STATE OF MINNESOTA COUNTY OF HENNEPIN	DISTRICT COURT FOURTH JUDICIAL DISTRICT
J.K., a minor, by and through K. Kimball, as parent and natural guardian, Plaintiff, v. New Horizon Kids Quest, Inc., Defendant.	Case Type: Personal Injury Court File No. 27-CV-12-9958 Hon. Ivy S. Bernhardson **ORDER FOR NEW TRIAL**

This matter came before the undersigned Judge of District Court on Defendant's motion for a new trial on June 15, 2015, in Courtroom 657, Hennepin County Government Center, 300 South 6th Street, Minneapolis, Minnesota.

Wilbur W. Fluegel, Esq., appeared on behalf of Plaintiff. Charles D. Slane, Esq. and Richard A. Ruohonen, Esq. TSR Injury Law, also appeared on behalf of Plaintiff. Plaintiff's parent and guardian was also present.

Daniel A. Haws, Esq. HKM, P.A., appeared on behalf of Defendant. Skip Durocher, Esq., Dorsey & Whitney LLP, also appeared on behalf of Defendant. Corporate officers of Defendant were also present.

Based upon the files, records and proceedings herein, including the arguments of counsel, the Court enters the following:

ORDER

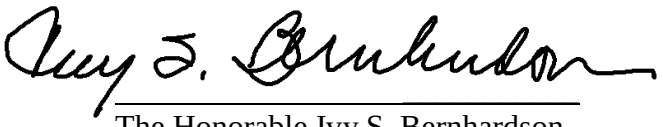
1. Defendant's motion for a new trial is **granted**.

2. The April 30, 2015 Order including Findings of Fact and Conclusions of Law based on the special jury verdict is hereby **vacated**.

3. This matter is set for a jury trial commencing at 9:00 a.m. on October 26, 2015.

4. The memorandum that follows is incorporated herein.

BY THE COURT:



Dated: September 8, 2015

The Honorable Ivy S. Bernhardson
Judge of District Court

MEMORANDUM

A nine-year-old boy assaulted Plaintiff J.K., then three years old, at a daycare facility which was owned and operated by Defendant New Horizons Kids Quest ("NHKQ") on January 23, 2008. NHKQ stipulated in advance of the trial that it was negligent in the care and supervision of Plaintiff on the date of the assault.

This matter came before this Court for a two-week jury trial on the issue of damages only starting January 20, 2015. Due to a variety of factors, including the age of the victim, there were differing views as to the nature of the assault that led to the damages. Plaintiff contended that the victim was physically and sexually assaulted and had substantial psychological damages. Defendant's position was that both that the assault was likely just physical, and non-sexual in nature, and that, in any case, J.K's actual damages were less than Plaintiff claimed. The jury retired to deliberate on Friday, January 30, 2015. After less than three hours of deliberation, they awarded Plaintiff J.K. $13,532,032.94 in total damages.

Before this Court is Defendant's motion for a new trial under Minn. R. Civ. P. 59.01. This follows Defendant's motion for a mistrial immediately after Defendant's counsel's opening statement in the case (outside of the jury's presence). The Court reflected briefly on that motion and denied the motion. However, upon further reflection and consideration, including a review of

the trial transcript, the Court concludes that it would be a grave injustice to Defendant if the Court denied the motion for a new trial. Statements made by Plaintiff's counsel during the trial, particularly those during their opening statement, clouded the jury's perspective and ability to consider all the evidence, and had a prejudicial effect on the jury's consideration of the entire matter, warranting a new trial.

LEGAL STANDARD

Under Minnesota law, the Court may grant a new trial in cases where certain irregularities or events may have resulted in prejudice or other reasons to doubt the validity of the proceeding. *See*, Minn. R. Civ. P. 59.01. However, "[t]he primary consideration in determining whether to grant a new trial [in cases involving attorney misconduct] is prejudice." *Wild v. Rarig*, 234 N.W.2d 775, 786 (Minn. 1975) (citing *Boland v. Morrilll*, 132 N.W.2d 711 (Minn. 1965)). One reason to permit a retrial occurs where there the prevailing party's attorney engaged in misconduct. Minn. R. Civ. P. 59.01(b). The determination of whether or not to grant a new trial because of attorney misconduct is not governed by fixed rules, but instead rests wholly within the discretion of the trial court. *Johnson v. Washington County*, 518 N.W.2d 594, 600 (Minn. 1994) (citing *Wild*, 234 N.W.2d at 785). Single events may not be enough to warrant a new trial, but one should be granted in order to prevent a miscarriage of justice. *Meagher v. Kavli*, 97 N.W.2d 370, 376 (Minn. 1959) (upholding trial court denial of new trial where appellant cited one errant remark (which was accompanied by a corrective instruction) as grounds for a new trial).

