1. IN THE IOWA DISTRICT COURT FOR ­­­­­\_\_\_\_\_\_\_ COUNTY

|  |  |
| --- | --- |
| , Plaintiff,v., Defendants. |  CASE No. **TRIAL BRIEF** |

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# INTRODUCTION

This is an action for ….

# VOIR DIRE

## The Iowa Constitution, Court Rules, and Case Law Guarantee Impartial Trials by Jury

 The Iowa Constitution holds the right to a trial by jury as inviolate. Iowa Const. art. I, § 9. Iowa Courts have reinforced this right, stressing that parties are “entitled to a fair and impartial trial before a jury of [their] peers, uninfluenced by any bias, prejudice, or preconceived notions.” *State v. Meyer*, 164 N.W. 794, 797 (Iowa 1917); *see also* *State v. Larmond*, 244 N.W.2d 233, 235 (Iowa 1976). This right is a “bedrock component of our system of justice.” *State v. Webster*, 865 N.W.2d 223, 232 (Iowa 2015).

## The Law on Jury Selection

* 1. **Parties’ Right to Fully Examine Perspective Jurors in Order to Exercise Peremptory Strikes**

 Courts allow great latitude in voir dire so that both challenges for cause and strikes may be intelligently exercised. *Schwickerath v. Maas*, 297 N.W. 248, 252 (Iowa 1941). The Court should not enter any order that infringes upon Plaintiff’s right to fully examine prospective jurors in order to exercise peremptory strikes or removal of a juror for cause. *Anderson v. City of Council Bluffs*, 195 N.W.2d 373, 377 (Iowa 1972)(Court approved proper inquiry of prospective jurors regarding interest in or connection with insurance companies). The Iowa Supreme Court has long held that:

Litigants have the right to examine prospective jurors on voir dire in order to enable them to select a jury composed of persons qualified and competent to judge and determine the facts in issue without bias, prejudice or partiality.

*Elkin v. Johnson,* 148 N.W.2d 442, 444 (Iowa 1967).

 Juries which are free from bias or prejudice provide the foundation for fair trials. To ensure fair and impartial juries, the Iowa Supreme Court has enacted court rules requiring potential jurors to be examined under oath, and grants the parties or their attorneys the right to conduct this examination. Iowa R. Civ. Pro. § 1.915(2). Most importantly, the Supreme Court has enacted a rule which allows courts to exclude for cause jurors who would be unlikely to decide a case impartially—or, in other words, jurors who “show[] a state of mind which will prevent the juror from rendering a just verdict.” Iowa R. Civ. Pro. § 1.915(6)(j).

The United States Supreme Court stated: “Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by ‘*impartial*’ jurors . . . .” *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1075 (1991) (emphasis added). Iowa Rule of Civil Procedure 1.915(6)(j) instructs that a juror may be challenged for cause by a party “when it appears the juror has formed or expressed an unqualified opinion on the merits of the controversy, or shows a state of mind which will prevent the juror from rendering a just verdict.” Iowa R. Civ. Pro. 1.915(6)(j).

“Due process requires fundamental fairness in a judicial proceeding.” *In re Detention of Morrow*, 616 N.W.2d 544, 549 (Iowa 2000). Fundamental fairness includes the right to trial before an impartial decision maker. *Singer v. United States*, 380 U.S. 24, 36 (1965). When a juror finds facts without the appropriate mindset, the viability of the jury system is seriously undermined. *In re Detention of Hennings*, 744 N.W.2d 333, 338 (Iowa 2008). To be denied the jury to which one is entitled under the Constitution is prejudicial. The wrongful denial of a challenge for cause may not seem to present a serious “tangible” harm to an individual litigant if the panelists who are biased are stricken with peremptory challenges. But the failure to excuse for cause jurors who are biased denies one party the jury he or she was, in fact, constitutionally entitled to have. The United States Supreme Court and Iowa federal courts have long recognized that while there is no “constitutional right” to peremptory challenges, the challenges constitute a necessary part of trial by jury. *See U.S. v. Johnson*, 403 F. Supp. 2d 721, 775–76 (N.D. Iowa 2005), citing *Ross v. Oklahoma*, 487 U.S. 81, 88 (1988) (“We have long recognized that peremptory challenges are not of constitutional dimension. They are a means to achieve the end of an impartial jury.”).

When a juror who should have been removed for cause is not, and a party must then remove the juror using a peremptory challenge, the party effectively loses that peremptory challenge to which he or she is entitled by law. *See* *Montana v. Good*, 43 P.3d 948, 956 (Mont. 2002). This failure to excuse jurors for cause violates the Equal Protection Clauses of the United States and Iowa Constitutions. U.S.C.A. Const. Amend. 14; Iowa Const. Art. 1 § 6. Any potential juror who expresses concern about his or her ability to be fair should be immediately excused. Attempts to “rehabilitate” jurors should be forbidden. In the treason case of Aaron Burr, Chief Justice John Marshall sitting as the trial judge wrote:

Why do personal prejudices constitute a just cause of challenge? Solely because the individual who is under their influence is presumed to have a bias on his mind which will prevent an impartial decision of the case, according to the testimony. He may declare that notwithstanding these prejudices, he is determined to listen to the evidence, and be governed by it; but the law will not trust him . . . Such a person may believe that he will be regulated by testimony, but the law suspects him, and certainly not without reason. He will listen with more favor to that testimony which confirms, than to that which would change his opinion; it is not to be expected that he will weigh evidence or argument as fairly as a man whose judgment is not made up in the case.

*U.S. v. Burr*, 25 F. Cas. 49, 50 (D. Vir. 1807).

What the Chief Justice recognized so long ago remains true, and has been exacerbated by the efforts of tortfeasors to destroy the public’s faith in and understanding of the civil justice system. Any panel member who expresses hesitation about his or her ability to serve fairly must be excused without any questioning designed to persuade or intimidate the panelist into agreeing that he or she “would follow the court’s instruction” or similarly worded leading questions. As Justice Marshall recognizes, the panelist may say and even believe that he or she can be governed by the evidence, but that will actually be impossible. *Id.* The panelist is likely to hear only the evidence that confirms his or her previously held beliefs and opinions and to ignore any evidence that does not confirm his or her previously held beliefs and opinions. The panelist must be excused for cause under Iowa Rule of Civil Procedure 1.915(6)(j).

In this case, the most likely reason a perspective juror may be challenged by a party for cause is under Iowa Rule of Civil Procedure Section 1.915(6)(j): “When it appears the juror has formed or expressed an unqualified opinion on the merits of the controversy, or shows a state of mind which will prevent the juror from rendering a just verdict.”

* 1. **Using Words “Fair and Impartial” Not Enough to Rehabilitate Potential Juror**

 The Iowa Supreme Court recently discussed disqualifying jurors for cause explaining:

On the issue of disqualification of a juror for cause, there is authority for the proposition that when a potential juror at the outset of voir dire expresses bias or prejudice unequivocally, the potential juror should be disqualified for cause notwithstanding later, generalized statements the potential juror could be fair. ...According to this approach, once the genie of prejudice or bias is out of the bottle, it is a fool's errand to put it back in through persistent coaxing....the United States Supreme Court stated when actual bias is stated, generalized affirmative response to questions like “[w]ould you follow my instructions on the law even though you may not agree” is insufficient to avoid disqualification of potential juror....Under the actual-bias cases, a later affirmative response to a “magic question” using the words fair and impartial is not enough to rehabilitate the potential juror.

*State of Iowa v. Jonas,* 904 N.W.2d 566, 571-72 (Iowa 2017)(citations omitted).

United States District Court Judge Mark W. Bennett observed:

As a [federal] district court judge for over fifteen years, I cannot help but notice that jurors are all too likely to give me the answers that they think I want, and they almost uniformly answer that they can “be fair.”

Bennett, Judge Mark, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*,

4 Harv. L. & Pol’y Rev. 149, 160 (Winter 2010)

Plaintiff’s position is illustrated in *Knop v. McCain*. 561 So. 2d 229, 234 (Ala. 1989). In that case, two prospective jurors should have been disqualified for cause on the motion of plaintiff’s counsel in a medical malpractice case. *Id.* at 234. Although both prospective jurors responded to defense questions by stating that they could determine the case based on the evidence and the law given them by the court, one prospective juror stated that in her opinion people were “too quick to sue” and that “evidence would have to be overwhelming” for the plaintiff before the perspective juror would be “willing to give her money.” *Id.* at 232. The other prospective juror stated that she “probably” could be fair and impartial although there was “some” doubt. *Id.* That was enough doubt for the appellate court, which reversed the case. *Id.* at 235.

