IN THE IOWA SUPREME COURT

Supreme Court No. 24-1669
Linn Cnty. No. LACV099133

MATTHEW McQUILLEN and ELIZABETH McQUILLEN, as Limited Co-Guardians and Co-Conservators of MARGARET G. McQUILLEN,

Plaintiffs–Appellees,

v.

WEST SIDE TRANSPORT, INC. and CLIFFORD CHARLES TAKES,

Defendants–Appellants.

APPEAL FROM THE DISTRICT COURT FOR LINN COUNTY

THE HONORABLE JUSTIN A. LIGHTFOOT, JUDGE

BRIEF FOR APPELLEES

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Under Iowa law, any benefit to a promisor is sufficient consideration for an enforceable contract. Here, West Side promised to facilitate payment of the judgment—to achieve finality for both parties—in exchange for the negotiated benefit of McQuillen withholding execution and securing funds in trust until all payments were received and a satisfaction of judgment tendered. Is there an enforceable settlement agreement which renders this appeal moot?

2. Argument found improper by the district court does not warrant a new trial unless a different result was probable absent the improper argument. The district court's assessment is entitled to substantial deference. Here, the district court found (1) the vast majority of closing argument was appropriate, (2) there was strong evidence of liability, and (3) there was no prejudice. Did the district court abuse its discretion in denying West Side's motion for new trial?

3. The district court is vested with broad discretion in ruling on the propriety of closing argument. Here, McQuillen's argument colloquially referred to a lay witness as an "expert" because the witness was more knowledgeable than West Side's cell phone expert with respect to Snapchat. Nobody stated or believed the lay witness was a technical expert. The district court found the argument proper and, regardless, found there was no prejudice. Did the district court abuse its discretion in denying West Side's motion for new trial?

4. The district court instructed the jury to reduce future damages to their present value. West Side violated a limine ruling regarding argument on what McQuillen could do with money awarded. The limine ruling required the issue be first addressed outside the presence of the jury. The court never prohibited present-value arguments. Did West Side preserve alleged error? If so, did the district court abuse its discretion?

ROUTING STATEMENT[1]

Although not for the reasons advanced by West Side,[2] McQuillen agrees this case warrants retention by the Supreme Court. It presents an opportunity for the Court to apply its recent decision in *Belhak v. Smith*, 21 N.W.3d 535 (Iowa 2025). The case also raises an issue of first impression: whether negotiated benefits tied to a judgment payoff created an enforceable settlement agreement which renders the appeal moot. *See* Iowa R. App. P. 6.1101(2)(*c*).

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[1] Plaintiffs–Appellees are collectively referred to as "McQuillen." When necessary for factual background, Margaret McQuillen is individually referred to as "Maggie."

Defendants–Appellants are collectively referred to as "West Side." When necessary for factual background, Clifford Takes is individually referred to as "Takes."

[2] This was not a so-called "nuclear verdict"—a term generally reserved for awards that far surpass reasonable expectations. In this case, the pain and suffering award accounted for less than one-third of the total verdict, and each category of economic damages was backed by substantial evidence. Notably, West Side has not appealed the damages as excessive. Furthermore, the legislature's later enactment of a $5 million cap on non-economic damages in truck-accident cases reflects an acknowledgment damages exceeding $5 million are a reasonably foreseeable consequence of semi-truck driver negligence.

NATURE OF THE CASE

McQuillen agrees with West Side's statement with respect to the jury's assessment of fault and damages. Following trial, the district court denied West Side's post-trial motions, including its motion for new trial. (D0464, Ruling at 11 (10/2/2024)). In the portions relevant to this appeal, the district court found isolated improper closing argument which the court did not believe affected the jury's determination of fault or damages. (D0464 at 10–14). The district court additionally found West Side had violated a limine ruling but was not otherwise restricted in its closing argument. (D0464 at 15). After West Side filed its notice of appeal, McQuillen filed a motion to dismiss this appeal. The motion argues an enforceable settlement agreement renders the appeal moot. On February 24, 2025, this Court entered an order directing the parties to address McQuillen's motion to dismiss in their appellate briefs.

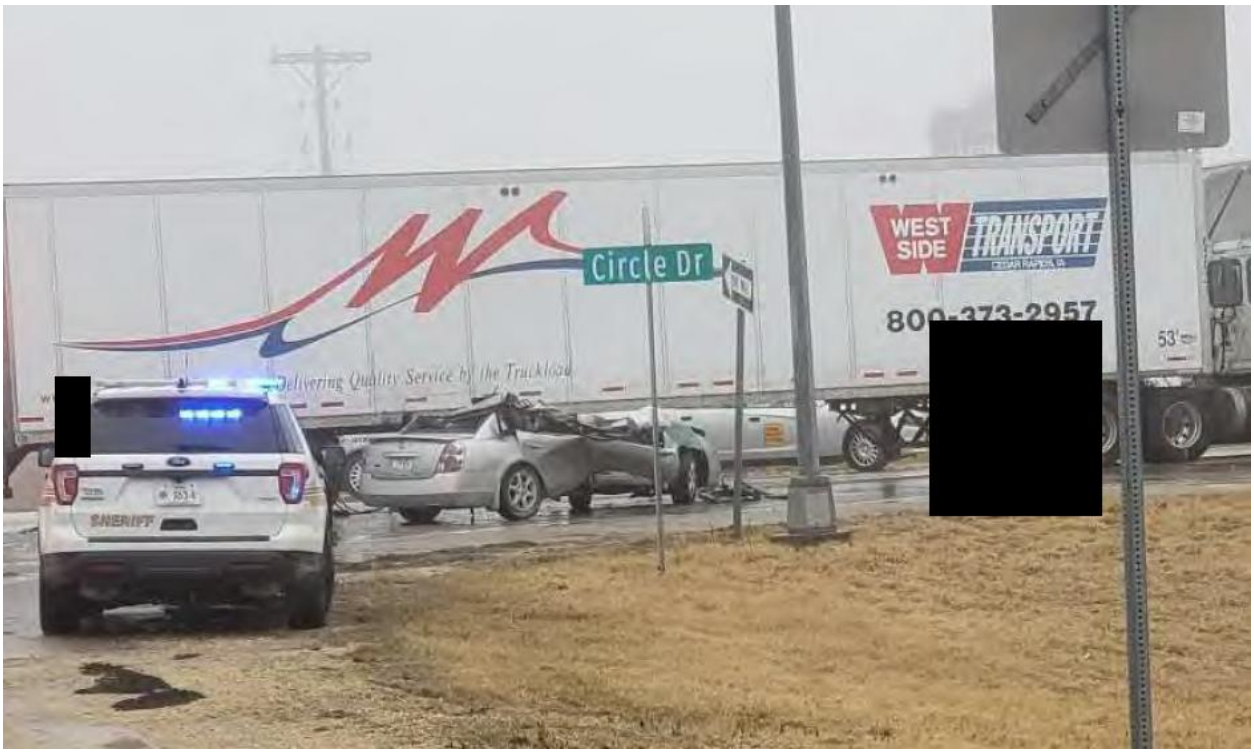
West Side has injected inaccurate statements of fact and improper argument into its statement of the Nature of the Case. First, West Side inaccurately claims plaintiff counsel's closing argument "centered specifications of negligence on which the district court had directed a defense verdict." Second, West Side mischaracterizes the context of

testimony from McQuillen's friend regarding Snapchat, as well as the colloquial reference to her as a "Snapchat expert" during closing argument. Third, West Side wrongly frames its blatant violation of the district court's limine ruling as a prohibition on addressing the time value of money in its closing argument. Each of these items are addressed in the following statement of facts.

STATEMENT OF THE FACTS

This matter arises from a devastating motor vehicle crash on March 19, 2020 involving a semi-truck and trailer—owned by West Side and operated by Takes—and a car driven by Maggie in Anamosa, Iowa. Maggie, then a high school senior, left home intending to meet her friend, Grace Lubben, at the high school track. At approximately 3:51 p.m., Maggie was driving southbound on divided Highway 151 and had the right of way. (D0479, Trial Tr. Vol. 2 at 195:1–2 (5/30/2024)). Despite foggy conditions and limited visibility, Takes—who was driving northbound on Highway 151—attempted an unprotected left-hand turn across the highway, crossing in front of Maggie and causing the collision. Maggie's vehicle struck the underside of Takes' trailer, resulting in

catastrophic injuries, including a severe traumatic brain injury ("TBI"). The crash occurred approximately two miles from Maggie's home. (D0478, Trial Tr. Vol. 5 at 157:16–21 (6/4/2024)).



(D0330, Ex. 9-313 at 28 (persons redacted — *see* rule 6.903(1)(*b*)).

The first person to reach Maggie's vehicle did not believe it was possible for the driver to survive. (D0485, Trial Tr. Vol. 1 at 62:4–63:2 (5/29/2024)). Maggie was unresponsive and gasping for air. (*Id.*) With the sirens of emergency responders nearing, her breathing and pulse stopped. (*Id.*) Maggie remained without a pulse during her extraction, the ambulance ride, and over ten minutes in the emergency room. (D0477, Trial Tr. Vol. 4 at 20:4–21 (6/3/2024)). The emergency physician

testified “effectively, somebody has died at that point in time.” (D0477 at 21:14–21). Miraculously, prolonged CPR finally brought Maggie back to life. (D0477 at 21:22–23:24).