A new trial may also be granted where there are excessive damages which appear to have been given "under the influence of passion or prejudice." Minn. R. Civ. P. 59.01(e). In determining whether a verdict is excessive, the trial judge is better able to consider all the evidence, the demeanor of the parties, and the circumstances of the trial. *Caspersen v. Webber*, 213 N.W.2d 327, 331 (Minn. 1973). A verdict should be set aside if it "shocks the conscience." *Verhal v. Independent Sch. Dist. No. 709*, 359 N.W.2d 579 (Minn. 1984).

ANALYSIS

Trial lawyers feel the push and pull of their multiple duties. They are told that zealous representation of their client is required, but also warned that going too far is forbidden. And in addition to their client, they must strive to be fair to the Court, to adverse counsel, and to the interests of justice as a whole. This is no small task, particularly because of the fact that the attorneys' trade often deals with some of the most upsetting and difficult instances of human conduct. This Court appreciates that this can be straining on all counsel, especially in situations such as the case at bar.

However, the Court believes that Plaintiff's counsel went beyond the bounds of zealous representation in the pursuit of this matter too many times. The statements and arguments at trial resulted in prejudice to the entire proceedings, a fact which requires a new trial. Such prejudice resulted from arguments regarding negligence and references to settlement negotiations. Additionally, Plaintiff's counsel made several arguments which inflamed the passion or prejudice of the jury, resulting in inflated damages.

1) Plaintiff's counsel engaged in attorney misconduct

Turning first to the issue of misconduct, the Court finds the case of *Hanskett v. Broughton*, 195 N.W. 794 (Minn. 1923) to be instructive.[1] In that case, the Minnesota Supreme Court ordered a new trial where plaintiff's counsel used prejudicial tactics. *Id*. at 84. *Hanskett* concerned liability for an automobile accident where one party was intoxicated and admitted negligence accordingly.[2] *Id*. In spite of this admission, plaintiff's counsel opened his argument by stating that the defendant was "to some extent under the influence of intoxicating liquor." *Id*. He returned to this argument multiple times, and was allowed to do so by the trial judge. *Id*. at 85-86.

The Supreme Court of Minnesota declared that there was prejudicial error in the failure to correct the misconduct, requiring a new trial. *Id*. at 85. The Court found that prejudice had been injected into the case by the plaintiff's attorney due to the "general and righteously angry attitude of the public against drunken automobilists." *Id*.

In the instant case, we are wading into similar territory. It is plainly clear that any form of child assault or abuse, especially of a sexual nature, is at the bottom of favorability rankings in the community, and rightly so. Plaintiff's counsel made use of this fact in their argument at trial, taking several opportunities to focus on the alleged bad acts of Defendant. Indeed, during initial briefing and argument concerning the admission of liability, Plaintiff argued that they were entitled to put evidence of such bad acts on the record irrespective of the admission of liability by Defendant. The Court forbade this strategy, as evidence of bad acts could only be used as a

[1] This Court also found this case instructive when it first ruled on the exclusion of evidence relating to negligence in a separate order in this case.

