IN THE SUPREME COURT OF IOWA

NO. 17-1971

LARRY EISENHAUER, as the Conservator for TD,
Plaintiff-Appellant

vs.

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

APPEAL FROM THE IOWA DISTRICT COURT FOR HENRY COUNTY LALA011871
THE HONORABLE MARK KRUSE

Defendant-Appellee Henry County Health Center's Final Brief

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Statement of Issues

I. Did the district court err in not submitting specifications of negligence that were not supported by the evidence; were embodied in other specifications; and/or were duplicative, an overemphasis of a theory, or were confusing and which caused no prejudice?

Alcala v. Marriot Int'l, Inc., 880 N.W.2d 699 (Iowa 2016)
Anderson v. Webster City Community Sch. Dist., 620 N.W.2d 263 (Iowa 2000)
Asher v. OB-GYN Specialists, 846 N.W.2d 492 (Iowa 2014)
Bigalk v. Bigalk, 540 N.W.2d 247 (Iowa 1995)
Conner v. Menard, Inc, 705 N.W.2d 318 (Iowa 2005)
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Van Iperen v. Van Bramer, 392 N.W.2d 480 (Iowa 1986)
Wall v. Jacob North Printing Co, 618 N.W.2d 282 (Iowa 2000)
Wolbers v. Finley Hospital, 673 N.W.2d 728 (Iowa 2003)

II. Did the district court abuse its discretion in excluding continuing medical education records which were cumulative of other evidence, not as probative as trial testimony on the same subject, would have interjected prejudice into the trial, and for which Plaintiff offered no testimony to support his offer of proof?

Cases
Brooks v. Holtz, 661 N.W.2d 526 (Iowa 2003)
Gacke v. Pork Xtra, L.L.C., 684 N.W.2d 168 (Iowa 2004)

Glenn v. Carlstrom, 556 N.W.2d 800 (Iowa 1996)
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Iowa Rules of Evidence 5.402 and 5.403

III. Did the district court abuse its discretion in allowing a Defendant physician to testify on the standard of care when he was disclosed to do so and in allowing the physician to testify, in response to Plaintiff's trial evidence, regarding underlying facts of the medical care at issue?

Cases
Estate of Long v. Broadlawns Medical Center, 656 N.W.2d 71 (Iowa 2002)
Hansen v. Central Iowa Hospital Corp., 686 N.W.2d 476 (Iowa 2004)

Rules
Iowa Rule of Civil Procedure 1.500 (2)(b)
Iowa Rule of Civil Procedure 1.500(2)(e)

IV. Did the district court abuse its discretion in only allowing the jury to view a video once during deliberations and in granting a motion in limine on hospital training evidence after denying Plaintiff's late attempt to add a negligent training claim (an order which Plaintiff does not appeal)?

Cases
Bannister v. Town of Noble, 812 F.2d 1265 (10th Cir. 1987)
Brooks v. Holtz, 661 N.W.2d 526 (Iowa 2003)
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Rules

Iowa R. App. P. 6.903(2)(g)
Iowa Rule of Evidence 5.803(18)
Iowa Rules of Evidence 5.402 and 5.403

Other Authority

Fed. R. Evid. 803, Advisory Committee Notes
Thomas Mayes & Anuradha Vaitheswaran, *Error Preservation in Civil Appeals in Iowa: Perspectives on Present Practice*,

Routing Statement

Defendant Henry County Health Center ("HCHC") agrees that this case is appropriate for transfer to the Iowa Court of Appeals as it involves the application of existing legal principles. *See* Iowa R. App. P. 6.1101(3).

Statement of the Case

Nature of the case.

This is a medical malpractice case arising from the birth of TD on August 31, 2007. Defendant Dr. James Widmer delivered TD at HCHC. There was a shoulder dystocia medical emergency during the delivery. TD was born with a permanent brachial plexus injury.

Plaintiff's only claim against HCHC was a vicarious liability claim based upon the alleged negligence of two nurses—Nurse Yvonne Sloan and Nurse Rebecca Fraise.

Course of proceedings.

This case was filed on March 10, 2016. App. I, 9 (petition). Trial commenced on November 7, 2017 and on November 17th the jury returned a verdict in favor of Defendants, finding that neither Dr. Widmer nor the HCHC nurses were negligent. *Id.* 405 (verdict). The jury never reached causation or damages. *Id.*

Certain pretrial and trial proceedings provide context for some of Plaintiff's appeal issues.

Plaintiff's March 10, 2016 petition asserted no claim or allegation that HCHC negligently credentialed Dr. Widmer (i.e., should not have allowed him to deliver babies); no allegation that Dr. Widmer or the nursing staff were not adequately trained or that HCHC negligently trained them; and no allegation that HCHC provided negligent oversight or supervision of its obstetric department. App. I, 9-18. These theories were proposed for the first time by Plaintiff in his first proposed amended petition filed with a motion for leave on August 9, 2017, less than three months before trial. *See Id.* 81-105 (8-9-17 motion, proposed amended petition); App. III, 191-216 (8-22-17 HCHC resistance).

HCHC resisted Plaintiff's motion for leave to the extent it added new claims and moved to strike Plaintiff's new expert opinion. App. III, 191-216 (8-22-17 resistance). In response, Plaintiff filed a new separate action against HCHC, asserting a negligent credentialing claim. App. I, 180 (10-13-17 ruling 4). Then Plaintiff withdrew his first motion for leave to amend and filed a second motion for leave to amend on August 31, 2017. *Id.* Because the second proposed amended petition still contained allegations beyond vicarious liability

as to HCHC, including negligent training and credentialing allegations, HCHC resisted in part. App. I, 139-42 (9-13-17 resistance).

Despite Plaintiff's position that he was no longer asserting an "institutional negligence" claim against HCHC for training or credentialing,[1] the district court agreed that Plaintiff's second proposed amended petition still alleged a negligent training claim. *Id*. 180-81 (10-13-17 ruling 4-5, "Any assertion that the proposed amendment does not set forth a negligent training claim is discounted;" "It is clear that what the Plaintiff is asking for is the inclusion of a claim of negligent training."). Indeed, Plaintiff's second proposed amended petition included such allegations as "HCHC failed to properly train and/or screen the HCHC delivery team to ensure that all members of the delivery team were capable of handling a shoulder dystocia emergency." *Id.* 123 (8-31-17 petition 15¶114).[2] This allegation essentially includes a negligent credentialing claim as to Dr. Widmer.

The district court went on to deny Plaintiff's August 31, 2017 motion for leave to amend "that relates to a theory of recovery based on negligent training or credentialing." *Id.* 183 (10-13-17 ruling 7). The court held the proposed

[1] *See* App. I, 140 (9-13-17 HCHC resistance 2); *Id.* 131 (9-5-17 Plaintiff's resistance to motion to strike 1).

[2] Plaintiff separately alleged the delivery team included Dr. Widmer and Nurses Fraise and Sloan. App. I, 121 (*Id.* 13¶94).

amendment would substantially change the issues for trial and prejudice the defense. App. I, 182 (*id.* 6). The court also denied Plaintiff's factual assertions of negligent training as "[t]o factually argue a negligent training ground that was disallowed defeats the reasons as to why it was disallowed." *Id.*

Given the above proceedings prior to trial, including the fact that Plaintiff insisted there was no independent claim against HCHC yet continued to assert allegations of negligent training and credentialing, Defendants moved in limine on references to HCHC's training of its nurses--one of Plaintiff's appeal issues. *Id.* 214 (10-24-17 motion ¶4).

The motion in limine was, in part, based upon the district court's October 13, 2017, ruling which included the following:

> The primary issues in this case remain as to what the applicable standard of care was on the date in question and whether there was a violation of this standard with a causal relationship to the injury.
> . . .
>
> there will be no references to a negligent credentialing claim or a separate claim of negligent training. Testimony shall be consistent with this ruling as a whole.

Id. 183, 185 (10-13-17 ruling 7, 9).[3]

[3] Notwithstanding this ruling, in his opening statement, Plaintiff stated "the delivery team was not prepared for shoulder dystocia." App. II, 18 (Vol 1, 36:22-25); *see also Id.* 40-41(Vol 1, 77:2-78:11, Plaintiff's response to mistrial motion on this and other matters, arguing he didn't use the word "training").

The trial was marked with repeated violations of limine orders and other improper arguments by Plaintiff's counsel—many of which were identified by the district court. App. II, 48-50, 54 (Vol I, 85:9-87:16, 91:2-9, court identifying three limine order violations during opening statement, agreeing one of Plaintiff's arguments sounded "sinister"); *Id.* 427-28 (Vol III, 414:18-415:7, court identifying arguments by Plaintiff during closing that were "pretty bad," including a reference to convicting Dr. Widmer and evidence about a nurse that was not in evidence).[4] Motions for mistrial were made. *Id.* 24 (Vol I, 61:7-24, oral motion after opening); App. I, 350-53 (11-8-17 Defendants joint motion for mistrial); App. II, 420-27,447-49 (Vol III, 407:21-414:17, 477:2-479:15, mistrial motion after Plaintiff's closing arguments).

Summary of the facts.

A "shoulder dystocia" is when the baby's shoulder is stuck or impacted against the mother's pubic bone and there is a potential dangerous delay between the delivery of the baby's head and the rest of the baby. *See* App. II, 178 (Vol II, 234:7-18, defense expert Dr. Boyle); *Id.* 128 (Vol I, 472:4-22, Plaintiff's expert Dr. Duboe).

[4] *See* App. II, 411, 416 (Vol III, 384:14-20, 392:13-15, Plaintiff's argument that "monitoring strips might convict Dr. Widmer" and Nurse Fraise "would have told you she's very inexperienced").

Plaintiff did not dispute that a shoulder dystocia is unpredictable, unpreventable, and an obstetrical medical emergency. App. II, 66, 83 (Vol 1, 249:8-13, 271:13-18, Plaintiff's nurse expert Sprague). Plaintiff's medical expert, Dr. Duboe, testified that the baby needs to be delivered within six minutes of recognition of the dystocia to avoid possible brain damage from hypoxia. *Id.* 128 (Vol I, 472:4-22). The urgent nature of the delivery arises because the umbilical cord is compressed in the birth canal. *Id.* 178 (Vol II, 234:11-18, Dr. Boyle). TD was delivered within six minutes of recognition of the shoulder dystocia and suffered no brain damage. *Id.* 126-27 (Vol I, 470:5-471:21, Dr. Duboe agreeing that should dystocia resolved in one minute and ten seconds after recognition); *Id.* 83-84 (Vol I, 271:25-272:10, Nurse Sprague).

