IN THE SUPREME COURT OF IOWA

CASE NO. 16-2148

Robert W. Milas, M.D.,
Plaintiff-Appellant,

v.

SOCIETY INSURANCE and ANGELA BONLANDER,
Defendants-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT
FOR SCOTT COUNTY

HON. HENRY W. LATHAM II (Trial and Motion to Recuse)
HON. NANCY S. TABOR (Motion for Summary Judgment)

APPELLEES' FINAL BRIEF

GREFE & SIDNEY, P.L.C.
Guy R. Cook AT0001623
Aaron W. Lindebak AT0011917
500 E. Court Ave., Ste. 200
Des Moines, IA 50309
Phone: (515) 245-4300
Fax: (515) 245-4452
gcook@grefesidney.com
alindebak@grefesidney.com
ATTORNEYS FOR APPELLEES
SOCIETY INSURANCE AND
ANGELA BONLANDER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

STATEMENT OF THE ISSUES

I. WHETHER THE DISTRICT COURT ERRED IN DISMISSING THE PLAINTIFF'S FRAUDULENT MISREPRESENTATION CLAIM AND FAILING TO INSTRUCT THE JURY ON THE FRAUDULANT MISREPRESENTATION?

CASES

Beyer v. Todd, 601 N.W.2d 35 (Iowa 1999)

Boelman v. Grinnell Mut. Reins. Co., 826 N.W.2d 494 (Iowa 2013)

Des Moines Flying Serv., Inc. v. Aerial Servs. Inc., 880 N.W.2d 212 (Iowa 2016)

Garren v. First Reality, Ltd., 481 N.W.2d 335 (Iowa 1992)

Grefe v. Ross, 231 N.W.2d 863 (Iowa 1975)

Hagerty v. Dysart-Geneseo Cmty. Sch. Dist., 282 N.W.2d 92 (Iowa 1979)

Lloyd v. Drake Univ., 668 N.W.2d 225 (Iowa 2004)

Magnusson Agency v. Pub. Entity Nat'l Co., 560 N.W.2d 20 (Iowa 1997)

Thompson v. City of Des Moines, 564 N.W.2d 839 (Iowa 1997)

Thorton v. Hubill, Inc., 571 N.W.2d 30 (Iowa 1997)

Van Sickle Constr. Co. v. Wachovia Commerical Mortg., 783 N.W.2d 683 (Iowa 2010)

RULES

Iowa R. Civ. P. 1.981(3)

II. WHETHER THE DISTRICT COURT ERRED IN FAILING TO GIVE JURY INSTRUCTIONS ON PUNITIVE DAMAGES WHEN THERE WAS NO UNDERLYING TORT?

CASES

Beyer v. Todd, 601 N.W.2d 35 (Iowa 1999)

Brokaw v. Winfield-Mt. Union Cmty. Sch. Dist., 788 N.W.2d 386 (Iowa 2010)

Cawthorn v. Catholic Health Initiative Iowa Corp., 743 N.W.2d 525 (Iowa 2007)

Globe Refining Co. v. Landa Cotton Oil Co., 190 U.S. 540 (1903)

Miranda v. Said, 836 N.W.2d 8 (Iowa 2013)

Pogge v. Fullerton Lumbar Co., 277 N.W.2d 916 (Iowa 1979)

Seastrom v. Farm Bureau Life Ins. Co., 601 N.W.2d 339 (Iowa 1999)

Vaughan v. Must, Inc., 542 N.W.2d 533 (Iowa 1996)

White v. Nw. Bell Tel. Co., 514 N.W.2d 70 (Iowa 1994)

III. WHETHER IN ACTING IMPARTIALLY AND IN ACCORDANCE WITH ETHICAL STANDARDS AT ALL TIMES, THE DISTRICT COURT DID NOT ERR IN DENYING PLAINTIFF'S MOTION TO RECUSE?