Maggie was transported to the University of Iowa Hospital after her resuscitation at Jones Regional Medical Center. In addition to her severe TBI, her diagnoses included forehead avulsion with skull exposure, fracture of the C-1 vertebrae, multiple facial lacerations, orbital wall fractures, numerous lacerations of the neck and left ear, and large lacerations of the forehead. (D0362, Ex. 28 Vol. 3 at 3740, UIHC records). Dr. Owens identified approximately 100 facial fractures and described surgeries to be like putting together “a puzzle with an erector set.” (D0478 at 137:6–138:1). There were over 19,000 pages of medical records from UIHC detailing Maggie’s acute care. (D0360–D365, Ex. 28, UIHC records). Maggie was discharged from UIHC to the Shirley Ryan Ability Lab in Chicago for brain injury rehabilitation. (D0368, Ex. 31, Shirley Ryan records). She then continued her lengthy rehabilitation in Iowa. (D0370, Ex. 33, On With Life records; D0371, Ex. 34, Amen Clinics records). Numerous experts testified concerning the permanent limitations and effects of Maggie’s injuries, including shortened life

expectancy, increased risk for dementia and Alzheimer's, and issues with executive functioning. (D0480, Trial Tr. Vol. 3 at 88:13–92:4 (5/31/2024)) She has a lifelong disability and faces a significantly elevated risk of progressive disinhibition, impaired judgment, poor impulse control, and memory loss. (D0477 at 60:7–24).

Crash Evidence

Dash camera video from the West Side truck evidences the weather conditions and movement of the truck. (D0166, Ex. 6, Takes' dash video). Takes drove 553.5 miles on the day of the crash—almost 150 to 200 miles more than his average. (D0479 at 180:7–181:2). His day started at 3:50 a.m. and the crash occurred at 3:51 p.m. (D0479 at 181:6–12). Despite the foggy conditions, Takes was driving as fast as 72 miles per hour just three minutes before the crash. (D0479 at 190:1–191:1, 199:9–200:19). His trailer was fully loaded at the time of the crash. (D0479 at 177:6–21).

Takes routinely parked on the street adjacent to Highway 151, which was on the west side of the four-lane divided highway, rather than the West Side terminal in Cedar Rapids. (D0479 at 27:4–10). The parking location required Takes to make an unprotected left-hand turn across the southbound lanes of 151. (D0479 at 184:5–9). Takes admitted he could

not think of a more dangerous unprotected left-hand turn than the one at issue—involving 65-mile-per-hour oncoming traffic, the extended length of the West Side tractor-trailer, a fully-loaded trailer, and limited visibility due to fog. (D0479 at 184:10–16).

In his deposition, Takes denied any responsibility for the crash. (D0479 at 207:20–25). At trial, he changed his testimony and took "a little responsibility." (D0479 at 207:20–25). Takes admitted it was suggested to him he might want to change his testimony in front of the jury. (D0479 at 208:1–12).

At the scene, following the crash, Takes told law enforcement he had stopped in the median for "about a minute," judging distance of the southbound traffic by oncoming headlights. (D0480 at 26:19–27:9). Takes also said he had his passenger window down to listen for traffic. (*Id.*) The dash camera video, however, establishes Takes stopped for less than five seconds before attempting the unprotected left-hand turn. (D0166, Ex. 6, Dash Video). After a comprehensive investigation, the State of Iowa charged Takes with failing to yield upon a left-hand turn. (D0480 at 21:3–11). Takes pled guilty to the citation, and the jury in this case was informed of the plea. (D0479 at 204:21–205:22).

Due to head trauma, Maggie has no personal recollection of the crash. Iowa law requires the use of headlights if visibility is 500 feet or less. The State's investigation concluded it was undetermined whether headlights were required at the time of the collision. (D0480 at 36:1–13). The headlight control knob on Maggie's car was in the "auto" position at the time of the crash. (D0480 at 36:15–37:2).

Other drivers behind Maggie observed the crash. Denise Miossi testified to having "a vivid memory" of "everything about [the crash]." (D0482, Trial Tr. Vol. 6 at 211:7–17 (6/5/2024); D0485 at 83:22–84:3). She had been traveling approximately 70–72 miles per hour but slowed down significantly after catching up to Maggie and then matching her speed. (D0485 at 74:1–75:20). Miossi was not sure if her own headlights were on—they were also in the "auto" setting. (D0485 at 74:3–75:8). She considered passing Maggie but decided to wait until it was less foggy. (D0485 at 75:23–76:4). From a few car lengths behind Maggie, Miossi witnessed the crash and described it as follows: "Literally the semi just – it had the feeling of appearing from nowhere. There was just no warning at all. It just came across the highway in front of me." (D0485 at 77:8–12). Miossi further testified there was no opportunity for Maggie to take

evasive action: "[F]rom my vantage point, it was just that split-second going across the highway. I – I didn't have time much to react, being right behind her. So that's why my observation is that she didn't have time to react because it was that quickly." (D0485 at 77:23–78:17). If Maggie's car had not been in front and slowed her down, Miossi believes "[i]t would have been [her,] for sure," in the crash. (D0482 at 211:14–17).

Allyson Funk was behind Miossi and Maggie. (D0485 at 56:2–57:19). She heard the collision before seeing the truck or Maggie's car wedged under the trailer. (D0485 at 58:3–59:3). Funk testified the truck came out of nowhere. (D0485 at 59:4–24).

Multiple crash reconstruction experts testified, including Daniel Fittano, who was retained by West Side. Fittano testified the collision occurred 9.9 seconds after Takes began the turn, with the truck traveling approximately 13 miles per hour at impact. (D0482 at 38:3–15). Fittano agreed the trailer was covering both southbound lanes of Highway 151 at the time of impact, and Maggie's car was centered in the right lane at impact. (D0482 at 70:18–25). Accordingly, he agreed Maggie could not have avoided the collision through evasive steering. (D0482 at 85:9–13). The only meaningful difference of opinion between the retained experts

was with respect to the speed of Maggie's car at impact, which Fittano believed to be a minimum of 40 miles per hour—compared to the 32.7 mile per hour estimate of McQuillen's expert. (D0482 at 71:8–23).

Cell Phone Evidence

West Side's comparative fault defense hinged, in part, on its disputed allegation Maggie opened the Snapchat application on her phone in the moments preceding the crash. On this issue, the jury heard testimony from Trooper Mike Messerich of the Iowa State Patrol.

Messerich performed a technical investigation of the crash on behalf of the State of Iowa and prepared a comprehensive report summarizing the investigation and his conclusions. (D0480 at 15:20–16:1; D0317, Ex. 2, Messerich Report). Messerich was a full-time collision reconstructionist at the time of his investigation but has since been promoted. (D0480 at 16:7–23). As a reconstructionist, Messerich's job was to "respond to any serious injury or fatal collisions[,]…properly document the scenes, evidence in the case, analyze all that evidence and provide a conclusion in the case." (D0480 at 16:24–17:5).

Following the crash, Messerich secured Maggie's cell phone for a technical analysis by the State's forensic specialist. (D0480 at 22:1–17). Through its investigation, the State of Iowa ruled out any cell phone use by Maggie at the time of the collision. (D0480 at 22:18–23). Messerich testified "after examining that information thoroughly, there was no evidence of any activity on [Maggie's] cell phone around the time of the collision." (*Id.*) The investigation included a forensic specialist who downloaded and analyzed the cell phone data with Messerich. (D0480 at 39:1–17). Accordingly, the State's investigation ruled out distracted driving by use of cell phone for Maggie. (*Id.*)

West Side retained Joshua Lorencz to offer opinions on Maggie's alleged cell phone use. Lorencz did not download data from Maggie's cell phone but relied on downloaded information from a source unknown to him. (D0481, Trial Tr. Vol. 7 at 77:13–78:6, 81:16–24 (6/6/2024)). He did not know it came from a prior retained defense expert. (D0481 at 83:20–84:5). Lorencz never contacted the prior expert to determine how the data was extracted and was not aware of the prior expert's report. (D0481 at 80:7–11, 83:20–84:8). Lorencz was aware of the State's data extraction but never contacted the State Patrol. (D0481 at 83:11–19, 102:19–

103:10). He testified he was unaware of the State's conclusion there was no distracted driving by use of a cell phone. (D0481 at 84:25–85:18).

Lorencz developed his opinions by purchasing a phone similar to Maggie's phone and testing a theory he developed. (D0481 at 54:22–56:3). Based on his experimentation, Lorencz opined that Grace Lubben sent the equivalent of a text message on Snapchat to Maggie at 3:41:07 p.m., that Maggie opened the message at 3:48:11 p.m., and that Maggie "manipulated" her phone in some fashion at 3:51:12 p.m.—approximately 13 seconds before the crash. (D0481 at 65:6–66:9, 74:16–75:1). Lorencz testified this "manipulation" could have included any touch of the screen or any touch of a button on the phone. (D0481 at 46:22–47:6). In giving his opinions, Lorencz admitted he has never used Snapchat or spoken with Lubben. (D0481 at 42:22–43:6, 86:9–20). Lorencz did not offer any opinions on Snap Map (a subset of Snapchat), its use, or its location-sharing function.

