No. 15-0943

IN THE SUPREME COURT OF IOWA

SHARI KINSETH AND RICKY KINSETH, co-executors of the estate of LARRY KINSETH, deceased,
Plaintiff-Appellee/Cross-Appellants,

v.

WEIL-MCLAIN,
Defendant-Appellant/Cross-Appellee,

and

STATE OF IOWA, ex. rel., CIVIL REPARATIONS TRUST FUND,
Intervenor.

Appeal from the Wright County District Court,
District Court No. LACV 022887,
The Honorable Stephen P. Carroll, presiding

FINAL BRIEF
by
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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The district court's denial of Weil-McLain's post-trial motion raises the following issues for appellate review:

1. Did the trial court err as a matter of law by violating Iowa Code Section 668.3 when it failed to include three released parties on the verdict form even though substantial evidence supported the conclusion that they contributed to Kinseth's injuries?

Asher v. OB-Gyn Specialists, P.C., 846 N.W.2d 492 (Iowa 2014)

Banks v. Beckwith, 762 N.W.2d 149 (Iowa 2009)

Brunner v. Brown, 480 N.W.2d 33 (Iowa 1992)

Estes v. Progressive Classic Ins. Co., 809 N.W.2d 111 (Iowa 2012)

Hagenow v. Schmidt, 842 N.W.2d 661 (Iowa 2014)

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Reese v. Werts Corp., 379 N.W.2d 1 (Iowa 1985)

Schwennen v. Abell, 430 N.W.2d 98 (Iowa 1988)

Smith v. Air Feeds, Inc., 556 N.W.2d 160 (Iowa Ct. App. 1996)

Summy v. City of Des Moines, 708 N.W.2d 333 (Iowa 2006)

Wolbers v. The Finley Hosp., 673 N.W.2d 728 (Iowa 2003)

2. Should the award of punitive damages be vacated because it conflicts with the Iowa Supreme Court's holding in *Beeman v. Manville Corp.*,

496 N.W.2d 247 (Iowa 1993), given plaintiffs' failure to present any evidence that Weil-McLain's conduct deviated from that of others in its industry?

Beeman v. Manville Corp., 496 N.W.2d 247 (Iowa 1993)

Hockenberg Equip. Co. v. Hockenberg's Equip. & Supply Co., 510 N.W.2d 153 (Iowa 1993)

Lamb v. Manitowoc County, 570 N.W.2d 65 (Iowa 1997)

Larson v. Great West Casualty Co., 482 N.W.2d 170 (Iowa Ct. App. 1992)

Lovick v. Wil-Rich, 588 N.W.2d 688 (Iowa 1999)

Spaur v. Owens-Corning Fiberglass Corp., 510 N.W.2d 854 (Iowa 1994)

Summy v. City of Des Moines, 708 N.W.2d 333 (Iowa 2006)

Top of Iowa Coop. v. Sime Farms, Inc., 608 N.W.2d 454 (Iowa 2000)

Wolf v. Wolf, 690 N.W.2d 887 (Iowa 2005)

3. Should the judgment and jury verdict be set aside and a new trial ordered because Weil-McLain was prejudiced by:

(i) the trial court's admission of an OSHA citation that was neither relevant to punitive damages nor proper expert reliance material;

(ii) the trial court's admission of Kinseth's asbestos exposure while tearing out Weil-McLain boilers, even though such exposure was noncompensable under the Iowa Statute of Repose, and plaintiffs urged the jury during closing to ignore the statute's legal force; and

(iii) the plaintiffs' improper closing argument, including their repeated violations of the district court's pretrial rulings?

Andrews v. Struble, 178 N.W.2d 391 (Iowa 1970)

Burke v. Reiter, 42 N.W.2d 907 (Iowa 1950)

Conn v. Alfstad, 801 N.W.2d 33 (Iowa Ct. App. 2011)

Gacke v. Pork Xtra, LLC, 684 N.W.2d 168 (Iowa 2004)

Graber v. City of Ankeny, 616 N.W.2d 633 (Iowa 2000)

In re Detention of Stenzel, 827 N.W.2d 690 (Iowa 2013)

Janssen Pharm., Inc. v. Bailey, 878 So. 2d 31 (Miss. 2004)

Kurth v. Iowa Dep't of Transp., 628 N.W.2d 1 (Iowa 2001)

Lioce v. Cohen, 174 P.3d 970 (Nev. 2008)

Mays v. C. Mac Chambers, Co., 490 N.W.2d 800 (Iowa 1992)

McCabe v. Mais, 580 F. Supp. 2d 815 (N.D. Iowa 2008)

Rosenberger Enters., Inc. v. Ins. Serv. Corp., 541 N.W.2d 904 (Iowa Ct. App. 1995)

Sandomierski v. Fixemer, 163 Neb. 716 (1957)

State v. Hendrickson, 444 N.W.2d 468 (Iowa 1989)

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State v. Tate, 341 N.W.2d 63 (Iowa 1983)

Vanarsdol v. Farlow, 203 N.W. 794 (Iowa 1925)

Whittenburg v. Werner Enterprises, Inc., 561 F.3d 1122 (10th Cir. 2009)

ROUTING STATEMENT

This appeal should be decided by applying settled, governing 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

Plaintiffs Shari Kinseth and Ricky Kinseth, as executors of the estate of Larry Kinseth ("Kinseth"), claim that Kinseth developed mesothelioma as a result of his exposure to asbestos-containing materials.

Before his death in 2009, Kinseth sued 43 defendants, each of which Kinseth alleged contributed to his disease. (App. 1-4.) Among the defendants Kinseth sued was Weil-McLain, a division of the Marley-Wylain Company. Weil-McLain designs and manufacturers boilers and is located in Indiana.

When this case went to trial in 2014, Weil-McLain was the only remaining defendant. As further discussed below, the jury returned a verdict in plaintiffs' favor totaling $6.5 million, including $2.5 million in punitive damages. Weil-McLain responded by filing (i) a Motion For Judgment Notwithstanding The Verdict On Punitive Damages And For A New Trial, and (ii) an Alternative Post-Trial Motion Regarding Excessive Damages And Entitlement To Set-Offs. (App. 740-81; Alt. Post-Trial Mot.) The district court denied Weil-McLain's post-trial motions, with the limited exception of ordering remittitur of the jury's award for pre-death medical expenses. (App. 822-23.)

STATEMENT OF FACTS

I. KINSETH WORKED WITH ASBESTOS-CONTAINING PRODUCTS MANUFACTURED BY DOZENS OF COMPANIES.

Kinseth was an Iowa resident who worked in the heating and plumbing industry. During a portion of his career, Kinseth installed and worked on residential and commercial boilers.

Kinseth began working part-time at his brother's company, Kinseth Plumbing & Heating, in 1953. (App. 869-71.) After graduating from high school in 1957, Kinseth worked full-time. (App. 870.) Nine years later, in 1966, Kinseth purchased Kinseth Plumbing & Heating from his brother. (*Id*., 887.)

A. Boiler manufacturers used asbestos products made and supplied by asbestos manufacturers.

During Kinseth's career, boiler manufacturers and others used asbestos in their products because of its unmatched qualities as a fire retardant and insulator. To guard against the risk of fire, Weil-McLain sealed its boilers with rope comprised partially of asbestos. (App. 491-94.)

Weil-McLain did not manufacture the asbestos it used; the asbestos came from other companies. (App. 490.) Nor did Weil-McLain manufacture the component parts used in its boilers. Those products, which

also contained asbestos, were supplied to Weil-McLain by other companies, many of whom were defendants in this case. (App. 490.)

Kinseth's work involved two distinct phases: (i) tearing out an old boiler, and (ii) installing a new one. Tearing out old boilers, according to Kinseth, was "the worst … because they had the most asbestos on it." (App. 875.) The process was "dusty as hell." (*Id.*) Kinseth also installed boilers, during which he claimed he was exposed to asbestos when cutting rope used during the installation. (*Id.*, 876-77, 879.)

B. Kinseth worked with many kinds of asbestos-containing boilers and component products manufactured by companies other than Weil-McLain.

During Kinseth's deposition, relevant portions of which were played at trial, plaintiffs' counsel walked Kinseth through every brand and type of boiler he installed, including: Peerless (App. 975-1006); Kewanee (*id.*, 1008-41); American Standard (*id.*, 1041-48); Burnham (*id.*, 1050-62); Crane (*id.*, 1062-76); and Cleaver-Brooks (*id.*, 1076-81).

Kinseth Plumbing installed boilers in both residential and commercial settings. The company used Weil-McLain boilers principally in residential installations. (App. 475.) For commercial installations, however, Kinseth Plumbing installed Kewanee and Cleaver-Brooks, although "once in a great while," it may have used a Weil-McLain boiler. (App. 475-76.)

The distinction between Kinseth's residential installations using Weil-McLain boilers and his commercial installations using other boilers is important. Approximately 91% of Weil-McLain's residential boilers were "packaged boilers." (App. 497-98.) Packaged boilers, unlike "sectional boilers" common in commercial settings, were delivered to Kinseth Plumbing preassembled. (App. 498.)

The tearout and installation processes also required Kinseth to work with component parts manufactured by other companies. Kinseth reconditioned parts such as valves, traps and pumps, which required using a knife to scrape off old gaskets, a process that released asbestos. (App. 1097-1104.) Kinseth identified numerous gasket and valve manufacturers with which he worked, including: NIBCO, Lunkenheimer, Powell, Johnson, Mueller, Taco, Watts, Yarway, McDonnell & Miller, Garlock, and John Crane. (App. 1094-95, 1128.) Kinseth worked with Taco and Bell & Gossett asbestos-containing pumps (App. 1116-17, 1122-26, 1131), as well as with steam traps manufactured by Hoffman and Yarway that contained asbestos (*id.*, 1147-49).

Kinseth used UCL, Hercules, and Johns-Manville asbestos cement with various boilers. (App. 1154-67.) Kinseth worked with joint compound manufactured by Bestwall, Bondex, and Georgia Pacific, an asbestos-laden

mixture he put on walls of houses and sanded. (*Id.*, 1170-96.) Finally, Kinseth worked on furnaces manufactured by American Standard, General Electric, Trane, and Mueller. (App. 969.) He frequently disturbed the asbestos contained in these furnaces and inhaled the particles released into the air. (*Id.*, 971-73, 1166-67.)

II. PROCEDURAL HISTORY

A. The district court granted Weil-McLain's motion for partial summary judgment on the statute of repose, eliminating any potential liability for "tearout" exposure.