CASES

Campbell v. Quad Cities Times, 547 N.W.2d 608 (Iowa Ct. App. 1996)

In re Marriage of Haecker & Blomme, No. 13-1876, 2015 WL 4642088 (Iowa Ct. App. Aug. 5, 2015)

Liteky v. United States, 510 U.S. 540 (1994)

McKinley v. Iowa Dist. Ct., 542 N.W.2d 822 (Iowa 1996)

State v. Biddle, 652 N.W.2d 191 (Iowa 2002)

State v. Mann, 512 N.W.2d 528 (Iowa 1994)

State v. Millsap, 704 N.W.2d 426 (Iowa 2005)

State v. Sinclair, 582 N.W.2d 762 (Iowa 1998)

State v. Wilder, No. 13-1664, 2006 WL 1896247 (Iowa Ct. App. July 12, 2006)

RULES

Iowa Code of Judicial Conduct 51:2.9(A)(1)(b)

Iowa Code of Judicial Conduct 51:2.11(A)

Iowa R. App. P. 6.903(2)(g)(3)

ROUTING STATEMENT

This case involves application of existing principles of law and should be routed to the Iowa Court of Appeals. Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

This case arises from a contract dispute between Dr. Robert Milas and Society Insurance.

Dr. Robert Milas was a treating doctor for Rickey Fitzgerald's injuries suffered during the course of Ricky's employment. Society Insurance is Rickey Fitzgerald's employer's workers' compensation insurance provider. App. 95. Following the completion of surgery, a dispute arose over Dr. Milas's fees and he brought suit against Society Insurance and Angela Bonlander. App. 96.

Dr. Milas alleged negligent misrepresentation, fraudulent misrepresentation, and breach of agreement. App. 96. On February 16, 2016, the district court ruled on Defendants' and Plaintiffs' motions for summary judgment. App. 95. The court granted Society Insurance's motion for summary judgment on fraudulent misrepresentation. App. 101-02. The court allowed Dr. Milas to proceed with his negligent misrepresentation and breach of agreement claims. App. 102.

This case initially proceeded to trial in front of Judge Henry W. Latham II on February 29, 2016, however a mistrial was declared. App. 278. The mistrial was declared after Dr. Milas's counsel violated the court's prior rulings by referring to the amount of profit made by Society Insurance in

relation to punitive damages. App. 281. Dr. Milas then sought the recusal of Judge Latham. App. 159. Defendants' resisted the motion. App. 163. On April 17, 2016, Dr. Milas's motion was denied. App. 174. Dr. Milas sought interlocutory review of the court's order on recusal. App. 176. Defendants' resisted the application for interlocutory appeal and the Iowa Supreme Court denied the application on June 16, 2016. App. 193.

On November 7, 2016, the district court considered Defendants' renewed motion for summary judgment on Dr. Milas's negligent misrepresentation claim. App. 138. The court granted the Defendants' motion for summary judgment. App. 139-40. The court also denied the Plaintiff's motion to amend petition to conform to proof to reassert a fraudulent misrepresentation claim. App. 141.

On November 14, 2016, this case proceeded to trial. App. 312. On November 21, 2016, the jury returned a verdict finding a contract was formed between Society Insurance and Dr. Milas. App. 477. The jury found Society Insurance breached a contract. Id. The jury found no contract was formed between Angela Bonlander and Dr. Milas. Id. The jury awarded Dr. Milas $14,325.87. App. 478.

Dr. Milas now appeals.

STATEMENT OF THE FACTS

Rickey Fitzgerald was an employee of Barker Apartments when he was seriously injured as a result of a fall down an elevator shaft. App. 95. Society Insurance is Barker Apartments' worker's compensation insurance provider. Id. After becoming unhappy with his treatment, Fitzgerald petitioned for and was granted a request for alternative care by the Iowa Workers' Compensation Commissioner. Dr. Milas became Fitzgerald's treating physician for Fitzgerald's neck and back injuries. Id. Dr. Milas determined Fitzgerald needed to undergo cervical fusion surgery. Id.