[2] It appears that the initial admission of liability was qualified; defendant's answer indicated that the plaintiff did not have the right-of-way. However, by the time the case went to trial, all parties adopted the assumption that the issue of negligence was largely resolved by the admission. *Id*. at 84-85 (noting that any argument concerning contributory negligence was "scant at best").

method to punish Defendant. Since this Court already had ruled that punitive damages were not available in this case, such a strategy was improper.

a) Plaintiff introduced prejudice to the proceedings by making arguments on negligence and punitive measures where such conduct was forbidden

When it came time for the trial, Plaintiff repeatedly made use of arguments and strategies that were not permissible in the instant matter. The first issue with their arguments concerned the focus on themes related to negligence. In the opening statement, Plaintiff's counsel's speech to the jury described the events of the day of the assault as they saw it. *See*, Trial Transcript 206:19-211:24 (hereafter "Tr."). Over the next several pages of his statement, Plaintiff's counsel described some element of the assault in the form of a formulaic narrative, punctuating each statement with some variation of the phrase "and nobody comes to help." Tr. 207:7. Counsel invokes this phrase 20 times over the next five pages of the transcript. *See*, Tr. 207:7-211:24. Defendant eventually objected in the middle of the opening, and the Court instructed the jury that the opening statement was not evidence. Tr. 223:13-14.

This conduct is prejudicial even though the Court attempted to issue a curative instruction. The focus on the failure to stop the assault was obviated by the admission of liability; it could only have been brought up in order to trigger outrage by the jury and imply some amount of greater negligence on the part of Defendant. The Court noted in its order on the admission of liability that this strategy was impermissible. Order on Admission of Liability, Dec. 19, 2014. Yet here we are.

Plaintiff's counsel made clear the adoption of a strategy highlighting negligence through statements that indicate that the jury must punish the Defendant. After asking the jury to place themselves in the shoes of Plaintiff, counsel argued that "the corporation's got to be

accountable." Tr. 225:7-9. This was after opening his statement by arguing that Defendant was insincere in its contrition and that individuals who are similarly insincere about their apologies were "going to do it again." Tr. 202:18-20. Plaintiff's counsel reemphasized that this would occur again in the closing, stating that "after this trial [the Defendant] gets to move on with the next kid and go on with their business…" Tr. 1436:20-22.

In cases not involving punitive damages, it is improper to invite the jury to punish or deter others from similar conduct. *Vanskike v. ACF Industries, Inc.*, 655 F.2d 188, 210 (8th Cir. 1981). Such arguments seeking to "send a message" are in effect punitive damage arguments by another name. *Harris v. Steelweld Equipment Co., Inc.*, 869 F.2d 396, fn. 13 (8th Cir. 1989). Plaintiff's counsel used these arguments in spite of the Court's order forbidding them from doing so.

This trial was not about whatever negligence had occurred on the day of the assault. Rather, it was about the effects of that assault on the victim. In the new trial, Plaintiff's counsel must not argue that Defendant needs to be punished nor that the jury must ensure that this does not happen again. This is the second Order in which the Court has indicated that strategies touching on negligence and punishment are not permissible. The Court hopes there will not need to be a third.

b) Plaintiff's counsel made arguments concerning settlement negotiations in an effort to paint Defendant as wholly unreasonable

Minn. R. Ev. 408 provides that "[e]vidence of conduct or statements made in compromise negotiations is…not admissible." In fact, "[a]ny reference to an attempt or lack of attempt to make a settlement [is]…improper." *James v. Chicago, St. P. & M & O Ry. Co.*, 16 N.W.2d 188, 192 (Minn. 1944). This rule is in place in order to encourage settlements, and is necessary to free

parties from concern that their attempts to settle will end up hurting them later if the matter fails to settle. The rule is essential to ensure that all such negotiations proceed in good faith.

However, it is not as though any mention of the word "settlement" will immediately prejudice proceedings. In *James v. Chicago*, the Court did not declare a mistrial when the plaintiff's attorney implied that there was no attempt to settle, a fact which the defendant's attorney disputed in front of the jury in a short exchange. *Id*. While they noted that the statement was "of course" improper, it is still necessary to show prejudice to allow a mistrial. *Id*.

Turning to this issue in the instant case, the Court again recognizes that effective counsel provides their clients with zealous representation, and counsel has latitude in their opening statements and closing arguments. Here, however, Plaintiff's counsel's opening statement included remarks that so tainted the proceedings, so poisoned the jury against Defendant, that it is clear to the Court with twenty-twenty hindsight that it should have granted the motion for a mistrial at that time.

