In The Iowa Supreme Court
Supreme Court No. 17-1892

GREGORY HAWKINS,

Plaintiff-Appellee,

vs.

GRINNELL REGIONAL MEDICAL CENTER, DAVID NESS, and DEBRA NOWACHEK,

Defendants-Appellants.

Appeal from the District Court for Poweshiek County

The Honorable Randy S. DeGeest

Appellants' Final Reply Brief

Oral Argument Requested

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Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Rules

I. The district court erred in refusing to submit Defendants' requested same-decision instruction.

A. Defendants preserved error.

Hawkins essentially agrees Defendants preserved error by timely objecting to the district court's failure to: (1) instruct the jury on Defendants' requested "same decision" defense; and (2) include questions in the verdict form relating to Defendants' same-decision defense.[1] (Pl. Brief 23; JA-I 1944-1952 [11:15-19:22], 1959 [26:18-24]).

Hawkins's argument that Defendants are judicially estopped from arguing they were entitled to a same-decision instruction is untenable. Defendants' argument at summary judgment—based on the record existing at that time—that Hawkins could not demonstrate pretext under the McDonnell Douglas[2] burden-shifting framework is immaterial. A "fundamental feature" of the judicial estoppel doctrine

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[1] Hawkins's suggestion Defendants were required to advance their same-decision defense during their closing argument to preserve error is illogical. It defies common sense to require Defendants to advance a legal theory during their closing that was not embodied in the marshaling instructions.

[2] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

is "the successful assertion of the inconsistent position in a prior action." Vennerberg Farms, Inc. v. IGF Ins. Co., 405 N.W.2d 810, 814 (Iowa 1987). "Absent judicial acceptance of the inconsistent position, application of the rule is unwarranted because no risk of inconsistent, misleading results exists." Id. Because the district court denied Defendants' motion, and did not "accept" their argument at that phase in the litigation, judicial estoppel does not apply.

B. The same-decision defense has been recognized by this Court for almost thirty years.

Hawkins's suggestion this Court has not "endorsed" the mixed-motive/same-decision framework for claims under the ICRA, and has given such approach only "theoretical approval," is incorrect. (Pl. Brief 27). Landals v. George Rolfes Co. was decided shortly after Price Waterhouse,[3] and involved ICRA age and disability-discrimination claims. 454 N.W.2d 891, 892 (Iowa 1990). The Court stated "[a] person may prove . . . discrimination by either of two methods"—the single-

[3] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

motive/pretext framework of McDonnell Douglas or the mixed-motive/same-decision framework of Price Waterhouse.[4] Id. at 893-94. Later, in Boelman v. Manson State Bank, the Court expressly recognized "[a] mixed motive analysis is appropriate when the employment decision was the product of a mixture of legitimate and illegitimate motives." 522 N.W.2d 73, 78 (Iowa 1994) (internal quotation omitted). In such a case, upon sufficient proof by the employee, "the burden of proof shifts to the employer to show that it would have made the same decision in the absence of the discriminatory motive." Id. (citation omitted). The Court analyzed the evidence and held the mixed-motive analysis was inappropriate because the plaintiff's disability was the only reason for his termination. Id. Finally, in McQuistion v. City of Clinton, this Court noted the mixed-motive/same-decision framework is applied when an employee presents credible evidence to support an inference that a

[4] The district court submitted the case to the jury using the McDonnell Douglas framework, which was not challenged on appeal. Landals, 454 N.W.2d at 894.

discriminatory attitude was a motivating factor in the employment action at issue. 872 N.W.2d 817, 828 n.4 (Iowa 2015). This Court—as well as the Iowa Court of Appeals in numerous decisions—has recognized and endorsed the mixed-motive/same-decision framework for ICRA claims. (Defs. Brief 49-50). Hawkins's argument that the mixed-motive/same-decision framework was "concocted" by the United States Supreme Court and never recognized and endorsed by this Court is wrong.[5]

Further, the absence of a discussion of the mixed-motive/same-decision framework in DeBoom and Haskenhoff[6] does not support

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[5] Further, in adopting the "motivating-factor" standard for ICRA claims, DeBoom cited Vaughan v. Must, Inc. and Sievers v. Iowa Mut. Ins. Co., each involving claims under the federal Age Discrimination in Employment Act, not the ICRA. DeBoom v. Raining Rose, Inc., 772 N.W.2d 1, 13 (Iowa 2009) (citing Vaughan, 542 N.W.2d 533, 537-38 (Iowa 1996); Sievers, 581 N.W.2d 633, 639 (Iowa 1998)). Vaughan, like Hy-Vee Food Stores v. Iowa Civil Rights Commission, 453 N.W.2d 512 (Iowa 1990), Landals, and McQuistion recognizes the availability of the same-decision defense to employers in discrimination claims. 542 N.W.2d at 538-39.

[6] Haskenhoff v. Homeland Energy Sols., L.L.C., 897 N.W.2d 553 (Iowa 2017).

Hawkins's position. The issue presented in each case related only to the employee's burden of proof in her underlying ICRA claim. In both cases, this Court adopted a "determining"/"motivating" factor standard and rejected the employer's argument for a heightened burden of proof. DeBoom, 772 N.W.2d at 13 (rejecting argument employee must prove impermissible criteria was "the determinative factor" in employment decision); Haskenhoff, 897 N.W.2d at 602 (Cady, C.J., concurring) (rejecting argument employee must prove protected conduct was a "significant factor" in employment decision, and holding an employee's burden in a retaliatory discharge claim is the same as a discrimination claim). The lack of discussion of the longstanding same-decision defense is not a "conspicuous silence" that supports Hawkins's position. (Pl. Brief 29). Rather, it reflects the Court's adherence to the principle that instructional issues not preserved by the parties and raised in the appeal are not addressed. Iowa R. Civ. P. 1.924.

