel's conduct was prejudicial. *Mays v. C. Mac Chambers Co.*, 490 N.W.2d 800, 803 (Iowa 1992). "'[U]nless it appears probable a different result would have been reached but for claimed misconduct of counsel for the prevailing party,' we are not warranted in granting a new trial." *Id.* (citation omitted).

A district court has broad discretion in ruling on a motion for mistrial. *Fry v. Blauvelt*, 818 N.W.2d 123, 132 (Iowa 2012). "Such discretion is a recognition of the trial court's better position to appraise the situation in the context of the full trial." *Id.* (citation omitted). We review a district court's ruling on a motion for

mistrial for an abuse of discretion. *Crookham v. Riley*, 584 N.W.2d 258, 268 (Iowa 1998).

A. *Statements During Closing Arguments*

1. Prior to trial, Weil-McLain filed a motion in limine seeking to prohibit plaintiffs from mentioning "the amount of money or time spent by the Defendant in the defense of this matter, including attorney time and expenses and expert witness time and expenses." At the hearing on the motion in limine, as to the amount of money or time spent by Weil-McLain on defense, counsel for plaintiffs stated:

> I think what they are trying to prohibit here is talking about how much money they spent on their lawyers or preparing for trial and not trying to talk about how much their experts are paid or how much time their corporate representative spent in preparation. If that's all they mean, it's agreed.

The district court granted the motion in limine.

During closing arguments, counsel for plaintiffs stated: (1) "they had a very neat expensive graphic"; (2) "Here I cannot imagine being in your situation where you had experts on both sides that make obscene money. The money in this litigation to me is amazing, so who do you believe?"; (3) "You don't have to believe experts that are paid a lot of money, you can see it"; (4) "because even from their bought and paid-for science . . . they would have been violating OSHA"; (5) "you heard that there are 50 scientists that have published over 1,000 articles, they disagreed with what their paid expert says"; (6) "they paid a company tens of thousands of dollars to create a graphic to show you that"; (7) "35 percent of [the fourteen million she was asking in compensatory damages] is 4.9 million. That's half of what Mr. Rasmuson [defense expert] has made in two-

and-a-half years as a 43 year old man. Half"; (8) "Then explain to me why you spent half a million dollars for the test if it was as simple as people cutting rope a couple of times?"; and (9) on punitive damages, "What I suggest is anything that's in that one-to-three ratio of 4 million to 20 million is the right number. It is certainly within the realms of what they have paid in this litigation."[5] Additionally, she reviewed her arguments by stating:

> You heard Mr. Rasmuson made $9 to $10 million in less than two-and-a-half years. You heard Weil-McLain spent half a million dollars on the study that could have been done as easily as the two minutes we saw on this floor. We heard that to show us how a boiler is installed, an issue that's not even disputed, they hire DecisionQuest and spend tens of thousands of dollars for it. We've heard in this industry that $30 million went not to people suffering from mesothelioma, but to create literature to say brakes are safe.[6]

We conclude counsel for plaintiffs repeatedly violated the district court's ruling prohibiting the parties from mentioning the amount of money Weil-McLain was spending in defense in this litigation.

2. In a related subject, the motion in limine also sought to prohibit "[a]ny reference to the wealth, power, corporate size or assets of Weil-McLain which would suggest to the jury that the jury ought to compare the relative wealth of the Plaintiffs and Defendant in answering the jury questions." On statements about the wealth and assets of Weil-McLain, plaintiffs' counsel stated:

> I absolutely agree with the concept. I'm concerned with the lack of specificity in what that means. . . . Where I think they have a problem is if you're trying to suggest because they have wealth, because they have power and this was a little family, think about the imbalance. I agree that's not appropriate. But there are scenarios where the assets or abilities of the corporation are just

[5] An objection to this statement was sustained.
[6] A relevancy objection to this last statement was sustained.

> relevant to other issues, and I just wanted to be clear I'm going to go into those. Otherwise we have an agreement.

The district court granted Weil-McLain's motion in limine on this ground.

During closing arguments, counsel for plaintiffs stated, "you are trying to figure out how to make a company value pain and suffering of another human being. A company that values money maybe differently than people do in Wright County." She also stated, "as you consider the damages in this case, you are speaking from people in this community to make sure that the people who are hurt in this community are heard from a company that values things differently than I think most of us do." Counsel for plaintiffs compared the wealth of the company with the plaintiffs' situation, stating:

> And I want to acknowledge $100,000 would make this family rich. I mean's there's no question about that, that is an insane amount of money to most people. The numbers we talk about here of $30 million for brake stuff and $10 million are insane amounts of money for real people.