On May 20, 2013, Dr. Milas faxed Angela Bonlander, the claims representative at Society Insurance assigned to the case, two documents. The documents were titled "Estimate of Proposed Elective Surgery" each containing an estimate of the costs for a proposed neck and back surgery. App. 196-97. One estimate was for $14,325.87. App. 196. The other was an estimate for $14,860.55. App. 197. Angela signed and returned the estimates. App. 196-97. The surgery was performed on June 3, 2013, and a bill was submitted for $14,325.87 the following day. App. 96. As part of Society's normal course of business, the bill was sent to Health Systems International (HSI), a third-party bill reviewer. Id. HSI reviewed the bill and recommended payment of $1,620.52. Id. On July 15, 2013, Society

Insurance authorized payment in that amount to Dr. Milas and sent him a check. On July 25, 2013, Dr. Milas rejected that payment. Id. On June 26, 2015, an additional check was issued to Dr. Milas in the amount of $4,958.03. App. 238. That payment was also rejected.

Rickey Fitzgerald and Dr. Milas brought this action on November 4, 2013.[1] Following the completion of trial, Dr. Milas was paid $14,325.87. App. 475.

[1] Rickey Fitzgerald is not party to this appeal and his claims will not be discussed.

ARGUMENT

I. THE PLAINTIFF'S FRAUDULANT MISREPRESENTATION CLAIM WAS PROPERLY DISMISSED ON SUMMARY JUDGMENT.

Scope and Standard of Review

The Appellee agrees the Appellant preserved error on this issue on appeal.

A grant of summary judgment is appropriate when the moving party demonstrates there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981(3). Summary judgment rulings are reviewed for corrections of errors at law. *Des Moines Flying Serv., Inc. v. Aerial Servs. Inc.*, 880 N.W.2d 212, 217 (Iowa 2016). In reviewing the district court's ruling, the record is viewed in the light most favorable to the nonmoving party and the court may draw all legitimate inferences the evidence bears in order to establish the existence of fact questions. *Boelman v. Grinnell Mut. Reins. Co.*, 826 N.W.2d 494, 501 (Iowa 2013). "It is not enough for the nonmoving party to rely on the hope of the subsequent appearance of evidence generating a fact question." *Thorton v. Hubill, Inc.*, 571 N.W.2d 30, 32 (Iowa 1997).

The court reviews the failure to give jury instructions for errors at law. *Beyer v. Todd*, 601 N.W.2d 35, 38 (Iowa 1999).

In order to prove Society Insurance engaged in fraudulent misrepresentation, Dr. Milas must prove each of the following elements: "(1) representation, (2) falsity, (3) materiality, (4) scienter, (5) intent to deceive, (6) reliance, and (7) resulting injury and damage." *Van Sickle Constr. Co. v. Wachovia Commercial Mortg., Inc.*, 783 N.W.2d 684, 687 (Iowa 2010). These elements must be proven by "a preponderance of clear, satisfactory, and convincing proof." *Id.* (quoting *Lloyd v. Drake Univ.*, 686 N.W.2d 225, 233 (Iowa 2004).

On appeal, Dr. Milas argues Society Insurance made a material misrepresentation, had the requisite scienter and intent to deceive, and Dr. Milas relied on the misrepresentation.[2]

A. Society Insurance Did Not Make A False Material Misrepresentation.

Society Insurance did make a material representation but it was not false. To prove the statement was false, Dr. Milas must show it was false *at the time he relied upon it*. *See Hagarty v. Dysart-Geneseo Cmty. Sch. Dist.*, 282 N.W.2d 92, 95 (Iowa 1979) (emphasis added). Even though Society Insurance did not pay Dr. Milas the amount on the estimate following the submission of the bill for the completed surgery, that alone is not enough to

[2] Society Insurance will not address Dr. Milas's reliance argument. As Dr. Milas failed to prove the other elements of fraudulent misrepresentation. His claim must fail.

show the Society's earlier representation was false. *See Magnusson Agency v. Pub. Entity Nat'l Co.*, 560 N.W.2d 20, 28 (Iowa 1997) ("Even though PENCO later offered its bid to the second applicant, that fact alone is not enough to show that the earlier representation was false.").

