STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT

FOURTH JUDICIAL DISTRICT

Type of Case: Personal Injury

Court File No. 27-CV-12-9958

J.K., a minor, by and through K. Kimball, as parent and natural guardian,

Plaintiff,

v.

New Horizon Kids Quest, Inc.,

Defendant.

PLAINTIFF'S MEMORANDUM OF LAW IN RESPONSE TO DEFENDANT'S NEW TRIAL MOTION

INTRODUCTION

As the court observed from the outset of this case, the subject matter at issue involved "a difficult case." (267:2) Both sides applied zeal in the representation of their client's interests. In its supervision of a fair trial, the court admonished both sides: cautioning plaintiff's counsel in opening statement to "move on" (223:17) and requiring defense counsel after cross-examination to apologize to the court and counsel for a misrepresentation. (1164-67) (1167:25-1168:2) ("And apologize that he did this in front of the jury. THE COURT: Yes."); (1168:20 "MR. RYAN: . . . I apologize."). Each side had capable counsel, whose efforts to present the best case for their clients was obvious throughout the process.

Despite avid advocacy by the adversaries, the court's supervisory actions resulted in a fair trial for both sides. The current defense motions, however, retell the tale from its disappointed perspective, and urge the court to apply a legal test that is opposite of that

used at common law in the post-trial motions it has brought. To accomplish a result different than that imposed by the jury, the tools proffered by the defense suggest that the court should look for ways to second-guess the jurors and urge the court to assume that prejudice influenced the jurors without any tangible proof, rather than use the traditional approach of searching the record for evidence supportive of the verdict, or requiring the movant to show how it was prejudiced.

Verdicts of the size returned by the jury here are not uncommon in cases of sexual abuse, and juries are invariably tasked with setting the value of the pain and suffering which accompanies a life-changing tort. As will be discussed below, other compensatory jury awards for pain and suffering in sex abuse cases have equaled or exceeded ours, especially when the victim was someone with minimal life "coping" skills and who was betrayed by inaction or chagrined by belittlement.

The jury system and the decision of this obviously attentive and considerate jury should be supported and not rejected here. The jurors gave two weeks of their lives in fulfillment of their responsibilities under the Seventh Amendment, and the fruit of their efforts should not be lightly repudiated.

While the trial is now postured by the defense as replete with one-sided "misconduct" by Plaintiff, the truth is the Defendant's theory of the case invited a polarizing perspective for the jurors: either they would adopt Plaintiff's account and return an award commensurate with a life-changing event, or adopt the defense's perspective that a rape had not occurred, and if it had, that it produced no meaningful

harm. Thus, it was the polarizing nature of diametrically opposed theories that accounts for the "all or nothing" outcome, rather than isolated words throughout a lengthy trial stated by one side or the other.

Of the errors allegedly attributable to "misconduct," importantly only one sought relief in the form of a curative instruction by the defense – a comment by Plaintiff's counsel in opening that was objected to as "argumentative." (223:8-17) ("THE COURT: Members of the jury, remember what I said to you. This is not evidence. The evidence will be revealed in testimony and exhibits, so focus on that and not what the counsel is saying right now."). It then later took the form of a mistrial motion the day after completion of both opening statements, (259-260) which the court denied, in preference for the earlier curative instruction (262:12-23; 266:23-267:1), cautioning "the lawyers to try to stay in [their] lanes." (267:1-2).

Since fundamental law requires a contemporaneous objection – both to furnish an opportunity to the court to correct the situation and thereby abate any prejudice, as well as to preserve error for later review – it is remarkable that the actual legal test to be applied to the defense motions is not even mentioned in their brief:[1] the plain error doctrine.

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[1] The possible exception is footnote 10 at page 12, which alludes to the concept without naming it or outlining its requirements.

I. THE PLAIN ERROR DOCTRINE IS THE STANDARD OF REVIEW BY WHICH THIS CASE MUST BE JUDGED.

Since a party is "entitled to a fair trial, not a perfect trial,"[2] generally unless an error is of sufficient impact or prejudice, it will be deemed "harmless" and may not serve as the basis for a new trial. *See Alholm v. Witt,* 394 N.W.2d 488, 493 (Minn. 1986) ("Normally, there is no ground for reversal unless prejudice exists.").

The "[f]ailure to satisfy any of the prongs of the plain-error test dooms the claim." *Frazier v. Burlington N. Santa Fe Corp.,* 811 N.W.2d 618, 626 (Minn. 2012). Under plain-error review, the court may redress an error when it is "necessary to ensure fairness and the integrity of the judicial proceedings," but only when a party demonstrates that (1) there was error, (2) that the error was plain, and (3) that the error affected the party's substantial rights. *Frazier*, 811 N.W.2d at 626-27 (quotation omitted).

Courts are reluctant to grant a new trial for an error that the moving party did not consider enough of a problem at the time to even voice an objection over. They have thus characterized the relief as available only in "exceptional" [3]or "extraordinary"

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[2] *Danforth v. State*, 718 N.W.2d 451, 455 (Minn. 2006); *see State v. Billington* , 241 Minn. 418, 427, 63 N.W.2d 387, 392-93 (1954)(constitutional guarantee of a fair trial does not require a perfect trial, but rather one that is fair and does not prejudice the substantial rights of the accused).

[3] *See U.S. v. Atkinson*, 297 U.S. 157, 160 (1936)("In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise substantially affect the fairness, integrity, or public reputation of judicial proceedings.").

circumstances.[4] The rarity of the application of the "plain error" rule in practice is a point that must be fully appreciated:

> Findings of plain error, both to the explicit authorization to consider them found in the text of Rule 51 and also under the rule as it currently stands, have been confined to the exceptional case in which the error seriously has affected the fairness, integrity, or public reputation of the trial court's proceedings; the courts of appeal are deferential to the work of the district court. Not surprisingly, it is not unusual to see words in the judicial opinions characterizing the requisite severity of the error such as "fundamental," or "miscarriage of justice," or "egregious," or "patently erroneous." The burden on the party invoking the plain error principle, therefore, is a heavy one.

C. WRIGHT & A. MILLER, 9C FEDERAL PRACTICE & PROCEDURE, § 2558, at 199-207 (3d ed. 2008)(citing cases).

When, however, a civil litigant makes a conscious choice to elect one of a series of alternative approaches or theories in a trial, it may not "invite error" by later seeking to claim error for the path it has chosen to take. *See McAlpine v. Fid. & Cas. Co.*, 134 Minn. 192, 199, 158 N.W. 967, 970 (1916) ("The settled general rule is that a party cannot avail himself of invited error."). Longstanding Minnesota law prohibits a party from benefitting by error it has invited.[5] The Minnesota Supreme Court has not allowed a

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[4] *See Exxon Corp. v. Exxeen Corp.*, 696 F.2d 544, 548-49 (7th Cir. 1982) ("plain error" as applied to jury instructions seeks "extraordinary relief from the consequences of . . . lawyers' mistakes").

[5] *See Heise v. J.R. Clark Co.*, 245 Minn. 179, 191, 71 N.W.2d 818, 826 (1955) ("A party is concluded by an instruction given at his own request. . . . [T]he trial court's charge, even though it be erroneous, becomes the law of the case . . . ."); *Krenik v. Westerman,* 201 Minn. 255, 262, 275 N.W. 849, 852 (1937)(the invited error doctrine prevents a party from asserting an error on appeal that he invited or could have prevented in the court below).

party to gain a tactical advantage by making a conscious choice among options at trial and then arguing – when the choice "back fired" – that a fundamental or "plain error" requires a new trial.

Here, Defendant made a tactical decision to polarize the case by arguing J.K. was not raped, that J.K. did not have permanent PTSD, and J.K. did not require significant future medical treatment.[6] In essence, Defendant choose a high risk "all or nothing" strategy. The jury rejected Defendant's polarized perspective. Importantly, Defendant's complaints arose not from any error committed or allowed by the Court, but rather result from it's own poor strategy; one calculated to either convince or repel the jury. The defense not only employed an improvident strategy, but the Defendant did not object contemporaneously to the errors of which they now complain. That leaves only the plain error doctrine as a remote prospect for post-trial relief.

Critically, Defendant has not met the test for the plain error doctrine. Defendant has not proven that there was any error, let alone that the error was plain and that such error affected the Defendant's substantial rights in a demonstrable way. For this reason, the new trial motion should be denied.

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[6] Curiously, it was when Plaintiff pointed out these factual premises in his opening statement, (216:23-34 ("they said 'Jace wasn't raped, Jace doesn't have PTSD.'")) that Defendant objected (223:8-11 ("I object. This has been argumentative, and it's been stating things that are actually untrue. . . .")).

A. To Consider a Request for a New Trial, the Law Requires a Contemporaneous Objection and Request for a Curative Instruction or the Argument is Waived.