Plaintiffs' experts testified that once a shoulder dystocia is recognized, there are certain maneuvers the nurses and physicians attempt, starting with the least invasive, to assist with the delivery. *Id.* 67 (Vol. I, 250:6-23, Nurse Sprague); *Id.* 100 (Vol I, 384:6-19, Dr. Duboe). The first two maneuvers are performed by nursing staff under the direction of the delivering physician, including the "McRoberts" (flexing the mother's legs back towards her abdomen and chest to make more room for the baby to be delivered) and application of suprapubic pressure (pressure applied to the mother's pubic bone to attempt to move the baby down under the pelvic bone). *Id.* 67-71 (Vol. I,

250:6-252:2, 253:13-254:3, Nurse Sprague); *Id.* 91-92,100 (Vol I, 328:22-329:11, 384:6-25, Dr. Duboe).

When maternal maneuvers are not successful, there are additional maneuvers the physician can perform on the child ("fetal maneuvers"). App. II, 134 (Vol I, 495:10-13, Dr. Duboe). In this case, TD was born after the nurses performed the two maternal maneuvers (McRoberts and suprapubic pressure) and no physician maneuvers on the baby were performed. *Id.* 85 (Vol I, 284:7-24, Nurse Sprague).

Plaintiff's experts also testified that in a shoulder dystocia situation, the physician directs the actions of others, including the nurses in their performance of the maternal maneuvers. *Id.* 64 (Vol I, 222:16-18, Nurse Sprague); *Id.* 93-94, 107 (Vol I, 330:16-331:19, 395:10-23, Dr. Duboe).

Plaintiff's expert Dr. Duboe agreed that the physician may apply gentle traction to the baby's head after maneuvers are put in place to assist in the delivery. *Id.* 105, 95, 98 (Vol I, 393:12-16, 332:2-9, 374:7-13).

This case was unique in that it essentially involved the events that occurred over one minute and ten seconds-- all of which were recorded on a video (the "birth video"). *Id.* 59-60 (Vol I, 115:3-116:20). Dr. Duboe identified that the shoulder dystocia was identified at 13:42 on the birth video clock. *Id.* 104-105, 126 (Vol I, 392:24-393:14, 470:5-8). The shoulder dystocia was

released at 14:52 on the video—one minute and ten seconds after it was recognized and eighteen seconds after suprapubic pressure was applied. *Id.* 114, 126-127 (Vol I, 403:1-4, 470:5-471:21, Dr. Duboe).

The video shows Nurse Sloan and Nurse Fraise performing the McRobert's maneuver by helping flex Ms. Hirschy's legs nearly immediately upon recognition of the dystocia. App. III, 185 (Exh. BB at 1342); App. II, 205-206 (Vol II, 409:20-410:11, Dr. Widmer describing birth video time 1342 including nursing performance of McRoberts). The video also shows Nurse Sloan applying suprapubic pressure. App. III, 187-88 (Exh. BB at 1436, 1452). Both of Plaintiff's standard of care experts (Dr. Duboe and Nurse Sprague) were critical of what they saw on the video and opined that the nurses improperly performed the maneuvers. App. II, 70, 78 (Vol I, 253:5-8, 264:17, Nurse Sprague); *Id.* 123-24 (Vol I, 431:17-433:7, Dr. Duboe).

It was Plaintiff's theory that Dr. Widmer must have applied more than gentle traction during the delivery given the brachial plexus injury. *See Id.* 145 (Vol II, 78:14-19, Dr. Adler). Plaintiff's causation expert, Dr. Adler, testified that the traction was either excessive in degree or improper in angle. *Id.*

The defense experts disagreed with Plaintiff's experts, testifying that Dr. Widmer and the nursing staff complied with the standard of care and did not cause the injury. *Id.* 182-84 (Vol II, 244:2-246:5, 272:14- 273:21, Dr. Boyle);

Id. 279-80 (Vol III 153:23-154:2, Nurse Drummond); *Id.* 285-86 (Vol III, 196:12-197:5, Nurse Sanborn).

Argument

Iowa courts are "'reluctant to interfere with a jury verdict.'" *Estate of Long v. Broadlawns Medical Center*, 656 N.W.2d 71, 88 (Iowa 2002) *abrogated on other grounds by Thompson v. Kaczinksi*, 774 N.W.2d 829 (Iowa 2009) (citations omitted).

A jury verdict should not be reversed unless "justice would not be served by allowing the trial court judgment to stand." *Shawhan v. Polk County*, 420 N.W.2d 808, 810 (Iowa 1988); *see also Baysinger v. Haney*, 155 N.W.2d 496, 499 (Iowa 1968) ("A judgment should not be reversed and litigation prolonged unless error appears which we may reasonably suppose affected the result to the prejudice of the losing party.").

Here, Plaintiff had more than a fair trial. There were no errors in the district court's instructions and no abuses of discretion in evidentiary rulings. Nor did any of the issues about which Plaintiff complains cause any prejudice. The district court's rulings and the jury verdict in favor of Defendants should be affirmed.

I. There was no legal error in the specifications of negligence.

A. Standard of review.

Plaintiff over-argues the applicable standard of review. HCHC disagrees with the implication in Plaintiff's appeal argument that a plaintiff has an absolute right to plaintiff's proposed wording of specifications of negligence.

HCHC agrees that this Court reviews the refusal to give a requested jury instruction for corrections of errors at law. *See Alcala v. Marriott Int.'l, Inc.* 880 N.W.2d 699, 707 (Iowa 2016). However, notwithstanding this standard of review, the district court retains the ability—and has the responsibility—to formulate specifications of negligence to avoid duplication, overemphasis, or prejudice. Indeed, prejudicial error occurs when an instruction "confuses or misleads the jury, or is unduly emphasized." *Anderson v. Webster City Community Sch. Dist.*, 620 N.W.2d 263, 268 (Iowa 2000); *see also Olson v. Prosoco, Inc.*, 522 N.W.2d 284, 287 (Iowa 1994) ("even instructions correctly stating the law should not give undue emphasis to any particular theory, defense, stipulation, burden of proof, or piece of evidence."). Even the Court in *Alcala* clarified the standard of review as requiring an instruction if it "'correctly states the applicable law *and is not embodied in other instructions.*'" 880 N.W.2d at 707 (citation omitted, emphasis added).

"Parties are not . . . entitled to any particular instruction if the issue is adequately covered in other instructions. As long as the issues involved are

adequately covered, the court may choose its own language." *Hutchinson v. Broadlawns Med. Ctr*, 459 N.W.2d 273, 275 (Iowa 1990). "Instructions must be read as a whole, not segmented and considered individually." *Id.* Further, jurors "must be left to their intelligent apprehension and application of the rules put forth in the instructions." *Id.* (quoting *Stover v. Lakeland Square Owners Ass'n*, 434 N.W.2d 866, 868 (Iowa 1989)).

The "court is entitled to choose its own language in submitting an issue and need not adopt the form requested by a party." *Schuller v. Hy-Vee Food Stores, Inc*., 328 N.W.2d 328, 332 (Iowa 1982) (affirming trial court's submission of one negligence specification rather than multiple specifications; new trial granted on other grounds); *see also Kiesau v. Bantz*, 686 N.W.2d 164, 175 (Iowa 2004) *overturned on other grounds by Alcala* ("A trial court is not required to word jury instructions in a particular way and is free to draft instructions in its own way if it fairly covers the issues.").

"The facts of the particular case, of course, determine whether a court's instructions concerning negligence sufficiently encompass" a plaintiff's allegations. *Herbst v. State*, 616 N.W.2d 582, 586 (Iowa 2000). Given that "'instructions must be considered as a whole,'" an instructional error may be cured "'if other instructions properly advise the jury.'" *Id.* at 585 (quoting *Thavenet v. Davis*, 589 N.W.2d 233, 237 (Iowa 1999)).

In addition, a party is entitled to a specification of negligence only if it is supported by the evidence. "Proposed instructions must be supported by the pleadings and substantial evidence in the record." *Wolbers v. Finley Hospital*, 673 N.W.2d 728, 732 (Iowa 2003). Submission of issues without evidentiary support constitutes error. *See Manno v. McIntosh*, 519 N.W.2d 815, 823 (Iowa Ct. App. 1994); *Bigalk v. Bigalk*, 540 N.W.2d 247, 249 (Iowa 1995) (jury instructions "should be formulated so as to require the jury to focus on each specification of negligence *that finds support in the evidence.*") (emphasis added).

Plaintiff cites no case that a plaintiff is entitled as a matter of right to whatever language a plaintiff desires for a negligence claim. Under Plaintiff's theory, a plaintiff could rearticulate a claim of negligence five different ways or break a negligent act into five small steps and a district court would have no ability to formulate the specification in any way that varied from a plaintiff's proposal. Yet, the district court must not only give proposed instructions that apply and correctly state the law, but also must avoid error by giving instructions that do not unduly emphasize a position, duplicate a theory, mislead or confuse the jury, or which have insufficient support in the evidence. *See Anderson*, 620 N.W.2d at 268; *Olson*, 522 N.W.2d at 289; *Manno*, 519 N.W.2d at 823.

Finally, assuming without conceding the district court erred, instructional error does not require reversal unless it is prejudicial. *See Grefe & Sidney v. Watters*, 525 N.W.2d 821, 824 (Iowa 1994). Prejudice exists only "when the rights of the [party] 'have been injuriously affected' or the [party] 'has suffered a miscarriage of justice.'" *In re Detention of Palmer*, 691 N.W.2d 413, 416 (Iowa 2005) *overruled on other grounds by Alcala* (quoting *State v. Hartsfield*, 681 N.W.2d 636, 633 (Iowa 2004)).

B. Preservation of error.

HCHC agrees that Plaintiff preserved error. *See* App. II, 329-30, 350-51 (Vol. III 270:19-271:8, 291:23-292:9); App. I, 364-66 (11-16-17 revised proposed instructions No. 21-22).

C. There was no error in the specifications as to HCHC.

Plaintiff argues that there two errors in the specifications as to HCHC. There were not. Nor can Plaintiff establish he was prejudiced.