Dr. Milas points to the fact that Angela Bonlander intended to negotiate Dr. Milas's fees and send the bill to HSI. Prior to performing the surgery, Dr. Milas sent two forms to Angela Bonlander listing the estimated charges for Fitzgerald's cervical surgery. These forms specifically indicate the signature requested provides authorization for Dr. Milas to proceed with the surgery. Angela Bonlander testified she understood the form requesting her authorization for Dr. Milas to perform the procedure. App. 338. Angela Bonlander did not believe she was agreeing to pay the exact estimate listed on the form. App. 348. At the time of the material representation, it was unknown which of the two procedures Dr. Milas would perform. Because she did not believe she was entering into a contract paying Dr. Milas the amount listed on the authorization, she could not falsely represent she would pay the bill.

At the time Society Insurance entered into the agreement with Dr. Milas, it was possible for him to receive the amount he put on the authorization.

Without a false material misrepresentation, Dr. Milas's claim of must fail.

B. Society Insurance Did Not Intend to Deceive Dr. Milas.

A fraudulent misrepresentation claim requires scienter and intent to deceive. *Magnusson*, 560 N.W.2d at 28. "Scienter and intent to deceive are closely related elements of the tort, and the same general analysis applies for each." *Van Sickle*, 783 N.W.2d at 688. "Scienter and intent to deceive may be shown when the speaker has actual knowledge of the falsity of his representations or speaks in reckless disregard of whether those representations are true or false." *Id.* (quoting *Garren v. First Realty, Ltd.*, 481 N.W.2d 335, 338 (Iowa 1992)). Dr. Milas cannot show either element.

In the district court's original ruling, the court found no evidence to support Dr. Milas's claim. The district court found "[Dr.] Milas has failed to point out to the Court any evidence in the record that would support an inference that Ms. Bonlander or Society had an intent to deceive him other than Milas's own allegations." App. 102.

In ruling on Dr. Milas's motion to amend to conform to proof, the court again held the evidence, viewed in the light most favorable to Dr. Milas, was "not sufficient to establish the elements of scienter and intent to

deceive." App. 141. The fact that Society did not pay the amount sought by the plaintiff is not enough to support an intent to deceive claim. *Lamasters v. Springer*, 99 N.W.2d 300, 303 (Iowa 1959) ("[t]he fact the agreement was not performed does not alone prove the promissor did not intend keeping it when it was made."). The Supreme Court has explained:

> When a promise is made in good faith, with the expectation of carrying it out, the fact that it subsequently is broken gives rise to no cause of action, either for deceit, or for equitable relief. Otherwise any breach of contract would call for such a remedy. The mere breach of a promise is never enough in itself to establish the fraudulent intent.

Magnusson, 560 N.W.2d at 29.

At the time Angela Bonlander signed the two documents she did not believe she was entering into a contract to pay for the surgery, only that she was authorizing the surgery to take place. Angela testified she never has pre-authorized an amount for surgery and would not do so. App. 337, 348. Because Society Insurance did not believe it was entering into a contract at the time of the signature, Dr. Milas cannot show a genuine issue of material fact that Society Insurance intended to deceive him. *See Grefe v. Ross*, 231 N.W.2d 863, 867 (Iowa 1975) ("A false statement innocently but mistakenly made will not establish intent to defraud.").

C. Society Insurance Did Not Speak With Reckless Disregard.

Dr. Milas argues Society Insurance spoke with reckless disregard

because Society Insurance could have let Dr. Milas know the bill would be sent to a third-party bill reviewer, "written subject to bill review" on the surgical authorization, or not signed the agreement. Dr. Milas argues Society Insurance's choosing not to clarify its authorization is "clear evidence of scienter and intent to deceive." Appellant Brief p. 34. This is contrary to the standard required. The fact that Angela could have been more careful by making further inquiry is insufficient to show Society Insurance acted in disregard of the truth. *See Garren*, 481 N.W.2d at 338 ("The fact that defendant's agent could have been more careful by making further inquiry is insufficient to prove that she acted in reckless disregard of the truth.").

Because Society Insurance did not speak with reckless disregard, Dr. Milas has failed to show a genuine issue of material fact on the required element of scienter and his claim must fail.