If a party makes a challenge on the basis of cause, the judge should not attempt to rehabilitate the juror. The Iowa Judicial Bench Book, vol. 5, Rule 187(f) explains:

Particular care should be taken if the court undertakes to rehabilitate a juror because of the juror’s likely retreat from his/her position under the court’s questioning. For example, see *State v. Beckwith*, 242 Iowa 228, 46 N.W.2d 20 (1951). Therefore, the better rule would be to sustain the challenge when there appears to be an open question.

 The Kansas Supreme Court has described the duty of providing for an impartial and unbiased jury as follows:

[T]here is no more important feature of a trial than the impaneling of an impartial and unbiased jury, and the courts are very liberal in allowing inquiries into the competency and qualifications of persons called as jurors. The examination serves a double purpose – first, to learn whether there is a disqualification or cause for challenge, and, second, to enable a party to determine whether he shall exercise the right of peremptory challenge given by statute. So careful is the law that a fair jury may be obtained that it not only provides for the exclusion of those shown to be partial or prejudiced, but it gives each party the added right to challenge a certain number not shown to be prejudiced or disqualified, whom the parties may desire to exclude for reasons not recognized by law. Apart from admitted bias or prejudice, persons may be excluded from the panel because of possible prejudice on account of pecuniary interest, relationship, or business connection with the parties to the action.

*Mathena v. Burchett*, 369 P.3d 487, 490 (Kan. 1962).

Other courts have found reversible prejudice occurs when peremptory challenges must be used to strike jurors that should have been removed for cause.[[1]](#footnote-1) For example, when the Kentucky Supreme Court overruled the “presumed prejudice/per se reversible error” standard that had been applied in that state for over 170 years, the Court was deeply divided. *Morgan v. Commonwealth of Kentucky*, 189 S.W.3d 99 (Ky. 2006). Justice Cooper’s scathing and historically detailed nineteen page dissent was the basis of the reversal of *Morgan* a mere eighteen months after it had been decided. *See* *Shane v. Kentucky*, 243 S.W.3d 336 (Ky. 2007). There is an implicit recognition that a litigant is entitled to due process and if an act of the trial court negates such process, reversal is required. *Id.*

## Effective Voir Dire Prevents Bias and Prejudice from Tainting Trial

 A fair trial “requires an absence of actual bias” and prejudice. *In re C.L.C. Jr.*, 798 N.W.2d 329, 335 (Iowa 2011). But preventing bias and prejudice from influencing a trial requires a thorough and vigorous vetting of potential jurors. “The underlying purpose [of *voir dire*] is to secure a fair and impartial jury.” *State v. Windsor*, 316 N.W.2d 684, 687 (Iowa 1982). This is particularly true in cases like the present one, where potential jurors might have had similar experiences. By discovering bias and prejudice, *voir dire* safeguards against the corruption of jury panels, the erosion of our civil justice system, and the degradation of litigants’ right to trial by jury.

Unfortunately, bias and prejudice are innate characteristics often deeply ingrained and concealed from our own self-examination. The United States Supreme Court recognized this when it said that “[b]ias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence.” *Crawford v. United States*, 212 U.S. 183, 196 (1909). In addition, bias or prejudice can exist in someone “who was quite positive that he had no bias and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence.” *Id.* The Iowa Supreme Court has echoed this sentiment, finding “unsatisfying the notion that the principal consideration in determining bias is the potentially biased juror’s own assurances that he or she can be impartial.” *State v. Webster*, 865 N.W.2d at 248 (J. Hecht, concurring in part, dissenting in part).

Prospective jurors often cannot or do not acknowledge their own biases and prejudices when asked general *voir dire* questions. *See id.* Other courts have also noted this inherent shortcoming, even among honest panel members. The Tenth Circuit Court of Appeals has stated that a panel member may be deemed biased and struck for cause despite an honest belief that he or she can be impartial. *Gonzales v. Thomas*, 99 F.3d 978, 989 (10th Cir. 1996). This is notable if similarities exist between the panel member’s experience and the incident at issue at trial “that would inherently create in [the] juror ‘a substantial emotional involvement adversely affecting impartiality.’” *Id.* Put another way, “the issue for implied bias is whether an average person in the position of the juror in controversy would be prejudiced,” not the juror’s own professions of impartiality. *U.S. v. Powell*, 226 F.3d 1181, 1188 (10th Cir. 2000).

The American Bar Association, in guidelines dedicated to improving juries and jury trials, has echoed the importance of striking jurors who might be biased. Among its formal recommendations for *voir dire*, it advocates the following:

At a minimum, a challenge for cause to a juror should be sustained if the juror has an interest in the outcome of the case, may be biased for or against one of the parties . . . or may be unable or unwilling to hear the subject case fairly and impartially. There should be no limit to the number of challenges for cause.

In ruling on a challenge for cause, the court should evaluate the juror’s demeanor and substantive responses to questions. If the court determines that there is a reasonable doubt that the juror can be fair and impartial, then the court should excuse him or her from trial.

Ex. 4, *American Bar Association, Principles for Juries & Jury Trials*, p. 14 (2005) (emphasis added). The parties and this Court should strive to seat an impartial jury. If reasonable doubt exists about a panel member’s ability to be impartial, that panel member should be struck for cause.

## Rehabilitation of Panel Members Should be Limited and Used with Caution

Juror rehabilitation is likely to be ineffective at removing the bias expressed by a potential juror. Simply put, jurors do not come equipped with an on/off switch. A juror’s own bias towards one side or another, or towards one particular position on the law cannot be turned off simply at the command of the judge. *See* Judge Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 Harv. L. & Pol’y Rev. 149 (Winter 2010). Rather, jurors may potentially harbor such biases throughout the trial, making the administration of justice prejudicial to one side or another. *Id.*

These biases, known as implicit biases, are outside of the control of an individual’s own conscious mind. They can manifest themselves in any form, whether based on race, beliefs about the law, or any other subject of importance to a particular case. *Id.* By trying to “rehabilitate” jurors during *voir dire* instead of opting to excuse the jurors for cause, a judge can allow prejudiced jurors to be impaneled. This can lead to jurors paying little attention to evidence one party presents because their subconscious has already decided how they are going to rule on the case. *See id.* Thus, this Court should follow the Iowa Judicial Bench Book’s recommendation not to try to rehabilitate jurors that should be struck for cause as discussed in the prior section regarding the Iowa Constitution.

To seat an impartial jury, “wide latitude is necessarily afforded counsel in examining jurors.” *State v. Tubbs*, 690 N.W.2d 911, 915 (Iowa 2005). Close ended questions that suggest one correct answer, for example—“Mrs. Smith, you could certainly set aside your feelings about the plaintiff and look at the evidence impartially, couldn’t you?”—do not suffice, particularly if such questions come from the judge, who is a respected authority figure.[[2]](#footnote-2)

 The American Bar Association Report said that courts should not allow jurors to “self-qualify,” or to issue a blanket assertion that they would be able to cast aside acknowledged biases or prejudice and serve impartially. (Ex. 4). Only the Court can decide if a potential juror is impartial.

The trial court is a fact-finder when it rules on challenges for cause. Because a juror’s credibility depends on his or her answers to the court’s or counsel’s questions as well as his or her demeanor, it is important that the court evaluate both when making such a ruling.

(Ex. 4 at 75, citing *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994)).

Social science teaches that peoples’ belief systems are fixed and virtually immovable. The notion that such beliefs can be set aside is both wrong and dangerous. A few loaded questions from an authority figure cannot suffice to assure a fair trial from panel members who have already stated in public that they are, in fact, biased. Rehabilitation should not be permitted because it is simply impossible. To permit biased juries to serve deprives plaintiff of her constitutional right to a fair trial.

A trial judge who seeks to rehabilitate a prospective juror may unconsciously become an advocate for the juror’s impartiality and may create unreliable responses from the juror. *See* *McGill v. Virginia*, 391 S.E.2d 597, 600 (Va. Ct. App. 1990). “A juror’s desire to ‘say the right thing’ or to please the authoritative figure of the judge, if encouraged, creates doubt about the candor of the juror’s responses.” *Id*., citing *Foley v. Virginia*, 379 S.E.2d 915, 921 (Va. 1989). It is imperative that a court not become an advocate of any party’s cause. *State v. Cuevas*, 288 N.W.2d 525, 531 (Iowa 1980). A court’s rehabilitative efforts towards jurors may have such a residual effect. The *McGill* court noted:

A trial judge who actively engages in rehabilitating a prospective juror undermines confidence in the voir dire examination to assure the selection of fair and impartial jurors. The proper role for a trial judge is to remain detached from the issue of the juror’s impartiality. **The trial judge should rule on the propriety of counsel’s questions and ask questions or instruct only where necessary to clarify and not for the purposes of rehabilitation**.

