IN THE SUPREME COURT OF IOWA
Supreme Court No. 17-1971

LARRY D. EISENHAUER, Conservator, ex. rel., Conservatorship of T.D.,
Plaintiff-Appellant,

vs.

THE HENRY COUNTY HEALTH CENTER, JAMES WIDMER, M.D., and FAMILY MEDICINE OF MT. PLEASANT, P.C.,
Defendants-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT
FOR HENRY COUNTY
THE HONORABLE MARK KRUSE, JUDGE

APPELLANT'S FINAL BRIEF

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ROUTING STATEMENT

This appeal should be decided by applying settled principles of Iowa law. Accordingly, this case should be routed to the Court of Appeals for resolution. *See* Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

A. Nature of the Case

Appellant, Larry D. Eisenhauer, acting in his role as Conservator for T.D., appeals following the jury verdict entered in favor of Defendants and subsequent District Court Order dismissing T.D.'s claims against Appellees Dr. James Widmer, Family Medicine of Mt. Pleasant, P.C., and the Henry County Health Center ("HCHC"). The Honorable Judge Mark Kruse presided at all relevant proceedings.

This case concerns a medical negligence suit brought by Plaintiff against Defendants HCHC (HCHC is vicariously liable through the actions of two of their employee nurses), Dr. Widmer, and Dr. Widmer's employer Family Medicine of Mt. Pleasant, P.C. T.D. alleges Defendants' actions and omissions during T.D.'s birth resulted in T.D. suffering a permanent brachial plexus injury.

B. Course of Proceedings and Disposition Below

The underlying action was originally filed on March 10, 2016. A two-week jury trial was held in November 2017. On November 17, 2017, the jury returned a verdict in favor of the Defendants, finding no liability. Appellant filed a timely appeal on December 6, 2017, from the District Court's final Order entered on November 17, 2017, and all adverse rulings and orders inhering therein.

STATEMENT OF FACTS

A. T.D.

T.D. was born with a permanent brachial plexus injury on August 31, 2007. A permanent brachial plexus injury is a nerve injury that occurs when the nerves are stretched or torn in a traumatic nature. The injury prevents a person from having normal use and function of their arm, causes a significant cosmetic deformity, and is permanent. (Vol. 2 App. 137, 143-44). T.D. has received ongoing treatment for his permanent brachial plexus injury since his birth, including physical therapy. In 2014, a derotational osteotomy surgery was performed on T.D. The surgery involved cutting into T.D.'s arm, cutting and then rotating the humerus bone, and stabilizing the bone with a metal plate and screws. (Vol. 1 App. 194). The osteotomy allowed T.D. to use his arm in a different way but did not result in a net gain in range of motion. T.D.'s injury is permanent and he will never have full use of his arm. (Vol. 1 App. 194).

B. Defendants

Defendant Dr. Widmer, a specialist in family medicine, was responsible for the prenatal care of T.D.'s mother Lisa Hirschy ("Lisa") during her pregnancy with T.D., and the labor and delivery of T.D. (Vol. 1 App. 188). Dr. Widmer held himself out as a specialist in family medicine, treating all variety of medical conditions from birth until death. (Vol. 1 App. 188). At all relevant times, the Henry County Health Center ("HCHC") permitted Dr. Widmer to perform

obstetrics, including labor and delivery at HCHC. At all times material to this case, Dr. Widmer acted as an agent of Family Medicine of Mt. Pleasant, P.C. (Vol. 1 App. 188).

At all times relevant to this case, nurses Rebecca Fraise and Yvonne Sloan were obstetrical nurses at HCHC. Nurses Fraise and Sloan were responsible for providing care and treatment to Lisa and T.D. during T.D.'s labor and delivery. HCHC is vicariously liable for any actions and/or omissions of the nurses in this case. (Vol. 1 App. 187-88).

The HCHC nurses and Dr. Widmer constitute the delivery team, which was responsible for delivering T.D.

C. T.D.'s labor and delivery

On Friday, August, 31, 2007, Lisa presented to HCHC at approximately 10:30 a.m. because she had ruptured membranes. (Vol. 1 App. 189). Dr. Widmer ordered the administration of Pitocin due to the presence of ruptured membranes with no active labor. (Vol. 1 App. 190). Pitocin is a medicine that induces or augments contractions. The defendant nurses increased the rate of Pitocin at approximately 2:00 p.m., and again at 3:20 p.m. (Vol. 1 App. 190). Pitocin was continuously administered until T.D. was delivered. (Vol. 2 App. 233).

At approximately 5:00 p.m. Lisa entered the second stage of labor and was moved to a birthing chair. (Vol. 1 App. 187). The second stage of labor occurs

when the mother's cervix is fully dilated and the mother is at the point of pushing. (Vol. 2 App. 202). From 5:05 to 5:24 p.m. T.D.'s fetal heart tones ranged during pushing/contractions from 80 to 120 beats per minute. (Vol. 1 App. 191). Fetal distress or bradycardia is defined as a consistently slow fetal heart rate (the fetal heart rate remains below 110 for a full 10-minute period without raising above 110). (Vol. 1 App. 96). When fetal distress or bradycardia occurs, there is a danger that the fetus will be deprived of oxygen or nutrients and suffer a brain injury. A fetal heart rate of 80 to 90 beats per minute during pushing is not unusual because the fetus is compressed during contractions and pushing. (Vol. 1 App. 118).

Dr. Widmer claims T.D. suffered a bradycardia, and as result he had to deliver T.D. promptly. (Vol. 2 App. 225-26). The HCHC policy on oxytocin (Pitocin is the synthetic version of oxytocin) states that "fetal distress as evidenced by late decelerations, prolonged decelerations, or sustained fetal bradycardia" are "indications for terminating [Pitocin] induction/augmentation." (Vol. 3 App. 9). Dr. Widmer never terminated the administration of Pitocin throughout T.D.'s delivery. (Vol. 2 App. 233).

At approximately 5:30 p.m. T.D.'s head delivered but his left shoulder became stuck on Lisa's pelvis and T.D. suffered a shoulder dystocia. (Vol. 1 App. 191-92). A shoulder dystocia is a medical emergency that occurs when the baby's shoulder becomes stuck on the mother's pelvis after the baby's head is delivered.

(Vol. 1 App. 189). In a delivery where there is a shoulder dystocia, a physician has six minutes to safely deliver the baby before there is a risk of oxygen deprivation to the baby. (Vol. 2 App. 117). The physician must be careful not to "pull through" the shoulder dystocia, because such actions will injure the baby. Pulling too hard on the baby's head or neck when the shoulder is still stuck stretches and tears the baby's brachial plexus nerves, which can cause a permanent brachial plexus injury. (Vol. 2 App. 106-07).

Numerous maternal maneuvers, which are performed by the nursing staff on the mother, and fetal maneuvers, which are performed by the physician on the baby, exist for the delivery team to resolve the shoulder dystocia while reducing the risk of permanent brachial plexus injury to the baby. The maneuvers are designed to disengage the stuck shoulder and allow the physician to deliver the baby with gentle traction or pulling once the shoulder is safely dislodged. Such maneuvers include but are not limited to the maternal maneuvers (nurse performed maneuvers) of:

a. McRobert's
b. Suprapubic Pressure
c. Gaskin (all fours maneuver)

and the fetal maneuvers (physician performed maneuvers) of:

d. Wood's screw (and Reverse Wood's screw)
e. Delivery of Posterior Arm and Shoulder

f. Rubin

g. Zavanelli.

(Vol. 1 App. 195). Dr. Widmer was only familiar with two of these maneuvers, namely, McRobert's and suprapubic pressure. Dr. Widmer admitted that he had never performed any of the fetal maneuvers during any delivery and was unfamiliar with nearly all of them. (Vol. 1 App. 195); (Vol. 2 App. 234-36).

After recognizing the shoulder dystocia at approximately 5:30 p.m., the members of the delivery team continued to instruct Lisa to push until the shoulder dystocia was resolved. In fact, a DVD of the birth—recorded by Lisa's sister—shows that after the recognition of shoulder dystocia, members of the delivery team instructed Lisa to push 17 more times before the shoulder dystocia was resolved. No member of the delivery team instructed Lisa to stop pushing after the shoulder dystocia was recognized and before it was resolved. (Vol. 2 App. 214-15). T.D.'s experts opined that these actions breached the standard of care. (Vol. 2 App. 106).

Shortly after recognizing the shoulder dystocia, the HCHC nurses attempted the McRobert's maneuver to relieve the stuck shoulder. (Vol. 2 App. 102). After attempting to perform the McRobert's maneuver for nearly a minute, Nurse Sloan attempted to perform suprapubic pressure with an open hand for approximately 18 seconds. (Vol. 2 App. 71-72, 113-14). The HCHC policy on

suprapubic pressure says nurses should apply suprapubic pressure with a fist. (Vol. 2 App. 71).

T.D.'s experts opined that the nurses did not perform the McRobert's maneuver or suprapubic pressure properly or effectively. (Vol. 2 App. 70, 86, 111). As a result of the inadequately performed maneuvers, T.D.'s shoulder remained stuck. (Vol. 2 App. 111). T.D.'s experts opined that in the face of the stuck shoulder, Dr. Widmer applied inappropriate, continuous, and excessive traction—by pulling too hard on T.D.'s head and neck—despite T.D.'s shoulder remaining stuck. (Vol. 2 App. 111). T.D.'s experts opined that it was the inappropriate traction continuously applied by Dr. Widmer throughout the shoulder dystocia event that ultimately released the stuck shoulder and caused the brachial plexus injury. (Vol. 2 App. 111, 137-39). T.D.'s experts further opined that in light of the inadequate maternal maneuvers that failed to safely dislodge T.D.'s stuck shoulder, Dr. Widmer should have moved on to the fetal maneuvers in order to atraumatically disengage the stuck shoulder instead of applying inappropriate, excessive, and continuous traction to T.D.'s head and neck in order to deliver T.D. (Vol. 2 App. 111).