We determine plaintiffs' counsel's statements violated the district court's ruling on the motion in limine. Additionally, the statements as to the amount of money spent on the defense of the case also violate this ruling as statements about the large amounts spent by Weil-McLain on litigation highlight the corporate wealth of the company.

3. The motion in limine requested a prohibition on statements making "[a]ny references, statements or arguments that the jury should attempt to send Defendant a message." At the hearing on the motion, counsel for plaintiffs stated, "I never use the language sending defendant a message, so I largely agree to this," and "But I just want to be very clear that I will not—and I'll state it

on the record—state, 'You need to send the defendants a message.'" The district court granted the motion in limine prohibiting the parties from using language about sending defendant a message.

During closing arguments, plaintiffs' counsel stated, "It is not about what the family needs, it is about sending a message to a company who you've evaluated how they spend some of their money, you've evaluated some of their actions with studies, what message they need in order to value this appropriately." The record shows counsel for plaintiffs again clearly violated the district court's ruling on the motion in limine.

4. The motion in limine sought to prohibit evidence of other lawsuits, and counsel for plaintiffs agreed there should be no mention of any other lawsuits. In closing arguments for punitive damages she stated, "The last thing, and this is the one that they said is we have hurt you, they have their lawyer say it, no one at the company actually takes the stand and said that and having 30 years of lawsuits they claim they have been heard."[7]

We determine the motion in limine on this ground was violated as well.

5. In addition to the violations of the district court's ruling on the motion in limine, Weil-McLain claimed plaintiffs' counsel improperly requested the jury to disregard the statute of repose. During closing arguments, counsel for plaintiffs stated:

> I want to talk about the importance of the statute of repose. All of that work tearing out insulation to Weil-McLain boilers cannot be considered. Can't. It is a rule, it says in every meso[thelioma] case functionally, because you don't find out you're sick until 15 years later you just can't do anything to it and it applies to Weil just

[7] An objection by Weil-McLain to this statement was sustained.

> like it applies to all the other companies here, it really changed the nature of this case.

Shortly thereafter she stated,

> [A]nd so the effect of this rule, a rule I candidly don't understand, is not only do you not get to consider tearout of Weil-McLain boilers that happened many, many, many times, but you don't get to consider the fault of [another manufacturer] and where the actual exposures occurred. That is the effect of this bar after 15 years of exposure.

We determine plaintiffs' counsel engaged in improper closing statements by questioning the application of the statute of repose, which barred some of plaintiffs' claims. The court determines the law to be applied in a case and informs the jurors through instructions. *See State v. Willis*, 218 N.W.2d 921, 924 (Iowa 1974). "It is the duty of the jury to follow the instructions of the court." *Hall v. City of West Des Moines*, 62 N.W.2d 734, 738 (Iowa 1954). Jury nullification, or permitting the jury to determine the law and the facts, is not permitted under Iowa law. *State v. Hamann*, 285 N.W.2d 180, 184 (Iowa 1979).

6. Weil-McLain claims counsel for plaintiffs improperly referenced an OSHA citation the company received in 1974. Prior to trial, the district court determined the OSHA citation was not relevant on the issue of causation, but was relevant to the punitive damages claim and plaintiffs' expert could discuss it as "reliance" material. The court, therefore, denied Weil-McLain's motion in limine to bar evidence of the OSHA citation but ruled evidence of the citation would be tightly circumscribed. During the course of the trial, however, the court determined Weil-McLain had opened the door to fuller use of the OSHA citation.

On appeal, Weil-McLain's complains about references to the OSHA citation during closing arguments based on the court's pre-trial ruling limiting the

use of the evidence. Based on the court's later ruling Weil-McLain had opened the door to use of the evidence, we conclude counsel for plaintiffs did not violate the court's rulings by discussing the OSHA citation during closing arguments. *See State v. Parker*, 747 N.W.2d 196, 206 (Iowa 2008) (noting a party may open the door to otherwise inadmissible evidence by introducing evidence on the subject).