*McGill*, 391 S.E.2d at 600 (emphasis added).

 The Iowa Supreme Court has agreed with this notion and Iowa has historically held peremptory strikes to be invaluable to the jury selection process and the protection of fair trials. “Confidence in the fairness and impartiality of each member of the jury . . . is of the greatest importance to the welfare of the state. Indeed, it is of such paramount importance to every citizen that the time and expense necessary to secure jurors as to whom no doubt may rightly exist is an insignificant consideration.” *State v. Beckwith*, 46 N.W.2d 20 at 26, abrogated by *State v. Neuendorf*, 509 N.W.2d 743 (Iowa 1993) (in which the Court again stated the importance of an impartial jury, but held that error in denying a challenge for cause does not automatically require reversal.). In *Beckwith*, the Court reviewed the denial of a motion of dismissal for cause. 46 N.W.2d at 20. The juror in question had some actual knowledge of the issue in the case, stating “I think that what I have heard might influence me in my verdict even though I tried not to let it do so.” *Id.* at 24. The court then examined the juror, asking:

Well, you understand that if you were selected as—to sit as a juror in this case you take an oath and you are to arrive at your verdict solely upon the evidence that you hear in the court room or the exhibits that are introduced? A. Yes, sir.

The Court: And accordingly apply those facts according to the law as the court gives it to you in the instructions? A. Yes.

The Court: You understand that? A. Yes.

The Court: Notwithstanding any prejudice or opinion that you might now have. Can you do that? A. Yes, I can do it.

The Court: Will you do it? A. Yes.

The Court: Challenge is overruled.

*Id*.

 Upon review, the Iowa Supreme Court stated “[The court] succeeded in eliciting statements that the juror would arrive at a verdict solely upon the evidence and the instruction. The effect of these answers, however, is much weakened by the fact that the court first instructed the juror that it would be his duty to do just that.” *Id.* at 25. The Court went on to state “it seems to us that the effect [of the court’s questioning] was to put a considerable degree of pressure upon the juror to make the answers that would show him qualified.” *Id.* at 26. For these reasons, the Court held that “it seems abundantly clear” that the challenge for cause should have been sustained, rejecting the attempt by the trial court judge at “rehabilitating” the biased juror. *Id.*

 In *Black v. CSX Transportation, Inc*., an asbestos exposure case, the court found that a prospective juror who had expressed bias against personal injury lawyers, asbestos case plaintiffs, and damage awards predicated on anything other than pure objective science should have been excused for cause, even though he had also stated that he could render a verdict based upon the evidence and the law. 648 S.E.2d 610, 616–17 (W. Va. 2007). The Court reiterated that trial judges “must resist the temptation to ‘rehabilitate’ prospective jurors simply by asking the ‘magic question’ to which jurors respond by promising to be fair when all the facts and circumstances show that the fairness of that juror could be reasonably questioned.” *Id*. at 616.

 In *State v. John*, a prospective juror stated that he had already formed an opinion on the issue and it would take considerable evidence to convince him otherwise. 100 N.W. 193 (Iowa 1904). The judge asked him “Do you think you could give a fair verdict in this case, solely on the evidence and charge of the court, laying aside any opinion that you may have had heretofore?” *Id.* at 196. To which the juror answered, “I could.” *Id.* The trial court then overruled the challenge for cause. *Id.* The Supreme Court overturned this ruling as an abuse of discretion, again rejecting the trial court judge’s attempt at rehabilitating the juror. *Id.*

Similarly, in *Walls v. Kim*, 549 S.E.2d 797 (Ga. Ct. App. 2001), *aff’d by Kim v. Walls*, 563 S.E.2d 847 (Ga. 2002), the court found that the trial court should have excused a biased juror for cause despite her affirmative answers to rehabilitative questions from the judge. It stated as follows:

[W]e disagree with the way that the ‘rehabilitation’ question has become something of a talisman relied upon by trial and appellate judges to justify retaining biased jurors. Especially when the better practice is for judges simply to use their discretion to remove such partial jurors, even when the question of a particular juror’s impartiality is a very close call. **A trial judge should err on the side of caution by dismissing, rather than trying to rehabilitate, biased jurors because, in reality, the judge is the only person in a courtroom whose primary concern, indeed primary duty, is to ensure the selection of a fair and impartial jury**. While the parties to litigation operate under the guise of selecting an impartial jury, the truth is that having a jury which is truly fair and impartial is not their primary desire. Instead, their goal is to select a jury which, because of background or experience or whatever other reason, is inclined to favor their particular side of the case.

*Id*. at 798 (emphasis added); *accord*, *McConnell v. Akins*, 586 S.E.2d 688, 690 (Ga. Ct. App. 2003); *Mulvey v. Georgia*, 551 S.E.2d 761, 764 (Ga. Ct. App. 2001).

 The *Walls* rationale has been repeatedly applied by the Georgia Court of Appeals in order to support the impropriety of juror “rehabilitation” from the bench. For example, in *Ivey v. Georgia*, 574 S.E.2d 663, 665 (Ga. Ct. App. 2002), the Court proclaimed:

In too many cases, trial courts confronted with clearly biased and partial jurors use their significant discretion to ‘rehabilitate’ these jurors by asking a version of this loaded question: After you hear the evidence and my charge on the law, and considering the oath you take as jurors, can you set aside your preconceptions and decide this case solely on the evidence and the law? Not so remarkably, jurors confronted with this question from the bench almost inevitably say, ‘yes’. Such biased jurors even likely believe that they can set aside their preconceptions and inclinations – certainly every reasonable person wants to believe he or she is capable of doing so. Once jurors affirmatively answer the ‘rehabilitation’ question, judges usually decide to retain these purportedly rehabilitated jurors.

*See also*, *Doss v. Georgia*, 590 S.E.2d 208, 213 (Ga. Ct. App. 2003) (“it is completely improper for counsel, and especially for the trial court, to browbeat the juror into affirmative answers to rehabilitative questions by using multiple, leading questions.”).

In *Guoth v. Hamilton*, a prospective juror admitted during voir dire that her ability to be impartial was impaired by her knowledge of the parties and of the facts of the case. 615 S.E.2d 239, 243–44 (Ga. Ct. App. 2005). The appellate court found that the trial court erred in failing to disqualify the prospective juror for cause and that the court’s requests that she be impartial did not outweigh her previously stated bias. *Id*.

 The Kansas Supreme Court has stated that counsel should receive wide latitude in questioning jurors who have answered “stock questions” about their ability to be fair and follow instructions. Counsel, the court said,

should not necessarily be limited to “stock questions” such as “Have you formed an opinion as to the accused’s innocence or guilt?” or “Will you be able to determine guilt based only on the evidence presented?” Answers to such questions do, of course, go to the heart of the inquiry and are given under oath and therefore deserve a heavy presumption of correctness. Nevertheless, it is conceivable that prospective jurors with the purest of intentions may, in the heat of the moment in front of their peers, underestimate their own bias. Consequently, “[c]onsiderable latitude should be allowed counsel in the examination of jurors, so that all who have bias or prejudice, or are otherwise disqualified, may be eliminated.” Ultimately, whether ruling on challenges for cause or the scope or extent of questioning, trial courts should consider special circumstances that may be present.

*Kansas v. Hayes*, 258 908 P.2d 597, 599 (Kan. 1995).

