IN THE SUPREME COURT OF IOWA

NO. 17-1825

SHELLI R. FREER, Individually and as Administrator of the ESTATE OF NICOLE J. SANSOM, and MICHAEL SANSOM, Individually,

Plaintiffs/Appellants/Cross-Appellees,

vs.

DAC, INC., d/b/a Prairie House,

Defendant/Appellee/Cross-Appellant

APPEAL FROM THE IOWA DISTRICT COURT
FOR JACKSON COUNTY
THE HONORABLE MARK J. SMITH PRESIDING

APPELLEE/CROSS-APPELLANT'S BRIEF IN FINAL FORM AND REQUEST FOR ORAL ARGUMENT

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ROUTING STATEMENT

Appellee/Cross-Appellant, DAC, Inc., d/b/a Prairie House (hereinafter "DAC"), asserts that, pursuant to Iowa Rule of Appellate Procedure 6.1101(2)(c), this case should be retained by the Iowa Supreme Court, as it presents substantial issues of first impression. The issue as to whether the entry of a high-low settlement agreement precludes the filing of post-trial motions has not been addressed by the Iowa Court of Appeals or the Iowa Supreme Court.

STATEMENT OF THE CASE

This case arises out of the alleged wrongful death of Nicole Sansom on July 6, 2015 while a resident of Prairie House, a twelve-bed intermediate care facility for the intellectually disabled (ICF/ID) owned by DAC, Inc.[1] (Tr. Vol. I, p. 175:19–25; 338:4–20).

The jury trial began on July 10, 2017, with the jury beginning its deliberations on July 18, 2017. (Tr. Vol. I, p. 1; Tr. Vol. II, p. 210:4–9).[2]

[1] During the course of this litigation, DAC, Inc. changed its name to "Imagine the Possibilities." Throughout the trial of this matter and in this Brief, Defendant/Appellee/Cross-Appellant will continue to be referred to as DAC or DAC, Inc.

[2] References to the trial transcript are made to the original page and line numbers, in compliance with Iowa R. App. P. 6.904(4)(b).

On July 19, 2017, the jury returned a verdict finding DAC, Inc. was not negligent and not at fault. (App. 177–78).[3]

On the morning of July 19, 2017, while the jury was deliberating, the parties, through their attorneys, entered into a high-low settlement agreement whereby DAC, Inc. agreed that the minimum amount it would pay to Plaintiffs was $100,000 and the maximum exposure to DAC, Inc. was $1,000,000. (App. 332). It was further understood that a verdict in favor of the Plaintiffs between $100,000 and $1,000,000 would be paid as rendered. (App. 332). Rather than proceed with the settlement, Plaintiffs filed post-trial motions for a new trial and change of venue. (App. 179–82). In response, DAC filed a motion to enforce the binding settlement agreement entered into on July 19, 2017. (App. 329–331). DAC further moved to strike Plaintiffs' post-trial motions as moot. (App. 329–331). Alternatively, DAC resisted Plaintiffs post-trial motions as the same were without merit. (App. 337–339).

On October 13, 2017, the District Court, at a hearing on the record, refused to hear Plaintiffs' post-trial motions. (App. 340–345). Instead, the District Court properly found that a contracted-for settlement agreement had

[3] Citations to the record are made to the Second Amended Appendix as "App. [page no.]," which was filed by consent of the parties on April 26, 2018.

been entered into by the parties on the morning of July 19, 2017, and that the settlement agreement was to be enforced and, further, that Plaintiffs' post-trial motions were moot. (App. 342, 344). As a secondary matter, the cross-appeal involves the propriety of the District Court's pretrial ruling denying DAC's motion to exclude expert testimony and, further, its order granting Plaintiffs' motion in limine regarding the post-death findings of the Iowa Department of Inspections and Appeals (hereinafter "DIA") and the scope and application of that ruling during the course of trial. (App. 100–107).

STATEMENT OF FACTS

A. Introduction

DAC, Inc. is an Iowa nonprofit corporation with its principal offices in Jackson County, Iowa (Petition, ¶ 4). DAC provides services to individuals with intellectual disabilities through home- and community-based services (hereinafter "HCBS") homes, intermediate care facilities (hereinafter "ICF") and residential care facilities (hereinafter "RCF"). (Tr. Vol. I, p. 617:5–22). One facility operated by DAC is Prairie House, a twelve-bed intermediate care facility for the intellectually disabled (hereinafter "ICF/ID") in Maquoketa, Iowa (Plaintiffs' Petition, ¶ 5). The Code of Federal Regulations (hereinafter "CFR") and the Iowa Administrative Code (hereinafter "IAC") establish the framework for the

operation of ICFs in Iowa. (Tr. Vol. I, p. 755:1–10). The State of Iowa has adopted the federal rules and added additional rules (Tr. Vol. II, p. 81:17–23). The purpose of an ICF/ID is to provide a homelike environment for residents where they gain skills so that they become more independent and have more self-determination. (Tr. Vol. II, p. 81:4–10). The ultimate goal of ICF/IDs is to help each individual reach their potential through a process called "active treatment." (Tr. Vol. II, p. 83:5–9). An interdisciplinary team (hereinafter "IDT") composed of staff, the parent/guardian, human rights committee member, nurse, and a qualified intellectual disability professional ("QIDP") annually determines a personal plan for each individual resident, addressing the needs of the resident, establishing goals and the services and support the individual needs to accomplish the goals set. (Tr. Vol. I, p. 723:1–724:5). Pursuant to state and federal regulations, the goal for each individual is to make progress in skills, reduce behaviors, or minimize loss of function. (Tr. Vol. I, pp. 758:7–759:9).

State and federal regulations mandate that restrictions used as part of the programs are to be the least restrictive. (Tr. Vol. I, p. 771:12–17). The effectiveness of the programs is measured through the collection of data, and that data is used by licensing authorities to evaluate the facility. (Tr. Vol. I, pp. 771:18–772:8). Data is a measuring tool to evaluate how a resident is

progressing and is used by the IDT to make its decisions. (Tr. Vol. II, p. 84:13–17).

B. Nicole Sansom

Nicole Sansom was born on August 9, 1989. (Tr. Vol. I, p. 670:20–21). She was born with Down syndrome. (App. 88). She developed slowly, not sitting up by herself until she was three years old and not walking until age five; she spoke once and never spoke again. (Tr. Vol. I, p. 672:13–19). Further, Nicole was deaf in one ear and had low vision. (Tr. Vol. I, p. 672:20–25). She was diagnosed with severe mental retardation, hypothyroidism, and oppositional defiant disorder. (App. 88). From an early age, Nicole aspirated food and, as she became able to feed herself, demonstrated behaviors related to food, including guarding her plate and "shoveling it in." (Tr. Vol. I, pp. 672:1–12; 676:18–677:3). As Nicole got older, she became very obese, would food steal, eat too fast and choke. (Tr. Vol. I, p. 263:6–11; 676:18–677:3). Nicole's mother described her as "sneaky and fast," and she ended up taking Nicole to the emergency room on perhaps a dozen occasions for choking but never went in the emergency room door. (Tr. Vol. I, p. 698:11–13; 701:6–8).