The district court granted Weil-McLain's motion for partial summary judgment under the Iowa statute of repose, which bars claims not brought within 15 years for injuries arising out of "an improvement to real property." Iowa Code § 614.1(11) (2016). The court ruled that the statute of repose barred plaintiffs from recovering damages for Kinseth's exposure to asbestos while he tore out boilers, because the boiler became "an improvement to real estate" once it was installed, and all of Kinseth's tearout exposure occurred more than 15 years before his lawsuit. (App. 77-78.) Accordingly, plaintiffs could only recover against Weil-McLain for Kinseth's asbestos exposure during the installation of Weil-McLain boilers.

B. The district court admitted evidence of an OSHA citation and of noncompensable exposure to Weil-McLain tearouts.

The district court denied Weil-McLain's pre-trial motion to exclude evidence that in 1974, two years after the bulk of Kinseth's field work concluded, the Occupational Health and Safety Administration ("OSHA") cited Weil-McLain for measurements of asbestos in one of its manufacturing facilities, in Indiana. The court acknowledged that the conditions of that Indiana facility bore no resemblance to Kinseth's working conditions, but nevertheless ruled that the citation was relevant to punitive damages and could be used as reliance material by plaintiffs' expert. (App. 249-74.)

Another important evidentiary issue concerned the statute of repose. Because the statute precluded plaintiffs from recovering for Kinseth's noncompensable exposure to tearouts of Weil-McLain boilers, Weil-McLain argued that plaintiffs should be prohibited from introducing such evidence, but that Kinseth's exposure to other companies' tearouts, in contrast, remained relevant to establish that other companies' products had caused and/or contributed to Kinseth's injuries. (App. 382-93.) While the court agreed on this latter point, it concluded that the legally noncompensable tearout exposure related to Weil-McLain, but barred by the statute of repose, also should be admitted "in fairness," although it never explained what that meant or why it was "fair."

C. The district court declined to include on the verdict form several released parties that the evidence established were responsible for Kinseth's injuries.

The parties disagreed about which released defendants should be included on the verdict form. Kinseth's complaint and his deposition testimony made clear that he was exposed to many companies' asbestos and asbestos-containing products. In the briefing below, Weil-McLain identified each company to whose products Kinseth was exposed and cited record evidence establishing that exposure. In opposition, plaintiffs claimed there was a "lack of evidence" to support including three companies on the verdict form. (App. 589.) The court then declined to include the three companies. (App. 592.)

D. The jury returned a verdict for plaintiffs.

At the conclusion of the trial, the jury returned a verdict totaling $6.5 million. The jury awarded compensatory damages of $4 million, ascribing 25% of the fault to Weil-McLain, while distributing the remaining 75% among the thirteen other entities on the verdict form. (App. 676-709.) The jury's compensatory award included $500,000 in pre-death medical expenses even though the parties had stipulated that Kinseth's medical care

and travel expenses totaled only $131,233.06.[1] (App. 455-56.) The jury also awarded $2.5 million in punitive damages against Weil-McLain.

ARGUMENT

From start to finish, the trial of this case was saturated with error. These errors were not the product of a district court venturing into uncharted areas of law to make tough calls where reasonable legal minds might disagree. These instead were violations of settled law, contrary to clear Iowa precedent and unfairly prejudicial to Weil-McLain. The resulting prejudice to Weil-McLain was substantial, unfair and, predictably, generated an excessive, improper verdict for plaintiffs.

Begin at the end, with the special verdict form and one of the many simple, reversible errors made. Iowa law requires that released parties must be included on the verdict form for the purposes of assessing comparative fault if there is substantial evidence the released party contributed to plaintiff's injury. There is no ambiguity in the law. Yet the district court refused to include several parties on the verdict form even though the evidence that their products contributed to Kinseth's injuries was identical or superior to the evidence supporting inclusion of other parties on the form.

[1] In its ruling on Weil-McLain's post-trial motion, the district court concluded that there should be a remittitur of pre-death medical expenses to the stipulated amount of $131,233.06. (App. 809.)

Without the omitted parties, it was impossible for the jury to properly assess Weil-McLain's comparative fault.

Next, consider punitive damages. In *Beeman v. Manville Corp.*, 496 N.W.2d 247 (Iowa 1993), the Iowa Supreme court held that a plaintiff seeking punitive damages for a defendant's failure to warn must provide "clear, convincing, and satisfactory evidence" that the defendant's conduct deviated from that of others in its industry. Without such evidence, the plaintiff cannot establish that the defendant's conduct was "egregious" and no punitive damages may be awarded. Here, plaintiffs admitted that Weil-McLain's conduct was identical to others in the industry, and the trial evidence supported plaintiffs' admission. But plaintiffs' admission and the supporting evidence were brushed aside by the district court and the jury was allowed to award punitive damages. That award is contrary to *Beeman*, and should be vacated.

The district court's evidentiary rulings were no better. The trial court admitted evidence of an OSHA citation at one of Weil-McLain's manufacturing facilities in Indiana—where Kinseth never worked and where the exposures bore no resemblance much less similarity to his. The district court also admitted evidence of Kinseth's asbestos exposure while tearing out Weil-McLain boilers, even though such exposure was noncompensable

under the Iowa Statute of Repose, making Weil-McLain responsible for legally noncompensable harm.

Perhaps emboldened by the novel rulings in their favor, plaintiffs opted to press their luck in closing and rely on arguments that had been barred or cautioned against in pretrial rulings. For example, even though the district court promised to tightly circumscribe plaintiffs' use of the OSHA citation, plaintiffs' counsel argued in closing that the OSHA citation was the *most important fact* the jury should consider in deliberations. Plaintiffs' counsel also urged the jury to ignore the Iowa statute of repose, made repeated references to Weil-McLain's wealth and the amount it spent on its defense, and implored the jury to "send a message" to Weil-McLain. Despite these direct violations of pretrial rulings and settled law, the district court let the case roll forward over Weil-McLain's objections and mistrial motions.

Facing these significant errors, Weil-McLain had no chance. The jury's $6.5 million total verdict—returned just a few hours into deliberations—made that plain, and even included an award for pre-death medical expenses that significantly exceeded by nearly four times the parties' *stipulated amount* for such expenses. Given the record of errors

below, Iowa law demands that the judgment of the district court be reversed, punitive damages barred, and a new trial be ordered on all other issues.

I. THE DISTRICT COURT'S FAILURE TO SUBMIT THE FAULT OF THREE COMPANIES—BELL & GOSSETT, PEERLESS, AND MCDONNELL & MILLER—TO THE JURY CONSTITUTES REVERSIBLE ERROR.

Section 668.3 of the Iowa Code required the trial court to submit the fault of a settling defendant to the jury on the verdict form if substantial evidence supported an inference that its product contributed to Kinseth's injuries. Kinseth testified extensively regarding his exposure to asbestos dust while working on Bell & Gossett, McDonnell & Miller, and Peerless products.[2] Plaintiffs' expert also testified that exposure such as the exposure described by Kinseth would have contributed to Kinseth's disease. Without explanation, the trial court refused to put these three companies on the verdict form. This error requires reversal.

A. Weil-McLain preserved this issue for appellate review.

Before the case was submitted to the jury, Weil-McLain filed a memorandum supporting the inclusion of certain third parties on the verdict

[2] The court allowed the jury to assess fault to Peerless arising from Kinseth's exposure to Peerless *boilers*. But it refused to allow the jury to consider the exposure to Peerless *pumps*. (App. 156, 169-70 (noting the parties agree regarding "Peerless (boilers)" and requesting the inclusion of "Peerless – pumps"); Jury Instruction No. 35 (allowing the jury to consider Kinseth's exposure to "Peerless ([b]oilers)"); App. 592 ("I decided there's no submissible [sic] claims in my opinion on Peerless pump").)

form, including Bell & Gossett, Peerless (pumps), and McDonnell & Miller. (App. 166, 169-71, 175.) Although this motion was enough to preserve this issue for appeal, Weil-McLain also pressed this argument in its post-trial motion, citing its pre-verdict memorandum and reiterating the evidence supporting inclusion of those entities on the verdict form. (App. 778-79.)

B. Standard of review

"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." *Herbst v. State*, 616 N.W.2d 582, 585 (Iowa 2000). Although a claim that the jury should have received a different instruction is reviewed for an abuse of discretion, a trial court must give an instruction if substantial evidence supports it. *Banks v. Beckwith*, 762 N.W.2d 149, 152 (Iowa 2009); *Summy v. City of Des Moines*, 708 N.W.2d 333, 340 (Iowa 2006). "Substantial evidence is that which a reasonable person would find adequate to reach a conclusion." *Hagenow v. Schmidt*, 842 N.W.2d 661, 670 (Iowa 2014); *Herbst*, 616 N.W.2d at 585.

Critically, in resolving whether a proffered instruction should have been given, the evidence is viewed in the light most favorable to the party advocating for submission of the instruction—here, Weil-McLain. *Asher v.*

OB-Gyn Specialists, P.C., 846 N.W.2d 492, 495 (Iowa 2014); *Herbst*, 616 N.W.2d at 585.

C. Section 668.3 requires trial courts to include certain released parties on the special verdict form.

Kinseth brought suit against forty-three defendants, claiming each was in some way responsible for his injuries. Only Weil-McLain went to trial. Under Section 668 of the Iowa Code, the district court was required to reduce the judgment against Weil-McLain by the amount of fault attributable to certain settling defendants.

To make this determination, Section 668.3 required the jury to complete a special verdict form. *Id*. at § 668.3(2) ("the court … shall instruct the jury to answer special interrogatories … indicating … [t]he percentage of the total fault allocated to each claimant, defendant, third-party defendant, [and] person who has been released from liability under section 668.7"). Based on this determination, "[t]he court [would] determine the amount of damages payable to [Kinseth] in accordance with the findings." *Id*. at § 668.3.

Improperly failing to list settling defendants can have significant consequences. As the district court recognized, "The failure to consider the negligence of all tortfeasors, whether parties or not, prejudices the joined defendants who are thus required to bear a greater portion of the plaintiff's

loss than attributable to their fault." (App. 807 (quoting W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* 475-76 (5th ed. 1984)).)

