IN THE SUPREME COURT OF IOWA

Supreme Court No. 17-1892
Iowa District Court for Poweshiek County LALA002281

GREGORY HAWKINS,
Plaintiff-Appellee

v.

GRINNELL REGIONAL MEDICAL CENTER, DAVID NESS, and DEBRA NOWACHEK,
Defendants-Appellants

APPEAL FROM THE IOWA DISTRICT COURT FOR POWESHIEK COUNTY, THE HONORABLE RANDY S. DEGEEST

FINAL AMICUS BRIEF of IOWA DEFENSE COUNSEL ASSOCIATION, IOWA INSURANCE INSTITUTE, and IOWA ASSOCIATION OF BUSINESS AND INDUSTRY

Thomas M. Boes AT0001048
Catherine M. Lucas AT0010893
801 Grand Avenue, Suite 3700
Des Moines, IA 50309-2727
Phone: (515) 243-4191
Fax: (515) 246-5808
E-Mail: boes.thomas@bradshawlaw.com
E-Mail: lucas.catherine@bradshawlaw.com

ATTORNEYS FOR AMICI CURIAE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

STATEMENT OF THE IDENTITY OF THE AMICI CURIAE

The Iowa Defense Counsel Association is a group of more than 350 lawyers and insurance-claims professionals who are actively engaged in the practice of law or in work relating to the handling of claims and the defense of legal actions. The Iowa Insurance Institute is an association of Iowa's property and casualty insurance companies who, collectively, insure two million Iowans and employ 8,000 more. It is committed to promoting a cost-effective legislative and regulatory environment conducive to the ability of property and casualty insurers to write reasonably priced coverage. The Iowa Association of Business and Industry is the largest business network in the state of Iowa, representing over 1,500 business members that employ over 330,000 Iowans. The mission of the Iowa Association of Business and Industry is to nurture a favorable business, economic, governmental and social climate within the state of Iowa so our citizens can have the opportunity to enjoy the highest possible quality of life.

The specific defendants in this case are the employer and supervising employees of the Plaintiff, but the issue here is much broader. The longstanding and well-respected role of the jury is to serve as a fair and dispassionate arbiter of the facts of the case. The present case exemplifies a trend in which the concerted strategy of the plaintiff's counsel is to turn jury

decision-making on its head and implore jurors to make decisions based on inflamed passion and emotion. The strategy of urging jurors to abandon fair and dispassionate analysis of disputes negatively impacts all defendants and, in fact, all Iowans who rightfully turn to the judicial branch for fair and impartial dispute resolution.

In particular, it has now become a common strategy of plaintiffs' counsel to infuse improper, unnecessary, and inflammatory argumentation that is intended to trigger an emotional response from the jurors, to the prejudice of the defendant. Such impropriety, including the making of improper Golden Rule-type arguments has infiltrated nearly all aspects of the presentation of plaintiffs' cases. The case at bar presents a cogent example. The interests of Iowa Defense Counsel Association, Iowa Insurance Institute, and Iowa Association of Business and Industry represent the interests of these defendants and all persons who could potentially find themselves hauled into court as a defendant. Iowa Defense Counsel Association, Iowa Insurance Institute, and Iowa Association of Business and Industry request the Court provide a clear and forceful admonition that reaffirms and adds clarity to the rule that all persons deserve fair and impartial jurors who decide cases on the evidence presented rather than emotionally-charged arguments.

A limited number of cases such as the present matter are appealed due to the expenses and risks associated with an appeal—and fewer still reach the Iowa Supreme Court. For this reason, many cases in which similar misconduct occurred are, no doubt, being settled. When this happens plaintiffs' counsel simply moves to the next case and is buoyed by the fact that counsel's trial tactics, even if improper, have been successful in obtaining an outsized monetary award. To put an end to this cycle, the amici curiae advocate for this case to be directly routed to the Iowa Supreme Court for prompt review. Beyond simply remedying the errors that occurred in the trial court in the present case, it is imperative that the Iowa Supreme Court address the larger issues and trends exemplified by this case and provide guidance to the bar and the bench that can be applied in all cases moving forward.

STATEMENT OF THE PREPARATION OF BRIEF

Pursuant to Iowa Rule of Appellate Procedure 6.906(4)(d), the undersigned states no counsel of record of any party authored any part of this brief or contributed money to fund the preparation or submission of the brief. Iowa Defense Counsel Association, Iowa Insurance Institute, and Iowa Association of Business and Industry are the entities that contributed money to fund the preparation and submission of the brief.

ARGUMENT

A cornerstone of the Iowa judicial system is the jury's role of finding the facts and applying those facts to the law. Iowa Civ. Jury Instruction 100.2.[1] In so executing this role, jurors are instructed to "not be influenced by any personal sympathy, bias, prejudice or emotions." Iowa Civ. Jury Instruction 100.2. To promote adherence to this admonition to jurors, this

---

[1] In full, Iowa Civil Jury Instruction 100.2 provides as follows:

> **100.2 Duties Of Judge And Jury, Instructions As Whole.** My duty is to tell you what the law is. *Your duty is to accept and apply this law*.
>
> You must consider all of the instructions together because no one instruction includes all of the applicable law.
>
> The order in which I give these instructions is not important.
>
> Your duty is to decide all fact questions.
>
> As you consider the evidence, *do not be influenced by any personal sympathy, bias, prejudices or emotions*. Because you are making very important decisions in this case, you are to evaluate the evidence carefully and avoid decisions based on generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your reason and common sense, and these instructions. As jurors, your sole duty is to find the truth and do justice.