When Nicole was seventeen years old, her case manager from Clinton County suggested to Nicole's mother, Shelli Freer, that Nicole go to live in

an ICF/ID facility. (Tr. Vol. I, p. 680:5–21). In 2007, Nicole applied for and was accepted as a resident of Prairie House. (Tr. Vol. I, p. 230:19–22; 645:17–20). When Nicole arrived at Prairie House, she was very obese, would not walk, rarely wore clothes, was incontinent, and did not know how to eat with utensils. (Tr. Vol. I, p. 239:24–240:5). At the time of admission in 2007 to Prairie House, Nicole was 4' 7", 227 pounds. (Tr. Vol. I, p. 701:9–15). By May of 2015, Nicole was 4' 8", 165 pounds, was able to walk, use the bathroom, and ate with utensils. (Tr. Vol. I, p. 241:22–242:3; 701:18–23). Nicole was described as fun-loving, physically strong, strong-willed, at times determined and defiant, but 90% of the time compliant. (Tr. Vol. I, pp. 229:18–230:10). Although having intellectual disabilities, her mother believed Nicole understood what was said to her, and Prairie House staff believed Nicole was smart, eager to learn, and caught on to new things quickly, including learning her programs. (Tr. Vol. I, p. 241:2–6, 697:25–698:5).

One of the programs Nicole had at Prairie House involved food behaviors designed to address Nicole's lifelong food stealing and food gorging behaviors; other programs addressed Nicole's sleep, language, and other needs. (App. 91–92). Annually, Prairie House received input from speech therapists, occupational therapists, psychologists, and psychiatrists,

and, on occasion, the University of Iowa Behavioral Clinic regarding Nicole's programs. (App. 91; Tr. Vol. II, p. 88:4–10, 96:11–97:3). In addition, Nicole's family doctor certified Nicole as appropriate for ICF/ID care and, in particular, Prairie House, every ninety days. (Exhibits J-1–J-3). Nicole generally was making progress with her programs, but as with all residents, Nicole had her ups and downs. (Tr. Vol. II, p. 95:20–96:7).

At the beginning of 2015, Nicole's food program was designed to prevent and deter food stealing behavior, as well as food gorging. (App. 91–92). Staff would sit next to Nicole during meals, ensuring she alternated between bites and sips. (App. 91; Tr. Vol. II, p. 134:1–7). Nicole was on a general diet, but food was limited to fruit cocktail size pieces eaten with child-size utensils. (App. 94; Tr. Vol. II, p. 91:1–3).

In February 2015, after an incident where Nicole appeared to aspirate food, the Prairie House nurse sent Nicole to undergo a swallow study at the Jackson County Regional Health Center. (Tr. Vol. I, p. 279:13–20). As a result of the swallow study, the only change to Nicole's diet was from fruit-size bites to a mechanical soft diet. (Tr. Vol. II, p. 91:4–8). The dietician for Prairie House utilized the Iowa Simplified Diet Manual, Tenth Edition. (Tr. Vol. I, p. 120:19–121:8). Pursuant to the applicable diet manual, peanut butter was on Nicole's diet. (Tr. Vol. I, p. 120:14–18).

In March 2015, while at the day services building, Nicole was caught taking food from another program not associated with Prairie House. (Tr. Vol. I, p. 152:18–153:7). As a result of the food stealing incident, the IDT recommended revising the food program adopted after the swallow study; specifically, the IDT recommended modifying the program so that Nicole was in constant eyesight by staff while in the kitchen at day services, as well as at Prairie House. (Exhibit Q). Nicole's guardian, Shelli Freer, approved the modification of the program while Nicole was at day services, but did not approve modification of the program while Nicole was at her home at Prairie House. (Exhibit Q-1). Instead, Ms. Freer requested that data be collected over the next ninety days regarding Nicole's behaviors involving food stealing before she would agree to any additional restrictions. (Exhibit Q-1). In compliance with Ms. Freer's request, the IDT instructed Prairie House staff to begin documenting food ingestion incidents with incident reports and to continue using data collection for food stealing attempts. (Tr. Vol. I, p. 170:15–172:6).

On the morning of July 6, 2015, Nicole was observed sleeping at 6:00 a.m. (Tr. Vol. I, p. 530:18–531:10). Shortly thereafter, Nicole arose from her bed, left her room without being seen by staff, entered the Prairie House kitchen, took food from the cupboards, including peanut butter, went to the

laundry room and apparently gorged on peanut butter, ingesting the same. (Exhibit 99). Nicole was found at approximately 6:12 a.m. and was no longer breathing; 9-1-1 calls were made. (Exhibit 99; Tr. Vol. I, p. 494:6–21, 508:15–509:12). CPR was commenced, and first responders transported Nicole to Jackson County Regional Health Center; she was then transferred to the University of Iowa Hospitals and Clinics. (Tr. Vol. I, p. 545:12–546:4; Exhibit 32). Nicole subsequently passed away. (Tr. Vol. I, p. 360:10–13).

C. The Settlement Agreement

The trial of this case was submitted to the jury on July 18, 2017, at 11:55 a.m. (Tr. Vol. II, p. 210). On the morning of July 19, 2017, while the jury was in deliberations, DAC, by its attorney, Patrick L. Woodward, verbally communicated an offer via voicemail to Attorney Thomas Kyle offering to enter into a high-low settlement agreement with a minimum recovery of $100,000 and a maximum recovery of $1,000,000. (App. 332–336). In response, at 9:48 a.m., Attorney Kyle in an email stated, "they agree to the high/low of 100K to $1,000,000." (App. 332). At 9:58 a.m., counsel for DAC, Patrick L. Woodward, confirmed receipt of Attorney Kyle's email and the acceptance of the high-low settlement agreement. (App. 332). Subsequent to the settlement agreement, on July 19, 2017, the

jury returned its verdict finding that DAC was not negligent and was not at fault for the death of Nicole Sansom. (App. 177–178).

Rather than accept the tender of the $100,000 as agreed to on July 19, 2017, plaintiffs filed post-trial motions for new trial and change of venue. (App. 179–182). In response, DAC filed a Motion to Enforce the Settlement Agreement of July 19, 2017 and alternatively, filed resistances to plaintiffs' post-trial motions. (App. 329–331, 337–339).

A hearing on post-trial motions was held on October 13, 2017, at which time the District Court stated in relevant part:

> Mr. Kyle, you filed a motion for new trial. The verdict was for the defense, meaning there was no damages awarded to the plaintiff. When I notified you of that verdict by phone . . . your words were "thank God we entered into a high-low settlement agreement."
>
> . . .
>
> The Court: You sent Mr. Woodward an email on July 19, 2017, at 9:48 a.m. indicating they agree to the high-low of $100,000 - $1,000,000.
>
> Mr. Kyle: And I will agree that that is the email I sent . . . .

(App. 340–341). The Court then enforced the parties' settlement agreement and struck the Plaintiffs' post-trial motions as moot. (App. 342, 344).

D. <u>Plaintiffs' Motion in Limine</u>

Prior to trial, in paragraph 3 of Plaintiffs' Motion in Limine, the Plaintiffs sought to exclude the Department of Inspections and Appeals survey and report relating to the investigation of the events of this case. (App. 18–22). The District Court, in ruling on pretrial motions, stated:

> The Court finds that the DIA report regarding the incident in this case is inadmissible because there is a danger it will improperly influence the fact finding function of the jury and, therefore, it is unfairly prejudicial. Because this report may impermissibly invade the province of the jury, the Plaintiffs' Motion in Limine with regard to the DIA report is granted.

(App. 100–107).

In defense of the claims made against it, DAC, Inc. retained the services of Rosalie Steele as an expert witness. (App. 11–12). Ms. Steele was designated to testify consistent with her written report on the compliance by DAC of the policies and procedures in place at Prairie House and conformance with state and federal rules and regulations, as well as the level of services, care, and opportunities provided to Nicole Sansom while a resident of Prairie House. (App. 11–12). Further, Ms. Steele was designated to testify regarding the applicable standards and conformance therewith. (App. 11–12). Ms. Steele was a former employee of the Iowa Department of Human Services and Iowa Department of Inspections and Appeals, retiring in March 2015. (Tr. Vol. II, p. 74:3–14; 77:7–9). Ms. Steele testified that during the course of her work as an expert witness, she reviewed documents,

interviewed staff, and determined what happened to Nicole and if the plans and programs were carried out by DAC. (Tr. Vol. II, p. 77:11–16). Ms. Steele also determined whether the needs of Nicole were taken into account and gave "her honest feedback about what she found." (Tr. Vol. II, p. 77:11–16).