 In Florida, a new trial is mandated if there is a reasonable doubt as to whether a juror is impartial. *Four Wood Consulting, LLC v. Fyne*, No. 4D06-4586, 2007 WL 2376685, at \*2 (Fla. Ct. App., Aug. 22, 2007). “Reasonable doubt” has been found where a juror displays or admits to bias or prejudice, even though the juror later asserts that he or she could probably follow the court’s instructions. *See Imbimbo v. Florida*, 555 So.2d 954 (Fla. 4th 1990). For example, in *Bell v. Greissman*, the district court held that a medical malpractice plaintiff was entitled to a new trial as a remedy for the trial court’s failure to grant the plaintiff’s challenge for cause against a juror whose comments were not indicative of a “neutral mind.” *See* 902 So.2d 846 (Fla. Ct. App. 2005). During voir dire, the juror in question stated that he believed in damages caps and that the absence of such had been detrimental to the healthcare system. *Id*. at 847. He also stated the he would try to keep an open mind and that he would be fair. *Id*. The court denied the plaintiff’s challenge for cause and also denied another challenge as to a different juror. *Id*. The plaintiff exhausted her peremptory challenges, thereby precluding her from challenging two other jurors that she identified as ones against whom she wanted to use peremptory strikes. *Id*. The reviewing court concluded that the totality of the juror’s remarks raised reasonable doubt as to his ability to be impartial. *Id*. It stated that, “A juror is not impartial when one side must overcome a pre-conceived opinion in order to prevail.” *Id*.; *see also*, *Salgado v. Florida*, 829 So.2d 342, 345 (Fla. Ct. App. 2002) (even when a prospective juror eventually states that he will follow the law, the court should grant a challenge for cause if it appears that the prospective juror is nevertheless not in the state of mind to do so).

Instead of directing “rehabilitation” questions that suggest only one correct answer, the Court should permit the attorneys to ask open-ended questions that better assess bias and impartiality, and that advance our state’s guarantee to a fair trial. Furthermore, the court should be highly suspicious of any guarantees of impartiality offered by potential jurors, especially when said guarantees are elicited by the court’s own questioning.

A fair and impartial jury is inextricably linked to the parties’ constitutional right to a fair trial. This Court has a duty to oversee a thorough and efficient *voir dire*. That duty includes striking panel members for cause if the Court has a reasonable doubt about their ability to serve impartially. And it includes limiting the ability for any party or the Court to attempt to rehabilitate any panel member who has expressed any hesitancy about his or her ability to be fair. The Iowa Constitution demands no less.

## Preponderance of Evidence Standard

The burden of proof that the Plaintiffs are held to for every issue, including damages, is the preponderance of the evidence. *Falczynski v. Amoco Oil Co.*, 533 N.W.2d 226, 231 (Iowa 1995). Plaintiffs’ counsel, throughout the course of her career, has found that some individuals are not comfortable with the preponderance standard. Some individuals require that they be “100% certain” in their decisions, or “75% certain,” particularly with respect to damages. This is not the standard that Plaintiffs are required to prove his or her case, and is a standard above even what is required for a criminal case.

If a prospective juror states that he or she cannot, will not, or might not follow the preponderance standard, he or she should not be seated on the jury. If Plaintiffs discover a prospective juror who requires more certainty than required by the preponderance of evidence standard, Plaintiffs will move to challenge the juror for cause and the juror must be struck for cause. Plaintiffs are entitled to a completely impartial jury; to be able to get an impartial jury by using all of their peremptory challenges for reasons not related to cause; and to have any panelist who expresses doubt be excused for cause.

## Special Challenges Relating to Public Perception

 The dynamics of the present case make our State’s guarantee of a fair trial particularly important. In this action, dealing with polarizing topics, the Court must carefully scrutinize potential jurors for bias and prejudice. In essence, this Court serves as the trier of fact in determining whether prospective jurors can serve impartially and provide the parties a fair trial. *See State v. Rhoades*, 288 N.W. 98 (Iowa 1939), citing *State v. Hassan*, 128 N.W. 960 (Iowa 1910)(“In the examination of jurors as to their qualifications to try a case, the sole question to be determined by the trial court is whether they can fairly and impartially hear the evidence, and render a verdict thereon which shall be entirely free from the aid or influence of previous knowledge or preconceived opinions.”). Under the Iowa Court Rules, the appearance of partiality is a basis for this Court to strike that prospective juror for cause. Iowa R. Civ. Pro. 1.915(6)(j).

While Iowa law is less specific on the particulars of an “appearance of impartiality,” other state courts have had occasion to clarify. Trial courts may not rely solely on a prospective juror’s isolated and extracted statement of impartiality, but must consider the juror’s conduct throughout the entire voir dire. *Foster v. Georgia*, 574 S.E.2d 843, 850 (Ga. Ct. App. 2002). Nor may a prospective juror’s assurances of impartiality overcome a bias where the record shows on its face that such a bias is present. *Cannon v. Georgia*, 552 S.E.2d 922, 924 (Ga. Ct. App. 2001), *overruled on other grounds by* *Jackson v. Georgia*, 562 S.E.2d 847 (Ga. Ct. App. 2002). Trial courts must resolve any question of possible bias or prejudice in favor of the party seeking to strike for cause. *O’Dell v. Miller*, 565 S.E.2d 407, 410 (W.Va. 2002). Accepting a juror’s statement that she can set aside a stated bias and be impartial creates a great risk of seating biased jurors and creates “a clear appearance of prejudice” to a party. *Id*. at 411.

This issue is of utmost importance considering the dim view that many citizens have of the civil justice system. Survey results related to lawsuits, insurance costs, and damages are stunning. For example, a 2003 survey conducted by Mercury Public Affairs and publicized by the American Tort Reform Association and the American Medical Association found the following:

* 83% of those surveyed believe that there are too many lawsuits filed in America;
* 67% agreed that excessive lawsuits are causing “good” companies to go bankrupt;
* 61% of Americans feel that lawsuits result in personal injury lawyers getting rich;
* Voters favor tort reform (45% favor while 6% oppose) as a means to curb “frivolous” lawsuits.

*See* Gretchen Shaefer, *Voters Say “Too Many Lawsuits,” According to New National Poll on Tort Reform*, American Tort Reform Association, February 27, 2003. (Ex. 1). Other studies confirm the problems faced by injured people in accessing an impartial jury:

* 74% of the American public believes that the cost of insurance is in a state of crisis or is a major problem (Ex. 2: Gallup Poll, March 26-29, 2007);
* 76% believe that a large verdict against an insurance company would cause insurance rates to rise (Ex. 2).

Furthermore, advertising campaigns sponsored by business and insurance groups disguised as grass-roots organizations, such as Citizens Against Lawsuit Abuse, Truth and Fairness in Litigation Coalition, as well as distorted media coverage of lawsuits (such as in the McDonalds’ coffee case) contribute to the perception that there is a civil litigation “crisis.” There is no reason to believe that the statistics discussed above do not fairly represent the views of the people of Iowa. From focus group research and post-verdict juror interviews conducted by litigation consulting firms,[[3]](#footnote-3) it is abundantly clear that jurors who are preconditioned to believe assertions about meritless lawsuits and the litigation “crisis” are more likely to favor the defense or to argue for lower awards if a plaintiff’s verdict is reached. Because of this significant potential bias against plaintiffs, courts and counsel must scrupulously avoid efforts to “rehabilitate” individuals on the panel that exhibit signs of such preconditioning. To do so would prejudice plaintiffs and deny them justice.

*Elkin v Johnson*, 148 N.W.2d 442, 444 (Iowa 1967).

1. **Iowa Law on the “Insurance Question” (for newer Judges)**

The two appropriate forms of the insurance question asked during jury selection are:

§ **040 VOIR DIRE INSURANCE QUESTION**

**FORM:**

Are you, or is any member of your household or immediate family, an employee,

stockholder, agent, officer or director of any insurance company which writes

liability insurance policies?

**ALTERNATE FORM:**

Are you, or is any member of your household or immediate family, an employee,

stockholder, agent, officer or director of the (name insurance company)?

1. This is a special instance of determining whether a prospective juror has an interest in the case. Rules 1.915 & 2.18.

2. The question is allowed as long as asked in good faith and there is not an undue emphasis placed on insurance. *Anderson v. City of Council Bluffs,*195 N.W. 2d 373, 377 (Iowa 1972), *Brady v. McQuown,* 40 N.W. 2d 25, 29 (Iowa 1949).

Making Objections and Laying Foundations in Iowa, 2nd, Webber and Stefani, ITLA, (2005). Plaintiff believes the first Form is more comprehensive and appropriate. Regardless, if a prospective juror answers “yes,” then Plaintiff requests permission to ask the name of the insurance company.