With no objection from West Side, McQuillen called Lubben as a rebuttal witness. Her testimony was brief and direct. She is a childhood friend of Maggie, and both of them had used Snapchat and Snap Map since they were in middle school. (D0481 at 119:3–25). Lubben explained

that through Snapchat and its included Snap Map, she and Maggie shared their respective locations with each other. (D0481 at 122:9–18). Their Snap Map locations would only update, however, when they used the Snapchat application. (D0481 at 120:14–122:25). As such, Lubben testified when Maggie was not using Snapchat, Snap Map would show Maggie's location from when she last used the Snapchat application. (*Id.*) Lubben's testimony was corroborated by Snapchat's own website, which states: "Your location on Snap Map only updates when you have Snapchat open – your location won't update in the background." (D0402, Ex. 69, Snapchat Website).

After learning Maggie was in a crash, Lubben checked Snapchat and Snap Map in attempt to find Maggie's location. (D0481 at 124:3–15). Lubben testified Snap Map indicated Maggie's last known location was still at home. (*Id.*) This meant Maggie had not used Snapchat since leaving her house, including the moments preceding the crash. (*Id.*) West Side did not object to any of Lubben's testimony.

In response, the entirety of West Side's cross examination of Lubben was as follows:

Q. Is it Ms. Lubben?

A. Yes, yes.

Q. Thank you for coming to testify today. It's important to support the civil justice system. It may sound like kind of a dumb question, but are you a digital forensic examiner?

A. No.

Q. Do you have any training or work experience in what would be involved with being a digital forensic examiner?

A. No.

MR. REYNOLDS: Those are all the questions I had. Thank you.

(D0481 at 124:23–125:10).

McQuillen's Closing Argument

Before closing arguments, the district court issued a cautionary instruction to the jury:

The counsel for each party will be summarizing the testimony that you will have heard and the evidence which has been presented during this trial. They will merely be recalling the evidence, as you will do later.

They will not intentionally try to mislead you and if their recollection of the testimony is not the same as yours, you must follow and rely on your own recollection.

The closing arguments of counsel are merely that, arguments. They are not evidence nor should they be construed by you as evidence or instructions on the law. The arguments are

> intended to help you in understanding the contentions of each side, so please give them your very careful attention.
>
> So with that, the Plaintiff may present their closing argument.

(D0484, Trial Tr. Vol. 8 at 4:24–5:13 (6/7/2024)).

McQuillen's counsel's closing argument was over 90 minutes and spans 44 pages in the trial transcript. (D0484 at 5:14–48:20). On two occasions, counsel stated all that was required to establish West Side's liability was to prove "one of these things." The context of these statements is informative. On the first occasion, counsel stated:

> So was the West Side Transport driver at fault? So did Mr. Takes fail to yield to oncoming traffic when he made an unprotected left turn? And all we have to do is prove one of these things like this.

(D0484 at 10:13–16). The statement specifically related "one of these things" to Takes failing to yield to traffic when he attempted the unprotected left turn. On the second occasion, counsel stated:

> What did Mr. Takes say about that? Well, the first thing he did was he pled guilty to the citation for failure to yield. He said I'm taking responsibility. But then at his deposition he flip-flops, changes his story and he said I'm taking no responsibility, zero responsibility.
>
> But then he comes into court and says, oh, well, I didn't mean that, you know, the only reason I pled guilty was the lawyer and the company lawyer and this and that. And then he comes

> into court and he changes again. And now he says he takes a little responsibility. Why was that? Do you remember he said he had a conversation with somebody, somebody had a conversation with him and suggested to him that he change his sworn testimony? How does that sit with us, change your sworn testimony? Okay?
>
> So all we have to do is prove this. Now, here we had an admission, then he took it back, and then he came back. So I would suggest to you the answer is yes. That would be the end of it, because the judge read to you – the instruction said all you have to do is prove one of these things. Do you remember he said or, or, or?

(D0484 at 11:19–12:14 (emphasis added)). The statement again specifically related "one of these things" to Takes' failure to yield, for which he pled guilty. The statement also specifically directed the jury to the court's instructions to determine what was required to prove Takes' negligence.

During a break in the argument, West Side moved for a mistrial. West Side's entire record on the motion was as follows:

> Come now the Defendants and hereby make a motion for mistrial in this case based on Plaintiffs' closing argument. There's two reasons for this motion, Your Honor.
>
> First of all, in his slides and in his argument, he referred to Grace Lubben as an expert. I think he put up one slide that had her compared to Mr. Lorencz, who is an actual expert. As the Court knows, the jury will be given Instruction Number 5, which talks about experts and how the jury is to consider experts. Calling Grace Lubben an expert is going to be

> confusing to the jury and we think that is a clear error and grounds for a motion for mistrial.
>
> The second ground, just briefly, Your Honor, Mr. Rodriguez's arguments do not match the specifications of negligence. The one example I'm aware of thus far is he went into the parking and the parking slip and all that kind of stuff and it's my understanding that that stuff was taken out of the case and that the only remaining claims were claims of Cliff Takes's negligence and then West Side Transport's vicarious liability as a result of that. That concludes our motion, Your Honor, and record.

(D0484 at 36:1–22).

The district court denied West Side's motion, noting "the vast majority of the closing argument was appropriate" and the court "[did not] think there was any intentional misleading" by McQuillen's counsel. (D0484 at 37:13–39:17). Regarding evidence of negligence, while finding only a "small portion" of the argument to be improper, the district court specifically concluded West Side could "respond to those arguments" in its own closing argument, which the court reasoned to be a "much better remedy than a mistrial." (*Id.*) Notably, McQuillen's counsel never used the term "specification" in closing, nor did McQuillen's counsel ever suggest the jury should not follow the district court's instructions. To the contrary, the argument included statements suggesting the jury "read the instructions" and not to "take [his] word" but instead rely on the

evidence. (D0484 at 26:3–15). McQuillen's counsel went so far as to point out it would be improper to find Takes negligent for his texting violations, which were not at the time of the crash. (D0484 at 26:16–27:1).

Regarding Lubben, the district court explained its analysis as follows:

> First of all, the jury instructions just tell them to consider an expert just like any other witness. And second, I didn't find that inappropriate argument. I think when you – when you listen to Mr. Rodriguez's argument as a whole, he wasn't necessarily using expert and expert witness in any sort of legal terminology.
>
> He was just saying like look, you know, she knows more about SnapChat than their so-called expert. And I think that was the point he was trying to get across. That's at least how I took it and so I don't – I don't think there's any prejudice there. And, again, you can respond to that in your argument. I believe you did ask her on cross examination if she had expertise in forensic analysis and you can – so that's in evidence and you can certainly respond to that.

(D0484 at 38:24–39:15).

Later, the district court noted additional reasoning for its denial of a mistrial in that prior to closing arguments the court issued its "cautionary instruction" which "told them that the statements of counsel are not statements of the law and not evidence and that they should rely on their own recollection and the instructions." (D0484 at 66:16–25).

West Side did not respond to any of the district court's reasoning or offer any additional record on its mistrial motion.

While much of West Side's appeal is based on argument following the break—including McQuillen's counsel rhetorically asking, "What's it going to take to get this company to take safety seriously?" (D0484 at 48:8–17)—West Side did not make any additional objection, renew its motion for a mistrial, or make any additional record at any time. Instead, West Side proceeded to its own closing argument—during which, West Side chose not to address the instructions' specifications of negligence, McQuillen's argument,[3] or Lubben. Significantly, while West Side's appeal is largely based on allegations of misconduct by McQuillen's counsel during closing argument, West Side's own counsel was admonished for "improper argument" by repeatedly "interject[ing]

[3] Regarding Takes' decision on where to park, West Side's counsel stated as follows in closing argument:

> We can flip through these pretty quick. We all know this. He was going – he was on his way to park the truck at the AmericInn. You know, they say, oh, he should have got off the road, blah, blah, blah. I mean, he was getting off the road at the time the accident happens. I mean, he parks right there.

(D0484 at 57:8–13).

personal opinions that assumed facts not in evidence." (D0484 at 64:11–66:15).

Following West Side's closing argument and McQuillen's rebuttal argument, the district court addressed the various objections to closing arguments from both sides, stating:

> And I certainly did not think either party had any intentional improper arguments. This was a long trial and it's been a long case. This case has been continued a couple of times and the parties have been involved in it a long time, so I think just in the – being a zealous advocate, those sort of things happen from time to time....I'd just like to conclude by thanking the attorneys for your professionalism. This was a long trial. I thought all of the attorneys were very professional....

(D0484 at 95:2–23 (emphases added)).

West Side's Closing Argument

Prior to trial, McQuillen moved in limine to exclude argument from West Side regarding items a person could buy for the amount of money sought by Plaintiffs as damages, given such may constitute improper "golden rule" arguments. (D0106, Motion in Limine at 9–11 (4/26/2024)). The district court, in a very thorough ruling on the motions in limine, specifically ordered as follows:

> It is difficult to anticipate in limine what arguments will be made, or the precise wording of any such arguments. But, in light of the Court's concerns, to the extent that counsel wish to offer an argument regarding what plaintiff could do with the amount of money being requested, counsel shall first raise the issue with the Court outside of the presence of the jury.

(D0124, Ruling in Limine at 5–7 (5/15/2024) (second emphasis added)).