B. *Timeliness of Motions for Mistrial*

After closing rebuttal arguments by plaintiffs' counsel on April 24, 2014, the court noted it was 4:30 p.m. and stated proceedings would resume in the morning at 9:00 a.m. When court resumed at 9:02 a.m. on April 25, 2014, Weil-McLain made an oral motion for a mistrial based on improper arguments by plaintiffs' counsel during closing arguments. Weil-McLain raised several claims, including that plaintiffs' counsel (1) improperly argued the award of pain and suffering should reflect Weil-McLain did not evaluate things enough, (2) stated the jurors should send Weil-McLain a message, (3) argued corporations should not spend millions of dollars to defend litigation, (4) improperly talked about the money made by Weil-McLain's expert witnesses, and (5) raised arguments seeking damages based on sympathy, rather than the facts of the case. The district court ruled, "aside from the brake line issue, I was not given the opportunity to pass on these things during closing argument by way of a timely objection, so I'm overruling the Defendant's motion for mistrial on each and every respect."

"When an improper remark is made by counsel in the course of jury argument, it is the duty of the party aggrieved to timely voice objection."

Andrews v. Struble, 178 N.W.2d 391, 401 (Iowa 1970). "[I]t is not timely to await the result of the trial and then first complain by allegation in motion for new trial in the event of an adverse verdict." *Id.* A motion for mistrial based on remarks of counsel during closing argument is timely if it is made before the case is submitted to the jury. *Id.* at 402. An objection to opposing counsel's statements may be made for the first time in a motion for mistrial. *Id.*

We conclude Weil-McLain's motion for mistrial was timely. The motion was made as soon as court resumed after the end of closing arguments and before the case was submitted to the jury. We determine the district court should have considered the motion on the merits, rather than finding it was untimely because Weil-McLain did not raise objections during the arguments. *See State v. Romeo*, 542 N.W.2d 543, 552 n.5 (Iowa 1996) ("It is not always essential that opposing counsel interrupt closing argument with an objection.").

After closing arguments on punitive damages, Weil-McLain against asked for a mistrial, stating counsel for plaintiffs argued Weil-McLain had been engaged in litigation for thirty years and improperly raised the issue of how much Weil-McLain was spending defending this litigation and other cases. The district court denied the renewed motion for mistrial. This motion was also timely.

C. *Discussion*

The district court addressed Weil-McLain's arguments concerning the closing arguments in ruling on the post-trial motions. The court concluded, "On this voluminous record, I cannot conclude that counsel's remarks affected the outcome of the case." The court determined, "The instant case, however, is not

one where I can conclude a manifest injustice or, if you will, a substantial injustice, has occurred."

"Counsel is entitled to some latitude during closing argument in analyzing the evidence admitted in the trial." *State v. Phillips*, 226 N.W.2d 16, 19 (Iowa 1975). An attorney "may draw conclusions and argue all permissible inferences which may reasonably flow from the record which do not misstate the facts." *Id.* Alternatively, an attorney has no right to create evidence nor to interject personal beliefs. *Id.* "It is for the jury to determine the logic and weight of the conclusions drawn." *Id.*

"When determining liability it is improper for the jury to consider the relative wealth of the parties." *Rosenberger Enters., Inc. v. Ins. Serv. Corp.*, 541 N.W.2d 904, 907 (Iowa Ct. App. 1995). The Iowa Supreme Court has determined the discussion of the parties' earning power or "any *comparison* of respective earning powers or financial or economic conditions is entirely improper" to the process of determining damages in a tort action. *Burke v. Reiter,* 42 N.W.2d 907, 912 (Iowa 1950). A discussion during closing argument of the relative wealth of the parties may improperly influence jurors and in turn result in the necessity of a new trial. *Id.*; *Rosenberger Enters.*, 541 N.W.2d at 907.

While any one improper statement might not constitute prejudicial error, the cumulative effect of several improper statements may give rise to a claim of prejudice. *Andrews*, 178 N.W.2d at 402. Counsel's closing arguments should be viewed in their entirety to determine whether they caused prejudice. *Rosenberger Enters.*, 541 N.W.2d at 909 ("When viewed in its entirety, we

conclude the cumulative effect of Rosenberger's counsel's closing argument was an impassioned and inflammatory speech that likely caused severe prejudice to the defendant.").

In addition, "[w]hether the incident was isolated or one of many is also relevant; prejudice results more readily from persistent efforts to place prejudicial evidence before the jury." *State v. Greene*, 592 N.W.2d 24, 32 (Iowa 1999). In this regard, we consider whether statements during closing arguments were a "slip of the tongue," or whether an attorney should have been aware the statements were improper. *See Andrews*, 178 N.W.2d at 402 ("Attorneys engaged in the trial of cases to a jury know or ought to know the purposes of arguments to juries.").