Defendants acknowledge following DeBoom and Haskenhoff, an employee must prove only that an impermissible criteria was a "motivating factor" in the termination decision. However, under longstanding Iowa law, an employee's termination was not "because of" his age or disability or "because" he participated in protected activity when the employer can prove it would have made the same decision absent a discriminatory motive.

C. The same-decision defense is consistent with the ICRA's underlying purpose.

Hawkins correctly notes the ICRA is to be "construed broadly to effectuate its purposes." Iowa Code § 216.18(1). Tellingly, however, Hawkins does not cite or acknowledge the legislature's purpose in banning discrimination in employment—that is, to prohibit conduct which, in the absence of the employee's protected characteristic(s), "would not otherwise have occurred." DeBoom, 772 N.W.2d at 6; Sommers v. Iowa Civil Rights Comm'n, 337 N.W.2d 470, 474 (Iowa 1983). Liability when an impermissible criteria "played a part" in the termination decision—no matter how small or inconsequential—and

when the employer can prove it would have made the same decision in the absence of a discriminatory motive, is contrary to this purpose. No Iowa court has ever held otherwise.

Further, the same-decision defense does not provide an employer with a "second bite at the apple" or shield an employer from liability when it can "come up with a backup excuse" for the employment action at issue. (Pl. Brief 36, 38). To the contrary, as set forth in DeBoom and Haskenhoff, an employee will prevail upon proof an impermissible criteria was a "motivating factor" in his termination unless his employer proves—by a preponderance of the evidence—it would have made the same decision in the absence of consideration of such criteria. The burden of proving that defense rests solely on the employer.

As this Court has noted, social-science research reveals "the development of stereotypes—and consequent biases and prejudices—is not a function of an aberrational mind, but instead an outcome of normal cognitive processes associated with simplifying

and storing information of overwhelming quantity and complexity that people encounter daily." Pippen v. State, 854 N.W.2d 1, 33 n.9 (Iowa 2014) (Waterman, J., concurring specially). Subjecting employers to liability whenever such human biases and prejudices may be said to have "played a part" in the decision-making process—even when it can be proven the employment action at issue would have occurred regardless—would create a litigation minefield, call into question the employment-at-will doctrine, and run contrary to the purpose of the ICRA.

The "cookie example" used by Hawkins's counsel in closing argument exemplifies the mix of reasons that may be involved in a termination decision. (Pl. Brief 39). Human motives are mixed and complex. Defendants don't disagree with Hawkins that anti-discrimination laws "should be based on a realistic understanding of human behavior." (Pl. Brief 38). That is precisely why—when an employee has presented some evidence that illegitimate considerations motivated the termination decision—the employer is

entitled to present evidence that legitimate considerations were the main reason for the termination.

D. The continued recognition of the longstanding same-decision defense does not require the Court to "legislate from the bench."

Hawkins's argument that the continued recognition of the same-decision defense would somehow result in judicial activism ignores this Court's longstanding precedent and the purpose of the ICRA discussed above. His further suggestion that the same-decision defense is simply a statutory creation of Congress this Court should ignore is both disingenuous and incorrect.

The mixed-motive/same-decision framework set forth in Price Waterhouse, which this Court subsequently adopted, were acts of judicial interpretation (not "legislation") of the identical "because of" language found in Title VII and the ICRA. Compare 42 U.S.C. § 2000e-2(a)(1) (prohibiting discrimination "because of such individual's race, color, religion, sex or national origin") with Iowa Code § 216.6(1)(a) (prohibiting discrimination "because of the age,

race, creed, color, sex, sexual orientation, gender identity, national origin, religion, or disability" of the employee). Hawkins's argument that this Court's continued recognition of the mixed-motive/same-decision framework would be "substituting the language in Title VII for the words chosen by Iowa's legislature" is erroneous. (Pl. Brief 31 (emphasis in original)).

Hawkins's misguided argument flows from a sleight of hand suggesting the same-decision defense was a statutory creation originating from Congress's modifications to Title VII in the Civil Rights Act of 1991.[7] It was not. To the contrary, Congress's modification to Title VII in the Civil Rights Act of 1991 was a response to Price Waterhouse, and a partial codification thereto, in

[7] The district court erroneously accepted this argument: "Without the federal amendment allowing the same decision affirmative defense, this Court finds the same decision instruction is not consistent with the Iowa statute." (JA-I 2919-2920). This holding ignored this Court's adoption of the mixed-motive/same-decision framework from Price Waterhouse, its continued application in the decisions of this Court, and the plain language of Iowa Code Section 216.6(1)(a).

order to afford employees certain remedies even when an employer proved its same-decision defense under Price Waterhouse.

The Iowa legislature is presumed to be "familiar with the holdings of this court relative to legislative enactments." Roberts Dairy v. Billick, 861 N.W.2d 814, 821 (Iowa 2015). This Court has recognized the mixed-motive/same-decision framework for almost thirty years with no action by the legislature to abrogate the doctrine or to overrule this Court's decisions finding the purpose of the ICRA is to prohibit conduct that would not otherwise have occurred. Hawkins's suggestion this Court would be "rewriting" the ICRA by following its own longstanding precedent is illogical. (Pl. Brief 37).