Plaintiff argues the district court should have instructed the jury that the nurses were negligent by:

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

> c. Failing to properly and effectively perform the McRoberts maneuver and suprapubic pressure, to safely deliver [TD] after the shoulder dystocia occurred.[5]

What the court submitted to the jury included that Plaintiff must prove:

> (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.

App. I, 389 (Court's instruction No. 16).

Plaintiff suggests the court's specifications stated the alleged negligence "in a general way," without the "proper analysis," and represented a "sua sponte" choice to submit a different case than the one Plaintiff pleaded and tried. Plaintiff's brief 29-30. This is not the case.

The district court's instruction specifically identified the procedures at issue (McRobert's and suprapubic pressure) and the conduct at issue (the nurses' alleged negligence in the performance of the procedures).

As discussed further below, the district court allowed and considered the parties' lengthy arguments on the specifications. App. II, 329-55 (Vol III, 270:19-296:21). The district court explained its reasoning as to the

[5] Plaintiff submitted three additional specifications against HCHC but does not argue on appeal that the court erred in not submitting them. *See* App. I, 366 (11-16-17 proposed instruction No. 22).

specifications and adopted some suggestions and proposals by counsel. *Id; see also Id.* 345-49 (Vol III, 286:1-289:8, 290:11-23). There was proper analysis.

The allegation that the district court improperly found guidance in how issues were submitted in another case fails. There is nothing improper about a court looking at instructions from another case or samples. That is likely how Iowa model instructions have evolved and become uniformly used where applicable. Further, Plaintiff's counsel did the same by proposing a damage instruction used by another judge. *See* App. II, 361-62 (Vol III, 302:13-303:25).

1. The "direction to push" specification.

a. There was insufficient evidence to support this specification.

HCHC does not agree that there was expert testimony that HCHC nurses were negligent in directing Ms. Hirschy to push.[6] Plaintiff argues that:

- Dr. Duboe "testified that all commands to push and tractional efforts should have stopped at 13:42 on the birth video." Plaintiff's brief 34 (citing Vol I 393-94, 401-02).

- Dr. Duboe "testified that the failure to cease such commands and tractional efforts before implementing the correct maneuvers was a breach of the standard of care." *Id.* (citing Vol 1 394-95).

[6] HCHC objected to this specification because of a lack of evidence of breach. App. II, 353 (Vol III, 294:7-14); *see also Id.* 335-36 (Vol III, 276:19-277:4, Dr. Widmer objection).

- "Dr. Widmer's failure to instruct the nurses to stop encouraging Lisa to push . . . also breached the standard of care." *Id.* (citing Vol 1 330-31, 395).

The actual testimony does not support Plaintiff's argument. While Plaintiff's counsel *asked* about stopping the commands to push, Dr. Duboe only *testified* about stopping application of traction:

> Q: . . . do you have an opinion as to when all efforts and commands to push and tractional efforts should have stopped until the maneuvers were executed to relieve the shoulder dystocia?
>
> A: . . . So right around 13:42 is where all efforts at traction should stop until the proper maneuver is put into place . . .[7]
> . . .
>
> Q: . . . continuous traction after 13:42, breach of the standard of care . . .?
>
> A: Yes.

App. II, 104-06 (Vol I, 392:24-393:14; 394:12-20). While there was testimony that there were continued directions to push (*Id*. 107, Vol I, 395:12-14), there was no testimony that this was a breach of the standard of care.[8]

[7] Before answering the question, Dr. Duboe discussed the time period *before* 13:42. App. II, 105 (Vol I, 393:4-7). This is not testimony in support of the theory that instructions to push should have stopped. The shoulder dystocia was recognized at 13:42 on the birth video according to Dr. Duboe and under Plaintiff's theory that is when the alleged negligent conduct began.

[8] As to Nurse Sprague, she identified that there were encouragements to push on the video tape but never testified this was a breach of the standard of care. App. II, 75-77 (Vol I, 261:23-264:17). She may have been attempting to opine

Plaintiff also cites a section of transcript in which Plaintiff's counsel purports to summarize the evidence—but counsel's summary is incorrect. *See* App. II, 112-13 (Vol I, 401:24-402:14, "Doctor, you testified that all pushing efforts at that point and all tractional efforts stop until you put maneuvers into place"). As explained above, this is not an accurate summary of Dr. Duboe testimony[9] and there was no testimony from the witness on this subject at this point. *Id.* 113 (Vol I, 402:1-19). The other pages of transcript cited by Plaintiff also do not support Plaintiff's argument. *See Id*. 93-94 (Vol I, 330-331, no testimony about Dr. Widmer's failure to instruct the nurses to stop encouraging pushing).

Further, and perhaps more importantly, assuming without conceding that Plaintiff counsel's mentioning of pushing in the question was sufficient to support a specification of negligence, Dr. Duboe's response was that traction (and, under Plaintiff's argument, impliedly pushing) *could resume* after the maneuver was in place. *Id.* 105 (Vol I, 393:13-14, "traction should stop until the proper maneuver is put into place"); *see also Id.* 95 (Vol I, 332:2-5). While

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on this subject, but an objection to hearsay was sustained and she did not do so. *See Id.* 76 (Vol I, 262:2-5).

[9] A lawyer's questions are not evidence. *See* App. I, 378 (Court's Instruction No. 3, "The following are not evidence: 1. Statements, arguments, questions and comments by the lawyers. . . .").

Plaintiff disagrees the maneuvers were *properly* performed, he does not dispute they were performed. Even if it can be implied that Dr. Duboe testified about both traction *and* pushing, he testified they could resume after the maneuvers were in place. In fact, at one point, Dr. Duboe testified as if he was delivering a baby with suprapubic pressure being used and said: "*while mom's pushing*" he'd guide the head out. App. II, 98 (Vol I, 374:7-13) (emphasis added).

Plaintiff did not elicit evidence at trial to support the distinction that he needed to support this specification—that the directions to push occurred when the maneuvers were not in place. In fact, Plaintiff's counsel characterized the directions to push as occurring repeatedly (i.e. 17 times) after the recognition of the shoulder dystocia. *See, e.g., Id.* 415 (Vol III, 391:11-24, Plaintiff's closing). Yet the McRoberts maneuver began immediately upon recognition of the dystocia and remained in place. *See Id.* 205-06 (Vol II, 409:20-410:11, Dr. Widmer describing birth video time 1342 and nurses performing McRoberts at that time); *Id.* 104-05 (Vol I, 392:24-393:14, Dr. Duboe: 1342 was time shoulder dystocia was recognized); *see also* App. III, 185 (Exh BB).[10] Plaintiff

[10] *See also* Plaintiff's brief 16 (stating McRoberts was put in place "shortly after" recognition of the dystocia and continued "for nearly a minute." Given the dystocia lasted one minute and ten seconds, even under Plaintiff's facts, the directions to push after recognition of the dystocia were after a maneuver was in place.

failed to establish evidence that the directions to push occurred in the absence of the maneuvers.

The district court acknowledged the evidence that pushing could resume in explaining the rationale for the specifications. App. II, 349 (Vol III, 290:18-20, court: expert evidence supported "at some point you have to start pushing again."). This is also reflected in the defense expert Dr. Boyle's discussion of the issue. While Plaintiff suggests Dr. Boyle supports Plaintiff's position, Dr. Boyle testified that commands to push can be resumed once the maneuvers are performed and "That's exactly what happened in this case." *Id.* 193-94 (Vol II, 265:22-266:12); *see also Id.* 197-98 (Vol II, 316:20-317: 2).[11]

There is no error when a court does not give a requested instruction that is not supported by sufficient evidence. *See Kohles v. Mercy Health Serv.*, 2010 WL 3894447 *10 (Iowa Ct. App. 2010) (affirming trial court's refusal to instruct on specific allegation "because it concluded there was no expert testimony as to breach of standard of care or as to causation").

b. The allegation was embodied in the specification given.

[11] Nowhere does Dr. Boyle testify there was a breach of the standard of care based upon the directions to push as heard on the video tape after the shoulder dystocia was recognized.

Assuming without conceding that there was sufficient expert evidence that the nurses should not have instructed Ms. Hirschy to push, this is just one part or aspect of the maneuvers and is embodied within the specification as to performance of the maneuvers. In other words, part of the alleged negligent performance was instructing Ms. Hirschy to push. The district court so found. *See* App. II, 339 (Vol III, 280: 8-12, court: "Isn't that part of the maneuvers, that you stop pushing? Isn't that part of . . . doing the maneuvers correctly, is stopping pushing?").

The district court summarized the evidence: "it's how you do it properly, you stop, try and fix it and go on. . . . it's part of maneuvers to do it properly." App. II, 349 (Vol III, 290:11-17). The court also recognized that the expert evidence supported "at some point you have to start pushing again." *Id*. 290:18-23. Plaintiff's proposed specification failed to account for this dynamic aspect of this obstetrical emergency. It was misleading and confusing.

The allegation about directions to push was just one of many aspects or parts of the maneuvers. There were other actions that were part of the maneuvers—actions that actually *were* supported by Plaintiff's experts as allegedly improper and yet Plaintiff did not seek separate specifications for each. Nurse Sprague testified that in performing suprapubic pressure, Nurse Sloan should have stood on a stool to increase leverage and used her fist (as

opposed to the palm of her hand). App. II, 70-71, 77 (Vol I, 253:13-254:25, 263:6-11). Plaintiff's experts testified that in performing the McRoberts maneuver, the nurses should have lowered the head of the bed and flexed Ms. Hirschy's legs back more towards her chest. *Id.* 69-70 (Vol I, 252:5-253:8, Nurse Sprague); *Id.* 102 (Vol I, 389:3-21, Dr. Duboe). Plaintiff did not request specifications on each of these aspects of the maneuvers.

As the district court correctly explained in rejecting the specification that highlighted just one of many aspects of the maneuver: "it's doing a whole series of things to do the procedure correct." *Id.* 402 (Vol III, 346:9-20, discussing expert testimony); *Id.* 354 (Vol III, 295:17-22, court: "There's a whole series of things that doing those maneuvers entails"). In the context of the evidence, the district court was not required to separately instruct on one of the many different aspects of the maneuvers just because Plaintiff picked that one out of many to propose.

There was no error because the requested specification was embodied in the specification given that concerned the maneuvers as a whole. *See Alcala*, 880 N.W.2d at 707 (court required to give correct and applicable instruction if it "is not embodied in other instructions."); *Van Iperen v. Van Bramer*, 392 N.W.2d 480, 484-85 (Iowa 1986) (affirming trial court's refusal to submit specifications in part because they were subsumed in specification given);

Schuller, 328 N.W.2d at 332 (affirming decision to submit one specification of negligence: "[The] concept was adequately incorporated in the single submitted specification. The court is entitled to choose its own language in submitting an issue and need not adopt the form requested by a party.").

