No. 15-0943

IN THE SUPREME COURT OF IOWA

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

v.

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

and

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

Iowa Court of Appeals Decision Filed April 19, 2017

RESISTANCE TO APPLICATION FOR FURTHER REVIEW

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STATEMENT OF THE ISSUES

1. Did the Court of Appeals err, warranting further review, by ruling that Weil-McLain was not "judicially estopped" from appealing, where the Court of Appeals' ruling rests on established Supreme Court precedent and no case suggests a contrary result?

2. Did the Court of Appeals err, warranting further review, by ruling that Weil-McLain's motions for mistrial were timely because they were raised promptly following the close of argument and before the case was submitted to the jury?

3. Did the Court of Appeals err, warranting further review, by ruling that "the multitude of improper statements during closing arguments" by plaintiffs' counsel prejudiced Weil-McLain and warrants a new trial?

4. Did the Court of Appeals err, warranting further review, by ruling that McDonnell & Miller valves should have been included on the final verdict form because there was substantial record evidence supporting an inference that the company's products contributed to Kinseth's injuries?

TABLE OF CONTENTS

TABLE OF CONTENTS (CONT'D)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (CONT'D)

Page(s)

Statutes

Rules

STATEMENT RESISTING FURTHER REVIEW

After briefing, argument, and careful consideration of the record, the Court of Appeals issued a detailed 28-page opinion, reversing the judgment on multiple grounds. Plaintiffs now seek further review in an effort to restore a plainly improper judgment and avoid a new trial untainted by the error and misconduct that infected the first one.

Without exception, the Court of Appeals rooted its conclusions in well-established precedent; none of its rulings are inconsistent with Iowa law. For example, plaintiffs complain that the appellate court rejected their argument that judicial estoppel should have barred Weil-McLain from appealing. But plaintiffs have established *none* of the criteria for judicial estoppel under this Court's precedent: Weil-McLain never unequivocally stated it would forego its appellate rights or otherwise took an inconsistent position, nor is there any evidence of judicial acceptance of an unequivocal statement. Plaintiffs do not point to a single Iowa case finding a waiver of appellate rights under the circumstances here.

Plaintiffs also raise two points related to their counsel's closing arguments. First, plaintiffs argue that Weil-McLain's mistrial motions were untimely, even though they were made immediately following plaintiffs' closing arguments and before the case was submitted to the jury. Plaintiffs' argument is inconsistent with the case both parties cite for the binding rule on timeliness, *Andrews v. Struble*,

178 N.W.2d 391, 402 (Iowa 1970), which holds that an "objection urged for the first time in motion for mistrial made before submission [to the jury] is timely."

Second, plaintiffs complain that the Court of Appeals examined the appellate record *too closely*, thus showing a lack of deference to the district court, in determining that Weil-McLain was prejudiced by closing misconduct. That argument is refuted by the Court of Appeals' careful opinion, which is not a failure of deference, but a demonstration of the analysis required for an appellate court to find an abuse of discretion.

The Court of Appeals described over a dozen statements by plaintiffs' counsel and concluded that "the multitude of improper statements" warranted reversal. After its extensive analysis, the appellate court acknowledged that "[w]e do not reverse this case without pause and great consideration." Opinion at 17. This Court should not grant further review only to reassess the record that the Court of Appeals has already so cautiously and thoroughly examined. In any event, even a cursory review of the record confirms that the appellate court's assessment was both careful and justified.

Finally, plaintiffs argue that a third party, McDonnell & Miller, should not have been included on the verdict form principally because the claims against it are barred by the statute of repose, which prohibits recovery for exposure from *removal* of products containing asbestos if a claim is not brought within fifteen

years. Even assuming plaintiffs' argument is correct, it is irrelevant. The Court of Appeals ruled that McDonnell & Miller should have been included on the verdict form because there was substantial evidence from Kinseth's own testimony that "he *installed* valves manufactured by McDonnell & Miller" — an exposure not barred by the statute of repose. (Opinion at 23 (emphasis added).) The appellate court's ruling was based upon the sufficiency of the evidence regarding installation, not the statute of repose.

