IN THE SUPREME COURT OF IOWA

No. 16-2148

ROBERT W. MILAS, M.D.,

Plaintiff-Appellant,

vs.

SOCIETY INSURANCE and ANGELA BONLANDER,

Defendants-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT
FOR SCOTT COUNTY
HONORABLE HENRY LATHAM
Scott County No. LACE124179

APPELLANT'S FINAL BRIEF

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ROUTING STATEMENT

Plaintiff-Appellant submits that the Iowa Supreme Court should retain this case because this case presents fundamental and urgent issues of broad public importance requiring prompt or ultimate determination by the supreme court. Iowa R. App. P. 6.1101(2)(d). This case involves issues that will have an impact on whether injured workers will be able to receive prompt medical care from the authorized medical providers or whether injured workers will be at the mercy of workers' compensation insurance companies to delay medical care because of their business plans.

STATEMENT OF THE CASE

I. Nature of the Case

This appeal arises from a jury trial involving Robert Milas, M.D., ("Plaintiff" or "Dr. Milas") against a workers' compensation insurance company, Defendant Society Insurance Company, ("Defendant" or "Society Insurance") and Society Insurance's representative, Defendant Angela Bonlander. The jury found that Dr. Milas had a legally enforceable agreement with Society Insurance to pay Dr. Milas for a surgical procedure he performed on an injured employee, Ricky Fitzgerald, and that Society Insurance breached this agreement when it did not pay Dr. Milas the agreed upon amount. Dr. Milas has appealed the district court's rulings to limit the case to

a breach-of-contract case when Plaintiff had requested jury instructions on fraudulent misrepresentation and punitive damages. Dr. Milas also appeals the trial judge's refusal to recuse himself from hearing this case. The district court's errors resulted in prejudice to the Plaintiff and require remand for a new trial to a different trial judge.

II. Relevant Agency Proceedings

Rickey Fitzgerald filed an Application for Alternate Care with the Iowa Workers' Compensation Agency because he was dissatisfied with the medical care he was being provided. App. 252. Fitzgerald requested that Dr. Milas become the authorized treating surgeon and this request was granted. *Id.*

III. Relevant Proceedings in District Court

On October 14, 2015, Defendants filed a motion for summary judgment. At that time, there were two Plaintiffs, Dr. Milas and Ricky Fitzgerald, and Plaintiffs resisted. On February 16, 2016, the district court, the Honorable Nancy Tabor, denied the summary judgment motion regarding Fitzgerald's bad faith claim against Defendant Society Insurance and claim for punitive damages. App. 97-100.

Regarding Dr. Milas's claims, the district court denied the summary judgment motion regarding Dr. Milas's contract claim and negligent misrepresentation claim. App. 101-103. However, the district court granted

summary judgment on Dr. Milas's fraudulent misrepresentation claim. *Id.* The district court determined there was substantial evidence to create a jury question on the following elements: representation, falsity, materiality, and scienter. App. 101-102. However, the district court concluded there was not substantial evidence of the intent-to-deceive element of Dr. Milas's fraudulent misrepresentation claim. *Id.*

In determining the evidence in this case would not support a finding of these elements, the district court stated: "There simply is no evidence to suggest that Ms. Bonlander or Society intended to deceive Dr. Milas when she signed the estimate and authorization of surgery." *Id.*

On February 28, 2016, Ricky Fitzgerald had resolved his claim and dismissed his bad faith claim.

On February 29, 2016, Judge Henry Latham presided over the jury trial between Dr. Milas versus Society Insurance and its employee, Angela Bonlander. On March 1, 2016, Plaintiff's Counsel began his opening statement, and Defense Counsel made a motion for a mistrial in front of the jury. App. 262. Plaintiff's Counsel asked Judge Latham to respond. *Id.* Judge Latham said "No" in an angry voice and excused the jury. *Id.* Judge Latham then granted Defendants' counsel's motion for mistrial. *Id.*

On March 2, 2016, Plaintiff filed a Motion to Recuse Judge Latham. App 159-62. Defendants resisted this Motion, and Judge Latham denied it. App. 163-166, 282-311.

On May 17, 2016, Plaintiff filed an application for interlocutory appeal on his motion to recuse Judge Latham. Plaintiff's application for interlocutory appeal was denied.

On October 13, 2016, Defendants renewed their motion for summary judgment regarding Dr. Milas's negligent misrepresentation claim. Defendants filed this motion after the deadline set forth in the trial scheduling order. App. 106-09. Plaintiff filed a motion to dismiss the renewed motion for summary judgment based on it was untimely, App. 110-12, and filed a resistance on the merits, App. 113-16. Judge Latham decided to rule on the renewed motion for summary judgment regarding Dr. Milas's claim for negligent misrepresentation. App 134-143.

On October 16, 2016, Plaintiff filed a motion to amend petition to conform to proof. Judge Latham did not wait until the close of evidence to rule on this motion. *Id.* At the same time, Judge Latham denied Plaintiff's motion to amend petition to conform to proof, Judge Latham granted Defendants' renewed motion for summary judgment. *Id.*

During the jury instruction conference, Plaintiff requested Judge Latham to provide additional jury instructions to the jury. App. 440-41, 470-76. Plaintiff's proposed jury instructions included instructions on fraudulent misrepresentation and punitive damages. *Id.* Judge Latham refused to submit these instructions to the jury. Judge Latham stated that: "There has been no evidence presented during the course of trial to the jury that would support those claims." App. 441. Judge Latham stated further:

> …It's clear that the Defendants in this case have testified basically that they acted in accordance with how they conduct business on a regular basis. There was nothing intentional that they did towards Dr. Milas….

App. 444.

On November 21, 2016, the jury returned a verdict in favor of the Plaintiff on the breach-of-contract claim. Defendants did not appeal the verdict.

Plaintiff appeals the district court's decision to grant summary judgment on his claim for fraudulent misrepresentation, and then later deny jury instructions this issue. Second, Plaintiff appeals the district court's decision to deny jury instructions on punitive damages. Third, Plaintiff appeals the district court's decision to deny his motion to disqualify Judge Latham.

STATEMENT OF THE FACTS

I. Dr. Milas, the authorized surgeon, informed Society Insurance exactly how much he would charge for performing the recommended surgical procedures.

After the Agency ordered that Dr. Milas become the authorized treating surgeon for Fitzgerald, Dr. Milas, a board-certified neurosurgeon, concluded that Fitzgerald needed surgery to his neck and lower back. App. 410-11. For the safety of Fitzgerald, Dr. Milas decided to perform the surgery to the neck first. *Id.* He recommended that his patient undergo a delicate neck surgery. App. 412-419. Generally speaking, this surgery involved cutting through skin and muscles to get to the bones or vertebrae of the neck. *Id.* Then, Dr. Milas would fuse the neck bones together with tiny screws all the while avoiding the spinal cord and arteries that feed the brain stem. *Id.*

Dr. Milas had never dealt with Society Insurance before becoming the authorized treating surgeon for Fitzgerald. App 357. To avoid any confusion, Dr. Milas told Society Insurance exactly how much he charged for performing each of two possible recommended set of surgical procedures.[1] App. 198-99. Dr. Milas faxed his surgical fees to Society Insurance because Dr. Milas

[1]Dr. Milas proposed to address Fitzgerald's spinal issues through one of two possible sets of surgical procedures. App. 427-28; App. 198-99. Because he was not sure which method would be required, he sent two proposals to Society Insurance, one for each set of procedures. *Id.*

wanted to know exactly how much he would be paid for his services *before he performed the surgery*. App. 421-23. Dr. Milas requested that Society Insurance's representative approve his surgical fees for both options in writing. App. 198-99, 421-23.

II. Society Insurance unequivocally approved payment of Dr. Milas's fees when its representative signed the proposals.

Angela Bonlander was the adjuster in charge of handling and administering workers' compensation benefits for Society Insurance. App. 319. Bonlander had been working at Society Insurance for over nineteen (19) years, and one of her responsibilities was approving the payment of medical fees. *Id.*

On May 20, 2013, Bonlander received the two requests for approval of surgical fees submitted by Dr. Milas. App. 198-99. Each proposal explained the procedures and set forth the total fee Dr. Milas charged for performing that set of procedures. *Id.*

Bonlander discussed Dr. Milas's surgical fees with her supervisor, Shawn Kelderman. App 323. Kelderman had worked in the insurance industry for decades, App. 361, and she knew that Dr. Milas was seeking "preauthorization" of his fees, App 363. In fact, Kelderman admitted the following at trial.