Generally, the failure to object and seek a curative instruction weighs heavily against the grant of new trial. *See State v. Griese*, 565 N.W.2d 419, 428 (Minn. 1997). ("A party is not permitted to remain silent, gamble on the outcome, and, having lost, then for the first time claim misconduct."); *Wild v. Rarig*, 302 Minn. 419, 433, 234 N.W.2d 775, 786 (1975). "An objection to improper remarks, a request for curative instruction, and a refusal by the trial court . . . are generally prerequisites to the obtaining of a new trial on appeal." *Lake Superior Ctr. Auth. v. Hammel, Green & Abrahamson, Inc.*, 715 N.W.2d 458, 479 (Minn. App. 2006), *review denied* (Minn., Aug. 23, 2006), *quoting Hake v. Soo Line Ry. Co.*, 258 N.W.2d 576, 582 (Minn. 1977); *see also Hahn v. Tri-Line Farmers Co-op*, 478 N.W.2d 515, 523 (Minn. App. 1991), *review denied* (Minn., Jan. 27, 1992) ("A new trial is unwarranted in the absence of an objection and request for curative instructions.").

The reason for this rule is that "[t]he district court judge is best positioned to determine whether an attorney's misconduct has tainted the jury's verdict." *Id.* The exception to the requirement of a request for a curative instruction applies to misconduct that is "so flagrant as to require the court to act on its own motion." *Id., quoting Hake*, 258 N.W.2d at 582. There was no *sua sponte* action by the Court here, and none was required. The philosophy underlying these rules is that "prejudicial remarks in closing argument can be corrected by a curative instruction except in the case of the most extreme

misconduct." *Bisbee v. Ruppert*, 306 Minn. 39, 47, 235 N.W.2d 364, 370 (1975). "When an objection is made and the trial court issues a curative instruction, a new trial is unnecessary unless the misconduct is 'extremely prejudicial.'" *Mueller v. Sigmond*, 486 N.W.2d 841, 844 (Minn. App. 1992), *review denied* (Minn., Aug. 27, 1992), *citing Omlid v. Lee*, 391 N.W.2d 62, 65 (Minn. App.1986). The issuance of a cautionary instruction is discretionary and should not be reversed unless the misconduct is "so prejudicial that it would be a miscarriage of justice to permit the result to stand." *Robinson v. Mack Trucks, Inc.*, 426 N.W.2d 220, 227 (Minn. App.1988), *review denied* (Minn., Sept. 28, 1988).

The only objection during Plaintiff's opening statement occurred near the end of the opening as follows:

> And he's going to tell you that that plan costs 2.4 million dollars at least to make sure that he doesn't end up killing himself, or attempting to, being in prison, or being an abuser himself. And that's a lot of money. I know that. But PTSD is forever for Jace. It's never going to change. But we can medicate and get therapy to help him deal with it so that he knows what his brain is telling him is wrong. And we gave that to them, and we said, "Jace needs this help", and they said, "Jace doesn't need help. Jace doesn't have PTSD." They're just making excuses.
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> MR. HAWS: Your Honor, I object. This has been argumentative, and it's been stating things that are actually untrue and inappropriate in the opening statement throughout. And so I've sat down, but this has gone on long enough.

(221:21-222:12).

Defendant's statement did not clearly articulate an objection to any specific statement, but was merely a general comment to the effect defense counsel felt that comments in Plaintiff's opening were inappropriate. The lack of objection at trial waives

any relief from Plaintiff's counsel's comments on these matters.[7] See *Bisbee v. Ruppert,* 306 Minn. 39, 47, 235 N.W.2d 364, 370-71 (1975)("defense counsel did not specifically object to the improper comments during plaintiff's counsel's closing argument. . . . In the absence of such a request, we will not require a new trial. . . .").

Regardless, the Court gave a curative instruction immediately following the objection to the form of Plaintiff's remarks.:

> THE COURT: Members of the jury, remember what I said to you. This is not evidence. The evidence will be revealed in testimony and exhibits, so focus on that and not what the counsel is saying right now. I would expect you to move on, too, Mr. Ruohonen.

(223:13-17). Other than this one objection in opening statement which was addressed by the curative instruction, Defendant cites only two other instances where Defendant actually made an objection to comments or questions at trial – one objection in *voir dire*,[8]

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[7] Interestingly, the only place Defendant mentions the impact of its failure to object to the numerous comments it now raises as improper, is in footnote 10 of its Memorandum at 12 admitting they failed to object but arguing this "should not prevent the Court from ordering a new trial now." Curiously, the authority they then cite contradicts this argument.

[8] Defendant cites this exchange in *voir dire* as improper comments in support of its motion (see footnote 10 of Defendant's Memorandum), which was the only objection in Plaintiff's entire *voir dire*:

> MR. NYLIN: I agree, but I'm -- I understand you can't go back in time where definitely things would be different, but at the same time I understand that there needs to be some compensation to assist folks that are victims.
> MR. RUOHONEN: What kind things do you think that are involved in that compensation? What kind of items do you think that should be awarded for a person?

and one in closing argument,[9] both of which were contemporaneously dealt with by the

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> that's hurt?
> MR. HAWS: Your Honor, I object, it's argumentative.
> THE COURT: Sustained.
> MR. RUOHONEN: Let me ask you this, I have heard jurors say that, you know, I'm willing to award money for medical bills but not for things like pain and suffering and disability and emotional distress; have you ever heard someone say that?
> MR. HAWS: Same objection, Your Honor.
> THE COURT: Counsel, approach the bench?
> WHEREUPON, a discussion was had at side bar off the record.
> THE COURT: Go ahead, Mr. Ruohonen.
> MR. RUOHONEN: If the Court instructs you on the law and that law is if you find damages which could include things like pain, disability, emotional distress, are you willing to follow that law, even if you don't think that you would award damages for that?
> Mr. Ridgeway, do you have any concerns about that or thoughts about awarding those kinds of damages?
> MR. RIDGEWAY: I think we can do that based on the law.

(171:2-173:5) The Court will likely recall that during the sidebar, the Court suggested how Plaintiff's counsel could properly ask the question Plaintiff's counsel was trying to ask, and Plaintiff followed the Court's advice without further objection.

[9] Defendant cites the following exchange in closing argument (see footnote 10 of Defendant's Memorandum and pages 18-19 of its brief – arguing the reference to "Christopher" was a misstatement of evidence), which was the only objection during Plaintiff's entire closing argument:

> MR. RUOHONEN: Jace made all these scribbles and then he drew the bug. The bug. He drew it. That's pretty good drawing for a three-year-old. Look at it. Where did it happen? And what is the kid's name? Christopher? Why is that important? Because Christopher is a trigger for Jace. The boy told him his name was Christopher. Think that might play a role in him seeing Christopher outside his window and waking up with a kid on top of him?
> MR. HAWS: Your Honor, I actually object to that. That's a misstatement of evidence.
> THE COURT: Members of the jury, you have heard the evidence and it's up to you to determine if counsel is accurately stating the facts in this

court, and neither of which support its argument of misconduct "so prejudicial that it would be a miscarriage of justice to permit the result to stand." *Robinson*, 426 N.W.2d at 227.

A district court has the discretion to caution the jury that an opening statement is not evidence, and advise the jurors that it is simply an outline of what the lawyer expects will be proven, as a way of reducing the likelihood of any prejudice. *See Mayall v. Peabody Coal Co.*, 7 F.3d 570, 573 (7th Cir.1993). Indeed, the Minnesota courts have said that curative instructions go a long way to eliminate prejudice from improper or overzealous remarks. *Eklund v. Lund*, 301 Minn. 359, 362, 222 N.W.2d 348, 351 (1974)

> matter. So use your collective memory to determine that.
> MR. RUOHONEN: Christopher, boy. He didn't know Christopher Pietz yet, just for the record. I think I said that, right.

(Tr. 1413:21-1414:13). It should be noted that seven days after the assault and before J.K. even knew Christopher Pietz, he told Deanna Johnson, the social worker, that the boy in the red shirt was named Christopher, and she wrote out Christopher's name on Exhibit 14A which was entered into evidence. Also, in Exhibit 13:17-18 (which is the recorded statement of J.K. from that interview) the following was entered into evidence:

> Deanna Johnson (DJ): Do you know what his name was?
> J.K.: It was Christmas [sic].
> DJ: Christopher was his name?
> J.K. : (inaudible)
> DJ: Is that what his name was?
> J.K.: Yeah.
> DJ: Did he tell you that was his name? Christopher?
> J.K.: Um hum

(Trial Exhibit 13:17-18). Thus, the objected-to statement by Plaintiff in closing had a factual basis in the record of admitted evidence, whatever the correct name of the boy in the red shirt actually was.

("cautionary instructions of the trial court substantially negated possible prejudice arising out of some excess in the give-and-take of opposing counsel").

If the comments of Plaintiff's counsel amounted to an error – and that is an unproven assertion – the Court here did exactly what was supposed to be done: providing a cautionary or curative instruction to alleviate any potential prejudice.

Frankly, however, there was no error in the statements made by Plaintiff's counsel, as the statements were supported by the record. Indeed, defense counsel responded to them and elaborated on them in his opening statement.

The defense objection was to Plaintiff's assertion in opening that the contention of Kids Quest was that (1) Jace had not been raped, and (2) Jace did not have a serious condition of PTSD. When the record is "fly specked," it is abundantly clear that those were in fact the contentions of the defense.