In short, plaintiffs' application is nothing more than a plea for an appellate do-over, hoping that this Court might come to a different conclusion than the one unanimously reached by the Court of Appeals. That, however, is not a proper ground for further review. Plaintiffs' application should be denied.

STATEMENT OF THE CASE

Plaintiffs Shari Kinseth and Ricky Kinseth, as executors of the estate of Larry Kinseth, claim that Kinseth developed mesothelioma as a result of his exposure to asbestos-containing materials. Before his death in 2009, Kinseth sued 43 defendants, each of which he alleged contributed to his disease.

Among the defendants Kinseth sued was Weil-McLain, which designs and manufacturers boilers. When this case went to trial in 2014, Weil-McLain was the only remaining defendant.

I. Kinseth worked with asbestos-containing products manufactured by dozens of companies.

Kinseth was an Iowa resident who worked in the heating and plumbing industry. During a portion of his career, Kinseth installed and worked on residential and commercial boilers.

To guard against fire risk, Weil-McLain sealed its boilers with rope comprised partially of asbestos. Weil-McLain did not manufacture the asbestos rope it used; the asbestos rope came from other companies. Nor did Weil-McLain manufacture the component parts in its boilers. Those products, which also contained asbestos, were supplied to Weil-McLain by other companies.

Kinseth's work involved two distinct phases: (i) tearing out an old boiler, and (ii) installing a new one. (App. 875-77, 879.) Both tearout and installation required Kinseth to work with component parts manufactured by other companies. Kinseth reconditioned parts such as valves, traps, and pumps, which required using a knife to scrape off old gaskets, a process that released asbestos. (App. 1097-1104.) Kinseth identified numerous gasket and valve manufacturers with which he worked, including McDonnell & Miller. (App. 1094-95, 1128.)

II. Procedural History

A. The district court granted Weil-McLain's motion for partial summary judgment.

The district court granted Weil-McLain's motion for partial summary judgment under Iowa's statute of repose, which bars claims not brought within 15

years for injuries arising out of "an improvement to real property." Iowa Code § 614.1(11) (2016). The court ruled that the statute of repose barred plaintiffs from recovering damages for Kinseth's exposure to asbestos while he tore out boilers, because the boiler became "an improvement to real estate" once it was installed, and all of Kinseth's tearout exposure occurred more than 15 years before his lawsuit. (App. 77-78.) Accordingly, plaintiffs could only recover against Weil-McLain for Kinseth's asbestos exposure during the installation of Weil-McLain boilers.

B. The district court declined to include several released parties on the verdict form.

Kinseth's complaint and deposition testimony made clear he was exposed to many companies' asbestos and asbestos-containing products. In the district court briefing, Weil-McLain identified each company to whose products Kinseth was exposed and cited record evidence establishing that exposure. In opposition, plaintiffs claimed there was a "lack of evidence" to support including three companies on the verdict form. (App. 589.) The court then declined to include the three companies, including McDonnell & Miller. (App. 592.)

C. The jury returned a verdict for plaintiffs.

The jury returned a verdict totaling $6.5 million. The jury awarded compensatory damages of $4 million, ascribing 25% of the fault to Weil-McLain, while distributing the remaining 75% among thirteen other entities on the verdict

form. (App. 676-709.) The jury also awarded $2.5 million in punitive damages against Weil-McLain.

D. Weil-McLain appealed.

Weil-McLain filed post-verdict motions, which the district court denied, with the limited exception of ordering remittitur of the award for pre-death medical expenses.

Weil-McLain timely appealed. The Court of Appeals reversed based on improper statements made by plaintiffs' counsel during closing arguments and the district court's failure to include McDonnell & Miller valves on the verdict form. Plaintiffs did not ask the Court of Appeals to reconsider but now seek further review from this Court.

