No. 15-0943

IN THE SUPREME COURT OF IOWA

SHARI KINSETH AND RICKY KINSETH, co-executors of the estate of LARRY KINSETH, deceased,
Plaintiffs-Appellees / 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

BRIEF OF APPELLEES/CROSS-APPELLANTS

Lisa W. Shirley *Pro Hac Vice*
SIMON GREENSTONE PANATIER BARTLETT, PC
3232 McKinney Ave., Suite 610
Dallas, TX 75204
(214) 687-3248 Telephone
(214) 276-7699 Facsimile
lshirley@sgpblaw.com

James H. Cook
DUTTON, BRAUN, STAACK & HELLMAN
3151 Brockway Road
Waterloo, IA 50701
(319) 234-4471 Telephone
(319) 234-8029 Facsimile
cookj@wloolaw.com

ATTORNEYS FOR PLAINTIFFS-APPELLEES/CROSS-APPELLANTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Rules

Other Authorities

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Plaintiffs/Appellees state the following issues for review:

1. Did the district court abuse its discretion in ruling that Weil-McLain failed to present substantial evidence to support submission of a jury question on apportionment of fault to certain released parties?

Baker v. Smith, 2002 Iowa App. LEXIS 1055, at *11 (Iowa Ct. App. Oct. 16, 2002)

Crawford v. Yotty, 828 N.W.2d 295 (Iowa 2013)

Greenwood v. Mitchell, 621 N.W.2d 200 (Iowa 2001)

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

Pexa v. Auto Owners Ins. Co., 686 N.W.2d 150 (Iowa 2004)

Ranes v. Adams Labs., Inc., 778 N.W.2d 677 (Iowa 2010)

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

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

St. Paul's Evangelical Lutheran Church v. City of Webster City, 766 N.W.2d 796 (Iowa 2009)

Studer v. DHL Express (USA), Inc., 2009 Iowa App. LEXIS 233 (Iowa Ct. App. Mar. 26, 2009)

Swift v. Petersen, 240 Iowa 715, 721-22, 37 N.W.2d 258 (1949)

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

Tyson Foods, Inc. v. Hedlund, 740 N.W.2d 192 (Iowa 2007)

Vasconez v. Mills, 651 N.W.2d 48 (Iowa 2002)

Vennerberg Farms, Inc. v. IGF Ins. Co., 405 N.W.2d 810 (Iowa 1987)

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

2. Did the district court correctly find that (1) Weil-McLain waived its argument that punitive damages should not be imposed because its conduct did not deviate from that of other manufacturers, and (2) the trial record contains substantial evidence setting Weil-McLain's conduct apart from that of other asbestos manufacturers?

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

BMW of N. Am. v. Gore, 517 U.S. 559 (1996)

Channon v. UPS, 629 N.W.2d 835 (Iowa 2001)

Field v. Palmer, 592 N.W.2d 347 (Iowa 1999)

Johnson v. Dodgen, 451 N.W.2d 168 (Iowa 1990)

Kimbrough v. Loma Linda Dev., Inc., 183 F.3d 782 (8th Cir. 1999)

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

Mercer v. Pittway Corp., 616 N.W.2d 602 (Iowa 2000)

Miller v. Young, 168 N.W.2d 45 (Iowa 1969)

Ogden v. Wax Works, Inc., 214 F.3d 999 (8th Cir. 2000)

Ragee v. Archbold Ladder Co., 471 N.W.2d 794 (Iowa 1991)

Royal Indem. Co. v. Factory Mut. Ins. Co., 786 N.W.2d 839 (Iowa 2010)

Schlegel v. Ottumwa Courier, 585 N.W.2d 217 (Iowa 1998)

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003)

Walsh v. Nat'l Computer Sys., 332 F.3d 1150 (8th Cir. 2003)

Wilson v. IBP, Inc., 558 N.W.2d 132 (Iowa 1996)

3. Did the district court abuse its discretion in ruling:

(i) OSHA's citation of Weil-McLain in 1974 for failing to place warning labels on its asbestos rope and asbestos cement was relevant and admissible because decedent Larry Kinseth had exposure to asbestos from Weil-McLain boilers during that time period; Plaintiffs' experts were entitled to rely on OSHA's asbestos fiber measurements from the asbestos rope and asbestos cement operations in Weil-

McLain's plant; and Weil-McLain itself introduced the asbestos fiber measurements as substantive evidence when it questioned its own witness about them;

(ii) evidence of Larry Kinseth's asbestos exposures from tearing out Weil-McLain boilers was relevant and admissible on the issue of causation;

(iii) Weil-McLain waived its objections to statements made by Plaintiffs' counsel in closing argument and there was no prejudice from the statements because they did not affect the outcome of the case?

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

Baysinger v. Haney, 261 Iowa 577, 583, 155 N.W.2d 496 (1968)

Blum v. Merrell Dow Pharms., 33 Phila. 193, 221, 1996 WL 1358523 (Phil. Ct. Comm. Pleas 1996)

Boren v. BOC Group, Inc., 895 N.E.2d 53 (Ill. App. Ct. 2008)

Burke v. Brimmer, 2009 Iowa App. LEXIS 621 (Iowa Ct. App. June 17, 2009)

Conn v. Alfstad, 2011 Iowa App. LEXIS 1090 (Iowa Ct. App. Apr. 27, 2011)

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

Gilster v. Primebank, 747 F.3d 1007 (8th Cir. 2014)

In re Welding Fume Prods. Liab. Litig., 534 F. Supp. 2d 761 (N.D. Ohio 2008)

Int'l Rehabilitative Sciences, Inc. v. Sebelius, 688 F.3d 994 (9th Cir. 2012)

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

Nat'l Sur. Corp. v. Westlake Invs., LLC, 872 N.W.2d 409 (Iowa Ct. App. 2015)

Pexa v. Auto Owners Ins. Co., 686 N.W.2d 150 (Iowa 2004)

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

Smith v. Haugland, 762 N.W.2d 890 (Iowa Ct. App. 2009)

State v. Dudley, 856 N.W.2d 668 (Iowa 2014)

State v. Miller, 834 N.W.2d 873 (Iowa Ct. App. 2013)

State v. Morrison, 368 N.W.2d 173 (Iowa 1985)

State v. Nelson, 234 N.W.2d 368 (Iowa 1975)

State v. Reynolds, 765 N.W.2d 283 (Iowa 2009)

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

Wyeth v. Rowatt, 244 P.3d 765, 722 (Nev. 2010)

4. On cross-appeal, did the district court err in allowing Weil-McLain to apportion fault to bankrupt entities?

Pepper v. Star Equipment, Ltd., 484 N.W.2d 156 (Iowa 1992)

Rivera v. Woodward Res. Ctr., 865 N.W.2d 887 (Iowa 2015)

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

ROUTING STATEMENT

This appeal should be decided by the Iowa Supreme Court as it involves substantial issues of first impression and fundamental issues of broad public importance requiring ultimate determination by the Supreme Court. Iowa R. App. P. 6.1101(2)(c) and (d).

STATEMENT OF THE CASE

In January 2008, Larry Kinseth ("Kinseth") and his wife, Shari Kinseth, brought this tort suit in the District Court for Wright County, seeking damages arising from Kinseth's diagnosis of malignant mesothelioma, a cancer uniquely caused by asbestos exposure. (App. 1, 6). They sued the manufacturers of the asbestos-containing products that Kinseth was exposed to during his long career as a heating and plumbing service technician from 1953 to 1987, including Weil-McLain. (App. 5-6). Plaintiffs' petition included claims for negligence, strict products liability, breach of express and implied warranties, and loss of consortium. (App. 5).

After Kinseth died from mesothelioma in January 2009, Shari Kinseth and Kinseth's son, Ricky Kinseth, were appointed co-executors of his estate and substituted as Plaintiffs to pursue a wrongful death claim. (2nd Am. Pet. p. 2; Order 4/10/12 pp. 1-2). The complaint was later amended again to add a claim for punitive damages. (3rd Am. Pet. p. 12; Order 4/10/12 pp. 1-2).

In October 2010, Judge Stephen P. Carroll issued a combined 98-page ruling on the summary judgment motions brought by a number of defendants who argued that Plaintiffs' claims were barred by the 15-year statute of repose for claims arising out of defects in improvements to real property, Iowa Code § 614.1(11) (2009). (App. 10-107). The court's rulings turned on whether defendants' products were "improvements to real property" at the time of Kinseth's asbestos exposure. (App. 25-26). The court determined that pumps, valves, steam traps, boilers, and other heating and plumbing equipment became improvements to real property when they were permanently attached to a building. (App. 28-29, 38-39, 41-42, 65, 74, 77). The court found that the statute of repose barred claims based on Kinseth's asbestos exposure that occurred after the equipment had been attached, including exposures during the removal, demolishing, or refurbishing of old equipment. (App. 27-32, 39, 50, 55, 58, 66, 70, 73, 77-78, 81). The court distinguished exposures that occurred before or during installation, however, finding injury from such exposures to be compensable. (App. 50, 61, 70, 73-75, 78, 81).

Summary judgment was denied or granted in whole or in part depending on whether Kinseth had exposure to a defendant's product before or after installation. (App. 105-06). Weil-McLain was granted partial summary judgment. (App. 78, 106). Plaintiffs' claims based on Kinseth's exposure from tearing out and removing old Weil-McLain boilers were found barred, but Plaintiffs were allowed to proceed with their claims based on his exposure to asbestos rope during installation of Weil-McLain boilers. (App. 77-78, 106).

This case was tried against Weil-McLain over three-and-a-half weeks in April 2014. The jury returned a verdict in favor of the Kinseths, finding Weil-McLain liable on theories of negligence, product liability design defect, product liability warning defect, and breach of the implied warranty of merchantability. (App. 676-77). The jury considered the liability of thirteen other asbestos manufacturers and found ten of them at fault. (App. 679-703). The jury awarded $4 million in compensatory damages. (App. 705). The jury apportioned 25% fault to Weil-McLain, another 25% to two bankrupt entities (Hercules and Johns-Manville), and the

remaining 50% to eight other defendants who settled or were dismissed prior to trial. (App. 706). The jury also made a punitive damages finding against Weil-McLain, and awarded $2.5 million in punitive damages. (App. 707-09). Because the jury did not find that Weil-McLain's conduct was directed at Kinseth, (App. 709), 75% of the punitive damages must be paid to the Iowa Civil Reparations Trust Fund. Iowa Code § 668A.1(2)(b).

Judgment was entered against Weil-McLain for $3.5 million, plus interest and costs. (App. 738-39). Weil-McLain's post-trial motions were denied, with the exception that the district court granted a remittitur of medical expenses from $500,000 to $131,233.06, the amount stipulated by the parties at trial. (App. 809, 822). This timely appeal and cross-appeal followed. (App. 824-34).