Moreover, the jury should only be asked to judge whether conduct (the performance of the maneuvers) is negligent once. *See Conner v. Menard, Inc.*, 705 N.W.2d 318, 323 (Iowa 2005) (reversible error to submit a general negligence claim in addition to a specific negligence claim under facts of case as doing so impermissibly gave the plaintiffs "two bites of the apple").

Instructing the jury on essentially the same alleged wrongdoing in more than one specification of negligence is prejudicial. It overemphasizes a plaintiff's case, requires the jury to consider the defendants' conduct again and again, and gives the plaintiff multiple bites of the apple. Nor should a plaintiff be allowed to rearticulate a negligence claim over and over with slightly different language or in varied degrees of specificity. To do so is prejudicial. *See Anderson*, 620 N.W.2d at 268 (prejudicial error occurs when an instruction is unduly emphasized); *Olson*, 522 N.W.2d at 289 (holding submission of duplicative theories and instructions was error).

c. There was insufficient evidence of causation.

Assuming without conceding that there is sufficient expert evidence that it was negligent to continue to direct Ms. Hirschy to push, there is no evidence to support that alone caused any injury. Plaintiff cites none.[12]

When multiple specifications of negligence are submitted, each must be able to stand alone to support a finding of liability. *See Alcala*, 880 N.W.2d at 710 ("A new trial is required after a general verdict is returned for the plaintiff if the evidence was insufficient to submit one of several specifications of negligence.").

There must be evidence in the record that directing Ms. Hirschy to push after the shoulder dystocia was recognized, alone, caused the brachial plexus injury. Plaintiff's experts did not so testify. *See Oswald v. LeGrand*, 453 N.W.2d 634, 635 (Iowa 1990) (to prove a claim for medical malpractice, expert testimony must be produced which: "develops a causal relationship between the violation [of the standard of care] and the injury sustained."); *see also Van Iperen*, 392 N.W.2d at 484-85 (affirming trial court's refusal to submit two specifications in part because of insufficient medical expert causation evidence); *Faber v. Herman*, 731 N.W. 2d 1, 7 (Iowa 2007) (causation "must exist between the breach of the duty of care and the damages sought"); *Wall v.*

[12] Defendants objected to this specification based upon lack of evidence of causation. App. II, 336 (Vol III, 277:4-7, Dr. Widmer); *see also Id*. 297-99 (Vol III, 236:20-238:15, HCHC motion for directed verdict).

Jacob North Printing Co., 618 N.W. 2d 282, 285 (Iowa 2000) ("plaintiff must establish that but for a defendant's negligence, the plaintiff's injury would not have occurred").[13]

It would have been reversible error to submit a specification that lacked causation evidence. *Manno*, 519 N.W.2d at 823; *see also Field v. Palmer*, 592 N.W.2d 347, 352 (Iowa 1999) ("A trial court has the responsibility to submit only those instructions that have support in the record").

At trial, Plaintiff argued there was causation evidence from the defense position that the mother's pushing caused the injury via the maternal forces. App. II, 348 (Vol III, 289:9-23). But this is not the case. Defense expert Dr. Boyle did not testify that maternal pushing alone after the recognition of the shoulder dystocia and during the one minute and 10 seconds at issue caused the injury. *See Id*. 179 (Vol II, 240:11-23, Dr. Boyle).

Asher v. OB-GYN Specialists, 846 N.W.2d 492 (Iowa 2014) does not help Plaintiff as to his lack of causation evidence. In *Asher*, a shoulder dystocia case, the court found there was sufficient evidence of causation to support specifications of negligence given there was evidence that the alleged negligent acts "led to the shoulder dystocia" and increased the risk of harm. *Id.* at 500,

[13] This is how the jury was instructed in this case. *See* App. I, 386 (Instruction No. 13, "The conduct of a party is a cause of damage when the damage would not have happened except for the conduct.").

503. In *Asher*, there was expert evidence to support the alleged negligent acts (use of a vacuum and a failure to document) increased the chance of shoulder dystocia and identification of a problem which in turn led to the injury. *Id.* at 500-03. In contrast, here, there is no evidence at all to link the repeated encouragement to push with the outcome.

d. There was no prejudice.

There can be no prejudice to Plaintiff given the lack of evidence to support submission of this specification. It was incumbent on Plaintiff to proffer the needed evidence to support the specification as a standalone theory of recovery. Plaintiff did not do so.

Further, there was no prejudice as a result of the court declining to separately instruct on one of many aspects and steps in the nursing maneuvers. As discussed above, there were many other aspects and steps in the maneuvers that were supported by expert testimony that Plaintiff chose *not* to propose as separate specifications. And the jury *was* instructed it could find negligence based upon performance of the maneuvers that fell below the standard of care—that specification encompassed all of the steps and aspects of the maneuvers.

In addition, in explaining its reasoning as to the specifications, the district court made it abundantly clear to Plaintiff's counsel that he could argue the allegation about the direction to push without limit. App. II, 349 (Vol III,

290:11-17 “You can argue that point, that’s fine. You can argue that all you want, and that’s fine.”). Plaintiff’s counsel did so in closing argument. *See* App. II, 414-15 (Vol III, 390:6-391:24). *See Hutchinson*, 459 N.W.2d at 277 (agreeing that requested instruction was adequately covered in court’s instruction, noting “defendants were free to argue, and apparently did” their position on the issue).

Plaintiff argues that because the court refused to submit the pushing specification, defense counsel argued in closing arguments that it was irrelevant. Plaintiff’s brief 36. Yet, the defense argument cited by Plaintiff did *not* mention the pushing allegation but instead referenced other accusations made during trial by Plaintiff that were not submitted by the court. *See* App. II, 434-35 (Vol III, 421:22- 422:2, citing arguments and testimony about Pitocin, vacuums, charting, and calling for help “that are totally irrelevant”).

2. The failure to “properly and effectively perform” specification.

a. The district court was not required to use Plaintiff’s language.

Plaintiff’s complaint is that the specification submitted by the court (that the nurses were negligent “in the performance” of the maneuvers) prejudicially varies from Plaintiff’s proposal (that the nurses “failed to properly and effectively perform” the maneuvers). But Plaintiff himself and his experts use

alternative words and phrases in describing this theory and suggest the word and phrases are interchangeable. *See* Plaintiff's brief 47 (maneuvers by nurses "were inadequate, improper, or *otherwise* ineffective") (emphasis added); App. II, 78 (Vol I, 264:17, Nurse Sprague, "The maneuvers were never done correctly").

"A trial court is not required to word jury instructions in a particular way and is free to draft instructions in its own way if it fairly covers the issues." *Kiesau*, 686 N.W.2d at 175. The "court is entitled to choose its own language in submitting an issue and need not adopt the form requested by a party." *Schuller*, 328 N.W.2d at 332.

b. Plaintiff's proposal was duplicative, an overemphasis, and confusing.

As proposed by Plaintiff, there would be duplication and overemphasis of the alleged negligent act. Under Plaintiff's proposal, the substance of the specification would be that the nurses were negligent by negligently (i.e. improperly) performing the maneuvers. That the district court formulated the specification to avoid this language that is cumbersome (at best) and a prejudicial over-emphasis (at worst) was not legal error. It certainly did not cause prejudice.

As the district court noted during the instruction conference in reference to another instruction where Plaintiff proposed "properly and effectively"-- "I

think we're over adverbing this." App. II, 346 (Vol III, 287:13-19).[14] Plaintiff seemed to agree as to other instructions. In another instruction, Plaintiff himself argued in support of one word to encompass others. As to traction, Plaintiff argued that the specification for Dr. Widmer should only include "improper traction" and not "excessive axial or lateral traction" because "[i]mproper traction contemplates both." *Id.* 332 (Vol III, 273:13-21); *Id.* 333 (Vol III, 274:6-8, objection to "axial and lateral" as "merely complicating and . . . confusing to the jury"). In the same way, adding a list of adverbs to qualify performance when the jury was already instructed that the issue was whether the nurses were negligent in the performance adds nothing but potential complication and confusion.

The word "effectively" created a risk of misleading the jury on the evidence. Plaintiff's own expert agreed that in the efforts to deliver a baby once dystocia is recognized, the physician and nurses have at their disposal a number of maneuvers. If the least invasive maneuvers do not succeed in resolving the dystocia, the delivery team moves to another. *See Id.* 100 (Vol I, 384:6-19, Dr. Duboe testifying that once shoulder dystocia is recognized, one can start with McRoberts and "[i]f that doesn't work, . . . you go to your next maneuver.");

[14] The court also observed "these people aren't English majors. They aren't going to be looking at a dictionary." App. II, 348 (Vol III, 289:3-6).

App. II, 134 (Vol I, 495:10-13, Dr. Duboe describing Dr. Widmer should have use "fetal maneuvers if the proper maternal maneuvers were not effective in reducing the shoulder dystocia"). In other words, Plaintiff's own experts did not testify that if a maneuver does not work (i.e. was ineffective), that necessarily means there is negligence. By adding the word "effectively," Plaintiff proposed unnecessary ambiguity in the specification with the potential to mislead the jury. *See Anderson*, 620 N.W.2d at 268 (a prejudicial instruction is one which "confuses or misleads the jury").

As with the pushing specification, the phrase "failing to properly and effectively" perform is encompassed in the language the court used. There was no error. *See Alcala*, 880 N.W.2d at 707 (court required to give correct and applicable instruction if it "is not embodied in other instructions."); *Van Iperen*, 392 N.W.2d at 484-85 (affirming trial court's refusal to submit specifications in part because they were subsumed in specification given); *Schuller*, 328 N.W.2d at 332 (affirming decision to submit one specification of negligence: "[The] concept was adequately incorporated in the single submitted specification.").

c. There was no prejudice.

Plaintiff cannot establish prejudice by the court's submission of the issue as:

> the nurses were negligent in the performance of the maneuvers

instead of:

> the nurses failed to properly and effectively perform the maneuvers.

As Plaintiff himself argues "The record is replete with testimony from TD's experts stating that the maternal maneuvers attempted by the HCHC nurses were inadequate, improper, or otherwise ineffective." Brief 47 (citing transcript pages). Plaintiff's theory was not lost on the jury. *See Olson*, 522 N.W.2d at 287 ("Error in giving or refusing to give instructions is reversible, only if prejudicial.").