ARGUMENT

Plaintiffs' application raises no grounds remotely sufficient to warrant review by this Court: the appellate court did not deviate from an appellate decision "on an important matter," decide a substantial question of constitutional law, address an important question of changing legal principles, or face an issue of broad public importance. Iowa R. App. P. 6.1103(1)(b)(1)-(4). Instead, the appellate court reviewed the record and reversed due to the types of "normal circumstances" under which further review is routinely denied. *Id*.

I. The Court Of Appeals Correctly Determined That Weil-McLain Is Not Judicially Estopped And Did Not Waive Its Right To Appeal.

Plaintiffs again press their implausible argument that Weil-McLain is judicially estopped from appealing the jury's verdict because, during arguments in the punitive damages phase, Weil-McLain's counsel said it would "compensate these folks based on what you said." Plaintiffs' request for further review is based on one case—*State v. Duncan*, 710 N.W.2d 34 (Iowa 2006)—that plaintiffs did not even cite to the Court of Appeals.

The doctrine of judicial estoppel "prohibits a party who has *successfully and unequivocally* asserted a position in one proceeding from asserting an *inconsistent* position in a subsequent proceeding." *Vennerberg Farms, Inc. v. IGF Ins. Co.*, 405 N.W.2d 810, 814 (Iowa 1987) (emphasis added). "[J]udicial estoppel applies only when the position asserted by a party was material to the holding in the prior litigation." *Tyson Foods, Inc. v. Hedlund*, 740 N.W.2d 192, 198 (Iowa 2007). "Absent judicial acceptance of the inconsistent position, application of the rule is unwarranted because no risk of inconsistent, misleading results exists." *Id.* at 196-97: *accord Duder v. Shanks*, 689 N.W.2d 214, 221 (Iowa 2004).

Plaintiffs' argument ignores this well-established law. Not only did Weil-McLain not take any inconsistent position, its counsel's statement to the jury cannot be a basis for judicial estoppel. That statement was not made to the district court, was not material to—or even considered in—the court's rulings, and

presents no risk of inconsistent judicial results. Moreover, the jury found against Weil-McLain. Plaintiffs' novel theory that a comment to the jury can judicially estop a party from filing an appeal is directly contrary to this Court's holding that judicial estoppel "does not apply unless there has been a judicial acceptance of the inconsistent position." *Schettler v. Iowa Dist. Court for Carroll Cnty.*, 509 N.W.2d 459, 467 (Iowa 1993).

Plaintiffs now argue that the Court of Appeals' decision conflicts with *State v. Duncan*, but *Duncan* does not suggest a different result. In *Duncan*, the Supreme Court applied judicial estoppel to prevent a criminal defendant from affirmatively relying on evidence at trial and then arguing on appeal that the same evidence was irrelevant and prejudicial. 710 N.W.2d at 43 ("It would be strange indeed for us to allow [the defendant] to use what he now contends is irrelevant and prejudicial evidence to support this theory of self-defense and following an unfavorable verdict allow him to urge reversal on appeal based on the same evidence."). *Duncan* is entirely consistent with the Court of Appeals' ruling.

First, unlike Weil-McLain, the defendant in *Duncan* took "inconsistent" positions. In the trial court, he took the position "beginning with voir dire" through his "final argument" that evidence of his domestic abuse was relevant. On appeal, he argued the exact opposite—that this history was not relevant. *Id.* By contrast, Weil-McLain took no position with the trial court. It simply made a

statement to the jury, which was nothing more than an uncontroversial promise to abide by any judgment entered after a fair trial. That promise remains true and there is no inconsistency.

Second, the *Duncan* court concluded the defendant "unambiguously" took the position that his history of domestic abuse was relevant. Here, Weil-McLain's general statement was not an unambiguous waiver of its fundamental right to challenge the district court's rulings or jury verdict on appeal. Plaintiffs' after-the-fact assertion that the statement operated to waive all of Weil-McLain's appellate rights is on its face absurd.