STATEMENT OF FACTS

Initially, Plaintiffs must correct two fundamental distortions of the trial record that underlie much of Weil-McLain's appeal. First, many of Weil-McLain's arguments are based on the flawed premise that Kinseth's exposures to asbestos from installing Weil-McLain boilers ended in 1972. As detailed herein, these installation exposures actually continued up until 1987. Second, Weil-McLain barely mentions asbestos cement, but the evidence established that Kinseth was exposed to both asbestos rope and asbestos cement when installing Weil-McLain boilers.

It is undisputed that Kinseth began installing Weil-McLain boilers in 1953. (App. 743-44, 869-70, 882, 884-85, 905, 925). He worked on the installation crew of his family's plumbing and heating business from 1957 to 1963 (App. 884-86, 908-10), during which time he installed "hundreds" of boilers. (App. 901-02; *see also* App. 891, 903, 917). Even after he began helping with sales in 1963, and eventually bought the business from his brothers in 1966, he continued to do hands-on work, including boiler installations. (App. 886-88).

Kinseth's exposures to asbestos from installing Weil-McLain boilers did not end in 1972. Kinseth testified that after 1972, he "occasionally" did boiler installation. (App. 949-50.) Even into the 1970s, the company was putting in "a lot" of boilers. (App. 906-07). He recalled one specific instance of installing a boiler in the Aco seed building in "about '72 or '74." (App. 898-900). He explained that, "[c]lear back up into the 1980s[,] [w]e still put boilers in." (App. 933).

Kinseth testified multiple times that he continued to work around the installation of boilers up into the 1980s:

- He continued to work "hands-on in the field" until his retirement in 1987. (App. 889-90).
- With regard to exposure from installation of boilers up into the 1980s, he said the "way I would be exposed is I did go to all the jobsites . . . ." (App. 904).
- Even in 1980, he was only in the store "half time." (App. 911).
- He accompanied the mechanics when they were working on boilers. (App. 926).

Experts on both sides of this case, as well as Weil-McLain's corporate representative, Paul Schuelke, understood that Kinseth had boiler exposures after 1972. Plaintiffs' expert in occupational medicine, Dr. Carl Brodkin, testified that although most of Kinseth's asbestos exposures were prior to 1972, Kinseth continued to have intermittent exposure and bystander exposure to asbestos from installing Weil-McLain boilers after 1972, and even up into the 1980s as a supervisor. (App. 368-69). Intermittent or occasional work with asbestos products can and does cause mesothelioma. (App. 369). Kinseth's asbestos exposures in the 1980s contributed to cause his mesothelioma. (App. 369-71).

Defense expert Eric Rasmuson admitted that Kinseth worked intermittently with boilers between 1972 and 1987. (App. 537-40). He testified that "[a]ccording to the deposition testimony of Mr. Kinseth, he indicated that he worked in the field after 1972." (App. 537). He concluded from the deposition testimony that Kinseth was still working hands-on with equipment off and on after 1972, but that his primary work involved selling equipment and estimating jobs. (App. 537-38). Rasmuson testified

that in evaluating Kinseth's total cumulative lifetime exposure and risk of asbestos-related disease, exposures all the way until 1987 should be considered if the evidence shows exposure in those later years, which he admitted that it does. (App. 540).

Schuelke agreed that Kinseth occasionally did some hands-on boiler work after 1972, even though the bulk of his work was before that time. (App. 523-25). He clarified that he was not trying to say that just because a Weil-McLain boiler came out in 1973 or 1974, that meant Kinseth did not work on it. (App. 524). Schuelke acknowledged that Kinseth's hands-on boiler work continued until his retirement in 1987, on an occasional basis. (App. 526).

Weil-McLain was a "real popular" brand of boiler that Kinseth worked with, including between 1953 and 1957. (App. 876; *see also* App. 873-74, 903, 925, 1089). He personally installed No. 86 and No. 94 Weil-McLain boilers and Type MGB Weil-McLain boilers, as well as other Weil-McLain boilers. (App. 1088-90).

Kinseth primarily worked with sectional boilers, and Weil-McLain was the largest supplier of sectional boilers that he

installed in residences. (App. 923-24). Weil-McLain has confirmed that, in the 1950s and going into the 1960s, 75-80% of Weil-McLain boilers were sectional boilers. (App. 505). Kinseth spent more of his career installing residential boilers than commercial boilers. (App. 928). His company continued to install sectional residential boilers into the 1980s. (App. 929).

Sealants are required between the sections of Weil-McLain's sectional boilers to prevent the escape of hot, combustible gases. (App. 491-93). According to Schuelke, the sealants utilized in Weil-McLain sectional boilers were asbestos rope and/or asbestos cement. (App. 494, 514-16). In fact, most Weil-McLain commercial boilers manufactured in the 1950s, 1960s, and 1970s required both asbestos rope and asbestos cement. (App. 853). The rope supplied by Weil-McLain contained asbestos from the mid-1950s until 1983. (App. 367, 853, 863). Weil-McLain supplied asbestos cement with its boilers until 1977. (App. 367, 516, 844, 847).

There is no dispute that Kinseth installed asbestos rope in Weil-McLain boilers. (App. 876-77, 919-22, 951). The asbestos rope was supplied by Weil-McLain as part of the boiler. (App. 877, 918,

939). Sometimes Kinseth installed both asbestos rope and asbestos cement on boilers. (App. 921-22). The Weil-McLain manuals he reviewed focused on asbestos rope as a sealant because the manuals were all dated after 1977, after Weil-McLain stopped using cement as a sealant. (App. 376, 463-64).

Weil-McLain did not start using asbestos rope as a sealant in its boilers until 1955. (App. 862). Even then, asbestos rope was used on "very few" Weil-McLain boilers in the late 1950s. (App. 862). There were thus at least two years, 1953 to 1955, in which Kinseth installed Weil-McLain boilers when only asbestos cement was used as a sealant.

Kinseth personally used asbestos-containing cement products to install boilers. (App. 398-99, 921-22, 931, 963). His brother and co-worker, Rolland Kinseth, testified that Weil-McLain supplied bags of asbestos cement with its boilers for use in installation. (App. 481). Kinseth testified that there was one type of powdered asbestos that did not have a brand name on it. (App. 883).

Schuelke agreed that there was no question that Kinseth repeatedly talked about using asbestos cement on boilers. (App. 511). He acknowledged that Kinseth identified using powdered asbestos, later described to be mixed cement, and that one of the types did not have a brand name on it. (App. 510-11). Weil-McLain sold Johns-Manville asbestos cement until 1977. (App. 520, 844, 847). He testified that Weil-McLain sold its cement in bags with no name. (App. 510). Weil-McLain sold Johns-Manville 352 cement by repackaging it into an unmarked bag. (App. 510, 847).

Schuelke confirmed that some of the specific Weil-McLain boilers identified by Kinseth by boiler number used asbestos cement as a sealant and that Weil-McLain supplied the cement with the boiler. (App. 512-13). He further acknowledged that for years when Kinseth was installing Weil-McLain boilers, most of Weil-McLain's boilers utilized asbestos cement. (App. 514). One of the specific Weil-McLain boiler numbers that Kinseth installed, No. 87, was manufactured during the 1953-72 time period and always utilized asbestos cement, not asbestos rope. (App. 856, 862).

From his review of the factual record, Brodkin identified asbestos rope and asbestos cement as the relevant products on Weil-McLain boilers. (App. 372-75, 404, 445). Brodkin testified that Kinseth was regularly exposed to insulating cement used to seal boilers during installation. (App. 374). The 100% chrysotile asbestos cement that Weil-McLain supplied with its boilers was essentially raw asbestos. (App. 375). The main exposure was from mixing up the dry powder. (App. 378-79). Kinseth used Weil-McLain-supplied asbestos cement on vent pipes. (App. 381-82). Kinseth also reported using asbestos cement during installation of boilers. (App. 399-400). Kinseth would not know that Weil-McLain was the supplier of the asbestos cement he used because Weil-McLain has stated that it repackaged the cement and placed it in unlabeled bags. (App. 399). Brodkin also relied on Schuelke's testimony that cement was furnished with Weil-McLain boilers to make them gas tight. (App. 400). Brodkin further noted the evidence that asbestos cement was the only sealant available until 1955 and rope was used on very few boilers even in the late 1950s.

(App. 402-03). As a result, Kinseth's installation of Weil-McLain boilers from 1953-55 involved asbestos cement. (App. 403-04).

Defense expert Rasmuson acknowledged that Weil-McLain boilers contained both asbestos rope and asbestos cement, with the rope on the top and bottom and the cement on the sides. (App. 541).

The evidence at trial showed that Weil-McLain both knew and should have known that its asbestos products could cause fatal disease. As of 1939, Weil-McLain had *actual knowledge* that asbestos exposure causes disease. (App. 845-46). In addition, the evidence of what it should have known from available information was substantial, and came not only from Plaintiffs' experts Brodkin (App. 318-62), and Dr. Mark, (App. 286-87), but also from defense expert Rasmuson. (App. 548-61). Rasmuson admitted, for example, that it has been known since the 1930s that inhaling asbestos dust could lead to disabling and fatal lung disease. (App. 548-49). He further admitted that cases of lung cancer associated with asbestos exposure were first reported in the 1930s, and that by the 1950s it was firmly established that asbestos exposure

increases the risk of lung cancer. (App. 549). He also testified that he agreed that a company using ordinary care in the 1950s should have foreseen that cancer and/or death among the wives of asbestos-exposed workers might reasonably result from laundering asbestos-laden clothing. (App. 552-53). The evidence also showed that the specific products at issue, asbestos rope and asbestos cement used on boilers, have been known to be hazardous since the 1930s. (App. 318, 321-22, 338, 349-51).

According to Weil-McLain, it began placing asbestos warnings on its asbestos rope and asbestos cement products in 1974. (App. 517, 857). Other evidence showed that Weil-McLain did not warn in the 1970s, or that the warning was completely inadequate, as neither Kinseth nor his brother Rolland Kinseth ever saw any asbestos warnings on any Weil-McLain products. (App. 482-83, 964-68). Schuelke himself never saw a warning on Weil-McLain products during the 1975-78 time period, and agreed that if no one sees a warning it is not a reasonable warning. (App. 517-18, 521-22).

It was undisputed that Kinseth died of asbestos-caused mesothelioma at the age of 69. (App. 285, 288-91, 422). Plaintiffs' medical experts attributed his disease to his exposure to asbestos from Weil-McLain boilers and other asbestos products. (App. 294-99, 410-13, 416-17, 419-21). He suffered terribly as a result of his cancer diagnosis and treatment, and his expected life span was cut short by fourteen years. (App. 424-34, 465-73, 484-87, 957-62, 1197-1212).