In reviewing the closing arguments by plaintiffs' counsel in this case, we determine the district court abused its discretion in denying Weil-McLain's motion for mistrial. Plaintiff's counsel persistently made statements referring to matters that were barred by the court's ruling on the motion in limine. In particular, counsel referred several times to the amount of money Weil-McLain was spending in defending the case and this in turn highlighted the corporate wealth of Weil-McLain and compared it to the circumstances of plaintiffs. Counsel for plaintiffs also improperly told the jury to send Weil-McLain a message and told them Weil-McLain had been engaged in litigation for thirty years, also contrary to the pre-trial rulings. This continuous disregard for the court's rulings could not have been "a slip of the tongue" and was not an isolated incident. In considering the closing arguments in their entirety, we conclude it appears quite probable a

different result would have been reached but for the misconduct of plaintiffs' counsel, and therefore, Weil-McLain was prejudiced.

We do not reverse this case without pause and great consideration. We are keenly aware of the pressures on the trial court to bring cases, such as this, to a conclusion after many days of trial and dozens of witnesses coupled with the demands that continue to be placed on the dockets of trial judges. However, we cannot allow the continued violation of a judge's ruling to be so trampled upon that the power and leadership of the trial is taken away. Rulings on motions in limine, like all rulings, are binding upon the parties and should be readily enforced by the courts.

Based on the multitude of improper statements during closing arguments, we determine the district court's decision must be reversed and the case remanded for a new trial.

III. Admissibility of Evidence

"Because we reverse and remand this case for retrial, we will review other evidentiary issues raised at trial that may arise on retrial." *State v. Nance*, 533 N.W.2d 557, 561 (Iowa 1995).

Weil-McLain claims the district court improperly permitted evidence of the OSHA citation and Kinseth's exposure to asbestos from removal of the boilers. The district court denied the company's arguments on these issues in its ruling on the motion in limine. We review a district court's ruling on the admissibility of evidence for the abuse of discretion. *Giza v. BNSF Ry. Co.*, 843 N.W.2d 713, 718 (Iowa 2014). "The grounds for a ruling are unreasonable or untenable when they are based on an erroneous application of law." *Id.* (citatation omitted).

A. Weil-McLain claims the district court should have granted its motion in limine to entirely exclude evidence of the OSHA citation. It states the 1974 citation was for asbestos exposure at its plant in Indiana and did not have any relevance to Kinseth's exposure to asbestos from installing Weil-McLain boilers. The district court ruled the OSHA citation was not relevant to causation and was inadmissible on this issue. The court found the OSHA citation was admissible, however, on the issue of punitive damages and plaintiffs' expert could discuss it as "reliance" material. The court stated, "I think it's got limited relevance, so that's why I say I wanted to have it tightly—tightly constrained."

The OSHA citation was relevant to the issue of punitive damages because it showed Weil-McLain did not start putting warnings on its products until after it received the citation. Weil-McLain states Kinseth stopped installing boilers in 1972 and moved to mainly supervisory work, so its actions in 1974 are not relevant on the issue of punitive damages. The evidence shows Kinseth was present occasionally when boilers were installed after 1972, as part of his supervisory work, and so Weil-McLain's actions in 1974 were relevant.

Also, under Iowa Rules of Evidence 5.703 and 5.705, an expert may testify concerning otherwise inadmissible evidence the expert relied upon if (1) the information is of a type reasonably relied on by other experts in the field, and (2) the expert's reliance may be amply tested on cross-examination. *Brunner v. Brown*, 480 N.W.2d 33, 35 (Iowa 1992). Plaintiffs' expert, Dr. Carl Brodkin, testified one of his sources of information about the concentration of asbestos fibers in the air while cutting asbestos rope was the OSHA testing at the Weil-

McLain plant. We conclude the district court did not abuse its discretion in finding the OSHA citation had limited relevance.

During the course of the trial, the district court found Weil-McLain "kicked open the door" on the admissibility of the OSHA citation through the testimony of Paul Schuelke, a mechanical engineer and the Director of Technical Services at Weil-McLain, permitting plaintiffs to use the OSHA citation for other purposes. Whether this same scenario occurs on remand will depend on the testimony presented in the case, and therefore, further speculation on the admissibility of the OSHA citation is unnecessary at this time.