During opening statement, explaining the regulatory oversight responsibilities of DAC, defense counsel stated in relevant part:

> They come annually without any notice and do a survey, do an inspection. They're the ones that determine whether staffing is proper. They're the ones that determine whether or not programs are proper, and they're also the ones that investigate incidents such as happened with Nicole on July 6, 2015, and you're going to learn that they found no violations –

(Tr. Vol. I, pp. 99:20–100:2). Thereafter, upon objection of Plaintiffs' counsel, the Court admonished the jury to disregard the last statement about the Department of Inspections and Appeals. (Tr. Vol. I, p. 100:7–11).

Following opening statement, in response to questioning by Plaintiffs' attorney regarding reportable and non-reportable incidents, Tiffany Higgins testified:

> So for our regulations through the Department of Inspections and Appeals, there are categories that are defined as reportable incidents . . .

(Tr. Vol. I, p. 155:10–12).

In response to further questioning by Plaintiffs' attorney as to when a guardian is notified of an incident, Higgins testified:

> We would notify guardian of any major events that were reported to the Department of Inspections and Appeals or the guardian request . . . .

(Tr. Vol. I, p. 156:5–7). Plaintiffs' counsel then inquired about the investigation of the incident:

> Q. You investigated the July 6, 2015 incident, correct?
>
> A. Yes, I did – that's a difficult question to ask. We began an investigation knowing that another entity was coming in to investigate.

(Tr. Vol. I, p. 181:14–18). At the conclusion of Ms. Higgins' testimony, counsel for Plaintiffs made a record, and the Court stated "Counsel, if you would tell your witnesses they're not to --." (Tr. Vol. I, p. 185:22–23).

When Rosalie Steele was called as a witness, outside the presence of the jury, counsel for Plaintiffs made the following record:

> Mr. Kyle: . . . I'd like to ask Ms. Steele a couple of questions outside the presence of the jury because I didn't want to violate the motion in limine or open the door to it. It's about her review of the case and her DIA experience. It probably should be no more than two or three questions.
>
> The Court: Well, without knowing what the questions are, it's a little hard to make that ruling, but you can indicate what you're going to ask.
>
> Mr. Kyle: I'm going to ask what was asked in the deposition, and that she went ahead and followed the same procedures and

guidelines in reviewing this case as she did reviewing cases in her capacity at DIA.

The Court: That opens up the whole question of what she did for DIA.

Mr. Kyle: Exactly. That's why I'm asking to do it outside of the presence of the jury.

Mr. Woodward: What for?

Mr. Kyle: Because if she reviewed this the exact same way she did it with DIA, there's no correlation and her comments as an expert are unfounded.

The Court: Well, so what would – what difference would that make to the jury if it's outside their presence?

Mr. Kyle: Well, I didn't want to bring up: You looked at this case exactly how you did your investigations when you were at the DIA and you used the same procedure for doing so, and, therefore, you came to the – exactly what she says in her report, exactly what DIA found, "Not the result of deficient practices. I concur with their findings." That was in her report. So the idea is she looked at it like she did in the capacity of DIA, she concurred with their findings, and that's what her testimony is based on today, which, from my understanding of your ruling on the MIL, was that it was an improper way to assess and look at and make a determination as far as Prairie House's conduct in this case.

The Court: Well, no, that's not what I found. I found that their conclusions that they didn't violate the regulations was irrelevant to these proceedings based on the requirements for proving negligence. If she used the same protocol in making her decision, then, again, that – that's up to you as to whether or not you want to bring that up, but if you do, they're going to find out that she was an investigator for DIA. Are you – I guess what I'm asking is, are you challenging her ability to act – or testify as an expert in this case? Is that what you're asking?

> Mr. Kyle: That's exactly what I'm asking. And the reason being is, if she's merely just reviewing this case as DIA would have, then it's not sufficient as an expert. It's not an independent analysis that she looked at herself. She merely adopted the findings of DIA, which, in her report she said she did.
>
> Mr. Woodward: She testified as to her methodologies used in this case, the facts and conclusions, based upon her review of all of the information. It's clearly appropriate expert testimony. I don't care if it's DIA, CIA, or –
>
> The Court: Well, if her methodology is the same as she used in her DIA investigation, again, that doesn't – that doesn't go to her ability to testify as an expert, that goes to the weight of her testimony. The problem you have, of course, if you bring that up in front of the jury, that does open the door as to the fact that she was a DIA investigator, so I'm not going to indicate to you that you don't open the door if you ask her that, but if you want to make a record on those issues outside the presence of the jury by question and answer of the witness, I'll allow you to do that.

(Tr. Vol. II, p. 135:11–38:3).

During the question and answer which occurred outside of the presence of the jury, Ms. Steele testified that she used the guidelines of a DIA investigator for part of what she did in her investigation. (Tr. Vol. II, p. 138:9–17). She testified that she conducted additional inquiry. (Tr. Vol. II, p. 138:18–24). Ms. Steele further testified that in her written report in this matter she concurred with the DIA investigation but went farther into the records than a DIA investigator would. (Tr. Vol. II, p. 139:5–9). Ms. Steele

also testified that she was a DIA investigator for ten years, learning investigative methods as a surveyor, and that her opinions in this case were based upon her education, training, and experience with over thirty years in intermediate care facilities for the intellectually disabled. (Tr. Vol. II, p. 140:2–17). Ms. Steele then confirmed that she believed she had the ability to evaluate and examine incidents for compliance with rules, procedures, and practices. (Tr. Vol. II, p. 140:11–17).

ARGUMENT ON APPEAL

I. THE DISTRICT COURT CORRECTLY FOUND THE ISSUES RAISED IN PLAINTIFFS' MOTION FOR NEW TRIAL TO BE MOOT DUE TO ITS ENFORCEMENT OF THE CONTRACTED FOR HIGH-LOW AGREEMENT

A. Preservation of Error

DAC agrees that, if not waived, this issue has been properly preserved.

B. Standard of Review

DAC agrees that the proper scope of review on this issue is for errors at law. *Data Documents, Inc. v. Pottawattamie Cty.*, 604 N.W.2d 611, 614 (Iowa 2000); *Miller v. Ginsberg*, 874 A.2d 93, 99 (Pa. Super. 2005) (finding trial court's enforcement of settlement agreement should be reviewed for errors at law).

C. Discussion

Plaintiffs first argue that the District Court improperly found the issues raised in their Motion for New Trial and Change of Venue were moot due to the granting of DAC's Motion to Enforce Settlement Agreement and Motion to Strike. In granting DAC's combined motions, the District Court properly enforced the parties' settlement agreement and struck the Plaintiff's post-trial motions, fully settling the matter and disposing of the entire controversy. This ruling clearly made any and all issues raised in Plaintiffs' post-trial motions moot, as the Court's ruling made all arguments set forth in Plaintiffs' motion merely academic, with no effect on the underlying controversy. *Wengert v. Branstad*, 474 N.W.2d 576, 578 (Iowa 1991). For that reason, which is set forth more fully below, the District Court's ruling on this matter should be affirmed.