ARGUMENT

I. THE DISTRICT COURT PROPERLY RULED THAT WEIL-MCLAIN COULD NOT SEEK TO APPORTION FAULT TO THIRD PARTIES FOR WHICH THERE WAS NOT SUBSTANTIAL EVIDENCE OF COMPENSABLE EXPOSURE.

A. Weil-McLain did not preserve error.

Although Plaintiffs do not deny that Weil-McLain raised this argument before the district court, Weil-McLain waived its right to seek a new trial on liability when it informed the jury during the punitive damages phase of this case that it would pay the jury's compensatory damages award. In an effort to discourage a large punitive damages award, defense counsel told the jury: "[t]he people at Weil-McLain understand what you have said here . . . . they're going to compensate these folks based on what you said . . . ." (App. 726). Weil-McLain is therefore judicially estopped from now contesting liability for the judgment it told the jury it would pay.

The doctrine of judicial estoppel "prohibits a party who has successfully and unequivocally asserted a position in one proceeding from asserting an inconsistent position in a subsequent

proceeding." *Vennerberg Farms, Inc. v. IGF Ins. Co.*, 405 N.W.2d 810, 814 (Iowa 1987). "The doctrine is designed to protect the integrity of the judicial process by preventing intentional inconsistency." *Id.* The doctrine should be applied when necessary to prevent the risk of inconsistent, misleading results. *Tyson Foods, Inc. v. Hedlund*, 740 N.W.2d 192, 198 (Iowa 2007).

Because Weil-McLain is now contending that it is not liable for the jury's verdict, the unmistakable conclusion is that it intentionally misled the jury when it stated that it would pay compensatory damages to the Kinseths. This statement was used to gain an advantage in the punitive damages phase, as defense counsel told the jury, "I think you've already sent your message here" and that the Kinseths were already going to be compensated "based on what you said." (App. 726). This was a successful strategy, as the jury awarded much less in punitive damages than requested by Plaintiffs. Plaintiffs' counsel asked the jury to award punitive damages in the amount of $12 million. (App. 725). She explained that a 1:1 ratio with the compensatory award would be $4 million, but encouraged the jury to go with a 3:1 ratio of $12

million. (App. 725). The jury returned a punitive award of $2.5 million. (App. 709).

Allowing Weil-McLain to commit to compensating the Kinseths, but then fail to do so, would create an inconsistent, misleading result. This is unfair to the Kinseths, and to the people of Iowa who share in the jury's punitive damages award. Iowa Code § 668A.1(2)(b). Weil-McLain should therefore be judicially estopped from now taking a position opposite of what it promised the jury.

B. Standard of review and scope of review.

Plaintiffs agree that the district court's refusal to submit a requested jury instruction is reviewed for an abuse of discretion. *See Hagenow v. Schmidt*, 842 N.W.2d 661, 670 (Iowa 2014); *Crawford v. Yotty*, 828 N.W.2d 295, 298 (Iowa 2013). "An abuse of discretion occurs when the court's decision is based on a ground or reason that is clearly untenable or when the court's discretion is exercised to a clearly unreasonable degree." *Pexa v. Auto Owners Ins. Co.*, 686 N.W.2d 150, 160 (Iowa 2004).

C. Weil-McLain had the burden of establishing the fault of third parties with substantial evidence.

The district court properly excluded certain settled parties from the verdict form when Weil-McLain failed to present substantial evidence of Kinseth's compensable exposure to asbestos attributable to those parties. The comparative fault statute provides that the jury may allocate fault to "each claimant, defendant, third-party defendant, person who has been released from liability under section 668.7, and injured or deceased person whose injury or death provides a basis for a claim to recover damages for loss of consortium, services, companionship, or society." Iowa Code § 668.3(2). But the statute does not say that fault must be allocated to all categories of parties in all cases, regardless of the state of the evidence. The district court carefully studied the evidence of third-party fault presented by Weil-McLain, (App. 592), and allowed Weil-McLain to argue that *thirteen* other companies should be apportioned fault in this case. (App. 706). The district court correctly determined, however, that

Weil-McLain failed to provide sufficient evidence that any additional companies should share liability.[1]

The jury does not automatically consider the fault of settled parties. *See Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854, 863-64 (Iowa 1994) (holding that the district court properly refused to let the jury allocate fault to four settled parties who were asbestos product suppliers when there was no legal or evidentiary support for submission). Instead, Iowa courts have long held that a comparative fault instruction must be supported by substantial evidence in the record. *See Wolbers v. Finley Hosp.*, 673 N.W.2d 728, 731-732 (Iowa 2003); *Vasconez v. Mills*, 651 N.W.2d 48, 52 (Iowa 2002). An instruction should be refused if it rests on speculation instead of substantial evidentiary support. *Thompson v. City of Des Moines*, 564 N.W.2d 839, 846 (Iowa 1997). "Evidence is substantial if a reasonable person would accept it as adequate to reach a conclusion." *Vasconez*, 651 N.W.2d at 52. If the record is insufficient to support a party's theory of recovery or

[1] In its post-trial motions, Weil-McLain contended that five additional companies should have been included on the Special Verdict Forms. (App. 806, 778-79). It has now reduced its complaint to just three companies. Appellant's Br. at 15.

defense, the theory should not be submitted to the jury. *Id.* (citing *Swift v. Petersen*, 240 Iowa 715, 721-22, 37 N.W.2d 258, 261 (1949)).

Instructions on the claimant's comparative fault are routinely denied when there is insufficient evidence to support them. *See Greenwood v. Mitchell*, 621 N.W.2d 200, 205-06 (Iowa 2001); *Studer v. DHL Express (USA), Inc.*, 2009 Iowa App. LEXIS 233, at *10-11 (Iowa Ct. App. Mar. 26, 2009); *Baker v. Smith*, 2002 Iowa App. LEXIS 1055, at *11 (Iowa Ct. App. Oct. 16, 2002). In *Greenwood*, the Court held that the claimant's comparative fault should not be submitted to the jury in the absence of expert testimony that would support a jury finding of causal connection. 621 N.W.2d at 206.

"[T]he standard of proof is no less exacting when the defendant alleges the plaintiff caused his own damages than it is when the plaintiff alleges that the defendant caused the plaintiff's damages," *id.* at 207, or when the defendant alleges that another party is liable for the harm. There is no "principled distinction" for treating causation differently when a defendant seeks to prove it.

Id. And as with a claimant's comparative fault, a released party's fault should only be submitted to the jury when there is sufficient evidence to support it. *See Smith v. Air Feeds*, 556 N.W.2d 160, 164 (Iowa Ct. App. 1996).

The district court correctly concluded that, "the defendant, when attempting to allocate fault so as to lessen fault allocable to defendant, has the same causation burden of the plaintiff in establishing fault against those whom it brings claims." (App. 805). On appeal, Weil-McLain does not challenge the proposition that its causation burden against third parties is the same as Plaintiffs' causation burden in their case in chief. Nor does Weil-McLain dispute that causation in toxic tort cases must be established with expert testimony. *See Ranes v. Adams Labs., Inc.*, 778 N.W.2d 677, 688 (Iowa 2010).

D. Weil-McLain only relied on evidence of exposure during refurbishment of pumps and valves.

Weil-McLain failed to submit the requisite causation evidence with regard to the three pump and valve companies

complained about in Weil-McLain's motion: Peerless Pump, McDonnell & Miller, and Bell & Gossett.

This issue is governed by the district court's application of the statute of repose to Kinseth's pump and valve exposures. Weil-McLain and other defendants successfully invoked the statute of repose in the district court, convincing the court that exposures from the removal of asbestos materials were barred because the products were already attached and had become improvements to real property. (App. 37-41, 77-78).

Plaintiffs resisted summary judgment on the statute of repose. (App. 37-41). Plaintiffs took the position, and still maintain, that Iowa law does not bar recovery for claims based on exposure from ordinary repair work that does not enhance the capital value of real property. (App. 40). *See also St. Paul's Evangelical Lutheran Church v. City of Webster City*, 766 N.W.2d 796, 799-800 (Iowa 2009) (holding that claims arising out of ordinary repairs to a sewer line were not barred by the statute of repose).

Plaintiffs' view did not prevail, Weil-McLain won this issue, and the trial was governed by the district court's ruling that there could be no recovery for exposures from the removal of asbestos materials already in place. Weil-McLain has never argued against that ruling, and has not appealed that ruling. Now that ruling must be applied to Weil-McLain with equal force when it attempts to apportion third party fault. There is no "principled distinction" between Plaintiffs' burden and Weil-McLain's burden when it comes to establishing fault. *Greenwood*, 621 N.W.2d at 207.

With regard to pump and valve manufacturers, the district court ruled that exposures from removing and replacing gaskets and packing were barred after the pumps and valves were permanently attached and considered improvements to real property. (App. 35-42, 50-55, 58, 73-74). Accordingly, the district court granted summary judgment to two pump manufacturers, Ingersoll-Rand and William Powell, because Kinseth's only exposure to asbestos gaskets from those pumps was during maintenance and refurbishing of the pumps after they had already been in service. (App. 39, 41, 55). Partial summary

judgment was granted to two valve manufacturers, and a number of other defendants, on this same basis. (App. 105-06). Again, this was over Plaintiffs' resistance.

Because Weil-McLain invoked the statute of repose, and the district court ruled that the statute of repose applied to bar Plaintiffs' claims against pump and valve manufacturers based on refurbishment work, Weil-McLain's attempt to apportion fault to pump and valve manufacturers based on refurbishment work is similarly barred. Yet Weil-McLain relies *only* on Kinseth's testimony about exposures during refurbishment in arguing that liability should have been assigned to Peerless Pump, McDonnell & Miller, and Bell & Gossett. Appellant's Br. at 21-22. The hypothetical questions Weil-McLain posed to Plaintiffs' medical expert, Dr. Mark, did not distinguish between asbestos exposures before or during installation of the pumps and exposures after the equipment was already permanently attached. Appellant's Br. at 20. As the district court noted, Plaintiffs proved their case against Weil-McLain by eliciting expert causation opinions based only on exposures from installation, whereas "[i]n contrast, counsel for

Weil-McLain did not ask Mark to differentiate between Kinseth's exposures from installation compar[]ed to tear-out work, making it difficult, perhaps impossible, for the jury to sort out the compensable exposures." (App. 806). Even Weil-McLain's expert, Dr. Steven Smith, could not say that Kinseth had a significant exposure during installation of pumps and valves. (App. 569-74).

The district court therefore correctly concluded that with regard to the companies omitted from the verdict form, "Weil-McLain failed to meet its burden of presenting substantial evidence that Kinseth had exposure to these products during installation and that any exposure was a substantial factor in causing his meso[]thelioma." (App. 806). Given the lack of evidence supporting exposures during installation of Peerless Pump, McDonnell & Miller, and Bell & Gossett, the district court did not abuse its discretion in determining that Weil-McLain was not entitled to submit a comparative fault instruction for these third parties.