1. The Defense Maintained that Jace was not Raped

Defense counsel asserted that J.K. was not raped:

a. Jace's problems are the result of the family having hired a lawyer (48:12; 48:15-25), who was trying to "build a case for litigation" instead of taking care of any real issues Jace had. (49:13-18).

b. Plaintiff's argument is: "Blame it on the Kids Quest incident. Blame it on what this nine-year-old boy is ***alleged*** to have done." (241:1-2) (emphasis added).

c. "You will not see any evidence of a sexual assault, nor does anyone see any evidence of that." (243:16-18).

d. I don't know where he's going because you can't tell. But he "goes back up into the Quest at some place to where they just said that there was this anal

rape. That's inconsistent with what their experts say that he would avoid all of these situations." (244:7-10).

e. "I'll tell you that the experts have said that whatever happened to Jace, people aren't going to be able to tell you exactly what happened, but whatever happened, he did not view it as a sexual incident at the time. Whether it was a sexual incident or not, he did not view it that way." (245:16-21).

f. "[T]here are no specific physical findings of a sexual assault other than what they have said this petechiae that nurse Thompson didn't note." (246:20-22).

g. "Dr. Hudalla says, no trauma to the anus is noted. None. Set aside whether this could even occur with a nine-year-old, which we'll talk about, but set that aside. It went from this questionable sexual assault until the attorneys get involved, and now it was and is a confirmed anal rape." (248:23- 249:3)

h. "The attorneys were on the TV announcing this, as well, as a confirmed sexual assault, despite the fact that the records showed something different." (249:13-16).

i. "Four and a half years later as we're getting ready for this case, contact is made again by the attorneys, and "Will you write a letter to help us in this lawsuit?" And they say, "yes", and all of a sudden the reports come back not questionable sexual assault, but a confirmed anal rape by a nine-year-old boy. Different than the records." (249:18-24).

j. Dr. Thompson is "going to tell you that, first of all, can a nine-year-old even do what is claimed? That there is simply no studies out there that that can occur. She doesn't believe that physiologically -- that certainly, young children can get erections even as babies. But is it enough to actually get a penetration or create an anal rape as has been alleged? Dr. Thompson will tell you, uh, she does not believe that that is at all likely or possible to occur." (250:8-16).

k. "Linda Thompson will tell you that there was nothing in the physical findings to support that there was this kind of event that had taken place." (250:22-24).

It is against this backdrop that the defense now contends it was "untrue" and

"misconduct" for Plaintiff to have referenced in opening statement the fact of Kids Quest's denial that a rape had occurred. As a basis for new trial, the contention is spurious. Kids Quest had continually denied a rape occurred, so that material disagreement was entirely appropriate for comment in opening as it outlined the nature of a key factual dispute, and each side presented its evidence in support or refutation of the rape that had been previewed in opening statements.

2. The Defense Maintained Jace did not have PTSD

As to whether defense counsel said J.K. was normal or did not have PTSD from this 2008 assault, the record shows the following comments by defense counsel in his opening statement:

a. "You are going to find out from many people that he is a happy, social, doing well in school with friends, uh, sleepovers, he's engaging in outdoor activities, he engaged in football. He's doing all the things that a normal ten-year-old boy, ten-and-a-half-year-old boy would do." (226:7-12)

b. "For those who choose not to put a label on Jace, for those who choose not to focus on the negative, for those who choose not to find all the things that are wrong with Jace and say that it's doom and gloom forever and ever for twenty-two and a half million dollars, Jace Kimball is doing well if we search and look for that and give him the credit that he is due." (226:13-19)

c. "There is a significant dispute about a number of things in this case about what happened." (227:13-15). "Again, Jace -- if you were to see him and to hear him, for those who haven't placed a label, Jace would appear to be a normal boy." (227:23-228:1)

d. "He was diagnosed almost immediately with PTSD by Jill Hahn, uh, and she made those assessments, and Jill Hahn, uh, -- I think this was maybe her first counseling job that she had had, uh; it was certainly very early on in her career at the time. But Jace has gone through a number of sessions, uh, I think you will find that in those sessions that Jill continued to tell him to

focus on the trauma of the incident itself as the reason why all of these bad things have happened, and the focus has always been to go back to this incident rather than let's move on, let's figure out how to deal with it, which is completely appropriate." (232:15-25, 233:1-2).

e. "Behaviorally, you're going to hear again, as we said, he testimony is, is that behaviorally other than at home, Jace is doing well." (233:22-24)

f. "[O]ne thing is certain that has been in existence for Jace's entire life is that he has always sought and looked for the attention of his mother. And, he knows how to push her buttons, and he knows how to get what he wants. He knows how to say things to get what he wants and how to make it difficult for her. He has been a handful at times. But fortunately, he has improved. He did get some medication for some of the ADHD situations. His initial doctor, by the way, who prescribed this, Dr. Israelson, who you don't get to hear from unfortunately, did not diagnose him with PTSD initially. It was always ADHD." (236:8-23).

g. "There is certainly a lack of attention, a lack of focus, but there is many, many -- in terms of a -- that's in terms of concentration, which can be attributed to some of these ADHD symptoms that Jace clearly had. Two and a half -- and, ladies and gentlemen, some of these facts existed at age two and a half." (239:18-22).

h. "From that day on, the attorneys have been part of this. They hired experts, not counselors, not therapists, because when you hire an expert such as Ms. Mitnick or Dr. Jensen, they do not provide counseling, they do not provide direction in terms of medical assistance or care. They render opinions as experts -- as paid experts. They were hired within a year or so of this incident, and there were multiple experts hired, and those experts were making contact with treating therapists, including Jill Hahn, to talk about the case." (248:8-18).

i. "This is not a case, ladies and gentlemen, where it's a parental abuse. This is not a long-term abusive relationship that took place. This is not one where a trusted clergyman, teacher, doctor, or parent, or grandparent, uh, or babysitter engaged in this kind of activity where a trust was breached." (251:1-7).

j. "And, she will tell you that he does not meet PTSD because he does not have ongoing functional and societal impairment." (252:1-3).

k. "Dr. Aletky will explain why you don't just try to pick an incident and then plug it in to make a criteria. This is one of the most misused forms of what's called a DSM-5, that's the book that people in the therapy field, psychology and psychiatry field, use to do diagnoses. It's not something you do." (252:7-13).

l. "Don't do what the plaintiff's experts have done, which is take this slice of event in his life, albeit no doubt a very unfortunate and a traumatic event that occurred with Jace, for which we will accept responsibility for whatever you find happened, for whatever you find happened, they have accepted responsibility for that, and they're here to do that, but not for all these other things, ladies and gentlemen." (253:17-25).

m. "Don't put a label on Jace. Don't look for all the things as they have to say this is the answer." (254:4-5).

It is against this backdrop that the defense now contends it was reversible error for Plaintiff to reference in opening statement that the defense would maintain that J.K.'s problems were not PTSD, but rather only ADHD, attention-seeking or something else. Their assertion is facially duplicitous.

In short, rather than ask for a contemporaneous mistrial because things were so obviously "over the line" in opening that a new trial should be granted for a "miscarriage of justice," Defendant presented exactly the defense that Plaintiff's counsel suggested it would. This demonstrates that everything Plaintiff's counsel discussed in opening was actually evidence in the case. It cannot be reversible error to accurately state what the evidence will be.

The parties were represented by capable and zealous advocates, each of whom made tactical choices and thus the doctrine of "plain error" is not available to allow anyone to "Monday morning quarterback" an earlier choice.

B. Stating "No One Came" or "Nobody Comes to Help" is a Permissible Statement of the Facts and goes Directly to the Element of Breach of Trust as an Aspect of J.K.'s Damages.

Defendant claims in post-trial motions that comments by Plaintiff in opening statement to the effect that "nobody comes" or "nobody came to help" was an impermissible discussion of liability that should form the basis for a new trial.

Obviously evidence may be relevant and admissible for one point, even though it is wholly inadmissible as evidence in support of another point.[10] When confusion could result over the jury's legitimate application of the evidence for a particular purpose, the proper thing for an aggrieved party to do is to request a limiting or cautionary instruction.[11] Here, the defense made no contemporaneous objection, let alone a request for a limiting or curative instruction. Once again, by law that means their right to object has been waived, but further, the statement was true, and it was highly relevant to the issue of damages.

1. No One from Kids Quest came to Help Jace

Importantly, the statement at issue – that no one from Kid Quest came to help Jace – was indisputably true. The video and testimony admitted into evidence shows that

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[10] For example, Minn.R.Evid. 407 provides that evidence of subsequent remedial measures "is not admissible to prove negligence," but that it is admissible to prove "ownership, control, or feasibility of precautionary measures, if controverted, or impeachment."

[11] Again, by analogy, CIVJIG 25.48 presents the instruction used to advise jurors as to which limited purpose they may consider evidence of subsequent remedial measures.

nobody did come for 99 minutes while J.K. was being assaulted. Counsel is permitted in opening statement to state facts which will be borne out, proven or admitted to the jury. In fact, in the Court's opening instructions the following statement was read to the jury:

> On January 23, 2008, Plaintiff Jace Kimball, age three, was left in the care, custody and control of the Kids Quest drop-in daycare facility operated by Defendant and located on the premises of the Grand Casino Mille Lacs in Mille Lacs, Minnesota. While he was there, Jace was assaulted by another male child at the daycare center, who was nine years old. Kids Quest admits that it owed a duty to Jace Kimball, and that it was solely responsible for his supervision, safety and security while he was in their daycare facility, and that it was negligent and failed to fulfill those obligations to Jace on January 23, 2008. Kids Quest has accepted responsibility to pay for all of the damages that the jury in this case finds to be sustained by Jace Kimball as a result of the incident or incidences that occurred while he was at the Kids Quest facility in Mille Lacs, Minnesota on January 23, 2008. However, Kids Quest disputes the nature and extent of Jace's injuries and the damages arising from the incidents.