T.D. was delivered at approximately 5:31 p.m., around a minute and ten seconds after the shoulder dystocia was recognized. As a result of the delivery, T.D.'s left arm was bruised at birth and he sustained a permanent brachial plexus injury to his left brachial plexus. T.D.'s brachial plexus injury was due to the

stretching of the peripheral nerves in his neck during the birthing process. (Vol. 1 App. 193). T.D.'s experts opined that T.D.'s injury was a direct result of the delivery team's errors. (Vol. 2 App. 111, 137-39). T.D.'s experts testified that the delivery team breached the standard of care by improperly performing the maternal maneuvers to dislodge the stuck shoulder and that Dr. Widmer breached the standard of care by applying inappropriate, continuous, and excessive traction to T.D.'s head and neck—pulling too hard—despite T.D.'s shoulder remaining stuck. (Vol. 2 App. 111).

D. Dr. Widmer's lack of education and training

Dr. Widmer graduated from medical school in 1978 and completed his residency for his specialty as a family physician in 1981. (Vol. 1 App. 194). In August of 2007 when T.D. was born, Dr. Widmer spent five to ten percent of his time delivering babies. (Vol. 1 App. 194); (Vol. 2 App. 201). Since completing his medical residency in 1981, there is no record of Dr. Widmer receiving continuing medical education ("CME") on McRobert's, suprapubic pressure, Wood's maneuver, delivery of the posterior arm, or Zavanelli maneuver. (Vol. 1 App. 194). Dr. Widmer could not recall ever taking a CME course related to shoulder dystocia. (Vol. 3 App. 21).

Dr. Widmer's CME records showed that from 1997 to August 31, 2007—the date T.D. was born—Dr. Widmer took approximately 400.25 hours of CME credits. (*See* Vol. 3 App. 16-93). Only eight out of the 400.25 CME hours were

"potentially related to obstetrics." (*See* Vol. 3 App. 21, 23-33; 16-93). The records also show that from 2002 to 2016 Dr. Widmer spent less than 1% of his CME's on topics "potentially related to obstetrics." (*See* Vol. 3 App. 93); (Vol. 2 App. 177).

E. Defendants failure to retain medical records

HCHC admitted that it failed to maintain T.D's fetal heart monitoring strips in accordance with its own policy. (Vol. 1 App. 199); (Vol. 3 App. 119). The fetal heart monitoring strips record the baby's heart rate second-by-second in relation to the mother's contractions. The strips would definitely show whether a baby suffered bradycardia or fetal distress, or merely variable decelerations. (Vol. 2 App. 120-21).

F. Pre-trial Proceedings

The trial court granted 16 out of 19 of Defendants' Motions in Limine prior to trial. (Vol. 1 App. 340). The overly broad relief requested by Defendants and granted by the trial court included Defendants' Motion in Limine No. 4, which barred "[a]ny reference to, or evidence concerning . . . HCHC's training and credentialing processes and activities," and Defendants' Motion in Limine No. 19, which barred "[a]ny reference to, or evidence concerning Dr. Widmer's training as a family practice physician, including Dr. Widmer's CME records." (Vol. 1 App. 214, 229, 340).

G. Trial Proceedings

In accordance with its pre-trial rulings, the trial court prevented T.D. from presenting any evidence on Dr. Widmer's CME records. (Vol. 2 App. 177). T.D. made an offer of proof at trial on the admissibility of the CME records but the trial court maintained its ruling barring the evidence. (Vol. 2 App 177). The trial court also prohibited T.D. from impeaching Dr. Widmer's credibility with the CME records, even though Dr. Widmer testified as an expert on the standard of care for the obstetrical maneuvers performed in this case and the records would have shown that Dr. Widmer spent less than 1% of his CME hours on topics "potentially related to obstetrics" from 2002 to 2016. (Vol. 3 App. 93); (Vol. 2 App. 175-77).

The trial court also allowed Dr. Widmer to testify as an expert on new, undisclosed opinions on the standard of care and bradycardia despite his failure to make any of the required expert disclosures. (Vol. 2 App. 208-09); (Vol. 2 App. 246-64). After his designation, Dr. Widmer never disclosed any of his expert opinions in a written report or summary pursuant to Iowa Rule of Civil Procedure 1.500(2) despite numerous requests from T.D. to do so. (Vol. 3 App. 16, 67-68, 71-72). Dr. Widmer also failed to respond to T.D.'s Request for Production No. 6, which asked Defendants' experts to produce all the documents they intended to refer to or rely upon for trial. (Vol. 3 App. 19).

On November 10, 2017—63 days after the close of discovery and three days into the trial—Dr. Widmer listened to the birth DVD and made notes that timed the heart rate at various times during the delivery. (Vol. 2 App. 265, 431-32). These notes were not disclosed during discovery, nor were they disclosed as a trial exhibit or in any other way before Dr. Widmer produced them for the first time on November 15, 2017 (the sixth day of trial). (Vol. 2 App. 246-64). T.D.'s counsel learned of these notes for the first time on November 15, 2017, when Dr. Widmer pulled them from his pocket during his trial testimony. (Vol. 2 App. 246-53). Opposing counsel knew of the existence of these notes before Dr. Widmer took the stand to testify on November 15, 2017—opposing counsel had a digital copy of the notes that he projected to the jury—but failed to disclose these notes to T.D.'s counsel beforehand. (Vol. 2 App. 246-64).

H. Jury Instructions

In T.D.'s original proposed marshalling instructions, T.D. submitted eleven specifications of negligence against Dr. Widmer, and eight specifications of negligence against the HCHC nurses. (Vol. 1 App. 199-200, 231-34). After the close of evidence, the trial court sua sponte determined T.D.'s specifications needed to be narrowed down. (Vol. 2 App. 325). In complying with the trial court's demand, T.D. submitted revised proposed marshalling instructions for Dr. Widmer and the HCHC nurses. T.D. included six specifications of

negligence against Dr. Widmer in his revised proposed instructions, and five specifications against the HCHC nurses. (Vol. 1 App. 364-66).

The trial court declined to include four of T.D.'s specifications against Dr. Widmer and four of T.D.'s specifications against the HCHC nurses in its final instructions. (Vol. 1 App. 388-89). The trial court never weighed the evidence to determine whether T.D.'s proposed specifications were supported by substantial evidence. Ultimately, the trial court used instructions from another shoulder dystocia case to draft its marshalling instructions. (Vol. 2 App. 343).

I. Jury's Access to the birth DVD

T.D. offered a video recording of his birth into evidence. The video depicts the events of T.D.'s delivery, including the actions of the delivery team during the shoulder dystocia event. Experts from both parties used the birth DVD to form their opinions. When the exhibit was offered into evidence neither Defendant objected and it was duly admitted into evidence. (Tr. Vol I p. 116). Defendants later admitted ten screenshots taken from the birth DVD into evidence. (Vol. 2 App. 211); (Vol. 3 App. 180).

At the close of evidence the trial court decided to restrict the jury's access to the birth DVD during deliberations while allowing the jury full access to Defendants' ten screenshots taken from the birth DVD. When the jury begun their deliberations the trial court provided the jury with Defendants' ten screenshots taken from the birth DVD for their consideration without any court-

imposed limitations. At the same time, the trial court only allowed the jury to watch the birth DVD once during deliberations. Further, the jury had to request to watch the DVD in order to access it and the jury did not have the ability to stop, rewind, or replay the DVD. (Vol. 2 App. 390-92, 445-46).

ARGUMENT

More than sixty years ago, Justice King Thompson famously wrote that "[i]t is sometimes said that error 'crept' into the trial of a lawsuit. Not so in the case at bar. It marched in like an army with banners, and trumpets." *State v. Tolson*, 82 N.W.2d 105, 106 (Iowa 1957).

In this case, the trumpet of error blew early, often, and loudly during trial. Error was present, and pronounced, at every stage in this case. These errors were not the product of a trial court venturing into uncharted areas of the law, nor did the errors committed require complex or novel legal interpretation where reasonable minds could differ. Instead, the trial court's errors violated well settled law. Ultimately, the errors trumpeted by the trial court and invited by Defendants prevented T.D. from receiving a fair trial on his claims of medical negligence against Dr. Widmer and the Henry County Health Center ("HCHC").

The jury instructions illustrate one of the obvious reversible errors committed by the trial court. Under Iowa law a trial court must give a jury instruction if it states the correct law and substantial evidence exists to support it. Relevant to this appeal, a plaintiff is entitled to have the jury instructed concerning each alleged act or omission ("specification") of negligence that finds support in the evidence. There is no ambiguity in this requirement. Yet the trial court refused to instruct the jury on several specifications of negligence that were supported by substantial expert testimony. In fact, the trial court flatly failed to

conduct the proper analysis. Without the omitted specifications of negligence, it was impossible for the jury to properly assess the case T.D. pleaded and proved.

The trial court's evidentiary rulings were similarly flawed, and fatal to T.D.'s case. For instance, the trial court excluded evidence on Dr. Widmer's lack of continuing medical education in resolving the medical emergency of shoulder dystocia, which was the exact medical emergency that T.D. alleged the Defendants were negligent in handling. T.D.'s counsel could not even use the word "training"—in a professional malpractice case no less—without risking reprimand from the trial court, which unfairly prevented T.D. from presenting relevant and probative evidence. Compounding its initial error in excluding relevant evidence of Dr. Widmer's medical education, the trial court also prevented T.D. from utilizing this evidence to impeach Dr. Widmer in his capacity as a designated expert. The trial court further erred when it allowed Dr. Widmer to testify at trial to new, last-minute, undisclosed opinions in his capacity as an expert despite his failure to comply with discovery and disclosure requirements. The cumulative effect of the trial court's evidentiary rulings stifled T.D.'s ability to present his case.