If anything, the trial court erred on the side of including third parties on the Special Verdict Forms even when the evidence

of exposure during installation was thin. (App. 592). Only one other pump or valve company, TACO, was included on the Special Verdict Forms, and the jury apportioned it *no fault*. (App. 706). The jury apparently agreed with Plaintiffs that there was no evidence of exposure during installation of TACO pumps because Kinseth was only exposed to asbestos gaskets on pumps during refurbishment work barred by the statute of repose under the district court's ruling. (App. 613-14). Thus, even for a pump company for which the district court found there to be a submissible case (the others were granted summary judgment, as noted above), the jury could not conclude that there was any compensable exposure. Weil-McLain has thus failed to demonstrate that the inclusion of any other valve and pump companies would have changed the jury's verdict.

II. THE JURY'S PUNITIVE DAMAGES FINDING HAS SUPPORT IN IOWA LAW AND THE TRIAL RECORD.

A. Weil-McLain did not preserve this issue for appellate review.

The district court properly determined that Weil-McLain did not assert, as a ground for directed verdict on punitive damages, that its conduct was consistent with other manufacturers. (App. 815-16). This argument was therefore waived because the district court did not have the opportunity to consider it before submitting the issue of punitive damages to the jury. (App. 815-16).

Iowa law instructs that, "[a] motion for judgment notwithstanding the verdict must stand or fall on grounds urged in the movant's earlier motion for directed verdict." *Ragee v. Archbold Ladder Co.*, 471 N.W.2d 794, 798 (Iowa 1991). Appellate review is limited to the grounds raised in the motion for directed verdict. *Channon v. UPS*, 629 N.W.2d 835, 859 (Iowa 2001); *Schlegel v. Ottumwa Courier*, 585 N.W.2d 217, 221 (Iowa 1998).

Weil-McLain did move for directed verdict on Plaintiffs' punitive damages claim, but not on the grounds that its conduct was excused because it was consistent with that of other

manufacturers. (App. 653-61). Rather, it asserted four *different* grounds in support of its contention that the jury could not award punitive damages as a matter of law. (App. 656-61).

Iowa Rule of Civil Procedure 1.1003(2) only permits a motion for judgment notwithstanding the verdict, "[i]f the movant was entitled to a directed verdict at the close of all the evidence, *and moved therefor* . . . ." Iowa R. Civ. Pro. 1.1003(2) (emphasis added). The purpose of this rule is "to give the trial court an opportunity to correct its error in failing to sustain a motion for directed verdict." *Miller v. Young*, 168 N.W.2d 45, 50 (Iowa 1969). If the specific ground is not raised at the direct verdict stage, it is as though no directed verdict motion was made at all. *See id.*

Iowa courts apply this rule quite strictly. Simply moving for directed verdict on a particular cause of action does not meet the requirements of Rule 1.1003(2). For example, in *Ragee*, the defendant moved for directed verdict as to the plaintiff's theory of res ipsa loquitur. 471 N.W.2d at 797. It asserted two grounds: that the plaintiffs had failed to show the defendant's exclusive control and that the plaintiffs had failed to prove that the plaintiff's

injuries were not caused by her own actions. *See id.* After a jury verdict against it, the defendant sought a judgment notwithstanding the verdict, but asserted an entirely new argument as to why the res ipsa loquitur theory was not viable, contending that this theory is not available when there is direct evidence as to the precise cause of injury. *See id.* The Court rejected this attempt to circumvent the Rules of Civil Procedure, and held that the new argument would not be considered because it had not been raised in the defendant's directed verdict motion. *See id.* at 798.

There are no exceptions to the rule that arguments not raised at the directed verdict stage are waived. *See Field v. Palmer*, 592 N.W.2d 347, 351-52 (Iowa 1999). *Field* presented the same scenario as in *Ragee*, in that the defendant moved for a directed verdict on two grounds, and then raised a third ground for the first time when it sought a judgment notwithstanding the verdict. *See id.* at 349, 351. Even though the district court recognized that the third argument was new, it granted judgment notwithstanding the verdict. The Iowa Supreme Court held that it

was improper for the trial court to consider a ground not raised in the motion for directed verdict, and that it would violate "our well-established rules governing posttrial motions and error preservation" to allow the defendants to rely on that deficiency in the evidence on appeal. *Id.* at 351, 353. The Court explained that a verdict may not be set aside on any grounds not raised before submission to the jury. *Id.* at 352.

Under these firmly established principles requiring all grounds for setting aside the jury's verdict to be raised at the directed verdict stage prior to submission of the case to the jury, Weil-McLain has waived its argument that punitive damages cannot be awarded because its conduct was consistent with that of other manufacturers.

Although Weil-McLain did not seek directed verdict on this basis, it attempts to salvage this argument by pointing to one sentence in its 30-page directed verdict motion that mentions Weil-McLain's competitors did not warn about asbestos rope. Appellant's Br. at 25. This statement was made in service of its argument that it did not know asbestos rope was dangerous

during the relevant time period, falling under the heading: "Weil-McLain did not have knowledge of the likelihood of injury from asbestos rope and deliberately fail to warn." (App. 658). The transcript of Weil-McLain's oral argument on its directed verdict motion confirms that any mention of other manufacturers was only made in support of Weil-McLain's contention that it did not know its own product was dangerous. (App. 580-81). Defense counsel argued that, "I think what supports the idea that it was unknown during this time frame is that" Kinseth did not see warnings from other manufacturers. (App. 580-81).

The argument that Weil-McLain did not know its asbestos products were dangerous is completely different from the argument that Weil-McLain's conduct was no "worse or different than its peers." Appellant's Br. at 23. The district court correctly determined that he had not been given the opportunity to pass on this specific ground at the directed verdict stage, and therefore could not grant a judgment notwithstanding the verdict on the basis that Weil-McLain's conduct was consistent with other boiler manufacturers.

B. Standard of review and scope of review.

Plaintiffs agree that punitive damages awards are reviewed for correction of errors at law. Iowa R. App. P. 6.907. In addition, a district court's denial of a motion for judgment notwithstanding the verdict is also reviewed for correction of errors at law. *Royal Indem. Co. v. Factory Mut. Ins. Co.*, 786 N.W.2d 839, 846 (Iowa 2010). In reviewing rulings on a motion for judgment notwithstanding the verdict, the appellate court simply asks whether a fact question was generated for the jury. *See id.; Johnson v. Dodgen*, 451 N.W.2d 168, 171 (Iowa 1990).

C. Weil-McLain's conduct was not consistent with that of other manufacturers.

The district court correctly determined that even if Weil-McLain had not waived this argument, there was ample evidence that Weil-McLain's conduct departed from that of other manufacturers. (App. 816-17). Under Iowa law, punitive damages may be imposed when clear and convincing evidence shows that "the conduct of the defendant from which the claim arose constituted willful and wanton disregard for the rights or safety of

another." Iowa Code Ann. § 668A.1. "'Willful and wanton' in the context of this statute means that the defendant 'has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which is usually accompanied by a conscious indifference to the consequences.'" *Mercer v. Pittway Corp.,* 616 N.W.2d 602, 617 (Iowa 2000) (quoting W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* § 34, at 213 (5th ed.1984)).

These principles were applied to the conduct of an asbestos product manufacturer in *Beeman v. Manville Corp. Asbestos Disease Compensation Fund*, 496 N.W.2d 247 (Iowa 1993). There, the Court held that punitive damages could not be imposed simply based on the general knowledge of the asbestos industry about the health hazards of asbestos exposure. *See id.* at 256. Rather, there must be "evidence that sets [the defendant's] conduct apart from that of other asbestos manufacturers." *Id.* The Court recognized that in 1965, upon publication of the Selikoff epidemiological study, the risk of asbestos-related disease to end-users of asbestos

products was clearly established, and asbestos manufacturers, including the defendant in *Beeman*, generally started warning around that time. *See id.* at 250, 255.

There are at least four ways in which Weil-McLain's conduct deviated from that of other manufacturers. First, the district court found that the evidence not only established that Weil-McLain both knew and should have known that its asbestos products could cause fatal disease, but also "that Weil-McLain delayed warning until well after other manufacturers." (App. 817). Consistent with the evidence presented in *Beeman*, there was evidence in this case that Johns-Manville began warning in 1964. (App. 355). Contrary to Weil-McLain's contention that this evidence was not properly admitted at trial, Plaintiffs' expert Brodkin testified—without objection—that beginning in 1964, Johns-Manville warned about the hazards of asbestos exposure on bags of asbestos cement and other insulation materials. (App. 355). Weil-McLain elicted additional testimony from Brodkin on this topic during cross-examination, asking him whether he knew

about Johns-Manville warnings from Johns-Manville's interrogatory responses. (App. 436-37).

Weil-McLain suggests that it is unfair to compare its conduct to that of Johns-Manville because they were "not peers," but fails to mention that *Johns-Manville manufactured the asbestos cement sold by Weil-McLain*. (App. 356). Both Brodkin and Schuelke testified that Weil-McLain purchased Johns-Manville No. 352 asbestos cement. (App. 356, 507, 510, 846). Schuelke explained that Weil-McLain repackaged 100-lb bags of Johns-Manville No. 352 asbestos cement into smaller 15-lb. bags. (App. 507, 510, 846). For many years, Weil-McLain sold those smaller bags of asbestos cement to its customers, in unmarked bags. (App. 510, 846-47). Weil-McLain continued to purchase Johns-Manville asbestos cement until 1977. (App. 520).

In contrast to Johns-Manville's warnings in 1964, according to Weil-McLain it began placing asbestos warnings on its asbestos rope and asbestos cement products in 1974. (App. 857). The jury could have found, however, that Weil-McLain did not warn in the 1970s, or that the warning was completely inadequate, as neither

Kinseth nor his brother Rolland Kinseth ever saw any asbestos warnings on any Weil-McLain products. (App. 482-83, 964-68). Schuelke himself never saw a warning on Weil-McLain products during the 1975-78 time period, and agreed that if no one sees a warning it is not a reasonable warning. (App. 517-18, 521-22). Even under a best-case scenario, Weil-McLain waited *ten years* after Johns-Manville warned on the very same product. Some evidence suggests that Weil-McLain did not warn even up to *nineteen years* after other manufacturers of the same product were warning.

While Weil-McLain wants to compare its conduct to that of other boiler manufacturers, the proper comparison is to the conduct of those selling the exact same asbestos cement sold by Weil-McLain. Weil-McLain's failure to include warnings on Johns-Manville insulating cement for at least ten years after Johns-Manville placed warnings on that product shows a radical departure from the conduct of other manufacturers.