(Tr. 31:21-25, 32:1-15). This stipulation clearly tells the jury that the Defendant admits it was responsible for J.K.'s supervision, safety and security while he was in the care, custody and control of Defendant and that they failed to supervise him resulting in him being assaulted. Stating nobody came to help is, at a minimum, a demonstrably accurate statement of uncontested facts.

2. The Fact "No One Came" is Relevant to Damages

Further, the evidence that "no one came" or "nobody came to help" was clearly relevant to the contested issue of damages relating to the breach of trust that occurred when nobody helped J.K. as he was being beaten, strangled and raped. Plaintiff's theory of the case was that this evidence went directly to J.K.'s damages, and Plaintiff's experts

testified in support of this theory.

Dr. Jensen explained the breach of trust in three ways: first, as a consequence of the inactions of supervising, responsible adults, J.K. will now have trouble trusting others due to the breach of trust of the boy in the red shirt (963:22-963-14), second, J.K. will not be able to trust institutions that most people would and should expect to be safe such, as hospitals, (964:14-965:11), finally J.K. will now have difficulty trusting his mother, as she was the one that left him at a place that did not protect him. (965:12-966:3). In fact, Dr. Jensen testified that this breach of trust explained why J.K. was angry and why he reflexively acts out violently towards his mother although J.K. is not even aware of his doing so. (965:17-25; 966:1-11)

People, particularly young children assume that in a just world, adults are there to protect them, and the psychological consequence of adult indifference is anger, pain and suffering. The fact "no one came" is thus highly relevant, and is a fair and logical subject for comment in opening statements designed to outline what the key facts will be at trial.

Mindy Mitnick also testified to the significance that no one came. She explained that J.K.'s dreams revealed a theme of there is no one there to help. (453:5-7). She testified to the shattering of basic assumptions such as the assumption that the world is a safe place. (467:23-468:13). Finally, the Court allowed Ms. Mitnick to testify over defense objection to the breach of trust:

> So, breach of trust in two ways, which is that little children just assume that the world is safe, they just trust in the grownups that are around them, and so there is that breach of trust that the people at the daycare center did not

> keep him safe. And then, unfortunately, there is the breach of trust where little kids should be able to count on their parents keeping them safe. And that undermines their trust, then, in their parents.

(580:16-581:5).

The obvious fact that nobody came to help J.K. was central to Plaintiff's damages regarding the breach of trust felt by J.K. when Defendant failed to supervise him and permitted a significant and long-lasting assault. It is the genesis of a tremendous part of his pain and suffering and was thus a permissible subject for comment in opening statement, rather than unobjected-to "misconduct."

C. No Statements Made in Opening by Plaintiff's Counsel Constituted Improper Evidence of Settlement Negotiations.

As harmful as inaction by responsible adults is to a child's psychological well being, the sting of a hollow apology is hurtful as well. Respectfully, an empty apology was the main defense approach in this case, with their admission that they were "at fault" coupled with their contention that no harm ensued from the event. That disingenuous approach is a tactic that may either carry the day or fail horribly, but it must be recognized as a tactic before one fairly analyzes what occurred at trial and how the reference in Plaintiff's opening statement to "they won't pay" becomes merely a means of summarizing the defense's duplicitous tenet: we admit we hurt you, but you are not really hurt.

It is axiomatic in an admitted liability case that the trial is about one thing: money. Stating in opening that Kids Quest did "not want to pay" is simply telling the jury,

Defendant has admitted responsibility, but does not want to be responsible for the harm it caused. Frankly, if the defense would agree to pay fair compensation, then the trial would be unnecessary. The comment hardly amounts to a shocking game-changer that perverts the course of justice; it merely explained why the parties were in court. It was not a reference to the parties' prior settlement negotiations in the way that case law has said may justify consideration of a new trial.

Defendant cites *Breza v. Thaldorf*, 246 Minn. 180, 149 N.W.2d 276 (1967), as support for the grant of new trial for discussing the subject of settlement negotiations in an opening statement. However, in *Breza,* what occurred is far different from our case. The Minnesota Supreme court explained:

> The most substantial error assigned by defendants relates to the misconduct of plaintiff's counsel in disclosing a prior settlement offer by defendants. Defendants had introduced in evidence, over plaintiff's objections, a letter from plaintiff's attorney demanding $1,280 for the 'garage which Mr. Breza built on your property.' The purpose of the exhibit at that point in the trial apparently was to show that plaintiff had assumed inconsistent positions prior to the trial. Because plaintiff's counsel considered the introduction of the exhibit improper, as constituting part of settlement negotiations, he thereafter asked defendant Robert Thaldorf the following question:
>
> > 'As a matter of fact, Mr. Brehmer and Mr. Lindquist were trying to work this thing out during 1964; at one time you made an offer to settle it for $700?'
>
> There is little question that this act of counsel was improper and ordinarily would, without more, require a mistrial.

Id. at 83-84, 149 N.W.2d at 279-80.

Here, unlike *Breza*, Plaintiff did not discuss amounts offered, nor the fact of an

exchange of settlement offers. Yet, even in *Breza*, despite the improper comment, the Supreme Court agreed with the trial judge that on the record as a whole the incident did not affect the result and that by electing to proceed, the defendant effectively waived the objection to the misconduct. *Id.* at 185, 149 N.W.2d at 280. Therefore, *Breza* supports the notion that far more overt "settlement" comments in opening statement are indeed error, but that the error is not enough to justify the grant of a new trial. It therefore cannot logically support Defendant's request for a new trial.

In *James v. Chicago, St. P. M. & O. Ry. Co.*, 218 Minn. 333, 16 N.W. 2d 188 (1944), an attorney commented that the company did not try to make a settlement with him, at which point the attorney for the defendant interrupted and stated that the defendant had, in fact, tried to make a settlement with him. *Id.* at 339, 16 N.W.2d at 192.[12] The Minnesota Supreme Court stated:

> Any reference to an attempt or lack of attempt to make a settlement was, of course, improper, but, in our opinion, not of a character likely to prejudice the minds of the jury, especially in view of the statement of defendant's counsel that an offer of settlement had in fact been made. As said in *State v. Hass*, 147 Minn. 269, 271, 180 N.W. 94, 95: '* * * The jury is a part of the court in the administration of justice. It is not swayed by every imprudent or wrongful remark of counsel. We must credit it with exercising good judgment.

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[12] The specific statement and response was "At that time they knew it was all their fault, and they didn't even hold an investigation of this derailment, and because it was the general yardmaster nobody was criticized and nobody got suspended. Instead of going out to that employee that had worked for them for 20 years and who was then disabled according to their own doctor, and trying to make a settlement with him." At this point counsel for defendant interrupted and objected, stating, "In fact, we tried to make a settlement." This ended the discussion between counsel. *Id.*

Id. [13] The *James* case supports the notion that the jury as an institution is not a delicate or fragile thing, but that it is a vibrant entity that is fully capable of recognizing malarkey – if in fact that is what is being dispensed.

In the present case, there was simply no seductive siren call mentioning any amount that was offered or demanded by either party. Stating "they don't want to pay" does not constitute reference to settlement negotiations, but rather offers an explanation for why the dispute continued to trial following an "admission" of liability. This is not the type of statement whose character is likely to prejudice the minds of the jury. In fact, once again in opening statement the Defendant commented on not wanting to pay:

> "All the things that you've heard, the allegations that were made, which are a bit offensive to me, that "we gave it to them" and "we did this". We have gone out and pursued the evidence, gathered all the information, and done an evaluation, participated in that with the discovery process, along with them. They have seen all the evidence, as well." (229:12-16)
>
> "For those who choose not to put a label on Jace, for those who choose not to focus on the negative, for those who choose not to find all the things that are wrong with Jace and say that it's doom and gloom forever and ever for twenty-two and a half million dollars, Jace Kimball is doing well if we search and look for that and give him the credit that he is due." (226: 13-20)
>
> "Those are all things that will be factored in and need to be factored in by good doctors who actually do a complete analysis rather than focus on this incident and say, 'uh-huh, everything is because of this.' That's an easy way out." (229:12-16).

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[13] Defendant also cites the 1916 case of *Smith. v. Great Northern Railway Co.,* 133 Minn. 192, 158 N.W. 46 (1916), which actually stands for the proposition. "A new trial is not granted because of the misconduct of counsel unless substantial prejudice results" and if it was unabated by the court's failure to instruct the jury to disregard improper comments following a contemporaneous objection. *Id.* at 194, 158 N.W.2d at 47.

Defendant readily and skillfully replied to the suggestion by Plaintiff that it should pay anything, by explaining to the jurors *why* in fact it was not going to pay what Plaintiff was asking the jury to award. Assuming that the comments by Plaintiff's counsel were error – again, an unproven assertion for which speculation is invited – the robust response by the defense alleviated any prejudice.