Third, unlike the district court here, the trial court in *Duncan* accepted the defendant's position by allowing him to admit certain evidence—the same evidence he argued on appeal was inadmissible. Here, plaintiffs speculate that the jury decreased its punitive award based on Weil-McLain's statement, but they provide no support for their contention that a jury's verdict can constitute "judicial acceptance." Nor do plaintiffs offer any support for their speculation about the verdict, other than their disagreement with the amount of the award. And, of course, plaintiffs' judicial estoppel argument only applies to the punitive damages phase, not to the underlying jury verdict.

Plaintiffs' new citation to *Duncan* thus changes nothing. They have failed to establish any of the elements of judicial estoppel, identify any result that deviates

from Iowa law, or raise any conflict on a substantial question of law. At bottom, plaintiffs' argument rests on a misunderstanding of the law of judicial estoppel and, as a result, their argument lacks merit.

II. The Court Of Appeals Correctly Determined That Weil-McLain's Motions For Mistrial Were Timely.

Before the case was submitted to the jury, Weil-McLain objected in two mistrial motions to a slew of improper and prejudicial statements in plaintiffs' closing argument. (App. 710-15, 730-36.) The district court denied Weil-McLain's motions, holding that Weil-McLain had waived any objections not made during closing and that objections first raised in mistrial motions were untimely. (App. 822.)

The Court of Appeals reversed, holding that "[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." (Opinion at 14 (citing *Andrews v. Struble*, 178 N.W.2d 391, 401-02 (Iowa 1970); *State v. Romeo*, 542 N.W.2d 543, 552 n.5 (Iowa 1996).) The Court of Appeals' ruling is firmly rooted in over forty years of Iowa precedent dictating that an "objection urged for the first time in motion for mistrial made before submission is timely." *Andrews*, 178 N.W.2d at 401-02; *Rosenberger Enters., Inc. v. Ins. Serv. Corp.*, 541 N.W.2d 904, 907 (Iowa Ct. App. 1995) ("Where the alleged impropriety involves the conduct or remarks of counsel during

closing argument, a motion for mistrial is considered timely if made prior to the submission of the case to the jury….").

In adopting this now well-established rule, the Iowa Supreme Court agreed with the reasoning of the Nebraska Supreme Court:

> Continued objections by counsel to prejudicial statements of opposing counsel in his argument to the jury could place the former in a less favorable position with the jury, and thus impose an unfortunate consequence upon his client which was actually caused by the wrongful conduct of opposing counsel. This he is not required to do.

Andrews, 178 N.W.2d at 402 (quoting *Sandomierski v. Fixemer*, 163 Neb. 716, 719 (1957)).

The reasoning of *Andrews* and *Sandomierski* applies here, where Weil-McLain was confronted with a flood of improper arguments, but opted to object sparingly in the jury's presence and instead make its objections before the case was submitted to the jury. Under *Andrews* and *Rosenberger*, Iowa law gave Weil-McLain the right to make that decision without waiving its objections.

Plaintiffs now seek further review by reprising the argument that failed to persuade the Court of Appeals, claiming that objections to statements in closing argument are waived unless raised "at the close of argument *and* before submission to the jury." (Application at 14). Plaintiffs cite *Andrews*, but *Andrews* itself supplied the clear rule applied by the Court of Appeals that an "objection urged for

the first time in motion for mistrial made before submission is timely." 178 N.W.2d at 402.

Even if Iowa law imposed a more stringent requirement that objections be raised "at the close of argument," Weil-McLain satisfied that standard too, as the Court of Appeals noted. (Opinion at 13-14.) On April 24, at 4:30 p.m., plaintiffs' counsel concluded her closing argument. The district court's next statement was: "Well, it's 4:30, it's been a long day, so I'm not -- I'm choosing not to read the instructions to you at this time …. We'll resume at 9:00 tomorrow morning." (App. 644-45.) On April 25, trial reconvened at 9:02 a.m. The first words by the judge were: "Okay. You wanted to make a record, sir." Weil-McLain's counsel answered: "Yes, Your Honor. At this time Defendant, Weil-McLain, moves for a mistrial for Plaintiffs' improper argument in close and for a variety of reasons, and if I may go through them." Weil-McLain then raised various grounds for mistrial, including plaintiff's closing misconduct. (App. 710.) Weil-McLain's mistrial motion immediately followed plaintiffs' argument. Iowa law does not require more.

