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

LARRY D. EISENHAUER,
Plaintiff-Appellee,

vs.

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

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

APPELLANT'S FINAL REPLY BRIEF

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Did the trial court err when it refused to instruct the jury on certain specifications of negligence even though the specifications were supported by substantial evidence?

Authorities

Bigalk v. Bigalk, 540 N.W.2d 247 (Iowa 1995)
Herbst v. State, 616 N.W.2d 582 (Iowa 2000)
Sonnek v. Warren, 522 N.W.2d 45 (Iowa 1994)
Speed v. Skate, 240 N.W.2d 901 (Iowa 1976)
State v. Murray, 796 N.W.2d 907 (Iowa 2011)

II. Did the trial court err in precluding T.D. from introducing relevant and probative evidence on Defendants' training and medical education in a medical practice case?

Authorities

Andersen v. Khanna, 913 N.W.2d 526, 543 (Iowa 2018)
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III. Did the trial court err in allowing Dr. Widmer to testify on undisclosed expert opinions outside the scope of what a treating physician may testify to, despite his failure to comply with the disclosure requirements under Iowa law?

Authorities

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IV. Did the trial court err in restricting the jury's access to the birth DVD during deliberations while allowing unfettered access to Defendants' ten screenshots taken from the birth DVD, and granting motions in limine that were overly broad and prevented T.D. from presenting relevant and probative evidence?

Authorities

Lewis v. Buena Vista Mutual Association, 183 N.W.2d 198 (Iowa 1971)

REPLY ARGUMENT

Defendants cannot justify the trial court's erroneous decisions below. Confronted with the weight of authority and record-supported reasoning in T.D.'s opening brief, Defendants misapply controlling law and misstate the record. When Defendants arguments are stripped of their surplusage and measured against the applicable standards, they do not support the trial court's decisions. This Court should reverse the judgment of the trial court in its entirety, and order a new trial *with instructions* to ensure the trial court does not re-commit the same errors that prevented T.D. from receiving a fair trial the first time around.

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

Defendants do not dispute the applicable law as set out in *Bigalk v. Bigalk*, 540 N.W.2d 247 (Iowa 1995) and *Herbst v. State*, 616 N.W.2d 582 (Iowa 2000). Rather, Defendants argue that, in this case, the specifications of negligence sought by T.D. were duplicative and unduly emphasized certain evidence, and therefore T.D. was not entitled to separate specifications of negligence. Defendants' argument requires misinterpreting the law as set forth in *Bigalk* and *Herbst*, and merging independent and distinct acts and omissions of negligence into overly general specifications of negligence that fail to advise the jury of each negligent action or omission by Defendants.

A. ***Herbst*** and ***Bigalk*** Support Reversal

Iowa case law is clear, "[j]ury instructions should be formulated so as to require the jury to focus on ***each*** specification of negligence that finds support in the evidence." *Bigalk*, 540 N.W.2d at 249 (emphasis added). This requirement ensures that "the jury will give consideration to ***each*** of the alleged acts or omissions in determining the overall question of breach of duty." *Id.* (emphasis added).

In *Herbst* and *Bigalk,* the Iowa Supreme Court reversed the trial courts' decisions because the trial courts' jury instructions failed to require the jury to focus on ***each*** specification of negligence supported by the evidence. *See id.*; *Herbst*, 616 N.W.2d at 587.

In *Bigalk*, a plaintiff claimed to have been injured by falling in an unguarded stairwell on property owned by the defendant. *Bigalk*, 540 N.W.2d at 248-49. In the plaintiff's negligence lawsuit against the defendant, the plaintiff alleged the defendant was negligent by:

> (1) failing to warn her of the danger,
> (2) providing inadequate illumination in the area of the stairwell,
> (3) not covering the open stairwell, and
> (4) not providing a railing around the stairwell.

Id. The district court provided only the following specification of negligence in its final jury instructions:

> The Defendant was negligent in failing to make the condition (open stairway) safe or in failing to warn the Plaintiff of the condition and risk involved.

Id. at 249.

The plaintiff objected to the district court's instruction "on the ground that, apart from the language with respect to warning of the condition, neither this instruction nor any other instruction *advised the jury concerning the specific acts or omissions that plaintiff claimed were negligent conduct, i.e., failure to provide adequate illumination, failure to cover the opening, or failure to provide a railing*." *Id.* at 250 (emphasis added). On appeal, the Iowa Supreme Court agreed with the plaintiff:

> We conclude that plaintiff was entitled to have the jury instructed in the present case concerning each alleged act or omission that found support in the evidence. Although the specification involving improper illumination was arguably not supported, the other specifications of negligence clearly were. The failure to so instruct requires reversal of the judgment and a grant of a new trial on all issues.