Finally, and perhaps most egregiously, the trial court unduly emphasized evidence by unfairly restricting the jury's access to the birth DVD—only allowing the jury to view it once without the ability to pause, rewind, or replay it—during deliberations while allowing the jury unfettered access to ten screenshots taken

by Defendants from the birth DVD. Through its ruling the trial court permitted the Defendants to unduly emphasize ten handpicked seconds from the twenty-one-minute birth DVD, and simultaneously deprived the jury of the proper context to evaluate those ten seconds.

Facing this army of trial court errors, T.D. had no chance to recover for his permanent shoulder injury. A defense verdict, in favor of Dr. Widmer and the HCHC nurses—returned after deliberating for less than 3 hours following a two-week trial involving fourteen witnesses and over 56 admitted exhibits—made that plain.

Given the record of errors at trial, Iowa law requires that this Court vacate the jury verdict, reverse the judgment of the trial court in its entirety, and order a new trial *with instructions* to ensure the trial court does not re-trumpet the same errors.

I. The Trial Court Erred in Refusing to Instruct the Jury on Certain Specifications of Negligence that were Supported by the Evidence

Standard of Review

The standard of review for a ruling denying a requested jury instruction is for correction of errors at law. *Alcala v. Marriott Int'l, Inc.*, 880 N.W.2d 699, 701 (Iowa 2016). Trial courts are required to give requested jury instructions that are supported by the evidence and the applicable law. *Id.* at 707–08. "The verb 'require' is mandatory and leaves no room for trial court discretion." *Id.* at 707.

When considering whether an "instruction is supported by substantial evidence, [courts] give the evidence the most favorable construction it will bear in favor of supporting the instruction." *Asher v. OB-Gyn Specialists, P.C.*, 846 N.W.2d 492, 495 (Iowa 2014), *overruled on other grounds by Alcala*, 880 N.W.2d at 707-08.

Preservation of Error

T.D. preserved error when he submitted the following revised proposed jury instructions to the trial court after the trial court sua sponte demanded T.D. narrow his original specification after the close of evidence:

2. Dr. Widmer was negligent by failing to meet the standard of care in the following way:

    a) Repeatedly directing Lisa to push after shoulder dystocia was identified and traction failed to deliver the anterior shoulder;

    b) Applying improper traction to T.D.'s head or neck during the delivery;

    c) Failing to properly and effectively supervise, direct, or coordinate the efforts of the delivery team;

    d) Mistakenly concluding that T.D. was experiencing bradycardia and as a result, delivering T.D. hastily and without due care;

    e) Failing to follow the HCHC policy on Shoulder Dystocia, or Vacuum Extraction, or Pitocin;

    f) Failing to properly and effectively use maternal and fetal maneuvers to safely deliver T.D. after shoulder dystocia occurred, including but not limited to: McRobert's maneuver, suprapubic pressure, Wood's screw, reverse Woods screw (Rubin's), delivering the posterior arm, and Gaskin's maneuver;

    …

2. Either nurse or both Rebecca Fraise, R.N. and Yvonne Sloan, R.N., were negligent by failing to meet the standard of care in the following way:

   a) Repeatedly directing Lisa to push after this shoulder dystocia was identified and traction failed to deliver the anterior shoulder;

   b) Failing to follow the HCHC policy on Shoulder Dystocia or Pitocin;

   c) Failing to properly and effectively perform the McRobert's maneuver and suprapubic pressure to safely deliver T.D. after shoulder dystocia occurred;

   d) Acting without due care in delivering T.D.;

   e) Failing to call for help.

(Vol. 1 App. 365-66); (Vol. 2 App. 325).

Despite T.D.'s request for these precise, pleaded, and proven specifications, the trial court chose to instruct the jury in a very narrow way, including only two specifications in the final marshalling instruction for Dr. Widmer and one specification for the HCHC nurses:

> (2) Dr. Widmer was negligent by failing to meet the standard of care in one or more of the followings ways:
>
> (a) in failing to direct or coordinate proper maneuvers to deliver the baby after the recognition of shoulder dystocia;
>
> (b) by applying excessive or improper traction in an effort to deliver him after the recognition of shoulder dystocia;
>
> …
>
> (2) That either of the nurses was negligent by failing to meet the standard of care in the following way:

(a) in the performance of the McRobert's maneuver and/or the application of suprapubic pressure

(Vol. 1 App. 388-89). T.D. timely objected to the trial court's specific and narrow specifications, which only addressed the use of maneuvers and traction, and the court's failure to instruct the jury as T.D. requested in his proposed revised jury instructions. (Vol. 2 App. 330).

A. The trial court chose to instruct the jury on a different case than what T.D. pleaded and proved

T.D. was entitled to have the jury instructed concerning each alleged act or omission of negligence that found support in the evidence, and it was error for the trial court to instruct the jury otherwise. *See Herbst v. State*, 616 N.W.2d 582, 586 (Iowa 2000). T.D. detailed his legal theory of negligence against Dr. Widmer and the HCHC nurses through the specifications of negligence included in his pleadings and proposed jury instructions. From opening statements until closing, T.D.'s counsel presented a case centered on those specifications. The specifications made it clear that T.D.'s malpractice claim was not simply that Dr. Widmer and the HCHC nurses breached the standard of care in a general way, but that they breached the standard of care through very specific actions and omissions. The trial court's final instructions failed to include six specifications—four against Dr. Widmer and two against the HCHC nurses—which were supported by the pleadings and substantial evidence in the record. Without

conducting the proper analysis, the trial court submitted only two specifications of negligence *of its own creation* for Dr. Widmer, and one specification for the HCHC nurses. The trial court sua sponte chose to submit to the jury a different case than what T.D. pleaded and proved at trial. This error requires reversal.

B. Plaintiffs must identify the specific acts or omissions relied on to generate a jury issue.

Plaintiffs in a negligence case are required to identify the specific acts or omissions relied on to generate a jury issue. *Bigalk v. Bigalk*, 540 N.W.2d 247, 249 (Iowa 1995); *see also Asher*, 846 N.W.2d at 495 (requiring the plaintiff to detail the acts or omissions of the doctor that established a breach of the standard of care in a medical malpractice case). "Each specification should identify either a certain thing the allegedly negligent party did which that party should not have done, or a certain thing that party omitted that should have been done, under the legal theory of negligence that is applicable." *Coker v. Abell-Howe Co.*, 491 N.W.2d 143, 145 (Iowa 1992).

In Iowa, to prove a claim for medical malpractice a plaintiff must produce evidence which "(1) establishes the applicable standard of care, (2) demonstrates a violation of this standard, and (3) develops a causal relationship between the violation and the injury sustained." *Oswald v. LeGrand*, 453 N.W.2d 634, 635 (Iowa 1990). A medical professional is liable for injuring a patient when they fail to apply the "degree of skill, care, and learning ordinarily possessed and exercised

by other [medical professionals] in similar circumstances." *Speed v. State*, 240 N.W.2d 901, 904 (Iowa 1976). "[E]vidence of the applicable standard of care—and its breach—must be furnished by an expert." *Oswald*, 453 N.W.2d at 635; *see also Kennis v. Mercy Hosp. Medical Center*, 491 N.W.2d 161, 165 (Iowa 1992).

As required by Iowa law, T.D.'s specifications of negligence detailed the various ways in which the HCHC delivery team breached the standard of care. *See Welte v. Bello*, 482 N.W.2d 437, 439 (Iowa 1992) ("[A] party claiming negligence must identify specifically the acts or omissions constituting negligence."). T.D. clearly and concisely pleaded each specification of negligence based on the facts of his case, evidence obtained from discovery, expert opinions, and the applicable law. The specifications were detailed and specific, not only because Iowa law requires them to be but also because expert testimony established that shoulder dystocia can only be resolved atraumatically through very precise and effective actions carried out by a delivery team who possesses the requisite degree of skill, care, and learning.

C. Jury instructions must include each specification of negligence that finds support in the evidence

"Jury instructions should be formulated to require the jury to focus on each specification of negligence that finds support in the evidence." *Bigalk*, 540 N.W.2d at 249. This requirement ensures that the jury will give consideration to each of the alleged acts or omissions in determining the overall question of

breach of duty. *Id.* "The facts of the particular case . . . determine whether a court's instructions concerning negligence sufficiently encompass all specifications of negligence alleged by a plaintiff." *Herbst*, 616 N.W.2d at 586. The court's instructions should advise the jury concerning all of the potential ways in which the defendant was negligent. *Id.* at 587.

A plaintiff is entitled to have the jury instructed concerning each alleged act or omission of negligence that is supported by the pleadings and substantial evidence. *Id.* at 585-86. Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion. *Coker*, 491 N.W.2d at 150. "When weighing the sufficiency of the evidence to support a requested jury instruction, . . . the evidence [is viewed] in a light most favorable to the party seeking the instruction." *Duncan v. City of Cedar Rapids*, 560 N.W.2d 320, 325 (Iowa 1997). If substantial evidence exists to support an alleged act or omission, the trial court has no discretion to exclude the specification of negligence from the jury instructions. *Alcala*, 880 N.W.2d at 707 ("Iowa law requires a court to give a requested jury instruction if it correctly states the applicable law and is not embodied in other instructions."); *Herbst*, 616 N.W.2d at 585.

D. The trial court failed to include specifications of negligence that were supported by substantial evidence in its final instructions

The trial court refused to submit certain specifications of negligence that were supported by substantial evidence in its final jury instructions. The trial

court was required to analyze each specification requested by T.D. and determine whether the specification was supported by substantial evidence, weighing the evidence in a light most favorable to T.D. *Herbst*, 616 N.W.2d at 585. The trial court had no discretion to exclude specifications supported by substantial evidence from its final instructions. *Id.* The trial court flatly failed to conduct this analysis, and as a result failed to ensure the jury gave consideration to each of the alleged acts or omissions in determining the overall questions of breach. *See Bigalk*, 540 N.W.2d at 249.