Q: [The] estimate represented preauthorization, did it not, on what Dr. Milas was going to charge?

A: Yes.

App. 363.

Kelderman had the authority to pay one hundred percent (100%) of Dr. Milas's surgical fees. App. 359-60.[2] She told Bonlander to "sign off" on both of the proposals. App. 323. Bonlander signed the proposals and sent them back to Dr. Milas. App. 198-99.

III. Society Insurance hid its corporate policy from Dr. Milas.

Bonlander "signed off" on both of the proposals even though she had no intention of honoring the agreement. App. 322, 348. In fact, Bonlander admitted at trial that her intention the whole time was to wait until after Dr. Milas performed surgery and then attempt to negotiate his fees:

Q: You never told Dr. Milas that you intended on negotiating his fees, true?

A: True.

App. 327.

Bonlander signed the proposals without revealing to Dr. Milas that Society Insurance had a corporate "cost-containment" policy. App. 327. That

[2] Society Insurance designated Kelderman as the corporate representative at the time of deposition and at trial.

corporate policy provided: "All medical bills shall be submitted to our *cost containment vendor* for review and re-pricing, as appropriate." App. 250.

A "cost-containment vendor" is an insurance industry term. App. 266.

A cost-containment vendor is a company that increases an insurance company's profit by recommending that the insurance company pay less or "contain" its costs. App. 393-94. For an insurance company, "costs" include paying medical professionals for their services. *Id.*

Society Insurance had one and only one cost-containment vendor: Health Systems, International ("HSI"). App. 267. Society Insurance had an agreement with HSI that promised HSI twenty-three percent (23%) of the reduction in medical costs that they were able to negotiate with the providers. App. 268-70, 256-57.

Before signing the agreement, Bonlander knew that she was going to send Dr. Milas's fees to Society Insurance's "cost-containment vendor," but never told Dr. Milas about her intentions. App. 327. Bonlander intended on paying whatever Society's "cost-containment vendor" told her to pay Dr. Milas. App. 327, 344.

Society Insurance's employees testified inconsistently on whether Bonlander had the authority to pay Dr. Milas what had been agreed upon. App. 274, 277, 344. Bonlander testified that "it was not her job to question"

the cost-containment vendor. App. 344. However, Society Insurance's vice-president of workers' compensation testified differently: Bonlander had the power to disregard the cost containment vendor's recommendation and pay Dr. Milas what had been agreed upon App. 272 & 274.

Regardless, the evidence is absolutely clear that Bonlander's supervisor, Kelderman, had the authority to disregard the cost-containment vendor. App. 277. The evidence is absolutely clear that Bonlander's supervisor instructed her to sign the agreement with Dr. Milas, App. 323, and Bonlander intended on paying whatever Society's cost-containment vendor told her to pay Dr. Milas, App. 326, 344. Moreover, the evidence is absolutely clear that Bonlander intended on waiting until *after* Dr. Milas performed surgery to negotiate his fees. App. 327.

IV. Society Insurance incentivized its employees to follow its corporate policy of cost-containment with end-of-the-year bonuses.

Bonlander was eligible for an end-of-the-year bonus as an employee of Society Insurance. App. 333-36. Bonlander's supervisor was also eligible for an end-of-the-year bonus. App. 374-377. Their bonus was dependent in part on whether they followed the corporate cost-containment policy in paying workers' compensation claims. App. 373, 375-77, 393 -94.

V. Bonlander waited until after the surgery to contact the company's cost-containment vendor.

Bonlander received Dr. Milas's proposals on or about May 20, 2013. App. 98-99. Each proposal stated that the surgery would be performed on June 3, 2013. *Id.* Thus, Society Insurance had approximately thirteen (13) days to get a recommendation from its cost-containment vendor regarding how much to pay Dr. Milas for his professional services. *Id.*

Society expected its cost-containment vendor to make its recommendation within ten (10) days. App. 273, 380, 250, 332-33. Normally, Society Insurance received the recommendation from its cost-containment vendor in about five days. App. 273. Accordingly, Society Insurance had the ability to find out exactly how much its cost-containment vendor recommended paying Dr. Milas *before* Dr. Milas performed the surgery. App. 273, 332-33.

Bonlander admitted that nothing would have prevented her from sending Dr. Milas's surgical fees to the cost-containment vendor before the surgery:

> Q: [Just] so its clear, we can agree that you could have had Dr. Milas's fees audited before you signed Plaintiff's Exhibit 2A?
>
> A: Yes.

App. 333.

However, Bonlander chose to wait until after Dr. Milas performed surgery before finding out the cost-containment vendor's recommendation. App. 247, 333-34, 356.

Bonlander hid from Dr. Milas her intention to submit his bill to the company's cost-containment vendor and to pay whatever that vendor told her to pay Dr. Milas. App. 319, 344.

VI. Dr. Milas performs the surgery.

On June 3, 2013, Dr. Milas performed surgery on Ricky Fitzgerald. App. 201. Dr. Milas decided that the less expensive procedure was better for his patient. App. 420-21. Society Insurance agreed that this was a medically necessary surgery. App. 320-21. Further, Society Insurance admitted that it had no criticisms of the surgery performed by Dr. Milas. App. 321.

Dr. Milas performed this surgery in reliance on Society Insurance's agreement to pay his stated fee for the surgery. App. 429-34. Craig Nierman testified at trial as an expert witness for Dr. Milas. Mr. Nierman had worked as a claims adjuster for approximately seven (7) years. App. 382-83. In addition, Mr. Nierman has taught insurance law at the University of Iowa as an adjunct professor. App. 381-82. Based on his experience, education, and training, Mr. Nierman testified that it was appropriate for Dr. Milas to rely on Society Insurance to fully compensate him for his services after he performed

surgery because Society Insurance's representative approved his surgical fees. App. 385.

VII. Dr. Milas sends final bill to Society Insurance for the exact amount stated in his proposal.

On June 4, 2013, Dr. Milas sent his bill for the surgery to Society Insurance for payment. App. 200. The final bill was exactly the same amount as the previously submitted proposal for his surgical fees – to the cent. App. 320. The final bill for Dr. Milas's surgical fees was $14,325.87. App. 200.

VIII. Society Insurance and its agents attempt to negotiate Dr. Milas's surgical fees after he performed surgery.

After the surgery was performed and Dr. Milas had submitted his bill, Society Insurance sent the bill to its cost-containment vendor. App. 247-48. Thereafter, a negotiating company, Knowledgeable Provider Negotiators Services (hereinafter "the Negotiators"), faxed a "resolution agreement" with the caption "Negotiation of Workers' Compensation Charges" to Dr. Milas on June 25, 2013. App. 229-30.

The Negotiators recommended that Dr. Milas accept $4,604.99 even though the signed proposal listed $14,325.87 as the fee for the surgical procedures. *Id.* The Negotiators did not provide a reason for its suggested reduction of Dr. Milas's fees. *Id.* The Negotiators did however warn Dr. Milas

that he should accept the reduced fees in order to "avoid further bill review and any audit reductions." App. 229.

Society Insurance's "audit guidelines" provide a reason why the Negotiators told Dr. Milas to accept a reduction in his fees. App. 251. Society Insurance's guidelines for its adjuster's state: "If our Bill Review Company is unable to secure savings on your bill; as [sic] it is cost effective to do so, consider negotiating a reduced rate in exchange for prompt payment"! *Id.* In other words, if Dr. Milas did not accept the Negotiators' offer, he could expect further delay in payment and additional reductions.

Dr. Milas declined the Negotiator's offer, App. 231, and true to the Negotiators' warning, there was a "further bill review" and further "audit reductions." App. 247-48. On July 12, 2013, HSI performed a bill review audit and further reduced Dr. Milas's bill. *Id.* On July 15, 2013, Society Insurance sent Dr. Milas a check for approximately eleven percent (11%) of the agreed upon amount, $1,620.52. App. 233.