(Emphasis added); *see also Thompson v. Butler*, 274 N.W. 110, 115–16 (Iowa 1937) ("It is a special province of the jury to determine fact questions, judge the credibility of the witnesses and the weight to be given their testimony."); *Richardson v. City of Boston*, 60 U.S. 263, 268 (1856) ("As it is the duty of the jury to decide the facts, the sufficiency of evidence to prove those facts must necessarily be within their province.").

Court developed a rule decades ago that both plaintiffs' and defendants' counsel must abide: the prohibition of "Golden Rule" or "do-unto-others" appeals. By this prohibition, counsel is barred from making a plea to the jurors to put themselves into the shoes of a litigant and do unto that person as they would have done unto them under similar circumstances, i.e. the Golden Rule. Asking the jurors to apply the Golden Rule is direct encouragement to the jurors to depart from neutrality and to decide the case based personal sympathy, bias, prejudices or emotions—rather than on the evidence.

Nonetheless, such emotionally-charged, prejudicial, and inflammatory trial tactics and improper closing arguments appear to be a growing, deliberate, and strategic choice amongst plaintiffs' attorneys in an effort to obtain favorable verdicts and inflated damages awards. These tactics result in partial, prejudiced, and biased jurors who fail to administer substantial justice. The play on emotions, rather than law and fact, takes closing arguments far afield from their purpose: "The single purpose of closing argument is to assist the jury in analyzing, evaluating, and applying the evidence." *Lange v. Coe College*, 581 N.W.2d 214, 218 (Iowa Ct. App. 1998); *see also Gilster v. Primebank*, 747 F.3d 1007, 1011 (8th Cir. 2014) ("The cardinal rule of closing argument [is] counsel must confine comments

to evidence in the record and to reasonable inferences from that evidence."). This growing trend, exemplified by the conduct of Plaintiff's counsel in the case at bar, is contrary to longstanding legal authority and must be rejected by this Court in clear and explicit terms.

This misconduct is materially affecting the substantial rights of defendants (and all persons who could ever potentially be a defendant) and proves extremely difficult to curb in the trial court. With this wave of inappropriate and prejudicial trial tactics, defendants are left with little recourse: requests for new trials have proven unsuccessful and, even if granted, are costly. Rulings and/or pre-trial stipulations on motions in limine are flouted. And when a proper objection is made and sustained at trial to foreclose this inappropriate conduct, damage is nonetheless done to the defendant making the objections in the eyes of the jurors. Therefore, this Court must make a clear declaration to the bar and the bench that reiterates, in no uncertain terms, what has long been the rule in Iowa: "Golden Rule" arguments, "do unto others" arguments, and emotionally-charged argumentation have no place in Iowa trial courtrooms.

I. HISTORY OF THE "GOLDEN RULE" PROHIBITION

The "Golden Rule" is often referenced outside of the courtroom: Do unto others as you would like them to do unto you. *See Luke* 6:31; *see also Matthew* 7:12. The Golden Rule argument used in the courtroom is a variation on that theme. As the Iowa Supreme Court first described it, a "Golden Rule" argument is where counsel asks the jurors to put themselves in the place of a party or victim. *Russell v. Chicago, Rock Island & Pac. R.R. Co.*, 86 N.W.2d 843, 848 (Iowa 1957). This is impermissible because, in doing so, the attorney appeals to sympathies as opposed to the record evidence.

The Iowa Supreme Court first recognized the impropriety of these do-unto-others jury appeals more than sixty years ago, stating:

> Direct appeals to jurors to place themselves in the situation of one of the parties, to allow such damages as they would wish if in the same position, or to consider what they would be willing to accept in compensation for similar injuries are condemned by the courts.

Id. As further explained by the Eighth Circuit Court of Appeals, a "golden rule argument which asks the jurors to place themselves in the position of a party is *universally condemned* because it encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence." *United States v. Palma*, 473

F.3d 899, 902 (8th Cir. 2007) (emphasis added) (citations and quotation marks omitted). Stated otherwise, "[a]dvocating for jurors to put themselves into the shoes of a party is improper" and this prohibition applies to all litigants and, thus, "is improper whether done by plaintiff's counsel or defense counsel." *Conn v. Alfstad*, No. 10-1174, 2011 WL 1566005, at *5 (Iowa Ct. App. April 27, 2011).