Weil-McLain's conduct is similar to that found sufficient to impose punitive damages in *Lovick v. Wil-Rich*, 588 N.W.2d 688

(Iowa 1999). There, the Court held that there was sufficient evidence to support punitive damages because "[t]here was evidence [the defendant] failed to institute a warning campaign for numerous years despite knowledge of numerous similar incidents involving its [product] and knowledge of the efforts of [a competitor] to warn their users of the danger." *Id.* at 699. The Court noted that there "was also some inference from the evidence that [the defendant] acted indifferently to any need to warn of the potential for danger." *Id.* The facts of the instant case mirror *Lovick* in that Weil-McLain failed to institute a warning campaign for numerous years despite knowledge of the danger and despite knowledge that a competitor company was warning.

The second way in which Weil-McLain's conduct departed from other manufacturers is that it violated the asbestos warning regulations of the Occupational Safety and Health Administration (OSHA). (App. 817). The evidence at trial was that OSHA required warnings on asbestos products as of 1972. (App. 420, 854). As Weil-McLain did not even think about placing warnings on its asbestos products until 1974, Weil-McLain admits that it was in

blatant violation of this federally-mandated warnings requirement for at least two years. (App. 838, 849, 854). Weil-McLain contends that no other boiler manufacturers were issuing asbestos warnings, but provides no evidence from other manufacturers regarding the time period when they started warning. And Weil-McLain has not shown that any other boiler company was in blatant violation of OSHA requirements.

Third, Weil-McLain stands alone in that it did not adequately warn even after being cited by OSHA for its failure to warn. In 1974, OSHA cited Weil-McLain for violating regulations requiring it to put warning labels on its asbestos rope and its asbestos cement. (App. 848, 854). Even after Weil-McLain claims it started warning, neither Kinseth, nor his brother, nor Schuelke himself, saw asbestos warnings on those Weil-McLain products. (App. 482-83, 517-18, 964-68). There is no evidence that other asbestos manufacturers were ever cited by OSHA for failing to warn, or that they continued such failure in the face of OSHA regulatory action.

Finally, Weil-McLain's conduct departed from other manufacturers in the realm of testing and funding research. The district court found that, "Weil-McLain, unlike other manufacturers of asbestos, did not test its products or fund scientific research on its products to determine the amount of asbestos fiber release and whether working with its products produced a risk of harm." (App. 817). The evidence established that many other asbestos product manufacturers tested their products. (App. 544-47). The district court noted that, in contrast, Schuelke testified "categorically" that Weil-McLain never undertook any testing or research of its own asbestos products. (App. 817, 854-55).

Weil-McLain's contention that its conduct was not unique among asbestos product manufacturers and sellers is simply not borne out by the facts. As the district court concluded, "[t]he jury's punitive damages finding was supported by substantial evidence." (App. 820). The punitive damages evidence discussed herein, and in other parts of the district court's order (App. 818-20), establish that a fact question was generated for the jury on the issue of

Weil-McLain's willful and wanton disregard for the safety of workers like Kinseth. The jury's punitive damages finding should not be disturbed.

D. The size of the jury's punitive damages award comports with due process.

On appeal, Weil-McLain has not challenged the constitutionality of the size of the jury's punitive damages award. This should constitute a clear and voluntary waiver of any constitutional excessiveness issue. Iowa R. App. P. 6.903(2)(g)(3). The opportunity for appellate review for excessiveness should be sufficient from a constitutional due process standpoint. However, if the Court chooses to review the award to ensure that it comports with due process pursuant to *Wilson v. IBP, Inc.*, 558 N.W.2d 132, 144 (Iowa 1996) (allowed 500:1 ratio), there can be little doubt that the jury's award is within constitutional bounds.

The United States Supreme Court has explained that "courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to

the general damages recovered." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 426 (2003). Although the Court has declined to prescribe a mathematical bright line between what is constitutionally acceptable and what is not, it has indicated that ratios of punitive damages to actual damages of 145:1 and 500:1 exceed due process limits. *Id.* at 425-26; *BMW of N. Am. v. Gore*, 517 U.S. 559, 581-82 (1996). A rule of thumb is that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Campbell*, 538 U.S. at 425. The Eighth Circuit's case law is consistent with this guideline, upholding punitive damages awards with ratios up to 10:1. *See Walsh v. Nat'l Computer Sys.*, 332 F.3d 1150, 1162 (8th Cir. 2003) (3:1 ratio); *Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1011 (8th Cir. 2000) (6.5:1 ratio); *Kimbrough v. Loma Linda Dev., Inc.*, 183 F.3d 782, 785 (8th Cir. 1999) (10:1 ratio).

Here, the ratio of punitive damages to compensatory damages is .625:1 when the entire compensatory award of $4 million is considered. Even if the Court only considers Weil-

McLain's $1 million share of compensatory damages when calculating the ratio, it would only be 2.5:1. This ratio of less than 3:1 is well within the bounds of what is considered constitutional by the United States Supreme Court.

The constitutionality of this modest ratio is bolstered by the evidence that Weil-McLain's conduct in this case was reprehensible. "'[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.'" *Wilson*, 558 N.W.2d at 146 (quoting *Gore*, 517 U.S. at 575). As set forth in Section II.C, even Weil-McLain's own version of events is that it delayed warning about the asbestos hazards of its products until at least ten years after other manufacturers were warning, and only began warning after it was forced to do so under a citation issued by OSHA in 1974. This and other evidence of Weil-McLain's repeated and persistent disregard of the significant risk that those working with its boilers would develop fatal asbestos-related cancer, as Kinseth did, demonstrates that the reprehensibility of Weil-McLain's conduct justified the punitive

damages award in this case. The punitive damages award in this case is not excessive.

III. THERE WAS NOT CUMULATIVE ERROR AT TRIAL.

Weil-McLain has presented this issue in three subsections that have different records on error preservation and different standards of review. Plaintiffs have therefore addressed the threshold issues of error preservation and standard of review at the beginning of each subsection.

A. The district court did not abuse its discretion in admitting the OSHA citation.

(1) Preservation of error.

Plaintiffs agree that Weil-McLain preserved its objection to the admission of the OSHA citation. However, for the reasons set forth in Section I.A, Weil-McLain is judicially estopped from seeking a new trial on liability.

(2) Standard of review and scope of review.

Plaintiffs agree that evidentiary rulings are reviewed for an abuse of discretion. *State v. Dudley*, 856 N.W.2d 668, 675 (Iowa 2014); *Pexa,* 686 N.W.2d at 160. Even when an abuse of discretion

has occurred, reversal is not warranted if the error was harmless. *State v. Reynolds*, 765 N.W.2d 283, 288 (Iowa 2009).

(3) *The OSHA citation was admissible for three reasons.*

The district court did not abuse its discretion in admitting testimony about the 1974 OSHA citation against Weil-McLain. Although the document itself was not offered in evidence, and is not part of the record, it should be understood that the one-page citation listed six different violations of OSHA's asbestos regulations, including that Weil-McLain failed to follow OSHA regulations requiring warnings on asbestos rope and asbestos cement, and that asbestos levels were measured above permissible limits in the areas of the plant where asbestos rope and asbestos cement were used. The district court ruled in limine that the part of the citation involving warnings violations was admissible on the issue of whether Weil-McLain's conduct was willful and wanton, but that the asbestos levels in the plant were not admissible except as reliance material for Plaintiffs' causation expert Dr. Brodkin. (App. 258-61, 265-68). Ultimately, because Weil-McLain discussed the asbestos levels in the plant as substantive evidence

with its own corporate representative, the district court determined that it could come in as substantive evidence to show that Weil-McLain's plant conditions. (App. 820). The district court did not abuse its discretion in admitting this evidence.

(a) *The OSHA citation was relevant to jury's evaluation of whether punitive damages were warranted.*

Initially, the district court found the OSHA citation relevant on the issue of whether Weil-McLain acted willfully and wantonly in disregard for others' safety in delaying any warnings about the hazards of asbestos rope and asbestos cement until 1974, when it was found to be in violation of OSHA regulations. (App. 261, 265-67). Weil-McLain's corporate representative, Schuelke, testified at length about the fact that the company had been cited in 1974 for failing to place caution labels on asbestos rope and asbestos cement that it was selling to customers. (App. 848, 854). He also admitted that Weil-McLain was not warning customers even though it knew about the dangers of its asbestos products and its obligations under OSHA regulations two years prior to 1974. (App. 849, 854). The OSHA citation was such a pivotal event that Weil-McLain claims that it began putting warnings on its asbestos rope

and asbestos cement in 1974 in response to the citation. (App. 854, 858).

Weil-McLain's contends that the OSHA citation was not relevant for the purpose of punitive damages because, it argues, 1974 was not the "the time Kinseth allegedly worked with Weil-McLain's products." Appellant's Br. at 46. Plaintiffs' evidence demonstrated, however, that Kinseth continued to occasionally work with and around Weil-McLain boilers into the 1980s. (App. 897-900, 906-07, 911, 932-33, 949-50). The district court was well-aware of this factual dispute at the time the court ruled in limine on the OSHA citation. (App. 252 ("on the one side obviously Mr. Eckerly's trying to constrain the case and cut things off at 1972 and Plaintiffs' counsel in her argument was trying to significantly expand the case in talking about bystander exposure, among other things.")). As the evidence easily raised a fact question for the jury Kinseth's post-1972 exposure to Weil-McLain boilers, there is not a proper relevancy objection to the OSHA citation.

(b) *The OSHA citation was admissible as expert reliance material.*

The district court ruled that he would allow Brodkin to rely on OSHA's fiber release measurements from cutting asbestos rope in Weil-McLain's plant if Plaintiffs' counsel laid a foundation that he reasonably relied on those tests and that they were substantially similar to the exposures Kinseth had from cutting asbestos rope when installing Weil-McLain boilers. (App. 258-59, 268). Such a foundation was laid by Brodkin. He testified that he had "considered studies that inform my opinion about the levels of fiber in the air when people are handling, cutting, asbestos rope." (App. 406). Brodkin in fact identified the OSHA citation in response to an objection by Weil-McLain's counsel that Brodkin had not stated a "foundation for whose these tests are, where these tests where done." (App. 406). Brodkin then explained that one of the studies he was relying on was OSHA's testing of exposures from cutting asbestos rope at Weil-McLain's plant. (App. 407). Thus, Weil-McLain solicited this reliance testimony.

Brodkin explained that OSHA's airborne asbestos measurements from cutting rope were on the "high end" because

the Weil-McLain workers at the plant were engaged a higher volume of work, but testified that "it certainly informs me it's the exact same material and it's the exact same act of cutting." (App. 408). Counsel for Weil-McLain had the opportunity to cross-examine Brodkin about the OSHA testing numbers and their relevance to the determination of Kinseth's exposure from cutting asbestos rope. (App. 442-43). Brodkin explained that he found the measurements from the plant informative because "they were cutting rope that went with boilers." (App. 442).