II. The damages instruction wrongly directed the jury to award compensation for "any" emotional distress.

A. Defendants preserved error.

At trial, Defendants objected that the proposed damages instruction would "permit the jury to award damages for any emotional distress sustained by the Plaintiff." (JA-I 1960 [27:8-11]). Defendants previously alerted the district court regarding the same

concern, explaining "[w]e're not responsible for 'any' emotional distress [Hawkins] ever had," and offered an alternate instruction. (JA-I 193-194, 1952-1953 [19:24-20:25], 1954 [21:7-22], 1955-1956 [22:11-23:3], 1960 [27:5-7]). Defendants also objected to the accommodation instruction regarding employment practices that were not submitted for a liability determination. (JA-I 1959 [26:7-13], "this is not a reasonable accommodation case.").

Hawkins argues these objections did not preserve error because the objections "said nothing about the failure to include a date or specific incidents." (Pl. Brief 41). Defendants adequately preserved error by "specifying the matter objected to and on what grounds." Iowa R. Civ. P. 1.924. "[T]he real criterion is whether the objection alerted the trial court to the claimed error." Froman v. Perrin, 213 N.W.2d 684, 689-90 (Iowa 1973); see also Shams v. Hassan, 905 N.W.2d 158, 168 (Iowa 2017) (noting the "ultimate question is . . . whether it was raised—either by objection or by request for instruction"). "[E]ven if the objection was not ideal and defective," it

is adequate for preservation if it alerts the district court to the claimed error. Reilly v. Anderson, 727 N.W.2d 102, 106 (Iowa 2006) (internal quotation marks omitted); see also Froman, 213 N.W.2d at 689-90 (finding objection that "failed to zero in on the real imperfection of the instruction" sufficient).

This Court has rejected comparable error-preservation arguments. See, e.g., Segura v. State, 889 N.W.2d 215, 219-20 (Iowa 2017) (rejecting "hypertechnical" error-preservation argument); Bartlett Grain Co., LP v. Sheeder, 829 N.W.2d 18, 24 n.4 (Iowa 2013) (error preserved where appellant elaborated position on appeal); Office of Consumer Advocate v. Iowa State Commerce Comm'n, 465 N.W.2d 280, 283-84 (Iowa 1991) (error preserved where appellant specified constitutional clause on appeal).

B. The damages instruction failed to communicate the applicable law and confused and misled the jury.

Jury instructions must accurately communicate the applicable law so the "jury has a clear and intelligent understanding of what it is to decide." Sanders v. Ghrist, 421 N.W.2d 520, 522 (Iowa 1988). The

ICRA mandates a causal relationship between the monetary award and the harm caused by the employment practice at issue. Iowa Code § 216.15 (9)(a)(8); Simon Seeding & Sod, Inc. v. Dubuque Human Rights Comm'n, 895 N.W.2d 446, 471-72 (Iowa 2017); Dutcher v. Randall Foods, 546 N.W.2d 889, 894 (Iowa 1996). The district court's damages instruction authorized the jury to return an award for damages prohibited under the ICRA.

On this point, Hawkins offers no substantive argument and seemingly concedes the legal error. Hawkins opposed Defendants' proposed damages instruction, but never argued it inaccurately stated the law. (JA-I 406-410, 1953 [20:17-23]). Instead, Hawkins's attorney told the district court his proposed damages instruction was based on a conglomeration of unidentified model instructions. (JA-I 1953 [20:3-13]) (noting, "[t]his is the exact one we propose in every case that goes to trial. To my understanding it was rooted in a model. We've taken pieces from models"). Unlike Hawkins's hodgepodge instruction, however, Defendants' proposed instruction was based on

a cohesive model instruction. See Eighth Circuit Model Civil Jury Instruction 6.70 (2017).

C. The erroneous instruction prejudiced Defendants.

The Court presumes prejudice "unless the record affirmatively establishes that there was no prejudice." Haskenhoff, 897 N.W.2d at 579. Hawkins distorts this presumption, claiming Defendants must show "the jury awarded damages for claims not before them." (Pl. Brief 41). Even if this were a correct statement of law, the shocking size of the verdict alone demonstrates prejudice.

Hawkins contends the district court's statement of the case allowed the jury to extrapolate that "wrongful conduct" or "illegal actions" meant "termination of employment." As presented to the jury, however, the statement of the case was not labeled an "instruction." (JA-I 2103). The statement of the case contained no definitions, providing no insight that would allow the jury to infer the meaning of nebulous terms in the damages instruction.

Similarly, the jury could not fairly extrapolate the meaning of "wrongful conduct" or "illegal actions" from the marshaling instructions because the accommodation instruction identified another potential unlawful employment practice besides termination. Abstract instructions elsewhere cannot rescue the legal errors in a critical instruction such as the damages instruction. See Haskenhoff, 897 N.W.2d at 580-81; Law v. Hemmingsen, 89 N.W.2d 386, 390-91 (Iowa 1958) (court should not expect jury to determine applicable rule of law from stock instruction).