Courts in Iowa and in other jurisdictions have routinely observed the impropriety of this type of appeal to the emotions or personal interests of the jurors, rather than adherence to the evidence of the case, and have granted new trials due to violation of the prohibition against such arguments. *See, e.g., Conn*, 2011 WL 1566005, at *5 (affirming grant of new trial due to prejudicial Golden Rule argumentation); *Caudle v. Dist. of Columbia*, 707 F.3d 354, 363 (D.C. Cir. 2013) (ordering new trial due to improper Golden Rule and "send a message" argumentation by counsel); *Loose v. Offshore Nav., Inc.*, 670 F.2d 493, 497 (5th Cir. 1982) (ordering new trial due to prejudicial Golden Rule argumentation by plaintiff's counsel); *Collins v. Union Pac. R. Co.*, 143 Cal. Rptr. 3d 849, 861 (Cal. Ct. App. 2012) (affirming grant of new trial on damages due to improper Golden Rule argumentation by plaintiff's counsel); *Grosjean v. Imperial Palace, Inc.*, 212

P.3d 1068, 1082 (Nev. 2009) (ordering new trial on damages due to improper Golden Rule argumentation by plaintiff's counsel).

While there is a jurisdictional split on whether the Golden Rule prohibition is just for damages issues or whether it is broader and pertains to liability arguments and damages, plainly the better reasoned approach is to prohibit Golden Rule argumentation as to both. As the District of Columbia Circuit Court of Appeals recently explained:

> Courts forbid golden rule arguments to prevent the jury from deciding a case based on inappropriate considerations such as emotion. *See, e.g., Stokes v. Delcambre*, 710 F.2d 1120, 1128 (5th Cir. 1983) ("The rule's purpose is to reduce the risk of a jury decision based on emotion rather than trial evidence."). It is no more appropriate for a jury to decide a defendant's liability *vel non* based on an improper consideration than to use the same consideration to determine damages. Accordingly, we agree with the Third Circuit that a golden rule argument made with respect to liability as well as damages is impermissible.

Caudle, 707 F.3d at 360.[2]

---

[2] The Third Circuit, Fourth Circuit, Seventh Circuit, and Eighth Circuit are in accord. *See Edwards v. City of Philadelphia*, 860 F.2d 568, 574 n. 6 (3d Cir. 1988) ("We see no rational basis for a rule that proscribes the 'Golden Rule' argument when a plaintiff argues damages, but permits it when the defendant argues liability. . . . [because the] same concerns are present in both situations—the creation of undue sympathy and emotion" (quotation marks and brackets omitted)); *Ins. Co. of North America, Inc. v. U.S. Gypsum Co., Inc.*, 870 F.2d 148, 154 (4th Cir. 1989) (suggesting but not holding that defense counsel's opening statement—"asking the jurors to consider whether any of them would like to be accused of fraud based upon the evidence which they were about to hear"—was improper); *Joan W. v. City of Chicago*, 771 F.2d 1020, 1022 (7th Cir. 1985) ("[The Plaintiff] urges

The Iowa Court of Appeals adopted the reasoning of the D.C. Circuit and the Third Circuit by citing with approval this case law rejecting the position that Golden Rule arguments are only improper when used by the plaintiff with respect to damages and not with respect to liability. *Conn*, 2011 WL 1566005, at * 5 (citing *Edwards*, 860 F.2d at 574 n. 6); *see also Graves v. State*, No. 06-0369, 2007 WL 1484512, at *2 (Iowa Ct. App. May 23, 2007) (analyzing the Golden Rule argument with regard to liability). Moreover, full prohibition against Golden Rule argumentation is consistent with Iowa doctrine and model jury instructions, which instruct that jurors should avoid being influenced by any personal sympathy, bias, prejudices or emotions on all matters—not just damages. *See* Iowa Civ. Jury Instruction 100.2.

While the prohibition of Golden Rule arguments is well-established in Iowa courts, ignorance and/or blatant violation of the prohibition—even after a limine ruling prohibiting such argumentation—has become all too common. Therefore, the amici curiae respectfully request the Court set forth

---

that the Golden Rule argument is not objectionable when it refers only to the assessment of credibility. There is no reason for such a distinction because the jury's departure from its neutral role is equally inappropriate regardless of the issue at stake."); *Lovett ex rel. Lovett v. Union Pac. R. Co.*, 201 F.3d 1074, 1083 (8th Cir. 2000) (holding Golden Rule argument by defendant's counsel was improper for asking jury to put themselves in place of the defendant when deciding liability).

in clear and direct terms that Golden Rule arguments are to be flatly prohibited at trial. Such guidance from the appellate courts of Iowa is necessary to curb improper conduct of counsel in the course of jury trials and to preserve the overall integrity of Iowa's jury system.

II. PLAINTIFF'S COUNSEL REPEATEDLY VIOLATED THE PROHIBITION AGAINST MAKING GOLDEN RULE ARGUMENTS EVEN AFTER AGREEING NOT TO MAKE SUCH ARGUMENTS AT THE MOTION IN LIMINE STAGE.

Golden Rule arguments are not only "universally condemned" as a matter of law,[3] in this very case the parties agreed and the district court ruled that such arguments could not and would not be made at trial. (*See* Defendant's Brief in Support of their First Motion in Limine, No. IV, filed June 22, 2017; *see also* Transcript of Motion in Limine Proceedings, pp. 14:23-16:7). Defendants' Motion in Limine No. IV explicitly requested preclusion of "advocating for jurors to put themselves in the shoes of Plaintiff or that they should 'do the right' thing." (Defendants' Brief in Support of their First Motion in Limine, No. IV, filed June 22, 2017). At the hearing on motions in limine, the parties and the judge agreed such argument would not be permitted. (Transcript of Motion in Limine Proceedings, pp.