On July 25, 2013, Dr. Milas wrote a letter to Society Insurance requesting that Society Insurance honor their agreement. App. 232. Bonlander received this letter, App. 349, yet, Bonlander chose not to respond to Dr. Milas. App. 357.

IX. Application of Society Insurance's corporate policy.

As mentioned above, Society Insurance had an agreement with HSI that promised HSI twenty-three percent (23%) of the reduction in medical costs that they were able to negotiate with the providers. App. 268-70; App 256-57. Society Insurance's corporate policy of cost-containment would have applied in the following way to Dr. Milas's final bill for $14,325.87:

Society Insurance:	$9,783.12
Cost-Containment Vendor:	$2,922.23
Dr. Milas:	$1,620.52

Society Insurance reviewed Dr. Milas's fees of $14,325.87 and paid approximately eleven percent (11%) of the fees, and consequently, Society Insurance saved $9,783.12. App. 198, 233, 247, 393-94.

Society Insurance's choice to reduce the payment of Dr. Milas's fees for this surgery resulted in a delay in surgery to Mr. Fitzgerald's back. App. 410-11. Society Insurance's choice to reduce the payment of Dr. Milas's fees also resulted in Fitzgerald losing the doctor he had fought so hard to get. App. 426.

X. Society Insurance lacked a reasonable basis to deny paying one hundred percent (100%) of Dr. Milas's surgical fees.

Bonlander gave a statement *under oath* that was completely inaccurate. App. 324-27, 235-366. In her Interrogatory answer, Bonlander stated that Society Insurance did not pay one hundred percent (100%) of his fees because "Dr. Milas has to utilize a fee schedule in Illinois." App. 326, 236. At trial, Bonlander admitted that she knew that the Illinois fee schedule did not apply:

> Q: Under the circumstances, you knew that an Illinois fee schedule didn't apply to an Iowa workers' compensation claim, yes?
>
> A: Yes
>
> Q: So what's written there is not accurate, is it?
>
> A: No.

App. 326.

Bonlander made an additional statement *under oath* even though she did not know whether it was true or false. App. 324-27, 235-366. In her Interrogatory answer, Bonlander stated that Society Insurance did not pay one hundred percent (100%) of his fees because "Defendants issued payment for Dr. Milas's bill consistent with the usual and customary charges in his area as reflected by the bill review." App. 326, 236. At trial, Bonlander admitted that she did not actually know what the usual and customary charges were:

Q: That's not accurate either, is it? $1,620.52, that's not usual and customary for that type of surgery? Can we agree to that?

A: I don't know.

App. 326-27.

XI. Society Insurance treated Dr. Milas differently than other medical professionals.

Society Insurance paid for Ricky Fitzgerald to undergo an evaluation with its medical experts for litigation purposes. App. 353, 242. The medical expert did not provide medical care, rather, he gave medical opinions about medical care. App. 353. Society Insurance paid the medical professional one hundred percent (100%) of the agreed upon fees. App. 353, 242. Society Insurance paid its expert witness more for a one-time evaluation than it tried to pay Dr. Milas for performing a surgery and three months of follow-up care. App. 233, 353.

In addition, Society Insurance promptly paid the anesthesiologist who was present during the surgery performed by Dr. Milas. App. 241, 254, 354. Society Insurance paid the anesthesiologist more than what it paid Dr. Milas even though they were in the same operating room for the same amount of time. App. 241, 254.

ARGUMENT

I. The district court erred in dismissing Plaintiff's fraudulent misrepresentation claim on summary judgment, and then later erred in failing to instruct the jury on Plaintiff's fraudulent misrepresentation claim.

There is substantial evidence in the record that Society Insurance, through its claims adjuster, Bonlander, made a fraudulent misrepresentation to Dr. Milas that Society Insurance would pay him one hundred percent (100%) of his surgical fees. *See Turner v. Zip Motors*, 245 Iowa 1091, 1099, 65 N.W.2d 427, 430 (1954) (holding employer is responsible for employee or agent's fraud committed in the scope of employment under maxim of respondeat superior).

There are seven elements of the tort of fraudulent misrepresentation: (1) representation; (2) falsity; (3) materiality; (4) scienter; (5) intent to deceive; (6) justifiable reliance; and (7) resulting injury or damage. *Air Host Cedar Rapids, Inc. v. Cedar Rapids Comm'n*, 464 N.W.2d 450, 453 (Iowa 1990).

Here, the district court erred in granting summary judgment to the Defendants on Plaintiff's fraudulent misrepresentation claim and in later denying jury instructions on fraudulent misrepresentation because there was substantial evidence to support all of the elements of a fraudulent

misrepresentation claim. In its summary judgment ruling, the district court determined there was substantial evidence of a representation, falsity, materiality, and scienter to create a jury question. App. 101-02. However, the district court granted summary judgment on the basis that there was not a genuine issue of fact on the element of intent to deceive. *Id.* Plaintiff respectfully submits that this determination was in error.

At the jury instruction conference, the district court refused to give Plaintiff's proposed instructions on fraudulent misrepresentation. App 441-43. Plaintiff respectfully submits that this determination was also in error.

A. Error Preservation

Before trial, Plaintiff preserved error by resisting Defendants' Motion for Summary Judgment. App. 46-94. At trial, Plaintiff preserved error by making offers of proof during the course of trial, and by making a motion to conform to proof. App. 330-37, 365-80, 386-409, 429-39, 313-18, 442-47. In addition, Plaintiff requested that the judge provide jury instructions regarding the law of fraudulent misrepresentation. App. 470-76, 441-47. Defendants had an opportunity to argue this issue, and after hearing arguments from both sides, the trial judge refused to provide jury instructions on fraudulent misrepresentation. App. 440-47.

B. Standard of Review for Motion for Summary Judgment

The standard of review of for a motion for summary judgment is based on errors of law. *See* Iowa R. App. P. 6.907. Summary judgment is only appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P. 1.981(3). The moving party bears the burden of establishing the nonexistence of material fact. *Nelson v. Lindaman*, 867 N.W.2d 1, 6 (Iowa 2015) *reh'g denied* (May 20, 2015) (quoting *Hlubek v. Pelecky*, 701 N.W.2d 93, 95 (Iowa 2005)).

"On a motion for summary judgment, the court must: '(1) view the facts in the light most favorable to the nonmoving party, and (2) consider on behalf of the nonmoving party every legitimate inference reasonably deduced from the record.'" *Hoyt v. Gutterz Bowl & Lounge L.L.C.*, 829 N.W.2d 772, 774 (Iowa 2013) (quoting *Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689, 692 (Iowa 2009)).

"Even if the facts are undisputed, summary judgment is not appropriate if reasonable minds may draw different inferences from them." *Raymon v. Norwest Bank Marion, Nat'l Ass'n*, 414 N.W.2d 661, 663 (Iowa Ct. App. 1987) (quoting *Tasco, Inc. v. Winkel*, 281 N.W.2d 280, 282 (Iowa 1979)).

C. Standard of Review for Failure to Give Jury Instructions

The standard of review of a failure to give a requested instruction is based on errors of law. *See* Iowa R. App. P. 6.907. Trial courts are required to give a requested instruction when it states a correct rule of law having application to the facts of the case, and the concept is not otherwise embodied in other instructions. *Stover v. Lakeland Square Owners Ass'n*, 434 N.W.2d 866, 868 (Iowa 1989).

Failure to give jury instructions on issues that are supported by substantial evidence is error. *Meck v. Iowa Power & Light Co.*, 469 N.W.2d 274, 276 (Iowa Ct. App. 1991) (citing *Borough v. Minneapolis & St. L. Ry.*, 184 N.W. 320, 323 (Iowa 1921); *Miller v. Int'l Harvester Co.*, 246 N.W.2d 298, 301 (Iowa 1976)). Instructional error warrants reversal if the complaining party has been prejudiced. *Rudolph v. Iowa Methodist Med. Center*, 293 N.W.2d 550, 555 (Iowa 1980).