The law on mootness was generally laid out by the Plaintiffs' in their opening brief, but their application misconstrued that law and is not supported by the record. A court need not rule on a motion when, if granted, the decision "will have no practical legal effect upon the existing controversy." *See Roth v. Reagen*, 422 N.W.2d 464, 466 (Iowa 1988) (quoting *Toomer v. Iowa Dep't of Job Serv.*, 340 N.W.2d 594, 598 (Iowa 1983)). Put another way, a dispute "is deemed moot if the issue becomes nonexistent or academic and, consequently no longer involves a justiciable

controversy." *Lewis Investments, Inc. v. City of Iowa City*, 703 N.W.2d 180, 183 (Iowa 2005) (quoting *State v. Hernandez–Lopez*, 639 N.W.2d 226, 234 (Iowa 2002)). "The test is 'whether an opinion would be of force or effect in the underlying controversy.'" *Lewis Investments, Inc.*, 703 N.W.2d at 183 (quoting *Iowa Bankers Ass'n v. Iowa Credit Union Dep't*, 335 N.W.2d 439, 442 (Iowa 1983)).

The reason the District Court's ruling on DAC's motions made the Plaintiffs' post-trial motions moot was clearly set forth during hearing on the matter and is supported by common sense and Iowa law. Judge Mark J. Smith set forth his reasoning as follows:

> **THE COURT:** [T]o me, this matter—the Motion for New Trial is moot, because you contracted with counsel to agree that if the jury verdict exceeded 1 million, then the $1 million would be the high; and if the jury verdict was less than a hundred thousand, the low amount would be 100,000.
> . . .
>
> [A] contractual agreement would negate any jury verdict that came about if it was less than a hundred thousand or more than 1 million. The jury verdict was less than a hundred thousand dollars, so, again, I'm just enforcing the settlement that was agreed on.

(App. 342:1–24). The District Court granted DAC's Motion to Enforce Settlement Agreement and Motion to Strike Plaintiffs' post-trial motions. Given this ruling, the matter was fully resolved by virtue of the parties' high-low settlement agreement. Implicit in this ruling is that the high-low

agreement did not allow for post-trial motions; the case was fully and finally resolved the moment the jury returned a verdict below $100,000.00. With the underlying controversy resolved, the Plaintiffs' post-trial motions were moot, and the District Court properly refused to rule on the same.

In their Brief, the Plaintiffs claim the test for mootness is whether a court had jurisdiction to render a particular decision. However, they have failed to cite to any authority which provides that jurisdiction is a factor in determining mootness. Plaintiffs first cite to the case, *In re M.T.*, 625 N.W.2d 702, 704 (Iowa 2001), claiming it provides that mootness depends on whether a court had jurisdiction to decide an issue affecting the underlying controversy. However, the court in *In re M.T.* makes no mention of jurisdiction; the court merely sets forth the general principles on mootness outlined above. 625 N.W.2d at 704 –05. Claiming that "[t]he presence of jurisdiction" determines whether a court's decision would be moot, the Plaintiffs then cite to a 1913 Iowa Supreme Court case, *Graves v. Bd. of Sup'rs of Carroll Cty.*, 144 N.W. 298, 299 (Iowa 1913). Once again, this decision does not provide that jurisdiction plays any role in a mootness analysis. Instead, in a one-paragraph decision, the court in *Graves* simply found that ***because*** the trial court lacked jurisdiction, an evidentiary issue raised by the appellant was moot. *Id.* Nothing in the court's decision even

implies that a court's jurisdiction over an issue factors into whether an issue is moot. Certainly a court can have jurisdiction over an issue but that issue has become moot as a result of some other decision in the case. The proper test for mootness, whether it "will have no practical legal effect upon the existing controversy," *Dorr*, *supra*, was set forth above and was correctly applied by the District Court in its ruling on the parties' post-trial motions.

Plaintiffs then go on to baldly claim that their post-trial motions would have had an effect on the underlying controversy, citing to Iowa R. Civ. P. 1.1004, which provides the basis for a motion for new trial. The Plaintiffs simply ignore the fact that the District Court enforced the parties' high-low settlement agreement, resolving the case and disposing of the underlying controversy. Implicit in this ruling was that the parties' high-low agreement did not allow for post-trial motions. Ruling on the Plaintiffs' motion for new trial and motion for change of venue, at that point, would have been purely academic, as the District Court had already found that the parties had settled the matter.

D. Conclusion

The District Court correctly found that the Plaintiffs' post-trial motions, in which they sought a new trial and change of venue, were moot as a result of it granting DAC's motion to enforce the high-low agreement.

The enforcement of the high-low settlement agreement ended the controversy. Further, the Plaintiffs' reliance on jurisdiction in its mootness argument is erroneous; the District Court granting DAC's Motion to Enforce Settlement Agreement and Motion to Strike, Plaintiffs' post-trial motions had no such effect. The District Court properly found Plaintiffs' post-trial motions to be moot.

II. THE DISTRICT COURT CORRECTLY DECLINED TO HEAR ARGUMENT OR RULE ON PLAINTIFFS' MOTION FOR NEW TRIAL AFTER ENFORCING THE HIGH-LOW AGREEMENT

A. Preservation of Error

DAC agrees that if not waived, this issue has been properly preserved.

B. Standard of Review

DAC agrees that the proper scope of review on this issue is for errors at law. *Data Documents, Inc.*, 604 N.W.2d at 614; *Miller*, 874 A.2d at 99 (finding trial court's enforcement of settlement agreement should be reviewed for errors at law).

C. Discussion

Plaintiffs argue that the District Court erred in finding the parties' high-low agreement precluded the filing of post-trial motions. There is substantial overlap between this issue and the mootness argument, as the basis for the District Court's finding of mootness was its enforcement of the

high-low agreement, but Plaintiffs address this matter separately. Therefore, DAC's argument focuses primarily on the enforceability of high-low agreements and their preclusion of post-trial motions. As discussed below, the high-low agreement entered by the parties precluded post-trial motions, and the District Court properly excluded and refused to rule on the same.

First, the Plaintiffs concede that a valid contract for settlement was entered by the parties. Plaintiffs do not dispute that high-low agreements are enforceable under Iowa law, or that the high-low agreement in this case was accepted by their counsel. *See Phipps v. Winneshiek County*, 593 N.W.2d 143,146 (Iowa 1999) (confirming that settlement agreements are treated and enforced as any other contract). The Plaintiffs also make no argument that the parties understood the high-low agreement to be anything other than a conditional settlement agreement which would fully and finally settle the matter if the jury returned a verdict outside the negotiated settlement amounts. Plaintiffs' position, unsupported by reason and law, is that the parties' high-low agreement still allowed them to proceed with post-trial motions. As correctly determined by the District Court, the true intent of the high-low agreement was to fully and finally resolve the Plaintiffs' claims, without any post-trial motions or appeals, upon the jury returning a verdict outside the range of $100,000.00–$1,000,000.00.

It is undisputed that Iowa courts have authority to enforce settlement agreements entered in a pending case. *Gilbride v. Trunnelle*, 620 N.W.2d 244, 249 (Iowa 2000). Settlement agreements are contracts arrived at after arm's length negotiations. *Waechter v. Aluminum Company*, 454 N.W.2d 565, 568 (Iowa 1990). Iowa courts interpret and enforce settlement agreements like any other contracts. *Phipps v. Winneshiek County*,593 N.W.2d 143,146 (Iowa 1999). "Like a contract, we enforce a settlement agreement absent fraud, misrepresentation, or concealment." *Walker v. Gribble*, 689 N.W.2d 104, 109 (Iowa 2004).

In *Wright v. Scott*, the Iowa Supreme Court described the court's view on settlements:

> The law favors settlement of controversies.
> A settlement agreement is essentially contractual in nature. The typical settlement resolves uncertain claims and defenses, and the settlement obviates the necessity of further legal proceedings between the settling parties. We have long held that voluntary settlements of legal disputes should be encouraged, with the terms of settlements not inordinately scrutinized.