1. The trial court failed to include or incorporate four specifications of negligence against Dr. Widmer that were supported by the evidence in its final instructions

When the proper analysis is conducted, the following four specifications of negligence identified in T.D.'s proposed revised marshalling instructions warrant inclusion in the trial court's final marshalling instruction for Dr. Widmer:

1. **(a). Repeatedly directing Lisa to push after shoulder dystocia was identified and traction failed to deliver the stuck shoulder;**

Expert testimony from both T.D.'s and Defendants' experts supported the conclusion that it was a breach of the standard of care for Dr. Widmer to instruct Lisa to continue pushing after shoulder dystocia was identified and before the proper maneuvers were utilized to relieve the shoulder dystocia. T.D.'s expert Dr. Duboe testified that all commands to push and tractional efforts should have stopped at 13:42 on the birth video, when the shoulder

dystocia was first recognized. (Vol. 2 App. 105-06, 112-13). Dr. Duboe further testified that the failure to cease such commands and tractional efforts before implementing the correct maneuvers was a breach of the standard of care. (Vol. 2 App. 106-07). Additionally, Dr. Widmer's failure to instruct the nurses to stop encouraging Lisa to push after the shoulder dystocia was recognized also breached the standard of care. (Vol. 2 App. 93-94, 107). Even Defendants' expert, Dr. Boyle, admitted that commands to push and tractional efforts should be stopped once shoulder dystocia is recognized, and only resumed after the correct maneuvers are applied. (Vol. 2 App. 197-98) ("After dystocia is diagnosed, I think you should apply the maneuvers, *and once those are applied,* the pushing and the traction are indicated to continue.") (emphasis added); *see also* (Vol. 2 App. 193-94). Implicit in that testimony is the assumption that the mother is told to refrain from pushing during an attempted maneuver. (Vol. 2 App. 193-94).

The evidence is uncontroverted that Dr. Widmer never told Lisa to stop pushing or instructed the nurses to stop directing Lisa to push after the shoulder dystocia was recognized and before it was resolved. In fact, Dr. Widmer continued to command Lisa to push throughout the shoulder dystocia event. After watching the birth DVD, Dr. Widmer admitted that he never instructed Lisa to stop pushing from the time shoulder dystocia was recognized until the time T.D. was delivered. (Vol. 2 App. 215); *see also* (Vol. 2 App. 63). Furthermore,

the birth DVD shown to the jury multiple times throughout the trial and admitted into evidence as Plaintiff's Exhibit 8, documents 17 times in which a member of the HCHC delivery team instructed Lisa to push after the shoulder dystocia was recognized and before it was resolved, while no one told Lisa to stop pushing during this time frame. (Vol. 2 App. 215).

a. The trial court's jury instruction

Despite substantial evidence in the record, the trial court failed to include T.D.'s requested specification of negligence that Dr. Widmer was negligent by:

> (a) Repeatedly directing Lisa to push after shoulder dystocia was identified and traction failed to deliver the stuck shoulder.

(Vol. 1 App. 365). Instead, the trial court chose to instruct the jury on only two aspects of negligence involving maneuvers and traction. The only specifications included in the court's final instructions were:

> (a) in failing to direct or coordinate proper maneuvers to deliver the baby after the recognition of shoulder dystocia;
> (b) By applying excessive or improper traction in an effort to deliver him after the recognition of shoulder dystocia;

(Vol. 1 App. 388). The trial court reasoned that the pushing specification was encompassed by the specification on the maneuvers, even though the specification on maneuvers failed to include any language relating to pushing, commands to push, or Dr. Widmer's failure to ever instruct Lisa to stop pushing. (Vol. 2 App. 349).

The language in the court's final instructions is devoid of any reference to Dr. Widmer's repeated directions to Lisa to continue pushing throughout the shoulder dystocia event, or his failure to tell Lisa to stop pushing at any point. The absence of such a specification permitted the Defendants to argue anything not included in the trial court's extremely limited specifications, such as the pushing issue, was irrelevant. (Vol. 2 App. 435). Since the trial court's instruction failed to include or incorporate anything on directions to stop pushing, a key part of T.D.'s case became "irrelevant."

The trial court's failure to instruct the jury on Dr. Widmer's negligence in repeatedly directing Lisa to push throughout the shoulder dystocia event is reversible error because it made it impossible for T.D. to present this theory of negligence against Dr. Widmer to the jury. Throughout the course of the trial, T.D. emphasized that the delivery team's repeated instructions to Lisa to push after shoulder dystocia was recognized constituted negligence in and of itself. T.D. emphasized this specification throughout his opening, case in chief, cross-examination of Defendants' witnesses, and closing. (Vol. 2 App. 10-12, 13-14, 17, 63, 76, 78, 105, 107, 197-98, 415-16). T.D. further emphasized this specification through demonstrative timelines that identified each time the delivery team instructed Lisa to push throughout the shoulder dystocia event. (Vol. 2 App. 10). The trial court's action unfairly prevented T.D. from presenting his legal theory to the jury, despite substantial support in the record. *See Sonnek*

v. Warren, 522 N.W.2d 45 (Iowa 1994) ("Parties to lawsuits are entitled to have their legal theories submitted to a jury if they are supported by the pleadings and substantial evidence in the record.").

2. **(c). Failing to properly and effectively supervise, direct, or coordinate the efforts of the delivery team;**

3. **(f). Failing to properly and effectively use maternal and fetal maneuvers to safely deliver T.D. after shoulder dystocia occurred . . .**

The trial court's single specification on the maneuvers failed to adequately incorporate Plaintiff's proposed specifications on the maternal and fetal maneuvers in the court's final instructions. Expert testimony established that Dr. Widmer breached the standard of care by failing to properly and effectively direct the nurses in their performance of maternal maneuvers to deliver T.D. Expert testimony further supported the conclusion that once the maternal maneuvers failed to deliver T.D., Dr. Widmer breached the standard of care by failing to perform the necessary fetal maneuvers to safely deliver T.D.

Shoulder dystocia occurs when a baby's head is delivered through the vagina, but his shoulders get stuck inside the mother's body. More specifically, the baby's anterior shoulder becomes stuck on the pubic symphysis shortly after the delivery of the fetal head. When a shoulder dystocia occurs the delivery team must use specific maneuvers to resolve the shoulder dystocia and safely deliver the baby. Maternal maneuvers, such as McRobert's maneuver and suprapubic

pressure, are only performed by the nurses. (Vol. 2 App. 91-92). Although the doctor does not perform maternal maneuvers, he is in charge of making sure the nurses perform the maneuvers properly. (Vol. 2 App. 94, 107). On the other hand, fetal maneuvers are physician-applied maneuvers that can only be performed by the doctor. Fetal maneuvers are required when the maternal maneuvers fail to dislodge the shoulder easily and without trauma to the baby. (Vol. 2 App. 132-33).

T.D.'s experts testified that Dr. Widmer was in charge of directing the HCHC nurses' performance of maternal maneuvers to resolve the shoulder dystocia. (Vol. 2 App. 94, 107). Specifically, Dr. Duboe testified that "[i]f the doc knows that something isn't being done properly, then the people involved need to be instructed on proper maneuvers and proper execution of those maneuvers, so it's the doc's job to recognize that and to put that into play." (Vol. 2 App. 94); *see also* (Vol. 2 App. 64). Both Dr. Duboe and Nurse Sprauge also testified that the maternal maneuvers were not performed properly in this case. (Vol. 2 App. 70, 78, 123-24). Despite the inadequate and improper performance of the maternal maneuvers, the evidence shows that Dr. Widmer never instructed the nurses that they were performing the maneuvers incorrectly, or directed them on how to perform the maneuvers in the proper manner. (Vol. 2 App. 107-11, 215-16).

Finally, Dr. Duboe testified that Dr. Widmer should have moved on to fetal maneuvers (physician-applied maneuvers) to resolve the shoulder dystocia because the maternal maneuvers were done inadequately:

> The videotape is pretty much what you just saw, just continuous traction, ongoing, in the face of a stuck shoulder that hasn't resolved because of inadequate McRoberts and suprapubic pressure efforts. So that shoulder stayed stuck and ultimately it came with continuous traction, which is inappropriate in the face of a shoulder dystocia. Moving on to other maneuvers is what needed to be done here.

(Vol. 2 App. 111) (emphasis added); *see also* (Vol. 2 App. 117, 124, 134-35). "You've got to know the other maneuvers that you can apply, the rotational maneuvers that we talked about, Woods Screw, Rubin's, delivery of the posterior arm, if necessary, Gaskin, all the things that you use if your basic maternal maneuvers are not working. These are all physician-applied maneuvers …." (Vol. 2 App. 123-24). The evidence at trial established that Dr. Widmer never performed any of the physician-applied fetal maneuvers during T.D.'s delivery. (Vol. 2 App. 243). In fact, the evidence showed that Dr. Widmer had never performed any of these maneuvers and was unfamiliar with nearly all of them. (Vol. 2 App. 234-35, 243).

a. The trial court's jury instruction

Substantial evidence supported that Dr. Widmer's failure to direct the proper performance of the maternal maneuvers and *use* the proper fetal maneuvers breached the standard of care. However, the trial court failed to

include this specification in its instructions. The trial court included only the following specification related to the maneuvers in its final jury instructions:

> (a) in failing to direct or coordinate proper maneuvers to deliver the baby after the recognition of shoulder dystocia.

(Vol. 1 App. 388). The trial court's chosen language is problematic for two reasons. First, it completely excluded T.D.'s specification that Dr. Widmer was negligent in failing to properly *use or perform* fetal maneuvers to deliver T.D. (*See* Vol. 1 App. 365) ("(f). Failing to properly and effectively *use* maternal and *fetal* maneuvers to safely deliver T.D. after shoulder dystocia occurred . . . .") (emphasis added). The trial court's instruction limited Dr. Widmer's liability to his failure to properly direct or coordinate the *maternal maneuvers* (nurse-applied maneuvers). Dr. Duboe testified multiple times that Dr. Widmer breached the standard of care by failing to move on to the *fetal maneuvers* (physician-applied maneuvers) once the maternal maneuvers failed. (Vol. 2 App. 111, 117, 124, 134-35). Second, the trial court's language limits the doctor's responsibility to simply making sure the proper maneuvers are attempted, regardless of whether they are used effectively. It is undisputed that the HCHC nurses attempted the proper maternal maneuvers. However, Dr. Duboe and Nurse Sprague both testified that the proper maneuvers were not performed adequately or effectively. (Vol. 2 App. 70, 78, 123-24). The trial court's instruction failed to ensure the jury would make this crucial distinction.