D. The District Court Did Not Err In Denying to Give Instructions On Fraudulent Misrepresentation.

A district court cannot submit a jury instruction "on an issue having no substantial evidential support." *Thompson v. City of Des Moines*, 564 N.W.2d 839, 846 (Iowa 1997) (citations omitted). Even viewing the evidence in the light most favorable to Dr. Milas, the record does not contain sufficient support for the requested instruction. At the time Dr. Milas relied on the Society Insurance signature, Society Insurance had made no false

representation and did not intend to deceive him. Society Insurance did not speak with a reckless disregard for the truth or falseness of the authorization. Instead, Society Insurance believed it was entering into a contract to authorize the surgery only. Without supporting evidence, the district court was correct in denying the requested jury instruction.

II. THE DISTRICT COURT ACTED CORRECTLY IN NOT GIVING THE JURY PUNITIVE DAMAGES INSTRUCTIONS.

Scope and Standard of Review

Appellant has preserved error on this issue with the exception of his argument that Society Insurance acted in bad faith. Dr. Milas never alleged bad faith against Society Insurance. Therefore, he has failed to preserve this claim. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.").

The court reviews the failure to give jury instructions for errors at law. *Beyer*, 601 N.W.2d at 38. Punitive damages are discretionary and are never awarded as a matter of right. *Brokaw v. Winfield-Mt. Union Cmty. Sch. Dist.*, 788 N.W.2d 386, 395 (Iowa 2010). The district court's failure to give the requested jury instruction warrants reversal only if it resulted in prejudice to Dr. Milas. *Vaughan v. Must, Inc.*, 542 N.W.2d 533, 539 (Iowa 1996).

The purpose of punitive damages are not compensatory, but serve as a punishment or deterrence for future bad conduct. *Miranda v. Said*, 836 N.W.2d 8, 34 (Iowa 2013).

"Generally, a breach of contract, even if intentional, is insufficient to support a punitive damage award." *Magnusson*, 560 N.W.2d at 29 (citing *White v. Nw. Bell Tel. Co.*, 514 N.W.2d 70, 77 (Iowa 1994)). "Considerable logic supports Justice Holmes' observation that '[i]f a contract is broken, the measure of damages generally is the same, whatever the cause of the breach.'" *Pogge v. Fullerton Lumber Co.*, 277 N.W.2d 916, 919 (Iowa 1979) (quoting *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U.S. 540, 544, (1903)).

To be awarded punitive damages for a breach of contract, Dr. Milas must show the breach constituted an intentional tort, and was committed maliciously, in a manner that meets the standards of Iowa Code section 668A.1. *Seastrom v. Farm Bureau Life Ins. Co.*, 601 N.W.2d 339, 347 (Iowa 1999). As stated in the previous section, the district court was correct in granting summary judgment on Dr. Milas's fraudulent misrepresentation claim. Because there was no tort, Dr. Milas cannot receive punitive damages.

Even if there were an intentional tort, Dr. Milas failed to prove Society Insurance acted maliciously. There must be some form of malice, actual or legal, to support an award of punitive damages. *Cawthorn v. Catholic Health Initiatives Iowa Corp.*, 743 N.W.2d 525, 529 (Iowa 2007). "Actual malice may be shown by such things as personal spite, hatred, or ill-will and legal malice may be shown by wrongful conduct committed with a willful or reckless disregard for the rights of another." *Id.* (citations omitted).

Dr. Milas argues Society Insurance acted with actual malice towards him by paying other medical professionals more than Society Insurance paid him. The district court was correct in stating "There is nothing from the evidence that the Court could even glean that there was a malicious act by the Defendants in this case." App. 441. Angela Bonlander testified she followed Society Insurance's standard operating procedure in processing the request for surgery and the approval of that surgery and payment. App. 337. Society Insurance submitted Dr. Milas's bill to its third-party bill reviewer, HSI. Like all bills sent to HSI from Society Insurance, HSI reviewed the bill and returned with an amount Society Insurance should pay. App. 341. Society Insurance then paid Dr. Milas that amount. App. 370. Angela Bonlander testified Dr. Milas was treated like all other authorized doctors. App. 328. There was no actual malice towards Dr. Milas on the part of

Society Insurance. Instead the matter was handled in accordance with the policies and practices of Society Insurance. App. 378.