Defendant made it clear that it disagreed with Plaintiff's request for the jury to award $22,505,000 and addressed the issue head on by stating they did not see the evidence in the same way as did Plaintiffs. Neither party addressed any settlement negotiations, but rather both parties zealously advocated their diametrically opposed and polarized positions. In context, the comments were not error, and there was no demonstrated prejudice from them. The grant of a new trial is thus unjustified.

D. Statements Made Throughout the Trial by Plaintiff's Counsel Were Proper and not Unduly Inflammatory.

Defendant's post-trial brief cites various unobjected-to comments in Plaintiff's closing argument as improper and as the basis for a new trial. First, as already discussed, the law is clear that without a timely objection these issues are deemed waived.

Second, there is no reported case in Minnesota where a verdict was overturned due to something said in an opening statement, though a number of decisions characterize certain "over the line" statements as inappropriate. Those decisions all denied a motion for new trial and upheld the trial court's exercise of discretion to provide or withhold a curative instruction. There is clearly a reason for these outcomes: opening statements are

presented at the threshold of a trial, but are not themselves evidence of anything, and – when contemporaneously objected to – a court can cure any prejudice by a curative instruction to remind jurors that words said to influence rather than to inform are just words and not evidence.

In *Johnson v. Washington County*, 518 N.W.2d 594 (Minn. 1994), the plaintiff's decedent was a child who drowned at a swimming beach, allegedly due to the inattention of adult supervisory personnel. Plaintiff's counsel was accused of misconduct for speaking in an inflammatory fashion that the defense urged could have inspired the jury to award "punitive" damages, where none had been allowed.[14] The Minnesota Supreme

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[14] The alleged misconduct in *Johnson* can be divided into four parts. First, in closing argument, plaintiff's counsel stated that after a supervisor told Brandon to go find his buddy, Brandon walked out into the water and drowned. Second, even though the trial court indicated prior to trial that it would not allow testimony concerning an employment termination proceeding, plaintiff's counsel questioned a witness, over repeated objections, about the proceeding. Third, plaintiff's counsel misstated the law of damages to the jury by referring to the "loss of the relationship," as opposed to the conventional formulation of loss of "aid, comfort and support." Fourth, despite the fact that punitive damages are not permitted against school districts by law, the defendant contended that plaintiff's counsel made irrelevant and prejudicial statements in closing argument designed to persuade the jury to award punitive damages. Plaintiff's counsel described individuals, parties, and actions as "indecent," "despicable," and "immoral." He further stated that a supervisor and the district "lied and lied and lied" after the accident. In addition, plaintiff's counsel spoke of the value of a first son as well as the value of a son in the Christian religion and stated that if the jury awarded the damages requested, "perhaps then there will be no more Brandon Johnson's and people might start listening to jurors who hear despicable cases like this." *Id.* at 600. Appealing to jurors on such religious grounds has been held to be improperly inflammatory, though even then a curative instruction to a contemporaneous objection may avert a new trial motion. *See Lundman v. McKown*, 530 N.W.2d 807, 831 (Minn. App. 1955), *review denied* (Minn., Jan. 22, 1996), *cert. denied,* 516 U.S. 814 (1996). The same has been held to exist for arguments that invite the jury to "send a message" by its verdict, *Jewett v. Deutsch*, 437 N.W.2d 717, 721 (Minn. App. 1989), though again the requirement is for contemporaneous objection.

Court observed, "We agree with the court of appeals that counsel's conduct came close to warranting a new trial primarily because his closing argument seemed to center on encouraging the jury to punish the district and county for outrageous and reckless conduct." *Id.* at 601. The Court observed that the "trial court judge . . . is present during the trial and is best positioned to determine whether or not an attorney's misconduct has prejudiced the jury." *Id.* The Supreme Court thus "affirm[ed] the court of appeals and h[e]ld that the trial court did not abuse its discretion in denying the . . .motion for a new trial based on attorney misconduct." *Id.*

In *Eklund v. Lund*, 301 Minn. 359, 222 N.W.2d 348 (1974), the plaintiff was hurt in a motor vehicle collision, and "counsel for plaintiffs in their opening statements made impermissible appeals to the sympathies of the jury . . . engaged in abuse and ridicule of opposing counsel during the presentation of evidence and the consideration of objections to evidence . . . impermissibly argued that the jury should be guided by the 'golden rule' . . . expressed their personal beliefs and opinions, and referred to non-admitted documentary evidence . . .." *Id.* at 360, 222 N.W.2d at 349-50. The Minnesota Supreme Court "conclude[d] that the conduct of which defendants complain . . . does not warrant reversing the appraisal of the experienced trial court" which denied a motion for new trial based on the alleged prejudicial misconduct of plaintiff's counsel. *Id.* at 360-61, 222 N.W.2d at 350.

Defendant also argues that certain unobjected-to statements in Plaintiff's closing

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Cox v. Crown CoCo, Inc., 544 N.W.2d 491, 499 (Minn. App. 1996).

argument and opening statement violated the "golden rule,"[15] citing, *Mueller v. Sigmond*, 486 N.W.2d 841 (Minn. App. 1992). In *Mueller,* during closing argument Mueller's attorney stated:

> Think, for example, what an injury like this would mean to Michael Jordan * * * or yourself * * * or anyone else that you know, how it would take them out of the game of life that they're in.

Id., at 844. Sigmond's attorney immediately objected, approached the bench, and requested a curative instruction. The trial judge acknowledged:

> I agree that the argument probably did cross the line of that which is permissible, however I don't know that it's necessary to have a curative instruction under the circumstances, based on my instructions on the issue of damages.

Id. Despite what was seen by the court and opposing counsel as a clear violation the golden rule and a refusal by the judge to provide curative instruction the appellate court held "the trial court's decision was a permissible exercise of discretion" because Mueller's comment was not "so prejudicial" as to cause a "miscarriage of justice."[16] *Id.*

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[15] See Defendant's Memorandum at 17 indicating "when we drop our kids off at these daycares" violated the golden rule.

[16] The *Mueller* court further stated:

> "When an objection is made and the trial court issues a curative instruction, a new trial is unnecessary unless the misconduct is 'extremely prejudicial.' *Id.* Issuance of a cautionary instruction is discretionary and should not be reversed unless the misconduct is 'so prejudicial that it would be a miscarriage of justice to permit the result to stand.' . . . Although the trial court refused Sigmond's request for an immediate curative instruction, he later instructed the jury to 'do your duty as jurors regardless of any personal likes or dislikes, opinions, prejudices or sympathy.' In these circumstances,

Thus, even when misconduct does occur, and garners a contemporaneous objection and the request for a curative instruction, a trial court may rely on the context of her instructions as a whole, rather than give serial curative instructions.

Here, the Defendant did not object to the statements of which it now complains, nor did the Court *sua sponte*, in its own discretion, determine any argument or statement crossed the line, so Defendant cannot now object for the first time in post-trial motions as the time to object has passed. Second, the cases cited by Defendant all involved statements in opening or closing that were actually *objected* to by the opposing party and arguably went "over the line." In those cases, the trial court deemed that the conduct did not warrant a new trial. Here – as it promised the Court it would at a post-trial scheduling conference – Defendant "fly-specked" the transcript to mine for isolated remarks that might be taken as possible error. Frankly, the defense took numerous statements made by Plaintiff's counsel out of context and exaggerated the nature of those statements, and then speculated about how these may have influenced the jury. Respectfully, this is not the standard by which post-trial motions are to be assessed. Instead of an analysis of the record to see if the verdict is supported or if prejudice resulted, the effort here is instead is to try to build a mountain from a mole hill, when no one saw fit to even comment about a given matter at the time.

Defendant has not and simply cannot meet its burden of proving that any

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the instruction was sufficient to remove any possible prejudice."

Id. (internal citation omitted).

unobjected-to comment made by Plaintiff in opening or closing, resulted in any prejudice. As such, "misconduct" of counsel as a basis for new trial must be denied under the long-standing common law rules of post-trial review.

II. DEFENDANT' S MOTION FOR A NEW TRIAL SHOULD BE DENIED, AS THE VERDICT IS CLEARLY SUPPORTED BY THE EVIDENCE.

A. Standard of Review for the Grant of New Trial Looks for Prejudice

Motions for a new trial "should be granted cautiously and sparingly and only in the furtherance of substantial justice." *Leuba v. Bailey*, 251 Minn. 193, 208, 88 N.W.2d 73, 83 (1957).

The primary consideration in granting a new trial is prejudice. *Boland v. Morrill,* 132 N.W.2d 711, 720 (1965). A new trial rests in the discretion of the trial court, which will exercise its discretion to prevent a miscarriage of justice. *Meagher v. Kavli,* 97 N.W.2d 370, 376 (1959). "A trial court will not be reversed unless its failure to declare a mistrial or to grant a new trial constituted a clear abuse of discretion." *Eklund v. Lund,* 301 Minn. 359, 362, 222 N.W.2d 348, 351 (1974), *citing Reese v. Ross & Ross Auctioneers, Inc.*, 276 Minn. 67, 149 N.W.2d 16 (1967); *Colgan v. Raymond,* 275 Minn. 219, 146 N.W.2d 530 (1966); *Harris v. Breezy Point Lodge, Inc.*, 238 Minn. 322, 56 N.W.2d 655 (1953).