Hawkins points to one sentence from his counsel's summation, but that single reference to a date regarding lost wages[8] failed to cure the instructional error on emotional-distress damages. See Haskenhoff, 897 N.W.2d at 580 (instructional error cannot be cured by counsel in summation). Furthermore, closing arguments carry

[8] Hawkins specified the starting date for lost wages in an admitted trial exhibit. (JA-III 239-240). The district court instructed the jury to accept as fact that "Hawkins did not suffer any lost wages in 2013 or 2014." (JA-I 2108) (emphasis added). No such trial exhibit or instruction addressed emotional-distress damages.

"less weight with a jury" than the court's instructions. Id. at 581. Here, the district court told the jury it was obligated to accept and apply the law reflected in the court's instructions. (JA-I 2104). The district court also directed the jury to "base [the] verdict only upon the evidence and these instructions," specifying that attorney argument was not evidence. (JA-I 2105).

After persuading the district court to adopt his attorneys' "model" damages instruction, Hawkins's counsel "took advantage of the flawed jury instruction in . . . closing argument." Haskenhoff, 897 N.W.2d at 580. Counsel told the jury "you must determine the amount of damages for any emotional distress sustained by Plaintiff." (JA-I 2007 [74:16-17]) (emphasis added). This was Defendants' precise objection to the instruction. (JA-I 1960 [27:8-11]). As discussed in Defendants' opening brief, counsel's summation on emotional-distress damages repeatedly referenced harm from events before the termination date and employment practices other than termination. (Defs. Brief 63-64, 69-71).

This is a single-incident employment-termination case. Yet on appeal, Hawkins again concedes the jury awarded damages based on harm caused by employment practices distinct from the June 3, 2015 termination:

- "No amount of money can make up for enduring a degrading campaign of discrimination and retaliation."[9]
- "Defendants began their campaign of discrimination and retaliation when Gregg was literally fighting for his life."[10]
- "During the year before Gregg was actually fired, Defendants set him up.'"[11]

These arguments highlight Hawkins's continuing strategy on appeal to secure an award for "any" emotional distress he ever sustained while employed by the Hospital. By adopting Hawkins's "model" damages instruction, the district court allowed Hawkins's counsel to ask the jury "to award damages for any emotional distress sustained by the Plaintiff," and the jury did so. (JA-I 1960 [27:8-11]).

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[9] Pl. Brief 45.
[10] Pl. Brief 50.
[11] Pl. Brief 52.

D. The remedy is a new trial on damages.

Hawkins fails to cite a single case supporting his request to limit a new trial to emotional-distress damages. At trial, there were disputed issues regarding lost wages and mitigation. (JA-I 1465-1489 [195:25-219:2], 1491-1492 [221:17-222:7]). The jury's determinations on these issues were likely influenced by the award for emotional-distress issues, so the remedy is a new trial on all damages. Brant v. Bockholt, 532 N.W.2d 801, 805 (Iowa 1995).

III. The $4.28 million emotional-distress award is excessive.

A. Compared to other single-incident termination cases, the emotional-distress damages award is flagrantly excessive and shocks the conscience.

Termination of employment is a discrete act, not a continuing violation. Dindinger v. Allsteel, Inc., 860 N.W.2d 557, 571 (Iowa 2015). "Termination cases involving a single incident of wrongful-termination conduct producing the more common consequences of any involuntary loss of employment support a much lower range of damages." Jasper v. H. Nizam, Inc., 764 N.W.2d 751, 773 (Iowa 2009). Under the ICRA, actual damages must have a causal relationship

with the employment practice at issue—termination—rather than harassment, failure to accommodate, discipline, or demotion. Iowa Code § 216.15 (9)(a)(8); Dutcher, 546 N.W.2d at 894.

This is a single-incident termination case, but the district court seemingly treated it as a continuing violation. In ruling on Defendants' motion for new trial, the district court concluded the verdict was not excessive based on "evidence of retaliatory actions taken against the Plaintiff by the Defendants over an extended period of time." (JA-I 2917) (emphasis added). Hawkins tries to salvage the verdict by characterizing the termination as a continuing violation, describing a "campaign of discrimination and retaliation"[12] and citing settlements and verdicts from harassment cases. Not one verdict cited by Hawkins, however, is comparable in size to the emotional-distress award in this case.

This Court has recognized it can be "helpful . . . to consider the rough parameters of a range from other like cases," because they can

[12] Pl. Brief 45, 53.

"establish broad ranges from which to examine particular awards of emotional-distress damages." Jasper, 764 N.W.2d at 772 (citation omitted). Although Hawkins contends that comparing verdicts in other cases offers limited value, he cites Zurba v. United States, in which the court awarded damages based on a thorough review of verdicts in comparable cases. 247 F. Supp. 2d 951, 962-65 (N.D. Ill. 2001).

"[E]motional-distress damages tend to range higher in employment cases . . . involving egregious, sometimes prolonged, conduct." Smith v. Iowa State Univ., 851 N.W.2d 1, 32 (Iowa 2014). Harassment cases often include egregious and prolonged conduct. In Smith, an intentional tort case, this Court found a $500,000 award for intentional infliction of emotional distress was not excessive (although a lesser verdict would have "been in the range of reasonableness"), in part because the plaintiff "was subjected to wrongful conduct for an extended period of time," was "vulnerable to stress," and "sought treatment from a psychologist." Id. The tort-

based damages claim in that case was not subject to statutory constraints such as: (1) administrative exhaustion; (2) an "actual damages" limitation; or (3) a causal relationship between the unlawful employment practice and the emotional-distress damages. In contrast, the ICRA's statutory text constrains the award in this single-incident termination case—an award eight times more than the Smith award.