Over the course of a two-week trial, West Side never again raised the issue with the district court. Instead, West Side plowed ahead with prohibited closing argument in the presence of the jury, drawing an objection from McQuillen. (D0484 at 80:7–12). This district court summarized the ensuing events as follows:

> Plaintiff's counsel objected after Defendant's counsel placed Slide 33 on the courtroom screen. An unreported sidebar conference was held, at which Plaintiff's counsel argued that the slide violated the Court's limine ruling. The Court agreed and indicated that this should have been brought to the Court's attention prior to showing the slide to the jury, in accordance with the limine ruling. The Court instructed defense counsel not to display the slide. No additional restrictions were placed on defense counsel's closing argument during the sidebar. Neither party requested that the Court make an immediate record on this issue or asked for a recess.

(D0433, Order Regarding Bill of Exceptions at 2–3 (6/18/2024) (emphasis added) (footnote omitted)).

Significantly, the Court placed "[n]o additional restrictions" on West Side's closing argument. (*Id.* (emphasis added).) Having merely been instructed to take down slide 33 and abide by the district court's limine ruling—which required raising the issue outside the presence of the jury—West Side elected not to argue damages. The district court did not make a final ruling on whether Defendants' intended arguments were or were not permissible—West Side simply violated the district court's limine ruling and then elected not to argue damages.

Negotiated Finality

Following the district court's denial of West Side's post-trial motions, West Side sought to resolve the matter to avoid execution on the judgment. The district court's order on October 2, 2024 lifted its previous stay of execution on the judgment, effective October 7, 2024. (D0464 at 35). On October 3, 2024, McQuillen's counsel wrote to West Side counsel to identify the amount of the judgment, with applicable interest and costs, and expressly stated the conditions on which Plaintiffs would agree to resolve this matter. Included in those conditions, McQuillen agreed to withhold execution on the judgment provided West Side agreed to the stated terms of resolution by October 4, 2024. The terms required "all

settlement checks should be made payable to: Pickens, Barnes & Abernathy Trust Account." (MTD Ex. 1, 11/12/2024 (emphasis added)).

On October 4, 2024, counsel for West Side wrote to counsel for McQuillen in response to the October 3, 2024 letter. West Side's counsel indicated West Side had made payment arrangements and stated, "West Side has also directed its insurance carriers to immediately pay their limits, per the directions in your letter of October 3, 2024." (MTD Ex. 2, 11/12/2024 (emphasis added)). West Side specifically requested, and confirmed, agreement to hold all funds in trust until all payments were received and "a proper and fully executed Satisfaction of Judgment has been provided to West Side." (*Id.*) Likewise, West Side specifically requested, and confirmed "Plaintiffs will not execute on the judgment pending receipt of the insurance proceeds." (*Id.*)

West Side had four insurance carriers involved. One of the insurance checks stated on the face of the check it was "In Payment Of: Full and Final Settlement of Any and All Claims." (MTD Ex. 3, 11/12/2024 (emphasis added)). Another insurance carrier's check included a memo stating the check was being paid by reason of "Settlement of Claim." (MTD Ex. 4, 11/12/2024 (emphasis added)).

Pursuant to the agreement, McQuillen withheld execution and—after all payments were received—filed a satisfaction of judgment. (D0474, Satisfaction (11/12/2024)). Importantly, McQuillen negotiated finality in return for withholding execution on the judgment.[4]

ARGUMENT

1. West Side's Conditional Payment Terms Created an Enforceable Settlement Agreement Which Renders This Appeal Moot

Following the district court's denial of post-trial motions, West Side sought resolution. West Side viewed potential execution on the $27.5 million judgment as very problematic to its business operations. The district court's October 2, 2024 order lifted its previous stay on execution, effective October 7, leaving a short window of time for potential resolution before commencement of collection. West Side, through its personal counsel, accordingly brokered a deal. Pursuant to the deal, McQuillen agreed to withhold on execution and secure funds in a trust

[4] The judgment entitled McQuillen to collect from West Side. By negotiating finality in the case, McQuillen would eliminate becoming an involuntary fiduciary of $28.5 million—which is the position McQuillen has been in since October 2024.

account until the filing of a satisfaction of judgment. When West Side delivered payment of approximately $12.4 million on October 4, it promised to facilitate insurance payments while specifically confirming McQuillen "[would] not execute on the judgment pending receipt of the insurance proceeds" and McQuillen's counsel would "hold all funds…in the trust account…until such time as all funds have been received and a proper and fully executed Satisfaction of Judgment has been provided to West Side." (MTD Ex. 2).

"Iowa has a well-established public policy favoring the voluntary settlement of disputes." *Nance v. Iowa Dep't of Revenue*, 908 N.W.2d 261, 269 (Iowa 2018).

> A settlement agreement is essentially contractual in nature. The typical settlement resolves uncertain claims and defenses, and the settlement obviates the necessity of further legal proceedings between the settling parties. We have long held that voluntary settlements of legal disputes should be encouraged, with the terms of settlements not inordinately scrutinized.

Id. (quoting *Peak v. Adams*, 799 N.W.2d 535, 543 (Iowa 2011)) (emphasis added); *see also Walker v. Gribble*, 689 N.W.2d 104, 109 (Iowa 2004) (holding unilateral mistake of law was insufficient to void settlement agreement). The Iowa Supreme Court enforces settlement agreements

"absent fraud, misrepresentation, or concealment." *Phipps v. Winneshiek Cnty.*, 593 N.W.2d 143, 146 (Iowa 1999).

Under Iowa law—contrary to the majority rule, which requires both—"[c]onsideration can be either a legal benefit to the promisor, or a legal detriment to the promisee." *See Meincke v. Nw. Bank & Tr. Co.*, 756 N.W.2d 223, 227 (Iowa 2008) (citing *Magnusson Agency v. Pub. Entity Nat. Co.–Midwest*, 560 N.W.2d 20, 27 (Iowa 1997)) (emphases added).

> The legal sufficiency of a consideration for a promise does not depend upon the comparative economic value of the consideration and of what is promised in return. In other words, the relative values of a promise and the consideration for it do not affect the sufficiency of the consideration, and whatever consideration a promisor assents to as the price of his promise is legally sufficient. Even a nominal consideration…will sustain a promise if it is the consideration in fact agreed upon. And while, to be sufficient, the consideration agreed upon must be a legal benefit or detriment, it need not be an actual pecuniary benefit or detriment.

Hart v. Hart, 160 N.W.2d 438, 444 (Iowa 1968) (citation omitted).

Here, West Side bargained for the legal benefits of (1) avoiding execution on the judgment while several insurance payments were

processed,[5] and (2) the securing of funds in a trust account until a satisfaction was tendered. These were terms of settlement. If the payments were merely to satisfy the judgment, there would be no reason for West Side to negotiate conditions or bargain for specific legal benefits. While one of the insurance carriers is attempting to pursue this appeal, it is the intent and actions of West Side itself which are controlling. West Side could have preserved its appeal rights by posting a supersedeas bond, delivering payment with no conditions or stipulations,[6] or simply responding to collection efforts. Instead, West Side resolved the claim, and the appeal filed by one of the insurance carriers is moot.

As West Side incorporated its prior filings, McQuillen likewise incorporates its filings from November 12 and November 29, 2024 with regard to its motion to dismiss this appeal.

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[5] When two of the insurance checks were received, they specifically noted being paid in "Settlement of Claim" and "Full and Final Settlement." (MTD Ex. 3; MTD Ex. 4). One of those checks was issued on October 9—after the district court's stay of execution was no longer in effect. (MTD Ex. 3).

[6] This assumes the doctrine in *Peoples Tr. & Sav. Bank v. Sec. Sav. Bank*, 815 N.W.2d 744 (Iowa 2012) controls here. It should not apply, however, given this is a distinguishable personal injury action—not secured creditors competing for collateral proceeds, as in *Peoples*.

2. The District Court Did Not Abuse its Discretion in Finding a Different Result Was Not Probable Absent Isolated Improper Closing Argument

2.1 Error Preservation

"When counsel makes an improper remark in the course of the closing argument, it is the duty of the aggrieved party to object and thereby provide the trial court with an opportunity to admonish counsel or instruct the jury as it may see fit." *Lange v. City of Des Moines*, 404 N.W.2d 585, 587 (Iowa Ct. App. 1987) (citing *Andrews v. Struble*, 178 N.W.2d 391, 401 (Iowa 1970)). Objections to closing arguments are waived unless they are made on the record prior to submission of the case to the jury, whether during closing or immediately after closing. *See State v. Delay*, 320 N.W.2d 831, 835 (Iowa 1982) (concluding any objection to prosecutorial misconduct during closing argument waived on appeal by defense counsel's strategical choice not to object at trial and instead bank on a favorable verdict); *see also State v. Nelson*, 234 N.W.2d 368, 371 (Iowa 1975); *Rosenberger Enters., Inc. v. Ins. Serv. Corp. of Iowa*, 541 N.W.2d 904, 907 (Iowa Ct. App. 1995).

"Error preservation requires a final ruling on a specific motion or request." *Halbur v. Larson*, 14 N.W.3d 363, 373 (Iowa 2024). It is well-

settled a party fails to preserve error on new arguments or theories raised for the first time in a posttrial motion. *Field v. Palmer*, 592 N.W.2d 347, 351 (Iowa 1999).