The complaining party has the burden to demonstrate both that the court erred and that prejudice resulted. *See Jenson v. Touche Ross & Co.,* 335 N.W.2d 720, 725 (Minn. 1983), *Bloom v. Hydrotherm, Inc.,* 499 N.W.2d 842. 845 (Minn. App. 1993). "A new

trial is not warranted unless the misconduct of counsel clearly resulted in prejudice to the losing party." *Sather v. Snedigar*, 372 N.W.2d 836, 839 (Minn. App. 1985). [17] "Misconduct of counsel does not warrant a new trial unless the misconduct clearly resulted in prejudice to the losing party." *Eklund v. Lund*, 301 Minn. 359, 362, 222 N.W.2d 348, 350 (1974).

The evidence fully supported an award well in excess of what was actually awarded. In fact, Plaintiff's counsel asked the jury for $22,505,000. Though the jury clearly believed Plaintiff's version of the damages, they also cut the damages back to what they felt was a reasonable sum which was almost $9 million less than requested by Plaintiffs. This fact alone demonstrates that the jury was not swept away in a tide of passion or prejudice.

B. The Trial Court is Vested with Substantial Discretion, but Generally Advocates are Permitted to Land "Hard Blows"

In this regard, whether to "grant a new trial because of attorney misconduct is not governed by fixed rules, but instead rests wholly within the discretion of the [district] court." *Johnson v. Washington County*, 518 N.W.2d 594, 600 (Minn. 1994). As the Minnesota Supreme Court stated in *Connolly v. Nicollet Hotel*, 258 Minn. 405,

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[17] It is to be remembered that a new trial for the misconduct of counsel is never granted as a "disciplinary measure but only to prevent a miscarriage of justice." *Nelson v. Twin City Motor Bus Co.*, 239 Minn. 276, 282-83, 58 N.W.2d 561, 565 (1953). The purpose of a new trial is "not to punish counsel, but to cure prejudice." *Sather*, 372 N.W.2d at 839; *see also, Eklund*, 301 Minn. at 362, 222 N.W.2d at 350 ("The purpose of a new trial, however, is not to punish such professional lapses but to obviate prejudice.").

104N.W.2d 721 (1960):

> [I]t is elementary that counsel when arguing to the jury is entitled to present his client's case forcefully and fairly, and that his efforts are not to be crippled by compelling him to run a course of technical hazards either when he draws factual inferences from conflicting evidence or when he applies the law to the facts as he, as an advocate, sees them. Although he may not strike foul blows, he may strike hard blows which are not always technically correct. No precise rule can therefore be laid down defining the scope of legitimate argument in summing up a case before a jury. We have recognized that of necessity much latitude must be allowed to counsel. He is rarely limited to the immediate issues in the case but entitled to much latitude in that respect.

Id. at 419-20, 104 N.W.2d at 732. There may have been "hard blows" exchanged by each side, but the court in the exercise of its supervisory authority, saw to it that no "foul blows" were allowed.

III. THE MOTION FOR NEW TRIAL SHOULD BE DENIED AS THE VERDICT IS WHOLLY SUPPORTED BY THE EVIDENCE AND WAS NOT EXCESSIVE.

A. The Jury was Properly Instructed.

The jury was instructed to award damages only when the Plaintiff proves "the nature, extent, duration and consequences of his injury" and that they "must not decide damages based on speculation or guess." Civil Jury Instruction 90.15.

B. Movant Must Show Prejudice to Merit Re-Trial.

For an award of damages to be "excessive" under Minnesota law, it "must so greatly exceed what is adequate as to be accountable on no other basis than passion and prejudice." *Kinikin v. Heupel,* 305 N.W.2d 589, 596 (Minn. 1981); *see also DeWitt v. Schuhbauer,* 177 N.W.2d 790, 795 (Minn. 1970).

Speculation that passion or prejudice existed is not sufficient to warrant a new trial. *See Vadnais v. American Family Mut. Ins. Co.,* 309 Minn. 97, 101, 243 N.W.2d 45, 47 (1976). A verdict should only be set aside by the trial court as excessive if it "shocks the conscience". *Verhel v. Ind. School Dist. No. 709,* 359 N.W.2d 579, 591 (Minn. 1984) *citing DeWitt v. Schuhbauer,* 287 Minn. 279, 286, 177 N.W.2d 790, 795 (1970).

Defendant has not shown any prejudice.

C. If There Is Any Evidence To Support The Verdict, the Highest Sustainable Award Must Be Upheld.

If there is "any evidence to support the verdict," it must be sustained. *Buck v. Buck,* 287 Minn. 122 Minn. 463, 469, 142 N.W. 729, 731 (1913). To determine that an award of damages is excessive as a matter of law, the trial court must determine "whether the verdict is within the bounds of the highest sustainable award under the evidence." *McPherson v. Buege,* 360 N.W.2d 344, 347 (Minn. App. 1984); *see also Dallum v. Farmers Union Cent. Exchange, Inc.,* 462 N.W.2d 608, 614 (Minn. App. 1990).

New Horizon's arguments are directed at the jury's award for future pain and suffering. As the jury instructions noted, there is no fixed standard for the jury to follow in assessing damages for pain and suffering.

New Horizon's attempt in post-trial motions to minimize the impact of J.K.'s injuries does not comport with the Court's obligation to view the evidence in the light most favorable to the award.[18] In this case, the jury received evidence that J.K. suffered

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[18] See *Kennedy v. Soo Line Railroad Co*, Order on Post-Trial Motions from the Honorable Ivy Bernhardson dated 10/24/13, in which this Court denied a motion for new trial where

from permanent PTSD(493:5-15)(955:17-23)(996:4-16), that he would require treatment for the rest of his life (993:9-13), that he would have triggering events which would remind of the event and be psychologically troubling (493:17-496:22), that he would require medication to some degree for the rest of his life (993:9-13), that he would be more prone to significant risks of things such as prison (961:8-13), being hospitalized (961:2-7), becoming an abuser himself (960:17-25), problems with drugs and alcohol (582:18-22), problems with relationships socially and occupationally (963:8-16) and that he had an increased risk of committing suicide. (958:8-20). The evidence was overwhelming that J.K. would experience the effects of the damage for the rest of his life, which the life expectancy tables had estimated to be another 67 years.

The jury received evidence that J.K.'s PTSD curtailed his ability to have normal childhood and adult life in general and clearly believe that evidence. The jury received evidence that, to a reasonable degree of medical certainty, J.K. would require $2.5 million in future care (993:9-13), and awarded that amount. The jury received evidence that, as a result of the January 23, 2008 incident, J.K. suffers and will continue to suffer for the rest of his life from significant, psychological issues and regular triggering events that cause him significant emotional distress.

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similar arguments were made by a defendant who lost the trial and the jury awarded over $3,646,277 with $2,300,000 being for pain and suffering. Defendant argued the same evidence it argued at trial for support the jury award was not justified by the evidence. This Court stated unequivocally, **"[t]he trial court must determine whether the verdict is within the bounds of the highest sustainable award under the evidence."** *Id.* at 17 (emphasis added). For that reason, the Court denied remittitur in that case. *Id.* at 18. See Order Denying a New Trial and Remittitur, attached as Exhibit A of Fluegel Affidavit.

The jury's valuation of past and future pain, disability, embarrassment and emotional distress in this case clearly does not "shock the conscience." In fact, this number is just over one-half of what Plaintiff's counsel requested to be awarded (225:13-14 – requesting the jury to award $22,505,000 and 1433:4 stating "$20,000,000 is the number" – referring to the total requested award for past and future general damages).

In this case, the evidence supported the jury's verdict for past and future pain, embarrassment and emotional distress. There are numerous emotional problems that Plaintiff is dealing with and both a psychologist and psychiatrist testified he had permanent PTSD. The jury undoubtedly found by a preponderance of the evidence that the problems were more likely than not caused by the incident at Kid's Quest where J.K. was beaten, strangled and raped, and rejected the Defendant's polarized view of the evidence.

The mere fact that the jury rejected the Defendant's theory of the case does not negate the verdict. The issue is not whether the jury *could* have found for the Defendant, but whether they could have found for the *Plaintiff*, and in undertaking the proper inquiry, the court "must view the verdict in light of the presumption that the jury obeyed their instructions." *Flatum v. Lampert Lumber Co.*, 215 N.W.2d 783, 785 n. 3 (Minn. 1994). Here, the instructions admonished the jury to weigh the nature, extent, duration and consequences of the injuries. For purposes of this motion, the jury is presumed to have fulfilled those instructions.

When different persons could reasonably draw different conclusions about the

evidence, the verdict should not be disturbed. *Ranwick v. Nunan,* 202 Minn. 415, 278 N.W. 589 (1938). The evidence here supports the jury's findings and there is no need for a new trial.

D. The Pain And Suffering Verdict Is Consistent With Cases Of Serious Sexual Abuse.

The justification for each jury award must be examined in light of the facts unique to each individual case, and obviously no two cases are exactly alike, so comparisons to other verdicts are – however alluringly reassuring – an inexact tool for the judicial task. Nonetheless, the $11,000,000 awarded to the Plaintiff here for past and future pain, disability, embarrassment and emotional distress is also not out of line in comparison to other sexual abuse cases.