D. There was no error in the specifications as to Dr. Widmer.

HCHC also disagrees that there was any error as to the specifications for Dr. Widmer. HCHC agrees with, and joins in, Dr. Widmer's appeal arguments as to the specifications against him.

II. There was no abuse of discretion in excluding Dr. Widmer's continuing medical education records.

Plaintiff does not argue that this appeal issue pertains to HCHC. Plaintiff's argument is limited to Plaintiff's offer of proof as to four exhibits concerning Dr. Widmer's continuing medical eduction ("CME") records. There was no claim submitted to the jury that HCHC was liable for Dr. Widmer's negligence. *See* App. I, 405-07 (verdict).

HCHC agrees with, and joins in, Dr. Widmer's appeal arguments on this issue. In addition, HCHC provides the following:

A. Standard of review.

HCHC agrees that the admissibility of evidence is reviewed for an abuse of discretion. *See Graber v. City of Anke*ny, 616 N.W.2d 633, 638 (Iowa 2000). "Issues of relevancy and prejudice are matters normally left to the discretion of the trial court; we reverse the trial court only when we find a clear abuse of that discretion." *Shawhan*, 420 N.W.2d at 809.

"Rulings within the trial court's discretion are 'presumptively correct, and a party challenging the ruling has a heavy burden to overcome the presumption.'" *Williams v. Dubuque Racing Ass'n*, 445 N.W.2d 393, 394 (Iowa Ct. App. 1989) (quoting *Countryman v. McMains*, 381 N.W.2d 638, 640 (Iowa 1986)). A court abuses its discretion only if its decision was "based on a ground or reason that is clearly untenable or when the court's discretion [was] exercised to a clearly unreasonable degree." *Pexa v. Auto Owners Ins. Co.*, 686 N.W.2d 150, 160 (Iowa 2004).

"'Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected. . . .'" *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 183 (Iowa 2004).

B. Preservation of error.

HCHC does not agree that Plaintiff preserved error. While Plaintiff made an offer of proof of Exhibits 137, 139, 139A, and 140, Plaintiff made no offer of proof of testimony on the exhibits. *See* App. II, 175-77 (Vol II, 212:3-214:21). Plaintiff argued the CME was relevant to show Dr. Widmer "didn't study obstetrics to the same percentage as . . . made up his practice." *Id.* 176 (*Id.* 213:1-12). Counsel's argument is not evidence. As discussed further below, Plaintiff offered no expert, or other, testimony in offer of proof to establish the relevance of the CME records. *See, e.g., Glenn v. Carlstrom*, 556 N.W.2d 800, 803 (Iowa 1996) (standards "must be . . . made relevant to issue by appropriate expert testimony"); *Brooks v. Holtz*, 661 N.W.2d 526, 529 (Iowa 2003) (offer of proof is necessary to provide a meaningful record for review, which exists "'when the court does not have to speculate on the evidence sought to be introduced.'").

Nor did Plaintiff make an offer of proof of questions to Dr. Widmer to "impeach" him as an expert.

In addition, Plaintiff's offer of proof includes material which is clearly inadmissible as hearsay and otherwise inadmissible under Rules of Evidence 5.402 and 5.403. Court exhibit 140 consists of a summary, apparently prepared by Plaintiff's counsel, which is hearsay, argumentative, and would require authentication by a witness for admission. App III, 93 (Court Exhibit 140).

Perhaps more troubling is court exhibit 137, which consists of 529 pages of discovery material.

Court Exhibit 137 includes many sets of interrogatories and requests for production and responses, including on subjects completely unrelated to the CME records (*see, e.g.*, Supp. App. 29-91); requests for admissions which were never admitted at trial and which included inadmissible matters such as insurance (*see, e.g., id.* 94-105); produced documents other than the CME exhibits, including patient medical records, Dr. Widmer's applications for hospital privileges, an employment agreement, and medical literature (*id.* 108-139, 161-70); email exchanges among counsel (*id.* 193-99, 215-17, 345-49); Plaintiff's motion to compel with a counsel affidavit (*id.* 259-85); deposition testimony, not all of which was admitted at trial, including excerpts of depositions of Nurses Sloan and Fraise (*id.* 335-40, 456-65, 482-86; 487-91(Sloan); 492-94 (Fraise)); and expert reports which were not admitted at trial (*id.* 403-06, 441-45, 495-502).

Even a cursory review of Exhibit 137 demonstrates it was wholly inadmissible for consideration by the jury given its inclusion of discovery, legal objections and argument, and counsel correspondence –as well as testimony and substantive documents which were otherwise not admitted. Yet Plaintiff offered it for such a use. Plaintiff was obligated to present offer of proof

exhibits in a format that were specific to the issue and suitable for jury consideration. *See Brooks*, 661 N.W.2d at 529 ("where part of the evidence is admissible and part is not, 'it is incumbent on the offeror, not the judge, to single out the admissible part.'")(quoting 1 John W. Strong, *McCormick on Evidence* §51 at 219 (5th ed 1999)).[15]

It matters not that Defendants did not object to these exhibits on all possible grounds at trial. *See State v Werts*, 677 N.W.2d 734, 737 (Iowa 2004) ("evidentiary rulings may be upheld on a theory not urged at trial"). Had the district court indicated an intent to reverse its prior ruling excluding the CME evidence, Defendants would have added to their objections based upon receipt of the specific offer of proof exhibits at trial.

C. There was no prejudice.

The nature of the CME exhibits was to allegedly impeach Dr. Widmer as an expert and to "call into question" his professional judgment and care and treatment in this case. App. II, 175-76 (Vol II, 212:8-213:12). Yet, in their very argument, Plaintiff's counsel referenced the other evidence in the record supporting Plaintiff's theories. *Id.* 176 (*Id.* 213:2-5, "the record itself shows, *in*

[15] This case is not like *Brooks*, where the trial court could readily determine what part of the offer of proof was inadmissible as there was agreement among counsel that settlement evidence would be omitted from offered exhibit. 661 N.W.2d at 529-30.

addition to his admissions, that he didn't know any other maneuvers beyond the two that he may have known.") (emphasis added); *see also* Plaintiff's brief 54 (evidence at trial included that Dr. Widmer's admitted "that he was unfamiliar with most of the fetal maneuvers"). The CME exhibits — purportedly showing Dr. Widmer's lack of obstetrical knowledge as relevant to this case—were cumulative. Thus, there is no prejudice. The district court explained its ruling:

> Just [to] reiterate the issue in the case is whether he used the proper standard of care during the delivery of [TD]. A lot of those statements or what maneuvers he used is already in his deposition, . . . So maintain the same ruling.

App. II, 177 (Vol. II, 214:15-21); *Id.* 176 (Vol II, 213:13-19, court: "some of the statements you said just bore out . . . the reasons for the ruling"); *see also Taylor v. State*, 352 N.W.2d 683, 687 (Iowa 1984) ("withholding of cumulative testimony will not ordinarily" establish prejudice).

Plaintiff introduced evidence at trial as to Dr. Widmer's education and training, including the alleged *lack* of experience in certain fetal maneuvers to attempt to resolve a shoulder dystocia. In Plaintiff's case, his expert Dr. Duboe testified that "Dr. Widmer didn't have that knowledge base. He didn't have that experience. He didn't ever have a prior experience." *Id.* 123 (Vol I, 432:15-17); *Id.* 99 (Vol I, 378:4-17, Dr. Duboe: based upon Dr. Widmer's deposition, Dr. Widmer had no experience with the fetal maneuvers and agreeing that in Dr.

Widmer's 30 years and 1000 deliveries "he's never used or was familiar with or knew what [the fetal maneuvers] were."). Dr. Duboe's testimony is substantially more probative on Plaintiff's theory than the CME records--offered by Plaintiff without any expert explanation.

In Dr. Widmer's deposition, shown to the jury, he was asked about his attendance at obstetric or other seminars relating to deliveries. App. II, 472 (Dep. 42:12-16). He testified that while he would go to family practice reviews over the course of 35 years that would have some obstetrics, he could not identify or recall a "specific obstetrics course." *Id.* 42:17-25. Plaintiff repeated the answer for emphasis: "You can't remember a specific obstetrics course." *Id.* 43:1-3. When asked "what advanced training" he had to qualify him for delivering babies, Dr. Widmer referred to his residency in 1978-81, his continuing eduction (for which he could not remember specifics as to obstetrics), and on-the-job training with colleagues. App. II, 474 (Dep. 51:4-25).

When he was asked about the fetal maneuvers performed by a physician in shoulder dystocia case, Dr. Widmer testified that he did not recall ever using the reverse Woods screw or Zavanelli. *Id.* 491 (Dep. 99:16-100:7). He further testified that if suggested by others to use these methods, he would "probably not" know the procedure by those names or by another term. *Id.* 491-92 (Dep.

101:2-14). He also testified that he had never performed the Woods maneuver. App. II, 500 (Dep. 132:19-24). He testified he "would have no idea" if there is any difference between the reverse Woods and Woods but he assumed they were different. *Id.* 133:9-24. He testified he did not "know what the reverse Woods is." *Id.* 133:25-134:4. Plaintiff's counsel returned to this subject during cross examination at trial. Dr. Widmer testified he did not recall ever performing the Woods maneuver or reaching for the posterior arm. App. II, 234-35 (Vol III, 71:7-72:24).

While HCHC does not agree with Plaintiff that the above testimony in anyway demonstrates that Dr. Widmer was not qualified,[16] it clearly demonstrates that Plaintiff was allowed to introduce substantial evidence about Dr. Widmer's obstetrical education (or alleged lack thereof) and his experience with physician maneuvers to resolve a shoulder dystocia (or alleged lack thereof). This evidence is far more specific to his qualifications applicable to this case than Dr. Widmer's CME records. Plaintiff himself emphasizes the testimony as "admissions." Plaintiff's parting words to the jury in his rebuttal closing arguments included:

> . . . You've got to relieve the shoulder dystocia so the shoulder can pass without injury, and there are ways to do that, maternal

[16]For example, Dr. Widmer explained that he was trained not to use proper names for the maneuvers but to describe them instead. App. II, 489 (Dep. 91:2-16).

> maneuvers, like McRoberts and suprapubic, and fetal maneuvers *that Dr. Widmer doesn't know how to do.*

App. II, 444 (Vol III, 474:2-6) (emphasis added).