Again citing only *Andrews*, plaintiffs contend that objections are timely only if raised in a motion for mistrial immediately following each *subsection* of improper argument, finding fault with Weil-McLain for waiting until the conclusion of plaintiffs' rebuttal argument to move for a mistrial. But there is no

authority for plaintiffs' proposed rule, and an application for further review will not be granted to *change* established law. The rule on preservation is set out in *Andrews* and *Rosenberger*. That was the standard applied by the Court of Appeals, and one satisfied by Weil-McLain. No further review is warranted.

III. The Cumulative Impact Of Improper Statements During Closing Argument Warranted Reversal.

The Court of Appeals concluded that it is "quite probable a different result would have been reached but for the misconduct of plaintiffs' counsel…." (Opinion at 16-17.) Plaintiffs do not argue that this decision involved an error of law, conflicted with a prior appellate decision, ignored a constitutional provision, or should have been rendered by this Court in the first instance. Instead, plaintiffs attack the Court of Appeals' assessment of the appellate record and fault the Court of Appeals for examining it *too closely*, making "its own evaluation of prejudice" and a "re-assessment based on the transcript." (Application at 17-19.)

Failure to rubberstamp the district court is not grounds for further review. If anything, the Court of Appeals should be commended for its careful attention to Supreme Court precedent, its meticulous consideration of the trial court record, including more than a dozen instances of misconduct, and resting its decision on the cumulative impact of the misconduct, without assigning excessive weight to any single statement. The court even stated that it was not reversing the district court "without pause and great consideration," as demonstrated throughout its

opinion. (Opinion at 17.) There is no basis in law or fact to challenge the decision.

A. The Court of Appeals applied the proper standard.

A request for new trial based on alleged misconduct by trial counsel involves a two-step inquiry. *See, e.g., Conn v. Alfstad*, 801 N.W.2d 33 (Iowa Ct. App. 2011) (citing *Mays v. C. Mac Chambers, Co.*, 490 N.W.2d 800, 802-03 (Iowa 1992)). "First, the court must determine whether counsel violated a motion in limine or otherwise made improper statements to the jury." *Id.* "If the court finds the attorney engaged in misconduct, the general rule is that a new trial will be granted only if the objectionable conduct resulted in prejudice to the complaining party." *Id.* Objectionable conduct is analyzed not for individual impact, but cumulatively. *See, e.g., Rosenberger*, 541 N.W.2d at 909.

This is precisely the standard applied and process followed by the Court of Appeals. The court began its analysis by identifying motions *in limine* potentially violated by plaintiffs' closing, walking through the applicable pretrial motions, plaintiffs' responses to those motions, and applicable rulings by the district court.

The appellate court then considered plaintiffs' potential violations of the district court's rulings. With respect to Weil-McLain's motion *in limine* to prohibit references to defense spending, for example, the appellate court quoted nine statements by plaintiffs' counsel that violated the trial court's pretrial ruling,

including plaintiffs' references to "a very neat expensive graphic," paying "tens of thousands of dollars" to create a graphic, "obscene money" in this litigation, "bought and paid-for science," and more. (Opinion at 8-9.) For other pretrial rulings, the Court of Appeals made a similarly measured assessment of plaintiffs' counsel's statements, such as her statement to the jury that "[i]t 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," and concluded that many of those statements were improper. (*Id.* at 9-11.)

The Court of Appeals also considered statements that could constitute misconduct even without a related pretrial ruling, such as the comments by plaintiffs' counsel to the jury criticizing Iowa's statute of repose:

> [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.