B. Weil-McLain claims the district court should have granted its objection to evidence Kinseth was exposed to asbestos while tearing out Weil-McLain boilers because the evidence was irrelevant to the issue of liability due to the operation of the statute of repose. The company also claimed the evidence was more prejudicial than probative.

Iowa's statute of repose, section 614.1(11), "closes the door after fifteen years on certain claims arising from improvements to real property." *Krull v. Thermogas Co.*, 522 N.W.2d 607, 611 (Iowa 1994). The district court determined Kinseth's claims arising from tearing out old boilers were barred by the Iowa statute of repose because once a boiler was installed, "it became an improvement to real estate within the meaning of the Iowa statute of repose," and there was no evidence Kinseth tore out old boilers within fifteen years of filing the action.

The district court denied the objection, finding the evidence relating to the exposure to asbestos while tearing out old boilers was relevant to Kinseth's

overall exposure to asbestos. In order to limit the prejudicial nature of the evidence, the court gave the jury an instruction specifying how the evidence could be considered. The instruction provided:

> As I mentioned to you at the outset of the trial, it may be necessary for me, from time to time, to give you a limiting instruction. This is one of those times. As you may recall, a particular item of evidence may be received for one purpose, and not for any other purpose.
>
> Iowa has a statute called the statute of repose. Under that statute, any claims against a party based on an alleged defective condition of an improvement to real property are extinguished after 15 years of the making of that improvement. Based on this statute, therefore, claims for dismantling (tear outs) of equipment and piping which have become improvements to real estate and refurbishment of steam valves and pumps, which at one time were part of an improvement to real estate, are not compensable. Therefore, you may not consider evidence of exposures to this category of evidence, tear outs of the improvements and refurbishment of valves and pumps, as evidence of fault or liability of any party. You may, however, consider the exposures to asbestos from tear outs of improvements to real estate and from refurbishment of valves and pumps as you consider the total exposure, if any, Mr. Kinseth had to asbestos.
>
> The exposures noted above, however, must be distinguished from any exposures to asbestos-containing material Mr. Kinseth might have sustained before or during the process of installation of real improvements to property. Exposures to asbestos experienced by Mr. Kinseth before and during the installation process are not barred by the statute of repose and you may consider such exposures in determining the fault, if any, and the extent of causation, if any, attributable to a party or released party.

We find the district court did not abuse its discretion in determining the evidence was relevant. In arguing plaintiffs should not be permitted to show Kinseth was exposed to asbestos when tearing out old Weil-McLain boilers, Weil-McLain stated it intended to present evidence Kinseth had been exposed to asbestos when tearing out pipes and valves, which it claimed presented a greater risk of exposure to asbestos. In addition, based on the instruction to the

jury concerning the purposes for which the evidence could be considered, we determine the evidence was not more prejudicial than probative. "Unless the contrary is shown, a jury is presumed to follow the court's instructions." *Schwennen v. Abell*, 471 N.W.2d 880, 887 (Iowa 1991).

IV. Allocation of Fault

Another issue which may arise on remand is a determination of the companies to be included on the special verdict form for the allocation of fault. Under section 668.3, although Weil-McLain was the only defendant actively defending the case, the jury was permitted to assign fault to companies who had previously settled with Kinseth if there was substantial evidence supporting an inference the company's product contributed to Kinseth's injuries. The jury assigned fault as follows:

Weil-McLain	25%
Kenwanee	10%
Peerless (boilers)	7%
American Standard/Trane	7%
Burnham	7%
Crane	7%
Cleaver Brooks	7%
Hercules	10%
JM (Johns-Manville)	15%
GE	2%
Yarway	0%
Georgia-Pacific/Bestwall	3%
Owens-Illinois	0%

A. Weil-McLain claims the district court should have submitted the issue of fault as to Peerless pumps, Bell & Gossett pumps, and McDonnell & Miller valves.[8] Weil-McLain states there was substantial evidence in the record

[8] Plaintiffs claim Weil-McLain is barred by the doctrine of judicial estoppel from raising this issue on appeal because it stated during the punitive damages phase of the trial it

to show Kinseth was exposed to products containing asbestos manufactured by these three companies. Our review on this issue is for the correction of errors at law. *See Alcala v. Marriott Int'l, Inc.*, 880 N.W.2d 699, 707 (Iowa 2016) ("[W]e review challenges to jury instructions for correction of errors at law." (citation omitted)).