Dr. Milas contends Society Insurance acted with legal malice. This is not supported by the evidence. Angela Bonlander testified she did not know at the time of reviewing Dr. Milas's bill that she could bypass the bill review process. App. 329. Dr. Milas argues Society Insurance was focused solely on year-end bonuses instead of Mr. Fitzgerald's surgery. This is not true. Dr. Milas was authorized to perform the surgery. No one disputes that the surgery was necessary. Angela testified this interaction with Dr. Milas had nothing to do with any bonus she received. Trial Trans. p. 386 Lines 4-8. If a medical provider has concerns over the amounts they have been paid, there are processes to address any concerns. App. 346-47. Society Insurance does not prevent patients from receiving prompt medical care, as authorized treating doctors do not need Society's permission to engage in treatment. App. 364.

Because the summary judgment on Dr. Milas's fraudulent misrepresentation claim was properly granted, there can be no award of punitive damages. Society Insurance did not act with actual or legal malice towards Dr. Milas.

III. JUDGE LATHAM ACTED IMPARTIALLY AND IN ACCORDANCE WITH ETHICAL STANDARDS AT ALL TIMES. THE DISTRICT COURT DID NOT ERR IN DENYING PLAINTIFF'S MOTION TO HAVE JUDGE LATHAM RECUSED.

Scope and Standard of Review

The appellee agrees the appellant preserved error on this issue except for the issue of Judge Latham's impartiality toward Dr. Milas presented under subheading D of Dr. Milas's brief.

The court reviews a "judge's recusal decision for an abuse of discretion." *State v. Millsap*, 704 N.W.2d 426, 432 (Iowa 2005).

Dr. Milas has the burden of showing grounds for the recusal. *Campbell v. Quad Cities Times*, 547 N.W.2d 608, 611 (Iowa Ct. App. 1996). "A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." Iowa Rule of Judicial Conduct 51:2.11(A). There is a constitutional right to a neutral and detached judge, yet mere speculation as to judicial bias is insufficient to prove grounds for recusal. *State v. Mann*, 512 N.W.2d 528, 532 (Iowa 1994). Dr. Milas must show actual prejudice before recusal is necessary. *McKinley v. Iowa Dist. Ct.*, 542 N.W.2d 822, 827 (Iowa 1996).

In deciding whether to recuse or not, a judge must consider "whether reasonable persons with knowledge of all facts would conclude that the

judge's impartiality might be questioned." *Mann*, 512 N.W.2d at 532. "[T]here is as much obligation for a judge not to recuse when there is no occasion for him to do so as there is for him to do so when there is." *Id.*

On appeal, Dr. Milas asserts Judge Latham engaged in ex parte communications with Defendant's counsel, was hostile towards Dr. Milas, committed an "evidentiary error" in favor of the defendant, and had an "unfavorable predisposition" to Dr. Milas's counsel. Each claim will be addressed in turn.

A. The Alleged Ex Parte Communication Involved An Administrative Matter Prior To Opening Statements And Was Proper Under The Iowa Rules Of Judicial Conduct.

The alleged communication did take place. However, Dr. Milas's summary of the conversation does not provide context or include the full discussion of what the alleged communication addressed.

The communication did not concern the merits of the case. Instead, the comments were to alert the court to a matter that would need to be addressed prior to opening statements. This type of communication is allowed under Iowa Code of Judicial Conduct Rule 51:2.9. The rule states

> ex parte communication for scheduling . . . which does not address substantive matters, is permitted, provided: … (b)the judges makes provision promptly to notify all other parties of the substance of the ex parte communication and give the parties an opportunity to respond.

Iowa Rule of Judicial Conduct 51:2.9(A)(1)(b).