For this reason, Iowa courts uniformly overturn verdicts where substantial evidence supported a finding that a party or released defendant caused the plaintiff's injuries yet the court omitted that entity from a special verdict form. *See, e.g., Kragel v. Wal-Mart Stores, Inc.*, 537 N.W.2d 699, 706-07 (Iowa 1995) (because the fault of two third-party defendants was "in issue," the "district court committed reversible error [under § 668.3] in refusing to so instruct the jury"); *Reese v. Werts Corp.*, 379 N.W.2d 1, 3 (Iowa 1985) (same); *Schwennen v. Abell*, 430 N.W.2d 98, 102 (Iowa 1988) ("parties 'whose fault towards the claimant is an issue' should be included in the total aggregate of causal fault"); *see also Estes v. Progressive Classic Ins. Co.*, 809 N.W.2d 111, 115 (Iowa 2012) ("Chapter 668 requires the court to instruct the jury to assess a percentage of fault to each tortfeasor."); *Smith v. Air Feeds, Inc.*, 556 N.W.2d 160, 164 (Iowa Ct. App. 1996) ("Even though Smith had settled with Okland prior to trial and dismissed his claim against him, the jury was instructed to consider Okland as a released party when allocating fault" because "there was sufficient evidence for submission.").

D. Plaintiffs' expert testified that exposure to these companies' asbestos-containing products would have contributed to Kinseth's mesothelioma.

Testimony from plaintiffs' *own expert*, Dr. Mark, provided substantial evidence that Kinseth was exposed to the asbestos-containing products of Bell & Gossett, Peerless, and McDonnell & Miller. Under Iowa law, these companies were required to be included on the special verdict form. Inexplicably, the district court refused to do so.

During his direct examination, Dr. Mark defined the term "special exposure" to mean "an exposure for which there is scientific evidence to conclude that that [sic] sort of exposure causes risk of disease." (App. 293.) In his view, "every special exposure to asbestos from asbestos-containing products contributes to the development of diffuse malignant mesothelioma." (App. 303.)

On cross examination, Weil-McLain walked Dr. Mark through Kinseth's work history, asking whether exposure to the settling defendants' products could have caused Kinseth's injuries:

- **Bell & Gossett**:

> Q. I want you to assume that the jury will hear testimony from Mr. Kinseth that he worked with Bell & Gossett pumps throughout his career, I want you to assume that he testified to working with asbestos associated with these pumps, that that work produced dust and that he breathed that dust, can you do that for me, Doctor? … Based on the work history sheet,

> Exhibit A, and the assumptions I've just asked you to make, would you agree with me that Larry Kinseth had a special exposure as you defined it to Bell & Gossett pumps?
>
> A. Yes, because he was working in the manner in which people do work around pumps. (App. 306-07.)

- **Peerless (pumps)**:

> Q. I want you to assume that the jury will hear testimony from Mr. Kinseth that he worked with Peerless pumps throughout his career, I want you to assume that he testified to working with asbestos associated with these pumps, that that created dust and that he breathed that dust. Based on the work history sheet, Exhibit A, and the assumptions I just asked you to make, would you agree that Larry Kinseth had a special exposure to Peerless pumps?
>
> A. Yes. (App. 307-08.)

- **McDonnell & Miller**:

> Q. I want you to assume that the jury will hear testimony from Mr. Kinseth that he worked with McDonnell and Miller valves throughout his career, I want you to assume he testified to working with asbestos associated with McDonnell and Miller valves, I want you to assume that he testified that this work created dust and he breathed this dust. Based on the work history sheet, Exhibit A, and the assumptions I just asked you to make, would you agree that Larry Kinseth had a special exposure to McDonnell and Miller valves?
>
> A. Mr. Kinseth had a special exposure to working around valves …. (App. 311-12.)

Like other jurisdictions, Iowa permits this form of expert testimony as long as the evidence supports the facts assumed in the questioning. *Wolbers v. The Finley Hosp.*, 673 N.W.2d 728, 737 (Iowa 2003); *Brunner v. Brown*, 480 N.W.2d 33, 34 (Iowa 1992).

E. Kinseth's own testimony established that he was exposed to these three companies' asbestos products.

Hoping to avoid the force of Dr. Mark's admissions, plaintiffs argued below that "Mark was asked a series of hypotheticals about Kinseth's exposure to [the companies' products], but the assumptions contained in those hypotheticals were never proven by Weil-McLain." (Opp. to JNOV at 56.) Not true; during Kinseth's deposition testimony, which was played at trial, Kinseth testified extensively regarding his exposure to asbestos from each of these companies' products.

First, Kinseth testified that he refurbished and reworked "many" Bell & Gossett pumps, which was the "main brand" he used because it was the "biggest pump seller." In working with these pumps, Kinseth would use "a knife" or a "wire brush" to remove asbestos "gaskets" within the pumps. Kinseth confirmed that this process created asbestos dust that he breathed without any respiratory protection. (App. 1117-27.)

Second, Kinseth worked with Peerless pumps in much the same way he worked with Bell & Gossett products. The pumps had gaskets that contained asbestos. Kinseth removed the gaskets using a knife or wire brush when the gasket got stuck, and the brush released asbestos dust that Kinseth breathed without the benefit of respiratory equipment. (App. 1134-44.)

Third, Kinseth refurbished McDonnell & Miller valves. As with the Bell & Gossett products and Peerless pumps, Kinseth testified he worked with "many" McDonnell & Miller valves. He also removed asbestos-containing gaskets from the McDonnell & Miller valves using a knife or a wire brush to dislodge the gasket when it got stuck, which happened every time. (App. 1106-15.)

Kinseth's own testimony supplied the factual premises for the hypothetical questions posed to Dr. Mark. Plaintiffs' argument and the trial court's conclusion—that there was no evidence that these companies' products may have caused Kinseth's injuries—is simply wrong. Kinseth admitted to having worked with and breathed asbestos from Bell & Gossett, Peerless, and McDonnell & Miller products. And Dr. Mark testified that breathing asbestos from these products would be a "special exposure" to asbestos that causes a risk of mesothelioma.

The verdict should be set aside and judgment, therefore, should be reversed under Section 668.3 because the trial court failed to include these three companies on the special verdict form, preventing the jury from determining the amount of fault attributable to each of these companies. Indeed, because plaintiffs' case against Weil-McLain itself depended on Dr. Mark's testimony that "every special exposure to asbestos from asbestos-

containing products contributes to the development of mesothelioma" and because the evidence established that Kinseth had a "special exposure" to these other three companies' products, it is virtually certain that the verdict would have come out differently had the trial court followed Section 668.3.

II. UNDER THE SUPREME COURT'S *BEEMAN* DECISION, PLAINTIFFS' CLAIM FOR PUNITIVE DAMAGES WAS PRECLUDED AS A MATTER OF LAW.

Under *Beeman v. Manville Corp.*, 496 N.W.2d 247 (Iowa 1993), a plaintiff may be awarded punitive damages for a failure to warn of asbestos-related dangers only if he proves by clear, convincing, and satisfactory evidence that the defendant's conduct deviated from that of its industry peers. This rule of law should have precluded the district court from even submitting the question of punitive damages to the jury.

Plaintiffs offered no evidence that Weil-McLain's conduct was worse or different than its peers, much less clear, convincing and satisfactory evidence. In fact, plaintiffs *admit* that the conduct of each and every boiler manufacturer was identical: none issued warnings during the relevant time. Kinseth's own testimony unequivocally supports plaintiffs' admission. Weil-McLain presented this argument to the district court, but the court summarily rejected it. Based on this error and contrary to *Beeman*, the jury

was permitted to reach punitive damages and return an excessive verdict. Under *Beeman*, that award of punitive damages cannot be sustained.

A. Weil-McLain preserved its argument that punitive damages are precluded under *Beeman*.

Citing *Beeman*, Weil-McLain argued below that plaintiffs' failure-to-warn evidence was legally insufficient to support an award of punitive damages. On appeal, Weil-McLain seeks relief based on *Beeman's* central holding, which Weil-McLain argued repeatedly below, that according to the evidence presented at trial, Weil-McLain's conduct with respect to warnings was *identical* to that of other boiler manufacturers and, as a result, punitive damages for failure to warn should have been barred under *Beeman*. (App. 658-59.)

The district court denied Weil-McLain's directed verdict motion, but said that Weil-McLain would have a chance to invite the court to "take another look at it perhaps post trial if necessary." (App. 584.) But when that post-trial time for "another look" came, the court inexplicably ruled that "[it] did not [previously] have a chance to pass" on the *Beeman* issue—*i.e.*, whether punitive damages were barred because Weil-McLain's conduct was consistent with other manufacturers—and incorrectly concluded that the argument had been waived. (App. 815-16.)

Weil-McLain preserved this argument in its motion for directed verdict and again in its post-trial motion. *See, e.g., Lamb v. Manitowoc County*, 570 N.W.2d 65, 67 (Iowa 1997) (issues raised in motion for directed verdict are preserved for a motion for judgment notwithstanding the verdict and appeal from denial of that motion).

With respect to its directed verdict motion, Weil-McLain explained that "[i]n products liability cases, punitive damages are not triggered by mere knowledge sufficient to initiate a duty to warn." (App. 654, citing *Lovick v. Wil-Rich*, 588 N.W.2d 688, 699 (Iowa 1999) and *Beeman*, 496 N.W.2d at 247.) Weil-McLain then applied this rule from *Lovick* and *Beeman* to the evidence: "At trial, there was no clear and convincing evidence of competitors warning about asbestos rope, rather Larry Kinseth made clear that none of the ten manufacturers of boilers he identified included warnings with the rope." (App. 658.) From this, Weil-McLain concluded that "[a]t most it is questionable whether the evidence at trial established knowledge sufficient to initiate a duty for Weil-McLain to warn, but that is insufficient to substantiate punitive damages." (*Id.* at 659.)

During argument on the directed verdict motion, Weil-McLain reinforced its position that punitive damages were unavailable because

plaintiffs had failed to present evidence that any other boiler manufacturer provided warnings on asbestos rope:

> [W]e can look across the board at all of the other boiler companies involved in this case and Mr. Kinseth has testified as to installing asbestos rope with all these boilers and he's also testified as to receiving no warnings from any of these manufacturers, so it's not that Weil-McLain is an anomaly in this respect ....

(App. 581.) This is the exact argument Weil-McLain raises now on appeal: because Weil-McLain was not an "anomaly" among boiler manufacturers, it could not be subject to punitive damages for a failure to warn.

Weil-McLain raised its *Beeman* argument yet again in its post-trial motion. In a section titled "Weil-McLain's Conduct Was Consistent With That Of Other Boiler Manufacturers, Which Precludes Punitive Damages Under *Beeman*," Weil-McLain argued that (1) under *Beeman*, Iowa law requires an asbestos plaintiff to prove that a defendant's conduct deviated from that of its peers to prove legal malice; (2) plaintiffs failed to demonstrate that Weil-McLain's conduct with respect to warnings was distinguishable from that of its peers; and, therefore (3) Weil-McLain could not be liable for punitive damages under *Beeman*. (App. 747-50.)