Id. Even though the trial court's jury instructions were broad enough to incorporate all of the plaintiff's specifications, the Iowa Supreme Court reversed because the plaintiff was entitled to have the jury instructed on ***each*** specification supported by the evidence, and the trial court's overly broad instruction failed to ensure the jury would give consideration to ***each*** of the defendant's acts or omissions. *Id.*

Similarly, in the present case T.D. alleged with particular specificity ***each*** of Defendants' acts and omissions that breached the standard of care. *See*

Plaintiff's Revised Jury Instructions (Vol. 1 App. 365) ("Dr. Widmer was negligent by . . . [r]epeatedly directing Lisa to push after shoulder dystocia was identified and traction failed to deliver the anterior shoulder . . . [m]istakenly concluding T.D. was experiencing Bradycardia . . . [f]ailing to properly and effectively use maternal and fetal maneuvers . . . ."). The trial court ultimately submitted two general jury instructions that failed to advise the jury of each of the Defendants' specific acts or omissions that T.D. claimed breached the standard of care, i.e., repeatedly directing Lisa to push after recognizing shoulder dystocia, failing to properly and effectively use maternal and fetal maneuvers to safely deliver T.D., and mistakenly concluding that T.D. was experiencing Bradycardia. *See* Court's Jury Instructions (Vol. 1 App. 388). While the trial court's jury instructions may have incorporated a few of T.D.'s specifications through their sheer breadth, the instructions failed to ensure the jury would give consideration to ***each*** of the Defendants' acts or omissions of negligence that found support in the evidence. *See Bigalk*, 540 N.W.2d at 250. This error requires reversal.

Defendants attempt to distinguish *Bigalk* from the present case by noting that in *Bigalk* the defendant alleged comparative negligence and the jury was instructed on all of the defendant's specifications of negligence at the trial court level; whereas here, "[d]efendants did not allege any comparative fault." Defendant Widmer's Brief at p. 19. This is a distinction without difference. While

the Supreme Court noted that the trial court's decision to instruct "as to all of defendant's specific allegations of negligence in its defense of contributory fault[,]" was *particularly* prejudicial to the plaintiff, the Court's reversal rested on the applicable legal standard, which focuses on whether the jury instructions *sufficiently advise the jury of the plaintiff's theory of the case*. *Bigalk*, 540 N.W.2d at 250. The Court's holding is clear:

> We must conclude, however, that the requirement for instructing on specific acts or omissions is at least partially designed to assure that the jury will give consideration to each of the alleged acts or omissions in determining the overall question of breach of duty. *Because the district court's instruction did not require the jury to do this in the present case, plaintiff has a plausible argument that the jury was not advised sufficiently concerning her theory of the case.* This suggestion of prejudice is particularly persuasive in light of the fact that the jury was instructed as to all of defendant's specific allegations of negligence in its defense of contributory fault.
>
> We conclude that plaintiff was entitled to have the jury instructed in the present case concerning each alleged act or omission that found support in the evidence.

Id. at 249-50 (emphasis added).

Herbst v. State, decided by the Iowa Supreme Court in 2000, presents a similar set of circumstances. 616 N.W.2d at 583-87. In *Herbst*, the plaintiff alleged she was injured when she fell while descending from the stage in an opera rehearsal hall, and that the defendant property owner was negligent in maintaining the condition of the stage. *Id.* at 583. The plaintiff's theory of negligence alleged that the defendant breached the standard of care in at least one of three ways:

> (1) permitting makeshift stairs to be used for access onto the stage at the Opera Rehearsal Hall;
> (2) failing to provide a safe and secure set of stairs for access onto the stage at the Opera Rehearsal Hall.
> (3) failing to provide unimpeded access to the permanent stairs for access to the stage at the Opera Rehearsal Hall.

Id. at 586. The district court provided only the following specification of negligence in its final instructions:

> The defendant, on June 17, 1995, was negligent in failing to provide safe and secure access onto the stage at the Opera Rehearsal Hall.

Id. at 586-87. The plaintiff timely objected, claiming that the court's instruction "failed to adequately advise the jury concerning the potential ways in which defendant was negligent, i.e., permitting makeshift stairs to be used for access to the stage, failing to provide a safe and secure set of stairs for access onto the stage, and failing to provide unimpeded access to the permanent stairs." *Id.* at 587. The Iowa Supreme Court reversed, holding that the trial court's jury instructions "did not adequately instruct the jury concerning the specifications of negligence as presented in plaintiff's premises liability claim against defendant." *Id.* at 587.

Importantly, the Court expressly rejected defendant's argument that the plaintiff's theory of negligence was adequately incorporated in the court's general instruction:

> The [defendant] argues that [the plaintiff's] theories of negligence were adequately incorporated in the court's general instruction regarding safe and secure access onto the stage. We conclude, however, that the court's

> instruction did *not adequately ensure that the jury would give separate consideration to the alleged act or omission by the [defendant] as stated above*.

Id. (emphasis added). Accordingly, an overly broad instruction will not save the trial court from reversal if the instruction fails to adequately ensure that the jury will give consideration to ***each*** of the alleged acts or omissions of negligence by the defendants' that find support in the evidence. *Id.* at 587.