The record contains sufficient evidence from which the jury could have found in T.D.'s favor on these specifications of negligence. The trial court committed reversible by error by failing to include these specifications in its instructions.

4. (d). Mistakenly concluding that T.D. was experiencing bradycardia and as a result, delivering T.D. hastily and without due care.

Expert testimony from both T.D.'s and Defendants' experts supported the conclusion that there was no evidence of bradycardia (also referred to as fetal distress) during T.D.'s delivery. T.D.'s expert further linked Dr. Widmer's mistake in concluding there was bradycardia to a breach in the standard of care.

Bradycardia refers to a consistently slow fetal heart rate (the fetal heart rate remains below 110 for a full 10-minute period without raising above 110). (Vol. 2 App. 96). Prolonged bradycardia presents the danger that the fetus will be deprived of oxygen for an extended period of time and suffer a brain injury. The more severe the bradycardia, the less time a physician has to deliver the baby before there is a risk of oxygen deprivation and brain damage. In a delivery where there is a shoulder dystocia, a physician has six minutes to safely deliver the baby before there is a risk of oxygen deprivation. (Vol. 2 App. 117). In a delivery where there is shoulder dystocia and bradycardia, a physician has less time to safely deliver the baby. (Vol. 2 App. 131).

T.D.'s expert Dr. Duboe and Defendants' experts Nurse Drummond and Nurse Sanborn testified that there was no evidence of bradycardia in T.D.'s delivery. (Vol. 2 App. 115-22); (Vol. 2 App. 281-84, 288-89). In fact, Dr. Duboe testified that no expert could conclude that there was bradycardia during T.D.'s delivery. (Vol. 2 App. 122); *see also* (Vol. 2 App. 120) ("[T]he nurse's notes occur at 1700, 1705, 1710, etc. Every five minutes something is charted regarding the heart rate, so we don't know what it is between those five-minute intervals, we only know what that is at five-minute intervals . . . ."). Even one of the Defendant HCHC nurses stated that there was no bradycardia during the delivery, and T.D.'s condition was "normal" considering the stage of the delivery. (Vol. 2 App. 240). Dr. Duboe further testified that T.D. experienced variable decelerations—where the fetal heart rate drops from a baseline above 110 to below 110, and then within 10 to 30 seconds goes right back up to the baseline above 110—which are common and not alone indicative of fetal distress. (Vol. 2 App. 118, 129-30).

Dr. Duboe testified that based on the lack of evidence of bradycardia, the birth DVD, and the nursing notes, Dr. Widmer should not have unnecessarily rushed T.D.'s delivery. (Vol. 2 App. 115-22). Dr. Duboe further testified that unnecessarily rushing a delivery produces a greater chance of errors and mistakes. (Vol. 2 App. 117). Dr. Duboe testified that Dr. Widmer had up to six minutes to deliver T.D. once shoulder dystocia was recognized before there was a danger of

oxygen deprivation and that he should have moved on to other maneuvers instead of applying extreme traction to deliver T.D. (Vol. 2 App. 111, 117). The evidence showed that Dr. Widmer never moved on to other maneuvers, and T.D. was delivered within a minute and ten of seconds of the shoulder dystocia being recognized. (Vol. 2 App. 218-24, 243).

a. The trial court's jury instruction

Based on the evidence presented, the jury could have concluded that there was no bradycardia and therefore Dr. Widmer breached the standard of care by unnecessarily rushing T.D.'s delivery. Even though there was substantial evidence in the record, the trial court failed to include or otherwise incorporate this specification of negligence in its final instructions. (Vol. 1 App. 388). The trial court's narrow specifications, which included no mention of bradycardia, allowed the Defendants to completely sidestep the fact that there was no evidence of bradycardia in this case. This error requires reversal.

2. The trial court failed to include or incorporate two specifications of negligence against the HCHC nurses that were supported by the evidence in its final instructions

When the proper analysis is conducted, the following specifications of negligence identified in T.D.'s revised proposed jury instructions warrant inclusion in the court's final marshalling instruction for the HCHC nurses:

1. **(a). Repeatedly directing Lisa to push after shoulder dystocia was identified and traction failed to deliver the stuck shoulder.**

Expert testimony from both T.D.'s and Defendants' experts supported the conclusion that it was a breach of the standard of care for the HCHC nurses to continually instruct Lisa to push after shoulder dystocia was identified and before the proper maneuvers were utilized to relieve the shoulder dystocia. (Vol. 2 App. 76, 78, 105-07, 112-13, 193-94, 197-98).

Substantial evidence in the record demonstrated that the HCHC nurses—and Dr. Widmer—never told Lisa to stop pushing throughout the entire shoulder dystocia event. (Vol. 2 App. 215). Instead, after the shoulder dystocia was recognized and until it was resolved through improper traction, the members of the delivery team instructed Lisa to push 17 times without once commanding her to stop. (Vol. 2 App. 215). T.D.'s experts specifically pointed out the different points in the birth video where the HCHC nurses continually commanded Lisa to push without first applying the proper maternal maneuvers effectively. (Vol. 2 App. 76, 78, 105-08).

a. The trial court's jury instruction

Despite substantial evidence in the record, the trial court failed to include T.D.'s requested specification of negligence, which claimed the HCHC nurses were negligent by:

> (a) Repeatedly directing Lisa to push after shoulder dystocia was identified and traction failed to deliver the stuck shoulder.

(Vol. 1 App. 366). The trial court's final instructions did not include *any* language related to pushing. Instead the trial court included only the following, narrow specification of negligence in its final instructions for the HCHC nurses:

> (a) in the performance of the McRobert's maneuver and/or the application of suprapubic pressure;

(Vol. 1 App. 389). The trial court's narrow and restrictive specification permitted the Defendants to argue T.D.'s only claim of negligence against the HCHC nurses was that they performed the maneuvers ineffectively. (Vol. 2 App. 441). This is not reflective of what T.D. pleaded, proposed, or proved at trial. Throughout the course of the trial T.D. emphasized that the delivery team's repeated instructions to Lisa to push after shoulder dystocia was recognized was in and of itself an act of negligence. (Vol. 2 App. 10-12, 13-14, 17, 63, 76, 78, 105, 107, 197-98, 414-15). The trial court's jury instructions failed to convey this, and this error requires reversal.

2. (c). Failing to properly and effectively perform the McRobert's maneuver and suprapubic pressure to safely deliver T.D. after shoulder dystocia occurred;

T.D.'s legal theory of negligence alleged that although the HCHC nurses attempted the proper maternal maneuvers, they did not do so properly or effectively. While T.D.'s experts agreed that the HCHC nurses attempted the proper maternal maneuvers—McRobert's and suprapubic pressure—the key aspect of their testimony, and T.D.'s case theory, was that the maneuvers were

not performed adequately or effectively. (Vol. 2 App. 15-16). The record is replete with testimony from T.D.'s experts stating that the maternal maneuvers attempted by the HCHC nurses were inadequate, improper, or otherwise ineffective. (Vol. 2 App. 70, 74-78, 82, 101-02, 106, 110-11, 123, 134-35).

a. The trial court's jury instruction

Because the evidence supported the conclusion that the maternal maneuvers were not done effectively or adequately, T.D. requested the following specification of negligence:

> c. Failing to properly and effectively perform the McRoberts maneuver and suprapubic pressure, to safely deliver T.D. after the shoulder dystocia occurred.

(Vol. 1 App. 366). Critical to this requested specification was the "proper and effective" language. It was T.D.'s theory of negligence that the nurses did the correct maneuvers, but did not do them properly or effectively. Despite the abundance of expert testimony describing the maneuvers as inadequate, improper, or ineffective and T.D.'s specific request for the "proper and effective" language, the trial court chose to exclude the "proper and effective" language from its final instruction, which read as follows:

> (a) in the performance of the McRobert's maneuver and/or the application of suprapubic pressure;

(Vol. 1 App. 389). The court's language failed to ensure that the jury would consider T.D.'s evidence that the maternal maneuvers were performed

inadequately and ineffectively. Yet again, a crucial component of T.D.'s theory of negligence was omitted from the case that was presented to the jury. This error warrants reversal.

E. Errors in jury instructions are presumed prejudicial

"Errors in jury instructions are presumed prejudicial unless 'the record affirmatively establishes there was no prejudice.'" *State v. Murray*, 796 N.W. 2d 907, 908 (Iowa 2011) (quoting *State v. Hanes*, 790 N.W.2d 545, 551 (Iowa 2010)). If the rights of the complaining party have been injuriously affected by the trial court's error, reversal is warranted. *State v. Marin*, 788 N.W.2d 833, 836 (Iowa 2010). In this case, the record firmly establishes there was indeed prejudice.

1. The trial court's failure to include the specifications of negligence that were supported by the evidence unfairly prejudiced T.D.

The trial court's decision to omit specifications that were supported by the evidence from the jury instructions prevented T.D. from submitting his legal theory of negligence to the jury. *Herbst*, 616 N.W.2d at 587 (reversing the trial court because the "court's instruction failed to adequately advise the jury concerning the potential ways in which [the] defendant was negligent … ."). T.D. deliberately and carefully pleaded each specification of negligence based on the facts of his case and the applicable law. Ultimately, the trial court submitted a different case to the jury than what T.D. pleaded and proved at trial. (Vol. 2 App. 343) ("What I'm doing, I'm going to look at the Des Moines County case, see

what they said, which is very general, and I think I'll just leave it general."). The trial court gave instructions *based on what was done in another case*, not on what the evidence reflected in T.D.'s case. (Vol. 2 App. 343).