The CME records, which alone and without expert testimony only reflect Dr. Widmer's continuing education hours without any context of his underlying medical education and experience or what type of CME a physician such as Dr. Widmer would be expected to attend, are considerably *less* probative on his training and experience than the evidence admitted. Whether introduced as support for a breach of the standard of care or to impeach Dr. Widmer, Plaintiff had the evidence he needed and there was no prejudice by exclusion of the CME records.

D. The district court did not abuse its discretion in excluding the CME exhibits.

There was no negligent training claim or negligent credentialing claim against either Defendant. *See* App. I, 375-99 (instructions). Plaintiff's medical standard of care expert, Dr. Duboe, did not testify (or attempt to testify) about the necessary or reasonable training and preparation for a physician in circumstances similar to Dr. Widmer. HCHC does not agree that the excluded CME exhibits were relevant.

Further, as set forth above, Plaintiff made no offer of proof from his expert to explain to the jury the alleged significance of the CME records. A lay

jury does not know if a physician is only competent and qualified to deliver babies if he or she obtains ongoing education in obstetrics in addition to medical school and residency and experience as a practicing physician. The jury was instructed that it was to determine the degree of "learning required of Dr. Widmer . . . only from the opinions of the physicians . . . who have testified as to the standard of care." App. I, 387 (Instruction No. 14). Without expert testimony, the jury would have been left only with inferences and argument from Plaintiff's counsel (which is not evidence and which would have been unfairly prejudicial).

Even if relevant to Dr. Widmer's credibility and background, the district court did not abuse its discretion in excluding the CME exhibits under Rule 5.403. As explained above, the probative value of the records is marginal at best. However, the entire subject matter of Dr. Widmer's CME records, if allowed at trial, would have been unfairly prejudicial to the defense.

For example, Plaintiff's expert Dr. Duboe included inflammatory comments in an August 3, 2017 expert report, including that Dr. Widmer "elected not to produce some CME records . . . and has been evasive and defensive." App. III, 221(8-22-17 HCHC resistance to motion for leave, Exh. 5, p 4); *id.* (suggesting Dr. Widmer is taking litigation and TD's injury "lightly," referencing a legal pleading in case). This opinion by Dr. Duboe was before the

district court prior to trial and considered when the court was considering Plaintiff's proposed amended petition and Defendants' motion to strike Dr. Duboe's new opinions. In its ruling, the district court stated:

> The report of August 3, 2017, as set for the in the final redaction sets for the statements that can be clearly understood to be opinions on credibility, statements of legal conclusion, sarcasm, and statement regarding motive. These will have no place at trial. . . . These can be addressed at trial or through a motion in limine.

App. I, 184 (10-13-17 ruling 8).

Accordingly, and not surprisingly, Defendants moved in limine on discovery and procedural disputes, including "allegations" about the defense production. *Id.* 213-14 (10-24-17 joint motion 7-8, ¶3); *see also id.* 229-30 (10-24-17 Widmer motion ¶19, moving to exclude CME records). In response, at the hearing on the motions in limine, Plaintiff's counsel acknowledged that he understood Defendants' motions to pertain to "the alleged delays in the production of the CME's" and argued strenuously that he should be allowed to make references to, and introduce evidence about, Defendants' alleged failure to "fully answer discovery requests" as "relevant and highly probative." Supp. App. 14-15 (limine hearing 144:18-145:9); *see also id.* 15-16 (145:22-146:2, Plaintiff stating he wanted to ask Dr. Widmer at trial "why did you take that position" in discovery); *Id.* 16-19 (146:3-149:25).

Nearly every, if not every, time Plaintiff's counsel discussed the CME exhibits, Plaintiff's counsel did so with inflammatory accusations. *See, e.g.*, App. I, 81 (10-13-17 ruling 5: "The Plaintiff makes very strong and personal statements regarding the actions and intentions of counsel . . . This included allegations that fit in the category of dishonesty . . ."). By the time of Plaintiff's offer of proof on the CME exhibits, Plaintiff's counsel had already violated motions in limine and motions for mistrial had been made. *See* course of proceedings above. In this context, particularly in conjunction with the low probative value of the CME records, there was a great risk of improper statements from Plaintiff's counsel and unfair prejudice if the CME records were introduced. The district court did not abuse its discretion.

III. There was no abuse of discretion in allowing Dr. Widmer's testimony.

Plaintiff complains about one question and answer in Dr. Widmer's testimony (as an undisclosed opinion) and about his testimony as to his observations during trial about which he made notes (as undisclosed in discovery).

This appeal issue does not appear to pertain to the claims against HCHC. Plaintiff does not argue otherwise. HCHC agrees with, and joins in, Dr. Widmer's appeal arguments on this issue. In addition, HCHC provides the following:

A. Standard of review.

HCHC agrees evidentiary rulings are reviewed for an abuse of discretion. *See* authority under Part II A; *Hansen v. Central Iowa Hospital Corp.*, 686 N.W.2d 476, 479 (Iowa 2004).

B. Preservation of error.

HCHC agrees Plaintiff interposed an objection to the single question to Dr. Widmer that is at issue in Plaintiff's appeal. *See* Plaintiff's brief 61 (quoting question and Vol II, 428:2-7).

As to the discovery complaint and Dr. Widmer's testimony at trial on notes he made while listening to the birth video during trial, it was Plaintiff—not Dr. Widmer's counsel—who published Dr. Widmer's notes to the jury. After Plaintiff complained about the notes and an extensive record outside the presence of the jury on this issue, Dr. Widmer's counsel determined: "I'm not going to use it, Your Honor." App. II, 257 (Vol III, 107:23-24);[17] *see also id.* 248-257 (Vol III, 98:5-107:25). It was Plaintiff who then showed the notes to the jury. *Id.* 265-68 (Vol III, 117:20-120:24). Plaintiff waived the appeal issue pertaining to Dr. Widmer's notes by going substantially further than Dr. Widmer's counsel and actually displaying the notes to the jury.

[17] In fact, Dr. Widmer's counsel only ever intended to use the notes to refresh Dr. Widmer's recollection, not to introduce as evidence. *See* App. II, 245-47 (Vol III, 95:9-97:23).

C. The district court's rulings were not an abuse of discretion.

1. The standard of care question.

The question about which Plaintiff complains was:

> 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.

Plaintiff's brief 61; App. II, 209 (Vol II, 428:2-7).

First, as to HCHC, HCHC counsel asked no questions of Dr. Widmer at trial. App. II, 211-12 (Vol III, 7:24-8:1). To the extent he had testimony as to the nursing staff, that was primarily –if not entirely—elicited during the deposition, shown during Plaintiff's case. Thus, Dr. Widmer's opinions as to the nursing staff were disclosed in his August 3, 2016 deposition, more than 2 years before trial.[18]

[18] He testified that he asked the nurses to pull the mother's legs up towards the chest (the McRoberts) and they did so satisfactorily. App. II, 487-88 (Dep. 83:14-84:8). He described the suprapubic pressure as acceptable by hand or fist. *Id.* 493 (Dep. 104:10-25). He testified that the McRoberts maneuver was performed successfully and properly and that the maneuvers were effective. *Id.* 494, 540 (Dep. 107:24-108:3, 267:22-268:17).

Further, Dr. Widmer would have reached opinions about the nurses' performance during his care and treatment as he was, according to Plaintiff's experts, responsible to direct or correct the nurses in performance of the maneuvers. App. II, 64 (Vol I, 222:16-18, Nurse Sprague: "the doctor is in charge of the team. They let us know what they need."); *Id.* 93-94 (Vol I, 330:16-331:19, Dr. Duboe, physician is the boss and it is physician's job to recognized if maneuvers are not being done properly and make corrections). Iowa law allows a treating physician to testify regarding the care he provided and any opinions he reached in connection with that care without disclosure of a written expert report. *See Hansen,* 686 N.W.2d at 482-83.[19]

Nor does HCHC agree that the district court abused its discretion in allowing the testimony as to Dr. Widmer's own care and treatment. First, a significant part of Plaintiff's case was that Dr. Widmer was negligent in failing to correct the nursing staff. Yet, his opinions about the nurses' performance were disclosed in his deposition and were part of his care and treatment.

Moreover, Dr. Widmer was not a retained or specially employed expert who was required to provide a written report under Iowa Rule of Civil

[19] *Hansen* does not hold that a treating physician could never opine on the appropriateness of care without a disclosed opinion. *See* 686 N.W.2d at 482 (physician is not "ordinarily" required to form standard of care opinion in treatment).

Procedure 1.500(2)(b). Assuming without conceding that Rule 1.500(2)(e) applies,[20] it was satisfied. Rule 1.500(2)(e) states that an expert who is not required to provide a report, must disclose the subject matter and summary of facts and opinions (as opposed to a signed written report).

Dr. Widmer's expert designation identified that Dr. Widmer would testify on the standard of care. *See* App. I, 27 *(* 9/9/16 HCHC and Widmer Designations).[21] Given that Plaintiff knew that Dr. Widmer did not admit that he breached the standard of care, it was clear that Dr. Widmer's trial testimony would be precisely as it was—that he believed his care conformed to the standard of care. The designation, combined with the rest of Dr. Widmer's discovery responses, including the reports of his retained experts and Dr. Widmer's deposition testimony as to the nurses' maneuvers, adequately informed Plaintiff as to Dr. Widmer's opinion on the standard of care.

This single opinion could not have surprised Plaintiff and it was adequately disclosed by disclosing Dr. Widmer as an expert on the standard of

[20] HCHC knows of no Iowa authority that supports applying all of the disclosure rules applicable to retained experts or treating physicians to the actual defendant physician in a medical malpractice case.

[21] Dr. Widmer's designation included that "The purpose of calling Dr. Widmer will be to have him testify on the issue of standard of care, causation and damages." App. I, 27 (9/9/16 Widmer Designation).

care—more than 2 years before the case was tried. The district court's allowance of this one question and answer was not an abuse of discretion.

2. Dr. Widmer's trial notes and related testimony.

Plaintiff's complaint appears to be that the notes Dr. Widmer took at trial and his related "opinion" were not disclosed during discovery. Of course the notes were not disclosed in discovery –they did not exist during discovery. And Dr. Widmer's testimony was not an expert opinion which he was required to disclose earlier. The notes and his related testimony were factual in nature—the type of facts which a defendant in a medical malpractice case must be allowed to present in defending him or herself at trial. *See* App. II, 249 (Vol III, 99:5-15, counsel describing intent of testimony is to "testify as to the facts as he sees them and hears them on the videotape as to what the heart rate tones were").