The alleged ex parte exchange happened in open court and was acknowledged on the record and is memorialized in the hearing transcript. Specifically, the Court states, "Mr. Cook, you would like to make a record. And the record should reflect we are outside the presence of the jury, both counsel are present." App. 280. Society Insurance's counsel then proceeded to address the issue of Plaintiff's proposed demonstrative exhibits. Id. Dr. Milas's counsel was provided an opportunity to respond in opening court regarding the matter. Id. The statement did not affect the case or the merits of the proceedings. In accordance with the rule, the court allowed both parties to be heard on this issued. Iowa Rule of Judicial Conduct 51:2.9(A)(1)(b); *see generally State v. Wilder*, No. 03-1664, 2006 WL 1896247, at *8 (Iowa Ct. App. July 12, 2006) ("the prosecutor's request for a continuance was heard in open court, with an opportunity for defense counsel to respond."). When addressed during the hearing on the motion to recuse a full discussion occurred. The full discussion of the alleged ex parte communication provides:

> The Court: That was a simple remark by Mr. Cook that he wanted to make a record prior to beginning with opening statements. It was basically an administrative comment. There was nothing of substance that was offered. And, Mr. Cook, I would invite you to further comment on that, if you would like.

> Mr. Cook: Yes, Your Honor. That's exactly correct. I merely asked the Court to make a record regarding an issue of demonstrative exhibits that the Plaintiff attorney intended to use in opening statement and alerted the Court administratively that we needed to take up the matter before the Court and counsel. That was it. There was no discussion of the merits, no genuine ex-parte communication other than alerting the Court that there was an issue for the Court to address without addressing the merits of the issue.

App. 303.

The district court acted within the Iowa Rules of Judicial Conduct. The statement was not an ex parte communication and no reasonable person would conclude that the judge's impartiality was affected.

B. A Reasonable Person Would Not Find Judge Latham's Statement That He Was Uncomfortable with Dr. Milas Staring At Him To Effect Judge Latham's Impartiality.

Society Insurance does not agree that this issue was preserved as it was not addressed by the district court. The motion to recuse and request for interlocutory appeal were made and ruled on prior to the statement made by Judge Latham in the November 2016 trial and Dr. Milas did not object to the statement. *In re Marriage of Haecker & Blomme*, No. 13-1876, 2015 WL 4642088, at *1 (Iowa Ct. App. Aug. 5, 2015) (Plaintiff "did not . . . object to the comments he found offensive, or raise the bias issue at any stage of the trial. Accordingly, we conclude the issue was not preserved for our review.").

Nonetheless, the comment by Judge Latham was not improper nor did it show any impartiality. When discussing jury instructions, outside the presence of the jury, Judge Latham stated "it appears to me that Dr. Milas is kind of staring me down. I – it's very uncomfortable." App. 449. Dr. Milas then faced toward the jury box and the parties continued to discuss the jury instructions. App. 449-50. "Only personal bias or prejudice stemming from an extrajudicial source constitutes a disqualifying factor." *Millsap*, 704 N.W.2d at 432.

> Opinions formed by a judge:
>
> > on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deepseated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They may do so if they reveal an opinion that derives from an extrajudicial source; and they will do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.

Liteky v. United States, 510 U.S. 540, 555 (1994). Nothing stated by the court was from an extrajudicial source. The comments were from Judge Latham's own knowledge of observing Dr. Milas. There is nothing about this statement that shows impartiality and it was made outside the presence of the jury. *See State v. Biddle*, 652 N.W.2d 191, 199 (Iowa 2002) (court

noting "all of the district court's comments were outside the presence of the jury."). They show no antagonism towards Dr. Milas and the parties continued with proceedings without incident.

Dr. Milas fails to state how he was prejudiced by the Judge Latham's statement. Without prejudice, the claim must fail. *McKinley*, 542 N.W.2d at 827.

C. Dr. Milas Fails to Allege Any Prejudice As A Result Of The Admittance of Exhibit G.

In his brief, Dr. Milas fails to state how he was prejudiced by the entrance of exhibit G into evidence. Dr. Milas must show actual prejudice before a recusal is needed. *Id*. Dr. Milas bears the burden of showing grounds for recusal and mere speculation is not enough. *Mann*, 512 N.W.2d at 532.

Dr. Milas has made no argument as to how this alleged evidentiary error led to any prejudice to him during trial. His failure to argue any prejudice deems this issue waived. Iowa R. App. P. 6.903(2)(g)(3) (Failure to cite authority in support of an issue may be deemed waiver of that issue).