(Opinion at 11-12 (emphasis added)). In its review, the Court of Appeals concluded that it was improper for plaintiffs' counsel to "question[] the application of the statute of repose" in this way because "[t]he court determines the law to be applied in the case and informs the jurors through instructions." (*Id.* at 12.)

The Court of Appeals then assessed the improper statements cumulatively, concluding that "[t]his continuous disregard for the court's rulings could not have

been 'a slip of the tongue' and was not an isolated incident" and thus "it appears quite probable a different result would have been reached but for the misconduct of plaintiffs' counsel, and therefore, Weil-McLain was prejudiced." (Opinion at 16-17.)

The court below was well justified in reaching its conclusions—the same conclusion recently reached by a trial court in Minnesota, similarly finding that the same plaintiffs' trial counsel made "blatant," "sequential, constant" and "systematic" violations of the court's pretrial rulings in her opening statement and that "the cumulative effect of these violations" was "extremely prejudicial" and obligated the court to declare a mistrial. (*See* WM's Notice of Supplemental Authority, filed January 5, 2017.)

In seeking further review, plaintiffs quibble with the Court of Appeals' assessment of specific instances of misconduct. Plaintiffs' criticisms are wrong, as discussed below, but also miss the point, especially in an application for further review. As the Court of Appeals explained, reversal was required because plaintiffs' counsel "persistently" made statements barred by pretrial rulings and showed "continuous disregard" of the court's rulings and basic principles of Iowa law. (Opinion at 16.) This assessment of the appellate record is not up for grabs on further review. Regardless, the Court of Appeals' conclusion that there was prejudice to Weil-McLain is firmly rooted in Iowa law and the record.

B. Plaintiffs' counsel repeatedly referred to Weil-McLain's wealth and corporate power during closing argument.

Weil-McLain had a right to present its case to a jury untainted by references to its wealth or the amount spent on its defense. *See, e.g.*, *Rosenberger*, 541 N.W.2d at 907 ("When determining liability it is improper for the jury to consider the relative wealth of the parties."); *Whittenburg v. Werner Enters. Inc.*, 561 F.3d 1122, 1129-30 (10th Cir. 2009).

Consistent with Iowa's long-standing prohibition and condemnation of such tactics and arguments, Weil-McLain sought pretrial rulings prohibiting "[a]ny reference or comment by counsel" to the "amount of money or time spent by the Defendant in the defense of this matter," including "expert witness time and expenses," or to the "wealth, power, corporate size or assets of Weil-McLain." (App. 110, 112.) As the Court of Appeals observed, that became the law by which plaintiffs were to abide.

Plaintiffs do not challenge the district court's pretrial ruling or claim a right to comment on Weil-McLain's wealth or corporate power, but simply deny having made any "rich vs. poor" argument whatsoever, asserting that plaintiffs' counsel's comments were "a proper exploration of defense experts potential bias." (Application at 21.) As the Court of Appeals concluded after a careful review, plaintiffs' view is untenable: plaintiffs' counsel repeatedly highlighted Weil-

McLain's defense spending in order to compare it with plaintiffs' circumstances. (Opinion at 16.)

For example, plaintiffs' counsel ridiculed the sums spent by Weil-McLain testing the amount of dust created by cutting asbestos rope, telling the jury that Weil-McLain "spent half a million dollars for the test ... as simple as people cutting rope a couple of times." (App. 640.) Later, plaintiffs' counsel did it again: "Weil-McLain spent half a million dollars on the study that could have been done as easily as the two minutes we saw on the floor." (App. 643.) These taunts had no legitimate purpose—they were not, for example, part of an argument about whether the studies were probative, biased, or reliable—but served only to paint Weil-McLain as rich enough to be careless with its money, at least when it came to its legal defense.

Plaintiffs' counsel also repeatedly disparaged Weil-McLain's studies and expert opinions as "bought and paid-for science." (App. 605, 602.) Such comments went beyond establishing bias. They reinforced plaintiffs' improper theme that Weil-McLain was wrong to prepare a defense and would sooner use its resources to "buy science" than make its products safe for ordinary people.