D. Society Insurance made a material misrepresentation to Dr. Milas when it unequivocally signed Exhibit 2(a).

Society Insurance, through its representative, made a material misrepresentation. A statement of intent to perform a future act is a false representation if, when made, the speaker had an existing intention not to perform. *City of McGregor v. Janett*, 546 N.W.2d 616, 619 (1996). A representation "is material if it is likely to induce a reasonable person to act."

Dier v. Peters, 815 N.W.2d 1, 7 (Iowa 2012). "The existence of a contract requires a meeting of the minds on the material terms." Iowa Uniform Jury Instruction 2400.3 (Existence of a Contract). "This means the parties must agree upon the same things in the same sense." *Id.* "The intent expressed in the language used prevails over any secret intention of either party." Iowa Uniform Jury Instruction 2400.5 (Terms – Interpretation). "Where the contract provides for mutual promises, each promise is a consideration for the other promise." Iowa Uniform Jury Instruction 2400.4 (Consideration).

Here, Society Insurance made a statement of intent to pay Dr. Milas when its representative signed Exhibit 2(a). In fact, the jury found that Society Insurance and Dr. Milas had formed a legally binding agreement, i.e., a contract. App. 477. The jury found that Society Insurance made a statement of intent to perform a future act, or a promise, to pay Dr. Milas $14,325.87 in exchange for him performing surgical procedures outlined in Exhibit 2(a). App. 477.

Society Insurance made a false representation. Society Insurance agreed to pay Dr. Milas $14,325.87 for performing the surgical procedures listed in Exhibit 2(a); however, Society Insurance sent Dr. Milas a check in the amount of $1,620.52. App. 233. In fact, the jury found that Society

Insurance had breached its contract with Dr. Milas after Dr. Milas had performed under the contract. App. 477.

Society Insurance made a material representation. Dr. Milas requested that Society Insurance's representative approve his surgical fees in writing. App. 198, 421-23. Dr. Milas wanted to know exactly how much he would be paid for his services before he performed the surgery. App 421-23. If Society Insurance would not have signed the proposal, Dr. Milas would have waited to perform the surgery until there was an agreement on the amount of his surgical fees. App. 430.

Thus, there was substantial evidence in the record that Society Insurance had made a material misrepresentation to Dr. Milas when its representative unequivocally signed Exhibit 2(a).

E. There is substantial evidence that Society Insurance had scienter and the intent to deceive Dr. Milas when its representative unequivocally signed Exhibit 2(a).

In ruling on the Defendants' motion for partial summary judgment, the district court concluded there was not substantial evidence of the scienter and intent-to-deceive elements of Dr. Milas's fraudulent misrepresentation claim. "'The element of scienter requires a showing that alleged false representations were made with knowledge they were false.'" *Dier*, 815 N.W.2d at 8 (quoting *B&B Asphalt Co. v. T.S. McShane Co.*, 242 N.W.2d 279, 284 (Iowa 1976)).

This requirement is also "'met when the evidence shows such representations were made in reckless disregard of their truth or falsity.'" *Id.*

Similarly, the Iowa Supreme Court has stated the following with respect to the intent-to-deceive element of fraud:

> We have held that the intent to deceive element, *like the scienter element,* may be proved in one of two ways: "by proof that the speaker (1) has actual knowledge of the falsity of the representation or (2) speaks in reckless disregard of whether those representations are true or false."

Id. at 9 (quoting *Rosen v. Bd. of Med. Exam'rs*, 539 N.W.2d 345, 350 (Iowa 1995)); *accord Iowa Sup. Ct. Att'y Disciplinary Bd. v. Weaver*, 750 N.W.2d 71, 84 (Iowa 2008) ("Intent to deceive can be shown by attorney's reckless disregard for the truth, as well as by actual knowledge of falsity.")

In determining the evidence in this case would not support a finding of this element, the district court stated: "There simply is no evidence to suggest that Ms. Bonlander or Society intended to deceive Dr. Milas when she signed the estimate and authorization of surgery." App. 102. Contrary to the court's ruling, however, there is substantial evidence in the record in addition to Society Insurance's failure to pay Dr. Milas the fee stated in his proposal that would support a jury finding that Society Insurance had scienter and the intent to deceive Dr. Milas when its representative signed Exhibit 2(a). The same evidence supports a finding of both of these elements.

First, there is substantial evidence in the record that Society Insurance had actual knowledge of the falsity of its representation. Society Insurance represented to Dr. Milas that it would pay the proposed surgical fees in Exhibit 2(a) when its representative, Bonlander, signed the proposals. Yet, Bonlander knew that she was not going to pay Dr. Milas the amount in Exhibit 2(a). App. 348. Bonlander's intention was always to "negotiate" his fees, i.e., to pay Dr. Milas less than the amount listed in Exhibit 2(a). App. 327. In fact, Bonlander admitted the following at trial:

> Q: You never told Dr. Milas that you intended on negotiating his fees, true?
>
> A: True.

App. 327.

Consequently, Society Insurance's representative, the one who signed the proposals, admitted that she had actual knowledge of the falsity of the representation.

Second, there is substantial evidence in the record that Society Insurance spoke in reckless disregard of whether its representation was true or false. Society Insurance represented it would pay Dr. Milas the amount in Exhibit 2(a) but Society Insurance made this representation in reckless disregard of whether it was true or false. Before signing the agreement, Bonlander knew that she was going to send Dr. Milas's fees to Society

Insurance's "cost-containment vendor," and she intended on paying whatever Society's "cost-containment vendor" told her to pay Dr. Milas. App. 327, 344.

Consequently, when Society Insurance made the representation that it would pay Dr. Milas the amount in Exhibit 2(a), its representative did so in reckless disregard of whether this representation was true or false. Society Insurance did not know what its cost-containment vendor was going to recommend for payment but it knew that in all likelihood, that the recommendation would be less than the amount agreed upon in the proposal.

Any argument that Society Insurance believed it was merely approving the surgical procedures and not the fees is not a defense to the fraudulent misrepresentation claim; that evidence would be for the jury to weigh and consider. Society Insurance's representative, Bonlander, testified that she believed she was just approving the surgical procedures when she signed the proposals, but a jury would not have to believe her testimony. In fact, the jury didn't believe Bonlander and found that Society Insurance and Dr. Milas had a legally, binding agreement to pay the specified fees when Society Insurance signed the proposals. App. 477.

The jury's finding is not surprising as Bonlander discussed Dr. Milas's surgical fees with her supervisor before signing the proposals, App. 323, and

Bonlander's supervisor knew that Dr. Milas was seeking "preauthorization" of his fees, App. 363. In fact, Society Insurance's supervisor admitted the following at trial.

> Q: [The] estimate represented preauthorization, did it not, on what Dr. Milas was going to charge?
>
> A: Yes.

App. 363. Bonlander's supervisor told Bonlander to "sign off" on both of the proposals knowing that Dr. Milas was seeking preauthorization of his surgical fees.

Other direct evidence and circumstantial evidence also undermined Bonlander's testimony that she was merely approving the surgery and not the fees. Society Insurance employees admitted they are not allowed to approve or disapprove of the medical care recommended by the authorized treating doctor. At trial, Bonlander admitted that she did not have the medical training to interfere with Dr. Milas's recommendation for surgical procedures needed by his patient. App. 352. Bonlander was not qualified to determine what type of surgery the patient needed. App. 352. Bonlander admitted that it would be ridiculous to tell Dr. Milas what surgery he should or should not perform:

> Q: In other words, you wouldn't say, you know what Dr. Milas, I don't think you should go with the laminectomy, you should go with a laminoplasty. That would be ridiculous, wouldn't it?

A: Yes.

App. 352.

Furthermore, the vice-president of Society Insurance agreed that the authorized doctor does not need to get approval for Society Insurance before performing surgery:

Q: Can we agree that in May of 2013, if an authorized doctor orders surgery, that doctor can proceed accordingly?

A: That doctor can proceed with surgery. That's between them and the patient.

App. 271. In fact, the vice-president of Society Insurance admitted that Society Insurance does not need to sign a document before performing surgery:

Q: Right. They don't need to send a document to say, I'm an authorized doctor, I want to do this surgery, approve my surgery?

A: No. No.