> Although our error preservation rules are not designed to be hypertechnical, *Griffin Pipe Prods. Co. v. Bd. of Review*, 789 N.W.2d 769, 772 (Iowa 2010), we require that the nature of any alleged error be timely brought to the attention of the district court, *Summy v. City of Des Moines*, 708 N.W.2d 333, 338 (Iowa 2006).

Mitchell v. Cedar Rapids Cmty. Sch. Dist., 832 N.W.2d 689, 695 (Iowa 2013). Just two months ago, this Court rejected an attempt to broaden a motion for a mistrial through arguments first presented in a posttrial motion. *Belhak*, 21 N.W.3d at 542–43. Controlling precedent thus limits West Side to the short record it made at trial. (*See* D0484 at 36:1–22).

McQuillen agrees West Side preserved alleged error to a very limited extent with regard to McQuillen's closing argument, but only to the extent of the very short record West Side made during the break in McQuillen's argument, and only as to the portion of McQuillen's argument which preceded the record. (*See id.*).

West Side has emphasized numerous slides in its brief, but at trial it did not object to any slides with respect to Takes' negligence. Instead, West Side's only objection as to slides was in the context of Lubben. (*See*

id.). Alleged error was not preserved with respect to the slides concerning Takes' negligence. *See*, *e.g.*, *Belhak*, 21 N.W.3d at 542–43.

West Side also failed to preserve any alleged error with regard to what it now calls a "punishment-and-deterrence argument." (*See* D0484 at 48:8–22). West Side admits it did not object or make any record regarding this portion of the argument. (D0472, Tr. Hrg. at 16:21–17:12 (11/4/2024)). West Side's written motion for new trial did not even address this portion of the argument. Instead, this issue was raised for the first time at the hearing on posttrial motions. This did not preserve alleged error. *See*, *e.g.*, *Belhak*, 21 N.W.3d at 542–43.

Additionally, West Side failed to preserve alleged error related to its new theory that a probability of even a one-percent shift in comparative fault is sufficient to require a new trial. (*See* West Side Brief at 27). While West Side now argues its burden is "relaxed to a degree in this context" and it must merely show a "different"—not "opposite"—result would have been probable, (*see id.* at 27–29), this argument was never presented to the district court. In its brief, West Side explicitly concedes "the district court did not assess whether a different result as to comparative fault would have been likely absent the improper closing."

(*Id.* at 29). Plainly, alleged error is not preserved where an issue has not been considered and decided by the district court. *Meier v. Senecaut*, 641 N.W.2d 532, 537–41 (Iowa 2002).

Relatedly, West Side has failed to preserve any alleged error with respect to the legal standard applied by the district court to its motion for new trial. *See id.* at 537–41. While West Side now argues "an erroneous application of law is an abuse of discretion," (*see* West Side Brief at 29), it never presented the district court with an alternative legal standard it should apply, and the district court never considered nor decided whether alternative legal standards should be applied.

2.2 Standard of Review

The district court's determination on the propriety of closing argument is reviewed for "clear abuse of discretion." *Rasmussen v. Thilges*, 174 N.W.2d 384, 391 (Iowa 1970); *Lange*, 404 N.W.2d at 587 (Iowa Ct. App. 1987). Where closing argument is deemed improper, the district court is reviewed for abuse of discretion and "may choose one among many acceptable alternatives, so long as its choices are not clearly untenable or unreasonable." *Belhak*, 21 N.W.3d at 541 (quoting *State v. Tucker*, 982 N.W.2d 645, 657 (Iowa 2022)). Under this standard, the

district court must make a "judgment call" and is afforded a "great deal of leeway." *Id.* (quoting *State v. Newell*, 710 N.W.2d 6, 20–21 (Iowa 2006)). "The notion of abused discretion only makes sense if it is assumed that an official or judge has considerable decisional freedom, or leeway, short of abuse." *Id.* (cleaned up, citation omitted).

In the context of a motion for new trial, the district court must determine whether a different result was "probable" absent the improper argument. *Id.* at 543 (quoting *Loehr v. Mettille*, 806 N.W.2d 270, 277 (Iowa 2011)). This determination is reviewed for an abuse of discretion. *Id.* at 541–43. The district court is "entitled to substantial discretion in determining whether the misconduct was prejudicial." *Olson v. BNSF Ry. Co.*, 999 N.W.2d 289, 300 (Iowa 2023). The Iowa Supreme Court has "long recognized that trial judges' advantageous point of view requires that their conclusions on such matters be given significant weight by reviewing courts, whose analysis is confined to words written on a page." *Id.* (citations omitted).

Earlier this year, the Iowa Supreme Court emphasized substantial deference to the district court: "We ordinarily only find an abuse of discretion upon the denial of a mistrial where there is no support in the

record for the trial court's determination." *State v. Kieffer*, 17 N.W.3d 651, 658 (Iowa 2025) (quoting *State v. Brown*, 5 N.W.3d 611, 614–15 (Iowa 2024)) (cleaned up).

2.3 Argument

While West Side attempts to paint a trial riddled with misconduct, the actual record—and the district court's findings—demonstrate the pure fiction of this portrayal. In reality, the district court found only isolated improper argument—from both sides. (D0484 at 37:13–38:16, 64:11–66:15). At the close of the record, the district court thanked all counsel for their professionalism, and West Side declined to make any additional record regarding closing arguments. (D0484 at 95:2–23). In a very thorough ruling on post-trial motions, the district court noted the vast majority of McQuillen's closing argument was appropriate and related to the specifications of negligence. (D0464 at 13–14, 18).

Iowa law has "long given…some leeway for rhetorical flourishes in closing argument." *State v. Meyer*, No. 18-0354, 2019 WL 1933990, at *4 (Iowa Ct. App. May 1, 2019). "The scope of closing arguments is not strictly confined, but rests largely with the sound discretion of the trial court." *Lane v. Coe Coll.*, 581 N.W.2d 214, 218 (Iowa Ct. App. 1998).

"[W]hen exercising its discretion in determining the proper scope of closing argument, the trial court should give counsel the latitude to make comments and arguments within the framework of the legal issues and evidence introduced at trial." *Id.* "This latitude is compatible with effective advocacy." *Id.* "A trial court has broad discretion in deciding on the propriety of closing arguments to the jury and an appellate court will not reverse unless there has been a clear abuse of this discretion." *Lange*, 404 N.W.2d at 587 (citing *Rasmussen*, 174 N.W.2d at 391) (emphasis added). Accordingly, the district court's determination as to what constitutes proper or improper argument is entitled to substantial deference. *See id.* Where there has been a finding of improper argument, the district court's determination of prejudice from the improper argument is likewise entitled to substantial deference. *Belhak*, 21 N.W.3d at 541.

Here, with no objections from West Side, the district court issued three specifications of negligence for Takes in the jury instructions:

> [1] failing to yield the right-of-way upon a left turn; or
>
> [2] failure to maintain a proper lookout; or
>
> [3] failure to discontinue operation of a vehicle under hazardous conditions.

(D0419, Jury Instructions at 17 (6/10/2024)). Very little of McQuillen's closing argument strayed beyond the specifications, and there is no support for West Side's claim of "repeated, deliberate, and pre-planned use of illegitimate lines of argument."[7] All of the argument in dispute related to evidence admitted at trial.

The district court determined the argument was only improper to the extent McQuillen's counsel suggested non-submitted specifications would be sufficient to find fault. (D0464 at 14–15). Where argument is deemed improper, the district court is vested with broad discretion in how to address the concern:

> Under an abuse-of-discretion standard, "the district court may choose one among many acceptable alternatives, so long as its choices are not clearly untenable or unreasonable." *State v. Tucker*, 982 N.W.2d 645, 657 (Iowa 2022). In applying this standard, "we give a great deal of leeway to the trial judge who must make [a] judgment call." *State v. Newell*, 710 N.W.2d 6, 20–21 (Iowa 2006). The notion of abused discretion "only makes sense…if it is assumed that an official or judge has considerable decisional freedom, or leeway, short of abuse." Frederick Schauer, *Thinking Like a Lawyer* 191 n.6 (2009).

[7] Rather than itemizing all of the proper argument, McQuillen trusts the Court will review the transcript to gauge proportionality. (*See* D0484 at 5:15–48:22).

Belhak, 21 N.W.3d at 541 (emphasis added). Here, the district court appropriately considered the options and determined it was most appropriate to allow West Side to address the concerns in its own closing argument.[8] Having found only isolated improper argument, this was the appropriate response—and it certainly was not "clearly untenable or unreasonable." *See id.*

"[U]nless a different result would have been probable in the absence of misconduct, a new trial is not warranted." *Loehr*, 806 N.W.2d at 277 (emphasis added). The Iowa Supreme Court has repeatedly recognized the district court is best positioned to observe alleged misconduct and gauge whether it likely affected the outcome of the trial.

> As firsthand observers of the alleged misconduct—and any jury reaction elicited by it—trial courts are entitled to substantial discretion in determining whether the misconduct was prejudicial. We have long recognized that trial judges' advantageous point of view requires that their conclusions on such matters be given significant weight by reviewing courts, whose analysis is confined to words written on a page.

Olson, 999 N.W.2d at 300 (citations omitted).