D. Judge Latham Acted Fairly And Impartially Towards Dr. Milas's Counsel.

Dr. Milas claims Judge Latham was "unwilling[] to listen to Plaintiff's counsel" and acted in a manner his counsel considered "hostile"

and “angry” among other descriptions, citing to affidavits from himself and his counsel.

However, a review of the transcript of both the first trial and the second trial indicate that was not the case. Instead, a review of the transcripts demonstrates the extreme leeway granted to Dr. Milas’s counsel in arguing their case. Moreover, the transcripts reflect a significant number of rulings which Judge Latham made in favor of the Plaintiff. Further, the full transcripts show Plaintiff’s counsel were afforded extensive time in which to provide argument on all issues before the court. Judge Latham’s tone and demeanor were professional and Judge Latham acted in an appropriate manner during all proceedings.

An affidavit by attorney William J. Bribriesco claims Judge Latham responded in angry tone when discussing what issues would be presented to the jury. App. 279. Yet, Judge Latham made clear he was not, in fact, becoming angry. Id. Judge Latham stated he was simply attempting to control the proceedings of the case and “get it moving along.” Id. Judge Latham’s tone was appropriate. Even if frustrated or annoyed, however, such a tone would not warrant or require recusal. *See McKinley*, 542 N.W.2d at 826.

In looking at the record as a whole, no reasonable person with knowledge of all the facts and circumstances of this matter could possibly "conclude that the judge's impartiality might be questioned." Judge Latham was fair and professional throughout his involvement in this matter.

E. Dr. Milas Failed To Show Prejudice.

Plaintiff has not been prejudiced. "Actual prejudice must be shown before a recusal is necessary." *State v. Sinclair*, 582 N.W.2d 762, 766 (Iowa 1998).

Dr. Milas has failed to show any prejudice as a result of the conduct of Judge Latham. The alleged ex parte communication involved nothing more than an administrative request for an opportunity to make a record to address remaining issues prior to opening statement. In accordance with the rule, Dr. Milas's counsel was allowed to respond on the record.

Judge Latham was outside of the presence of the jury when it alerted counsel to his feeling uncomfortable with Dr. Milas's behavior towards him. Dr. Milas turned his gaze and the court and parties continued with the discussion on jury instructions. Dr. Milas cannot show actual prejudice on this issue.

Dr. Milas failed to make any argument on prejudice as it related to allowing Exhibit G into evidence.

Finally, Dr. Milas cannot and has not shown how Judge Latham's tone and demeanor, which were appropriately professional and judicial, resulted in prejudice toward him.

CONCLUSION

Therefore, Appellee Society Insurance requests the district court be affirmed on all grounds.

REQUEST FOR NON-ORAL SUBMISSION

The Appellee believes this case can be decided on the briefs without the assistance of oral argument. However, if oral argument is granted, the Appellee requests the opportunity to be heard.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on July 12, 2017, I electronically filed the foregoing Appellee's Final Brief with the Clerk of the Supreme Court by using the Iowa Electronic Document Management System (EDMS), which will send notice of electronic filing to the following:

Anthony J. Bribriesco
Andrew W. Bribriesco
William J. Bribriesco
2407 18th Street, Suite 200
Bettendorf, IA 52722
Phone: (563) 359-8266
Fax: (563) 359-5010
E-mail: anthony@bribriescolawfirm.com
ATTORNEYS FOR PLAINTIFF

Per Rules 6.106(1) and 6.701, this constitutes service for purposes of the Iowa Court Rules.

/s/ Guy R. Cook
Guy R. Cook
Aaron W. Lindebak
Attorneys for Appellees

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirement and type-volume limitation of Iowa Rs. App. P. 6.903(1)(*d*) and 6.903(1)(g)(1) because:

[x] this brief has been prepared in proportionally spaced typeface using Times New Roman 14 point and contains 4,783 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Guy R. Cook
Guy R. Cook
Aaron W. Lindebak
Attorneys for Appellee

July 12, 2017
Date