App. 271. Bonlander's supervisor was also asked whether Society Insurance needed to sign a form to authorize the procedure before Dr. Milas performed surgery:

Q: And so there was no form that was required for Dr. Milas before June the 3rd to send to you or to Angie Bonlander for authorization because he was the doctor authorized; isn't that correct?

A: Yes.

App. 276. This evidence undermines any argument by Society Insurance that it thought it was merely approving the surgery and not the fees by signing the proposal submitted by Dr. Milas.

Legally, Dr. Milas, as the authorized physician, could use his medical judgment to recommend whatever treatment his patient needed, and he did not need Society Insurance's approval. *See Jones v. American Greetings*, File No. 5052089 (Alt. Care Dec. 1/28/15) (citing *Pote v. Mickow Corp.*, File No. 694639 (RR Dec. 6/17/86); *Punt v. De Jong Farms*, File No. 5048096 (Alt. Care Dec. 1/14/15); *Podgorniak v. Asplundh Tree Expert Co.*, File No. 5011317 (RR Dec. 5/8/15).

In summary, Society Insurance knew that Dr. Milas was not seeking its approval of his surgery, rather, he was seeking approval of the amount of his surgical fees. If Society Insurance had not intended to deceive Dr. Milas about its intent to pay the proposed fee, Society Insurance easily could have let Dr. Milas know that Society would pay for the surgery, but only on the basis of what its cost-containment vendor recommended. App. 356. Bonlander could have written "subject to bill review" on the proposal. *Id.* Or, Bonlander could have simply not signed the agreement. App. 355. Society Insurance chose not

to clarify its authorization, and this act is clear evidence of scienter and intent to deceive Dr. Milas.

F. Dr. Milas justifiably relied on Society Insurance's representation to his detriment.

Dr. Milas justifiably relied on Society Insurance's representation. Iowa Uniform Jury Instruction No. 810.8, "Fraudulent Misrepresentation – Reliance - Generally" states in relevant part:

> [T]he plaintiff must rely on the representation and the reliance must be justified. It is not necessary that the representation be the only reason for the plaintiff's action. It is enough if the representation was a substantial factor in bringing about the action. Whether reliance is justified depends on what the plaintiff can reasonably be expected to do in light of their own information and intelligence. Reliance is not justified if the representation is of an unimportant fact or is obviously false**.**

Here, Dr. Milas justifiably relied on Bonlander's representation to his detriment. Dr. Milas requested preapproval of his surgical fees—in writing—from the authorized representative of Society Insurance. App. 198-99. It was important to Dr. Milas to know how much he would be paid for his professional services before he actually performed these surgical procedures. App. 421-23. A jury could reasonably conclude as a matter of common sense that Dr. Milas was justified in relying on the signature of Society Insurance's representative that Society Insurance would fully compensate him for his services. In addition, this common- sense conclusion was supported by the

testimony of Plaintiff's expert witness that it was appropriate for Dr. Milas to rely on Society Insurance to fully compensate him for his services after he performed surgery because Society Insurance's representative approved his surgical fees. App 385.

Society Insurance's fraudulent misrepresentation has resulted in damages or injury to Dr. Milas. Dr. Milas has not been paid the amount of the agreed upon fees. App. 477-78. In addition, Society Insurance's material misrepresentation to Dr. Milas caused him to experience emotional and mental anguish as it interfered with his ability to treat his patient. App 429-33. Finally, Dr. Milas has spent time on corresponding with Society Insurance to explain why Society Insurance's reduction of his charges was inappropriate, time that could have been invested in his medical practice. App. 229-32.

II. The district court erred when it refused to give jury instructions on punitive damages.

A. Error Preservation

Plaintiff preserved error by making offers of proof during the course of trial, and with a Motion to Amend Petition to Conform to Proof. App. 330-37, 365-80, 386-409, 429-39, 313-18, 442-47. In addition, Plaintiff requested that the judge provide jury instructions regarding punitive damages. App. 441-47. Defendants had an opportunity to argue this issue, and after hearing arguments

from both sides, the trial judge denied the request to provide jury instructions on punitive damages. *Id.*

B. Standard of Review

The standard of review for the failure to give a requested instruction is based on errors of law. *See* Iowa R. App. P. 6.907. Trial courts are required to give a requested instruction when it states a correct rule of law having application to the facts of the case, and the concept is not otherwise embodied in other instructions. *Stover v. Lakeland Square Owners Ass'n*, 434 N.W.2d 866, 868 (Iowa 1989).

Failure to give jury instructions on issues that are supported by substantial evidence is error. *Meck v. Iowa Power & Light Co*, 469 N.W.2d 274, 276 (Iowa Ct. App. 1991) (citing *Borough v. Minneapolis & St. L. Ry.*, 184 N.W.2d 320, 323 (Iowa 1921); *Miller v. Int'l Harvester Co.*, 246 N.W.2d 298, 301 (Iowa 1976)). Instructional error warrants reversal if the complaining party has been prejudiced. *Rudolph v. Iowa Methodist Med. Center*, 293 N.W.2d 550, 555 (Iowa 1980).

C. General Principles Governing Punitive Damages

Punitive damages serve a vital function in our tort system. *Spaur v. Owens-Corning Fiberglas Corp*., 510 N.W.2d 854, 865 (Iowa 1994). They punish a defendant and deter the offending party and like-minded individuals

from committing similar acts. *Ryan v. Arneson*, 422 N.W.2d 491, 496 (Iowa 1988). This purpose has particular importance here where the conduct of a workers' compensation insurer is at issue. Unless deterred, Society Insurance will continue its tactic of inducing medical providers to provide care to employees with promises of payment, only to deny and delay payment once medical services have been provided in the hope of "negotiating" (coercing) a savings for the insurer. With the importance of the purpose of punitive damages in mind, Plaintiff turns to the principles that will govern this court's review of the trial court's refusal to submit punitive damages to the jury.

Iowa Code section 668A.1 provides that punitive damages may not be awarded unless the jury finds that "the conduct of the defendant from which the claim arose constituted willful and wanton disregard for the rights or safety of another." This standard is met by a showing of actual or legal malice. *See Cawthorn v. Catholic Health Initiatives Iowa Corp.*, 743 N.W.2d 525, 529 (Iowa 2007). It is well established that punitive damages may be awarded in an action for fraud when this standard has been met. *Spreitzer v. Hawkeye State Bank*, 779 N.W.2d 726, 745 (Iowa 2009).

The Supreme Court has observed that "[i]n considering whether punitive damages should be permitted, the nature of the conduct is more significant than the legal label which is attached to it." *Woods v. Schmitt*, 439

N.W.2d 855, 870 (Iowa 1989) (viewing nature of attorney's conduct in attorney negligence case to determine whether punitive damages should have been submitted and concluding there had been no proof of "malice, fraud, gross negligence, or an illegal act" to support a punitive damage award); *Pogge v. Fullerton Lumber Co.*, 277 N.W.2d 916, 920 (Iowa 1979) (stating in breach-of-contract case, that punitive damages were permissible upon proof of defendant's "malice, fraud, gross negligence, or an illegal act"). This focus was apparent in the Supreme Court's *Sebastian* case, where the Court focused not on the fact that the plaintiff's claim for compensatory damages was based on negligence, but on the important role punitive damages could play in deterring "drunken and grossly negligent operators." *Sebastian*, 246 Iowa at 103, 66 N.W.2d at 846.

Here, the Plaintiff's contract claim and fraudulent misrepresentation claim were each individually a basis upon which to submit punitive damages.

D. The trial judge's refusal to instruct the jury on punitive damages was erroneous because there is substantial evidence in the record that Society Insurance acted with actual malice.

There is substantial evidence in the record that Society Insurance acted with actual malice toward Dr. Milas. Actual malice is characterized by such factors as personal spite, hatred, or ill will. *Schultz v. Sec. Nat'l Bank*, 583 N.W.2d 886, 888 (Iowa 1998).

Here, there is substantial evidence that Society Insurance had actual malice towards Dr. Milas. There is abundant evidence in the record that Society Insurance treated Dr. Milas differently than any other medical professional who provided medical care to Ricky Fitzgerald. Society Insurance boasted that it had paid $214,000.00 to medical professionals for providing care to Fitzgerald. App. 346. Yet, Society Insurance's payment to Dr. Milas was only $1,620.52. App. 233.