B. Passion and prejudice provoked the jury to make an excessive award.

The $4.28 million emotional-distress damages award cannot be explained rationally, other than the award resulted from the passion of a misguided jury, responding to and influenced by inflammatory, irrelevant evidence and hearsay; a misleading and confusing "model" jury instruction on damages; and improper summation.

C. The emotional-distress damages award is unsupported by the evidence.

As in Jasper, the evidence in this case regarding "emotional distress was not supported by medical testimony and was largely nonspecific," primarily based on "general descriptive observations."

764 N.W.2d at 773. The evidence showed Hawkins experienced "the more common consequences of any involuntary loss of employment." Jasper, 764 N.W.2d at 773. Hawkins never received medical treatment nor took prescription medication for the emotional distress he contends was caused by the termination. (JA-I 1509 [9:8-16]). In July 2015, one month after termination, Hawkins reported no psychiatric symptoms to his oncologist. (JA-I 1270-1272 [62:11-64:18], 1573-1574 [13:22-14:8]; JA-III 289). Similarly, in October 2016, over one year after the termination, Hawkins reported no psychiatric symptoms. (JA-I 1514 [14:9-16]; JA-III 293).

Previously, in 2004, Hawkins received medical treatment for his mental health due to the death of his father and his daughter's serious illness. (JA-I 1506-1509 [6:19-9:1], 1633-1634 [133:2-134:5]; JA-III 329-333). In 2004, Hawkins took prescription medication (Zoloft) for anxiety. (JA-I 1634 [134:2-5], 1634 [134:10-18]; JA-III 329-333). In contrast, after Hawkins's termination, Hawkins did not feel, and his

wife did not observe, any indication that medical treatment was necessary. (JA-I 1598-1599 [98:22-99:16], 1634 [134:6-20]).

More than a year after the termination, Kelly Champion, Plaintiff's retained expert, met with Hawkins twice to prepare an expert opinion in this case. (JA-I 1384 [114:6-10], 1388-1389 [118:18-119:13], 1391-1393 [121:13-123:6], 1438 [168:4-7]). Champion, a psychologist, does not hold a medical degree, never attended medical school, and cannot prescribe medication. (JA-I 1384 [114:6-10], 1420 [150:7-18]). She never provided medical treatment to Hawkins. (JA-I 1424 [154:4-8]).

Champion considered her assessment a "snap shot" reflecting Hawkins's condition in August 2016, when she signed her report. (JA-I 1421 [151:9-17], 1441 [171:1-8]). Champion's opinion was based on administering the Patient Health Questionnaire 9 ("PHQ 9") to Hawkins and a personal interview. (JA-I 1391 [121:13-16], 1431-1433 [161:23-163:9]). PHQ 9 is the "single most [common] tool used by medical doctors to identify signs of depression." (JA-I 1432 [162:3-

17]). The PHQ 9 results showed Hawkins was not experiencing emotional distress at that time. (JA-I 1432-1433 [162:1-163:9]). Further, Hawkins personally reported no signs or symptoms of depression to Champion. (JA-I 1431-1433 [161:23-163:9], 1435-1436 [165:23-166:13]).

To reconcile that with Hawkins's counsel's theory of "severe" emotional distress, Champion concluded Hawkins downplayed his symptoms and was "a fairly terrible reporter." (JA-I 1412-1413 [142:24-143:16], 1435-1436 [165:23-166:13]). She had "to come up with a term" to describe his condition, so she used "acute stress reaction," a purported precursor to post-traumatic stress disorder, which was "the best shorthand description" she could find. (JA-I 1436-1440 [166:8-170:1]). According to Champion, that "shorthand" diagnosis reflected her belief "in the modern world . . . part of our physical integrity, our safety and security, depends on us having a way of supporting ourselves, our keeping a roof over our heads." (JA-I 1440 [170:6-17]). Controverting Champion's opinion, however, Hawkins testified he and his wife never had to dip into their retirement

savings because they had been "conservative and fairly frugal in [their] spending habits" and "save[d] well for the future." (JA-I 1489-1491 [219:6-221:7]).

Champion didn't equate Hawkins with a person who had experienced the type of traumatic event required for a post-traumatic stress disorder diagnosis, such as a soldier returning from active combat. (JA-I 1439-1440 [169:10-170:17]). Even though Champion opined in August 2016 that Hawkins should get therapy, Hawkins failed to pursue it. (JA-I 1440 [170:18-25], 1509 [9:8-11]).

Hawkins's immediate family members do not perceive him as a mental health risk. (JA-I 1591 [91:3-17], 1635 [135:8-11]). Since the termination, Hawkins picks up his two grandsons from school almost every day. (JA-I 1468-1469 [198:21-199:16], 1589-1590 [89:11-90:9]). Hawkins continues to play piano and play clarinet in the municipal band, which he "enjoyed [] thoroughly." (JA-I 1458-1459 [188:24-189:5]). He remains engaged in Rotary activities and serves on the

board of trustees at his church. (JA-I 1242-1244 [225:22-227:15], 1592 [92:8-16], 1630-1632 [130:25-132:4]).

The evidence regarding "the more common consequences of any involuntary loss of employment"[13] did not support a $4.28 million emotional-distress award. The award was substantially beyond what the evidence supported, and was punitive, rather than compensatory. See City of Hampton v. Iowa Civil Rights Comm'n, 554 N.W.2d 532, 537 (Iowa 1996). The district court abused its discretion in denying a new trial.