After argument outside the presence of the jury, the district court's discussion and ruling included:

> . . . what I understand the doctor is going to testify to is on an exhibit in evidence, which is the birth video.
>
> There was examination of him regarding his interpretation of the distress of the child, heart rates and so forth. All he's doing is testifying to what he believed was on the tape that shows why he did what he did. Again, I don't see it to be anything more than that, and he was cross-examined extensive about that, so he should have a chance to respond.
>
> As far as the cheat sheet notes, whatever it was, . . . it was just created. It's on the video for the jury to hear, I assume. The only

> thing he's doing is making sure they understand what's on the video, is my understanding.
>
> Second thing is that these document cheat sheets and so forth. I mean, throughout this case there's like 40 points and these are cheat sheets. . . . nobody can remember . . . every little thing over a course of 20 minutes about what was said, like he said it 24 times or 22 times or 10 times. That's the same reason the Plaintiff has these out, kept referring to them, . . . there's one, two, three, four, five boards. I mean, those are . . .the same thing. You know, that just helps people remember what was said and so that they can understand what was going on with out . . . constantly going back, refreshing your memory and so forth. So I'll allow the question.

App. II, 256-57 (Vol III, 106:6-107:9). Dr. Widmer then showed Plaintiff's counsel the notes before the jury returned. *Id*. 258 (Vol III, 108:10-15).

On further direct, Dr. Widmer then testified that he timed the baby's heart rate while he listened to the birth video during trial, wrote it down, and calculated it. *Id.* 258-59 (Vol III, 108:22-109:7). He then testified to the heart rate at different times during the video and other things he heard on the video. *Id.* 258-64 (Vol III, 108:8-114:2).

Plaintiff, on re-cross-examination, went into Dr. Widmer's notes, establishing that they were made "last Friday." *Id.* 265 (Vol III, 117:17-19). It was Plaintiff's counsel who then showed the notes to the jury. *Id.* 265-69 (Vol III, 117:20-121:2). In further re-direct, Dr. Widmer's counsel offered the notes (Exh. CC) "that's been shown to the jury now." *Id.* 271(Vol III, 123:14-17). The court admitted the notes as demonstrative only over Plaintiff's objection

based upon the discovery rules. App. II, 271-72 (Vol III, 123:18-124:1); App. III, 190 (Court Exh. CC).

Plaintiff fails to acknowledge that Dr. Widmer is more than a treating physician—he is a party. Plaintiff cites no authority that a defendant physician, who is also necessarily a treating physician, cannot testify about factual information or about the evidence presented at trial unless that is previously disclosed as an expert or treating physician opinion. The subject matter concerned the facts at the delivery of TD –specifically what was audible to those in the delivery room in terms of the baby's heart tones and rate. The court did not abuse its discretion in allowing the testimony. *See also* App. II, 254 (Vol III, 104:10-13, HCHC counsel argument at trial: "I think that the witness ought to be able to testify what he was hearing at the time.").

D. There was no prejudice.

Plaintiff argues he was "ambushed;" could not prepare to meet Dr. Widmer's new opinions, including those expressed in the notes; and could not adequately cross-examine Dr. Widmer. Plaintiff's brief 57-58. Plaintiff has not established prejudice.

A single question on standard of care to Dr. Widmer—the answer to which could not have surprised Plaintiff—caused no prejudice. There was no ambush, no surprise, and no inability to respond. Further, Dr. Widmer's opinion

is cumulative to Dr. Boyles. The admission of cumulative evidence is not prejudicial. *See Estate of Long*, 656 N.W.2d at 88-89; 7 Iowa Practice, §5.403.1 (E) (2003) ("admission of cumulative evidence is not a prejudicial error.").

As to the notes and testimony about the notes, they are derived from Plaintiff's own exhibit—the birth video. The birth video was Plaintiff's video. It was in evidence as Exhibit 8 and had been shown to the jury multiple times by this point in the trial. *See* Part IVA. There was no information on Dr. Widmer's notes (what he heard on the video) that was not available to Plaintiff. The video was available to Plaintiff long before it was available to the defense and Dr. Widmer's notes were made available promptly.[22]

The same information that Dr. Widmer obtained listening to the video during trial could have been obtained (with much more time) by playing the 21 minute video[23] again at trial during Dr. Widmer's re-direct. As counsel argued to the court at the time "under 403, we think that would be an incredible waste of time." App. II, 255 (Vol III, 105:14-24).

Further, the use of Dr. Widmer's notes, which summarized the trial evidence, is akin to Plaintiff's trial tactic of having each expert fill out a blank

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[22] Dr. Widmer's counsel became aware of the notes on a break during trial on the same day they were brought to the attention of the court and Plaintiff. App. II, 247, 255-56 (Vol III, 97:2-6, 105:14-106:2).

[23] The video was 21 minutes long. App. I, 267 (Vol III, 119:8-9).

exhibit to reflect their trial testimony as to the number of deliveries they participated in over their career and estimated number of shoulder dystocias. *See, e.g.,* Supp. App. 20 (Exh. 162A); App. II, 286-87 (Vol III, 197:14-198:20, Plaintiff's counsel explaining to HCHC expert nurse Sanborn: "We're doing this with all the witnesses . . . Would you just fill this sheet out and I'll ask you each question). While Dr. Widmer created notes while listening during trial, Plaintiff asked experts to create a trial exhibit—which was not disclosed in discovery—based upon trial testimony.[24]

IV. The district court's ruling as to the birth video and limine orders do not support a new trial.

A. The birth video.

1. Standard of review.

HCHC agrees that the district court's ruling as to the jury's access to the birth video is reviewed for an abuse of discretion. *See Brooks v. Holtz*, 661 N.W.2d 526, 532 (Iowa 2003) ("'[S]ubmission of exhibits to the jury is a matter resting in [the] trial court's discretion.'"); *State v. Baumann,* 236 N.W.2d 361, 366 (Iowa 1975) (trial court has "considerable discretion" in acting on a jury request to hear tape recordings during deliberations).

[24] *See* App. II, 65-66 (Vol 1, 248:14-249:6, court overruling defense objection to exhibit for Nurse Sprague as information is "already in the record"); *Id.* 87-90 (Vol I, 319:16-322:9, Plaintiff's expert Duboe completing similar exhibit and court overruling defense hearsay and cumulative objection to exhibit).

2. Preservation of error.

HCHC agrees Plaintiff preserved error as to the jury's access to the birth video. App. II, 387-94, 399-401 (Vol III, 328:10-335:9; 343:19-345:2).

3. The district court did not abuse its discretion in only allowing the jury to view the birth video once during deliberations.

Before the jury began deliberations and after closing arguments, the district court stated to the jury:

> . . . You'll have the exhibits in the jury room. As stated by the lawyers in the case, if you wish to review the birth tape again, we will have that set up. We will play it from beginning to end. Actually, I think we probably do it in here, not in the jury room, because that TV is bigger and you have a little bit more room, and I think the acoustics would probably be a bit better. So we would to that, just let somebody know. Very simple, okay?

Id. 445-46 (Vol III, 475:22- 476:5). The jury did ask to see the video and the court allowed the request. App. I, 400-04 (11-17-17 notice and record entry re juror note).

The district court and counsel discussed the issue at length the day before. App. II, 387-404 (Vol III, 328:10-335:9). The district court ruled that it would allow the video to be played once rather than allowing unlimited access to the video. *Id.* 390, 400-01 (Vol III, 331:19-23; 344:22-345:2, court noting ruling was consistent the case law reviewed). The district court did not abuse its discretion.

In *Brooks*, 661 N.W.2d at 532, the Iowa Supreme Court affirmed the trial court's ruling that the jury would not be allowed to have a tape of an accident scene during deliberations. As in this case, in *Brooks*, the video was shown several times to the jury, contained audible comments, was admitted into evidence, and plaintiff requested that the jury be allowed to have the video. *Id.* After discussing Iowa law that certain types of evidence may be given disproportionate importance when allowed during deliberations, the Supreme Court found no abuse of discretion: "This judgment call was one for the trial court to make." *Id.*

The same is true in this case. It was for the district court, who sat through the entire trial and heard the testimony and argument about the video and who watched and heard the video the same number of times as the jury, to make the judgment call as to whether unlimited access to the video would cause undue emphasis and prejudice. *See also Baumann*, 236 N.W.2d at 366 (upholding trial court ruling to withhold audio tape from jury in deliberations even though requested by jury); *State v. McCullough*, 2012 WL 5541238 *4 (Iowa Ct. App. 2012) (affirming trial court's ruling, "limiting the jury to a single viewing of [a] video," as it protected against the risk that the jury would "replay parts of the interview multiple times, overemphasizing it in comparison to other evidence"); *id.* ("by arranging a single showing in the courtroom, the district court ensured

the jury did not improperly use the DVD exhibit."); *State v. Mack*, 2012 WL 2819367 *3 (Iowa Ct. App. 2012) (affirming trial court's order to deny jury request to review video evidence, citing relevant factors including need to protect against improper use).

The birth video was 21 minutes long. It was shown multiple times to jury.[25] Plaintiff essentially had unlimited opportunity at trial to show the video during witness examinations. *See* App. II, 80 (Vol 1, 266:15-21, court overruling cumulative objection to video); *Id.* 213 (Vol III, 30:4-9, same).

Videos possess an inherent ability to over-emphasize evidence. *See Bannister v. Town of Noble*, 812 F.2d 1265, 1269 (10th Cir. 1987) (acknowledging "dominating nature of film evidence" as a "legitimate concern;" discussing concern that jury will give greater weight to film). If allowed in the jury room the jurors could draw conclusions from parts of birth video that the parties' experts did not address. While the video was 21 minutes long, Plaintiff agrees that the parties' experts focused on one minute and eleven seconds of the video. Plaintiff's brief 68 ("Experts for both sides devoted extensive testimony to this time frame.").

[25] *See* App. II, 60-62, 73, 74-80, 80-82, 103-110 (Vol I, 116:20-118:25, 256:13-17, 260:17-266:10, 266:12-268:15, 391:1-398:9); App. II, 140-42 (Vol II, 44:5-46:7); App. II, 213-24, 273-78 (Vol III, 30:18-41:16, 139:2-144:9).