Society Insurance paid for Ricky Fitzgerald to undergo an evaluation with its medical experts for litigation purposes. App. 353, 242. The medical expert did not provide medical care, rather, he gave medical opinions about medical care. App 353 Society Insurance prepaid the medical professional one hundred percent (100%) of his agreed upon fees about a month before the evaluation. App. 353, 242.

Society Insurance paid its expert witness more for a one-time evaluation than it paid Dr. Milas for performing a delicate surgery and three months of follow-up care. App. 233, 353.

For another example, Society Insurance promptly paid the anesthesiologist who was present during the surgery performed by Dr. Milas. App. 241, 254, 354. Society Insurance paid the anesthesiologist more than

what it paid Dr. Milas even though they were in the same operating room for the same amount of time. App. 241, 254.

Society Insurance has offered no credible reason for treating Dr. Milas any differently than it treated the other health professionals involved in Fitzgerald's care and the evaluation of his care. Society Insurance's representative claimed that she had to send Dr. Milas's fees to the cost-containment vendor, but this is simply untrue. Society Insurance's vice-president testified that Society Insurance's representative had the power to disregard the cost containment vendor's recommendation and pay Dr. Milas what she had agreed to pay him before the surgery App 272, 274. In other words, Society Insurance's representative could have sent Dr. Milas a check for one hundred percent of his fees on June 4, 2013 – more than three years before the trial in this case. Instead, Dr. Milas had to struggle for more than three years with this insurance company, and actually go through a trial before Society Insurance paid him what it had agreed to pay in the first place.

Society Insurance's conduct in processing payment of Dr. Milas's fees, particularly as compared to how it handled the payment for services of other medical professionals, would support a jury finding that Defendants acted with personal spite or ill-will toward Dr. Milas—a finding that would support

an award of punitive damages. For this reason, the trial court erred in refusing to instruct the jury on punitive damages.

E. The trial judge's refusal to instruct the jury on punitive damages was erroneous because there is substantial evidence in the record that Society Insurance acted with legal malice.

There is substantial evidence in the record that Society Insurance acted with legal malice. Legal malice is conduct that exhibits a "willful and wanton disregard for the rights or safety of another." Iowa Code § 668A.1(1)(a); *accord Beeman v. Manville Corp. Asbestos Disease Comp. Fund*, 496 N.W.2d 247, 256 (Iowa 1993). It "involves wrongful conduct committed 'with a reckless disregard of another's rights.'" *Spreitzer*, 779 N.W.2d at 745 (quoting *Midwest Management Corp. v. Stephens*, 353 N.W.2d 76, 82 (Iowa 1984)). The intentional acts of the defendant must be of "an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow...." *Fell v. Kewanee Farm Equip. Co.*, 457 N.W.2d 911, 919 (Iowa 1990). Evidence of a "defendant's persistent course of conduct . . . shows that the defendant acted with no care and with disregard to the consequences of [his] acts." *Wolf v. Wolf*, 690 N.W.2d 887, 893 (Iowa 2005); *accord Miranda v. Said*, 836 N.W.2d 8, 34 (Iowa 2013).

There was evidence in the record that Bonlander's supervisor understood that Dr. Milas was requesting preauthorization of his fee for

performing Fitzgerald's surgery and that she nonetheless instructed Bonlander to sign the approval forms submitted by Dr. Milas. Bonlander did so with the intention that she would submit Dr. Milas's fees to Society Insurance's cost-containment vendor for review and with full knowledge that such a review would result in a reduction in Dr. Milas's fees and an attempt to negotiate a savings for Society Insurance. Moreover, the evidence showed that these actions were encouraged, if not required, by Society Insurance's corporate policies.

There was also evidence from which the jury could find that upon receipt of Dr. Milas's bill for performing the surgery, Society Insurance arbitrarily refused to pay that bill. Notwithstanding their preauthorization of the surgery in an amount identical to the bill ultimately submitted, Society Insurance's employees and agents attempted to coerce Dr, Milas to agree to a substantially reduced payment to avoid further delay and additional reductions in payment. When he refused to accept that offer, his bill was submitted to Society Insurance's cost-containment vendor who also recommended that Society Insurance pay a substantially reduced sum in payment of Dr. Milas's agreed-upon fees.

Bonlander's supervisor, Kelderman, even admitted their conduct was consistent with the custom and practice of Society Insurance. App. 378.

Society Insurance's "audit guidelines" contain corporate policies and procedures governing payment of medical bills. App. 378-79. One policy and procedure in those guidelines states: "If our Bill Review Company is unable to secure savings on your bill; as [sic] it is cost effective to do so, consider negotiating a reduced rate in exchange for prompt payment"! App. 251. Thus, Society Insurance tells its employees—without qualification—that it is acceptable to withhold payments to medical providers in order to negotiate a reduced amount with those providers.

A jury could find from this evidence that Bonlander and her supervisor acted in reckless disregard of Dr. Milas's rights throughout their handling of Fitzgerald's surgery, instead focusing on efforts to obtain a savings on the cost of the surgery to financially benefit Society Insurance and their individual year-end bonuses. A jury could also reasonably find from the evidence outlined above that Society Insurance engaged in a persistent course of conduct that disregarded the rights of medical providers and the adverse impact its conduct would have on patients receiving prompt medical care when their authorized, treating doctors are not fully compensated. Therefore, this evidence was sufficient to create a jury question on the issue of punitive damages, and the trial court erred in refusing to submit this issue to the jury under proper instructions.

F. Defendants' breach of contract supports a punitive damages award because the breach constituted an intentional tort and was malicious.

Society Insurance's breach of contract is sufficient to support a punitive damage award. Generally a breach of contract, even if intentional, will be insufficient to support a punitive damage award. *White v. Nw. Bell Tel. Co.*, 514 N.W.2d 70, 77 (Iowa 1994). However, punitive damages may be awarded for breach of contract upon proof of two things: (1) that the breach also constitutes an intentional tort, and (2) that the breach was committed maliciously, in a manner meeting the standards of section 668A.1. *Hockenberg Equip. Co. v. Hockenberg's Equip. & Supply Co. of Des Moines*, 510 N.W.2d 153, 156 (Iowa 1993). Here, Society Insurance's breach constituted the intentional tort of bad faith, and Society Insurance acted with actual and legal malice toward Dr. Milas.

First, Society Insurance's breach constituted the intentional tort of bad faith. There is a two-part test for the common law tort of bad faith: (1) an insurance company lacked a reasonable basis to deny or delay benefits; and (2) the insurance company knew or should have known that it lacked a reasonable basis to deny or delay benefits. *McIlravy v. N. River Ins. Co.*, 653 N.W.2d 323, 329 (Iowa 2002).

Society Insurance lacked a reasonable basis to deny full payment to Dr. Milas. Society Insurance gave the following reason to deny payment: "Dr. Milas has to utilize a fee schedule in Illinois." App. 236, 326. At trial, Bonlander admitted that she knew that the Illinois fee schedule did not apply:

> Q: Under the circumstances, you knew that an Illinois fee schedule didn't apply to an Iowa workers' Compensation claim, yes?
>
> A: Yes
>
> Q: So what's written there is not accurate, is it?
>
> A: No.

App. 326. Thus, Society Insurance lacked a reasonable basis and admitted at trial that it knew it was unreasonable. In fact, the district court held that there was a jury question on whether Society Insurance had acted in bad faith. App. 99-100.

Second, Society Insurance's breach was committed maliciously, in a manner meeting the standards of section 668A.1. Plaintiff details above how Society Insurance acted with both actual malice and legal malice. Thus, Plaintiff's breach of contract claim also supports a punitive damages award.

III. The District Court erred in denying Plaintiff's Motion to Disqualify Judge Latham.

A judge should disqualify himself or herself in a proceeding in which a reasonable person would question the judge's impartiality. *McKinley v. Iowa Dist. Court for Polk Cty.*, 542 N.W.2d 822, 827 (Iowa 1996). This test for disqualification is an objective one. *State v. Mann*, 512 N.W.2d 528, 532. (Iowa 1994). A reasonable person would question the impartiality of Judge Latham, who presided over the trial of this matter, and therefore, Plaintiff's Motion to Disqualify Judge Latham should have been granted.