Iowa's rules on issue preservation require a party to present an issue to the district court at the appropriate time before presenting it on appeal. *See, e.g., Summy*, 708 N.W.2d at 338; *Top of Iowa Coop. v. Sime Farms*,

Inc., 608 N.W.2d 454, 470 (Iowa 2000). Weil-McLain did precisely that, by presenting its *Beeman* argument in its motion for directed verdict, during oral argument on the directed verdict motion, and again in its post-trial motion and oral argument on that motion. (App. 789-98.) Issue preservation requires no more, and the *Beeman* issue is properly before this Court.

B. Scope and standard of appellate review.

An award of punitive damages is reviewed for correction of errors at law. *Wolf v. Wolf*, 690 N.W.2d 887, 893 (Iowa 2005); Iowa R. App. P. 4. The issue of punitive damages may be submitted to a jury only where the plaintiff has presented "by a preponderance of clear, convincing, and satisfactory evidence [that] the conduct of the defendant from which the claim arose constituted willful and wanton disregard for the rights or safety of another." *See* Iowa Code § 668A.1(1)(a).

Weil-McLain moved for judgment notwithstanding the verdict on this basis, arguing that plaintiffs had not made the required showing to submit the issue of punitive damages to the jury. The district court denied Weil-McLain's motion. In reviewing that ruling, this Court looks at the evidence in the light most favorable to the nonmovant, making every legitimate

inference in its favor. *See Hockenberg Equip. Co. v. Hockenberg's Equip. & Supply Co.*, 510 N.W.2d 153, 156 (Iowa 1993).

C. Plaintiffs presented no evidence, let alone clear and convincing evidence, that Weil-McLain's warnings deviated from industry norms.

1. *Beeman* required plaintiffs to prove that Weil-McLain's conduct deviated from that of other boiler manufacturers.

"Punitive damages are only appropriate when a tort is committed with 'either actual or legal malice.'" *Wolf*, 690 N.W.2d at 893. Plaintiffs do not contend that Weil-McLain acted with *actual* malice toward Kinseth. *See Wolf*, 690 N.W.2d at 893 (actual malice requires a showing of "'such things as personal spite, hatred, or ill-will'"). Instead, plaintiffs argue that Weil-McLain acted with *legal* malice, which is "wrongful conduct committed with a willful or reckless disregard for the rights of another." *Id.*

Under that standard, a plaintiff seeking punitive damages must prove more than negligence. As the Supreme Court explained in *Beeman*, "Even through reasonable jurors could find that the manufacturers had enough knowledge to trigger a duty to warn ... and that such failure amounted to negligence, the real issue here is conduct. For punitive damages, a defendant's conduct must be more egregious than mere negligence." 496 N.W.2d at 256.

Beeman provided clear direction on when, as a matter of law, a defendant's alleged failure to warn of asbestos-related dangers was sufficiently "egregious" for punitive damages to be submitted to a jury: its conduct—the failure to warn—must have deviated from its peers. *See Beeman*, 496 N.W.2d at 255. If a defendant's conduct was consistent with others in its industry, that conduct was not, as matter of law, "egregious," and punitive damages are unavailable. *See id.*

In *Beeman*, a plumber/pipefitter sought actual and punitive damages against Keene Corporation ("Keene") for his exposure to asbestos based on various theories of liability, including failure to warn. The jury returned a verdict for $1.175 million in compensatory damages, for which Keene was ten percent at fault, and for $5 million in punitive damages against Keene only. The district court reduced the actual damage award and set aside the punitive damages.

The Iowa Supreme Court affirmed. Regarding punitive damages, the Court observed that "Keene and its predecessors manufactured and distributed asbestos-containing thermal insulation materials for many years." *Id.* at 255. But Keene was not alone in manufacturing and distributing asbestos-containing thermal insulation, and in doing so without warnings. *Id.* According to the Supreme Court, the industry's conduct was

understandable, given that "[a]sbestos was recognized as the best insulating material available" and studies about the risks of asbestos insulation produced equivocal results. *Id*.

Based on these facts, the Supreme Court held that "[e]ven though reasonable jurors could find that the manufacturers had enough knowledge to trigger a duty to warn of the potential hazards of their products, and that such failure amounted to negligence, the real issue here is conduct.... [P]unitive damages may not be assessed against Keene based on the general knowledge of the asbestos industry. Instead, ***there must be clear, convincing, and satisfactory evidence that sets Keene's conduct apart from that of other asbestos manufacturers***." *Id.* at 256 (emphasis added). Because no such evidence was produced by the plaintiff, there was "insufficient evidence to generate a jury question as to punitive damages against Keene Corporation." *Id.*

Beeman dictates the same result in this case, where plaintiffs failed to present any evidence—much less, clear, convincing and satisfactory evidence—that set Weil-McLain's conduct apart from other boiler manufacturers with respect to asbestos warnings. The simple fact is that the court below ruled contrary to and in violation of *Beeman's* holding.

2. Plaintiffs admit that Weil-McLain's conduct was identical to its peers.

Remarkably, plaintiffs seek punitive damages against Weil-McLain while simultaneously admitting that Weil-McLain's conduct was identical to that of other boiler manufacturers. Plaintiffs' counsel emphasized this point in her closing argument:

> In terms of conduct. ***We know <u>all</u> the companies failed to warn. I want to pause for a moment on that***. One instruction you will not see, not anywhere in here, is that because other people acted badly, you're okay. That because the industry acted badly, you're okay. That's not the law. All of us, regardless of what our friends are doing, I learned this from my third grade teacher, regardless of what our peers are doing, have a responsibility to be reasonable and to follow the safety rules. That's the law. ***But in terms of conduct, <u>all</u> of the companies failed to warn***….

(App. 622 (emphasis added).)

Plaintiffs' counsel is correct that an entire industry can fail to act reasonably—*i.e.*, an entire industry can be negligent. But for punitive damages, the law is different and the standard is higher: punitive damages for failure to warn may be assessed only if a defendant's conduct falls below that of its peers with respect to the conduct at issue. *Beeman*, 496 N.W.2d at 255.

In the same breath as they admit Weil-McLain's conduct is identical to its peers, plaintiffs attempt to save their punitive damages request by

noting that (i) Weil-McLain failed to settle this case, (ii) OSHA cited a Weil-McLain manufacturing plant in Indiana, and (iii) an asbestos (not boiler) manufacturer, Johns-Manville, did issue warnings. (App. 622.) Weil-McLain, of course, is not subject to punitive damages for failure to warn because it chose to defend itself at trial. *See* Section IV.E (discussing plaintiffs' improper criticism of Weil-McLain for its spending on its legal defense). Nor is Weil-McLain subject to punitive damages for conduct entirely unrelated to Kinseth's exposure, *i.e.*, for conditions at a manufacturing plant where Kinseth never worked. *See* Section IV.C (discussing plaintiffs' improper use of a 1974 OSHA citation). The conduct of the asbestos (not boiler) manufacturer Johns-Manville is similarly irrelevant, but given plaintiffs' heavy reliance on this point, it is addressed in detail below. *See* Section II.C.4. Regardless of how plaintiffs attempt to justify the punitive damages award, the key point is undisputed: Weil-McLain's conduct was indistinguishable from its peers and, under *Beeman*, plaintiffs have no valid punitive damages claim.

Punitive damages are an extraordinary remedy and it is a plaintiff's burden to offer clear, convincing, and satisfactory evidence to support such an award. *Larson v. Great West Casualty Co.*, 482 N.W.2d 170, 175 (Iowa Ct. App. 1992). These plaintiffs, however, ignore their burden and

suggested below that any "lack of information about the conduct of others" should benefit plaintiffs. (App. 623.) Plaintiffs' argument fails, as plaintiffs conceded the evidence established that "all of the companies failed to warn." (App. 622.) In any event, because it was plaintiffs' burden to show that Weil-McLain's conduct deviated from its peers, any "lack of information" about Weil-McLain's peers would bar that conclusion and preclude punitive damages. *Beeman*, 496 N.W.2d at 255.

3. The evidence demonstrated that Weil-McLain's conduct was identical to that of its peers.

Plaintiffs correctly admitted that Weil-McLain's conduct was no different than that of other boiler manufacturers. The evidence presented at trial on this point was overwhelming.

Like other boiler manufacturers, Weil-McLain used asbestos rope as a sealant in some of its sectional boilers because that rope could withstand the extreme heat of the chamber while maintaining the necessary seal to prevent fire and carbon monoxide escape. (App. 494, 1090.) Use of asbestos rope was consistent and commonplace across the boiler industry. (App. 1054-55.) For example, Kinseth testified that various models of Peerless sectional boilers required several feet of asbestos rope each. (*Id.*, 980 (Model 211A); 989-90 (Series 61).) Each time Kinseth installed a Peerless sectional boiler, the rope had to be cut, creating dust. (*Id.*, 980-81; 989; 997.) Kinseth never

saw "any warnings pertaining to asbestos exposure on the outside or the inside of a Peerless boiler," nor did he see any warnings in Peerless instruction manuals relating to asbestos dust. (*Id.*, 982.)

Kinseth gave identical testimony about the use of asbestos rope in other sectional boilers he installed, including those manufactured by Kewanee, American Standard, Burnham, Crane, and Cleaver-Brooks. (App. 1014-15 (Kewanee); 1044-45 (American Standard); 1052-53 (Burnham); 1068-69 (Crane); 1076-77 (Cleaver-Brooks)). Each boiler manufacturer included asbestos rope as a sealant, which had to be cut as part of the installation process, ***and none provided warnings about the dangers of asbestos***. (App. 1054-55 (asbestos rope included with all sectional boilers); 1027 (no warnings on Kewanee boilers or instruction manuals); 1045-46 (same for American Standard); 1058 (same for Burnham); 1069-70 (same for Crane); 1079 (same for Cleaver-Brooks).)

Plaintiffs presented no evidence that Weil-McLain's conduct was distinguishable or any different from that of other boiler manufacturers with regard to asbestos warnings in the assembly manuals or on the boilers themselves. In fact, Kinseth's testimony confirms that Weil-McLain's conduct was the same as its peers. Having failed to distinguish Weil-McLain's conduct from others in its industry, plaintiffs cannot recover

punitive damages as a matter of law. *Beeman*, 496 N.W.2d at 255. By holding otherwise, the trial court improperly failed to comply with *Beeman*.

4. **Evidence that a single asbestos manufacturer started issuing warnings in 1964 is not clear and convincing evidence setting Weil-McLain's conduct apart from other boiler manufacturers.**

As they did in response to Weil-McLain's post-trial motion, plaintiffs will likely attempt to compare Weil-McLain to Johns-Manville, a large raw asbestos manufacturer. Below, plaintiffs pointed to an interrogatory response from Johns-Manville stating that Johns-Manville started issuing warnings about dangers of asbestos in its cement in 1964. Plaintiffs' contentions about Johns-Manville are not only baseless, but independently establish error.