410 N.W.2d 247, 249–50 (Iowa 1987) (internal citations omitted); *see also Shirley v. Pothast*, 508 N.W.2d 712, 715 (Iowa 1993); *Walker*, 689 N.W.2d at 109. Just as with all other contracts, courts are not to have any concern with the "wisdom or folly" of a settlement agreement. *Id.* (quoting *Bjornstad v. Fish*, 87 N.W.2d 1, 7 (Iowa 1957)).

It is well recognized that high-low agreements are valid and enforceable and are nothing more than conditional settlement agreements. *See Thompson v. T.J. Whipple Construction Co.*, 985 A.2d 221, 224 (Pa. Super. Ct. 2009); *Employers Reinsurance Corp. v. Gordon*, 209 S.W.3d 913, 917 (Tex. App. 2006). In *Pike v. Premier Transportation & Warehousing, Inc.*, the U.S. District Court for the Northern District of Illinois aptly described high-low agreements as follows:

> A high-low agreement, when initially reached by the parties . . . is, in fact, a conditional settlement. The condition of the agreement is that the jury render[s] a verdict that falls outside the range of the high-low agreement. When a verdict is rendered outside of the agreed-upon range, the condition is triggered and the "high" or the "low" becomes binding upon the parties as a settlement. By contrast, when a jury renders a verdict within the range of the high-low agreement, the condition is not met and the high-low agreement is rendered academic.

No. 13 C 8835, 2017 WL 951323, at *2 (N.D. Ill. Mar. 10, 2017) (quotations omitted).

In the present case, the District Court properly concluded that a valid and enforceable contractual settlement agreement was reached between the parties. The Plaintiffs and DAC agreed to settle their claims for either $1,000,000.00 or $100,000.00 conditioned on the jury returning a verdict either above or below those numbers, respectively, which agreement became binding on the Plaintiffs when the jury returned a defense verdict. The

intent of the high-low agreement was clear from the outset, to fully and finally settle the Plaintiffs' claims should the jury's verdict fall below the minimum recovery or above the maximum recovery.

Plaintiffs conditionally settled their claims on July 19, 2017, during deliberations of the jury, and then sought to disregard that settlement because they were displeased with the jury's verdict. Plaintiffs' motion for new trial and change of venue was, therefore, properly stricken by the District Court, and the high-low settlement agreement was correctly enforced.

In support of their argument, Plaintiffs cite to a string of New York cases which they claim hold that high-low agreements do not preclude post-trial motions unless expressly provided for. This is an incorrect statement of the law expressed in that line of cases which have limited precedential value. The New York courts will, absent an express agreement, prohibit post-trial motions if it is determined that was the parties' intent. *Doubrovinskaya v. Dembitzer*, 20 Misc. 3d 440, 444, 858 N.Y.S.2d 874, 878 (Sup. Ct. 2008), *rev'd on other grounds*, 77 A.D.3d 609, 908 N.Y.S.2d 730 (2010). New York courts will go so far as to imply an intent to bar post-trial motions if it would be "universally recognized" to be part of the high-low agreement. *Id.* at 444 ("A court might even imply such an intent if it were "universally

recognized" to be part of a high-low agreement."). The New York cases are of little precedential value as they provide very little rationale for allowing post-trial motions in some circumstances following entry of a high-low agreement.

In the present case, the high-low settlement contract was entered into by counsel on the morning of the second day of jury deliberations. (App. 332–336). All evidence had been entered, objections made and ruled upon, arguments had been heard, and the jury had been instructed; both counsel were well aware of any potential basis for a post-trial motion and both chose to settle the matter by high-low agreement. *See id.* (determining the propriety of a post-trial motion and considering the fact the agreement was made prior to the jury's determination of liability and that defendant moved for a directed verdict, "clearly indicating his understanding that the parties' agreement did not preclude motions on which the Court would weigh the sufficiency of the evidence.").

Perhaps the best reasoning regarding the effect of a high-low settlement agreement was stated in the case of *Tauer v. Secura Ins.*, 2001 WL 1516723, at *2 (D. Minn. Nov. 26, 2001) (unpublished opinion), where the court specifically addressed whether a post-trial motion is permitted when the parties enter into a high-low agreement. After applying basic

principles of contract law, the answer given by the court was "no." *Id.*, and the sound rationale of the court was stated as follows:

> [Movant's] motions must be denied **because one of the fundamental purposes of high-low agreements is to dispense with post-trial motions and appeals.** High-low agreements are regarded as partial settlements in which the plaintiff and the defendant agree to abide by the jury's verdict on liability. Regardless of a higher or lower jury verdict on damages, Plaintiff agrees to collect no more than a maximum amount and defendant agrees to pay no less than a minimum amount. Accordingly, each party insures the other against an extreme jury verdict.
>
> The high-low agreement thereby reduces the risks of trial to a range of numbers acceptable to both parties. It is a partial settlement. Courts may enforce high-low agreements like any other settlement agreement. By negotiating a high-low agreement, parties intend to have the case quickly resolved by a jury verdict and eliminate further litigation and expenses. *See, e.g.*, *Smith v. Settle*, 492 S.E.2d 427, 429 (Va. 1997) (refusing to read into a high-low agreement any right to seek post-trial relief). Unless such a right is explicitly reserved, the parties' high-low agreement should not be rewritten to impose a right to post-trial or appellate relief that is neither stated nor implied therein. *See id.* ***Because continued litigation is contrary to the purposes underlying a negotiated high-low agreement, [movant's] motions are denied.***

Id. (emphasis added). As stated in *Tauer*, the primary purpose of a high-low agreement is to ensure against extreme verdicts while disposing of post-trial motions and appeals. Permitting a post-trial motion or appeal would be contrary to that very purpose.

Finally, there are practical problems that arise with allowing post-trial motions following entry of a high-low agreement. First, was the filing of Plaintiffs' post-trial motions a repudiation of the high-low agreement? If not and the case is remanded to the District Court for hearing on Plaintiffs' post-trial motions, can the Plaintiffs still demand payment of the $100,000.00 from DAC? If a second trial is ultimately ordered, can DAC repudiate the high-low agreement because it believes it can again procure a defense verdict? It is clear that the more practical approach, and the one applied in the authority cited by DAC above, is that the case was fully and finally resolved when a defense verdict was entered, barring any post-trial motions or appellate relief.

D. Conclusion

The high-low settlement agreement contracted for on July 19, 2017, became a full, final, and complete resolution of this case upon entry of a defense verdict, barring any post-trial or appellate relief. The District Court's ruling should therefore be affirmed.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING PLAINTIFFS' MOTION FOR MISTRIAL

A. Preservation of Error

DAC agrees that, if not waived, Plaintiffs properly preserved error with respect to their motion for mistrial regarding statements made during

opening argument and the case-in-chief. (Tr. Vol. I, p. 114:15–115:13; Tr. Vol. II, p. 7:25–9:21).

However, Plaintiffs failed to preserve and waived any claim that statements made during closing argument by DAC's counsel violated the District Court's pretrial order. "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, when closing arguments are reported, certified, and made part of the record." *Rosenberger Enterprises, Inc. v. Ins. Serv. Corp. of Iowa*, 541 N.W.2d 904, 907 (Iowa Ct. App. 1995) (citing *State v. Nelson,* 234 N.W.2d 368, 371 (Iowa 1975)). Counsel for Plaintiffs did not move for mistrial based on statements made during closing argument. Thus, Plaintiffs waived any claim on appeal that those statements entitled them to a mistrial.

B. Standard of Review

DAC agrees that the proper scope of review for the denial of a motion for mistrial is abuse of discretion. *State v. Newell*, 710 N.W.2d 6, 32 (Iowa 2006).