B. Defendants' Arguments Fail to Overcome *Herbst* and *Bigalk*

The Iowa Supreme Court's holdings in *Herbst* and *Bigalk* are controlling, clear, and inescapable. A plaintiff is entitled "to have the jury instructed concerning ***each*** alleged act or omission that f[inds] support in the evidence" and "[j]ury instructions should be formulated as to require the jury to focus on ***each*** specification of negligence that finds support in the evidence." *Bigalk*, 540 N.W.2d at 249-50 (emphasis added); *see also Herbst*, 616 N.W.2d at 587.

Faced with the weight of controlling authority against them, Defendants resort to advancing the same arguments rejected by the Iowa Supreme Court in *Bigalk* and *Herbst*.

First, Defendants' attempt to sidestep the unequivocal language in *Bigalk* and *Herbst* by claiming that T.D.'s proposed specifications "unduly emphasized his theory of the case." Defendant Widmer's Brief at p. 19. This argument is without merit. T.D.'s proposed specifications set forth his theory of negligence against Defendants, as is required by Iowa law. Additionally, "[p]arties to lawsuits

are entitled to have their legal theories submitted to a jury if they are supported by the pleadings and substantial evidence in the record." *Sonnek v. Warren*, 522 N.W.2d 45, 47 (Iowa 1994). Defendants' conflate a plaintiff's right to present his theory of negligence to the jury with "unduly emphasizing" the plaintiff's theory of the case. Under the argument advanced by Defendants, the Iowa Supreme Court "unduly emphasized" the plaintiffs' theories of negligence in *Bigalk* and *Herbst* when it reversed the lower courts' decisions for their failure to adequately instruct the jury concerning each specification of negligence alleged by the plaintiffs and supported by the evidence. Clearly, Defendants' argument cannot stand.

Next, Defendants contend that T.D.'s proposed specifications were duplicative or already incorporated in the trial court's general jury instructions. Defendant Widmer's Brief at p. 19. The Iowa Supreme Court rejected this same argument in *Herbst*:

> The [defendant] argues that [the plaintiff's] theories of negligence were adequately incorporated in the court's general instruction regarding safe and secure access onto the stage. We conclude, however, that the court's instruction did *not adequately ensure that the jury would give separate consideration to the alleged act or omission by the [defendant] as stated above*.

616 N.W.2d at 587 (emphasis added). The controlling standard is not whether the plaintiff's theories of negligence are incorporated in the court's jury instructions. *See id.; see also Bigalk*, 540 N.W.2d at 250. The standard is whether the court's instructions "adequately ensure that the jury [will] give separate

consideration to the alleged act[s] or omission[s]" committed by the defendant. *Herbst*, 616 N.W.2d at 587. Defendants' argument fails to recognize this critical distinction.

Furthermore, even if the parties were to ignore the clear language from *Herbst*, the trial court's instructions still failed to incorporate all of T.D. specifications of negligence that were supported by the evidence. (Plaintiff's Proof Brief at Part I, D.). This point is best illustrated by the trial court's refusal to incorporate T.D.'s specification on pushing and T.D.'s specification on Dr. Widmer's failure to *use* fetal maneuvers.

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

Expert testimony supported the conclusion that Dr. Widmer and the HCHC nurses breached the standard of care by instructing Lisa to continue pushing after shoulder dystocia was identified and before the proper maneuvers were utilized to relieve the shoulder dystocia. (Vol. 2 App. 105-07, 112-13, 197-98); *see also* (Vol. 2 App. 193-94). The court's final jury instructions did not include a specification on pushing. Instead, the trial court only provided the following two general specifications:

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

(Court's Jury Instructions, Vol. 1 App. 388).

Defendants attempt to overcome the trial court's omission by claiming the specification on pushing was "properly factored into the first part of the marshalling instruction—failure to direct or coordinate proper maneuvers." Defendant Widmer's brief at p. 20. Defendants' further claim that "directions to push could only deviate from the standard of care in the event Dr. Widmer 'fail[ed] to direct or coordinate proper maneuvers to deliver the baby after the recognition of shoulder dystocia.'" *Id.*

Expert testimony from Dr. Duboe established that commands for Lisa to push and all tractional efforts should have stopped *prior* to any maneuvers being attempted. (Vol. 2 App. 105). Dr. Duboe's testimony is clear, once shoulder dystocia is recognized all tractional forces should stop until the correct maneuvers are put in to place. Defendants' expert, Dr. Boyle, agreed with this testimony. (Vol. 2 App. 197-98) ("After dystocia is diagnosed, I think you should apply the maneuvers, *and once those are applied,* the pushing and the traction are indicated to continue.") (emphasis added).