The trial court's errors were further aggravated by Defendants' red herring closing arguments. During closing arguments, opposing counsel used the court's narrow marshalling instructions, which included only two specifications of negligence against Dr. Widmer and one specification against the HCHC nurses, to accuse T.D.'s counsel of presenting irrelevant evidence meant to distract the jury from the real issues:

> Now, you just heard an hour and a half closing argument and how many days of testimony that addressed Pitocin, that addressed vacuums, that addressed charting, that addressed calling for help, that addressed all sorts of things that are totally irrelevant. They're cluttered. And I'm going to get to this at the end of the case as to why do you think you heard about all this extraneous stuff that has absolutely nothing to do with the two issues you have to decide for Dr. Widmer.

(Vol. 2 App. 434-40). Because the court excluded and failed to incorporate so many of T.D.'s specifications of negligence, regardless of their evidentiary support, it likely appeared to the jury that T.D. presented irrelevant evidence. This unfairly prejudiced T.D. and is grounds for reversal.

II. The Trial Court Erred in Precluding T.D. from Introducing Relevant and Probative Evidence on Defendants' Training and Medical Education

Standard of Review

A trial court's evidentiary determination on the admission or exclusion of evidence is reviewed for an abuse of discretion. *Graber v. City of Ankeny*, 616 N.W.2d 633, 638 (Iowa 2000). An abuse of discretion exists when "the court exercised [its] discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *State v. Maghee*, 573 N.W.2d 1, 5 (Iowa 1997). "A ground or reason is untenable when it is not supported by substantial evidence or when it is based on an erroneous application of the law." *Graber*, 616 N.W.2d at 638.

Preservation of Error

T.D. preserved error through making offers of proof at trial regarding the trial court's exclusion of Dr. Widmer's Continuing Medical Education ("CME") records. (Vol. 2 App. 175-77).

Merits.

The trial court erred in prohibiting T.D. from offering relevant and probative evidence on Defendants' *medical training and education* in a medical malpractice case. Dr. Widmer's CME records revealed that Dr. Widmer devoted a miniscule amount of his required continuing education on obstetrics. The CME records were highly probative of whether Dr. Widmer lacked the reasonable

degree of knowledge and skill ordinarily possessed by others in the profession for safely resolving a shoulder dystocia. The trial court abused its discretion in excluding such probative and relevant evidence, and this Court should reverse the trial court's decision and order a new trial.

A. A Defendant's Training and Medical Education is Relevant Evidence in a Medical Negligence Case

Evidence of Defendants' applicable training and medical education, or lack thereof, is relevant to show a breach of the standard of care under Iowa law. In Iowa, to prove a claim for medical malpractice a plaintiff must produce evidence which (1) establishes the standard of care, (2) demonstrates a breach of this standard, and (3) shows a causal relationship between the breach and the injury sustained. *Oswald*, 453 N.W.2d at 635. A medical professional breaches the standard of care when they fail to apply the "degree of skill, care, and *learning* ordinarily possessed and exercised by other [medical professionals] in similar circumstances." *Speed*, 240 N.W.2d at 904 (emphasis added); *see also* Iowa Civil Jury instruction 1600.2 Negligence – Duty of Physician. In other words, medical professionals owe a duty to their patients to exercise the ordinary *knowledge and skill* of their profession when providing care and treatment. *J.A.H. ex rel. R.M.H. v. Wadle & Assocs., P.C.*, 589 N.W.2d 256, 260 (Iowa 1999).

Iowa Rule of Evidence 5.401 provides that "evidence is relevant if: (a) [i]t has any tendency to make a fact more or less probable than it would be without

the evidence; and (b) [t]he fact is of consequence in determining the action." All evidence meeting Rule 5.401's test of relevancy is admissible unless a rule, statute, or constitutional provision mandates exclusion. *See* Iowa R. Evid. 5.402. While relevant evidence may be excluded if its probative value is *substantially* outweighed by the danger of unfair prejudice, exclusion is not warranted if evidence is merely prejudicial. *See* Iowa R. Evid. 5.403 (emphasis added). As the Iowa Supreme Court aptly noted in *State v. Neiderbach*, "in a sense, all powerful evidence is prejudicial to one side. The key is whether the danger of *unfair* prejudice substantially outweighs the evidence's probative value . . . ." 837 N.W.2d 180, 202–03 (Iowa 2013) (emphasis in original).

B. Dr. Widmer's CME records are relevant to establishing a breach of the standard of care

Dr. Widmer's lack of CME credit hours in obstetrics demonstrates that he did not possess the same "degree of skill, care, and *learning* possessed and exercised by other physicians" who practice obstetrics. *Speed*, 240 N.W.2d at 904 (emphasis added). CME refers to a specific form of continuing education that is required for physicians to maintain their competence and license to practice medicine. The State of Iowa requires physicians to register 40 CME credit hours every two years to maintain their license while specialty groups such as the American Board of Family Medicine, of which Dr. Widmer is a member, require 150 CME hours or more over a three year period. *See*

https://medicalboard.iowa.gov/licensure/continuing.html; https://www.theabfm.org/moc/index.aspx; Vol. 3 App. 179).

Dr. Widmer's CME records show that from 1997 to August 31, 2007—the date T.D. was born—Dr. Widmer took approximately 400.25 hours of CME credits. (*See* Vol. 3 App. 16-93). Only eight out of the 400.25 hours were "potentially related to obstetrics." (*See* Vol. 3 App. 21, 23-33, 93). Of the CME credits "potentially related to obstetrics," it is possible that none actually included information on shoulder dystocia. Dr. Widmer could not recall ever taking a CME related to shoulder dystocia. (*See* Vol. 3 App. 21). Given that obstetrics made up 5 to 10 percent of Dr. Widmer's practice in 2007 and less than 2 percent of his CMEs from 1997 to 2007—a ten-year period—were related to obstetrics, a jury could reasonably infer that Dr. Widmer lacked the degree of knowledge and learning ordinarily possessed by other family physicians who practice obstetrics. (Vol. 2 App. 176, 201); (Vol. 1 App. 194).

Dr. Widmer's abysmal CME record on obstetrics has a tendency to make the fact that he breached the standard of care in this case more probable than it would be without this evidence. IRE 5.401(a). Dr. Widmer's CME records demonstrate that he failed to adequately maintain his education and competency in obstetrics, and that he did not regularly train or hone his obstetrical skills. The CME records, coupled with Dr. Widmer's own admissions that he was unfamiliar with most of the fetal maneuvers available to a physician to resolve shoulder

dystocia, provide strong evidence that Dr. Widmer lacked the reasonable degree of knowledge and skill possessed by others in the profession. *See* Iowa R. Evid. 5.401(b); (Vol. 2 App. 234); *Wadle & Assocs., P.C.*, 589 N.W.2d at 260 ("A physician owes a duty to his patient to exercise the ordinary knowledge and skill of his or her profession . . . ."); *see also Andersen v. Khanna*, 896 N.W.2d 784, ___ (Iowa Ct. App. 2017) (holding that a physician's lack of experience performing a procedure was relevant and admissible to determine whether the physician performed the procedure in a negligent manner); *Wicks v. Vanderbilt U.*, M2006-00613-COA-R3CV, 2007 WL 858780 (Tenn. App. Mar. 21, 2007) (reversing the lower court's decision to exclude evidence of the defendant doctor's lack of experience with the relevant medical procedure because such evidence "was material to the issue of the standard of care incumbent upon doctors and nurses who perform [the relevant medical procedure], as it relate[s] to the properly provable issue of 'the skill and knowledge normally possessed by members of that profession . . . .").

Dr. Widmer's CME records were highly probative of whether he possessed the requisite knowledge and skill possessed by other professionals, and minimally, if at all, prejudicial. *See Neiderbach*, 837 N.W.2d at 202–03. The trial court erred in excluding such relevant and probative evidence.

C. The CME records were admissible to impeach Dr. Widmer in his capacity as a designated expert

It is a long-standing rule in Iowa that "evidence may be introduced to impeach a skilled or expert witness or to lessen the weight of his expert opinion, or qualifications . . . ." *Ipsen v. Ruess*, 41 N.W.2d 658, 661-62 (Iowa 1950) (quoting 32 C.J.S., Evidence, § 571). Counsel is allowed great latitude in the cross-examination of an expert witness. *Madsen v. Obermann*, 22 N.W.2d 350, 355 (Iowa 1946); 31 Am. Jur. 2d *Expert and Opinion Evidence* § 88 (1989) (noting that counsel is permitted more latitude in the cross-examination of an expert witness compared to other witnesses). Impeachment evidence is admissible if it is "relevant to establishing or undermining the general credibility of the witness being impeached." *State v. Turecek*, 456 N.W.2d 219, 224 (Iowa 1990).

T.D. was entitled to introduce impeachment evidence that lessened the weight of Dr. Widmer's expert opinion. *Ipsen*, 41 N.W.2d at 661-62; *see Heinz v. Heinz*, 653 N.W.2d 334, 342-43 (Iowa 2002) (noting that the right to cross-examine the other side's expert witness's credibility should not be unfairly limited). At trial Dr. Widmer testified that in his expert opinion, the obstetrical maneuvers he used to resolve the shoulder dystocia were done in conformity with the standard of care. (Vol. 2 App. 209); (*see also* Vol. 1 App. 27) ("The purpose of calling Dr. Widmer will be to have him testify on the issue of standard of care, causation and damages."). The CME records would have shown the jury

that from 2002 through 2016, Dr. Widmer spent less than one percent of his CME hours on topics related to obstetrics. (*See* Vol. 3 App 16-93). Clearly, this evidence would have weakened Dr. Widmer's credibility as an expert opining on the standard of care for obstetrical maneuvers. The trial court's decision to exclude Dr. Widmer's CME records, even solely for purposes of impeachment, bolstered Dr. Widmer's credibility as an expert and improperly shielded him from valid impeachment evidence.