C. Discussion

1. Introduction

Before addressing the merits of this argument, it must again be noted that Plaintiffs have waived any post-trial relief by entering into the high-low settlement agreement with DAC. The high-low agreement fully and finally settled the matter, waiving post-trial motions and appellate relief. Thus, Plaintiffs' request for review of the District Court's ruling on their motion for mistrial was waived and fails for on this basis alone, without the need to address the merits of the argument.

Not only did Plaintiffs waive their motion for mistrial, their argument on the matter still fails on its merits.

Plaintiffs' motion for mistrial stemmed from the District Court's order granting their Motion in Limine with regard to the report of the Iowa Department of Inspection and Appeals ("DIA"). Specifically, Plaintiffs claim DAC's counsel violated the Court's order by mentioning the DIA report and that those statements prejudiced them. In fact, counsel for DAC did not violate the Court's pretrial order regarding the DIA, and, even if there was a violation, no prejudice to the Plaintiffs resulted.

2. Argument

Trial courts are vested with broad discretion in determining whether to grant a mistrial. *State v. Blackwell*, 238 N.W.2d 131, 137–39 (Iowa 1976); *Giltner v. Stark*, 219 N.W.2d 700, 711 (Iowa 1974) (refusal to grant

mistrial due to misconduct by counsel); *Sandman v. Hagan*, 154 N.W.2d 113, 120 (Iowa 1967) (refusal to grant mistrial or new trial due to counsel's misconduct). Such discretion is a recognition of the trial court's better position to appraise the situation in the context of the full trial. *Blackwell*, 238 N.W.2d at 138; *State v. Breitbach*, 488 N.W.2d 444, 448 (Iowa 1992).

Appellate courts give broad discretion to trial courts regarding motions for mistrial:

> We give extremely broad, though not unlimited, discretion to a trial court on motions for mistrial and new trial.

Strover v. Lakeland Square Owner's Assoc., 434 N.W.2d 866, 874 (Iowa 1989). To show an abuse of discretion, one must generally show "that the court exercised its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *Blackwell*, 238 N.W.2d at 138.

It is first important to address the reasoning of the District Court in granting Plaintiffs' Motion in Limine of evidence of the DIA report:

> For reasons similar to *Huston*, the Court finds that the DIA report regarding the incident in this case is inadmissible *because there is a danger it will improperly influence the fact-finding function of the jury* and therefore it is unfairly prejudicial."

(App. 102) (emphasis added). In finding the DIA report inadmissible, the Court's concern was that the jury may simply adopt the DIA's conclusion as

its verdict. It was the finding of "no violations" that the Court stated in its order to be unfairly prejudicial, not any and all mention of the DIA or its regulatory function. This is an important distinction, as Plaintiffs attempt to argue that a few vague references to the DIA, generally, violated the District Court's ruling and caused them prejudice.

With that in mind, during opening statements, counsel for DAC made two comments which Plaintiffs claim violated the Court's order on their Motion in Limine. However, neither of the statements revealed the specific findings of the DIA investigation or the contents of its report. In opening, counsel for DAC first briefly mentioned "as the agency that licenses and inspects ICF facilities and investigates incidents, including that of July 6, 2015," and you are going to learn they found no violations --, (Tr. Vol. I, p. 99:17-100:2), at which time counsel immediately asked to approach the bench, and the Court issued a cautionary instruction to the jury, telling them to disregard the statement relating to the DIA investigation. (Tr. Vol. 1, p. 99:17–100:12). The second statement Plaintiffs object to was with regard to DAC's expert, Rosalie Steele, and her experience in having worked for the DIA. In noting that Ms. Steele formerly worked as a surveyor and inspector for the DIA, counsel for the Defendant was simply describing the qualifications of the expert witness. There was no mention of the DIA's

investigation or findings regarding the incident at issue. Put simply, the jury could not possibly substitute its own conclusions with those of the DIA given the vague and brief mention of its investigation during opening statements or the qualifications of DAC's expert. The District Court's concern in granting the Motion in Limine, namely substituting DIA's findings for that of the jury, was not raised, and it properly denied Plaintiffs' motion for mistrial based on these statements. This is especially true as it pertains to opening statements, and the subsequent instructions to the jury as what is evidence, and that statements of counsel are not.

Plaintiffs also claim violations of the District Court's order occurred during examination of a DAC witness. Plaintiffs contend that DAC's witness, Tiffany Higgins, violated the District Court's order by responding to a question from plaintiffs' counsel by saying another "entity." (Tr. Vol. I, p. 181:14–18). First, the testimony by Ms. Higgins came in response to questions from Plaintiffs' attorney regarding DAC's investigation of Sansom's death. (Tr. Vol. I, 181:14–18). Ms. Higgins response was that DAC investigated the incident, knowing that "another entity" would be coming in to investigate. (Tr. Vol. I, 181:16–18). Counsel for Plaintiffs clearly opened the door to testimony on the DIA investigation by inquiring into post-incident investigations. Plaintiffs cannot be awarded the benefit of

asking about investigatory efforts while also arguing that DAC should be banned from mentioning the DIA. Second, there was still no mention by Ms. Higgins of the DIA investigation or report; it was merely a general statement that another entity would be investigating the incident.

As for the remarks during closing arguments, objections to the same were waived by failing to move for a mistrial prior to the case being submitted to the jury. *See Rosenberger Enterprises, Inc.*, 541 N.W.2d at 907. Even if counsel for Plaintiffs had timely objected to the remarks, however, they do not support a mistrial. Plaintiffs object to DAC's counsel having again referred to Ms. Steele's experience working for the State of Iowa and counsel's reference to her testimony that "there was no violation of the rules of regulations." No reference was made to DIA or the investigation in closing argument and the comment on Ms. Steele's experience had nothing to do with the DIA investigating the death of Sansom. Instead, the argument cited Ms. Steele's testimony that DAC complied in her opinion with all rules, regulations, and standards of care.

The District Court's order did not bar witnesses from testifying on DAC's compliance with safety rules; it only prohibited reference to the DIA's findings. During closing argument, there was no mention of DIA or

its findings; only the opinions of Ms. Steele. Plaintiffs' request for a mistrial should therefore be denied.

Not only was there no violation of the Court's pretrial order, there was no prejudicial effect. The purpose of the District Court's order was to prevent the jury from adopting the findings and conclusions of the DIA. None of the remarks or testimony cited by Plaintiffs could potentially realize this concern. General and vague discussion about the DIA and its regulatory role could not cause the jury to adopt the DIA's investigative findings, as there were no findings to adopt. There was only one general remark that even mentioned the DIA's investigation and findings, together with annual inspections, and Counsel for the Defendant did not go into any detail. It was the briefest mention of the DIA investigation, and it was immediately remediated by the Court.

Upon Plaintiffs' objection during opening statements, the Court also immediately admonished to the jury. (Tr. Vol. I, 100:7–11). Further, when Plaintiffs renewed their motion for mistrial at the close of openings, the Court offered Plaintiffs the opportunity to submit a cautionary jury instruction, which Plaintiffs' counsel declined. (Tr. Vol. I, 117:2–17). Iowa courts have held that, "[g]enerally, an admonition to the jury to disregard inadmissible testimony is sufficient to cure any prejudice." *State v.*

Brown, 397 N.W.2d 689, 699 (Iowa 1986); *Fry v. Blauvelt*, 81 N.W.2d 123, 132 (Iowa 2012). "Only in extreme instances where it is manifest that the prejudicial effect of the evidence on the jury remained, despite its exclusion, and influenced the jury is the defendant denied a fair trial and entitled to a [mistrial]." *State v. Peterson*, 189 N.W.2d 891, 896 (Iowa 1971)). In considering whether the prejudicial impact of inadmissible evidence can be adequately mitigated by the use of a cautionary instruction, Iowa Courts consider the extensiveness of the challenged testimony and the promptness with which it is stricken from the record. *State v. Belieu*, 288 N.W.2d 895, 901 (Iowa 1980). Here, there was no testimony, only the statement of counsel and the jury was admonished and instructed not to consider the statement. Plaintiffs have given no reason for it to stray from the general rule that such measures are sufficient to protect against prejudice.