Judge Latham's impartiality in this matter might be reasonably questioned for several reasons. First, Judge Latham had an ex parte communication with Defendants' counsel, which he did not divulge. Second, Judge Latham showed an unfavorable disposition towards Plaintiff at trial. Third, Judge Latham made clear evidentiary error against Plaintiff. Fourth, Judge Latham showed an unfavorable disposition towards Plaintiff's counsel before trial, during trial, and after trial.

A. Error Preservation

Plaintiff preserved error when he filed a Motion to Recuse Judge Henry Latham as Assigned Judge on Re-Trial and during the hearing on his Motion to Recuse App159, App 282. In addition, Plaintiff filed an unsuccessful

application for interlocutory appeal after this Motion to Recuse was denied. App 193-95.

B. Standard of Review

The standard of review of a trial judge's decision whether to recuse himself or herself is for an abuse of discretion. *State v. Millsap*, 704 N.W.2d 426, 432 (Iowa 2005).

C. A reasonable person would question Judge Latham's impartiality because Judge Latham had inappropriate ex parte communications with Defendants' counsel.

A reasonable person would question a judge's impartiality when he engages in an inappropriate ex parte communication. *See State v. Millsap*, 704 N.W.2d 426, 433 (Iowa 2005) (citing *In re Inquiry Concerning Stigler*, 607 N.W.2d 699, 703 (Iowa 2000)) (noting that recusal was warranted in part because of "improper ex parte communications").

It is inappropriate for a judge to engage in ex parte communications related to the "merits" of a pending proceeding. *Iowa Sup. Ct. Bd. of Prof'l Ethics & Conduct v. Rauch*, 650 N.W.2d 574, 578 (Iowa 2002). The "merits" of a pending proceeding includes procedural as well as substantive matters. *Id.* A judge should not discuss procedural matters when there is a potential for the procedural matters to impact later proceedings. *Id.* The Iowa Supreme Court has stated that: "It is imperative that we avoid even the appearance of

granting one party a *procedural* or tactical advantage over the other as a result of an ex parte contact." *Id.* (emphasis added)

"The purpose behind the rule prohibiting ex parte communications is to prevent the effect, or even the appearance, of granting undue advantage to one party to the litigation." *Id.* "Improper ex parte communications undermine our adversarial system, which relies so heavily on fair advocacy and an impartial judge." *Id.* "Such communications threaten not only the fairness of the resolution at hand, but the reputation of the judiciary and the bar, and the integrity of our system of justice." *Id.*

An ex parte communication regarding procedural matters is improper unless it is authorized by law or court order. *See* Iowa R. Prof. Conduct 32:3:5 ("A lawyer shall not… communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order[.]") The law allows ex parte communication only under specific circumstances:

> In an adversary proceeding, a lawyer shall not communicate, ... as to the merits of the cause with a judge ... before whom the proceeding is pending, except:
> (1) In the course of official proceedings in the cause.
> (2) In writing if a copy is promptly delivered to opposing counsel or to the adverse party if not represented by a lawyer.
> (3) Orally upon adequate notice to opposing counsel or to the adverse party if not represented by a lawyer.
> (4) As otherwise authorized by law.
> DR 7-110(B). The fourth exception includes only ex parte communications for the purpose of "obtain[ing] ex parte restraining orders, submissions made in camera by order of the

> judge, or similarly rare occasions." *Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Lesyshen*, 585 N.W.2d 281, 287 (Iowa 1998) (quoting Charles W. Wolfram, Modern Legal Ethics § 11.3, at 605 (1986)).

Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Rauch, 650 N.W.2d 574, 577 (Iowa 2002).

Here, Judge Latham had an ex parte communication with Defendants' counsel about procedural matters. App. 302-03. Before divulging the ex parte communication, Judge Latham admitted on the record that an ex parte communication with Defendants' counsel would be inappropriate under the totality of the circumstances:

> …I made it a very distinct point, because I could tell – I could feel the animosity between [Plaintiff's counsel] and [Defendants' counsel], and I made it a clear point not to engage in any ex-parte communications specifically with [Defendants' counsel], to welcome him to our courthouse, I never took an opportunity to do that, I never asked him about his stay, where he was staying, never made any type of possible suggestions for restaurants or anything of that kind. And I will state for the record I have done that on occasion with out-of-state – out-of-county attorneys in welcoming them here to our courthouse. But because of the animosity that I felt between the parties, *I felt that would be inappropriate* and I didn't want to have any cause that there would be concern that I didn't want to have showing favoritism to anyone in this case.

App. 298-99.

Yet, Judge Latham engaged in an inappropriate ex parte communications regarding the merits of the case before opening statement.

Moreover, Judge Latham did not divulge this information before ruling adversely against Plaintiff i.e., granting the motion for mistrial. It was actually a witness in the courtroom who first came forward about this ex-parte communication. App. 258-60. The witness heard Judge Latham and Defendants' counsel's discussions while Plaintiff's counsel was not present. *Id.* Later, Judge Latham characterized those discussions as an "administrative comment" to Defendants' counsel, who admitted that it involved the proceedings regarding opening statement. App. 302-03. The "administrative comment" involved how opening statement would proceed. *Id.*

Thus, a reasonable person would question Judge Latham's impartiality because he engaged in an ex parte communication with Defendants' counsel on the merits of the case when he knew that an ex parte communication would appear inappropriate given the totality of the circumstances. Even worse, Judge Latham did not divulge the ex parte communication until it was brought to his attention that his ex parte communication had been witnessed.

D. A reasonable person would question Judge Latham's impartiality because of his hostile disposition toward the Plaintiff.

A reasonable person would question Judge Latham's impartiality because of his hostile disposition toward the Plaintiff**.** A reasonable person would question a judge's impartiality when he exhibits an unfavorable

disposition toward one of the parties. *See In re C.L.C. Jr.*, 798 N.W.2d 329, 336-37 (Iowa Ct. App. 2011) (citing *Liteky v. United States*, 510 U.S. 540, 551, 114 S.Ct. 1147, 1155, 127 L.Ed.2d 474, 488 (1994)) "A favorable or unfavorable predisposition can also deserve to be characterized as 'bias' or 'prejudice' because, even though it springs from the facts adduced or the events occurring at trial, it is so extreme as to display clear inability to render fair judgment." *Id.*

It is wrong to say that an "extrajudicial source" is the only basis for establishing a disqualifying bias or prejudice. *See In re C.L.C. Jr.*, 798 N.W.2d 329, 336-37 (Iowa Ct. App. 2011) (citing *Liteky v. United States*, 510 U.S. 540, 551, 114 S.Ct. 1147, 1155, 127 L.Ed.2d 474, 488 (1994)). The Supreme Court of the United States said:

> 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, 510 U.S. at 555, 114 S.Ct. at 1157, 127 L.Ed.2d at 491 (emphasis original).

Here, Judge Latham accused Dr. Milas of staring at him: "Mr. Bribriesco, it appears to me that Dr. Milas is kind of staring me down. I – it's

very uncomfortable." App. 449. A reasonable person who heard Judge Latham accuse of Plaintiff of "staring him down" would certainly question Judge Latham's impartiality.

E. A reasonable person would question Judge Latham's impartiality because Judge Latham committed a clear, evidentiary error in favor of Defendants and adverse to Plaintiff.

Judge Latham committed clear error on an evidentiary issue when he allowed Defendants to introduce a record that contained hearsay into evidence. A party seeking to admit a record containing hearsay into evidence under Iowa Rule of Evidence 5.803(6) must establish the following foundational elements:

1. That it is a business record;
2. That it was made at or near the time of an act;
3. That it was made by, or from information transmitted by, a person with knowledge;
4. That it was kept in the course of a regularly conducted business activity;
5. That it was the regular practice of that business activity to make such a business record.

State v. Reynolds, 746 N.W.2d 837 (Iowa 2008) (citing *Beachel v. Long*, 420 N.W.2d 482, 484 (Iowa Ct. App. 1988)).