[3] *Palma*, 473 F.3d at 902 ("golden rule argument which asks the jurors to place themselves in the position of a party is universally condemned").

14:23-16:7). Nonetheless, at trial, Plaintiff's counsel failed to abide by this agreement and ruling.

One way in which the edict against Golden Rule arguments is often violated, particularly relevant to the present case, is through counsel's injection of the word "you" or a form of "you" into counsel's argument at trial. *See State v. May*, No. 04-1170, 2005 WL 3477983, at * 8 (Iowa Ct. App. Dec. 21, 2005) (citing *State v. McDaniel*, 462 S.E.2d 882, 884 (S.C. Ct. App. 1995) (prosecutor's use of "you" or a form of "you" forty-five times during closing arguments, asking the jury to put themselves in the place of the victim, was reversible error)). The *Caudle* case, which was also an employment discrimination case, stands as a relevant example of how such "you" language is improperly inserted into argument by counsel and further explains why it must be barred. *Caudle*, 707 F.3d at 358. The court in *Caudle* found the following statements in the closing argument inappropriate:

> You heard [the] plaintiffs explain that they felt humiliated, berated, and isolated at the [June 20] meeting listening to their supervisors and peers comment on their discrimination complaint. Now, ask yourself, would *you* hesitate to speak up if *you* knew that speaking up would mean that *your* boss would call a meeting with *your* entire office. . . .
>
> As you make those decisions, we ask yourselves [sic] to *put yourselves in the plaintiffs' shoes*. What would it do to *you* to

> have *your* complaint broadcast to *your* entire office, to be the only one excluded . . .
>
> By protecting plaintiffs' right to complain about unlawful conduct without reprisal, you preserve the rights *not just of plaintiffs but of everyone.* By ensuring that plaintiffs are made whole for what they have endured, you ensure that *others will be free to exercise their rights without fear.* Yours is an important job and we trust that you will *[do what] is right and ensure that justice is done.*

Id. (emphasis in italics original to D.C. Circuit). The *Caudle* court noted, "The jury may not return a verdict based on personal interest, bias or prejudice and an argument asking it to do so is improper." *Id.* at 359. The court concluded that such "you" language is violative because it "ask[s] jurors to decide how each of them—not a reasonable person—would feel if he were in the [party's] situation." *Id.*

In the present case, the use of similar—and even more repetitive and egregious— "you" language in an attempt to have the jury place themselves in the shoes of Plaintiff was the primary modus operandi of Plaintiff's counsel during closing argument. Plaintiff's counsel's Golden Rule arguments appeared at the very start of her prepared closing remarks, when she began:

> At the end of our lives, don't we all want to know that we contributed in some way? During the trial my nephew was born back on July 13. I didn't have a chance to meet him until last weekend. He was a big boy, ten pounds, three ounces, so

> he seemed bigger than a newborn. But as I looked at him, I thought, "What will **you** become?"
>
> And then my thoughts turned a little more intense. When we go to leave this world, what is the mark we want to leave behind? What is this legacy? What if **you** work **your** whole life, almost 40 years, expecting that **you** left the world and **your** work place a little bit better than how **you** found it? What if **your entire identity** depended on it?
>
> But then **your** employer decided that somehow **you** were no good merely because **you** had the misfortune to get cancer and **you** refused to give in to their demands to retire, when instead **you** stood up to them and said, **I** still have – [*at this point a proper objection was lodged by defense counsel but it was not sustained by the trial court*]

(Trial Tr., Vol. 10, p. 95:3-21) (emphasis added).

By this argument Plaintiff's counsel was clearly urging the jurors to place themselves in the position of the Plaintiff when weighing their decision in this case.

Nonetheless, when resisting the Defendants motion for new trial, Plaintiff argued that counsel was not referring to the jurors by using the word "you", but was rather referring to her nephew. This contention is hard to believe, but even if the explicit reference was to Plaintiff's counsel's nephew, the reference was little more than a pretextual device. In a similar situation where a plaintiff's attorney made reference to a puppy in what was referred to as "the Puppy Story," the Florida appellate court saw through the obvious ploy of using a puppy as a narrative device and recognized "the only

conceivable purpose behind counsel's argument was to suggest jurors imagine themselves in the place of [the plaintiff]." *SDG Dadeland Assocs., Inc. v. Anthony,* 979 So. 2d 997, 1003 (Fla. Dist. Ct. App. 2008). The same is true here, even if Plaintiff's counsel had her nephew in mind during this portion of her argument, the reference was little more than a device to seek to have the jurors imagine themselves in the place of the Plaintiff.