[8] As noted by the district court, West Side never requested a cautionary instruction yet later complained none was given. (D0464 at 19–20).

Here, the district court thoughtfully applied a five-factor analysis to determine if the isolated improper argument was prejudicial. Under controlling precedent, this firsthand analysis is entitled to substantial deference:

> [O]verall, the improper argument comprised a small portion of counsel's lengthy closing argument. And of the slide in question, three of the five listed questions related to the specifications of negligence that were submitted to the jury. This factor weighs slightly against finding prejudice.
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> ....
>
> The Court finds that the evidence of Takes's negligence was strong. Takes pled guilty to failing to yield, which was one of the specifications of negligence. Takes made an unprotected left-handed turn under conditions and circumstances of which he testified at trial were so dangerous that he could not think of a more dangerous unprotected left-handed turn. He could not see all cross-traffic. He chose to make that dangerous turn despite other options being available, such as taking the exit just a couple miles back and waiting out the fog.
>
> It seems unlikely that the jury would have found Takes negligent because he was speeding earlier in the day. It was clear from the evidence that Takes was not speeding at the time of the accident, and that speeding did not contribute to the accident. The second improper specification of negligence argued by Plaintiffs related to Takes failing to receive authorization to park in the location where he parked in Anamosa. The evidence on this point throughout trial was not clear and was certainly much less clear than the evidence that Takes failed to yield in making a left-handed turn. Having heard all of the evidence at trial, the Court finds the evidence of Takes' negligence to be strong, and it is unlikely that the jury would not have found him negligent absent this improper

> argument. The strength of evidence weighs against a finding of prejudice.
>
> ....
>
> The instructions provided to the jury were accurate and mitigate any prejudice from the improper argument. This factor weighs in favor of finding that Defendants were not prejudiced.
>
> ....
>
> Upon consideration of the above factors, the Court finds that the improper closing argument did not prejudice Defendants. Specifically, the Court cannot find that it is probable that the result of the trial would have differed absent the improper argument. The improper arguments were a small portion of a lengthy closing argument, evidence of negligence was strong, and the jury was properly instructed that counsel's argument was not the law, and also properly instructed as to the grounds upon which they could find Takes negligent.

(D0464 at 18–21 (emphasis added)).

It is presumed—without contrary evidence—the jury followed the district court's instructions. *State v. Sanford*, 814 N.W.2d 611, 620 (Iowa 2012). Typically, misstatements of law by parties or their counsel, where otherwise stated sufficiently clearly through jury instructions, are not sufficient to require a new trial. *See Fournier v. Fraternal Ord. of Eagles, Waterloo Aerie No. 764*, 368 N.W.2d 849, 853 (Iowa Ct. App. 1985). Here, any alleged prejudice was mitigated by the district court's instructions.

This included the cautionary instruction that "closing arguments of counsel are merely that, arguments" which "are not evidence nor should they be construed by you as evidence or instructions on the law." (D0484 at 4:17–5:13). The district court's negligence instruction, including its specifications of negligence, properly stated the law and was issued without objection by West Side. (D0419 at 17; D0481 at 160:19–25). There is no evidence to rebut the presumption the jury followed these instructions. As noted by the district court, "West Side could have effectively addressed this issue in their closing argument by highlighting the actual specifications of negligence set forth in Jury Instruction No. 16." (D0464 at 21 n.9). While now arguing severe prejudice, West Side's strategic decision to forego such argument contradicts their position on appeal, and it does not create grounds for a new trial.

All of West Side's additional appellate arguments regarding alleged misconduct—including what it now calls punishment-and-deterrence argument—have been waived by virtue of its failure to object or raise the issue prior to submission to the jury. *See*, *e.g.*, *Delay*, 320 N.W.2d at 835. Very recently, the Iowa Supreme Court assessed a closing argument which referenced "betrayal" and used a theme of accountability to appeal

to jurors' emotions. *Belhak*, 21 N.W.3d at 542–43. Noting (1) the motion for mistrial did not specifically reference the "betrayal" remark and (2) the district court did not believe a different result would have been probable, the Supreme Court found no abuse of discretion and affirmed the denial of the mistrial motion on these grounds. *Id.*

The Supreme Court in *Belhak* also reviewed an alleged "golden rule" argument involving a hypothetical conversation with a man offering $7 million in exchange for the harm suffered by the plaintiff. *Id.* at 543–44. The hypothetical dialogue included the words "you" and "your," which the defendant argued to be an invitation for jurors to place themselves in the plaintiff's position. *Id.* While skeptical of the district court's conclusion this did not constitute a golden-rule argument, the Supreme Court nonetheless deferred to the district court and did not find an abuse of discretion. *Id.* Regarding potential prejudice, the Supreme Court noted "the damages that the jury awarded were far less than those mentioned in the story." *Id.*

Here, as in *Belhak*, the district court's assessment of prejudice is again entitled to substantial deference:

> Upon consideration, however, the Court cannot find that this statement is so "evidently prejudice" that a new trial should

> be granted. *See Olson v. BNSF Railway Co.*, 999 N.W.2d 289, 299 (Iowa 2023). The portion of the closing argument at issue was a short portion of long closing argument. It was contained in Plaintiffs' initial closing argument, and not rebuttal argument. The jury returned damages in amounts less than requested for almost all categories of damages. And it was not even noticeable enough at trial for defense counsel to ask for a mistrial on this basis. The Court does not find it likely that the jury's verdict would have differed absent this improper argument. The Court's conclusion does not change even when considering this improper argument together with the improper argument [regarding non-submitted specifications of negligence], meaning that the Court finds it probable that the verdict would have been the same even without any of the improper argument.

(D0464 at 34 (emphases added)). As noted by the district court, the jury's $35.8 million valuation of damages was substantially less than the $49.2 million requested by McQuillen in closing argument. (D0484 at 45:24–46:14).

Plainly, a different result was not probable absent the improper argument—from either party. It is not the role of the appellate court to order a new trial based on West Side's pure speculation a slightly differing allocation of fault was possible. It is just as likely West Side counsel's repeated injection of personal opinions into closing argument affected the outcome—but in neither case is a different result probable

as opposed to possible. The district court's denial of West Side's motion for new trial should be affirmed.[9]

3. McQuillen Did Not Argue a Rebuttal Witness Should Be Treated as a Technical Expert, and the District Court Did Not Abuse its Discretion in Finding a Different Result Was Not Probable, Regardless

3.1 Error Preservation

McQuillen agrees West Side preserved alleged error to a very limited extent with regard to closing argument regarding Lubben. Any alleged error has been preserved only to the extent of the very short record West Side made during the break in McQuillen's closing argument. (D0484 at 36:1–22).

West Side has plainly waived any objection or argument to Lubben being an "undisclosed" witness. *See Meier*, 641 at 537–41. West Side did not object to her being called as a rebuttal witness, nor did West Side object to any of her testimony. (D0481 at 117:3–124:17).

[9] Even if, *arguendo*, the district court abused its discretion, any new trial should be limited to the issue of fault. The jury's damages award was properly decided and should remain undisturbed. West Side deliberately chose not to offer evidence or argument on damages, and this appeal provides no basis for a second chance on that issue.

Again, West Side failed to preserve alleged error related to its new theory that a probability of even a one-percent shift in comparative fault is sufficient to require a new trial. (*See* West Side Brief at 27). While West Side now argues its burden is "relaxed to a degree in this context" and it must merely show a "different"—not "opposite"—result would have been probable, (*see id.* at 27–29), this argument was never presented to the district court. In its brief, West Side explicitly concedes "the district court did not assess whether a different result as to comparative fault would have been likely absent the improper closing." (*Id.* at 29). Plainly, alleged error is not preserved where an issue has not been considered and decided by the district court. *Meier*, 641 at 537–41.

Relatedly, West Side has failed to preserve any alleged error with respect to the legal standard applied by the district court to its motion for new trial. *See id.* at 537–41. While West Side now argues "an erroneous application of law is an abuse of discretion," (*see* West Side Brief at 29), it never presented the district court with an alternative legal standard it should apply, and the district court never considered nor decided whether alternative legal standards should be applied.

3.2 Standard of Review

Again, the district court's determination on the propriety of closing argument is reviewed for "clear abuse of discretion." *Rasmussen*, 174 N.W.2d at 391; *Lange*, 404 N.W.2d at 587. Because the district court determined this portion of the closing argument was not improper, West Side must first establish a clear abuse of discretion in this threshold finding. *See Belhak*, 21 N.W.3d at 544 (expressing skepticism as to the district court's opinion on whether the plaintiff presented a golden-rule argument, but nonetheless deferring to the district court's conclusion).

If, *arguendo*, the district court clearly abused its discretion in finding the argument was not improper, then the district court is reviewed for abuse of discretion and "may choose one among many acceptable alternatives, so long as its choices are not clearly untenable or unreasonable." *Id.* at 541 (quoting *Tucker*, 982 N.W.2d at 657). Under this standard, the district court must make a "judgment call" and is afforded a "great deal of leeway." *Id.* (quoting *Newell*, 710 N.W.2d at 20–21). "The notion of abused discretion only makes sense if it is assumed that an official or judge has considerable decisional freedom, or leeway, short of abuse." *Id.* (cleaned up, citation omitted).