Brodkin very clearly tied his causation opinions to the exposure levels found by OSHA in Weil-McLain's plant. He testified that the typical level of exposure from cutting asbestos rope was between 1.7 and 24.2 fibers per cubic centimeter (fibers/cc) of air, with the OSHA numbers being on the high end. (App. 407). These levels are 800,000 to 10 million times above background levels of asbestos in the ambient air. (App. 409). This evidence supported Brodkin's opinion that Kinseth's exposure from cutting asbestos rope was a substantial cause of the development of his mesothelioma. (App. 410).

Weil-McLain claims that the OSHA citation was "not reliance material," but it clearly was. Under Iowa Rule of Evidence 5.703, an expert may rely on otherwise inadmissible evidence if of a type reasonably relied upon by experts in the field. Iowa R. Evid. 5.703. On cross-examination, Brodkin again explained that, as a physician, he must rely on the work practice studies performed by other professionals that measure fiber release from asbestos products. (App. 441-42). As noted, he explained why the OSHA measurements informed his opinions about Kinseth's exposures and twice stated that he had accounted for the differences between the conditions in Weil-McLain's plant and the conditions that Kinseth experienced in the field. (App. 408, 442-43).

Weil-McLain's reliance on *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168 (Iowa 2004), is misplaced. In that case, there was no basis at all for admission of the documents, except as reliance material. *See id.* at 182. Here, of course, the district court found the OSHA citation to be admissible on the issue of Weil-McLain's willful and wanton conduct. (App. 261). In *Gacke*, the problem was

that the experts only relied on portions of the document, but the entire documents were allowed in evidence. 684 N.W.2d at 183. Here, Weil-McLain claims that it was not relevant to Brodkin's opinion that the measurements were taken by OSHA as part of a citation, but that fact was already properly in evidence on the punitive damages issue. The district court did not abuse its discretion in permitting Brodkin to testify about the asbestos fiber release measurements in the OSHA citation.

(c) *The OSHA citation was admissible as substantive evidence of Weil-McLain's plant conditions.*

The district court properly found that Weil-McLain opened the door to broad use of the OSHA citation as substantive evidence of Weil-McLain's plant conditions when its own counsel asked Schuelke about it. (App. 718-20, 820). Schuelke had already testified about the fact that Weil-McLain received a citation for not warning (App. 848, 854), but defense counsel asked him to get into the specifics of the measurements in different areas of the plant. (App. 502-03). Scheulke testified that OSHA had not measured excessive asbestos exposures in the area of the plant

where boilers were assembled. (App. 502-03). At that point, the district court recognized that Weil-McLain had waived any objection to using OSHA's fiber measurements as substantive evidence in this case, and that Plaintiffs had the right to explore the asbestos fiber levels in Weil-McLain's plant through further examination of witnesses and through argument. (App. 718-20, 820).

When Weil-McLain decided to use the OSHA citation to make the point that OSHA did not find excessive exposures in the area where boilers were assembled, it abandoned any objection to the admission of the other asbestos fiber measurements appearing in that document. Weil-McLain contends that it did not open the door to substantive use of the OSHA citation because Plaintiffs had already asked Brodkin about it. But Weil-McLain was able to cross-examine Brodkin about his reliance on those measurements and the differences in the plant conditions and Kinseth's exposure. (App. 442-43). There was no reason for Weil-McLain to use the OSHA citation with its own witness, other than to support its defense that working with its boilers was safe. It was only entitled

to use the OSHA citation as substantive evidence if Plaintiffs could also use it for this purpose. And there can be no possible prejudice to Weil-McLain when the admission of the fiber measurements as substantive evidence was entirely based on its own decisions at trial. Once Weil-McLain engaged in the offensive use of OSHA's fiber measurements, it waived any objection to Plaintiffs' use of the document to show that asbestos fiber levels were excessive in the areas where asbestos rope was cut and asbestos cement was re-packaged.

B. The district court did not abuse its discretion in admitting evidence of tear-out exposure.

(1) *Preservation of error.*

Plaintiffs agree that Weil-McLain preserved its objection to the admission of evidence of Kinseth's exposure to asbestos from tearing out Weil-McLain boilers. However, for the reasons set forth in Section I.A, Weil-McLain is judicially estopped from seeking a new trial on liability.

(2) *Standard of review and scope of review.*

Plaintiffs agree that evidentiary rulings are reviewed for an abuse of discretion. *Dudley*, 856 N.W.2d at 675; *Pexa,* 686 N.W.2d at 160.

(3) *Evidence of tear-out exposure was admissible and relevant on the issue of causation.*

Weil-McLain takes the position that only Weil-McLain, and not Plaintiffs, were entitled to introduce evidence that Kinseth had exposure to asbestos from tearing out boilers. From the beginning, Weil-McLain consistently sought to introduce evidence that Kinseth had exposure from tearing out asbestos insulation materials. (App. 136-37, 565-68, 813). In the context of Weil-McLain's general objection that Plaintiffs should not be allowed to introduce evidence of exposure from the tear-out of Weil-McLain boilers, the Court confirmed that Weil-McLain intended to present this exact same evidence with regard to tear-out exposure from other manufacturers. (App. 392).

While the district court had already ruled that exposure from tear-outs was not compensable under the statute of repose, the court determined that this evidence was relevant to the jury's

consideration of what exposures contributed to the causation of Kinseth's mesothelioma: "exposures which were not compensable still were relevant on the general issue of causation." (App. 812-13).

Weil-McLain contends the jury should not have heard evidence of Kinseth's exposure from the tear-out of Weil-McLain materials even though Weil-McLain was permitted to introduce evidence of Kinseth's exposure from tearing out asbestos materials made and supplied by other manufacturers. This argument misses the point that the jury was only allowed to hear tear-out evidence in order to consider Kinseth's compensable exposures in the full context of all his exposures. The jury would not have had a complete picture of causation if all tear-out exposures *except* to Weil-McLain boilers had been admitted. Weil-McLain fails to address how the jury could evaluate the relative contribution of Kinseth's exposure from tearing out other boilers without also considering that Kinseth was exposed from tearing out Weil-McLain boilers.

There was no "jury nullification," as Weil-McLain contends. During opening statements, Plaintiffs' counsel explained the statute of repose to the jury and informed them that they could consider evidence of tear-out exposure, but not in allocating fault. (App. 280-81). Weil-McLain had no objection. Thereafter, Plaintiffs were careful in having their experts testify about Kinseth's exposure to asbestos from Weil-McLain boilers only during installation of the boilers. (App. 294-96, 397, 404). During closing, Plaintiffs' counsel again explained that only exposures during installation were compensable. (App. 609-10).

The jury was instructed that it could consider Kinseth's total asbestos exposure but that the tear-out exposures could not be used to allocate fault. (App. 394-96). The district court determined that such an instruction was necessary to guide the jury's evaluation of the evidence. (App. 813).

The jury is presumed to have followed instructions absent evidence to the contrary. *State v. Morrison*, 368 N.W.2d 173, 176 (Iowa 1985). Weil-McLain has offered no argument, much less any evidence, that the jury did not follow the instructions that it could

only allocate fault based on compensable exposures. Weil-McLain did not want the jury to be instructed about non-compensable exposures, but, as the district court found, Weil-McLain never contended that the instruction would be confusing to the jury. (App. 813). The jury in fact apportioned fault to thirteen other companies, indicating that it fully understood the instructions and applied them appropriately. (App. 706).

C. The district court did not abuse its discretion in determining that statements made by Plaintiffs' counsel during closing argument were not objectionable or prejudicial.

(1) *Weil-McLain did not preserve error.*

As the district court found, Weil-McLain waived its objections to the comments made by Plaintiffs' counsel in closing argument by failing to make a contemporaneous objection. (App. 721, 821-22). The district court followed the Eighth Circuit's recent decision in *Gilster v. Primebank*, 747 F.3d 1007 (8th Cir. 2014), (App. 721, 822), which holds that a trial court's ruling on a contemporaneous objection is "'the most specific and timely guidance from the court to the jury with respect to the propriety of counsel's closing arguments.'" *Id.* (quoting *Whittenburg v. Werner*

Enterprises, Inc., 561 F.3d 1122, 1132 (10th Cir. 2009)). The district court's ruling is also in accord with Iowa law holding that "[t]o properly preserve for review alleged error of counsel during jury argument, opposing counsel must make a timely objection and bring the alleged misconduct to the attention of the presiding judge." *Burke v. Brimmer*, 2009 Iowa App. LEXIS 621, at *3 (Iowa Ct. App. June 17, 2009). Interrupting the argument with an objection, and giving the trial court a chance to give guidance to the jury, is proper. *See id.*

Weil-McLain cites the case of *Andrews v. Struble*, 178 N.W.2d 391 (Iowa 1970), for the proposition that objections to statements made during closing argument may properly be raised for the first time in a motion for mistrial. Weil-McLain misreads *Andrews* as holding that "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." Appellant's Br. at 41-42. That is not an accurate statement of the holding in *Andrews* or of Iowa law. *Andrews* and other cases clearly contemplate that if not raised at the time the remarks are made,

an objection is waived unless raised at the *close of argument* and in a motion for mistrial. *Andrews*, 178 N.W.2d at 402 ("[A] party may move for mistrial at the time an improper argument is made or at the close of the argument."); *see also State v. Nelson*, 234 N.W.2d 368, 371 (Iowa 1975) ("[O]bjections to remarks of counsel during final jury argument are timely if urged at close of argument and in a motion for mistrial made before submission to the jury."); *State v. Miller*, 834 N.W.2d 873, n.2 (Iowa Ct. App. 2013) (same).

Weil-McLain did not raise an objection either contemporaneously or at the close of argument. Instead, it waited a full day before it decided that it should object to Plaintiffs' counsel's argument in a motion for mistrial. Plaintiffs' counsel's closing argument was given in the morning on Thursday, April 24, 2014, (App. 594-95), and her rebuttal was given that afternoon. (App. 638). Weil-McLain did object a number of times during the argument, but not to the statements about Weil-McLain's wealth or sending a message that it now claims are problematic (App. 596, 600, 607, 620, 632), and it did not make any type of objection

at the close of the argument. (App. 644-45). It was not until the next morning, April 25, 2014, that Weil-McLain identified several statements it found objectionable and moved for a mistrial. (App. 710-15). Even in moving for a mistrial, Weil-McLain *never* complained about counsel making comments about the money Weil-McLain spent on studies or graphics. (App. 710-15).