Uncontroverted evidence from the birth DVD proves the Defendants never told Lisa to stop pushing before implementing any of the maneuvers, but instead commanded Lisa to push 17 times after Dr. Widmer recognized the shoulder dystocia. (Plaintiff's Exhibit 8, 13:36-15:00, Vol. 2 App. 213-15). The video also shows that different maneuvers were not put into place 17 different

times, meaning the Defendants instructed Lisa to push numerous times before implementing the maneuvers after T.D.'s shoulder remained stuck. (Plaintiff's Exhibit 8, 13:36-15:00, Vol. 2 App. 243).

Defendants' failure to instruct Lisa to stop pushing before implementing the maneuvers is a separate ground for negligence. Defendants own argument even acknowledges the distinction, stating that "experts on both sides . . . unanimously agreed that direction 'to push' may resume once a 'proper maneuver is put into place.'" Defendant Widmer's Brief at p. 20. Thus, even Defendants recognize that it would be a breach of the standard of care to instruct Lisa to push before performing the proper maneuvers, or while performing the proper maneuvers. The direction to push may only resume *after* a proper maneuver is put into place. Further, the direction to push is separate and distinct from the issue of whether the maneuvers themselves were done properly.

Even assuming *arguendo* that the maneuvers were done correctly, Defendants' failure to command Lisa to stop pushing before attempting the maneuvers still breached the standard of care. (Vol. 2 App. 105, 197-98). The trial court's improper action of lumping the pushing specification together with the maneuvers specification ensured that the jury would not give separate consideration to ***<u>each</u>*** alleged act or omission by Defendants.

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

The trial court's single specification on the maternal and fetal maneuvers failed to adequately incorporate T.D.'s specification that Dr. Widmer breached the standard of care by failing to *use* fetal maneuvers to deliver T.D. *See* Plaintiff's Proposed Jury Instructions (Vol. 1 App. 365). Dr. Duboe testified that Dr. Widmer should have moved on to fetal maneuvers (physician-applied maneuvers) to resolve the shoulder dystocia because the maternal maneuvers (nurse-applied maneuvers) were done inadequately:

> The videotape is pretty much what you just saw, just continuous traction, ongoing, in the face of a stuck shoulder that hasn't resolved because of inadequate McRoberts and suprapubic pressure efforts. So that shoulder stayed stuck and ultimately it came with continuous traction, which is inappropriate in the face of a shoulder dystocia. *Moving on to other maneuvers is what needed to be done here.*
>
> …
>
> The other thing is that if for whatever reason, if you believe those maneuvers have been done improperly, rather than just pulling, you go to another maneuver, but -- but Dr. Widmer didn't have that knowledge base. He didn't have that experience. He didn't ever have a prior experience, like a -- like a
> gun fighter coming to a fight without a bullet in the gun. *You've got to know the other maneuvers that you can apply, the rotational maneuvers that we talked about, Woods Screw, Rubin's, delivery of the posterior arm, if necessary, Gaskin's, all the things that you use if your basic maternal maneuvers are not working. These are all physician-applied maneuvers, versus McRoberts and suprapubic being maternally based maneuvers.*

(Vol. 2 App. 111) (emphasis added); (Vol. 2 App. 124) (emphasis added).

The trial court's instruction on maneuvers solely stated that Dr. Widmer was negligent:

> (a) In failing to *direct or coordinate* proper maneuvers to deliver the baby after the recognition of shoulder dystocia;

(Court's Jury Instructions, Vol. 1 App. 388) (emphasis added). Defendants' argue that the trial court's instruction "encompass the maneuvers Dr. Widmer and his medical team performed *in addition to any maneuver Dr. Widmer and his medical team allegedly failed to perform*." Defendant Widmer's Brief at p. 23 (emphasis added). Defendants' argument is untenable in light of the trial court's use of the words "direct or coordinate."

The trial court's chosen language completely excludes T.D.'s specification that Dr. Widmer was negligent in failing to properly *use* fetal maneuvers to safely deliver T.D. *See* Plaintiff's Revised Jury Instructions (Vol. 1 App. 365) ("(f). Failing to properly and effectively *use* maternal and *fetal* maneuvers to safely deliver T.D. after shoulder dystocia occurred . . . .") (emphasis added). By stating that Dr. Widmer was negligent in failing to "direct or coordinate" proper maneuvers, the trial court's instruction limited Dr. Widmer's liability to his failure to properly direct or coordinate the *maternal maneuvers* (nurse-applied maneuvers). Because "direct and coordinate" both refer to controlling or managing others, Dr. Widmer's liability for his own conduct in failing to *use* or *perform* the fetal maneuvers is excluded from the trial court's instructions.

Dr. Duboe testified multiple times that Dr. Widmer breached the standard of care by failing to move on to the *fetal maneuvers* (physician-applied maneuvers) once the maternal maneuvers failed. (Vol. 2 App. 111, 117, 124, 134-35). T.D. alleged Dr. Widmer breached the standard of care by failing to use or perform the fetal maneuvers based on this evidence. The trial court's language limits Dr. Widmer liability to his actions and omissions in controlling or managing the maneuvers of the nurses (maternal maneuvers), and exculpates his omission of the required physician applied maneuvers.