In the context of a motion for new trial, the district court must determine whether a different result was "probable" absent the improper argument. *Id.* at 543. (quoting *Loehr*, 806 N.W.2d at 277). This determination is reviewed for an abuse of discretion. *Id.* at 541–43. The district court is "entitled to substantial discretion in determining whether the misconduct was prejudicial." *Olson*, 999 N.W.2d at 300. The Iowa Supreme Court has "long recognized that trial judges' advantageous point of view requires that their conclusions on such matters be given significant weight by reviewing courts, whose analysis is confined to words written on a page." *Id.* (citations omitted).

Earlier this year, the Iowa Supreme Court emphasized substantial deference to the district court: "We ordinarily only find an abuse of discretion upon the denial of a mistrial where there is no support in the record for the trial court's determination." *Kieffer*, 17 N.W.3d at 658 (quoting *Brown*, 5 N.W.3d at 615) (cleaned up).

3.3 Argument

The same legal framework applies. Iowa law has "long given…some leeway for rhetorical flourishes in closing argument." *Meyer*, 2019 WL 1933990, at *4. "A trial court has broad discretion in deciding on the

propriety of closing arguments to the jury and an appellate court will not reverse unless there has been a clear abuse of this discretion." *Lange*, 404 N.W.2d at 587 (citing *Rasmussen*, 174 N.W.2d at 391).

McQuillen called Lubben as a rebuttal witness to respond to the testimony of Josh Lorencz, West Side's expert witness. Based on his experimentation with another phone, Lorencz theorized Maggie opened Snapchat on her phone a few minutes before the crash to view a message received from Lubben. Lorencz further theorized Maggie "manipulated" her phone in some way 13 seconds before the crash—which Lorencz testified could have been any touch to the screen or a button on the phone. Lorencz had never used Snapchat. He did not testify about Snap Map—the optional location-sharing feature within Snapchat. Lorencz's testimony was contradicted by the findings of the Iowa State Patrol's technical investigation and the testimony of Trooper Mike Messerich. In fact, the State's official investigation ruled out any cell phone use by Maggie at the time of the collision. Lorencz, however, was unaware of this official finding.

Lubben testified as a fact witness. As friends, Maggie and Lubben shared their respective locations through Snap Map. Lubben testified to

her understanding Snap Map only updated users' locations when they opened the Snapchat application on their phone. After learning of the crash, Lubben opened Snap Map in attempt to find Maggie's location. Maggie's location on Snap Map was still at home—two miles from the crash site. This established Maggie had not opened Snapchat in the moments preceding the crash, thus refuting the opinions of Lorencz. Lubben's testimony is corroborated by Snapchat's own website, which states: "Your location on Snap Map only updates when you have Snapchat open – your location won't update in the background." (*See* D0402). Her testimony was also consistent with the State's official finding Maggie had not been using her phone at the time of the crash.

In closing argument, to discredit Lorencz's opinions McQuillen's counsel colloquially referred to Lubben as a "Snapchat expert." At no time did McQuillen's counsel argue or suggest Lubben was a technical expert.[10] The fact Lubben was not testifying as a technical expert was

[10] During West Side's closing argument, its counsel told the jury, "you folks are experts by now on the jury system." (D0484 at 75:4–13 (emphasis added)). Nobody took this to mean the jurors were technical experts with little need for the court's instructions given their own expertise. Instead, this was understood as a colloquial reference—in the same way Lubben was referred to as an "expert."

made clear by West Side's three-question cross examination, which simply confirmed Lubben was not a "digital forensic examiner" and was not trained as such. (D0481 at 124:21–125:10). Lubben did, however, know more than Lorencz about Snapchat—an application he had never used. This was proper argument discrediting of Lorencz's opinions.

The district court did not find McQuillen's argument regarding Lubben to be improper, and this finding is entitled to substantial deference. *Rasmussen*, 174 N.W.2d at 391; *Lange*, 404 N.W.2d at 587. In its ruling on post-trial motions, the district court stated:

> Counsel did use the term "expert" repeatedly (both in the slide and in the closing argument) in referring to Grace Lubben. But counsel was not attempting to mislead the jury into believing that Grace Lubben had expert-level scientific or technical qualifications. It was clear from the argument – as well as from Ms. Lubben's testimony – that she was a friend of McQuillen's and that her knowledge of Snapchat and the map feature came solely from her use of it daily for many years. Plaintiffs did not attempt to argue otherwise. When viewing the closing argument as a whole, the Court finds that the references to Ms. Lubben as an expert were designed to highlight what Plaintiffs felt were deficiencies in Mr. Lorencz's expertise and testimony regarding Snapchat. Nothing during Plaintiffs' closing argument would have confused the jury into believing that Ms. Lubben was an expert on Snapchat "because of [her] education and experience" which is the definition provided to the jury in Instruction No. 5.

(D0464 at 16–17).

Even if, *arguendo*, the district court clearly abused its discretion in finding the argument was not improper, West Side would need to additionally establish abuse of discretion in the district court's subsequent course of action and its analysis of potential prejudice. *See Belhak*, 21 N.W.3d at 541–44. As to the course of action taken by the district court, while not finding the argument improper, the district court specifically found an appropriate remedy would be for West Side to respond to the argument in its own closing. This was an appropriate use of discretion, and it certainly was not clearly untenable or unreasonable. *See id.* While now claiming substantial prejudice and confusion for the jury, West Side inexplicably chose not to even mention Lubben in its closing argument. West Side's strategic decision to forego such argument contradicts their position on appeal, and it does not create grounds for a new trial.

"[U]nless a different result would have been probable in the absence of misconduct, a new trial is not warranted." *Loehr*, 806 N.W.2d at 277 (emphasis added). A district court's analysis of potential prejudice is entitled to substantial deference. *Belhak*, 21 N.W.3d at 542–44. Here, the district court found no prejudice, even if the argument was improper.

(D0464 at 20–22). Specifically, the district court found "Lubben did not offer opinions which could be conceived as expert opinions" and the court correctly instructed the jury to "[c]onsider expert testimony just like any other testimony." (*Id.*) Jurors are presumed to have followed the instructions, *Sanford*, 814 N.W.2d at 620, and there are no indications the jury failed to do so here. The absence of prejudice is further evident from the fact it is entirely undisputed Snap Map only updates a user's location when the Snapchat application is open on their phone. This was confirmed by Snapchat's own website and presented as evidence to the jury. To the extent McQuillen's argument suggested any technical significance from Lubben's testimony, it merely alluded to this uncontested point.

The district court did not clearly abuse its discretion in finding there was no improper argument with regard to Lubben. Regardless, the district court appropriately used its discretion in finding West Side could respond to the argument in its own closing, and the district court did not abuse its discretion in finding a lack of prejudice from the argument. This Court should affirm the denial of West Side's motion for new trial.

4. West Side Plainly Violated a Limine Ruling, and the District Court Never Prohibited Argument on the Time Value of Money

4.1 Error Preservation

West Side did not preserve alleged error in any respect on this issue. McQuillen moved in limine to exclude arguments by West Side regarding items which could be purchased with the amount of money sought by McQuillen as damages, given such may constitute improper golden-rule arguments. (D0106 at 9–11). The district court, in a very thorough ruling on the motions in limine, specifically ordered as follows:

> It is difficult to anticipate in limine what arguments will be made, or the precise wording of any such arguments. But, in light of the Court's concerns, to the extent that counsel wish to offer an argument regarding what plaintiff could do with the amount of money being requested, counsel shall first raise the issue with the Court outside of the presence of the jury.
>
> Therefore, this portion of the motion in limine is granted in part, and reserved for further ruling in part.

(D0124 at 7 (first emphasis in original)).

The Iowa Supreme Court has stated:

> A ruling sustaining a motion in limine is generally not an evidentiary ruling. *Twyford v. Weber*, 220 N.W.2d 919, 923 (Iowa 1974). Rather, a ruling sustaining a motion in limine simply adds a procedural step to the introduction of allegedly

> objectionable evidence. *Id.*; *accord Johnson v. Interstate Power Co.*, 481 N.W.2d 310, 317 (Iowa 1992) (recognizing a ruling sustaining a motion in limine "merely adds a procedural step to the offer of evidence [and that i]f the evidence is not offered, there is nothing preserved to review on appeal"). Thus, a motion in limine "serves the useful purpose of raising and pointing out before trial certain evidentiary rulings the court may be called upon to make during the course of the trial" and, if sustained, excludes reference or introduction of this evidence until its admissibility is determined by the trial court, outside the presence of a jury, in an offer of proof. *Twyford*, 220 N.W.2d at 922–23 (recognizing further that the offer of proof allows the aggrieved party to present a proper record for review on appeal and, in the absence of such an offer, error may not be preserved).

Quad City Bank & Tr. v. Jim Kircher & Assocs., P.C., 804 N.W.2d 83, 89 (Iowa 2011).