Finally, as stated above, prior to jury deliberations, the Court gave instruction ICJI 100.4, which, in part, instructed the jury that "[s]tatements, arguments, questions and comments by the lawyers" are not evidence.

In their Brief, the Plaintiffs claim that the jury's request for a copy of the "regulations" demonstrates that the jury considered defense counsel's statements during opening. However, numerous "regulations" were discussed throughout trial, including federal and state regulations by

numerous witnesses. There was no request for DIA rules or its report; in fact, the jury communication specifically asked for the "Iowa Code," not the DIA investigative report or rules. This does not amount to evidence of prejudice and does not support the granting of a mistrial.

D. Conclusion

For the foregoing reasons, the District Court's ruling denying Plaintiffs' motion for mistrial should be affirmed.

ARGUMENT ON CROSS-APPEAL

I. THE DISTRICT COURT ERRED IN DENYING DEFENDANT'S MOTION TO EXCLUDE EXPERT TESTIMONY

A. Preservation of Error

This issue was preserved for appellate review through DAC's Motion to Exclude Expert Testimony, and the District Court's ruling on the issue by Order dated July 6, 2017.

B. Standard of Review

The standard of review for the admission of evidence is abuse of discretion. *Graber v. City of Ankeny*, 616 N.W.2d 633, 638 (Iowa 2000); *Berg v. Des Moines General Hospital*, 456 N.W.2d 173, 177–78 (Iowa 1990).

C. Discussion

In a pretrial Motion to Exclude Expert Witness, DAC asked the District Court to preclude Plaintiffs' expert, Kathleen S. Biddlestone, RN, from testifying at trial, asserting that she was unqualified to render an opinion on the standard of care at issue in the case. The District Court found Biddlestone to be qualified and permitted her testimony; this ruling was error and, should this case be remanded, the District Court's order denying DAC's Motion should be reversed.

Iowa courts have a "well-recognized role as guardians of the integrity of expert evidence offered at trials." *Ranes v. Adams Labs., Inc.*, 778 N.W.2d 677, 686 (Iowa 2010). Iowa Rule of Evidence 5.702 provides the standard for admission of expert testimony:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

Iowa R. Evid. 5.702. "In other words, '[e]xpert testimony is admissible if it is reliable and will assist the trier of fact in resolving an issue.'" *Heinz v. Heinz*, 653 N.W.2d 334, 342 (Iowa 2002) (quoting *State v. Rodriguez*, 646 N.W.2d 234, 245 (Iowa 2001)). Whether a witness is sufficiently qualified to testify as an expert is within the court's discretion. *Tappe v. Iowa Methodist Medical Ctr.*, 477 N.W.2d 396, 402 (Iowa 1991); "In all

circumstances involving expert testimony, the proponent of the evidence has the burden of demonstrating to the court as a preliminary question of law the witness's qualifications and the reliability of the witness's opinion." *Ranes*, 778 N.W.2d at 686 (citing Iowa R. Evid. 5.104(a)).

The broad test for admissibility of expert testimony has two preliminary areas of judicial inquiry that must be considered before admitting expert testimony. *See* Iowa R. Evid. 5.702. First, the court must determine if the expert witness is qualified to testify based on the expert's knowledge, skill, experience, training or education. *See* Iowa R. Evid. 5.702. It is not enough for a witness to be generally qualified as an expert in a certain area; rather, the witness must be qualified to answer *the particular question propounded* and address *the subject at issue*. *Wick v. Henderson*, 485 N.W.2d 645, 648 (Iowa 1992); *In re O'Neal*, 303 N.W.2d 414, 420 (Iowa 1981) (emphasis added). Second, the court must "determine if the [expert] testimony will assist the trier of fact in understanding the evidence or to determine a fact in issue." *Ranes*, 778 N.W.2d at 686 (citing Iowa R. Evid. 5.702). This includes determining whether the proferred opinion of the expert is relevant in assisting the trier of fact. *See Johnson v. Knoxville Cmty. Sch. Dist.*, 570 N.W.2d 633, 637 (Iowa 1997).

In fulfilling its role as the "guardian of the integrity of expert evidence," the court must first determine if a proposed expert is qualified under Iowa R. Evid. 5.702. The expert's knowledge, skill, experience, training or education must make her qualified to testify on the *specific subject at issue*, rather than simply be generally qualified in a particular area. *See* Iowa R. Evid. 5.702; *Wick*, 485 N.W.2d at 648. The specific subject at issue is the standard of care for the operation, management, training and programs of an ICF/ID. As discussed below, Biddlestone is not qualified to render opinions on ICF/ID programs, and her testimony should have been excluded by the District Court at trial.

Biddlestone testified at her deposition, a transcript of which was presented to the District Court, that she is a registered nurse with Cuyahoga County, Ohio on the Board of Developmental Disabilities, providing quality assurance reviews for independent living and group homes related to medication administration. (App. 34–35). Biddlestone has never practiced nursing or worked in any capacity in the State of Iowa and has no knowledge of the Iowa Administrative Code governing ICF facilities. (App. 36–37). Further, she has never worked as a direct care provider at an ICF facility or received training on federal regulations of ICF facilities, outside of her employment. (App. 22, 40, 49). Biddlestone has only ever worked as

a nurse in an ICF facility. (App. 49). She has no experience in conducting surveys of ICF facilities or developing an individual program plan on a facility-wide basis. (App. 41, 49). Biddlestone's experience is solely from the perspective of a nurse. In this case, Plaintiffs' theories of negligence relate in no way to nursing.

In *Ranes*, 778 N.W.2d at 695, Justice Cady explained that while an expert may be able to testify generally, evidence is required to demonstrate that the expert can render an opinion on complex issues, such as those at the heart of this case. Like the expert in *Ranes*, whose testimony the court excluded due to him being generally qualified as a physician but not in the specialized field of neurology, Biddlestone does not have the specific knowledge or experience necessary to render the opinions she proposed and did, in fact, testify to at trial.

In this case the Plaintiffs failed, as a matter of law, to show that Biddlestone had the knowledge, skill, experience, training, and education necessary to render opinions outside the field of nursing. Without qualifications as an expert in the development of care plans or a facility's compliance with state and federal regulations, Biddlestone was not qualified under Iowa R. Evid. 5.702 to testify at trial in this matter. The District Court

erred in denying DAC's Motion to Exclude her testimony and, should this case be remanded, that ruling should be reversed.

D. Conclusion

For the foregoing reasons, the District Court's ruling denying Plaintiffs' Motion to Exclude Expert Testimony should be reversed.

II. THE DISTRICT COURT ERRED IN GRANTING PLAINTIFFS' MOTION IN LIMINE REGARDING THE FINDINGS OF THE IOWA DEPARTMENT OF INSPECTIONS AND APPEALS AND THE SCOPE OF APPLICATION OF SUCH RULING

A. Preservation of Error

This issue was preserved for appellate review through Defendant's Resistance to Plaintiffs' Motions in Limine, and the District Court's ruling on the issue by Order dated July 6, 2017.

B. Standard of Review

The standard of review for the admission of evidence is abuse of discretion. *Graber*, 616 N.W.2d at 638; *Berg*, 456 N.W.2d at 177–78.