In response to this flagrantly improper Golden Rule argumentation, defense counsel objected; however, the district court allowed Plaintiff's counsel to proceed on the same course. Unabated, Plaintiff's counsel continued:

> When **you** refuse to give in to their demands to retire, when instead **you** stood up to them and **you** said, **I** still have more to give. And then they spent the next several months convincing **you** that 39 years meant nothing, were a fraud, that all of the times **you** missed **your** daughter's volleyball games, missed valuable time with **your** family, were late to dinner with friends, all of it was for naught. That in the end **your** flawless employment record was meaningless, and that, as **you** know, is why we are here today.

(Trial Tr., Vol. 10, p. 36:2-9) (emphasis added).

Contravention of the prohibition of Golden Rule argumentation continued throughout closing argument, including the following improper pleas to the jurors to place themselves in the shoes of the Plaintiff:

> So what is full and fair compensation for giving **your** life to **your** employer?

(Trial Tr., Vol. 10, p. 75:5-6) (emphasis added).

> What is it worth to have **your** pride and dignity stripped away, to have **your** lifelong career snatched from **you**, to be discarded because **you** stood up for **yourself** first by refusing to retire and go away, then retaliated against with false information against **you**?

(Trial Tr., Vol. 10, p. 76:20-25) (emphasis added).

> And then after **you** give them 39 years, they come in and label **you** as incompetent as a director, accuse **you** of failing to perform.

(Trial Tr., Vol. 10, p. 81:3-5) (emphasis added).

> "What is a lifetime of commitment to **your** employer worth?"

(Trial Tr., Vol. 10, p. 95:1-2) (emphasis added).

These arguments by Plaintiff's counsel were improperly aimed at having the jurors weigh a potential damages award by first placing themselves in Plaintiff's shoes (cancer and all), and then considering the extent of compensation they would desire. This was unmistakably improper and prejudicial. As one court reasoned, such argument is dramatically harmful to the judicial system because:

> It is hard to conceive of anything that would more quickly destroy the structure and of rule and principles which have been accepted by the courts as the standards for measuring damages in actions of law, than for the juries to award damages in accordance with the standard of what they themselves would want if they or a loved one had received the injuries suffered by a plaintiff. In some cases, indeed, many a juror would feel that

> all the money in the world could not compensate him for such an injury to himself or his wife or children. Such a notion as this—the identifying of the juror with a plaintiff's injuries—could hardly fail to result in injustice under our law, however profitable it might be deemed by many plaintiffs in personal injury suits.

Walters v. Hitchcock, 697 P.2d 847, 853 (Kan. 1985) (quoting *Bullock v. Branch*, 130 So.2d 74 (Fla. Dist. Ct. App. 1961)). The same is true here—the suggestion and invitation to the jury to first place themselves in the position of the Plaintiff, and then decide how much money would be appropriate compensation, wrought injustice in this case. Allowing continuation of such conduct risks destruction a principled judicial system.

Another classic form of improper Golden Rule argumentation is to ask the jurors: "Can you imagine… ." The case of *Whitehead v. Food Max of Mississippi, Inc.*, 163 F.3d 265, 278 (5th Cir. 1998) addressed this type of argumentation in a case where patrons, who were abducted from a store parking lot, sued the store for failing to provide adequate security. Plaintiff's counsel posited to the jury: "And *can you imagine* how it would feel to have a knife in your side or a knife on your leg or a pistol at your neck for ten seconds?" *Whitehead*, 163 F.3d at 278 (emphasis added). In assessing whether this argument was improper, the court concluded: "Even assuming [counsel] was not explicitly invoking the Golden Rule, counsel was clearly inviting the members of the jury to put themselves in the place

of the plaintiffs when deciding damages." *Id.*; *see also Ray v. Allergan, Inc.*, 863 F. Supp. 2d 552, 565 (E.D. Va. 2012) (holding use of "can you imagine" language was an "appeal for displacement and substitution and hence it too runs afoul of [prohibition against Golden Rule arguments]").

Not surprisingly, Plaintiff's counsel also employed this "can you imagine" tactic multiple times in closing argument. First, in reference to an email Plaintiff wrote about his suspicion his employment would be terminated, Plaintiff's counsel asked the jurors to consider: "**Can you imagine** how it felt to type those words?" (Trial Tr., Vol. 10, p. 89:6-7) (emphasis added). Next, regarding Plaintiff walking to the meeting at which he suspected his employment would be terminated, Plaintiff's counsel asked the jurors to consider: "**Can you imagine** how it felt walking up those stairs?" (Trial Tr., Vol. 10, p. 89:12-13) (emphasis added). Finally, regarding Plaintiff waking up the morning after his employment was terminated, Plaintiff's counsel asked the jurors to consider: "And then those following days, **can you imagine** how it felt the next morning, typically up and out the door on the way to his lab by 7 or 7:30 a.m." (Trial Tr., Vol. 10, p. 90:12-13 (emphasis added).