# The Law on the Restatement Third of Torts

## The Purpose of Tort Law in Iowa is the Protection of Others from Unreasonable Risks of Harm.

 Iowa law defines Negligence as doing something a reasonably careful person would not do under similar circumstances, or failing to do something a reasonably careful person would do under similar circumstances for the protection of others against unreasonable risks of harm. *Feld v. Borkowski*, 790 N.W.2d 72, 75 (Iowa 2010) (In a special concurrence in *Feld*, Justice Wiggins discussed the ability of the negligence doctrine to deter unreasonable conduct, and stated “the time has come to tip the balance in the direction of safety.”); *Thompson v. Kaczinski,* 774 N.W.2d 829, 834 (Iowa 2009); *Benham v. King,* 700 N.W.2d 314, 317 (Iowa 2005); *Knake v. King,* 492 N.W.2d 416, 417 (Iowa 1992); *Smith v. Shaffer*, 395 N.W.2d 853, 855 (Iowa 1986); *Seeman v. Liberty Mut. Ins. Co.,* 322 N.W.2d 35, 37 (Iowa 1982); *Lewis v. State,* 256 N.W.2d 181, 188 (Iowa 1977). In this case, Merlyn Trampel had a duty of care to pay attention to what was in front of him in a Work Zone for “the protection of others against unreasonable risks of harm” including other drivers and DOT workers instructing him to stop.

## The Iowa Law Requires Following Sections of the Restatement (Third) of Torts Adopted by the Iowa Supreme Court.

 In 2009, the Iowa Supreme Court adopted sections of the Restatement (Third) of Torts. *Thompson v. Kaczinski*, 774 N.W.2d 829, 834-39 (Iowa 2009). As a result, in order to recover, Mark Nel has the burden to prove: 1) the existence of a duty of care; 2) the failure to exercise reasonable care, 3) factual cause, 4) physical harm, and 5) harm within the scope of liability (previously called “proximate cause”) *Hill v, Damm*, 804 N.W.2d 95, 99 (Iowa App. 2011). *Thompson v. Kaczinski*, 774 N.W.2d 829, 836-39 (Iowa 2009).

## The Foreseeability of Risk of Harm is for the Jury to Decide.

 The Iowa Supreme Court adopted sections of the Restatement (Third) of Torts allocating the foreseeability of risk of physical harm to the jury when looking at negligence and a party’s failure to exercise reasonable care. *Thompson v. Kaczinski*, 774 N.W.2d 829, 835 (Iowa 2009). The Court in Thompson, described that:

The assessment of the foreseeability of a risk is allocated by the Restatement (Third) to the fact finder, to be considered when the jury decides if the defendant failed to exercise reasonable care.

Foreseeable risk is an element in the determination of negligence. In order to determine whether appropriate care was exercised, the factfinder must assess the foreseeable risk at the time of the defendant's alleged negligence. The extent of foreseeable risk depends on the specific facts of the case and cannot be usefully assessed for a category of cases; small changes in the facts may make a dramatic change in how much risk is foreseeable.... [C]ourts should leave such determinations to juries unless no reasonable person could differ on the matter.

*Id.* at 97-98. The drafters acknowledge that courts have frequently used foreseeability in no-duty determinations, but have now explicitly disapproved the practice in the Restatement (Third) and limited no-duty rulings to “articulated policy or principle in order to facilitate more transparent explanations of the reasons for a no-duty ruling and to protect the traditional function of the jury as factfinder.” *Id.* at 98-99. We find the drafters' clarification of the duty analysis in the Restatement (Third) compelling, and we now, therefore, adopt it.

*Thompson v. Kaczinski*, 774 N.W.2d 829, 835 (Iowa 2009).

 The Iowa Court of Appeals gives further direction and analysis concerning the jury’s responsibility to consider forseeability of risk of harm. *Hill v. Damm*, 804 N.W.2d 95, 99 (Iowa Ct. App. 2011). The Restatement (Third) explains that a person:

acts negligently if the person does not exercise reasonable care under all the circumstances. Primary factors to consider in ascertaining whether the person's conduct lacks reasonable care are ***the foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm***.

*Hill v. Damm*, 804 N.W.2d 95, 99 (Iowa Ct. App. 2011)(emphasis added).

## Iowa Law Gives Direction to Jury to Determine Foreseeability of Risk of Harm.

 Because the Iowa Supreme Court determined that the jury, not the Trial Court, must determine forseeability of risk of harm, it makes sense that the jury should be instructed on what to do and how to do it. Our problem is that the Uniform Jury Instruction on Negligence has not been updated to give the jury direction on its responsibilities to consider forseeability of risk of harm in determining the breach of duty to exercise reasonable care. As a result, the Plaintiff will request the following amendment to the Negligence instruction to conform to Iowa law giving the jury direction on its responsibility to determine forseeability of the risk of harm:

INSTRUCTION NO. \_\_\_\_\_

 "Negligence" means failure to use ordinary care. Ordinary care is the care which a reasonably careful person would use under similar circumstances. "Negligence" is doing something a reasonably careful person would not do under similar circumstances, or failing to do something a reasonably careful person would do under similar circumstances for the protection of others. Primary factors to consider in ascertaining whether the person’s conduct lacks ordinary care are: 1) the foreseeable likelihood that the person’s conduct will result in harm; 2) the foreseeable severity of any harm that may ensue; and 3) the burden of precautions to eliminate or reduce the risk.

Authority:

I.C.J.I. 700.2-Ordinary Care-Common Law Negligence Defined.

“Primary factors to consider...” re foreseeability. *Hill v. Damm*, 804 N.W.2d 95, 99 (Iowa Ct. App. 2011).

“For the protection of others.” See, *Feld v. Borkowski*, 790 N.W.2d 72, 75 (Iowa 2010) ("As a general rule, our law recognizes that every person owes a duty to exercise reasonable care to avoid causing injuries to others."); *Thompson v. Kaczinski*, 774 N.W.2d 829, 834 (Iowa 2009) (“negligence requires the existence of a duty to conform to a standard of conduct to protect others...”); *Benham v. King*, 700 N.W.2d 314, 317 (Iowa 2005)(“Negligence is conduct that falls short of the standard of care established by law for the protection of others against unreasonable risks of harm.”).

## Iowa Law on the Scope of Liability of Dangers Created by Defendant.

 Next, the jury must determine if the harm to Mr. Plaintiff is within the scope of Merlyn Trampel’s liability or fault. ICJI 700.3A-Scope of Liability – Defined; *Thompson v. Kaczinski,* 774 N.W.2d 829, 834-839 (Iowa 2009)**.**  Mark’s claimed harm is within the scope of Merlyn Trampel’s liability if that harm arises from the same general types of danger that Merlyn Trampel should have taken reasonable steps, or was obligated by the Rules of the Road, to avoid. Here, Merlyn Trampel created danger to the community by violating the driver’s safety Rules of the Road requiring drivers to pay attention to what is in front of them and stop at stop signs. To make the Scope of Liability determination, a jury must consider whether the repetition of Mr. Defendant’s conduct, makes it more likely harm of the type Mr. Plaintiff claims to have suffered would happen to another person in the community. ICJI 700.3A-Scope of Liability – Defined**.**

# CAUSATION standard used for retaliation claims

The causation standard under the Iowa Civil Rights Act is the same for both discrimination claims and retaliation claims. *Haskenhoff v. Homeland Energy Solutions, LLC*, 897 N.W.2d 553, 602 (Iowa 2017) (Chief Justice Cady concurring opinion). That standard is “that the protected activity be *a motivating factor* in the employer’s decision.” *Id*. (emphasis added). “A motivating factor is one that helped compel the decision[.]” *Id*. “A motivating factor is a factor that weighs in the defendant’s decision to take the action complained of—in other words, it is a consideration present to his mind that favors, that pushes him toward, the action. It is a, not necessarily the, reason that he takes the action. Its precise weight in his decision is not important.” *Id*. (quoting *Hasan v. U.S. Dep’t of Labor*, 400 F.3d 1001, 1006 (7th Cir. 2005)).

# Evidentiary Issues

## Leading Questions May be Used to Refresh Recollection

Because over years have passed since the events at issue, it is likely that some witnesses will not have complete recollection of the facts. It may become necessary for counsel to refresh the witnesses’ recollection. The Iowa Rules of Evidence specifically permit the use of leading questions under these circumstances: “Leading questions should not be used on the direct examination of a witness *except as may be necessary to develop that witness’s testimony*.” Iowa R. Evid. 5.611(c) (emphasis added); *see also*, Moore’s Fed. Practice § 611.3(c) p. 268-69; 3 Wigmore §§ 774-778.