C. The Court's Jury Instructions Unfairly Prejudiced T.D.

Lastly, both *Bigalk* and *Herbst* were premises liability cases. The present case is a medical malpractice case, where expert testimony established that shoulder dystocia can only be resolved atraumatically through very precise and effective actions carried out by a delivery team who possesses the requisite degree of skill, care, and learning. Accordingly, each specification represents a precise action or omission that T.D.'s experts determined the delivery team failed to carry out with the requisite degree of skill that ultimately caused T.D.'s injuries. Here, even more so than in *Bigalk* and *Herbst*, the jury instructions were crucial for T.D. to present his theory of negligence to the jury. The trial court's overly general specifications robbed T.D. of the opportunity to present his case to the jury. *See State v. Murray*, 796 N.W. 2d 907, 908 (Iowa 2011) ("Errors in jury

instructions are presumed prejudicial unless 'the record affirmatively establishes there was no prejudice.'").

If the jury had been properly instructed, it would have gone through each specification of negligence for each Defendant. Each specification presented an independent and distinct ground for negligence. Instead, the trial court's general instructions prevented the jury from considering each action or omission that breached the standard of care and caused T.D.'s injuries. The jury only considered the general specifications promulgated by the trial court.

The general specifications of negligence argued for by Defendant and granted by the trial court deprived T.D. of the right to have the jury consider each of his supported theories of negligence. In short, T.D.'s theory of negligence pinpointed specific acts and omissions of the Defendants that breached the standard of the care, and the trial court's general specifications prevented the jury from analyzing each and every alleged act of negligence.

Substantial evidence existed to support each of the specifications proposed by T.D. in his amended proposed jury instructions. *See* Plaintiff's Revised Jury Instructions (Vol. 1 App. 365-66). Each specification of negligence propounded by T.D. stands alone as a breach of the standard of care, and a finding in favor of T.D. on anyone of these specifications would have supported a verdict in his favor.

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

A. T.D. Preserved Error Under Iowa Law

Defendants' contention that T.D. failed to preserve error on the trial court's decision to exclude T.D. from introducing evidence of Dr. Widmer's Continuing Medical Education ("CME") records is without merit under Iowa law. Defendant Widmer's Brief at p. 30. T.D.'s offer or proof on the issue of the CMEs preserved error.

"Preserving a claim that evidence was erroneously excluded requires an offer of proof, which must alert the court to the specific evidence the proponent seeks to admit." Thomas A. Mayes & Anuradha Vaitheswaran, *Error Preservation in Civil Appeals in Iowa: Perspectives on Present Practice*, 55 Drake L. Rev. 39, 59 (2006); *see also* Iowa R. Civ. P. 5.103(a)(2) ("If the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the content.").

Prior to trial in the present case, the trial court granted Defendants' motion in limine number 19, which excluded evidence of Dr. Widmer's Continuing Medical Education credits ("CME's"). (Vol. 1 App. 229-30, 343). At the close of his case, T.D. offered the following offer of proof regarding the admissibility of the CME's:

> It's a long-standing rule in Iowa that evidence may be introduced to impeach an expert witness or to lessen the weight of his expert opinion or qualifications. Dr. Widmer was designated as an expert in this case in September of 2016, and then the Court denied Plaintiff's motion in limine requesting that Dr. Widmer's designation as an expert be struck, to limit his testimony. And since we know Dr. Widmer will testify as an expert witness, it's Plaintiff's position that we're entitled to introduce evidence that will lessen the weight of his opinion and also to raise doubts about the quality of his expertise. Dr. Widmer's CME records are relevant and admissible for this purpose. Even had Dr. Widmer not been designated as an expert witness, this evidence is relevant to call into question the professional judgment he exercised in the delivery of Txxxxxx and also the expected testimony, you know, he's expected to give in his defense that he -- he did not need more than two maneuvers, especially when the record itself shows, in addition to his admissions, that he didn't know any other maneuvers beyond the two that he may have known, that he also didn't study obstetrics to the same percentage as he did -- you know, as that percentage made up his practice, which I believe he testified in 2007 his practice was 5 to 10 percent obstetrics and then the CME records demonstrate less than one percent of his education or continuing medical education to be related or potentially related to obstetrics.
>
> …
>
> And then to complete the offer of proof, we've marked these education records as Exhibits 139 and 139A, and then we also offer Exhibit 140, which is a typewritten sheet which summarizes the importance of 139 and 139A.

(Vol. 2 App. 175-77).