In any event, by the time Weil-McLain made its motion the following day, any chance to admonish or instruct the jury on these issues had past. Defense counsel acknowledged as much, stating that "none of these things can be repaired at this time." (App. 713). As the district court noted, "any objections not made were waived because a timely objection stating the specific ground of objection was not made, and I ruled on the objections that were made." (App. 821).

The *Andrews* case emphasizes the importance of giving the trial court the opportunity to cure any potential prejudice from an improper statement: "When an improper remark is made by counsel in the course of jury argument, it is the duty of the party aggrieved to timely voice objection. This is to give the trial court

an opportunity to admonish counsel or instruct the jury as it may see fit." *Id.* at 401. An objection three days after closing arguments did not provide the district court with this important opportunity. The district court therefore properly found that Weil-McLain waived its objections to remarks made during closing argument.

(2) *Standard of review and scope of review.*

Plaintiffs do not agree that Weil-McLain has preserved error, *see* Section III.C.2., but Plaintiffs agree that Iowa has established a two-step process for evaluating whether alleged attorney misconduct requires a new trial. *See Conn v. Alfstad*, No. 1-036/10-1171, 2011 Iowa App. LEXIS 1090, at *10 (Iowa Ct. App. Apr. 27, 2011); *Burke*, 2009 Iowa App. LEXIS 621, at *4. First, there must be a determination of whether counsel violated a motion in limine or otherwise made improper statements to the jury, and second, there must be prejudice to the complaining party. *Id.*; *Mays v. C. Mac Chambers Co.*, 490 N.W.2d 800, 803 (Iowa 1992). A new trial is not warranted "'unless it appears probable a different result would have been reached but for claimed misconduct of counsel for the prevailing party.'" *Mays*,

490 N.W.2d at 803 (quoting *Baysinger v. Haney*, 261 Iowa 577, 583, 155 N.W.2d 496, 499 (1968)). In determining prejudice, the appellate court considers whether a curative instruction was requested or given. *Smith v. Haugland*, 762 N.W.2d 890, 900-01 (Iowa Ct. App. 2009).

The trial court is granted "considerable discretion" in determining whether any alleged conduct was so prejudicial that it affected the outcome of the case. *Mays*, 490 N.W.2d at 803; *Smith*, 762 N.W.2d at 900. This broad discretion is appropriate because the trial court has the advantage of being present to evaluate the effect of any improper statements. *Mays*, 490 N.W.2d at 803 (citing *Baysinger*, 261 Iowa at 582, 155 N.W.2d at 499). The appellate court "will not interfere with the court's determination of such a question unless it is reasonably clear discretion has been abused." *Baysinger*, 261 Iowa at 581, 155 N.W.2d at 498.

(3) *Plaintiffs' counsel violated no pre-trial rulings during closing argument and her statements were not prejudicial.*

Weil-McLain identifies two types comments that it contends were objectionable: statements about what Weil-McLain spent on

studies and graphics, and one isolated remark that the jury should send a message to Weil-McLain. These few comments must be considered in the context of the entire record at trial. *See Mays*, 490 N.W.2d at 804. Even if counsel's statements were objectionable, they were so isolated among a voluminous record that it is impossible to conclude that a different result would have been reached in the absence of those statements. *See id.* Indeed, "a stray improper remark in closing is no basis for upsetting a trial and requiring the parties and district court to redo their ordeal." *Whittenburg*, 561 F.3d at 1131.

Not only were counsel's remarks within the bounds of acceptable argument, they did not prejudice Weil-McLain. The district court evaluated the record and ruled that he "cannot conclude that counsel's remarks affected the outcome of the case." (App. 821).

(a) *The amount Weil-McLain spent on studies was admissible.*

Weil-McLain first complains that Plaintiffs' counsel inappropriately commented on its spending on studies and on trial graphics. These statements did not violate any motions in limine,

were not out of bounds, and did not affect the outcome of this case. (App. 821).

Weil-McLain contends that Plaintiffs' counsel should not have remarked on the fact that Weil-McLain relied on studies it had paid for, including that it paid half a million dollars for a study of the amount of dust created by cutting its asbestos rope. It is incorrect that these comments violated motion in limine nos. 9 and 27. Motion in limine no. 9 related to "any references to the amount of money or time spent by the Defendant in the defense of this matter, including attorney time and expenses and expert witness time and expenses." (App. 110). At the pre-trial hearing where the parties discussed the MILs in detail, Plaintiffs' counsel clarified that Plaintiffs were not agreeing to restrict evidence of what was paid to expert witnesses. (App. 130-32). Weil-McLain had no problem with that. (App. 132). Consistent with that understanding, both sides cross-examined the experts on how much they have been paid to testify in this case and in asbestos litigation generally. (App. 300-01, 316-17, 439-40, 529-31).

Weil-McLain does not fully quote its motion in limine no. 27,

which only precluded "any reference to wealth, power, corporate size *which would suggest to the jury they ought to compare the relative worth of the plaintiffs and the defendant in answering the jury questions*." (App. 112, emphasis added). At the pre-trial hearing, Plaintiffs agreed not to compare the respective wealth of the parties, but explained that evidence of the resources available to Weil-McLain would be relevant for other reasons, including that the company had the resources to discover that asbestos was dangerous and put a warning on their product. (App. 134-35). The Court later ruled that no. 27 was agreed to, but Plaintiffs reiterated that she wanted to be able to discuss Weil-McLain's "financial capacity to warn," which the Court acknowledged and Weil-McLain did not object to. (App. 192).

Not only did Weil-McLain not object to evidence that its expert was relying on a study he had been paid to perform, Weil-McLain was the party that first introduced this evidence to the jury. Defense counsel asked Weil-McLain's expert, Eric Rasmuson, how much he had been paid to conduct tests on Weil-McLain products and Rasmuson testified it was "approximately $540,000

for the study that was released." (App. 528). That sum had never been disclosed to Plaintiffs before trial. (App. 533).

Weil-McLain does not dispute that its reliance on studies it paid its experts to perform is highly relevant to the jury's ability to evaluate the reliability of the experts' opinions. When a product manufacturer has authored or sponsored studies of its own product, that "bring[s] their objectivity into question." *Int'l Rehabilitative Sciences, Inc. v. Sebelius*, 688 F.3d 994, 1002 (9th Cir. 2012). Courts routinely permit cross-examination of expert witnesses with evidence that they relied on studies funded by the party that hired them, including the amounts spent on the studies in question. *See In re Welding Fume Prods. Liab. Litig.*, 534 F. Supp. 2d 761, 763, 769, 771 (N.D. Ohio 2008); *Boren v. BOC Group, Inc.*, 895 N.E.2d 53, 63-64 (Ill. App. Ct. 2008); *see also Wyeth v. Rowatt*, 244 P.3d 765, 722 (Nev. 2010); *Blum v. Merrell Dow Pharms.*, 33 Phila. 193, 221, 1996 WL 1358523 (Phil. Ct. Comm. Pleas 1996).

Even defense witness Smith agreed that it is important to know if a scientific study has a non-scientific purpose or

motivation. (App. 575). When Rasmuson was cross-examined about his study, Weil-McLain never argued that this subject was a violation of a motion in limine, or was prejudicial in any way. (App. 533). Without objection, Rasmuson testified that all the studies he was relying on had been paid for by Weil-McLain. (App. 535). Without objection, both defense experts acknowledged that Weil-McLain funded the only two studies they relied on for their opinion that asbestos rope and asbestos cement are not hazardous. (App. 535, 543-44, 563).

It is hardly surprising that Weil-McLain did not think to object to Plaintiffs' statements that it bought and paid for studies and experts because this was an undisputed fact in the case. If any of counsel's comments had been improper or unfairly prejudicial, one would have expected Weil-McLain to make a contemporaneous objection, which it did not. It also failed to mention this as a ground for mistrial the day following closing arguments. Industry funding of the studies relied on by Weil-McLain's experts is a factor the jury was entitled to consider in evaluating the experts' opinions, and was not any kind of

improper comment on Weil-McLain's wealth, as it now belatedly claims.

Weil-McLain also fails to show the impropriety of counsel's statements that it used expensive graphics at trial. Plaintiffs' counsel did not state a dollar amount that had been spent or encourage the jury to compare the relative financial worth of Plaintiffs and Weil-McLain. A few isolated comments about trial graphics could not possibly have prejudiced Weil-McLain or affected the outcome of the trial. Indeed, Weil-McLain was so unconcerned about these comments that it did not object to them contemporaneously or in its motion for mistrial.

(b) *Weil-McLain was not prejudiced by any statements that the jury should "send a message."*

Plaintiffs' counsel did make a statement about "sending a message" to Weil-McLain in her closing argument. This was an isolated statement that was not representative of Plaintiffs' closing statement as a whole. Counsel also told the jury that other than punitive damages, "[a]ll of the other damages you were talking about are what we need to do to make this family whole." (App. 630).

Significantly, Weil-McLain did not object to this one isolated statement from Plaintiffs' counsel about sending a message, and instead repeatedly emphasized this idea in its own closing argument:

- "This case is what happened back then, because let's also keep in mind we don't use asbestos in this country anymore. It's just that simple, so we're not sending messages about asbestos, because we don't use it." (App. 634).
- "Weil hasn't used the asbestos rope in over 30 years and the cement, cement in over 40 years, so we're sending messages about something that just doesn't exist anymore." (App. 634-35).
- "This isn't some global, you know, we need to do this for mankind, we need to send a message to America, we need to do all this other stuff, that's not here. This is about what happened 40, 50, and 60 years ago." (App. 636).
- "This is not some global case about sending messages, but about asbestos because we don't even use asbestos in this country. This case is about the '50s and the '60s and what happened then." (App. 637).

Weil-McLain thus had ample opportunity to respond to Plaintiffs' one statement about sending a message. The district court concluded that, "the record reflects that defendant's counsel responded with cogent argument about why the case was not about sending a message." (App. 821). These multiple statements

from Weil-McLain's counsel effectively neutralized any potential prejudice that could have occurred from one use of this phrase in Plaintiffs' counsel's closing argument.

D. There was no prejudice to Weil-McLain.

Weil-McLain claims that the cumulative effect of the errors at trial was so prejudicial as to warrant a new trial. Weil-McLain has failed to demonstrate, however, that there were any individual errors or that any asserted error was unfairly prejudicial. It relies only on the *Rosenberger* case, in which "the integrity of the jury's verdict [was] in doubt" given the cumulative effect of an "impassioned and inflammatory speech that likely caused severe prejudice to the defendant," along with improper admission of evidence of insurance coverage. *Rosenberger Enters. v. Insurance Serv. Corp.*, 541 N.W.2d 904, 909 (Iowa Ct. App. 1995).

This case is in complete contrast to *Rosenberger*. There, counsel was found to have improperly made multiple statements that suggested the jury should find the defendant 100% liable based on its ability to pay damages rather than its relative fault.