For instance, in a recent case from Florida called *Jane Doe v. Delarosa and Essentials Massage and Facial of New Tampa,* a jury awarded $2,000,000 in past compensatory damages and $10,000,000[19] in future compensatory damages for a 33-year old woman who visited this massage therapist and while laying face down on the table and getting a massage from the therapist digitally penetrated her. The jury verdict form from this case is attached at Exhibit B to Fluegel Affidavit. Doe left the session and went to the hospital later that evening and reported the incident to the sheriff's office. Doe suffered severe post-traumatic stress disorder, which has affected all of her relationships,

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[19] The jury also awarded $35,000,000 in punitive damages. See Exhibit B, attached to Fluegel Affidavit

particularly those with men. She required ongoing psychological counseling. Her past medical expenses totaled $8,700 and her future therapy related expenses were estimated at $412,000.

Clearly, our case involved more significant damages with sustained treatment, numerous instances of behavioral difficulties and triggering events since the assault, a longer life expectancy, and included a violent beating, strangulation and actual rape. All of our facts support a much larger award of general damages than the $12,000,000 in *Doe*.

Another comparison may be drawn from the Minnesota jury that awarded $15,000,000 in compensatory damages to a child who was molested by his grandfather when he was eight years old. This pain and suffering award was upheld by the trial court, but a further award for future medical expenses was reduced, because the trial court determined the plaintiff in that case had failed to introduce evidence of future medical expenses in the amount awarded by the jury. *David O'Dehn, a minor, by Martin and Emilee O'Dehn*, 2005 WL 5490146(October 10, 2005) (upholding a $15,000,000 verdict for past and future pain suffering and disability in a sexual abuse case).[20]

Not surprisingly, similar arguments to those advanced by the defense in our case were made post-trial by defendant in the *O'Dehn* case in moving for a new trial. That case also included a failure to timely object by the defense. The Court denied the motion

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[20] A copy of this decision is attached as Exhibit C of Fluegel Affidavit.

for a new trial stating:

> The Court does not find that there was any misconduct by plaintiff's counsel that warrants a new trial. Even without any objection, the Court did give an instruction to the jury to disregard any inappropriate remarks by counsel. Under the doctrine announced in *Town of Wells v. Sullivan,* the jurors are presumed to follow instructions. 147 N.W. 244, 245 (Minn. 1914). In *Randall v. Goodrich-Gamble,* the instruction to decide a case on the law and evidence removed prejudice. 70 N.W.2d 261, 266 (Minn.1955). Therefore, any claims of prejudice were cured by the Court's instructions to the jury.

Id. at *4-5.[21] Importantly, the *O'Dehn* court also noted that the fact the jury rejected defendant's theory of the case did not negate or impugn its verdict, saying that it is not for any court to speculate as to the possible thought process of the jury. *Id.* at *6. The court upheld the award in *O'Dehn* stating that "$15,000,000 awarded for past and future pain, embarrassment and emotional distress is not out of line in comparison with other sexual

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[21] In discussing the failure to timely object as being fatal to a post-trial objection without even getting to the merits the court also observed:

> Furthermore, as previously stated, the Defendant did not object at trial. This lack of objection at trial waives any objection or error relating to Plaintiff's counsel closing arguments. In *Schwartz v. Consolidated Freightways Corp.,* the Court ruled that failure to request curative instruction for closing argument waives later claim. 237 N.W.2d 385, 386 (1975). *See also, Bisbee v. Ruppert,* 235 N.W.2d 364 (Minn. 1975) (failure to object usually waives the error unless too serious to remedy). In *State v. Morgan,* the court stated: This failure to object deprives the trial court of an opportunity to either give the jury a curative instruction, or, if the argument is sufficiently egregious, to declare a mistrial. We find this reluctance to object to closing argument unfortunate in light of the trial court being the appropriate forum for remedying these very serious errors. *State v. Morgan,* 477 N.W.2d 527, 531 (Minn. Ct. App. 1991).

Id. at *5.

abuse cases" and proceeded to give several examples which are listed in the margin here.[22]

Plaintiff has done some additional research on the issue of awards in sexual abuse cases and has found the following:

a. *Vai v. Deluca and St. Elizabeth Archdiocese*, Delaware verdict was for $33 million dollars total, $30,000,000 versus the priest and $3,000,000 versus the parish.

b. *Susana v. Father Neil Doherty*, Florida verdict against the Roman Catholic Priest for abusing one child – $100 million, $10 million in compensatory damages and $90 million in punitive damages.

c. Vermont case involving a woman suing Scott Issaacson, for sexually abusing her between the ages of 3 and 9 while she was on skiing trips. This was a $35 million dollar verdict, with $20 million in compensatory damages and $15 million in punitive damages.

d. *Doe v. Hepp and Boy Scouts of America*, Connecticut verdict for $7,000,000 (all compensatory) against the organization for a boy abused by the New Fairfield Boy Scouts troop leader, Siegfried Hepp.

e. *Conti v Jehovah Witnesses*, Northern California sexual abuse case in which the jury awarded $28 million to a woman who was abused by an adult

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[22] *See William S. v. Bonita Unified School Dist and Jack R. Kelly, Jr.*, 1999 WL 33498254 (Cal. Superior, March 29, 1999)($10,680,000 award to 13 year old boy); *Becarra, Ind. & A/N/F of Juan Doe v. Jerry Asher Houston Ind. School Dist.*, 33348971 (S.D. Texas, March 2, 1997)($45,500,000 verdict to two victims of sexual abuse); *Smith v. Smith*, Co. 02-L-414, 2004 WL 2715220 (Ill. Cir. September 30, 2004)($4,000,000 compensatory and $2,000,000 in punitive damages awarded to girl sexually abused by her father) *Pope v. Pope, et. al.*, 2003 WL 22410404 (Mo. Cir., September 18, 2003)($5,000,000 awarded to woman sexually abused by adopted father); *Fritz v. Clifford Scofield and Anaheim union High School Dist.*, 1999 WL 33498727 (Cal. Superior, August 26, 1999) ($3,050,000 damages awarded to student); *Jones v. Blome, et. al.*, 1998 WL 2023980 (Tex. Dist. September 28, 1998) ($3,500,000 noneconomic damages awarded to eight year-old sexual abuse victim).

member of the church, $7million in compensatory damages and $21 million in punitive damages.

f. *Doe v. Rudy Kos* cases, Texas sexual abuse case in which a priest, Rudy Kos was alleged to have molested 11 different victims in the late 90's resulting in a $119 million verdict for approximately 11 victims; $101 million in compensatory damages and $18 million in punitive damages resulting in a compensatory award of over $9 million per victim.

g. *Snyder v. Kenny*, Illinois verdict of $28 million in a case against a family friend who abused Snyder when he was young, $7 million in compensatory damages and $21 million in punitive damages.[23]

These verdicts all support large compensatory awards in cases of sexual abuse. Many of these verdicts did not involve victims who were also subjected to extreme violence in addition to sexual assault, as is the case here. Additionally, in most of these cases, the plaintiffs did not immediately report the incident or receive immediate treatment for what occurred and instead had to prove sometimes decades later that not only had the abuse occurred, but that it caused the significant psychological problems the child was now experiencing. In other words, these cases had far more attenuated causation then our case did.

While each side may point to higher or lower verdicts, the salient point is that the facts of each individual case must govern the soundness of each individual jury's assessment. Individual exemplar verdicts may afford indirect reassurance of what may be deemed "reasonable," but the facts of our case must determine the reasonableness of the jury's assessment here.

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[23] These verdicts and numerous articles reporting on them are readily available on the internet, and summaries are attached as Exhibit D of Fluegel Affidavit.

Given a tighter causation time line, the accompanying violence, and the betrayal of trust to an exceptionally young plaintiff, and viewing the evidence "in a light most favorable to the verdict," as opposed to being "fly-specked" against it, our jury's award is a very rational and justifiable one.

E. Remittitur Is Inappropriate.

The Defense here also moved for remittitur. The Court is given great deference when considering remittitur because of its close involvement with the trial. *Sorenson v. Kruse,* 293 N.W.2d 56, 62-63 (Minn. 1980); *Kamrath v. Suburban Nat'l Bank,* 363 N.W.2d 108, 112 (Minn. App. 1985).

When considering whether to remit, the Court should consider the greatest amount of damages a reasonable jury could have returned based on the facts presented. *Sandt v. Hylem,* 301 Minn. 475, 477, 224 N.W.2d 342, 343 (1974); *McPherson v. Buege,* 360 N.W.2d 344, 347 (Minn. App. 1984).

Defendant primarily objects to the damages award on the asserted ground that the evidence fails to support the award. First, Defendant argues that the medical plan was not supported by the evidence. However, Defendant never objected to the introduction of the medical plan at trial. Defendant engaged in a spirited cross exam of Plaintiff's medical experts regarding the plan but the jury clearly rejected Defendant's arguments and awarded exactly what Plaintiff requested.

Second, with regard to past and future general damages, Defendant made numerous arguments at trial as to why those numbers should only garner a minimal

award. The jury clearly rejected those arguments. Defendant's arguments in post-trial motion cast forth the same seeds before the Court that failed to find purchase with the jury in an effort to "re-try" to the court the premises that were within the jury's prerogative to reject.

The common law test is not "if you believe the defense then the verdict would be less," but rather is: what is the very most that the jury could properly award if they believed the plaintiff.