T.D.'s offer of proof fully satisfied the requirements of Iowa Rule of Civil Procedure 5.103(a)(2). It is clear from the offer that T.D. sought to admit evidence of Dr. Widmer's CME records to lessen his credibility as an expert and to further show Dr. Widmer was ill-prepared for the medical emergency of shoulder dystocia. *State v. Ritchison,* 223 N.W.2d 207, 212–13 (Iowa 1974)

(holding that "a meaningful record for appellate review" exists when the court does not have to speculate on the evidence sought to be introduced). The offer of proof included the relevant CME transcripts and a typed summary of the transcripts. (Vol. 2 App. 175-77). Accordingly, the offer of proof provided a suitable record for the trial court to make its decision, and provides the appellate court with a suitable record in which to review the lower court's decision.

Defendants' argument that the timing of T.D.'s offer or proof failed to preserve the issue is unpersuasive. Although T.D. made the offer proof at the close of his case, Iowa "caselaw has long established that parties may rely on opposing parties' evidence to make their cases." *Andersen v. Khanna*, 913 N.W.2d 526, 543 (Iowa 2018); *see, e.g.*, *Goldapp v. Core*, 19 N.W.2d 673, 675–76 (Iowa 1945) (implicitly accepting one party's reliance on testimony produced by opposing party); *Urdangen v. Edwards*, 174 N.W. 769, 772 (Iowa 1919) (allowing evidence produced by plaintiff to corroborate defendant's case); *Buseman v. Schultz*, 132 N.W. 378, 378 (Iowa 1911) (holding defendant did not need to offer any evidence to support his justification defense to false imprisonment allegation where every element of justification defense was proved by plaintiff's evidence). Therefore, nothing in this record would have prevented T.D. from relying on testimony garnered from Dr. Widmer on cross-examination to support the admission of the CMEs.

Finally, Defendants' suggestion that the offer was lacking because it "left out Dr. Widmer's practical experience and access to sources of medical information in authoritative journals" essentially criticizes T.D. for not including the Defendants' likely rebuttal evidence to the offer of proof. *See* Defendant Widmer's brief p. 31. Iowa law places no such burden on the plaintiff. Indeed it would be strange if any jurisdiction required the plaintiff to make both his case and the defendants in an offer of proof.

B. Dr. Widmer's Medical Education and Training is Relevant Evidence in a Medical Negligence Case

Defendants claim Dr. Widmer's CME records were irrelevant to establishing whether Dr. Widmer breached the standard of care in this case. Specifically, Defendants state that "in order for Dr. Widmer's CME records to be relevant, such evidence must make [it] more likely than not that—during T.D.'s birth—Dr. Widmer was negligent in duties or in supervising his medical team." Defendant Widmer's Brief at p. 36. Dr. Widmer's woefully inadequate CME record in obstetrics does have a tendency to make the fact that he breached the standard of care in this case more probable than it would be without this evidence. Iowa R. of Evid. 5.401(a). Specifically, Dr. Widmer's lack of CME credit hours in obstetrics demonstrates that he did not possess the same "degree of skill, care, and *learning* possessed and exercised by other physicians" who practice obstetrics. *Speed v. State*, 240 N.W.2d 901, 904 (Iowa 1976) (emphasis

added). Accordingly, the CMEs are relevant to deciding whether Dr. Widmer negligently delivered T.D. A recent Iowa Supreme Court decision supports this conclusion.

In *Andersen v. Khanna*, a plaintiff brought a medical malpractice suit against a surgeon for performing a heart surgery negligently. 913 N.W.2d 526, 530-31 (Iowa 2018). During trial, the district court admitted evidence regarding the defendant surgeon's training and experience. *Id.* at 532-34. At the close of trial, the district court instructed the jury to consider the defendant surgeon's training and experience when considering each specification of negligence. *Id.* at 548. "In doing so, the jury could use [defendant's] *lack of training or experience to help it decide if [defendant] was negligent as to any one of the specifications of negligence* the court submitted to the jury." *Id.* (emphasis added). The Iowa Supreme Court affirmed the district court's decision allowing the evidence of the surgeon's training and experience, noting that although the evidence was relevant in determining whether the defendant was negligent, the defendant's lack of experience alone would not constitute a breach of the standard of care. *Id.*; *see also Andersen v. Khanna*, 896 N.W.2d 784, ___ (Iowa Ct. App. 2017), *decision vacated on other grounds by Andersen*, 913 N.W.2d at 550 ("[W]e note the plaintiffs were allowed to (and did) introduce evidence regarding [defendant's] lack of experience in performing the procedure, and the jury was able to consider such evidence in determining whether the doctor had performed the procedure in a negligent manner."). Thus,

evidence of a defendant physician's training and experience is properly admissible as evidence the jury may consider in determining whether a physician breached the standard of care.

In the instant case, Dr. Widmer's CME credits were relevant to helping the jury decide if Dr. Widmer breached the standard of care in delivering T.D. While Dr. Widmer's abysmal CME record in obstetrics would not have established negligence in and of itself, such evidence would have helped the jury decide if Dr. Widmer delivered T.D. in a negligent manner.