Taken together, these examples of improper argumentation by Plaintiff's counsel illustrate just how pervasive the violation of the Golden

Rule prohibition was in this case. Plaintiff's counsel repeatedly told the jury to imagine how they would feel in Plaintiff's position: to put themselves in the shoes of Plaintiff. As discussed above, this is the exact type of argument the Iowa Supreme Court has warned against and the Eighth Circuit Court of Appeals has described as "universally condemned" because such argumentation erodes the fair-mindedness and impartiality of the jury. Or as the Fifth Circuit Court of Appeals summarized:

> ***What every lawyer should know*** is that a plea to the jury that they should put themselves in the shoes of the plaintiff and do unto him as they would have done unto them under similar circumstances .... is improper because it encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence.

Loose, 670 F.2d at 496 (emphasis added) (citation and quotation marks omitted).

The prejudice caused by Plaintiff's counsel's improper Golden Rule arguments is obvious. The prejudice is evident due to the flagrant and repeated improprieties of counsel. The prejudice is evident in light of excessive damage award of more than $4 million in emotional distress damages to the Plaintiff who never even sought treatment for emotional distress as a result of this incident. Moreover, the prejudice and necessity of a new trial is made all the more stark by the fact the district court failed to sustain Defendants' objections to Plaintiff's counsel's violation of the

prohibition of making Golden Rule arguments, the district court failed to admonish the jury to not consider the improper arguments, and district court failed to even attempt to provide any sort of curative jury instruction. In this way, the present case is markedly similar to *Loose v. Offshore Nav., Inc.*, where the trial court likewise overruled defendant's objection to the improper Golden Rule argument and the trial court similarly failed to take corrective action. 670 F.2d at 497. In *Loose*, as is also required here, the appellate court concluded it had no choice but to order a new trial due to the improper argumentation and absence of any effort by the trial court to mitigate or cure the problems. *Id.*

Plaintiff's counsel repeatedly violated the Golden Rule prohibition in such a flagrant manner that there can be no choice but to order a new trial, and in further response this conduct, this court should take this opportunity to assure all Iowans that they still have a guaranty to a fair jury, free to apply the facts without the influx of unnecessary emotions, regardless of whether the litigant is a plaintiff or defendant.

III. PLAINTIFF'S COUNSEL'S "SEND A MESSAGE" ARGUMENT WAS ALSO GROSSLY VIOLATIVE OF STANDARDS FOR PERMISSIBLE ARGUMENTATION AND REQUIRES A NEW TRIAL BE ORDERED.

In addition to making inappropriate Golden Rule arguments, Plaintiff's counsel also improperly implored the jurors to send a message.

"The function of the jury is to determine the facts based on evidence presented. The jurors are not empaneled to send messages on behalf of their community." *Coreas v. United States*, 565 A.2d 594, 604–05 (D.C. 1989). In particular, in cases where duress is at issue, counsel should "refrain from the use of language calculated to inflame the minds of the jury and disqualify them from rendering an impartial verdict." *Smith v. Blakesburg Sav. Bank*, 164 N.W. 762, 766 (Iowa 1917).

Courts generally hold "send a message"-type arguments are inappropriate because they "divert[] the jury's attention from its duty to decide the case on the facts and the law instead of emotion, personal interest or bias." *Caudle*, 707 F.3d at 361. This type of argument is particularly improper and unfair in cases where punitive damages are not allowed. *See Strickland v. Owens Corning*, 142 F.3d 353, 358 (6th Cir. 1998); *see also Vanskike v. ACF Indus., Inc.*, 665 F.2d 188, 210 (8th Cir. 1981). As one Iowa federal court relevantly stated:

> It is axiomatic that "send a message" arguments, which urge the jury to base its findings on compensatory damages on alleged facts outside of the record and for the purposes of punishment, are improper. *See Harris v. Steelweld Equip. Co.*, 869 F.2d 396, 406 n.13 (8th Cir. 1989) ("Without pleading punitive damages and proof thereof, the courts have held that it is reversible error for the complaining party's attorney to utilize a 'send a message' argument because evidence will not support the argument for an award of punitive damages.").

McCabe v. Mais, 580 F. Supp. 2d 815, 835 (N.D. Iowa 2008), *aff'd in part, rev'd in part sub nom., McCabe v. Parker*, 608 F.3d 1068 (8th Cir. 2010). In the present case, as a matter of law, punitive damages were not available to Plaintiff under the Iowa Civil Rights Act. This made any and all "send a message"-type argumentation wholly irrelevant and improper.

Notably, in a prior case the Eighth Circuit had the opportunity to review the argumentation of this same Plaintiff's counsel in closing argument and determined counsel's improper argumentation left no choice but to reverse and remand for a new trial. *Gilster*, 747 F.3d at 1011. Of particular relevance to the present case, the Eighth Circuit warned against the very type of argumentation that counsel subsequently employed in this case, stating that counsel asking jurors to perform their duties as "the conscience of the community" is "an improper argument that, in a close case, may warrant a new trial." *Id.*