Likewise, plaintiffs' counsel made numerous references to Weil-McLain's allegedly lavish spending on its defense. For example, she told the jury that Weil-McLain "paid a company tens of thousands of dollars to create graphics…." (App.

611.) On another occasion, she quipped that Weil-McLain made its point with "a very neat expensive graphic." (App. 598.) And again: "They hire DecisionQuest [for trial graphics] and spends tens of thousands of dollars for it." (App. 643.) Plaintiffs' counsel then argued that damages in the range of "4 million to 20 million is the right number" because "[i]t is certainly within the realms of what they have paid in this litigation." (App. 724.) Commenting upon the amounts spent to defend plaintiffs' claims violated the district court's order and Iowa law, and had no place before the jury, as the Court of Appeals properly concluded.

C. Plaintiffs' counsel's improper send-a-message arguments were prejudicial.

Weil-McLain sought a pretrial ruling prohibiting "[a]ny references, statements or arguments that the jury should attempt to send Defendant a message." (App. 110.) Plaintiffs' counsel agreed and told the court that "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.'" (App. 189; *see also* App. 133.) The court thus granted Weil-McLain's motion *in limine*, leaving no doubt about the propriety of send-a-message arguments. But again, this did not stop plaintiffs' counsel.

In closing argument on liability and compensatory damages, plaintiffs' counsel declared that "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

... what message they need in order to value this appropriately. That's why we're here. And so what that adds up to is $14 million." (App. 627-28.) In other words, forget about compensating plaintiffs for their actual injuries. If Weil-McLain can spend millions on defense, including tens of thousands on graphics alone, how much is required to send that company a message?

Contrary to plaintiffs' assertion, their counsel made more than a "single comment about sending a message." (Application at 22.) It was plaintiffs' closing theme. For example: "[Weil-McLain] is a company that has not heard ... that's why we're here." (App. 632.) And again: "[Y]ou are speaking [for] people from 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." (App. 643.)

Plaintiffs' counsel went so far as to warn the jury that Weil-McLain has been involved in "30 years of lawsuits" but has still not heard the people's message. (App. 728.) Weil-McLain's objection to this improper comment was sustained, but plaintiffs' counsel continued, undeterred. She went on to challenge the jury not to be "naïve" by thinking that anything less than a large monetary damages award would adequately send a message to Weil-McLain. (App. 728-29.)

Plaintiffs seek to excuse their improper conduct, as the district court did, by pointing to Weil-McLain's "cogent argument about why the case was not about

sending a message." (App. 821; Application at 22-23.) Weil-McLain, however, cannot be penalized for attempting to mitigate the prejudice caused by plaintiffs' closing misconduct. Nor do plaintiffs cite any authority to support the proposition that a "cogent response" excuses that misconduct. Regardless, as the verdict itself shows, Weil-McLain's efforts to overcome this prejudice were unsuccessful.

In short, plaintiffs' application for further review of the prejudice inflicted by its counsel's continuous and pervasive misconduct does not identify an error of law or any conflict with a prior decision, or provide any other basis for further review.

IV. The Court of Appeals Correctly Concluded That McDonnell & Miller Should Have Been Included On The Verdict Form.

In their final argument, plaintiffs contend the Court of Appeals erred in concluding McDonnell & Miller was improperly excluded from the verdict form. Like the other issues plaintiffs raise, this argument does not ask this Court to address an issue that has an impact beyond this case.

A. The Court of Appeals' decision does not conflict with this Court's precedent.

In trying to shoehorn their argument into one of the enumerated grounds for further review, plaintiffs argue the appellate court's "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." (Application at 25.) But there is no disagreement about the legal standard: the Court of Appeals, plaintiffs, and Weil-McLain all agree that "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." (Opinion at 21; Application at 25-26 ("a comparative fault instruction must be supported by substantial evidence in the record" (citing *Wolbers v. Finley Hosp.*, 673 N.W.2d 728, 731-732 (Iowa 2003); *Vasconez v. Mills*, 651 N.W.2d 48, 52 (Iowa 2002)).