As an initial matter, there is no record evidence that Johns-Manville issued warnings about the dangers of asbestos before Weil-McLain. The only source for this supposed evidence is an interrogatory response from Johns-Manville in a different case. (App. 448-49.) But the district court *excluded* that out-of-court hearsay statement as well as any questions based upon it:

> [I]t's an interrogatory apparently filed by Johns Manville, so that's an out-of-court statement. Mr. Schuelke did not observe it himself, so he's taking this out-of-court statement and relaying it for the truth of the matter in this proceeding, but it's not an admission by a party opponent as defined by 801(d)(2), because

> you're not offering it against Johns Manville, you're offering it against Weil-McLain, so my ruling is still the same that it's hearsay and [Weil-McLain's objection is] sustained.

(App. 452; *see also* App. 436-37.) No one with personal knowledge testified to the existence of warnings by Johns-Manville, and the interrogatory was properly excluded as hearsay on that basis. Plaintiffs' citation to *excluded* hearsay cannot—by definition—constitute proof "by clear, convincing, and satisfactory evidence" that Weil-McLain's conduct fell below that of its peers with respect to warnings.

Moreover, Johns-Manville and Weil-McLain are not peers. Instead, they are in different industries with radically different involvement with asbestos. Johns-Manville mined raw asbestos, sold raw asbestos in large volumes, and manufactured a number of asbestos-containing products it then sold to third parties. (App. 507-08, 520-21.) Weil-McLain, by contrast, manufactured boilers that contained asbestos-containing components manufactured by third parties, including small bags of Johns-Manville asbestos cement it provided to customers for use during one step of the boiler-installation process. (*Id*.) An asbestos manufacturer's knowledge about the dangers of asbestos cannot be charged to a boiler manufacturer which purchased asbestos in order to establish, by clear and convincing

evidence, that the boiler manufacturer's conduct was worse than other boiler manufacturers.

Even assuming that Johns-Manville's interrogatory response could be considered (and it cannot because it was hearsay not admitted into evidence), and also assuming that Weil-McLain and Johns-Manville were in the same industry (they were not), such a thin proffer based on one, single hearsay statement concerning another company would be insufficient to prove an entitlement to punitive damages by "clear, convincing, and satisfactory evidence." *See, e.g.*, *Spaur v. Owens-Corning Fiberglass Corp.*, 510 N.W.2d 854, 867 (Iowa 1994); *Larson*, 482 N.W.2d at 175.

In sum, there was no record evidence to support plaintiffs' allegation that Weil-McLain departed from boiler industry standards. Instead, there was overwhelming, uncontradicted evidence that Weil-McLain's practices were no different from its peers. On this record, the district court was not permitted by *Beeman* to send the question of punitive damages to the jury. This Court should correct that error by reversing and vacating the award of punitive damages, with instructions to the district court to direct a verdict in favor of Weil-McLain on the issue of punitive damages.

III. INADMISSIBLE EVIDENCE AND IMPROPER ARGUMENT BY PLAINTIFFS' COUNSEL TAINTED THE JURY'S VERDICT.

Plaintiffs relied on inadmissible evidence and improper argument to persuade the jury to return an excessive verdict. A verdict achieved on that basis cannot stand.

- ***Improper Use of OSHA Citation.*** Plaintiffs repeatedly referenced and emphasized an OSHA citation for asbestos levels in one of Weil-McLain's manufacturing facilities in Indiana. Weil-McLain moved *in limine* to exclude this evidence, and the court conceded that OSHA's measurements at the facility bore no resemblance to Kinseth's exposure. (App. 253-54, 503.) The district court nevertheless decided to admit, but "tightly circumscribe," the use of this OSHA evidence. Not content with this partial victory, plaintiffs' counsel defied the district court's efforts to restrict their use of the evidence, taking every opportunity to remind the jury that the United States government had sanctioned Weil-McLain, even though the citation was entirely irrelevant to Kinseth's exposure.

- ***Inadmissible Evidence of Noncompensable Weil-McLain Tearouts.*** The Iowa statute of repose barred plaintiffs from recovering damages that resulted from Kinseth's exposure to asbestos during the tearout process involving Weil-McLain boilers. Evidence of this exposure was thus

irrelevant as to Weil-McLain's liability. Unfortunately, the district court missed this point, and allowed plaintiffs to introduce evidence of tearout exposure and urge the jury during closing argument to ignore the legal force of the statute of repose.

- ***Attorney Closing Misconduct.*** Plaintiffs closed their case by inflaming the jury with improper remarks about Weil-McLain's wealth, its supposedly careless and excessive spending on its legal defense, and the way Weil-McLain simply did not value money the way the good people of Clarion did. (*See* App. 643.) Such arguments violated Iowa law and the court's pretrial rulings, but plaintiffs' counsel was undeterred. Building on these improper arguments, plaintiffs' counsel repeatedly asked the jury to "send a message" to Weil-McLain, again in direct violation of the court's pretrial rulings.

Individually, each of these issues likely altered the trial's outcome. Taken together, there can be no doubt: plaintiffs' consistent disregard for the court's pretrial rulings and the bounds of proper argument played on the jury's emotions, focused the jury on irrelevancies, and deprived Weil-McLain of a fair trial. That the jury was in fact inflamed is confirmed not only by the size of the punitive damages award, but also by the size of the compensatory award for pre-death medical expenses, which was in the

amount of $500,000—nearly four times greater than what the parties had stipulated as the actual amount, which was only $131,233.06.

A. Weil-McLain preserved these issues for appellate review.

1. Weil-McLain moved *in limine* to exclude OSHA evidence, objected to its admission at trial, and sought a new trial based on its inclusion and argument.

Weil-McLain moved *in limine* to exclude evidence of the OSHA citation. (App. 115-16.) The court heard argument on three different days before denying the motion. (App. 141-52; 195-243; 248-74.) Weil-McLain also objected to plaintiffs' efforts to introduce this evidence at trial (App. 364, 407, 414), and then moved for judgment notwithstanding the verdict on this same issue. (App. 766-69.)

2. Weil-McLain moved *in limine* to exclude evidence of noncompensable tearouts and objected to plaintiffs' improper use of this evidence.

Before trial, Weil-McLain moved for summary judgment, seeking to bar recovery for any tearout exposure. (WM 7/1/2009 MSJ at ¶ 6; WM 7/1/2009 Mem. in Support of MSJ at 9-12; App. 136-42.) The court agreed, granting Weil-McLain summary judgment. (App. 76-78.) At trial, consistent with its argument and the court's summary judgment ruling, Weil-McLain objected to plaintiffs' questioning of their expert regarding Kinseth's exposure to tearouts, arguing that Weil-McLain could not be held liable based on such evidence given the court's summary judgment ruling,

and thus this evidence was irrelevant and should be excluded. (App. 382-93.)

3. Weil-McLain raised all objections to plaintiffs' closing misconduct in two separate mistrial motions.

Before the case was submitted to the jury, in two motions for mistrial, Weil-McLain identified and objected to a slew of improper and prejudicial statements made in plaintiffs' closing argument. (App. 710-15, 730-36.) The court denied Weil-McLain's motions and "summarily ruled that any objections not made [during plaintiffs' closing argument] were waived because a timely objection stating the specific ground of objection was not made ...." (App. 821; *see also* 721.) In ruling on Weil-McLain's post-trial motion, the court concluded that Weil-McLain had waived any objections not made during plaintiffs' closing and that objections first raised in the mistrial motions were untimely. (App. 822.)

The district court was incorrect: objections to misconduct in a closing argument raised in a motion for mistrial are timely:

> Where the closing arguments are reported, certified and constitute a part of the record, objection to the remarks of counsel during the final jury argument urged at the close of the argument in motion for mistrial made before submission to the jury is timely.

Andrews v. Struble, 178 N.W.2d 391, 401-02 (Iowa 1970). Under Iowa law, preservation of objections to misconduct in closing argument turns on

whether the objections were raised before or after the case was submitted to the jury. An "objection urged for the first time in motion for mistrial made before submission is timely." *Id.* at 402 (emphasis added); *Rosenberger Enters., Inc. v. Ins. Serv. Corp.*, 541 N.W.2d 904, 907 (Iowa Ct. App. 1995) (same). Here, of course, Weil-McLain raised its objections prior to the case being sent to the jury.

In adopting this rule—that objections to an improper closing do not have to be made during the closing itself but must be made before the case is sent to the jury—the Iowa Supreme Court agreed with the reasoning of the Nebraska Supreme Court in *Sandomierski v. Fixemer*:

> Continued objections by counsel to prejudicial statements of opposing counsel in his argument to the jury could place the former in a less favorable position with the jury, and thus impose an unfortunate consequence upon his client which was actually caused by the wrongful conduct of opposing counsel. This he is not required to do....

Andrews, 178 N.W.2d at 402 (quoting *Sandomierski v. Fixemer*, 163 Neb. 716, 719 (1957)).

The reasoning and dictates of *Andrews* and *Sandomierski* apply with full force here, where Weil-McLain was confronted with a flood of improper arguments from plaintiffs' counsel, but opted to object sparingly in the jury's presence. Under *Andrews* and *Rosenberger*, Iowa law gave Weil-McLain the right to make that decision without waiving its objections. The

issues raised in its motions for mistrial are preserved for this Court to consider on the merits.

B. Scope and standards of appellate review.

In admitting the OSHA citation and Weil-McLain tearouts into evidence, the district court abused its discretion because the evidence was inadmissible. *Kurth v. Iowa Dep't of Transp.*, 628 N.W.2d 1, 8 (Iowa 2001). Although this Court cannot overturn the jury's verdict unless the erroneous admission of evidence caused prejudice, "prejudice is presumed" and a new trial is required "when evidence is erroneously admitted, 'unless the contrary is affirmatively established'" by the side which benefited from the inadmissible evidence. *Graber v. City of Ankeny*, 616 N.W.2d 633, 641 (Iowa 2000); *State v. Sullivan*, 679 N.W.2d 19, 29 (Iowa 2004).