McCormick on Evidence (Chapter 2, § 6 p. 12) states the rule clearly:

Similarly, when a witness has been fully directed to the subject by non-leading questions without securing from him a complete account of what he is believed to know, his memory is said to be “exhausted” and the judge may permit the examiner to ask questions which by their particularity may revive his memory but which of necessity may thereby suggest the answer desired.

This court should permit counsel to use leading questions to refresh a witness’s recollection at trial, should the need arise.

##  Interrogating Adverse Witnesses

 Generally, a party interrogating a witness on direct examination may not use leading questions except as may be necessary to develop a witness’s testimony. I.C.A. Rule 5.611(c). The rule, however, makes an exception for the situation where a party calls an adverse witness on their direct examination. *Id.* The rule states that “when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.” *Id.*

 On the cross-examination of the adverse witness by the party they share a bias in favor of, that party may not lead the witness. While the Iowa Court Rule 5.611(c) states that “ordinarily leading questions should be permitted on cross-examination,” the advisory committee’s notes to the Federal Rule of Evidence, which the Iowa advisory committee notes suggest should be used for analysis because of the absence of relevant state law, I.C.A. Rule 5.611 advisory committee’s note, and McCormick on Evidence suggest that in the situation where a witness is biased in favor of the party cross-examining them, that party should not be permitted to use leading questions. Fed. R. Evid. 611 advisory committee’s note; McCormick on Evidence, §6 at 13, (3rd ed. 1984). The advisory committee’s comment states:

The rule also conforms to tradition in making the use of leading questions on cross-examination a matter of right. The purpose of the qualification “ordinarily” is to furnish a basis for denying the use of leading questions when the cross-examination is cross-examination in form only and not in fact, as for example the “cross-examination” of a party by his own counsel after being called by the opponent (savoring more of re-direct) or of an insured defendant who proves to be friendly to the plaintiff.

Fed. R. Evid. 611 Advisory Committee’s note. Also, the term “ordinarily” in the rule is used specifically to allow the court to prohibit a party from using leading questions on cross-examination when the witness is biased in their favor. McCormick on Evidence, §6 at 13, (3rd ed. 1984) (citing *Moody v. Rowell*, 34 Mass. (17 Pick.) 490, 498 (1835)).

 In the present case, Plaintiff intends to call witnesses that are either adverse parties or are in some other way biased in favor of the Defendants. The Plaintiff intends to partially or completely use leading questions on his direct examination of his adverse witnesses in accordance with Iowa Court Rule 5.611(c). When the Defendants question the witness biased in their favor, the Court should not allow them to use leading questions in accordance with the above authorities and conform to the “traditional view that the suggestive powers of the leading question are as a general proposition undesirable.” Fed. R. Evid. 611 advisory committee’s note.

## Only the Questioner May Move to Strike Any Part of the Witness’s Answer

The questioner has an interest in seeking responsive answers to his or her questions. The opponent does not. The mere fact that an answer is unresponsive is not an objection available to the opponent. Only the questioner may move to strike on that basis. If the non-responsive answer is otherwise objectionable, the opponent may move to strike it because the answer was not anticipated and contains material which is not permitted. *See, e.g.*, McCormick on Evidence 3rd, Chapter 6 § 52 p. 127; Graham on Evidence, NITA, Chapter XV, § 3 p. 730. However, that objection cannot be based on the non-responsiveness.

## Iowa Law on Demonstrative Evidence

Admission or exclusion of demonstrative evidence rests largely within the trial court's discretion; therefore, we will not interfere unless the trial court has abused that discretion. . . . Demonstrative evidence is usually received if it affords a reasonable inference on a point in issue.

*State v. Thorton*,498 N.W.2d 670, 674 (Iowa 1993) (citations omitted).

The trial court also allowed the rear portion of [defendant's] car to be introduced as evidence. The vehicle was relevant as real evidence in the case and as demonstrative evidence of the car's lighting system. The court did not abuse its broad discretion in permitting demonstrative evidence to explain or illustrate the testimony of the witnesses.

*State v. Liggins*,524 N.W.2d 181, 189 (Iowa 1994).

 Additionally, diagrams or maps made or marked while a witness is testifying are admissible to illustrate or clarify the testimony. Visual aids and exhibits admitted into evidence may be used by a witness to illustrate matters in evidence and in analysis. *State v. Pepples,* 250 N.W.2d 390, 396 (Iowa 1977); *Hamdorf v. Come,* 101 N.W.2d 836, 841-42 (Iowa 1960). *Anderson v. Bliot,*57 N.W.2d 792, 797 (Iowa 1953), *State v. Plowman,* 386 N.W.2d 546, 551 (Iowa App. 1986).

## Evidence of Medical Bills Not Relevant When Only Requesting Non-Economic Damages

 Mr. Plaintiff amended his Gordon v. Noel damages interrogatory to specifically exclude any request for medical bills past and future, wage loss or loss of earning capacity only claiming damages for non-economic damages: pain and suffering and loss of function past and future. Mark Nel intends to prove his pain and suffering damages without claiming his medical bills past or expected future as damages. The Supreme Court discussed the support for an award of pain and suffering without medical bills as follows:

Moser himself testified: (1) since the accident he suffered pain while working, (2) he suffered sharp pains in the back, a stiffness in the neck, and numbness in the arms, none of which existed before the accident, (3) his back discomfort prevented him from doing certain things he was able to do before the accident. Medical experts testified Moser received an injury they defined as a violent ‘traumatic insult’ to the tissues involved in the neck and spine. The testimony indicated Moser still suffered pain from and was still affected by the injuries at the time of trial. The testimony also indicated Moser would continue to suffer pain from and be affected by the injuries. There was sufficient evidentiary support for the verdict.

*Moser v. Brown*, 249 NW 2d 612, 616 (Iowa 1977). In addition to the medical evidence described above, Mr. Plaintiff will provide testimony of before and after witnesses. The evidence supports that Mr. Plaintiff is entitled to an award of pain and suffering.

# JURY IS THE CONSCIENCE OF THE COMMUNITY DETERMINING FACTS AND SETTING COMMUNITY STANDARDS.

 A current trend for defense counsel is to object to any reference to the jury’s relationship to the community. In the video watched by all jurors before serving on a jury, retired Iowa Supreme Court Justice Linda K. Neuman explains that:

Serving as a juror is one of the most important responsibilities you have as a citizen of this country. **It is the rule of law which keeps us safe and protects our freedoms.**

A Jury of Our Peers, time stamp :43 - :52, ISBA 2012. (Emphasis added).

 In 1959, the Iowa Supreme Court described the nature of the jury’s duties as

 follows:

The question of due care is normally a jury question. Mr. Justice Holmes States in the Common Law P. 150: “***The question of what a prudent man would do under given circumstances is then equivalent to the question what are the teachings of experience as to the dangerous character of this or that conduct under these or those circumstances; and as the teachings of experience are matter of fact, it is easy to see why the jury should be consulted with regard to them***. They are, however, facts of a special and peculiar function. Their only bearing is on the question, what ought to have been done or omitted under the circumstances of the case, not on what was done. ***Their function is to suggest a rule of conduct***.”

*Motter v. Snell,* 95 N.W.2d 735, 737 (Iowa 1959) (emphasis added).

 The Court has stated “the standard of conduct required of a reasonable man may be prescribed by legislative enactment” and may be interpreted as fixing a standard of care ***for all members of the community*** from which it is negligence to deviate.” *Lewis v. State,* 256 N.W.2d 181, 188 (Iowa 1977) (citing Prosser, Torts, section 36 (4th Ed.). In the event no statute defines this standard, the conduct of a reasonable person is to be determined by the jury. *See id*.

 Similarly, the United States Supreme Court describes that: “a jury ... can do little more- and must do nothing less- than express the conscience of the community...” *Witherspoon v. State of Ill,* 88 S.Ct. 1770, 1775; 391 US 510, 519 (1968)(Trial Court must include jurors both for and against the death penalty in capital case to reflect the conscience of the community); See also, *Roth v. U.S.,* 354 U.S. 476, 490 (1957) (approving the judge's charge that "you and you alone are the exclusive judges of what the common conscience of the community is, and in determining that conscience you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious—men, women and children.").

 The 8th Circuit Court of Appeals describes that:

Ultimately, this sort of question is usually best left to the judgment of a jury, twelve ordinary people, than to that of a judge, one ordinary person. **The jury, after all, represents the conscience of the community.** It decides many similar questions-for example, what would a person of ordinary prudence have done in certain circumstances? Here, the matter is sufficiently close, in our view, to come within the jury's province.