Plaintiffs' only disagreement with the Court of Appeals concerns its assessment of the factual record. Plaintiffs argued on appeal that the statute of repose bars consideration of settling parties' liability if Kinseth was exposed to asbestos while he *refurbished* its products, but the Court of Appeals did not reach that legal issue in reaching its opinion, nor did it have to. Instead, the Court of Appeals reviewed the appellate record and held that the district court erred because it ignored the substantial evidence of exposure during *installation*: "We determine the district court should have included McDonnell & Miller in the list of companies on the special verdict form" because "Kinseth's testimony showed he installed valves manufactured by McDonnell & Miller." (Opinion at 23.)

In sum, the Court of Appeals applied a straightforward, undisputed standard and found that the trial court erred by not including a third party on the verdict form. That unremarkable ruling does not warrant Supreme Court review.

B. The Court of Appeals' decision was not error.

The parties agree that the jury should have considered McDonnell & Miller's fault if the record contained substantial evidence that Kinseth was exposed to McDonnell & Miller products during installation. Ample evidence of that exists in the record, as the appellate court readily determined.

Plaintiffs admit that Kinseth had contact with asbestos "during *installation* [of] flange gaskets," and that "McDonnell & Miller provided precut flange gaskets." (Application at 28-29 (emphasis added).) Plaintiffs try to minimize that admission by arguing that the "flange gaskets … were *generally* manufactured by Garlock or John Crane" (*id*.) (emphasis added), but "generally" does not mean "always." Remarkably, plaintiffs' record citations, which they point to for the first time and did not include in the Appendix, confirm that Kinseth was exposed to asbestos from McDonnell & Miller parts during installation. (Application at 29, citing Kinseth Trial Tr. Vol. 1 at 223:21-224:2 (Kinseth "did a lot [of work] with … McDonnell Miller"); Kinseth Trial Tr. Vol. II at 290:2-5 (Kinseth installed "[McDonnell] Miller" valves).

Plaintiffs also argue that "Weil-McLain's expert testified that installing precut gaskets would not have exposed Kinseth to significant asbestos." (Application at 29.) But plaintiffs ignore that there was ample evidence for the jury to conclude Kinseth's exposure to asbestos from McDonnell & Miller parts caused his injuries, including testimony from plaintiffs' own expert. As Weil-McLain explained below, "Plaintiffs' expert Brodkin supplied the necessary causation evidence when he testified that Kinseth, as a 'boiler installer,' 'cut gaskets' while he worked with 'valves' and 'pumps' to 'install' boilers. Based on 'literature about how much asbestos is released in the air when working with gasket packing,' Brodkin testified that this work 'substantially contributed to cause the development of Kinseth's disease.'" (WM Reply at 10-11 (citation and brackets omitted) (citing App. 419-20).)

In sum, there was "substantial evidence" that would have allowed the jury to assign some fault to McDonnell & Miller. The Court of Appeals carefully reviewed the record, applied the correct and undisputed legal standard, and concluded that the trial court had erred. Plaintiffs improperly ask this Court to review the same evidence and second-guess the appellate court's conclusion.

CONCLUSION

For the reasons stated above, and based on the careful and considered opinion of the Court of Appeals, plaintiffs' application should be denied.

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Because this RESISTANCE TO APPLICATION FOR FURTHER REVIEW has been filed and served through EDMS, the actual cost of printing or duplicating this brief is $0 per document, and the total cost for the three required copies of the brief is $0.

/s/ Robert M. Livingston Dated: May 19, 2017

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The undersigned hereby certifies that on May 19, 2017, the above and foregoing RESISTANCE TO APPLICATION FOR FURTHER REVIEW was electronically filed with the Clerk of Court for the Supreme Court of Iowa using the EDMS system, service being made by EDMS upon the following:

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