In the opening, Plaintiff's counsel made references to Defendant's refusal to settle, which plainly violates the rules against discussions of settlement or evidence of conduct or statements made in compromise negotiations at trial. Minn. R. Ev. 408. The Court points to the beginning of Plaintiff's counsel's opening; "…we've all heard someone say, 'I'm sorry, but,' When they say that, we know they're not really sorry. We know that whatever they did they're going to do again. And we know they're just making excuses…And that's what New Horizons is doing in this case. New Horizons knows that [J.K.], what happened to him that day, was really, really bad…they're just going to make excuses because they *don't want to pay*…" Tr. 202:17-203:5. He then went on to invoke negotiations more directly, stating that they "…gave all those records to New Horizons, and we said, 'be responsible.' *But they don't want to pay*…" Counsel closed

this portion of the argument by concluding that "[t]hey're just making excuses." Tr. 223:6-7. [3] Further, the closing argument reminded the jury of the Defendant's alleged intransigence in not settling the case.[4] Plaintiff's counsel repeatedly said that Defendant "[did]n't want to listen" (Tr. 1436:1) and that now they had to listen (Tr. 1436:7), implying that they were not listening (i.e. that they were being unreasonable in their refusals to settle) before.

More than once or twice, there were repeated references to the failure to pay money for a settlement, or the failure to negotiate in good faith about a settlement. Just as with the arguments concerning negligence and the need to punish, painting a defendant as unreasonable in its failure to settle the case can prejudice a jury. This is particularly true here, where Plaintiff's counsel went beyond merely mentioning settlement and took the step of arguing that Defendant was unreasonable in its alleged refusal to settle. Minnesotans enjoy a constitutional right to a civil jury trial in Minnesota. Minn. Const. Art. I, Sec. 4 ("the right of trial by jury shall remain inviolate"). While settlement is preferred for a number of reasons, it goes without saying that it is not mandatory. The failure to settle should not be used as a weapon to turn the jury against a party. This is precisely why the rules forbid such conduct.

This is further problematic because to counter these statements about the failure to settle, the defendant is left with nothing to say. The only way Defendant here could strike back would have been to either argue that they did attempt to settle in good faith or that Plaintiff sought some astronomical amount of money, neither of which would be permitted.[5] Even were this argument was permitted, this would simply result in the parties fighting about whose settlement offers

[3] Defendant objected immediately after Plaintiff's counsel made this statement concerning "excuses." Tr. 223:8-12. Defendant reiterated that objection before starting the trial again the morning after opening arguments closed. Tr. 259:21-260:11.

[4] "I told you at the beginning of this case what you're going to see here is someone saying they admit responsibility or are just making excuses. I told you New Horizons knows what happened to [J.K.] was really really bad…" Tr. 1399:25-1400:4.

[5] The Court notes that it has no idea whether either of these statements are true; they are merely illustrative.

were better in order to make the other side look bad. Allowing arguments along these lines would tend to hamper genuine negotiation and settlement, encouraging the tactics that Plaintiff's counsel alleges Defendant used.

Here, Plaintiff went far beyond what this Court can find acceptable in the caselaw, where even passing references to a failure to settle are deemed improper. *See*, *James*, 16 N.W.2d at 192. Given the size of the award, the fact that the references occurred repeatedly, and the fact that the references sought to paint settlement efforts by Defendant in a highly negative light, the Court finds that this also prejudiced the proceeding. This constitutes misconduct, and thus supports the granting of the motion for a new trial.

2) The verdict was excessive and appears to have been given under the influence of passion or prejudice

Minnesota rules permit a new trial in cases where it appears that the verdict is excessive due to passion or prejudice injected into the case. Minn. R. Civ. P. 59.01(e). Again, this Court notes that while this case dealt with sensitive issues, this does not mean that those issues should be used as tools to extract a massive verdict. Instead, parties must modify their conduct so as to permit the jury to do its duty. The Court does not believe that this occurred here.

a) Plaintiff's counsel made inflammatory arguments which tended to appeal to jurors' emotions, resulting in passion or prejudice that tended to inflate the award

Plaintiff's counsel engaged in strategies that sought to undermine the objectivity of the jury by injecting emotion and anger into the case. Towards the end of the opening statement, Plaintiff's counsel asked jurors to place themselves in the shoes of the parents of the victim, stating that "[w]hen we drop our kids off at these daycares, we are promised that they are going to be safe and secure." Tr. 225: 6-8. First, this clearly focuses on negligence, an issue covered in

the previous section. Second, this breaches what has been called the "golden rule" of trial advocacy; counsel should not tell the jury to imagine themselves as the victim for fear disrupting their objective role.[6] *Mueller v. Sigmond*, 486 N.W.2d 841, 844 (Minn. Ct. App., 1992). This type of conduct was indicative of an ongoing strategy that appears to have undermined the objectivity of the jury.