Persuasive authority further bolsters T.D.'s argument that the CME's are relevant. The Tennessee case of *Wicks v. Vanderbilt U.*, provides a nearly identical set of circumstances to the present case. M2006-00613-COA-R3CV, 2007 WL 858780, at *1-15 (Tenn. App. Mar. 21, 2007). In *Wicks*, the plaintiff brought claims of medical malpractice and negligent training against a hospital and doctor for a negligently performed bone marrow harvest. *Id.* at *1. During discovery the plaintiff learned that the defendant doctor lacked experience with the relevant procedure. *Id.* at *2-4.

Prior to trial the defendant hospital filed a motion in limine that sought to bar the plaintiff from presenting any evidence regarding the defendant doctor's level of experience with the relevant procedure during trial. *Id.* at *4. Defendants' argued the evidence was a "transparent attempt to support a negligent credentialing claim" which had not been properly asserted. *Id.* Before trial the

district court dismissed plaintiff's claim of negligent training—leaving only the medical malpractice claim—and granted the defendants' motion in limine barring the plaintiff from presenting any evidence on the defendant doctor's lack of experience. *Id.* at *5. Plaintiff alleged this was error and the Tennessee Court of Appeals agreed. *Id.* at *10-12.

The Court of Appeals determined that the trial court abused its discretion in excluding the evidence under a rule 401-403 analysis:

> We believe that the evidence pertaining to [defendants'] qualifications for performing bone marrow harvest procedures was relevant to the standard of care related to Appellants' medical malpractice claim. The trial court's decision to limit the jury's consideration of this evidence to the issue of credibility of [defendants], or in some instances to exclude it altogether, was erroneous.
>
> …
>
> [T]his testimony was material to the issue of the standard of care incumbent upon doctors and nurses who perform bone marrow harvests, as it related to the properly provable issue of "the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities [,]" *Dooley,* 805 S.W.2d at 385, and it was probative of whether or not [defendants] were "lacking in the reasonable degree of learning, skill and experience which ordinarily is possessed by others of his profession," *Redwood,* 49 Tenn.App. at 75, 350 S.W.2d at 416-17.

Id. at. *10-11. After determining the evidence was relevant, the *Wicks* Court applied rule 403 to determine if the evidence was nonetheless properly excluded. The Court determined that the dangers of unfair prejudice did not outweigh the probative value of this evidence. *Id.* at *12. The Court noted that defendants'

were permitted to present their own experts regarding the standard of care and those experts could talk about defendants' qualifications. *Id.* at *12.

In the present case, T.D. brought a claim of medical negligence against Dr. Widmer and HCHC. During discovery, T.D. learned that Dr. Widmer lacked sufficient education and training in obstetrics through his CME records. Prior to trial, the trial court granted Defendants' Motions in Limine No. 19, which barred the introduction of *any* evidence related to Dr. Widmer's CME records. (Vol. 1 App. 229-30, 343).

Unfortunately, just as the district court in *Wicks* conflated evidence of the defendant doctor's lack of experience as a negligent credentialing/training claim, so too did the trial court in this case. (*See* Vol. 2 App. 177) ("Just reiterate the issue in the case is whether he used the proper standard of care during the delivery of T[.D.]."); 10/13/2017 Ruling, at 7 (Vol. 1 App. 183) ("The primary issues in this case remain as to what the applicable standard of care was on the date in question . . . ."). As pointed out by the Tennessee Court of Appeals in *Wicks*, evidence of a defendant doctor's qualifications and experience is "material to the issue of the standard of care incumbent upon" doctors who perform medical procedures, "as it relate[s] to the properly provable issue of 'the skill and knowledge normally possessed by members of that profession . . . ." . *Wicks*, at *12 (internal quotes omitted). Here, evidence of Dr. Widmer's CME records was properly admissible to assist the jury in determining whether Dr. Widmer

possessed the skill and knowledge normally possessed by other doctors who perform the obstetric maneuvers required to safely resolve a shoulder dystocia.

C. The CME's were Admissible for Impeachment

Defendants designated Dr. Widmer as an expert on September 9, 2016. (Vol. 1 App. 27). Dr. Widmer's designation plainly stated that "[t]he purpose of calling Dr. Widmer will be to have him testify on the issue of standard of care, causation and damages." At trial, Dr. Widmer testified that in his expert opinion, the maneuvers he used to resolve the shoulder dystocia were done in conformity with the standard of care. (Vol. 2 App. 209). Defendants' presented Dr. Widmer to the jury as an expert, and although his testimony as an expert may have been limited, it addressed the ultimate issue in the case. (Vol. 2 App. 208-09) (stating that he [(Dr. Widmer)] met the standard of care and performed the relevant maneuvers in conformity with the standard of care).

Plaintiff was entitled to introduce impeachment evidence that lessened the weight of Dr. Widmer's expert opinion. *Ipsen v. Ruess*, 41 N.W.2d 658, 661-62 (Iowa 1950). The trial court's decision to exclude Dr. Widmer's CME records, even solely for purposes of impeachment, bolstered Dr. Widmer's credibility as an expert and improperly shielded him from valid impeachment. Defendants' claim that the CME's were unfairly prejudicial fails to take into account that their own experts on the standard of care were free to talk about Dr. Widmer's

qualifications, and the meaning of the CME records. *See Wicks*, M2006-00613-COA-R3CV, 2007 WL 858780, at *12.