III. The Trial Court Erred in Allowing Dr. Widmer to Testify on Undisclosed Expert Opinions

Standard of Review

A trial court's decision to exclude or admit expert testimony is reviewed for an abuse of discretion. *Hansen v. Iowa Hosp. Corp.*, 686 N.W.2d 476, 479–80 (Iowa 2004). Similarly, a trial court's rulings on discovery sanctions are reviewed for an abuse of discretion. *Lawson v. Kurtzhals*, 792 N.W.2d 251, 258 (Iowa 2010). An abuse of discretion occurs when the ruling rests on grounds or reasons clearly untenable or unreasonable. *Squealer Feeds v. Pickering,* 530 N.W.2d 678, 681 (Iowa 1995). A trial court abuses its discretion when there is a lack of substantial evidence to support its ruling. *State ex rel. Parcel v. St. John,* 308 N.W.2d 8, 10 (Iowa 1981).

Preservation of Error

T.D. preserved error by objecting to the relevant portions of Dr. Widmer's testimony as undisclosed expert opinions. (Vol. 2 App. 209); (Vol. 2 App. 245-264); (*see also* Vol. 2 App. 175-77). Error was also preserved when the trial court denied Plaintiff's Motion in Limine No. 14, which sought to preclude Dr. Widmer from testifying as an expert. *State v. Alberts*, 722 N.W.2d 402, ___ (Iowa 2006) (holding that when a trial court's ruling on a Motion in Limine leaves no question that the evidence at trial will be admitted, counsel need not renew its objection at trial to preserve error).

Merits.

The trial court erred in allowing Dr. Widmer to testify to undisclosed expert opinions at trial. Defendants seized on the trial court's error and ambushed T.D. with undisclosed opinions on the standard of care and bradycardia. In particular, after the first week of trial Dr. Widmer created notes describing the fetal heart tones in the birth DVD in order to support his position that bradycardia occurred during T.D.'s birth. The trial court later allowed Dr. Widmer to testify from these notes despite the fact that discovery was closed, the opinions expressed in the notes were not disclosed prior to trial, and the notes were not disclosed as a trial exhibit. The trial court unfairly deprived T.D. of the ability to effectively prepare for Dr. Widmer's new opinions, and further prevented T.D. from adequately cross-examining Dr. Widmer.

A. A Treating Physician Designated as an Expert Must Meet the Disclosure Requirements under Iowa Code § 668.11 and Iowa Rule of Civil Procedure 1.508 in order to Provide Expert Testimony

A treating physician's testimony is limited to observations made during the course of treatment unless the physician is designated as an expert. *See Thomas v. Consolidated Rail Corp.*, 169 F.R.D. 1, 2 (D. Mass 1996); *Hansen*, 686 N.W.2d at 480–482. In order to "give opinions on reasonable standards of care and causation" a treating physician "must be designated as an expert pursuant to section 668.11 . . . ." *Hansen*, 686 N.W.2d at 480 (citing *Cox v. Jones*, 470 N.W.2d 23, 25 (Iowa 1991)). "A treating physician who has formulated opinions going beyond *what was necessary to provide appropriate care* for the injured party steps into the shoes of a retained expert." *Thomas*, 169 F.R.D. at 2 (emphasis added).

A treating physician designated as an expert to give an opinion on legal questions must meet the disclosure requirements laid out in Iowa Code section 668.11 and Iowa Rule of Civil Procedure 1.508. *Hansen*, 686 N.W.2d at 482. Such disclosures are required because a treating physician ordinarily is not required to formulate opinions addressing legal issues when treating a patient. *Id.* In fact, "an opposing party should . . . be able to expect that a treating physician's testimony will not include opinions on *reasonable standards of care*" or other legal issues. *Id.* (emphasis added).

Consequently, when a treating physician designated as an expert fails to disclose opinions developed for the purpose of addressing issues in pending

litigation, such testimony will be barred for a failure to comply with rule 1.508. *See Hansen*, 686 N.W.2d at 482; *Morris-Rosdail v. Schechinger*, 576 N.W.2d 609, 612 (Iowa Ct. App. 1998).

Defendants designated Dr. Widmer as an expert on September 9, 2016. T.D. deposed Dr. Widmer on August 3, 2016, before Dr. Widmer was designated as an expert. T.D. deposed Dr. Widmer in his capacity as the treating physician. *See Hansen*, 686 N.W.2d at 480 ("[A]n opposing party should . . . be able to expect that a treating physician's testimony will not include opinions on reasonable standards of care."). T.D.'s request to depose Dr. Widmer a second time after his expert designation was denied by the trial court. Dr. Widmer's expert designation stated that "[t]he purpose of calling Dr. Widmer will be to have him testify on the issue of standard of care, causation and damages." (Vol. 1 App. 27). These are clearly legal issues, not "purely medical questions" that a treating physician ordinarily focuses on in the course of treatment. *Hansen*, 686 N.W.2d at 481. Consequently, once Dr. Widmer was designated as an expert he fell under the purview of the disclosure requirements in section 668.11 and the Iowa Rules of Civil Procedure. *See Hansen*, 686 N.W.2d at 482; *Morris-Rosdail*, 576 N.W.2d at 612.

B. Dr. Widmer failed to meet the expert disclosure requirements under Iowa law

After his designation, Dr. Widmer never disclosed any of his expert opinions in a written report and otherwise failed to meet the disclosure requirements laid out in section 668.11 and the Rules of Civil Procedure. Rule 1.500(2) requires designated experts to provide either a written report or a summary of the facts and opinions to which they are expected to testify. *See* Iowa R. Civ. Pro. 1.500(2)(b), (c)(2). Dr. Widmer failed to provide either disclosure despite numerous requests from T.D. (*See* Vol. 1 App. 16, 67-68, 71-72). Dr. Widmer also failed to respond to Plaintiff's Request for Production No. 6, which asked Defendants' experts to produce all the documents they intended to refer to or rely upon for trial. *See* Iowa Code § 668.11(2) ("If a party fails to disclose an expert pursuant to subsection 1 *or does not make the expert available for discovery*, the expert shall be prohibited from testifying . . . .") (emphasis added); Iowa R. Civ. Pro. 1.508(1) (allowing discovery of the facts, mental impressions, and opinions developed or acquired by an expert in anticipation of litigation); *Day by Ostby v. McIlrath*, 469 N.W.2d 676, 677 (Iowa 1991) ("[W]hen a treating physician assumes a role in litigation analogous to the role of a retained expert, supplemental discovery under rule 125(c) [now rule 1.508] could become obligatory.").

1. Dr. Widmer's opinion on the standard of care fell outside the scope of his disclosures and deposition testimony.

Pursuant to rule 1.508(4), Dr. Widmer should have been barred from presenting testimony that was inconsistent with or beyond the scope of his disclosures or deposition testimony. Iowa R. Civ. Pro. 1.508(4). Yet, at trial he did just that:

> Q. Do you have an opinion as to whether the maneuvers you used were in conformity with the standard of care?
> Mr. Goodman: Undisclosed opinion.
> The Court: Overruled.
> A. I believe I did.

(Vol. 2 App. 209). Dr. Widmer failed to provide this standard of care opinion in his deposition and failed to make any disclosures related to this opinion prior to trial.

Dr. Widmer did not form his expert opinion on the reasonable standard of care when he treated T.D., and it therefore required prior disclosure. No physician ordinarily forms an opinion about reasonable standards of care in order to treat a patient. *Hansen*, 686 N.W.2d at 482 (emphasizing that physicians ordinarily do not form opinions on the reasonable standard of care when treating a patient and that physicians who give such opinions are within the ambit of section 668.11's required disclosures). Dr. Widmer only arrived at his opinion on the standard of care after the present lawsuit was filed, and his opinion is therefore outside the scope of what a treating physician may testify to. *See id.*

2. Dr. Widmer failed to disclose the notes he created on the fetal heart rate prior to trial

In addition to his undisclosed opinion on the standard of care, Dr. Widmer also provided an undisclosed opinion on the fetal heart rate in the birth DVD. On November 10, 2017—64 days after the close of discovery and three days into the trial—Dr. Widmer listened to the birth DVD and made notes that timed the heart rate at various times during the delivery. (Vol. 2 App. 265, 431). These notes were not disclosed during discovery, nor were they disclosed as a trial exhibit or in any other way before Dr. Widmer produced them for the first time on the sixth day of trial. (Vol. 2 App. 246-64).

As opposing counsel summarized to the trial court, the notes were created solely to assist the jury in understanding Dr. Widmer's position in this litigation:

> Dr. Widmer has testified in this case he believes the baby was under some distress and for that reason he needed to deliver him sooner rather than later, or promptly – or emergently I believe he testified.
>
> . . . and so [the notes] would assist the members of the jury in better understanding this birth video that they've heard now some three or four or five times and to understand Dr. Widmer's position . . . .

(Vol. 2 App. 248-49). Dr. Widmer did not create these notes in the course of providing treatment to T.D. *See Thomas*, 169 F.R.D. at 2 (holding that a treating physician's testimony is limited to observations made during the course of treatment). He created them by watching the birth DVD after the lawsuit was filed and trial was already three days underway. These notes reflect observations

that could only be made outside the course of treatment. *See Hansen*, 686 N.W.2d at 482 (quoting *Carson v. Webb*, 486 N.W.2d 278, 281 (Iowa 1992)) ("[T]he paramount criterion is whether this evidence, irrespective of whether technically expert opinion testimony, relates to facts and opinions arrived at by a physician in treating a patient *or whether it represents expert opinion testimony formulated for the purposes issues in pending or anticipated litigation*.") (emphasis added)).