Id. at 908. Counsel also "impermissibly asserted his personal opinion," made melodramatic references to his religious beliefs and the death of his father, and improperly showed the jury evidence of the defendant's insurance coverage. *Id.* at 909.

Here, Plaintiffs' counsel did not reference Weil-McLain's ability to pay and actually encouraged the jury to only apportion 35% liability to Weil-McLain. (App. 623, 628). She even suggested to the jury the percentages of liability they should assign to ten other companies on the verdict form. (App. 616-21). This is not a case in which Weil-McLain was unfairly targeted as the only party at fault because of its finances. And unlike in *Rosenberger*, Weil-McLain's evidentiary complaints are the products of considered rulings by the trial court based on Iowa law and the arguments of the parties, not any improper conduct by Plaintiffs' counsel.

Weil-McLain's claim of prejudice rests entirely on the fact that the jury reached its verdict in "less than two-and-a-half hours." Appellant's Br. at 68. This argument that was never made to the district court, and Weil-McLain cites no legal authority

supporting the proposition that a verdict is called into question merely because it was rendered within a few hours.

Relatively short jury deliberations do not indicate that the verdict should be set aside. *See Nat'l Sur. Corp. v. Westlake Invs., LLC*, 2015 Iowa App. LEXIS 982, at *33, 872 N.W.2d 409 (Iowa Ct. App. 2015). When, as here, the jury has listened to evidence presented in a professional fashion over multiple weeks, been provided with comprehensive jury instructions and special verdict forms, and has heard thorough closing arguments from counsel, such circumstances can account for the speed of the verdict. *Id.*

Weil-McLain calls the jury's award of $500,000 for Kinseth's pre-death medical expenses a "basic mistake" given that the parties stipulated to medical expenses of $131,233.06. Appellant's Br. at 68. Plaintiffs do not agree that this part of the jury's award was necessarily a mistake. The jury's award for Kinseth's medical expenses is consistent with the evidence presented at trial. Brodkin testified that the total amount of medical expenses charged to the Kinseths was $405,780, and that this was "not meant to be a bright-line number." (App. 422). In any event, the

district court remitted the award to the amount stipulated by the parties. (App. 809).

There is no reason to conclude that the speed of the jury's verdict was a product of any improper conduct or erroneous evidentiary rulings, or that a different result would have been probable without these so-called errors. The district court was in the best position to evaluate Weil-McLain's claims of prejudice and could not conclude that any remarks by counsel affected the outcome of the case. (App. 821). Weil-McLain has failed to establish that any evidentiary rulings or comments by Plaintiffs' counsel resulted in prejudice warranting re-trial of this case.

CROSS-APPEAL

Plaintiffs' arguments on cross-appeal are contingent on an adverse ruling from this Court on Weil-McLain's appeal. Plaintiffs only seek relief in the event this Court reverses the district court's judgment and remands for a new trial.

I. THE DISTRICT COURT ERRED IN ALLOWING THE JURY TO APPORTION FAULT TO BANKRUPT ENTITIES.

A. Plaintiffs preserved this issue for review.

Before the case was submitted to the jury, Plaintiff objected to the inclusion of Hercules and Johns-Manville on the Special Verdict Form on the ground that Iowa law does not permit apportionment of fault to bankrupt entities. (App. 586-89). The district court overruled the objection and included these entities of the verdict form because Plaintiffs had received settlement payments from the asbestos bankruptcy trust funds set up by Hercules and Johns-Manville. (App. 591-92). After the jury issued its verdict and assigned fault to both Hercules and Johns-Manville, Plaintiffs moved for a new trial. (App. 782-85). The district court denied relief. (App. 808).

B. Standard of review and scope of review.

An alleged error in jury instructions is reviewed for legal error. *Rivera v. Woodward Res. Ctr.*, 865 N.W.2d 887, 892 (Iowa 2015). "Prejudice occurs and reversal is required if jury instructions have misled the jury, or if the district court materially misstates the law." *Id.*

C. The jury should not have been allowed to allocate fault to bankrupt entities Hercules and Johns-Manville.

The jury allocated 10% fault to Hercules and 15% fault to Johns-Manville. (App. 706). Based on the jury's total assessment of compensatory damages in the amount of $4 million, the share of damages assigned to Hercules was $400,000, and Johns-Manville's share was $600,000.

The amount of damages the jury allocated to Hercules and Johns-Manville was many, many times greater than the amount Plaintiffs recovered against these entities in the bankruptcy trust system. Plaintiffs received only $4,690 from Hercules, or about 1.2% of the $400,000 the jury determined should be borne by Hercules. Plaintiffs received only $26,250 from Johns-Manville, or

about 4.4% of its share as assigned by the jury. Such an enormous discount is grossly unfair and inequitable given the very serious damages Plaintiffs suffered in this case.

Iowa law clearly holds that fault should not be allocated to bankrupt entities. In *Pepper v. Star Equipment, Ltd.*, 484 N.W.2d 156 (Iowa 1992), the Court held that that a bankrupt entity could not be joined as a third party for comparative fault purposes. *Id.* at 158. This is primarily because "a third-party defendant's fault may not be considered in the apportionment of aggregate fault unless the plaintiff has a viable claim against that party." *Id.* The Court explained that this is "not a mere mechanical rule," but rather is "based on policy considerations arising in the application of chapter 668." 484 N.W.2d at 158. When the plaintiff has no possibility of obtaining an enforceable judgment against a third party, the plaintiff should be protected from the "fault-siphoning" that could occur if fault is assigned to the bankrupt entity. *See id.*

Allocation of fault to bankrupt entities is also foreclosed by *Spaur*, which specifically addressed whether fault could be allocated to an unreleased asbestos bankruptcy trust. 510 N.W.2d

at 863. The Court followed *Pepper* in noting that "Chapter 668 precludes fault sharing unless the plaintiff has a viable claim against that party." *Id.* As in *Pepper*, there would be no protection against fault-siphoning because there could be no enforceable judgment against the bankruptcy trust. *See id.* The Court explained that, "[a]lthough the inability to allocate fault to a codefendant as involved as Manville Trust in the manufacture of asbestos may indeed be harsh and unjust, we believe the potential insolvency of a codefendant should be borne by the solvent defendants, not the plaintiffs." *Id.* Therefore, an asbestos bankruptcy trust cannot be included on the verdict form. *See id.*

The type of fault-siphoning prohibited by *Pepper* and *Spaur* is exactly what occurred in this case. Because the jury was erroneously allowed to allocate fault to Hercules and Johns-Manville, Plaintiffs did not recover their full measure of damages. It is entirely possible that without these entities on the verdict form, the jury would have allocated more fault to Defendant Weil-McLain.

The verdict allocating 10% fault to Hercules and 15% fault to Johns-Manville is contrary to law. This error resulted in a full quarter of the verdict being wrongly allocated to entities whose fault should not have been considered by the jury in this case. Plaintiffs were substantially prejudiced by this error because this 25% share of the verdict is worth $1 million, yet Plaintiffs' recovery against Hercules and Johns-Manville in the bankruptcy trust system was a tiny fraction (less than 5%) of this amount.

Therefore, if the judgment is reversed and a new trial is granted, Plaintiffs ask that the Court correct this error and instruct that fault may not be apportioned to bankrupt entities upon re-trial of this case.

CONCLUSION

The district court's judgment should not be disturbed. Weil-McLain has failed to demonstrate any error that would warrant vacating or reversing the judgment and granting a new trial. In the alternative, if the judgment is reversed and remanded for a new trial, Plaintiffs ask the Court to instruct that bankrupt entities may not be apportioned fault.

Respectfully submitted,

/s/Lisa W. Shirley
Lisa W. Shirley *Pro Hac Vice*
SIMON GREENSTONE PANATIER BARTLETT, PC
3232 McKinney Ave., Suite 610
Dallas, TX 75204
(214) 687-3248 Telephone
(214) 276-7699 Facsimile
lshirley@sgpblaw.com

James H. Cook
DUTTON, BRAUN, STAACK & HELLMAN
3151 Brockway Road
Waterloo, IA 50701
(319) 234-4471 Telephone
(319) 234-8029 Facsimile
cookj@wloolaw.com

ATTORNEYS FOR PLAINTIFFS-APPELLEES/CROSS-APPELLANTS

REQUEST FOR ORAL ARGUMENT

Oral argument is requested. Discussion of the issues at oral argument will assist the Court in deciding this appeal.

CERTIFICATE OF COST

Pursuant to Appellate Rule 16.1221, the Brief for Appellee/Cross-Appellant was filed and served electronically via the EDMS system. The cost of duplication was $0.

/s/Lisa W. Shirley
Attorney for Plaintiffs/Appellees

July 8, 2016
Date

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

[**X**] this brief contains 13,661 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1) or

[ ] this brief uses a monospaced typeface and contains [state the number of] lines of text, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(2).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because:

[**X**] this brief has been prepared in a proportionally spaced typeface using MICROSOFT WORD FOR MAC 2011 FONT SIZE 14 CENTURY SCHOOLBOOK, or

[ ] this brief has been prepared in a monospaced typeface using [state name and version of word processing program] with [state number of characters per inch and name of type style].

/s/Lisa W. Shirley — July 8, 2016
Attorney for Plaintiffs/Appellees — Date

CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies that on July 8, 2016, the above and foregoing Brief for Appellees/Cross-Appellants was electronically filed with the Clerk of Court for the Supreme Court of Iowa using the EDMS system and electronically served on the following:

William R. Hughes, Jr., Esq.
Robert Livingston, Esq.
Stuart Tinley Law Firm
310 W. Kanesville Blvd., 2nd Floor
Council Bluffs, IA 51502
Phone: 712-322-4033
William.Hughes@stuarttinley.com
Robert.Livingston@stuarttinley.com

Edward J. McCambridge, Esq.
Jason Eckerly, Esq.
Segal McCambridge Singer & Mahoney
233 S. Wacker Drive, Suite 5500
Chicago, IL 60606
312-329-6553
emccambridge@smsm.com
jeckerly@smsm.com

Richard C. Godfrey
Scott W. Fowkes
Ryan J. Moorman
Howard M. Kaplan
Kirkland & Ellis LLP
300 North LaSalle Street
Chicago, IL 60654
richard.godfrey@kirkland.com

howard.Kaplan@kirkland.com
ryan.moorman@kirkland.com
scott.fowkes@kirkland.com

Richard Mull
Assistant Attorney General
Iowa Department of Transportation
General Counsel Division
800 Lincoln Way
Ames, IA 50010
Phone 515-239-1394
richard.mull@dot.iowa.gov

Attorney for Intervenor State of Iowa ex rel. Civil Reparations Trust Fund

s/Lisa W. Shirley
Attorney for Plaintiffs/Appellees

July 8, 2016
Date