*Garcia v. City of Trenton,* 348 F.3d 726, 729 (8th Cir. 2003).

 The Iowa Court of Appeals describes the concept in the frame work of the Restatement (Third) as follows:

[T]here will be contending plausible characterizations that lead to different outcomes and require the drawing of an evaluative and somewhat arbitrary line. ***Those cases are left to the community judgment and common sense provided by the jury.***

*Hill v. Damm*, 804 N.W.2d 95, 101 (Iowa Ct. App. 2011); *Hoyt v. Gutterz Bowl &Lounge, LLC.,* 808 N.W.2d 754(Iowa Ct. App. 2011); (citing Restatement of Torts, 3rd. § 29 cmt. i, at 504–05 (emphasis added)).

 The Iowa Supreme Court has a juror educational program on its website for teachers to educate high school students about jury service called “We the Jury, A Jury Service Project of the Young Lawyers Division of the Iowa State Bar Association.” https://www.iowacourts.gov/for-the-public/videos-and-brochures/we-the-jury-complete-program/ The educational materials describe Jurors as follows:

Jurors are the “collective conscience”of our communities. The jury system calls upon the sound judgment and character of our neighbors, friends and relatives to decide what is truth and what is fair compensation for those who have been wronged. Juries bring the courts to the people. America’s juries truly represent democracies at work.

We The Jury. Curriculum Guide, Handout 1-3. https://www.iowacourts.gov/static/media/cms/Curriculum\_2FF29D34060C9.pdf . As a result, Jurors being described as the conscience of their communities is not an alien concept in Iowa.

 Additionally, drawing jurors from a representative cross-section of the community is constitutionally required. *State v. Lohr*, 266 N.W.2d. 1, 4 (Iowa 1978). The Court should note that by statute personal injury actions are brought in the county where the defendant resides or in the county in which the injury or damage happened. ICA 616.18 (2019). In other words, venue is proper in the county or community where the defendant, the person whose conduct was allegedly negligent, resides or the community where the negligent conduct and damage occurred. Venue based upon the defendant and where the conduct or damage happened makes sense considering that Iowa law describes that a juries “function is to suggest a rule of conduct” in the community. *Motter v. Snell,* 95 N.W.2d at 737. For example, it may well be that driving a dog sled down the street is a breach of the standard of care for the reasonable person in Houston, Texas, and not Houston, Alaska. A jury simply cannot judge conduct if not by community standards, and it is not inflammatory or improper to suggest as much.

# THE REASONABLY CAREFUL PERSON DUTY OF ORDINARY CARE IS NOT A GOLDEN RULE VIOLATION

 It is indisputably the duty of the jury to make fact determinations on the evidence of the case and apply these facts to the law.

"Negligence" means failure to use ordinary care. Ordinary care is the care which a **reasonably careful person** would use under **similar circumstances*.*** "Negligence" is doing something a **reasonably careful person** **would not do under similar circumstances**, or failing to do something **a reasonably careful person** would do under similar circumstances.

ICJI 700.2 - Ordinary Care - Common Law Negligence (emphasis added). Plaintiff has the burden to put on evidence of what a reasonably careful person would do under similar circumstances. *Masteller v. Chicago R.I. & P. Ry. Co.,* 185 N.W. 107, 109 (Iowa 1921)(“[U]nder the circumstances shown, the appellee could only be liable for a want of ordinary care, and that no such want of ordinary care was shown.”); *Bartlett v. Chebuhar,* 479 N.W.2d 321, 322-323 (Iowa 1992). Proof of how others would proceed in similar circumstance is proper evidence at trial to establish the level of care required. Presenting proof of what a reasonably careful person would have done to avoid harming others, and proof of what the defendant did in the circumstance, does not violate the “Golden Rule” or ask the jury to decide the case on sympathy, passion, or prejudice. Improper “Golden Rule” arguments are those asking the jury to put themselves in the position of the plaintiff to determine the amount of damages. *Russell v Chicago, Rock Island & Pacific Railroad Co,* 86 N.W.2d 843, 848 (Iowa 1957). Asking the jury to determine and apply the reasonable person standard in negligence cases is not a violation of the “Golden Rule.”

# IOWA LAW ON CLOSING ARGUMENT

## Counsel Have Latitude in Closing Argument Which is Compatible With Effective Advocacy.

 Counsel have latitude in closing argument, subject to the trial court’s control, and limitation of the scope of the arguments is within the trial court’s discretion.*State v. Melk,*543 N.W.2d 297,301 (Iowa Ct. App. 1995). In *Melk*, the Court described that:

The single purpose of dosing argument is to assist the jury in analyzing, evaluating and applying the evidence. . . . It is a time for counsel to draw conclusions from the evidence introduced at trial and argue all permissible inferences. . . . The scope of closing arguments, however, is not strictly confined, but rests largely with the sound discretion of the trial court. . . . In exercising this discretion it is recognized counsel should be given latitude to make comments and arguments within the framework of the legal issues and evidence. . . . This latitude is compatible with effective advocacy. On the other hand, counsel has no right to create evidence by argument or express personal beliefs ...

*Id.* See also, *State v. Harless*,86 N.W.2d 210, 213-14 (Iowa 1957). In *Harless*, the Iowa Supreme Court explains that:

In argument to a jury counsel are entitled to at least some latitude in drawing conclusions from the evidence and pointing out inferences they feel may be drawn therefrom. . . . We have held repeatedly that misconduct of the prosecuting attorney in argument does not require granting a new trial unless it appears to have been so prejudicial as to deprive defendant of a fair trial. ... We nave also frequently pointed out that the trial court is in much better position than we are to judge whether claimed misconduct of counsel is so prejudicial as amounts to denial of a fair trial. ... Considerable discretion is allowed the trial court in passing on such a matter and we will not interfere with its determination unless it clearly appears there has been a manifest abuse of such discretion.

*Id.*

## Iowa Law on Golden Rule.

 Another trend on the rise appears to be Golden Rule objections. Iowa has clear precedent on the Golden Rule. Plaintiff will cite the Iowa case law for counsel and the Courts reference. In 1957, the Iowa Supreme Court laid out the law on Golden Rule as follows:

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**. ... It is evident that the argument of counsel in the case at bar was improper and the objections of defendant's counsel should have been granted. The court was at least within its fair discretion in granting a new trial on this ground.

*Russell v Chicago, Rock Island & Pacific Railroad Co*, 86 N.W.2d 843, 848 (Iowa 1957)(Citations omitted).

 In 1968, the Iowa Supreme Court reported that:

The claim of improper jury argument by plaintiff's counsel is that he resorted to the so-called ‘Golden Rule’ argument, in violation of this pronouncement in *Russell v. Chicago, R.I. & P.R. Co.* ... During closing argument to the jury here plaintiff's counsel made this statement in substance: ‘It's been suggested that my suggestion of $10,000 or $20,000 was ridiculous or something to that effect, but let me ask you this question: Would counsel for the defendant or his client or I or you-’ ... We have held many times the trial court has considerable discretion in determining whether alleged misconduct of counsel, if there was such, was prejudicial. We will not interfere with its determination of such a question unless it is reasonably clear the discretion has been abused. ... No abuse of discretion in Trial Court denying a mistrial.

*Oldsen v. Jarvis*, 159 N.W.2d 431, 435-436 (Iowa 1968)(Citations omitted).

 In 1969, the Iowa Supreme Court reports that:

Defendant assigns misconduct in final argument by the assistant county attorney. Two arguments were used to which defendant objects. First, the county attorney, in discussing the evidence, invited the jury to put themselves in the position of the witnesses at the time of the events about which they were testifying. Our condemnation of the ‘golden rule’ argument in discussing damages, [*Russell v. Chicago, R.I. & P.R. Co.,*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=107&FindType=Y&SerialNum=1958113552) is not authority for contending the argument here constitutes reversible error. The reasons for the prohibition in discussing damages are not present here. We are cited no cases holding such argument to be reversible error in a criminal case. We note defense counsel's arguments: ‘I could go into a lot of instances where this could occur in your life and my life. \* \* \*.’ Counsel on both sides are permitted reasonable latitude in final argument. We cannot say this latitude was abused here.

*State v. Mcpherson,* 171 N.W.2d 870, 873-874 (Iowa 1969)(Citations omitted).