Iowa appellate courts reviewing a request for new trial based on alleged misconduct by trial counsel undertake a two-step inquiry. *See, e.g.*, *Conn v. Alfstad*, 801 N.W.2d 33 (Iowa Ct. App. 2011) (citing *Mays v. C. Mac Chambers, Co.*, 490 N.W.2d 800, 802-03 (Iowa 1992)). "First, the court must determine whether counsel violated a *motion in limine* or otherwise made improper statements to the jury." *Id.* "If the court finds the attorney engaged in misconduct, the general rule is that a new trial will be granted only if the objectionable conduct resulted in prejudice to the

complaining party." *Id.* The district court's determination of whether misconduct was prejudicial is reviewed for abuse of discretion. *Rosenberger*, 541 N.W.2d at 906-07. "A new trial is required for improper conduct by counsel if it appears that prejudice resulted or a different result would have been probable but for any misconduct." *Id*. at 907.

C. The district court erred in denying Weil-McLain's motion *in limine* to exclude the OSHA citation.

No one disputes that the conditions at the Indiana manufacturing facility OSHA cited in 1974 were categorically different from and unrelated to those Kinseth experienced installing Weil-McLain boilers. (App. 253-54 (district court noting OSHA issued the citation two years after the "ending of [Kinseth's] hands-on work with boilers in '72"); App. 503.) For these reasons, the court barred plaintiffs from introducing the OSHA citation as substantive evidence of causation or knowledge because, as the court found, there was no "substantial similarity of conditions" between Weil-McLain's facilities and the environment in which Kinseth worked. (App. 254.)

But the district court did not stop there, as it should have. It went on to identify two purposes for which it believed the OSHA citation could be used. First, the court held that the citation "bears on consideration of the punitive damages standard." (App. 261.) The court admitted the evidence for this purpose even though plaintiffs never advanced this theory. (Pls'

Resistance to OSHA Citation MIL; App. 141-52; 195-244.) Second, with little explanation, the court ruled that plaintiffs' expert could discuss the citation as "reliance" material. Neither purpose was a valid use of the OSHA citation.

1. The OSHA citation is not relevant to punitive damages.

To recover punitive damages, plaintiffs had to prove that Weil-McLain's "conduct constituted a willful and wanton disregard for the rights or safety of another." (Jury Instruction No. 46.) In admitting the evidence, the court reasoned that "the OSHA violation of '74 has some probative value … because … they admit in '72 that they knew of the dangers … and the evidence is such that they put no warnings on … until the government said you got to do it." (App. 261.) Later, the court stated, "Yeah, I just see the limited relevance … is on the warning issue as pertains to conduct of the company and willful and wanton disregard, that they didn't warn until they had to, it's just simple as that." (App. 270.)

The district court's reasoning is unsound. In assessing punitive damages, the jury was charged with considering why Weil-McLain did not issue warnings about its boilers. Only Weil-McLain's reasons for not issuing the warnings during the period when Kinseth's work included installing Weil-McLain products was relevant to whether Weil-McLain

wantonly disregarded Kinseth's wellbeing. Why Weil-McClain may have chosen to issue warnings in 1974 after a citation at its Indiana manufacturing plant does not show why Weil-McLain chose not to issue warnings during the time Kinseth allegedly worked with Weil-McLain's products.

2. The OSHA citation is not proper reliance material, and, in any event, plaintiffs did not use it as reliance material.

The district court offered no explanation as to why the OSHA citation at a manufacturing plant in 1974 at which Kinseth never worked was proper expert reliance material. The court stated only that "[a]n expert relying on something like that under [Rule] 703 is different, because that's typically not offered for the truth of the matter." (App. 270.)

The court's error in admitting the OSHA citation as reliance material was made plain during plaintiffs' examination of their expert. Plaintiffs never elicited testimony on how their expert relied on the OSHA citation. Instead, they had him describe the OSHA citation and the conditions leading to it, which the court already had found were dissimilar. In this respect, even if the district court's decision to admit the OSHA citation for limited purposes but "to tightly circumscribe" its use was proper, the trial was nonetheless infected with inadmissible evidence because plaintiffs' counsel disobeyed the court's motion *in limine* ruling.

Plaintiffs' disregard for the district court's ruling and its impact on the trial was revealed as soon as plaintiffs' counsel began discussing the OSHA citation. After an initial question asking whether their expert was "familiar" with the OSHA citation, the expert began testifying about the underlying substance of OSHA's findings:

> It was, I mean that was OSHA investigating a Weil-McLain operation to look at specific operations, cutting asbestos rope and bagging asbestos insulating material and they found that both of those levels were quite high, they found them in violation of OSHA standards and there were citations because of them, so yes, that certainly was OSHA's decision that these are excessive exposures from these operations.

(App. 365.)

Plaintiffs immediately connected the OSHA citation in an Indiana plant Kinseth never worked at to liability in Kinseth's case, by asking their expert whether there was "any question in your mind that there was ample information about the dangers of asbestos in causing three different deadly diseases?" (App. 365.) Asking whether "there was ample information about the dangers of asbestos" goes to knowledge—the very issue plaintiffs continually asserted as a basis for admitting the citation and the district court had continually rejected. (*See* App. 201-02, 205.)

Continuing this pattern, plaintiffs' counsel later asked about "the exposures that were found … by OSHA in Weil-McLain's own plant …

above even the earliest OSHA levels?" (App. 414.) Plaintiffs' approach was a wrongful attempt to evade the district court's lack of any substantial similarity finding by referencing the specific exposure levels at the plant, and then improperly connecting plant exposure levels to Kinseth's allegedly unsafe exposure during boiler installations at homes and businesses. The district court finally sustained an objection to this last question. (App. 414.)

This testimony is not reliance material. *See* Iowa R. Evid. 5.703. "[R]ule 5.703 is intended to give experts appropriate latitude to conduct their work, not to enable parties to shoehorn otherwise inadmissible evidence into the case." *In re Detention of Stenzel*, 827 N.W.2d 690, 705 (Iowa 2013); *Gacke v. Pork Xtra, LLC*, 684 N.W.2d 168, 183 (Iowa 2004) (reliance materials are not admissible for their truth). Plaintiffs' expert drew no connection between the OSHA citation and any opinion he offered. Plaintiffs' use of the OSHA citation with the expert was a transparent end-run on the court's ruling that exposures at the Indiana plant bore no resemblance to Kinseth's exposures from Weil-McLain installations.

This misconduct alone warrants reversal. But plaintiffs did not stop there. They continued to misuse the citation with their expert. Even though the district court expressly concluded that the conditions in the facility were not "substantially similar" to Kinseth's working conditions, plaintiffs' expert

used exposure levels OSHA had measured in issuing the citation "to evaluate the asbestos that would be in the air" while "rope [was] being cut." (App. 407.) Over Weil-McLain's objection, plaintiffs' expert testified that "[o]n the high end [of the exposure-level spectrum] is actually OSHA … testing at the Weil-McLain plant where they tested the air levels in workers cutting the asbestos rope." (App. 407.) After eliciting the testimony that OSHA measured intolerably high levels of asbestos, plaintiffs' *counsel* then said—in an effort to undermine the district court's "substantial similarity" conclusion—that "so for this higher end, unlike … the lower end which was another company's product, this was actually the cutting of the actual type of rope that Mr. Kinseth was working on." (*Id*. at 407-08.)

The impropriety of this tactic bears emphasis. Plaintiffs' questions suggested the "high end" measurement, which occurred at the plant cited by OSHA, was closer to Kinseth's working conditions because the measurement occurred where "the actual rope … Kinseth was working on" was cut. This circumvention of the court's ruling can be seen on two fronts. First, exposure levels are not related to the type of rope. Exposure levels are correlated to the volume of rope cut, which would reflect the amount of asbestos in the air. The type of rope being cut at the facility was inconsequential. Second, again, this is not reliance evidence. The court

already concluded the levels at the Weil-McLain facility were dissimilar to Kinseth's conditions. Plaintiffs' expert could not then use the OSHA citation to determine the "high end" of the exposure level spectrum," in reaching an opinion on Kinseth's injuries. The district court's ruling necessarily concluded that the amount of asbestos at the facility was off the spectrum altogether.

Plaintiffs continued their impermissible use of the OSHA citation during closing argument. They initially paid lip-service to the court's "substantial similarity" finding by noting "those studies that [our expert] look[ed] at [including OSHA's testing at Weil-McLain's plant]" were "not 100 percent the same." (App. 606.) But plaintiffs' counsel then jumped over the court's roadblock by suggesting that the jury should nonetheless use the OSHA measurements to evaluate whether Weil-McLain caused Kinseth's injuries: "[A] lot of the differences, [between the OSHA facility and Kinseth's conditions], if anything, indicate that the risk will be worse for Larry Kinseth." (App. 606.) This assertion directly contradicts the court's ruling of a lack of substantial similarity. (App. 254.)

Plaintiffs capped off their unbridled use of the OSHA citation in remarkable fashion. Plaintiffs not only suggested the citation was substantive evidence, they expressly told the jury the OSHA citation was the

most important fact it should consider during its deliberations: "[T]he most powerful [study], the one that [our expert] knows is right on point is what OSHA, OSHA came into their plant." (App. 606-07.) Again, the district court ruled that the OSHA citation was not substantive evidence, it was not "right on point," and it could not be used to show that Kinseth's working conditions were dangerous. The court never changed its ruling, and while plaintiffs disagreed, they were not free to ignore the ruling and make the precise argument the court had barred.

3. The district court's error in admitting the citation and plaintiffs' improper use of the OSHA citation requires reversal.

The repeated use of the OSHA citation, which never should have been referenced, for purposes the district court expressly prohibited, requires reversal. Indeed, the Iowa Supreme Court has vacated verdicts where counsel tried to shoehorn inadmissible evidence into expert reliance material.

In *Gacke*, 684 N.W.2d at 181, the seminal Iowa case on the use of reliance material, plaintiffs circulated questionnaires to various individuals who owned property affected by an alleged nuisance. The plaintiffs referenced the questionnaires, which were otherwise inadmissible hearsay, by asking their experts whether they had "relied on questionnaires to

document the existence and frequency of the odor problem" at issue. *Id*. at 183. The Iowa Supreme Court held that asking experts whether they relied on otherwise inadmissible evidence does not automatically allow the experts to discuss the document, and that the expert discussed and exposed the jury to a substantial portion of the questionnaire the expert could not possibly have relied on. *Id*. That "evidence" should never have reached the jury, and because presenting inadmissible evidence to the jury is presumptively prejudicial, the Supreme Court vacated the verdict. *Id*.

Gacke stands for the proposition that experts do not have *carte blanche* to discuss inadmissible evidence just because an attorney asks if they relied on it. *See also State v. Neiderbach*, 837 N.W.2d 180, 205 (Iowa 2013) (testimony about studies that included out-of-court statements by caregivers was inadmissible under Rule 5.703 because the actual statements mentioned by the expert were not a type reasonably relied on by experts in the field).