IV. The district court's erroneous evidentiary decisions prejudiced Defendants, requiring a new trial.

A. Defendants preserved error.

Hawkins concedes Defendants objected based on hearsay and relevance, but erroneously argues those objections did not preserve error under Iowa Rule of Evidence 5.403. "An objection to evidence on the grounds that it is irrelevant and immaterial is sufficient to raise the issue of the probative value of this evidence in relation to the

[13] Jasper, 764 N.W.2d at 773.

purpose for which it was offered." State v. Sallis, 574 N.W.2d 15, 17 (Iowa 1998) (citation and internal punctuation omitted).

B. The hearsay notes and cards prejudiced Defendants.

Hawkins sidesteps a substantive hearsay argument,[14] claiming Defendants "fail to identify which portions of Exhibit 173 should have been excluded" and he therefore cannot respond. (Pl. Brief 57). Each out-of-court statement is hearsay. Iowa R. Evid. 5.801-5.802. (JA-II 1039-1081). Defendants specified in their opening brief that "all" correspondence in Exhibit 173 constituted hearsay. (Defs. Brief 80).

Hawkins also now argues the correspondence was offered for a non-hearsay purpose because it demonstrated an "outpouring of support" after his termination. (Pl. Brief 57). Hawkins offers no

[14] Hawkins argues about whether one note contained double hearsay. A "statement" includes nonverbal assertive conduct. State v. Dullard, 668 N.W.2d 585, 589-98 (Iowa 2003).

rationale to support a non-hearsay purpose,[15] and his belated effort to do so falls short.

Had Hawkins offered these out-of-court statements for a non-hearsay purpose, the district court would have determined whether the "true purpose" in offering the evidence was to prove the statements' truth. McElroy, 637 N.W.2d at 501-02. That determination must be an "objective finding based on the facts and circumstances developed by the record" and cannot turn solely on the offering party's claimed purpose. State v. Sowder, 394 N.W.2d 368, 371 (Iowa 1986).

At trial, however, the district court did not ask Hawkins to explain his "true purpose" in offering the exhibit. (JA-I 1376 [106:4-13]). Hawkins explains his true purpose on appeal: the exhibit shows he was a "skilled, dedicated, and responsive manager." (Pl. Brief 57; see also JA-I 1376-1377 [106:25-107:6]; JA-II 1039-1081). Thus,

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[15] McElroy v. State, 637 N.W.2d 488, 501-02 (Iowa 2001) (listing non-hearsay purposes).

Hawkins's relevance argument—relying on the truth of the matters asserted in the statements—reveals the exhibit was "merely an attempt to put before the fact finder inadmissible evidence." State v. Plain, 898 N.W.2d 801, 813 (Iowa 2017).

Because the district court made no determination the statements were offered and admitted for a non-hearsay purpose, the statements stand as hearsay. (JA-I 1376 [106:4-13]). Inadmissible hearsay is presumed prejudicial. Gacke v. Pork Xtra, L.L.C., 684 N.W.2d 168, 183 (Iowa 2004). Moreover, this record shows prejudice. No live witness at trial presented testimony comparable to these intimate, untempered, narrative statements from Hawkins's network of friends, colleagues, and relatives who spoke passionately in private notes. Defendants had no opportunity to cross-examine the declarants regarding their relationships with Hawkins or Defendants, biases, personal knowledge (or lack thereof), and motives.

Although Hawkins criticizes Defendants for not requesting a limiting instruction, if the district court had admitted the statements

for a non-hearsay purpose, it would have been the district court's responsibility to craft a limiting instruction. McElroy, 637 N.W.2d at 501-02. Here, the statements were offered to prove the truth of the matters asserted, so the district court never prepared a limiting instruction. Further, no limiting instruction could have cured the presumed prejudice to Defendants.

C. The district court abused its discretion in admitting irrelevant and prejudicial evidence.

The district court admitted irrelevant and prejudicial evidence. These materials did not make "more or less probable . . . [any] fact . . . of consequence in determining the action." Iowa R. Evid. 5.401. Nothing in this record overcomes the presumption that the inadmissible evidence prejudiced Defendants' substantial rights. See Kurth v. Iowa Dep't of Transp., 628 N.W.2d 1, 8 (Iowa 2001) (to defeat the presumption of prejudice, the admissible evidence must support the award "as being the only proper verdict that could be rendered.")

1. The photographs had no tendency to prove "disability."

Hawkins contends the photograph collection (JA-II 992-1038) was relevant because it proved he was "disabled" under the ICRA. On this record, the photographs had no evidentiary value in proving Hawkins had a disability.

The disability-discrimination marshaling instruction specified that Hawkins:

> had a disability if he had an impairment or a history of an impairment that substantially limited:
>
> (1) his ability to walk, perform manual tasks, see, stand, lift, bend, speak, concentrate, communicate, or work; or
>
> (2) his body's normal cell growth.

(JA-I 2116-2117). The instruction determined for the jury that "[c]ancer substantially limits normal cell growth," a point that Hawkins's counsel highlighted in summation. (JA-I 1998 [65:16-18], 2116-2117).

The relevant and uncontroverted evidence[16] regarding Hawkins's condition included Hawkins's own testimony, his work restrictions, his oncologist's testimony, and medical records. But photographs showing chemotherapy-induced alopecia, post-mastectomy radiation burns, and chemotherapy infusion offered no information that would have made it more probable that Hawkins was substantially limited in any activities specified in the instruction. (JA-I 2116-2117). This graphic, sympathy-invoking exhibit prejudiced Defendants, instigating the jury to return an excessive damages award.