If allowed to start and stop the video without restriction during deliberations, the jury could focus on aspects that the experts did not find relevant to the issues in this case, draw its own conclusions about such parts without the aid of an expert witness, and place undue emphasis on irrelevant parts of the video.

The rational for the rule that medical treatises are not admitted as exhibits applies to the birth video in this case. Iowa Rule of Evidence 5.803(18) prohibits the introduction of literature as an exhibit—even if this hearsay exception applies to allow medical literature to be read at trial.[26] There are sound reasons for not allowing the jury to pour over medical literature—or an expert-sensitive video—during deliberations. As the Advisory Committee Notes for the Federal Rule on medical literature explain:

> . . . The rule avoids the danger of misunderstanding and misapplication by limiting the use of treatises as substantive evidence to situations in which an expert is on the stand and available to explain and assist in the application of the treatise if desired. The limitation upon receiving the publication itself physically in evidence, contained in the last sentence, is designed, to further this policy.

Fed. R. Evid 803, Advisory Committee Notes.[27]

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[26] Rule 5.803(18) provides that if proper foundation is laid, statements in a treatise "may be read into evidence but not received as an exhibit."

[27] *See also Tart v. McGann*, 697 F.2d 75, 78 n.2 (2nd Cir. 1982) ("The last sentence of Rule 803(18) prohibits the admission of treatises as exhibits, in

The above rationale applies to the birth video in this case and distinguishes the cases relied upon by Plaintiff that a court may, in its discretion, allow access to a recording during deliberations. Neither *State v. Jackson*, 387 N.W.2d 623, 628-29 (Iowa Ct. App. 1986) nor *State v. Hernandez*, 2013 WL 1452958 **4-6 (Iowa Ct. App. 2013) involved expert testimony giving relevance to and explaining the recordings at issue. The video –alone and in and of itself--was not the critical evidence. It was the medical and nursing testimony about the video that gave it relevance and importance.

Nor was the trial court obligated to allow the jury unlimited access to the video given the admission of defense exhibit BB (10 screenshots from the video). Those screenshots were used during expert witness testimony. *See, e.g*, App. II, 211 (Vol III, 7:11-19). They constitute a small fraction of the entire video. In contrast, there was 21 minutes of the video—much of which was never the subject of expert testimony.

Plaintiff did not overcome the presumption that the trial court's ruling was correct. *See Williams*, 445 N.W.2d at 394 ("Rulings within the trial court's discretion are 'presumptively correct, and a party challenging the ruling has a heavy burden to overcome the presumption.'").

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order 'to prevent a jury from rifling through a learned treatise and drawing improper inferences from technical language it might not be able properly to understand without expert guidance.'")(citation omitted).

4. There was no prejudice.

Plaintiff cannot demonstrate that the exclusion of the birth video from the jury room caused him prejudice. Plaintiff was unrestricted in his ability to examine and cross-examine the witnesses on the video. The jury heard all the evidence relating to the video that Plaintiff desired to introduce from multiple witnesses. *See, e.g, Taylor v. State*, 352 N.W.2d 683, 687 (Iowa 1984) ("withholding of cumulative testimony will not ordinarily" establish prejudice).

B. The limine orders.

1. Standard of review.

HCHC agrees evidentiary rulings are reviewed for an abuse of discretion. *See* authority under Part II A.

2. Preservation of error.

HCHC does not agree that Plaintiff preserved error on the motion in limine issues. Plaintiff includes a long list of granted limine motions which Plaintiff allege should not have been granted. Plaintiff's brief 70. However, Plaintiff does not even identify the subject matter for any but two limine points and only argues there were offers of proof for two. *Id.* 65, 70 (only addressing defense limine No. 4 and 19 and only identifying offers of proof regarding the nurses' training and Dr. Widmer's CME records). Thus, the only *possible*

limine orders for which Plaintiff preserved error were defense limine motion 4 and 19.

"Preserving a claim that evidence was erroneously excluded requires an offer of proof . . . ". Thomas Mayes & Anuradha Vaitheswaran, *Error Preservation in Civil Appeals in Iowa: Perspectives on Present Practice,* 55 Drake L. Rev. 39, 59 (2006); *Johnson v. Interstate Power Co.*, 481 N.W.2d 310, 317 (Iowa 1992) (party failed to preserve error by failing to make an offer of proof of evidence excluded by trial court's ruling sustaining a motion in limine as "there is nothing preserved to review on appeal.").

In addition, when a party fails to address a topic in an appeal brief it is waived. *See* Iowa R. App. P. 6.903(2)(g) ("Failure to cite authority in support of an issue may be deemed waiver of that issue."); *McCleeary v. Wirtz*, 222 N.W.2d 409, 415 (Iowa 1974) ("plaintiffs neither present argument on that issue nor is reference made to any authority touching on the subject. Therefore the assignment is deemed waived.").

Plaintiff cannot cure this in reply. *See Young v. Gregg*, 480 N.W.2d 75, 78 (Iowa 1992) ("[W]e have long held that an issue cannot be asserted for the first time in a reply brief."); *State v. Walker*, 574 N.W.2d 280, 288 (Iowa 1998) (declining to consider argument raised for the first time in reply brief).

In addition, Plaintiff did not preserve error as to the defense motion in limine No. 4 (regarding training evidence). While Plaintiff asserts he made an offer of proof on this subject—he did not. The cited transcript pertains to an offer of proof relating to HCHC's record retention policy, not training. *See* App. III, 118-19 (Court Exh 409, J. Wilson deposition excerpt regarding HCHC's policy on retention of documents); *Id.* 14 (Court Exh. 14, HCHC Policy on record retention); App. II, 166-71, 174-76 (Vol II, 197:13-202:21, 211:17-214:22). Plaintiff identified no offer of proof as to the training of nursing staff.

As to the defense motion in limine No. 19, Plaintiff cites his offer of proof regarding Dr. Widmer's CME records. *See* App. II, 177 (Vol III, 214:3-14, offering Court Exhibits 137, 139, 139A, 140). For the reasons set forth under Part II B, Plaintiff has also failed to preserve this issue as well.

3. The district court did not abuse its discretion.

As explained in the course of proceedings above, after the district court denied Plaintiff's motion for leave to amend his petition to add allegations and claims pertaining to negligent training and credentialing, Defendants moved in limine on the subjects. Defendants' motion in limine No. 4 sought exclusion of:

> Any reference to, or evidence concerning, independent acts by HCHC or Family Medicine of Mt. Pleasant (including but not limited to HCHC's training and credentialing processes and activities) other than the fact HCHC employed the nurses involved in the delivery.

App. I, 214 (10-24-17 motion ¶4, bold removed). Defendants argued:

> The only claim against HCHC is a vicarious liability claim based upon the alleged acts and omissions of nurses involved in the delivery of TD on August 31, 2007. The only date at issue in this case pertaining to the claim against HCHC is August 31, 2007. HCHC's training of any physician or nurse is not an issue and the fact that HCHC credentialed Dr. Widmer to deliver babies at HCHC is not an issue. See Court's 10-13-17 Ruling on Motion for Leave to Amend and Motion to Strike Expert Opinion.
>
> Any reference, evidence or argument pertaining to an alleged independent act of HCHC (whether involving training, credentialing, or otherwise) would not be relevant and would only be used by the jury for an improper purpose, such as impermissibly awarding or increasing damages based on an alleged role of HCHC. Such evidence would also instill collateral and unnecessary issues into the trial. The evidence is inadmissible under Rules 5.402 and 5.403 and the Court's Oct. 13, 2017 ruling.

Id.

Plaintiff is incorrect in suggesting the above motion in limine is not specific and Plaintiff could not possibly know what it was talking about. The motion specifically identified "HCHC's training and credentialing processes and activities" as an example of a broader subject matter that had no relevance and was inadmissible under Rule 5.403.

Plaintiff also suggests an overly limited role for motions in limine. The only protection a party has to attempt to eliminate references to irrelevant and prejudicial subjects during voir dire, opening statements, and questioning of witnesses is a motion in limine. Such motions serve not just to identify and

exclude very specific and discrete subjects but also to alert the court and opposing counsel of subject matter that would, in the view of the moving party, unfairly prejudice the moving party and potentially cause a mistrial. *See Twyford v. Weber*, 220 N.W.2d 919, 923 (Iowa 1974) (limine motion "serves the useful purpose of raising and pointing out before trial certain evidentiary rulings the court may be called upon to make during the course of trial. The motion has the effect of advising the court and opposing counsel of the party's position on a particular matter . . .").

In this case, as discussed above, Plaintiff attempted to add negligent training and credentialing claims close to trial. Plaintiff withdrew the motion for leave to add the claims prior to a ruling but left factual allegations pertaining to such claims in their second proposed amended petition. *See* course of proceedings above. This was the subject of significant briefing and a long hearing. *See* App. I, 180 (10-13-17 ruling 4, hearing "did consume considerable time"). The district court disagreed with Plaintiff that his factual allegations about the "failure to train" the delivery team were somehow different from asserting a negligent training claim. *Id.* 182 (*id.* 6, "To factually argue a negligent training ground that was disallowed defeats the reasons as to why it was disallowed).

Plaintiff's persistence in attempting to keep training allegations in the case (though there was no training claim) is precisely why a motion in limine was warranted. Without such a motion, Plaintiff could be expected to state in opening statements that HCHC "failed to train" the delivery team.

Even if Plaintiff had preserved error on this issue (which Plaintiff did not do), the district court's limine order was not an abuse of discretion.

As relating to the defense motion in limine No. 19, as indicated above, Plaintiff's only offer of proof on this issue is Dr. Widmer's CME records. For the reasons set forth under Part II above, the district court's exclusion of the CME records was not an abuse of discretion.

4. There was no prejudice.

Given Plaintiff did not even attempt to offer the excluded evidence on training and did not attempt to submit a negligence claim or specification relating to training, Plaintiff cannot show prejudice.

Conclusion

For the reasons set forth above, Henry County Health Center requests that the district court's rulings be affirmed, that Plaintiff's appeal be denied in its entirety, and that the verdict and judgment in favor of Defendants be affirmed.

Request for Oral Argument

HCHC believes this case could be affirmed without oral argument. If argument is granted, HCHC requests to be heard.

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The undersigned certifies this brief was electronically filed and served on the 16th day of August, 2018, upon the following persons and upon the Clerk of the Supreme Court using the Electronic Document Management System, which will send notification of electronic filing:

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