Even where an expert does permissibly rely on otherwise inadmissible evidence, *Gacke* obligates trial courts to scrub irrelevant, prejudicial evidence inessential to the expert's reliance. 684 N.W.2d at 183 (acknowledging the expert permissibly relied on a portion of the questionnaire but reversing because the jury was exposed to otherwise-

inadmissible information on which the expert did not rely). In *Gacke*, the trial court should have allowed the expert to discuss only that portion of the questionnaire on which he permissibly relied. It follows that here, even if the district court had concluded the OSHA testing was somehow relevant to the expert's conclusions, the court was obligated to exclude the irrelevant aspects of that testimony: the fact that the testing occurred at Weil-McLain's facility and the fact that the testing led to a citation.

Finally, *Gacke* shows that these errors are presumptively prejudicial. This case is no different. Plaintiffs have no basis to contend that OSHA's conclusion that Weil-McLain violated the law did not play a part in the jury's high punitive damages award. In fact, plaintiffs' counsel effectively conceded this point—she told the jury the OSHA citation was the "most powerful" piece of evidence against Weil-McLain. (App. 606-07.)

4. **Weil-McLain did not open the door to this testimony.**

Realizing their error, plaintiffs argued post-trial that Weil-McLain had opened the door to testimony about the OSHA citation. Not true; all the improper testimony occurred during plaintiffs' direct examination of their expert. This preceded the supposed "door opening" plaintiffs identified in their post-trial brief. At the time, and solely in an effort to mitigate the prejudice created by plaintiffs' disregard for the court's order, Weil-McLain

on cross-examination clarified that the measurements that led to the OSHA citation occurred in an environment different than where Kinseth worked. (App. 501-03.)

Weil-McLain cannot open the door for impermissible testimony that occurred *before* the alleged door-opening. *State v. Tate*, 341 N.W.2d 63, 64 (Iowa 1983) (opening the door means "opportunity must be given … to *comment* upon, *explain*, or *rebut* the evidence" (emphasis added)); 4 Jones on Evidence § 25A:42 (2016) ("It is a widely recognized rule, applicable to civil and criminal litigation alike, that *when* one party offers evidence or raises a subject …, this may open the door to another party to offer evidence to *rebut*, *answer* or *explain* the matter." (emphasis added)). By the same token, Weil-McLain's effort to mitigate the unfairly prejudicial evidence by eliciting testimony intended to establish the dissimilar conditions did not open the door for plaintiffs to introduce more unfairly prejudicial evidence, nor did it justify plaintiffs opening the door to begin with through the direct examination of their expert. This is particularly true given that the evidence Weil-McLain elicited in its efforts to mitigate the damage already done by plaintiffs' violation of the trial court's prior ruling was evidence that simply confirmed what the trial court itself had found—that is, that the working

conditions in the Indiana manufacturing facility were neither the same as and were not similar to those under which Kinseth had worked. (App. 501-03.)

D. The district court erred in admitting evidence of Kinseth's exposure to Weil-McLain tearouts, which was noncompensable under the statute of repose, and plaintiffs urged the jury in closing to ignore the statute's impact.

1. The statute of repose made all exposure to Weil-McLain's tearouts noncompensable as a matter of law and therefore irrelevant.

Iowa's statute of repose requires that "an action arising out of the unsafe or defective condition of an improvement to real property" be brought within 15 years of the alleged misconduct. Iowa Code § 614.1(11). Boilers containing asbestos become "an improvement to real property" once they have been completely installed. Plaintiffs therefore could not recover for Kinseth's exposure to asbestos during the tearout of these boilers because the complaint in this case was filed more than 15 years after installation of the boilers that Kinseth allegedly tore out. The district court agreed on this point prior to trial, and thus granted Weil-McLain partial summary judgment as to all claims based upon Kinseth's tearouts of Weil-McLain boilers. (App. 76-77, 106; App. 136-37 ("I conclude that, once the boiler was installed, complete with asbestos rope sealing, it became an improvement to real estate within the meaning of the Iowa statute of repose.").)

Iowa law, therefore, effectively divided Kinseth's exposure to asbestos from Weil-McLain boilers into two distinct categories: (1) exposure to Weil-McLain's products during tearout, which was irrelevant and legally noncompensable under the statute of repose, and (2) exposure to Weil-McLain's products during installation, which was potentially compensable, depending upon the evidence and what the jury found.

2. The court erroneously admitted evidence that Kinseth was exposed to asbestos during the process of tearing out Weil-McLain boilers.

Despite the statute of repose's clear force and the district court's acknowledgement that the "the tear-outs … [were] noncompensable," (App. 137), the court nonetheless allowed plaintiffs to introduce at trial—over Weil-McLain's objection—evidence that Kinseth was exposed to Weil-McLain's products during the tearout process. (App. 382-93.) After this initial error, the jury continually heard about Kinseth's noncompensable exposure to asbestos during the tearing out of Weil-McLain's boilers. (App. 278, 283, 459, 461-62, 476, 479.)

Neither plaintiffs nor the district court ever explained how this evidence—which both plaintiffs and the court conceded was noncompensable as a matter of law—was relevant. Indeed, plaintiffs' post-trial briefing did not even argue that the evidence is relevant. Plaintiffs

merely contended that "in fairness the jury should … be permitted to hear evidence of [Kinseth's] exposure from the tear-out of Weil-McLain['s] materials" because "Weil-McLain was permitted to introduce evidence of Kinseth's exposure from tearing out asbestos materials made and supplied by other manufacturers." (Opp. to JNOV at 44.)

Plaintiffs are wrong, and their argument misses the fundamental point, as it ignores the different purposes for which the two parties introduced tearout evidence. *See, e.g.*, Iowa R. Evid. 5.404 (providing an example that shows evidence may be admissible for one purpose but inadmissible for another purpose). At trial, the ultimate question was what portion of fault for Kinseth's injuries should be allocated to Weil-McLain, if any, and what portion should be allocated to other entities. Kinseth's exposure to *other companies*' asbestos during the tearout process was relevant to assess what portion of Kinseth's injuries were attributable to causes such as other companies' asbestos or asbestos-containing products. Iowa Code § 668.3 (2016). But evidence of Weil-McLain tearouts was not relevant, given that it and any claims based upon such exposure were barred by the statute of repose.

If Weil-McLain persuaded the jury that Kinseth's exposure to another company's product caused his injuries, then evidence of Kinseth's exposure

to that other company's product allowed the jury to increase that company's fault on the special verdict form, reducing any judgment against Weil-McLain or eliminating the possibility of a judgment against Weil-McLain altogether. (Jury Instructions Nos. 36-41.)

Unlike Weil-McLain's introduction of evidence relating to Kinseth's exposure while tearing out other companies' boilers, plaintiffs had no reason to introduce the otherwise barred tearout evidence related to Weil-McLain tearouts. Kinseth's exposure to Weil-McLain's asbestos during the tearout process could not increase plaintiffs' award, nor serve as the basis of any award given the statute of repose. And plaintiffs unsurprisingly offer no support for their "fairness" theory. Nor did the district court ever explain why it was "fair" or what that meant given its prior ruling that the evidence of Weil-McLain boiler tearouts was not a proper basis for liability given the statute of repose.

3. Plaintiffs' request for jury nullification based on the tearout evidence confirms that Weil-McLain was prejudiced and a new trial is necessary.

Plaintiffs' obvious motive for introducing tearout evidence became explicit during plaintiffs' closing argument. After successfully introducing this evidence, and after the district court decided to give a special jury instruction—over Weil-McLain's objection—attempting to explain the

statute of repose (Jury Instruction No. 19), plaintiffs' counsel tried to further evade the statute of repose's impact by telling the jury: "I candidly don't understand [the statute of repose]," in part, because "in every meso[thelioma] case … you don't find out you're sick until 15 years later [and] you just can't do anything to it." (App. 610, 614.) This was nothing but a plea for jury nullification based on evidence that should have been excluded, and shows that, in plaintiffs' view, defendants like Weil-McLain should be forced to compensate individuals for claimed conduct barred by the statute of repose.

This Court must presume prejudice resulted from admitting the inadmissible tearout exposure. *Kurth*, 628 N.W.2d at 8. Regardless, the fact that plaintiffs' counsel urged the jury to nullify the law drives home the prejudicial impact of the irrelevant tearout evidence. Testimony at trial continually explained that asbestos causes mesothelioma, and plaintiffs' tactic of pointing to tearout evidence barred by the statute of repose improperly inflated the relevant amount of Weil-McLain asbestos to which Kinseth was exposed.

The jury should have only heard about the relevant exposure, *i.e.*, the exposure from installing Weil-McLain's boilers, but plaintiffs gave the jury a double dose of both tearout and installation exposure. Plaintiffs then

informed the jury that a legal rule—a mere and unfair technicality according to plaintiffs—might prevent the jury from compensating plaintiffs for this harm. Plaintiffs' overt request to the jury that they circumvent that technicality created an unjustifiable risk that the jury would do just that: compensate Kinseth for harm barred by the statute of repose. *State v. Hendrickson*, 444 N.W.2d 468, 473 (Iowa 1989) ("'Jury nullification exalts the goal of particularized justice above the ideal of the rule of law. We are persuaded the rule of law should not be subverted.'"); *Lioce v. Cohen*, 174 P.3d 970, 983 (Nev. 2008) (new trial warranted based on arguments for "impermissible jury nullification").

Plaintiffs' overt request for jury nullification underscores that the district court's attempt to properly instruct the jury was futile. In instructing the jury, the district court told the jury that it "may not consider evidence of exposures to … tearouts … as evidence of fault or liability," but, at the same time, that it "may, however, consider the exposure to asbestos from tearouts … as [it] consider[ed] the total exposure, if any, Mr. Kinseth had to asbestos." (Jury Instruction No. 19.) An attempted curative instruction alone cannot justify, excuse or eliminate the error resulting from erroneously admitting inadmissible evidence. Regardless, this instruction was hopelessly confusing and improper because it simultaneously told the jury *not to*

consider tearout exposure as evidence of fault but also *to consider* it as evidence of Kinseth's "total exposure." And even if the jury could have made sense of the instruction, any chance the jury would abide by Iowa law was negated when plaintiffs' counsel urged the jury to ignore Iowa the statute's legal force.

E. Plaintiffs' counsel repeatedly violated the district court's pretrial rulings during closing argument.

1. Plaintiffs' closing argument included repeated references to Weil-McLain's wealth and the amount spent on its legal defense.