2. The notes and cards weren't relevant to any consequential fact.

Hawkins offers no justification for statements in the notes-and-cards exhibit that were unrelated to his job performance, such as

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[16] Defendants never denied Hawkins had cancer. (JA-I 2066 [133:11-17]). Defendants objected to the disability-discrimination marshaling instruction, arguing the instruction should "measure the disability at the time of the termination." (JA-I 1958-1959 [25:19-26:6], 2066 [133 11-17]).

notes rallying Hawkins to pursue his claim at trial. (JA-II 1080-1081). As discussed, these out-of-court statements from non-testifying declarants were highly prejudicial, akin to admitting sympathy cards in a wrongful-death trial.

3. The June 2014 newsletter provoked anger toward Defendants.

Echoing his counsel's summation, Hawkins now reiterates that a June 2014 newsletter—featuring a story about Hawkins's cancer treatment—exposed Defendants' "gross hypocrisy" and their alleged "duplicity emotionally devastated" him. (Pl. Brief 56; JA-III 6-238). Hawkins repeatedly emphasized the newsletter was issued on approximately June 19, 2014, the day Ness and Linden met with Hawkins. (JA-I 1377-1378 [107:23-108:3], 1998 [65:19-23], 2010 [77:5-24], 2014-2015 [81:25-82:12], 2016 [83:8-14]). Yet the newsletter's timing was happenstance, unrelated to any decision regarding Hawkins's termination one year later. No evidence showed that Linden, Ness, or Nowachek were responsible for publishing the newsletter or reviewed the article before it issued.

Furthermore, if Hawkins experienced emotional distress caused by the newsletter, it occurred one year before the termination and was not recoverable as "actual damages." Iowa Code § 216.15(9)(a)(8). Consequently, the evidence had no tendency to prove a consequential fact. The newsletter, however, was a centerpiece of Hawkins's trial strategy to provoke a higher damages award, and substantially prejudiced Defendants.

4. **Linden's testimony about allocating financial resources did not open the door to evidence regarding the Hospital's wealth.**

Hawkins contends Defendants "opened the door" to evidence regarding Hospital CEO Linden's compensation by presenting testimony that the Hospital was "in a precarious financial situation" or impoverished. (Pl. Brief 60). This appellate argument differs from his rationale at trial, where Hawkins's attorney argued only that the Hospital was not-for-profit, "resources were scarce," and the Hospital

"had to make decisions about what resources to provide."[17] (JA-I 1087 [70:2-6]).

Either way, Linden presented no testimony that invited evidence regarding Linden's compensation, the Hospital's wealth, or the disparity in compensation between Hawkins and the Hospital's CEO. Linden testified the Hospital was a non-profit, like every other hospital in Iowa except one. (JA-I 1051 [34:7-9]). Also, he testified[18] the Hospital makes decisions allocating resources—a commonsense concept applicable to all employers. (JA-I 1051 [34:7-25], 1076 [59:22-24]).

Linden's compensation had no tendency to prove a consequential fact. Under the ICRA, the jury could only award actual

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[17] Hawkins, rather than the Hospital, introduced his personal financial donations to the Hospital and its non-profit status, dependence on philanthropy, and limited financial resources, including multiple statements from Hospital administrators (including Linden) that mirror the testimony he claims opened the door to Linden's compensation. (JA-I 1282-1283 [12:25-13:8], 2016 [83:2-7]; JA-III 23-24, 26, 32, 35, 44, 51, 59-65, 69, 75-76).

[18] Linden testified about resources in response to a leading question from Hawkins's counsel. (JA-I 1076 [59:22-24]).

damages, so the evidence was inherently prejudicial, as evidenced by the emotional-distress award that was approximately 100 times Linden's compensation.

V. Counsel's improper summation prejudiced Defendants because the verdict would likely have been different but for the misconduct.

A. Counsel engaged in misconduct through direct appeals to jurors.

Hawkins contends his counsel engaged in "no direct golden rule violation" because in his view, a golden-rule argument only asks jurors how much money they would accept if they were in the plaintiff's shoes. (Pl. Brief 60). This Court has not adopted the circumscribed rule Hawkins advocates. Instead, inappropriate closing argument includes:

> Direct appeals to jurors to place themselves in the situation of one of the parties, to allow such damages as they would wish if in the same position, or to consider what they would be willing to accept in compensation for similar injuries.

Russell v. Chicago, Rock Island & Pac. R.R. Co., 86 N.W.2d 843, 848 (Iowa 1957).

Hawkins's reliance on a criminal case is misplaced, because in criminal cases, the "reasons for the prohibition in discussing damages" during summation are immaterial. State v. McPherson, 171 N.W.2d 870, 873-74 (Iowa 1969). McPherson implicitly recognizes that such argument in the civil context is improper. Id.

Hawkins cites no case endorsing a comparable summation.[19] Hawkins mentions a civil tort case from Florida that presents a stark contrast to these facts. Grushoff v. Denny's, Inc., 693 So.2d 1068, 1069 (Fla. Dist. Ct. App. 1997). In Grushoff, after the plaintiff's attorney used the word "you" once in summation, the defendant's counsel objected, the objection was sustained, the plaintiff's counsel apologized, then moved to a different topic. Id. An intermediate appellate court concluded the isolated "use of one small 'you,'" did not require a new trial. Id. That is a far cry from this case, where Hawkins counsel repeatedly and deliberately used the term "you"

[19] Hawkins cites a handful of inapposite cases from other jurisdictions, but this is neither a Missouri criminal case nor a post-conviction appeal.

and variations over twenty times when discussing emotional-distress damages.