"Generally, a ruling on a motion in limine is not a final ruling that preserves an issue for appeal." *Morales v. Miller*, No. 09-1717, 2011 WL 222527, at *10–11 (Iowa Ct. App. Jan. 20, 2011) (citing *State v. Alberts*, 722 N.W.2d 402, 406 (Iowa 2006)). An exception exists for limine rulings which are unequivocal final rulings. *Alberts*, 722 N.W.2d at 406. The "key to [this] analysis is to determine what the trial court ruling purported to do." *Id.* Here, the district court specifically stated it was "difficult to anticipate in limine what arguments will be made," "reserved for futher ruling," and directed West Side to "first raise the issue with the Court

outside of the presence of the jury." This plainly was not a final ruling which preserves the issue for appeal. The district court reiterated as such in its ruling on post-trial motions:

> [H]ad Defendants brought the issue up prior to closing arguments as required by the limine ruling (or as noted below, sought a recess during closing arguments), the Court could have heard arguments from the parties and made a substantive ruling on the propriety of the closing argument and, depending on that ruling, Defendants may not have been limited at all in their closing.

(D0464 at 9).

After the district court found a violation of its limine ruling, West Side additionally failed to make any offer of proof or otherwise state on the record the argument it wanted to present. "An offer of proof serves to give the trial court an adequate basis for its...ruling and to make a record for appellate review. Such a record is necessary so the reviewing court does not have to base error on speculation...." *State v. Greene*, 592 N.W.2d 24, 27 (Iowa 1999) (citing *State v. Lange*, 531 N.W.2d 108, 114 (Iowa 1995)).

West Side's bill of exceptions—filed after the case was submitted to the jury, on the second day of its deliberations—does not preserve the issue for review. It is elementary to error preservation that issues must

be raised when the district court has an "opportunity to take corrective measures or pursue alternatives." *Mitchell*, 832 N.W.2d at 697–98; *see also Johnson v. Jennings*, No. 99-477, 2000 WL 1520050, at *4 (Iowa Ct. App. Oct. 13, 2000) ("We agree a bill of exceptions is the appropriate vehicle for making a record of unreported closing arguments.... However, the error itself must be preserved by objection prior to submission of the case to the jury." (citations omitted)). West Side deprived the district court of an opportunity to make a final ruling and take corrective measures, if deemed necessary.

This issue should be disposed of on error preservation, alone.

4.2 Standard of Review

A limine ruling is not a final ruling subject to appellate review. *Alberts*, 722 N.W.2d at 406; *Morales*, 2011 WL 222527, at *10–11.

Where there is a final ruling, in the context of closing argument, the district court is reviewed for clear abuse of discretion. *Rasmussen*, 174 N.W.2d at 391; *Lange*, 404 N.W.2d at 587. "A trial court has broad discretion in deciding on the propriety of closing arguments to the jury...." *Lange*, 404 N.W.2d at 587 (citing *Rasmussen*, 174 N.W.2d at 391).

4.3 Argument

West Side brazenly and inaccurately asserts the district court barred all argument on the time value of money—a claim that is especially striking given West Side's admissions during the hearing on post-trial motions. (*See* D0472 at 50:3–8 ("We would agree with the Court's recitation just stated of the facts regarding the sidebar. There may have been some miscommunication along the way, and I certainly apologize for that....")). In its account of the proceedings, the district court stated:

> I was surprised by the briefing on the damages issue regarding the time value sidebar discussion. When we discussed pretrial matters, I had informed the parties that we did not have the capability in this courtroom, unfortunately, to report sidebar conversations, that it would be their responsibility to make a record of all sidebar conversations at the next available break. Or if they deemed it important enough and necessary to make an immediate record, they would just need to ask me to do so.
>
> ....So I was surprised that a significant part of the motion was based on a short sidebar conversation that neither party found important enough to address on the record or to ask for a recess so that more arguments could be heard.
>
> ....
>
> ....The objection when we met at sidebar was that counsel – the plaintiff believed that counsel was going to violate the limine ruling that required the parties to inform the Court in advance, prior to making any statement or argument that

pertained to what Maggie McQuillen would do with the money. And I believe it was...one of the attorneys for plaintiffs, had a copy of the limine ruling with that specific sentence highlighted so that was the nature of the objection. It was very clear to all parties at sidebar that that was what the objection was, is that the limine ruling in order of the Court said you can't do this unless you bring it up ahead of time outside of the presence of the jury so we can have further argument on it.

I asked counsel for defense what was going to be argued and in connection with the slide, which I had barely seen because it just popped up. I did have a chance to look at it privately on my computer for about a minute. And counsel indicated that in connection with the slide they would be making time-value-of-money arguments related to plaintiff investing the money. So I did find that talking about plaintiff investing the money fell within the limine ruling about plaintiff doing something with the money, and it needed to be addressed outside the presence of the jury in advance so I could hear more arguments from it and do research on that to determine whether or not to allow it.

That was essentially the extent of the legal arguments or analysis in the very short sidebar. And so it's not accurate to say the basis of the objection was never articulated. The objection was just that the slide with the argument – the slide combined with the argument that was going to accompany it about plaintiff investing the money violated the Court's order because defendant failed to address it with the Court in advance so that we could have looked at it substantively in more detail.

So other than that, I did not restrict arguments any other way. In fact, I did not tell – technically, I did not even tell defense that they could not talk about the time-value-of-money concept if they could do so in a way that would not violate the limine ruling regarding

> what McQuillen could or should do with the money she was requesting.
>
> If counsel actually interpreted what was being said at sidebar as essentially voiding this entire damages argument, which is kind of how it's suggested in the brief, I am very surprised that counsel did not even think that it was important enough to raise the issue when I gave the opportunity to do so or ask for a recess so the issue could have been discussed, and I could have ruled on whether or not to allow that argument....
>
> And frankly, I didn't even perceive this to be a major issue until the bill of exceptions was filed and then when this motion was filed. I did not understand this to be something that was of major concern because I did not think my ruling was that extensive as it's being portrayed here.

(D0472 at 45:14–49:1 (emphases added)). Having previously admitted its rendition was false, it is disingenuous for West Side to now renew its claim the district court imposed a blanket prohibition on arguments concerning the time value of money.

While this Court need not reach the underlying issue, McQuillen maintains West Side's intended argument regarding how McQuillen could make purchases and invest money from the verdict was improper. It bears no relation to the evidence or the actual damages sustained. There is no conceivable link between McQuillen's damages and hypothetically investing $3 million at 4 percent interest while spending the $120,000 of interest every year. (*See* D0414, Ex. A: Dec. of Reynolds

at 18).[11] Additionally, as noted by the district court, "[t]here is very little practical difference between asking a juror to imagine what the juror would do with a certain amount of money, and highlighting to that same juror the type of things that the plaintiff could purchase with that same amount." D0124 at 6–7. This was the golden-rule concern raised in McQuillen's motion in limine.

Regardless, West Side cannot demonstrate prejudice. The district court appropriately directed the jury that "[f]uture damages must be reduced to present value." (D0419 at 27). Instruction No. 25 defined "present value" as "a sum of money paid now in advance which, together with interest earned at a reasonable rate of return, will compensate the

[11] The calculations on West Side's slide do not even accurately portray the concept of time value or present value. The slide asks the jury to assume a $3 million award and further assume $120,000 in interest income every year for 54 years. Confusingly, it then suggests the $3 million award is really like an award of $9.48 million. In reality, using West Side's 4 percent discount rate, $120,000 in year 54 would only be worth $14,434 today. Yet West Side's hypothetical would ask the jury to assume "a person could live on [that]," "spend it all," and still have the full principal at the end! The slide and West Side's intended argument were additionally objectionable due to its misleading nature.

Quite simply, the present value of $3 million today is exactly $3 million. Appropriate argument would need to place a value on future damages and then discount it to present value, as directed by the jury instructions.

plaintiff for future losses." *Id.* In its ruling on post-trial motions, the district court noted:

> The fact that this issue was an afterthought and not raised again until the second day of deliberations underscores the limited nature and impact of the Court's actual ruling at the sidebar conference. Indeed, nothing at the trial or sidebar conference suggested to the Court that Defendants felt that the ruling had any significant impact on their ability to argue their case. The Court cannot find that Defendant's substantial rights were affected on this issue.

(D0464 at 10). As with other issues addressed in this appeal, the district court's finding of a lack of prejudice is entitled to substantial deference.

Alleged error was not preserved. Nonetheless, the exclusion of West Side's intended argument was appropriate, and there is no prejudice given the present-value jury instruction. This Court should affirm the district court's denial of West Side's motion for new trial.

CONCLUSION

McQuillen maintains an enforceable settlement agreement renders this appeal moot. By negotiating terms and benefits related to the judgment payoff, West Side entered into a settlement. Accordingly, the appeal should be dismissed.

Should this Court reach the underlying merits of West Side's appeal, it will find the district court's rulings at every stage were thorough, thoughtful, and well-reasoned. West Side's revisionist arguments on appeal collapse under scrutiny of the record. As the firsthand observer, the district court properly exercised its discretion and correctly resolved the issues presented. There is no indication of an abuse of discretion—let alone one so clear as to warrant a new trial. The Court should affirm the denial of West Side's motion for new trial in its entirety.

REQUEST FOR ORAL SUBMISSION

McQuillen agrees it would be appropriate to schedule oral argument on this appeal.

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATIONS FOR BRIEFS

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(*g*)(1) and 6.903(1)(*i*)(1) because this brief has been prepared in a proportionally spaced typeface using Century Schoolbook in 14-point font and contains 13,000 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(*i*)(1).

DATE: July 15, 2025 SIGNATURE: */s/ Bradley J. Kaspar*