At various points in closing argument Plaintiff's counsel made clear that Plaintiff sought a verdict not based on the evidence of the case at bar, but rather sought to punish Defendants and send a message. For example, at the outset of closing argument, Plaintiff's counsel told the jury "it's going to be your responsibility as a citizen to decide how GRMC will operate in the future…." (Trial Tr., Vol. 10, p. 39:21-22). Later, Plaintiff's counsel

improperly told jurors to reach a verdict that did not depend on the evidence of the case, but to make a broader statement, by imploring the jurors: "It is going to be up to you back in that jury room to decide how far employers like GRMC can go to violating our rules against age, disabilities, and discrimination." (Trial Tr., Vol. 10, p. 78:23-25). Plaintiff's counsel inappropriately told the jurors their verdict would be broader than the case at bar by stating that rendering a verdict in Plaintiff's favor would "communicate [to Defendant] they should never do it again." (Trial Tr., Vol. 10, p. 95:17-18). And as a final misbegotten command, in disregard of established Iowa law and the unequivocal warning provided by the Eighth Circuit, Plaintiff's counsel inappropriately stated to the jurors: "You the jury are the conscience of our community." (Trial Tr., Vol. 10, p. 95:21-22). Ultimately, rather than focusing on the evidence of the case at bar, Plaintiff's counsel repeatedly exhorted the jurors to punish the Defendants—in a case where punitive damages were not permitted—such that Defendants sought to have the jury make its decisions upon bias and animus and not on the evidence.

These violations and the errors of the district court must be evaluated for cumulative effect. *Rosenberger Enterprises, Inc. v. Ins. Serv. Corp. of Iowa*, 541 N.W.2d 904, 909 (Iowa Ct. App. 1995) (holding the "cumulative

effect" of closing argument misconduct together with additional errors left "the integrity of the jury's verdict in doubt" and that the district court abused its discretion in failing to grant a new trial). Taking all of the various violations and errors together, as they must be, it is apparent that a different result would have been probable if the case had been tried appropriately and fairly. *See id*. (holding a new trial is required "if it appears that prejudice resulted or a different result would have been probable"). Thus, the only proper remedy is the ordering of a new trial.

IV. TO PRESERVE FAIRNESS AND IMPARTIALITY IOWA COURTS MUST MAINTAIN THE PROHIBITION ON GOLDEN RULE ARGUMENTS AND EMOTIONALLY-CHARGED ARGUMENTS THAT ARE NOT GROUNDED IN THE EVIDENCE.

Unfortunately for the people who rely on fair and impartial jurors, the conduct here is the new trend and without a strong statement from this Court, it is likely to continue to grow and infect litigation throughout the state of Iowa. The book REPTILE: THE 2009 MANUAL OF THE PLAINTIFF'S REVOLUTION is a highly influential text for the modern plaintiff's lawyer. DAVID BALL & DON KEENAN, REPTILE: THE 2009 MANUAL OF THE PLAINTIFF'S REVOLUTION (2009). The book describes a plaintiff's litigation strategy that has come to be known as the "Reptile Theory" or "Reptile Tactics." The strategy is designed to appeal to jurors' fears and prejudices,

so their decisions will be driven by their instincts and emotions. These reptilian tactics have plainly arrived in Iowa in this and other cases.

The Reptile's major axiom is, "When the reptile sees a survival danger, she protects her genes by impelling the juror to protect himself and the community." *Id*. at 17. Ball and Keenan posit, "[W]hen something we do or don't do can affect–even a little–our safety or the propagation of our genes, the Reptile takes over," and "The greater the perceived danger to you or your offspring, the more firmly the Reptile controls you." *Id*. at 17. As one federal district court observed, the Reptile Theory is used by plaintiffs' attorneys "as a way of showing the jury that the defendant's conduct represents a danger to the survival of the jurors and their families. The Reptile Theory encourages plaintiffs to appeal to the passion, prejudice, and sentiment of the jury." *Hensley v. Methodist Healthcare Hosps.*, No. 13-2436-STA-CGC, 2015 WL 5076982, at *4 (W.D. Tenn. Aug. 27, 2015). To counteract the unfair and legally impermissible tactics of plaintiffs' counsel deploying Reptile Theory at trial, courts have granted motions in limine precluding plaintiffs' counsel from attempting to present Reptile Theory evidence or argument. *See, e.g., Brooks v. Caterpillar Glob. Mining Am., LLC*, No. 4:14-CV-00022-JHM, 2017 WL 3401476, at *9 (W.D. Ky. Aug. 8, 2017). To wit, the Western District of Kentucky recently held:

> Reptile Theory arguments appear to mirror the "send the message" or conscience of the community arguments discussed previously. As noted above, "send a message" or conscience of the community arguments are disfavored in the Sixth Circuit. *Strickland v. Owens Corning*, 142 F.3d 353, 358 (6th Cir. 1998). Similarly, any argument by Plaintiffs' counsel that attempts to urge the jury to render a verdict against Defendant on the basis of fear for the safety of the community or fear for the safety of the jury and their families is inappropriate. Accordingly, Plaintiffs may not properly argue that the lawsuit was brought to ensure or promote community safety.

Id.