 In 2011, in an unpublished decision the Iowa Court of Appeals describes that:

By asking the jurors to envision how their lives would change if they received the amount of damages requested by the [Plaintiffs], defense counsel appealed to their emotions and passions. Defense counsel violated the prohibition against making a “golden rule” argument.

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

## Improper Argument Cumulative Effect.

 In 2005, the Iowa Court of Appeals decided a case that hit the trifecta of improper argument. *Rosenberger Enterprises, Inc. v. Ins. Service Corp. of Iowa*, 541 N.W.2d 904, 907-908 (Iowa Ct. App. 1995) The Court described that a new trial should have been granted because the “cumulative effect of Rosenberger's counsel's closing argument was an impassioned and inflammatory speech that likely caused severe prejudice” where counsel argued that the jury should find fault on the basis of ability to pay rather than actual fault, used melodramatic antics throughout final arguments, and impermissively asserted his personal opinion punctuated repeatedly with “as God is my judge.” *Id.*

## Counsel Can Tell Jury to “Send a Message” to Community.

 During closing, plaintiff’s counsel made the following argument: “Your decision will make a statement to this community...” and “Your decision is important to this community.” *Smith v. Haugland*, 762 N.W.2d 890, 898-99 (Iowa Ct. App. 2009). In *Smith*, the Court of Appeals explained:

Even if we assume that the defendants did not waive this error, we do not find counsel’s argument so impassioned and inflammatory that it likely caused prejudice. See, e.g., [Rosenberger Enterprises, Inc. v. Ins. Service Corp. of Iowa, 541 N.W.2d 904, 908 (Iowa Ct. App. 1995)] We again find no abuse of discretion.

*Id.* at 901.

## Defense Counsel Cannot Compare case to “Jackpot Justice” as it Offers a Personal Opinion on Merits of Case.

 In 2011, the Court of Appeals found argument improper when counsel gave personal opinion on the merits of case. *Conn v. Alfstad,* 801 N.W.2d 33 (Iowa Ct. App. 2011)(Unpublished). In *Conn,*

The court determined that by comparing *Conn*'s case to “jackpot justice,” defense counsel was essentially “offering a personal opinion about the merits of the case,” which is not acceptable argument. *See Rosenberger Enters., Inc.,* 541 N.W.2d at 908 (holding counsel may not interject personal beliefs into argument). ... It does not matter to our analysis whether counsel used the term “jackpot justice” or merely compared filing this lawsuit to hitting the jackpot at the casino. Either way, the statement was aimed at inflaming the passions of the jurors to think [Plaintiff] was trying to get a substantial verdict without an evidentiary basis for the amount sought...

*Id.*

## Counsel Can Use Models and Graphic Aids With Jury.

Counsel may use visual aids to illustrate matters in evidence in aid of their analysis.

*State v. Pepples,*250 N.W.2d 390, 396 (Iowa 1977) (citation omitted).

[Defendant] did indeed base his case on three grounds, and defense counsel were entitled at the proper time to state those grounds to the jury, using a blackboard as a visual aid if they chose in order to help the jury comprehend the issues .... Counsel had a right to cover over the three words and uncover the two which were left, as their method of making dear to the jury the bases which were left for jury determination.

*Sauer v. Scott,*238 N.W.2d 339, 344 (Iowa 1976).

Generally, a trial court may in its discretion permit counsel, in addressing a jury, to display drawings, diagrams, maps or other visual aids, not put in evidence, for the purpose of illustrating or elucidating matters properly in evidence provided the jury understands that they are employed merely for such purposes and are not of themselves evidence in any sense.

*State v. Blyth,*226 N.W.2d 250, 272 (Iowa 1975).

We find no reversible error in the overruling of defendants' objection to the closing argument of plaintiff's counsel when the latter used a toy tractor and trailer to illustrate points to the jury. The propriety of so doing was largely in the discretion of the trial court.

*Nielsen v. Wessels*,247 Iowa 213, 228-29, 73 N.W.2d 83, 91 (1955).

## Counsel Can Assist Jury in Reaching a Verdict by Suggesting a Course of Reasoning For Amount Asked.

 The Iowa Supreme Court determined that counsel can assist jury in reaching a money verdict:

We . . . have refused to reverse judgments for plaintiff on the ground that per diem formulas for pain and suffering were suggested in argument. It is not improper for an attorney to inform the jury of the amount plaintiff claims as damages. The jury knows he represents plaintiff.

*Althof v. Benson,*147 N.W.2d 875, 878 (Iowa 1967) (citations omitted).

The evidence of the injury and its past and present effect are before the jury as is its probable future effect. The task of the lawyer is to assist the jury in reaching a verdict. In doing this a suggestion of the manner in which the lawyer reached the amount asked without more cannot invade the province of the jury. The jury must reach their verdict by reasoning and drawing inferences. The per diem argument is nothing more than a suggestion of a course of reasoning from “the evidence of pain and disability to the award.

*Corkery v. Greenberg,*114 N.W.2d 327, 332 (Iowa 1962).

# CONCLUSION

Plaintiff Christopher Godfrey suffered significant and on-going harm as a result of Defendants’ conduct. Plaintiff was harmed by Defendants’ conduct, and he comes before the Court at long last seeking to be made whole for the damages he has experienced. Plaintiff asks the Court to facilitate an impartial jury trial through the thorough vetting of perspective jurors by way of a comprehensive voir dire, and that the court refuse to “rehabilitate” jurors who have expressed a bias for one side of the other, or to permit Defense counsel to do so.

/s/ *Roxanne Conlin*

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1. *See also* *Busby v. Florida*, 894 So.2d 88, 96–105 (Fla. 2004) (rejecting *Ross* and retaining its per-se reversible error rule); *Fortson v. Georgia*, 587 S.E.2d 39, 41 (Ga. 2003) (recognizing that forcing defendant to use peremptory challenge to strike juror that should have been removed for cause is per se harmful error); *Maine v. McLean*, 815 A.2d 799, 805 (Me. 2002) (“[W]hen a defendant’s right to have jurors selected in the manner prescribed by the Rules is impaired, as it was in this case, it would be virtually impossible for the State to show after conviction that the injury to the defendant is harmless, and equally difficult for the defendant to demonstrate prejudice.”); *Whitney v. Maryland*, 857 A.2d 625, 633 (Md. 2004) (refusing to abandon “per se” rule); *Montana v. Good*, 43 P.3d 948, 959–60 (Mont. 2002) (prejudice presumed if juror should have been excused for cause, peremptory strike is used and defendant’s peremptory strikes are exhausted – structural error not subject to harmless error analysis); *New York v. Cahill*, 809 N.E.2d 561, 578 (N.Y. 2003) (error in denying challenge for cause not rendered harmless because juror is later excused by peremptory challenge – the loss of the peremptory challenge constitutes the harm); *Hanson v. Oklahoma*, 72 P.3d 40, 48–49 (Okla. Ct. App. 2003) (reversal required when juror should have been removed for cause, defendant exhausted peremptories and identified an additional juror he would have stricken); *Brown v. Virginia*, 533 S.E.2d 4, 8 n.2 (Va. Ct. App. 2000) (prejudicial error occurs when trial court forces defendant to use peremptory challenge afforded by statute to excuse juror who should have been excused for cause); *Johnson v. Texas*, 43 S.W.3d 1, 10–11 (Tex. Ct. App. 2001) (Johnson, J. concurring) (primary rationale for peremptory challenges is to help secure the constitutional guarantee of trial by impartial jury; new trial required when trial court improperly denies challenge for cause forcing use of peremptory challenge). [↑](#footnote-ref-1)
2. A judge holds one of the most esteemed positions in society. In the courtroom, the judge is referred to as “Your Honor,” is distinguished by attire, is physically elevated over everyone else, and has near plenary power. Because of this high status, many potential jurors will seek approval when answering questions from a judge—even at the expense of hiding their true feelings and opinions. *See* Susan E. Jones, *Judge- Versus Attorney- Conducted Voir Dire: An Empirical Investigation of Juror Candor*, 11 Law & Human Behav. 131, 143 (1987) (“Subjects changed their answers almost twice as much when questioned by a judge as they did when interviewed by an attorney . . . [I]t appears that there may be implicit pressures in the courtroom toward conformity to a ‘perceived standard’ that differs depending upon who conducts *voir dire*.”). [↑](#footnote-ref-2)
3. For example, Ex. 3, Declaration of Lin S. Lilley Consulting Firm, Austin, Texas, Signed September 10, 2001. [↑](#footnote-ref-3)