The trial court's action deprived Plaintiff of his right to rigorously cross-examine and impeach Dr. Widmer. *See Heinz v. Heinz*, 653 N.W.2d 334, 342-43 (Iowa 2002) (noting that the right to cross-examine the other side's expert witness regarding his credibility should not be unfairly limited). This error requires reversal.

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

A. Dr. Widmer Failed to Meet the Disclosure Requirements under Iowa Code § 668.11 and IRCP 1.508 in order to Provide Expert Testimony

A treating physician designated as an expert to give an opinion on legal questions must meet the disclosure requirements laid out in Iowa Code section 668.11 and Iowa Rule of Civil Procedure 1.508. *Hansen v. Iowa Hosp. Corp.*, 686 N.W.2d 476, 482 (Iowa 2004). Dr. Widmer simply failed to meet these requirements.

Defendants' argue that Dr. Widmer's eight sentence designation fulfills the requirements of Iowa Rule of Civil Procedure 1.500(2)(c)(2), which requires an expert to provide "[a] summary of the facts and opinions to which the witness is expected to testify." *See* 9/9/16 Widmer Designation (Vol. 1 App. 27) (stating merely that Dr. Widmer would testify based on his review of the evidence in the

case and that his testimony would be consistent with deposition). Defendants' designation failed to disclose any specific facts or opinions that Dr. Widmer would provide at trial. Additionally, T.D. deposed Dr. Widmer before Defendants' designated him as an expert, meaning T.D. deposed Dr. Widmer solely in his capacity as a treating physician. Defendants' reliance on Dr. Widmer's deposition testimony to disclose his expert opinions is insufficient *See Hansen*, 686 N.W.2d at 480 ("[A]n opposing party should . . . be able to expect that a treating physician's testimony will not include opinions on reasonable standards of care.").

Dr. Widmer failed to make the required disclosures, and therefore should have been barred from testifying in an expert capacity. Despite Dr. Widmer's failure to make the required disclosures, the trial court still permitted him to testify as an expert on many subjects, even allowing him to testify on issues outside of the scope of the inadequate disclosures he submitted. This error requires reversal.

IV. The Trial Court Erred in Granting Overly Broad Motions in Limine

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

The trial court erred when it granted vague motions in limine that failed to pinpoint objectionable material. *Lewis v. Buena Vista Mut. Ass'n*, 183 N.W.2d 198, 201 (Iowa 1971). The vague relief granted by the court prejudiced T.D. and

confused both counsel and the court alike. (Vol. 2 App. 172-73) ("The motion in limine issue – and again, I couldn't figure out what it was talking about . . . ."); (Vol. 2 App. 31) ("The Court: Regarding the informed consent, what specific motion are you saying was violated? Mr. Houghton: That's a good question, Judge. I don't believe that's a violation of the motion in limine.")

As a result of the overly broad relief granted, the trial court mistakenly conclude that Plaintiff's counsel violated two motions in limine despite a lack of support in the record for these findings. *See* 11/02/2017 Ruling and Order Re: Motions in Limine (Vol. 1 App. 340); (Vol. 2 App. 50); 11/18/2017 Combined Resistance and Motion to Reconsider re: Orders in Limine Violations (Vol. 1 App. 410-15).

Instead of excluding specific objectionable material, the trial court granted motions that wholly prevented T.D. from presenting relevant and probative evidence that supported T.D.'s case theory. Additionally, the broad relief caused confusion, delay, and extended arguments at trial, all of which impeded T.D.'s ability to present his case.

New Trial

Throughout the trial, Defendants made numerous motions for a mistrial claiming that they were denied a fair trial and that there would be an unjust result. (*See* Defendants Joint Motion for Mistrial, Vol. 1 App. 350-53).

Defendants made three separate motions for a mistrial, the first on November 7, 2017, the second motion on November 8, 2017, and the last on November 17, 2017, made on the last day of trial after Plaintiff concluded his closing argument. (Vol. 2 App. 24, 28-29, 421).

Plaintiff agrees with Defendant that the trial was unfair and a new trial is necessitated, but disagrees on the grounds for the new trial. A new trial is warranted for the reasons advanced by T.D. and stated herein. Accordingly, the judgment of the lower court should be reversed and a new trial should be granted.

CONCLUSION

T.D. respectfully requests that the Court vacate the jury verdict, reverse the judgment of the trial court in its entirety, and send the case back to the trial court for retrial with instructions so that the trial court does not commit the same or similar errors again.

Respectfully submitted,

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CERTIFICATE OF COST

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

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

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

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

CERTIFICIATE OF FILING AND SERVICE

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

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