Similarly, Hawkins relies on Lovett v. Union Pacific Railroad Company, which is clearly distinguishable. 201 F.3d 1074 (8th Cir. 2000). In Lovett, after a single golden-rule violation by the defendant's attorney, the plaintiff's attorney objected, and counsel never returned to the subject. Id. That did not happen here. Instead, the district court overruled Defendants' objections and Hawkins's counsel continued the improper summation. Additionally, in Lovett, the trial court correctly instructed the jury. Id. As discussed, here, the district court's instructions exacerbated (rather than cured) the problem. With the flawed instructions, the jury was more susceptible to influence from improper summation.

B. Counsel encouraged the jury to punish Defendants.

Although Hawkins contends he merely asked the jury to hold Defendants accountable, throughout closing argument, Hawkins's counsel repeatedly focused on Defendants' conduct rather than

Hawkins's injury—a punitive damages argument. (JA-I 2008 [75:4], 2011 [78:3-6], 2011 [78:23-25], 2012 [79:9-14], 2016 [83:20-22], 2024 [91:14-15], 2028-2029 [95:16-96:2]); In re Vajgrt, 801 N.W.2d 570, 575 (Iowa 2011) (punitive damages focus on the defendant's conduct rather than the plaintiff's injury). Counsel repeatedly asked the jury to award damages beyond "actual damages" caused by the termination. (JA-I 2008 [75:5-6], 2018 [85:6-9], 2028 [95:1-9], 2028-2029 [95:16-96:2]). This improper argument encouraged the jury to return a punitive, rather than compensatory award, and the cumulative effect of such argument inflamed the jury to punish or otherwise send a message to Defendants for their alleged conduct.

C. Counsel's improper summation prejudiced Defendants.

Hawkins acknowledges the emotional-distress award was "intangible" and "not a scientific matter" susceptible to "absolute truth." (Pl. Brief 45). "When making challenging decisions about potentially nebulous concepts" such as an emotional-distress award, "juries will inevitably take cues from attorneys during their

respective closing arguments." Kinseth v. Weil-McLain, 913 N.W.2d 55, 73 (Iowa 2018). This Court recognizes "a heightened sensitivity to inflammatory rhetoric and improper statements, which may impress upon the jury that it can look beyond the facts and law to resolve the case." Id. Consequently, counsel has a "duty to refrain from crossing" the line from zealous advocacy to repeated and deliberate misconduct. Id.

In Gilster v. Primebank, the Eighth Circuit concluded Plaintiff's counsel's summation in an employment-practice case warranted a new trial. 747 F.3d 1007, 1011-13 (8th Cir. 2014). All factors analyzed in Gilster are present in this case.

First, "the remarks in question were not minor aberrations made in passing." Gilster, 747 F.3d at 1011 (citation omitted). Hawkins's trial counsel read from prepared notes, and during damages summation, used the word "you" and variations over twenty times. (JA-I 2008 [75:5-6], 2009 [76:20-25], 2011 [78:7-9], 2012 [79:23-80:3], 2013-2014 [80:19-81:5], 2022 [89:6-13], 2023 [90:12-20],

2024 [91:16-17], 2028 [95:1-2]). That demonstrates a deliberate theme, designed to provoke an excessive verdict.

Second, "the district court declined to take any specific curative action." Gilster, 747 F.3d at 1012. Here, the district court overruled defense counsel's timely objections to the improper argument. (JA-I 2011-2012 [78:20-79:14]). Consequently, the district court's decision overruling the objections "remained the most specific and timely guidance from the court to the jury with respect to the propriety of counsel's closing remarks." Id. (citation omitted).

Third, the size of the damages award "suggests that counsel's comment[s] had a prejudicial effect." Gilster, 747 F.3d at 1012 (citation omitted). In Gilster, the court recognized the $900,000 verdict (in a sexual harassment and retaliation case) was "not beyond the bounds of rationality," but the $4.28 million emotional-distress damages award in this termination case is beyond rational. Id. Hawkins's counsel's summation was calculated to escalate these damages.

The district court overruled Defendants' objections, provided no admonition, and presented no curative instruction. Unchecked, Hawkins's counsel repeatedly urged the jurors to place themselves in Hawkins's shoes and encouraged the jury to punish based on Defendants' conduct. Counsel's rhetoric prejudiced Defendants, requiring a new trial. See Kinseth, 913 N.W.2d at 73; Bronner v. Reicks Farms, Inc., No. 17-0137, 2018 WL 2731618, at *9 (Iowa Ct. App. June 6, 2018). The verdict "would likely have been different but for the misconduct." Kinseth, 913 N.W.2d at 68.

Conclusion

Defendants-Appellants Grinnell Regional Medical Center, David Ness, and Debra Nowachek respectfully request the Court reverse the judgment of the district court; reverse the district court's rulings awarding equitable relief, attorneys' fees, and costs; and remand this case for a new trial.

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I hereby certify that on September 13, 2018, I electronically filed the foregoing with the Clerk of the Supreme Court of Iowa using the Iowa Electronic Document Management System, which will send notification of such filing to the counsel below:

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