For purposes of allocation of fault under chapter 668, a "party" includes a defendant who has been released pursuant to section 668.7. Iowa Code § 668.2. No fault may be allocated against a party, however, "unless the plaintiff has a viable claim against that party." *Spaur v. Owens-Corning Fiberglass Corp.*, 510 N.W.2d 854, 863 (Iowa 1994). A plaintiff must be able to prove he "inhaled asbestos fibers as a result of being exposed to an asbestos-containing product manufactured and/or sold by [a defendant]; the mere possibility that plaintiff may have been exposed to [a defendant's] product is not enough." *Id.* at 862; *see also Huber v. Watson*, 568 N.W.2d 787, 790-91 (Iowa 1997) (noting "[p]roof of proximate cause in asbestos litigation is often limited to circumstantial evidence").

The district court determined Kinseth did not have a viable claim in instances where the claim was barred by the statute of repose. The district court determined, "Weil-McLain failed to meet its burden of presenting substantial evidence that Kinseth had exposure to these products during

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would pay plaintiffs' compensatory damages. We determine the doctrine of judicial estoppel is not applicable because this case does not involve successive proceedings. *See Wilson v. Liberty Mut. Grp.*, 666 N.W.2d 163, 166 (Iowa 2003) ("The doctrine 'prohibits a party who has successfully and unequivocally asserted a position in one proceeding from asserting an inconsistent position in a subsequent proceeding.'" (citation omitted)).

installation and that any exposure was a substantial factor in causing his mesothelioma." The statute of repose applies to "an improvement to real property," and "[t]he key [is] the actual attachment of the product." *Tallman v. W.R. Grace & Co.*, 558 N.W.2d 208, 209 (Iowa 1997) (citing Iowa Code § 614.1(11)).

In his deposition, Kinseth testified he installed McDonnell & Miller valves, which he stated contained asbestos packing around the stem and asbestos gaskets in the body. Some of the valves did not come with pre-cut gaskets, and Kinseth would cut an asbestos gasket to fit the valve. When cutting a new gasket, asbestos dust was created. Additionally, Kinseth testified he installed Bell & Gossett pumps, but there was no evidence of asbestos exposure from the pumps. There was no evidence of installation of Peerless pumps. Furthermore, there was evidence Kinseth refurbished McDonnell & Miller valves, Bell & Gossett pumps, and Peerless pumps.

Kinseth's testimony showed he installed valves manufactured by McDonnell & Miller and pumps manufactured by Bell & Gossett. For the Bell & Gossett pumps, however, there was no evidence of asbestos exposure during installation. We determine the district court should have included McDonnell & Miller in the list of companies on the special verdict form. We affirm the court's decision not to include Bell & Gossett and Peerless pumps because the only evidence to support asbestos exposure from these products is due to refurbishing, and there can be no recovery under the statute of repose, as the products were permanent additions to real property. *See Buttz v. Owens-Corning Fiberglas Corp.*, 557 N.W.2d 90, 91 (Iowa 1996).

Therefore, we reverse the district court's decision not to include McDonnell & Miller valves on the special verdict form, but affirm as to Bell & Gossett and Peerless pumps.

B. In its cross-appeal, Kinseth claims the district court erred by allowing the jury to apportion fault to bankrupt entities Hercules and Johns-Manville. Under the jury's verdict, plaintiffs state they should be able to receive $400,000 from Hercules and $600,000 from Johns-Manville,[9] but through the bankruptcy trust system they will only be able to collect a small percentage of these amounts. Kinseth believes if Hercules and Johns-Manville had not been included on the special verdict form the jury may have allocated more fault to Weil-McLain.

A similar issue was addressed in *Spaur*, 510 N.W.2d at 862-63. At that time Johns-Manville was in bankruptcy proceedings and the court noted the "settlement plan was not final. No funds have been paid out or award calculated." *Spaur*, 510 N.W.2d at 863. The court stated plaintiffs needed to avail themselves of the procedure to settle with the bankruptcy trust to receive compensation and this had not occurred. *Id*. Also, under a bankruptcy court order, plaintiffs had "no possibility of obtaining an enforceable judgment against Mansville Trust." *Id.* Under these circumstances, the court determined the Mansville Trust was properly omitted from the special verdict form. *Id.*

The circumstances in the present case are very different. Kinseth has settled with Hercules and Johns-Manville and received funds from them.