The Reptile Theory evokes community safety as personal safety's cousin, and asks the juror to project the defendant's act or omission onto a larger community canvas. "In a perversion of The Golden Rule ('[W]here counsel asks the jury to place itself in the victim's shoes and award such damages as they would charge to undergo equivalent pain and suffering,' *Collins v. Union Pacific Railroad Co*. (2012) 207 Cal. App. 4th 867, 861), the Reptile wants to punish the Defendant so he cannot endanger the community the Reptile is part of." Benjamin J. Howard, *A Field Guide to Southern California Snakes: Identifying and Collecting Plaintiff's Reptile Theory in the Wild*, The Update: Winter 2014, San Diego Defense Lawyers, *available at* www.sddl.org/downloads/sddlupdate/SDDL_Winter2014_WEB.pdf (accessed April 11, 2018).

The best admission that Reptile Tactics conflict with Golden Rule prohibitions come from Ball and Keenan's text itself. While the authors deny any relationship with Golden Rule arguments, the amount of pages in REPTILE: THE 2009 MANUAL OF THE PLAINTIFF'S REVOLUTION dedicated to the topic indicates otherwise. Almost one-fifth of their book is devoted to countering accusations that Reptile Tactics violate the Golden Rule prohibition. *See id*. Appendix B-1 of the book includes the leading case holdings on the "Golden Rule" from every state. Moreover, it is a telling admission that Ball and Keenan explain that Reptile Tactics rely on convincing jurors to make their decision based on "personal reasons."

It is precisely this sort of personal bias the prohibition on Golden Rule arguments and "send a message"-arguments were designed to address. Therefore, this Court should take this opportunity to expose the fact that many Reptile Tactics are merely backdoor Golden Rule and "send a message" arguments, and bar this new evolution of improper arguments.

Here, it is very clear the Reptile Tactics were at work, as Plaintiff's counsel beseeched to jurors in her argument: "You are the conscience of our community." (Trial Tr., Vol. 10, p. 95:21–22). Counsel also implored the jurors to go "back in that jury room to decide how far employers like GRMC can go to violating our rules against age, disabilities, and discrimination."

(Trial Tr., Vol. 10, p. 78:23-25). After an objection counsel repeated her plea, stating: "It is going to be up to you to decide how far employers like GRMC can go violating our rules on age and disability discrimination and retaliation in the workplace before they have to pay full and fair compensation to **someone**." (Trial Tr., Vol. 10, p. 79:10-13) (emphasis added). The essential implication being that if the jury did not render a large verdict against GRMC, then the juror's employer could violate the rule and "someone" else—i.e., the juror sitting in the jury box—could be the next victim.

Once the reptile sheds its skin, it exposes these tactics are Golden Rule and "send a message" arguments attempting to slither back into Iowa courts. In a sense, what Reptile Theory proposes is nothing new. At its heart, it involves an appeal to the jury to decide a case based on bias and emotion and self-preservation. As explained in REPTILE, "It gives jurors a **personal reason** to want to see causation and dollar amount come out justly, because a defense verdict will imperil them. Only a verdict your way can make them safer." DAVID BALL & DON KEENAN, REPTILE: THE 2009 MANUAL OF THE PLAINTIFF'S REVOLUTION, p. 39 (2009) (emphasis added). This Reptile Theory cannot be condoned in Iowa courts and the amici curiae pray this Court reaffirms longstanding principles of equity and fairness when

deciding this case. Juries must be preserved as fair and dispassionate finders of fact that make decisions based on the evidence properly presented in each and every case. This Court must draw a bright line that forbids improper tactics that are aimed at magnifying a juror's personal bias, prejudices or emotions.

CONCLUSION

For the reasons set forth above, this Court should reverse the district court's denial of the motion for new trial and remand for a new trial, making a decisive statement that the role of the Iowa jury cannot be usurped and that all Iowans are entitled to a fair and impartial jury.

Respectfully submitted,

/s/ Thomas M. Boes
Thomas M. Boes AT0001048
Catherine M. Lucas AT0010893
BRADSHAW, FOWLER, PROCTOR
& FAIRGRAVE, P.C.
801 Grand Avenue, Suite 3700
Des Moines, IA 50309-8004
Tel: (515) 243-4191
Fax: (515) 246-5808
E-Mail: boes.thomas@bradshawlaw.com
E-Mail: lucas.catherine@bradshawlaw.com

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rules of Appellate Procedure 6.903(1)(d); 6.903(1)(g)(l); and 6.906(4) because this brief has been prepared in a proportionally spaced typeface using Times New Roman font in 14 point size and contains 6,910 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(l).

/s/ Thomas M. Boes
Thomas M. Boes AT0001048

CERTIFICATE OF FILING AND SERVICE

The undersigned certifies a copy of this Amicus Brief was filed with the Clerk of the Iowa Supreme Court via EDMS and served upon the following persons by EDMS on the 27th day of April, 2018.

/s/ Thomas M. Boes
Thomas M. Boes AT0001048

Mary E. Funk
Randall D. Armentrout
Debra Hullet
David Bower
NYEMASTER GOODE, P.C.
700 Walnut Street, Suite 1600
Des Moines, IA 50309
ATTORNEYS FOR DEFENDANTS-APPELLANTS

Brooke Timmer
Amy Beck
FIEDLER & TIMMER P.L.L.C.
8831 Windsor Parkway
Johnston, IA 50131
ATTORNEYS FOR PLAINTIFF-APPELLEE