The court in *Reynolds* held that the district court erroneously admitted third party documents because the State failed to lay a proper foundation. In that case, the State attempted to lay a business records exception foundation

for the ten exhibits containing the Federal Reserve error reports through the testimony of Stella Best, a proof operator and research officer at Central State Bank. *Id.* at 841. Each of the exhibits contained six separate documents, with the first four documents being generated by Central State Bank and the last two documents in each exhibit being created by the Federal Reserve and sent to Central State Bank. *Id.* Defense counsel objected to the admission of the last two pages in each exhibit on hearsay grounds.

In responding to the objection, the State contended that Ms. Best testified they are presented to Central State Bank. Copies are maintained within their system within the normal course of business. They receive the records in the normal course of business from the Federal Reserve to notify them if there was an error. *Id.* at 842. Although the record is generated by the Federal Reserve, the State posited that because the Central State Bank received it in the normal course of their business, the hearsay objection should be overruled.

In determining whether the evidence was erroneously admitted, the court noted that while the prosecutor arguably addressed four of the five Rule 5.803(6) foundation elements in her response to Reynolds's hearsay objection, she failed to address the requirement that the relevant records were made by

a person with knowledge, or from information transmitted by a person with knowledge. The Court further stated:

> Best's testimony established Central State Bank "received" the documents from the Federal Reserve and "maintained" them in the normal course of Central State Bank's business. Rule 5.803(6), however, requires that the record be *made* by, or from information transmitted by, a person with knowledge. The hearsay objection raises an issue of "double hearsay," as the Federal Reserve generated the error report, not Central State Bank, and Best did not testify that she had any knowledge as to how the error reports themselves were made.

Id; *see also Union Story Trust & Sav. Bank v. Sayer*, 332 N.W.2d 316, 320-21 (Iowa 1983) (holding a party failed to lay a proper business records exception foundation for hearsay evidence under Iowa Code section 622.28 where party failed to demonstrate that the record sought to be introduced was the business record *of that party*) ; *State v. Lain*, 246 N.W.2d 238, 242 (Iowa 1976) (holding a telephone subscriber was unable to lay a business records exception foundation for telephone bill because the subscriber had no knowledge of the method or circumstances of the creation of the record); *Polson v. Meredith Publ'g Co.*, 213 N.W.2d 520, 525 (Iowa 1973) (stating that admitting third-party hearsay statements contained in a business record without a separate hearsay exception foundation for the third-party hearsay "would constitute a complete departure from the most

elementary rules of evidence rather than obedience to the statutory admonition that such rules should be liberally applied").

These cases establish that a party must establish the applicability of an exception to the hearsay rule authorizing the admission of third-party hearsay statements contained in a business record. The fact that third-party hearsay is contained in an otherwise-admissible business record does not cleanse it of the "untrustworthy" hearsay taint. *Sayer*, 332 N.W.2d at 320-21. While it is essential that the record be kept in the course of regularly conducted business activity, that fact alone is not dispositive; the record must also satisfy the other rule 5.803(6) conditions to establish admissibility of the hearsay statements in the record.

Here, Defendants attempted to introduce a third-party statement from its cost-containment vendor, which was labeled Exhibit G. App. 339-43. Plaintiff objected on the basis of hearsay and lack of personal knowledge. App. 343. Judge Latham allowed Exhibit G or the "Explanation of Benefits" into evidence. App 343.

There was no testimony from anyone with knowledge of how the Explanation of Benefits is generated by HSI. From the testimony of Bonlander, no employee at Society Insurance was able to, or at least did not, independently determine that the Explanation of Benefits was properly

generated; rather, Society Insurance relied exclusively on HSI to make that determination. There is no evidence on the record either as to how HSI generated the Explanation of Benefits, or how the report was made. Although the specific person who created the record in the course of business need not testify to lay the foundation for the business records exception, to offer the Explanation of Benefits as evidence, Bonlander was required to demonstrate that the evidence was made in the course of HSI's business using standard procedures that reasonably indicate the trustworthiness of the information. No such foundation was offered in this case. Bonlander's testimony was insufficient to satisfy Defendants' burden to establish that the statements made in the Explanation of Benefits were made by a person with knowledge, thereby rending the document inadmissible. Judge Latham therefore committed clear error in admitting the Defendants' Exhibit G. Plaintiff notified the Court that Bonlander lacked the personal knowledge to lay the proper foundation for the admission of this exhibit when Plaintiff made the timely objection of "lack of personal evidence of the actual contents and hearsay." App. 343.

F. A reasonable person would question Judge Latham's impartiality because Judge Latham had an unfavorable predisposition towards Plaintiff's counsel.

Judge Latham's conduct indicated that he had an unfavorable predisposition toward Plaintiff's counsel. A reasonable person would question a judge's impartiality when the judge exhibits an unfavorable disposition toward one of the attorneys. *See In re C.L.C. Jr.*, 798 N.W.2d 329, 336-37 (Iowa Ct. App. 2011) (citing *Liteky v. United States*, 510 U.S. 540, 551, 114 S.Ct. 1147, 1155, 127 L.Ed.2d 474, 488 (1994)) "A favorable or unfavorable predisposition can also deserve to be characterized as 'bias' or 'prejudice' because, even though it springs from the facts adduced or the events occurring at trial, it is so extreme as to display clear inability to render fair judgment." *Id.*

It is wrong to say that an "extrajudicial source" is the only basis for establishing a disqualifying bias or prejudice. *See id.* The Supreme Court of the United States has said:

> 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, 510 U.S. at 555, 114 S.Ct. at 1157, 127 L.Ed.2d at 491 (emphasis original).

Here, Judge Latham's manner toward Plaintiff's counsel has been described as:

- Aggressive attitude
- Hostile attitude
- Overt hostility
- Angry
- Brusque
- Condescending

App. 258-64. Judge Latham showed an "obvious unwillingness to listen to [Plaintiff's counsel's] arguments regarding the case. App. 264.

Thus, a reasonable person would question Judge Latham's impartiality because he exhibited an unfavorable predisposition that showed an obvious unwillingness to listen to Plaintiff's counsel – making a fair judgment impossible.

G. Plaintiff has been prejudiced by Judge Latham's impartiality.

Plaintiff has been prejudiced by Judge Latham's impartiality. The Court has stated that: "Actual prejudice must be shown before a recusal is necessary." *McKinley v. Iowa Dist. Court for Polk Cty.*, 542 N.W.2d 822, 827 (Iowa 1996). The "actual prejudice" requirement also relates to the effect of

the conduct on the outcome of the case. 16 Ia. Prac., Lawyer and Judicial Ethics § 19:4(b)(1).

Actual prejudice can be shown when there is a potential for an ex parte communication to impact later proceedings. *See Rauch*, 650 N.W.2d at 578 (discussing ex parte communication to obtain trial continuance has potential to impact merits of later proceedings).

There is more of a potential for a bias or prejudice to impact later proceedings when a judge does not acknowledge the existence of that bias or prejudice. *See State v. Sinclair*, 582 N.W.2d 762 (Iowa 1998). In *Sinclair*, a judge presided over a sentencing hearing of an attorney who had been convicted of driving drunk. The judge had received six calls from citizens who wanted the judge to provide the maximum sentence to the attorney. On the record, the judge informed the attorney of these calls.

The Iowa Supreme Court in *Sinclair* held that there had not been actual prejudice shown. 582 N.W.2d at 766. The Iowa Supreme Court reasoned that the judge had acknowledged the "public outcry" and "made it clear that he was not influenced" by it. *Id.*

Unlike the judge in *Sinclair*, Judge Latham neither acknowledged his ex parte communication with Defendants' counsel nor acknowledged his angry disposition toward Plaintiff's counsel before he granted a mistrial.

Thus, actual prejudice has been shown because Judge Latham did not acknowledge his bias and prejudice and as a result, it influenced his decision to grant a mistrial, which adversely affected Plaintiff's counsel and Plaintiff.

In addition, Plaintiff has been prejudiced by Judge Latham's decision to deny jury instructions proposed by Plaintiff. This prejudice is thoroughly discussed in other sections of the brief.

CONCLUSION

For the reasons stated above, the rulings of the district court, individually or cumulatively, require reversal and a new trial. Plaintiff respectfully requests that this Court remand this case for a new trial and direct the case to a different trial judge.

Respectfully submitted,

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