[9] Because the award for medical expenses has been reduced, the amounts would now be an award of $363,123 from Hercules and $544,685 from Johns-Manville.

According to Kinseth's appellate brief, plaintiffs received $4690 from Hercules and $26,250 from Johns-Manville. Thus, plaintiffs have availed themselves of the procedure to settle with the bankruptcy trusts for Hercules and Johns-Manville. Also, this is not a situation where plaintiffs could not obtain an enforceable judgment against the bankrupt entities, as they have already received compensation from these companies. We determine the district court did not err by including Hercules and Johns-Manville on the special verdict form for the allocation of fault.

V. Punitive Damages

Weil-McLain claims the district court improperly submitted the issue of punitive damages to the jury.[10] It states plaintiffs did not present clear, convincing, and satisfactory evidence its conduct deviated from that of its industry peers. Weil-McLain claims its conduct was identical to the conduct of its peers. Our review on this issue is for the correction of errors at law. *See Wolf v. Wolf*, 690 N.W.2d 887, 893 (Iowa 2005).

Punitive damages may be awarded if a plaintiff shows "by a preponderance of clear, convincing, and satisfactory evidence, the conduct of the defendant from which the claim arose constituted willful and wanton disregard for the rights or safety of another." Iowa Code § 668A.1(1)(a). Punitive damages are not compensatory in nature; their purpose is punishment

[10] Contrary to Kinseth's assertion, we determine this issue has been preserved for our review. It was raised in Weil-McLain's motion for directed verdict and the motion for judgment notwithstanding the verdict, and the district court ruled on the issue. *See Bank of Am., N.A. v. Schulte*, 843 N.W.2d 876, 883 (Iowa 2014) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal." (citation omitted)).

and deterrence. *Spaur*, 510 N.W.2d at 865. "To receive punitive damages, plaintiff must offer evidence of defendant's persistent course of conduct to show no care by defendant with disregard for the consequences." *Beeman v. Manville Corp. Asbestos Disease Comp. Fund*, 496 N.W.2d 247, 255 (Iowa 1993). Punitive damages are discretionary and are never awarded as a matter of right. *Brokaw v. Winfield-Mt. Union Cmty. Sch. Dist.*, 788 N.W.2d 386, 395 (Iowa 2010).

Within the context of section 668A.1, the phrase "willful and wanton" means, "[t]he actor has intentionally done an act of unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences." *Id.* at 396 (citation omitted).

"[M]ere knowledge sufficient to initiate a duty to warn does not meet the higher standard for punitive damages." *Lovick v. Wil-Rich*, 588 N.W.2d 688, 699 (Iowa 1999). In *Beeman*, a case involving asbestos pipe insulation, our supreme court found defendant Keene Corp. and other companies manufactured and distributed asbestos-containing products for many years. 496 N.W.2d at 255. Rather than assessing punitive damages "based on the general knowledge of the asbestos industry," the court concluded, "there must be clear, convincing, and satisfactory evidence that sets Keene's conduct apart from that of other asbestos manufacturers." *Id.* at 256.

Because we have determined the case must be reversed and remanded for a new trial, it is unknown whether punitive damages will be awarded in the second trial. For this reason, we make no ruling as to whether punitive

damages were appropriate under the law based on the evidence presented at the first trial.

VI. Conclusion

Weil-McLain Company appeals the jury's award of damages and punitive damages to plaintiffs on theories of negligence, product liability, and breach of implied warranty of merchantability arising from the death of Larry Kinseth due to exposure to asbestos, and plaintiffs cross-appeal. We find the district court abused its discretion in denying Weil-McLain's motions for mistrial due to statements of plaintiffs' counsel during closing arguments. We affirm the district court's rulings on the admissibility of evidence. We conclude the district court erred by not including McDonnell & Miller valves on the special verdict form, but otherwise affirm the court's determination of which entities should be included in the special verdict form for the allocation of fault. Due to our decision reversing and remanded for a new trial, we make no ruling on the award of punitive damages. We reverse and remand for new trial on the appeal and affirm on the cross-appeal.

REVERSED AND REMANDED FOR NEW TRIAL ON THE APPEAL, AFFIRMED ON THE CROSS-APPEAL.

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Case Number	**Case Title**
15-0943	Kinseth v. Weil-McLain

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