Weil-McLain had a right to present its case to a jury untainted by references to its wealth or the amount spent on its defense. *See, e.g.*, *Rosenberger*, 541 N.W.2d at 907 ("When determining liability it is improper for the jury to consider the relative wealth of the parties."); *Whittenburg v. Werner Enterprises, Inc.*, 561 F.3d 1122, 1129-30 (10th Cir. 2009) ("To imply or argue that the mere act of defending oneself … is reprehensible serves no proper purpose, and for time out of mind it has been the basis for appellate courts ordering new trials.").

It is thus long-settled that references to a party's wealth or amounts spent in defense is misconduct. *See, e.g., Burke v. Reiter*, 42 N.W.2d 907, 912 (Iowa 1950) ("This practice of referring to the worth or (poverty) of the respective litigants has been too often condemned by this court to need

citation of authority.") (quoting *Vanarsdol v. Farlow*, 203 N.W. 794, 795 (Iowa 1925)). It is also long-settled that such misconduct can often be remedied only by a new trial. *See, e.g., Rosenberger*, 541 N.W.2d at 907 (granting a new trial based on misconduct in closing); *Vanarsdol*, 203 N.W. at 795 ("It was a prejudicial error for the plaintiff's counsel to [refer to the relative wealth of the parties] in his address to the jury, and if, for no other reason, we would have no hesitancy in reversing this case on that ground.").

Notwithstanding Iowa law's long prohibition and condemnation of such tactics and arguments, Weil-McLain anticipated that plaintiffs might attempt to inflame the jury and inflate their damages by portraying Weil-McLain as a deep-pocketed corporate villain. To avoid such prejudicial tactics, Weil-McLain sought pretrial rulings prohibiting "[a]ny reference or comment by counsel" to the "amount of money or time spent by the Defendant in the defense of this matter," including "expert witness time and expenses," or to the "wealth, power, corporate size or assets of Weil-McLain." (App. 110, 112.) Plaintiffs ended up agreeing to these uncontroversial limitations (App. 189, 192), and that became the law by which plaintiffs were to abide. But in closing argument, they did not.

Plaintiffs' counsel ridiculed the amount spent by Weil-McLain testing the amount of dust created by cutting asbestos rope, telling the jury that

Weil-McLain "spent half a million dollars for the test ... as simple as people cutting a rope a couple of times." (App. 640.) Just a few minutes later, plaintiffs' counsel did it again: "Weil-McLain spent half a million dollars on the study that could have been done as easily as the two minutes we saw on the floor." (App. 643) (referring to a courtroom demonstration of how rope was cut). These taunts had no legitimate purpose—they were not, for example, part of an argument about whether the studies were probative or the results reliable—but served only to paint Weil-McLain as rich and careless with its money, at least when it came to its legal defense.

Plaintiffs' counsel also repeatedly disparaged Weil-McLain's studies and expert opinions as "bought and paid-for science." (App. 605; App. 602 ("if you buy their bought-for studies").) These inappropriate comments go beyond establishing bias. They reinforce plaintiffs' improper theme that Weil-McLain was wrong to prepare a defense and would sooner use its resources to "buy science" than make its products safe for ordinary people.

Likewise, plaintiffs' counsel made numerous references to Weil-McLain's allegedly lavish spending on its defense. For example, plaintiffs' counsel told the jury that Weil-McLain "paid a company tens of thousands of dollars to create graphics." (App. 611.) On another occasion, plaintiff's counsel quipped that Weil-McLain made its point with "a very neat

expensive graphic." (App. 598.) And again: "They hire DecisionQuest [for trial graphics] and spends tens of thousands of dollars for it." (App. 643.) If Weil-McLain was willing to spend tens of thousands of dollars on graphics, how many multiples of that should Weil-McLain have to pay in damages? Plaintiffs' counsel made this link explicit, arguing that damages in the range of "4 million to 20 million is the right number" because "[i]t is certainly within the realms of what they have paid in this litigation." (App. 724.) Commenting upon or arguments concerning amounts paid in defense violated the district court's order, plaintiffs' agreement to abide by the order, and the precedent of this state. Such argument had no place before the jury.

2. Plaintiffs' counsel improperly instructed the jury to "send a message" to Weil-McLain.

Weil-McLain sought and received a pretrial ruling prohibiting "[a]ny references, statements or arguments that the jury should attempt to send Defendant a message." (App. 110.) Before trial, plaintiffs' counsel agreed and told the court that "I just want to be very clear that I will not -- and I'll state it on the record -- state, 'You need to send the defendants a message.'" (App. 189; *see also* App. 133.)

As with the prohibition on references to the relative wealth of the parties and spending on defense, this pretrial ruling and plaintiffs' agreement were not strictly necessary because the law is clear that send-a-message

arguments are improper. *See Janssen Pharm., Inc. v. Bailey*, 878 So. 2d 31, 62 (Miss. 2004) (condemning the use of "inflammatory" send-a-message arguments and holding that "this issue alone merits reversal"). The district court nevertheless granted Weil-McLain's *motion in limine*, leaving no doubt about the propriety of send-a-message arguments. But again, this did not stop plaintiffs' counsel.

In closing argument on liability and compensatory damages, plaintiffs' counsel declared that "It is not about what the family needs, it is about sending a message to a company who you've evaluated how they spend some of their money ... what message they need in order to value this appropriately. That's why we're here. And so what that adds up to is $14 million." (App. 627-28.) In other words, forget about compensating plaintiffs for their actual injuries. If Weil-McLain can spend millions on defense, including tens of thousands on graphics alone, how much is required to send that company a message?

Send-a-message arguments are beyond the pale, especially in the context of argument on compensatory damages. *See, e.g., McCabe v. Mais*, 580 F. Supp. 2d 815, 834 n.13 (N.D. Iowa 2008) (*rev'd on other grounds*) ("It is axiomatic that 'send a message' arguments, which urge the jury to base its findings on compensatory damages on alleged facts outside of the

record and for purposes of punishment, are improper."); *Janssen*, 878 So. 2d at 62 ("Essentially, Plaintiffs' counsel was making a punitive damages argument ... when the only issue before the jury was a compensatory damages claim for negligent failure to warn. Such statements made by counsel were intended to inflame and prejudice the jury."). Plaintiffs did not need to be acquainted with these basic rules of Iowa law to understand that they were engaging in clear misconduct; they only needed to heed the district court's pretrial rulings. They did not.

The send-a-message argument cited above was not an isolated mistake. It was plaintiffs' theme. For example: "[Weil-McLain] is a company that has not heard ... that's why we're here." (App. 632.) And again: "[Y]ou are speaking from people from this community to make sure that the people who are hurt in this community are heard from a company that values things differently than I think most of us do." (App. 643.)

Plaintiffs' counsel went so far as to conclude her punitive damages argument by warning the jury that Weil-McLain has been involved in "30 years of lawsuits" but has still not heard the people's message. (App. 728.) Weil-McLain's objection to this improper comment was sustained, but plaintiffs' counsel continued, undeterred. She went on to challenge the jury not to be "naïve" by thinking that anything less than a large monetary

damages award would adequately send a message to Weil-McLain. (App. 728-29.) With that flourish, having infused the jury with a sense of mission to send a message and be heard, the jury was sent to deliberate on punitive damages. And, having been sent on its improper "mission" by plaintiffs' counsel, the jury paid heed, and fulfilled that mission by delivering a wrongful punitive damages award.

In response to Weil-McLain's post-trial motion, plaintiffs conceded, as they must, that the send-a-message arguments were improper. (Opp. to JNOV at 37-38.) But plaintiffs will likely again seek to excuse their improper conduct, as the district court did, by pointing to Weil-McLain's "cogent argument about why the case was not about sending a message." (App. 821.) Weil-McLain, however, cannot be penalized for attempting to mitigate as best it could the substantial prejudice caused by plaintiffs' closing misconduct. Regardless, as the verdict itself shows, Weil-McLain's efforts to overcome this prejudice were unsuccessful.

F. This inadmissible evidence and improper argument warrant a new trial.

Individually, the improper admission of the OSHA citation, plaintiffs' repeated abuse of the OSHA evidence in violation of the district court's ruling, and plaintiffs' counsel's closing misconduct each caused prejudice to Weil-McLain. Of course, these errors and violations are not properly

analyzed for their individual impact, but *cumulatively*. *See, e.g.*, *Rosenberger*, 541 N.W.2d at 909 (holding that the "cumulative effect" of closing misconduct together with additional errors left "the integrity of the jury's verdict in doubt" and that the district court abused its discretion in failing to grant a new trial). Taken together here, as they must be, it is apparent that a different result "would have been probable" but for the district court's errors and counsel's misconduct. *See, e.g., id.* at 907-09 (holding that a new trial is required "if it appears that prejudice resulted or a different result would have been probable").

The inadmissible evidence and misconduct had its intended effect, resulting in a rushed, inflated, and irrational verdict. For example, the jury saw fit to award plaintiffs $500,000 in damages for Kinseth's pre-death medical expenses despite the parties' stipulation that those expenses were no more than $131,233.06. (App. 809.) This basic mistake was unsurprising given that it took the jury less than two-and-a-half hours to: (1) reach a verdict on plaintiffs' claims against Weil-McLain, (2) consider Weil-McLain's affirmative defenses, (3) divide liability among 14 entities, (4) assess $4 million in compensatory damages divided among five categories, and (5) conclude that plaintiffs were entitled to an award of punitive damages. (App. 676-709.) The jury then took less than forty-five minutes

to return a $2.5 million award of punitive damages. *See, e.g., Janssen*, 878 So. 2d at 62 (concluding based on the substantial award of punitive damages that the jury was likely influenced by improper argument).

In the wake of plaintiffs' counsel's misconduct, the jury evidently was able to fill out the thirty-four-page verdict form quickly. Weil-McLain is entitled to a new trial before a jury that is focused on admissible evidence and not under the influence of improper arguments about how to "send a message" to a company that purportedly spends richly and carelessly on its defense and so obviously "values things differently than I think most of us do." (App. 643.)

CONCLUSION

The judgment on appeal was the product of a series of reversible legal errors, and improper conduct. Accordingly, Weil-McLain respectfully requests that the Court vacate the jury verdict, reverse the judgment of the district court in its entirety, instruct the district court to direct a verdict in favor of Weil-McLain on the issue of punitive damages, and order a new trial on plaintiffs' remaining claims.

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 Final Brief By Defendant-Appellant/Cross-Appellee 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 the twenty required copies of the brief is $0.

/s/ Robert M. Livingston Dated: July 8, 2016

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The undersigned hereby certifies that on July 8, 2016, the above and foregoing Final Brief By Defendant-Appellant/Cross-Appellee was electronically filed with the Clerk of Court for the Supreme Court of Iowa using the EDMS system, service being made by EDMS upon the following:

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