C. Discussion

1. Introduction

In response to paragraph 3 of Plaintiffs' motion in limine, the Court entered an order stating:

> [T]he Court finds that the DIA report regarding the incident in this case is inadmissible because there is a danger it will

> improperly influence the fact-finding function of the jury and therefore it is unfairly prejudicial. Because this report may impermissibly invade the province of the jury, the Plaintiffs' Motion in Limine with regard to the DIA report is granted.

(App. 102). The Court erred in granting the Plaintiffs' motion in limine on this issue, as evidence of the DIA investigation and report was relevant and admissible under Iowa R. Evid. 5.403. Therefore, if this case is remanded to the District Court, the Order on Plaintiffs' Motion in Limine should be reversed.

2. Argument

Evidence of the DIA investigation and the results thereof are relevant as to the alleged liability of DAC. The Plaintiffs' contention at trial was that DAC was negligent in its supervision and care for Nicole Sansom at Prairie House. In its investigative report, the DIA found no deficiencies in DAC's response to food ingestion/the choking incident involving Nicole Sansom. That the DIA found no deficiencies in the response of DAC certainly has a tendency to make it less probable that DAC was negligent in its care and supervision for Nicole Sansom. Iowa R. Civ. P. 5.401 (defining relevant evidence). Thus, evidence of the DIA investigation and report should have been admitted under Rule 5.401 unless deemed inadmissible under some other rule.

Admission of evidence of the DIA investigation and report would also not result in undue prejudice to the Plaintiffs. In its Order, the Court relied upon the case, *State v. Huston*, 825 N.W.2d 531 (Iowa 2013), stating it supports a finding that admitting the DIA letter report would be unfairly prejudicial to the Plaintiffs. In *Huston*, where the defendant was charged with child endangerment, the district court permitted a witness to testify that a Department of Human Services ("DHS") report of child abuse was "founded." *Id.* at 537. The Iowa Supreme Court disagreed, finding that the DHS report was irrelevant "to any issue for the jury to decide" and unfairly prejudicial to the defendant. *Id.* The court held that the DHS report being "founded" was unfairly prejudicial "due to the risk the jury would substitute the DHS determination for its own finding of guilt or would give the determination undue weight." *Id.* at 539. However, the present case does not involve any of the concerns voiced by the court in *Huston*. The DIA letter report merely states that there were no deficiencies noted during the inspection following the death of Nicole Sansom. It does not—as the administrative report did in *Huston*—serve to instruct the jury how to decide the salient issue, negligence. The DIA report simply supported DAC's defense that it was complying with all regulations and Nicole Sansom's individual plan. There could be no unfair prejudice to the Plaintiffs in

admitting the DIA report, and the District Court erred in not admitting the same.

The DIA report itself is also admissible pursuant to Iowa R. Evid. 5.803(8), which provides an exception to the hearsay rule for records or statements of public offices or agencies if they set out "[m]atters observed while under a legal duty to report" and "[f]actual findings from a legally authorized investigation." Iowa R. Evid. 5.803(8)(ii)(iii). It is undisputed that DIA was conducting the investigation as part of its legal duty and was legally authorized to conduct such investigation. The letter report and form also constitute "public records" under Iowa Code section 135C.19(1). Third, Federal courts have explicitly found the final reports of government agencies regulating nursing homes to be admissible under the federal counterpart to Rule 5.803(ii). *See Beechwood Restorative Care Ctr. v. Leeds*, 856 F. Supp. 2d 580, 588 (W.D.N.Y. 2012).

Not only was evidence of the DIA report and investigation relevant to the jury's determination of negligence, the investigation results were relevant and admissible to combat the Plaintiffs' claim for punitive damages.

In their Petition, the Plaintiffs asserted that DAC acted with wanton and willful conduct in its care and supervision of Nicole Sansom. In order to refute that allegation, it is certainly relevant that the DIA conducted an

investigation and found no deficiencies in the Defendant's facility related to the death of Nicole Sansom. The results of the DIA investigation provided crucial evidence that DAC did not act willfully and wantonly—that, in fact, DAC was complying with the requirements established by the applicable codes and rules of the DIA. Even if not admissible for all purposes, evidence of the investigation's results were relevant and admissible with regard to Plaintiffs' claim for punitive damages against DAC.

Not only did the District Court err in excluding the DIA, investigation results and the report, the Court went too far in barring virtually any mention of the DIA, its inspectors, investigation, or regulatory function. The Court clarified its ruling during trial:

> The motion in limine No. 3 requested any reference to or evidence about the Department of Inspections and Appeal survey and report, related evidence and related evidence about the investigation findings. My ruling filed July 6, 2017, states clearly because this report may invade the province of the jury, plaintiff's motion in limine with regard to the DIA report is granted.
>
> And again, I earlier referred to what specifically they requested and that would be any reference to or evidence about the Department of Inspections and Appeal survey and report and the related evidence about the investigation findings. So it's pretty clear that I – it's more than pretty clear. It is clear that I prohibited any reference to or evidence about that report . . . .

(Tr. Vol. I, p. 116:7–22).

Thus, the District Court not only barred evidence of the results of the DIA investigation, it also excluded any and all testimonial evidence on the DIA, and the DIA investigation in general. DAC respectfully submits that this was error. The basis for the Court's exclusion of the evidence was that the DIA report would be unfairly prejudicial, as it "may impermissibly invade the providence of the jury." In other words, the jury may simply adopt the results of the DIA investigation. This concern would be completely alleviated if the ***results*** of the DIA investigation were excluded but evidence of the DIA investigation generally was allowed into evidence. For example, with the Court's overly broad exclusion of this evidence, DAC was prohibited from introducing evidence of DAC's cooperation in the investigation or that the DIA was informed of the incident; in fact, DAC was precluded from even describing the regulatory function of the DIA or that its expert not previously been employed by DIA. Thus, if this Court finds the District Court properly excluded evidence of the results of the DIA investigation, the District Court's ruling should be reversed as to its exclusion of ***any*** evidence of the DIA investigation.

D. Conclusion

For the foregoing reasons, the District Court's ruling on this issue should be reversed.

CONCLUSION

For the reasons stated above, Appellee/Cross-Appellant, DAC, Inc., d/b/a Prairie House, respectfully requests that the District Court's ruling granting Defendant's Motion to Enforce Settlement Agreement be affirmed. The parties entered into a binding high-low settlement agreement, precluding any post-trial motions or appellate relief; the District Court properly granted the Motion to Enforce Settlement Agreement and struck the Plaintiffs' post-trial motions. Alternatively, if this case is remanded, DAC asks that the District Court's July 6, 2017 ruling be reversed with respect to the admissibility of evidence of the investigation and report of the Iowa Department of Inspections of Appeals, and the case remanded for trial, and that costs of this action and appeal be assessed against Appellants/Cross-Appellees.

REQUEST FOR ORAL ARGUMENT

The Appellee/Cross-Appellant requests to be heard at oral argument in connection with the issues raised in this appeal.

DAC, INC., d/b/a Prairie House,
Defendant/Appellee/Cross-Appellant

By: */s/ Patrick L. Woodward*
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/s/ Ryan F. Gerdes April 26, 2018
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CERTIFICATE OF SERVICE AND FILING

I certify that on the 26th day of April, 2018, I, the undersigned, did file electronically this Appellee/Cross-Appellant's Brief in Final Form and Request for Oral Argument with the Clerk of the Iowa Supreme Court using the Electronic Document Management System.

I certify that on the 26th day of April, 2018, I, the undersigned, did serve this Appellee/Cross-Appellant's Brief in Final Form on the attorney for the Appellants via electronic service of the Electronic Document Management System. Upon information and belief, the attorney for the Appellants is a registered filer pursuant to Iowa R. Civ. P. 16.201.

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