The rationale expressed by the Iowa Court of Appeals in *Morris-Rosdail* is applicable to the present case:

> Although the disclosure requirements of rule 125 [now IRCP 1.508] are generally limited to physicians retained for purposes of litigation and exclude treating physicians, *the application of the rule does not necessarily depend on the label or role of the physician*. Instead, it hinges on the reason and time frame in which the underlying facts and opinions were acquired by the physician. *Thus, even treating physicians may come within the parameters of rule [1.508] when they begin to assume a role in the litigation analogous to that of a retained expert*. This generally occurs when a treating physician begins to focus less on the medical questions associated in treating the patient and more on the legal questions which surface in the context of a lawsuit.

576 N.W.2d at 612 (internal citations omitted) (emphasis added). Because Dr. Widmer's notes were made for the express purpose of resolving a legal issue presented in Dr. Widmer's defense to this lawsuit—that there was no evidence of bradycardia—and because the notes were made well after Dr. Widmer provided care to T.D., they fall outside the scope of what a treating physician may testify to and required disclosure under Iowa law. *See id.*

C. Iowa's discovery rules are designed to prevent trial by ambush

Iowa's discovery rules exist to "'make trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.'" *Comes v. Microsoft Corp.*, 775 N.W.2d 302, 311 (Iowa 2009) (quoting *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682-83 (1958)). The discovery rules are designed to avoid surprise at trial. *Whitley v. C.R. Pharm. Serv., Inc.*, 816 N.W.2d 378, 386 (Iowa 2012).

Dr. Widmer had one year, five months, and twenty-eight days to disclose the facts and opinions he would rely on for his defense at trial. (Vol. 1 App. 19). By springing these opinions on T.D.'s counsel for the first time at trial, Dr. Widmer gained the element of surprise and ensured that T.D. would be unable to prepare for these opinions. *See White v. Citizens Nat'l Bank*, 262 N.W.2d 812, 816 (Iowa 1978) (holding that the plaintiff's failure to disclose evidence defendants were entitled to receive deprived defendants of their right to prepare for the actual matters they confronted at trial). Iowa's discovery rules are repugnant to trial by ambush. *See id.*

IV. The Trial Court Erred in Granting Overly Broad Motions in Limine and Restricting the Jury's Access to the Birth DVD

Standard of Review

A trial court's evidentiary determination on the admission or exclusion of evidence is reviewed for an abuse of discretion. *Graber*, 616 N.W.2d at 638.

Similarly, a trial court's decision regarding the submission of exhibits to the jury room is reviewed for an abuse of discretion. *Brooks v. Holtz*, 661 N.W.2d 526, 532 (Iowa 2003); *State v. Voll*, 655 N.W.2d 548, 550 (Iowa Ct. App. 2002). An abuse of discretion exists when "the court exercised [its] discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *Maghee*, 573 N.W.2d at 5.

Preservation of Error

Jury's Access to the Birth DVD: T.D. preserved error on the trial court's ruling restricting the jury's access to the birth DVD by timely objecting to the ruling. (Vol. 2 App. 387-94, 399-401).

Overly Broad Motions in Limine: T.D. preserved error through making offers of proof at trial regarding the trial court's decision to exclude evidence of the Defendants nurses' training and Dr. Widmer's CME records in accordance with its ruling on the Defendants' respective motions in limine. (Vol. 2 App. 168, 174-77). T.D. also preserved error by timely filing resistances to Defendants' Motions in Limine. (Vol. 1 App. 241).

Merits.

Beginning at the end, the trial court committed perhaps its most egregious error when it restricted the jury's access to the birth DVD while giving unrestricted access to ten of Defendants' screenshots handpicked from the birth DVD. The trial court determined that it would allow the jury to watch the birth

DVD once without the ability to pause, stop, or rewind the DVD. At the same time the trial court allowed the jury unfettered access to Defendants' ten screenshots. This undoubtedly overemphasized the photographs and underemphasized the importance of the birth DVD.

The trial court committed its first error when it erroneously granted a majority of Defendants' motions in limine, which requested vague and overly broad relief that was incapable of adequate definition and enforcement at trial. As a result of the trial court's error, T.D.'s counsel was forced to navigate a minefield of obstacles without clear guidance from the trial court on what evidence was excluded or prohibited versus what evidence was allowed.

A. The trial court erred in restricting the jury's access to the birth DVD during deliberations while allowing unlimited access to Defendants' screenshots from the birth DVD

The trial court's puzzling decision to restrict the jury's access to the birth DVD during deliberations while allowing them full access to Defendants' ten screenshots taken from the birth DVD unduly emphasized ten seconds from the birth video. The jurors began their deliberations at 1:15 p.m. on November 17, 2017. (Vol. 2 App. 447). At that time the trial court provided the ten screenshots taken from the birth DVD and submitted into evidence by Defendants to the jury for their consideration without any court-imposed limitations. At the same time, the trial court only allowed the jury to watch the birth DVD once. Further,

the jury had to request to watch the DVD in order to access it and the jury did not have the ability to stop, pause, or rewind the DVD.

When submitting exhibits to the jury it is appropriate for the trial court to consider:

> (i) whether the material will aid the jury in a proper consideration of the case; (ii) whether any party will be unduly prejudiced by submission of the material; and (iii) whether the material may be subjected to improper use by the jury.

State v. Jackson, 387 N.W.2d 623, 629 (Iowa Ct. App. 1986) (holding the trial court did not err in granting the jury's request to view a properly admitted video during deliberations without limiting instructions). If the exhibit is relevant to the fact finding process, easily accessible, and does not unfairly overemphasize any testimony, the jury should have access to it during deliberations. *See State v. Hernandez*, 832 N.W.2d 384, *4-6 (Iowa Ct. App. 2013) (holding that the trial court's decision to allow the jury unlimited access to a CD player and audio tapes was within the trial court's discretion because the recordings were not testimonial in nature but were depictions of the alleged event).

Here, less restrictive access to the birth DVD would have: (i) aided the jury in its fact-finding role, (ii) not unfairly prejudiced either party, and (iii) not been a risk for improper use. *Jackson*, 387 N.W.2d at 629. More access to the birth DVD would have aided the jury in evaluating the different experts' testimony in light of a depiction of what actually happened. *See id.* Neither party

would have been unfairly prejudiced if the court allowed the jury full access to the birth DVD because both parties utilized the birth DVD during their cases and both parties emphasized different portions of the DVD through expert testimony. *See id.* There were at least two portions of the birth DVD that were emphasized at trial that were important for the jury's review. First, in Defendants' counsel's opening statement he claimed the case came down to the 1 minute and 11 seconds it took to deliver T.D. after shoulder dystocia was recognized. (Vol. 2 App. 22-23). Experts for both sides devoted extensive testimony to this time frame. Second, Dr. Widmer testified at length on the significance of the fetal heart tones during the first twelve minutes of the birth video. (Vol. 2 App. 246-64). By restricting the jury's access to the birth DVD, the trial court ensured that the jury would be unable to adequately review the emphasized time frames.

Lastly, providing the jury with unlimited access to the birth DVD would not have increased the risk that the birth DVD would be used improperly. *See Jackson*, 387 N.W.2d at 629. Experts from both sides used the birth DVD to form their opinions. The DVD would have allowed the jury to evaluate the credibility of the experts with what was actually depicted on the DVD. Defendants' argument that the jury would improperly use the birth DVD to make their own analysis, but properly use the 10 screenshots taken from the birth DVD, is unpersuasive. (Vol. 2 App. 388). Defendants simply wanted to emphasize the

most favorable 10 seconds in the DVD via the screenshots, and the trial court's decision improperly placed its imprimatur on this tactic.

B. Defendants' motions in limine failed to pinpoint objectionable material

Motions in limine "should be used, if used at all, as a rifle and not a shotgun, pointing out the objectionable material and showing why the material is inadmissible and prejudicial." *Lewis v. Buena Vista Mut. Ass'n*, 183 N.W.2d 198, 201 (Iowa 1971). Motions in limine are designed to "prohibit mention of some *specific matter*, such as an inflammatory piece of evidence . . . ." *Id.* (emphasis added). Since motions in limine prevent parties from presenting evidence in the usual way, the relief requested should be narrow and precise. *See id.* at 200-01. Courts must "avoid indiscriminate application of [motions in limine]" so parties are not "prevented from even trying to prove their contentions." *Id.*

The trial court abused its discretion in granting motions in limine that sprayed too broadly, failing to pinpoint objectionable material while hitting relevant, highly probative evidence. *E.g.*, Defendants' Motions in Limine No. 4 (Vol. 1 App. 214) (requesting that Plaintiff be barred from making *any* reference concerning HCHC's training and credentialing processes and activities); Defendants' Motion in Limine No. 19 (Vol. 1 App. 229) (requesting that Plaintiff be barred from making *any* reference to Dr. Widmer's training as a family practice

physician); *see also* Defendants' Motions in Limine Nos. 2, 6, 8, 11, 13, 14, 18; Order re: Motions in Limine, p. 4-5 (Vol. 1 App. 207, 340).

Instead of excluding specific objectionable material, the trial court granted motions that wholly prevented T.D. from presenting relevant and probative evidence that supported T.D.'s case theory.

CONCLUSION

The judgment on appeal was the product of a series of reversible legal errors, and improper conduct. Accordingly, T.D. respectfully requests that the Court vacate the jury verdict, reverse the judgment of the trial court in its entirety, and send the case back to the trial court for retrial with instructions so that the trial court does not commit the same errors twice.

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

Pursuant to Rule 6.903(2)(i), oral argument is requested to assist the Court in resolution of this appeal.

CERTIFICATE OF COST

Because this Appellant Final Brief has been filed and served through EDMS, the actual cost of printing or duplicating this brief is $0 per document, and the total cost for reproducing the necessary copies of the brief is $0.

/s/ Daniel R. Peacock Dated: August 15, 2018

CERTFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using Microsoft Word in size 14 font Garamond and contains 13,878 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Daniel R. Peacock Date: August 15, 2018

CERTFICIATE OF FILING AND SERVICE

The undersigned hereby certifies that on August 15, 2018, the preceding Appellant Final Brief was filed electronically filed with the Clerk of the Iowa Supreme Court using the EDMS system, and that service was made via the EDMS system upon the following:

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