Defendant's assertion that the jury verdict award for general damages was not supported by the record is confounding in light of the evidence. Plaintiff's experts confirmed J.K. had permanent PTSD, that his "brain is broken," that he will experience triggering events that will affect him in his life in the future and that this condition will have lifelong consequences. Numerous witnesses from Katie Kimball to her family members to his teachers all testified as to continued problems in behaviors that Plaintiff's experts related to the New Horizon's incident. The invitation for this Court to re-weigh the evidence and substitute its own judgment for that of the jury should be rejected. The jury system is integral to justice and its voice should be respected.

IV. THE MOTION FOR A NEW TRIAL BASED ON EVIDENTIARY RULINGS SHOULD BE DENIED.

A. The Court's Exercise of Discretion On Evidentiary Rulings Was Justified.

The Defense also raises certain evidentiary objections as the basis for new trial. Before an evidentiary error may be grounds for a new trial, it must appear that the

inclusion or exclusion of the evidence in question might reasonably have changed the result of the trial. *Cloverdale Foods of Minn., Inc., v. Pioneer Snacks*, 580 N.W.2d 46, 51 (Minn. App. 1998). No evidence of that is offered by the defense here.

"The sufficiency of evidence to establish a foundation is discretionary with the trial court, and his decision will not be reversed if there is any evidence fairly tending to support it." *Schmidt v. Riemenschneider*, 196 Minn. 612, 615, 265 N.W.816, 817 (1936).

As to expert testimony, when an expert is qualified and the expert's opinion has a relevant basis, the jury decides the credibility and weight of the testimony. *Behlke v. ConwedCorp.*, 474 N.W.2d 351, 357 (Minn. App. 1991). Any alleged deficiencies in the factual basis of an expert opinion "go more to the weight of the expert's testimony than its admissibility." *McPherson v. Buege*, 360 N.W.2d 344, 348 (Minn. App. 1984). The reliability of expert opinion testimony with regard to the existence or cause of a psychological or other medical condition goes not to the admissibility of the testimony, but to the weight it should be given. *State v. Langley*, 354 N.W.2d 389, 401 (Minn. 1984). A party is free to "test the expert's testimony through cross-examination and, when appropriate, presentation of his own expert witnesses." *State v. Meyers*, 359 N.W.2d 604, 611 (Minn. 1984).

The admissibility of the opinions were previously argued by the parties in pre-trial motions *in limine*. After a thorough discussion of the law and applying it to the facts of the case, this Court ruled that the opinions were admissible, stating:

The dispute is not about whether there was consensual sex or whether J.K.

> responded in s manner that is consistent with what a jury might otherwise expect. Rather the dispute is just about the medical evidence and whether it seems to indicate that there was an assault of the nature in question. The Court does not believe that the same concerns of prejudice are present here.

See Order on Motions *in Limine* dated 1/5/15 at 15. It should be noted Defendant was permitted to argue and have its experts testify to that J.K. was not raped or that the evidence did not permit such an inference to be drawn. It is hard to envision prejudice arising from a direct and vigorous contest of opposing expert opinions.

The Defendant's objection is really more with which conclusion a jury should draw, than it is to the admissibility of the conflicting expert opinions. The jury simply did not accept Defendant's version of the facts on this issue as the evidence was overwhelming that J.K. was raped. Rather than reiterate the arguments set forth in the Motions *in Limine*, Plaintiffs stand by that previously provided. Under the law, the Court properly admitted this testimony and clearly did not abuse its discretion in permitting this testimony to go to the jury.

B. Plaintiff's Experts Were Qualified To Opine about J.K.'s PTSD.

Defendant also argues that the Court erred in permitting the testimony of Dr. Jensen and Ms. Mitnick that J.K. had permanent PTSD.

During the trial, significant foundation was laid for the admissibility of those opinions. Numerous articles (469-74) and the DSM V (463) were discussed which provided further support for this testimony. It is routine that medical experts are permitted to testify that injuries or conditions are not only caused by a given trauma but

to comment about whether these injuries or conditions are permanent in nature. *See, e.g., Derrick v. St. Paul City Ry.*, 252 Minn. 102, 108, 89 N.W.2d 629, 634 (1958) ("opinion of a medical expert . . . meet[s] the requirement"); *Renswick v. Wenzel*, 819 N.W.2d 198, 205 (Minn. App. 2012) ("expert medical-testimony is not the only means to prove . . . permanent injury."); *Peterson v. Kidd*, 400 N.W.2d 413, 415 (Minn. App. 1987) (jury is free to resolve conflicting expert testimony on the issue of permanent injury); *Mom's v Littler*, 399 N.W.2d 673, 677 (Minn. App. 1987) (jury was free to resolve conflicting testimony of six experts on the issue of permanent injury); *Rud v. Flood*, 385 N.W.2d 357, 360-61 (Minn. App. 1986)(circumstantial evidence and cross-examination may be sufficient to prove the issue of permanent injury).

Clearly these two experts not only had the foundation to testify about the condition at issue, but whether it was permanent in this case. Importantly, Defendant's expert was permitted to opine that J.K. did *not* have PTSD and only had an adjustment disorder, so again, any prejudice is illusory. Ultimately, the jury chose not to accept Defendant's theory that J.K. did not have PTSD. The Court properly admitted this testimony and clearly did not abuse its discretion in permitting this testimony to go to the jury.

V. DEFENDANT STIPULATED THAT IT WOULD PAY WHATEVER THE JURY DETERMINED THE DAMAGES TO BE.

The thrust of Defendant's post-trial argument is that Plaintiff's choice of words at certain isolated points in a two week trial effectively seduced susceptible jurors to act impulsively, based on misrepresentations inserted into the trial by overzealous advocacy.

It is evident, however, that a more basic "misrepresentation" came from the defense in the stipulation they asked be read to the jurors at the outset of trial: that Kids Quest would pay any verdict set by the factfinder. Their post-trial motions disprove that earlier representation to the jury.

In the Court's opening instructions the following stipulation about the case was read to the jury:

> On January 23, 2008, Plaintiff Jace Kimball, age three, was left in the care, custody and control of the Kids Quest drop-in daycare facility operated by Defendant and located on the premises of the Grand Casino Mille Lacs in Mille Lacs, Minnesota. While he was there, Jace was assaulted by another male child at the daycare center, who was nine years old. Kids Quest admits that it owed a duty to Jace Kimball, and that it was solely responsible for his supervision, safety and security while he was in their daycare facility, and that it was negligent and failed to fulfill those obligations to Jace on January 23, 2008. **Kids Quest has accepted responsibility to pay for all of the damages that the jury in this case finds to be sustained by Jace Kimball as a result of the incident or incidences that occurred while he was at the Kids Quest facility in Mille Lacs, Minnesota on January 23, 2008.** However, Kids Quest disputes the nature and extent of Jace's injuries and the damages arising from the incidents.

(Tr. 31:21-25, 32:1-15) (emphasis added).

"[C]ase law defines a stipulation as an agreement, admission or concession made in a judicial proceeding by the parties thereto or their attorneys, in respect to some matter incident thereto, for the purpose, ordinarily, of avoiding delay, trouble and expense." *State v. Virgo*, 947 P.2d 923, 927 (Ariz. App. 1997). In Minnesota as well, the "rule [is] that a stipulation is binding until set aside." *Lappinen v. Union Ore Co.*, 224 Minn. 395, 408, 29 N.W.2d 8, 18 (1947), *cited in Graff v. Robert M. Swendra Agency Inc.*, 800

N.W.2d 112, 123 (Minn. 2011) (a "stipulation is binding upon both parties at trial and on appeal."); *see also Casey v. Northern States Power Co.*, 247 Minn. 295, 306, 77 N.W.2d 67, 74 (Minn. 1956) ("A stipulation is binding until set aside."); *Abendroth v. National Farmers Union Property & Cas. Co.*, 363 N.W.2d 785, 787 (Minn. App. 1985) ("Parties may stipulate as to the evidence which will be considered by the trier of fact, and the stipulation is binding on a trial and appellate court as long as it remains in effect.").

The most fundamental misrepresentation one can make is to say "I accept responsibility" and then to refuse to accept accountability. Not only is this attitude unpalatable, but it often invites an uncharitable response by those assigned to sit in judgment.

More than any "misconduct" by Plaintiff, the duplicitous attitude projected by the defense accounts for what it now characterizes as a reprisal or prejudice from the jurors. The starting premise of Kids Quest purportedly was "we accept fault," yet their actual approach was just the opposite. They disavowed even the occurrence of the rape for which they purportedly had conceded responsibility, and argued no harm resulted to the child.

Such a hollow apology, once understood by an intelligent factfinder, may well echo with telling effect. The stipulation – while unlikely to legally "estop" these post-trial motions – is a striking reminder that in law as well as in life, we reap what we sow. The outcome by the jury here is far more evidently a justified rebuke by the jurors of the defense philosophy in offering up a hollow apology than it is anything else: a rebuke fully

supported by the evidence.

The Defendant agreed to accept responsibility to pay for the damages that the jury found to be sustained by Jace Kimball as a result of the incident occurring on January 23, 2008. The jury has now spoken and yet Defendant is still reticent to hear the jury's message. The Court should plainly pronounce it and affirm the verdict in all respects.

CONCLUSION

For the above stated reasons, Defendant's post-trial motions should be denied in all respects.

Respectfully submitted,

Dated: 6-2-15

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