Parties are not entitled to so inflame the jury, as this may result in an award related less to the facts than to passion or prejudice. Minn. R. Civ. P. 59.01(e). For instance, when a party essentially smears the other side, a new trial may be required. *Westbrook State Bank v. Johnson*, 358 N.W.2d 422, 425 (Minn. Ct. App. 1984) (retrial permitted where counsel referred to opponent bankers as "moneychangers" who viewed his own client as a "sucker"). Where a case concerns particularly sensitive matters likely to inflame passion, parties must take care not to exploit the emotions that may be triggered by the facts. *Strand v. Great Northern Ry. Co.*, 46 N.W.2d 266, 274 (Minn. 1951) (permitting new trial when an arguments were made in a case relating to the injury of children by a railroad); *see, also Brabeck v. Chicago & N.W. Ry. Co.*, 117 N.W.2d 921, 925-26 (Minn. 1962) (where counsel addressed decedent's children in an attempt to exploit their misfortune, a new trial could be granted).

In the closing argument, counsel for Plaintiff appealed to the jury's passion and prejudice stirred in the opening statement. He started by saying: "I woke up this morning at 3:00 a.m., couldn't sleep, because I don't want to let [J.K.] down and I don't want to let Katie down. And I told you at the beginning of this case what you're going to see here is someone saying they admit responsibility or are just making excuses." Tr. 1399:22-1400:2. He then implied that Defendant knew what the damage was and nevertheless lied about its extent as a trial strategy. Tr. 1400:2-9.

[6] Also problematic was a statement towards the end of the closing: "You know, it's been about an hour, I have been up here [delivering the closing statement], a little longer; [J.K.] lost 30 minutes up in that tube, to put it in perspective." Tr. 1435:8-10.

Counsel continued to paint Defendant in a negative light, stating a few minutes later that, "…New Horizons has never apologized to these two…" Tr. 1408:9-10. Towards the end of the closing, Plaintiff's counsel asserted that the "corporation doesn't want to make it right," (Tr. 1435:4-5) and next said that the jury could make it right. *Id*. He then critiqued as heartless the alleged decision by Defendant to involve lawyers in the days following the assault, an exceedingly common decision. Tr. 1408:1-6. Counsel also apologized to the victim's mother in front of the jury for his factual description of the assault, stating that he was sorry "we have to talk like this." Tr. 1407:14. He did something similar later in the closing. Tr. 1414:20-22.

In all of these statements, Plaintiff's counsel attempted to exploit the already high emotions of the case, just as occurred in *Strand*. 46 N.W.2d at 274. He made direct reference to the alleged bad acts of the Defendant and their attorneys multiple times, as in *Westbrook State Bank*. 358 N.W.2d 422 at 425. He also spoke directly to the mother of the victim in what seems to have been an effort to exploit how gruesome this experience had been for her, as in *Brabeck v. Chicago*. 117 N.W.2d at 925-26. Plaintiff's counsel created a playing field that was tilted in their favor, painting Defendant as a recalcitrant and unrepentant corporate behemoth. No curative instruction could remedy this, as became apparent when the verdict was rendered.

b) The verdict was inflated due to this injection of passion and prejudice

When passion or prejudice appears to have influenced a verdict, a court may set such a verdict aside. Minn. R. Civ. P. 59.01(e). The court is in the best position to determine this, as it has "the significant advantage of viewing the entire proceeding, some of which is not apparent on the record." *Caspersen*, 213 N.W.2d at 331; *see, also Mrozka v. Archdiocese of St. Paul and Minneapolis*, 482 N.W.2d 806, 813 (Minn. Ct. App. 1992) (permitting a remittitur by the trial court in a case involving contentious and sensitive child sexual abuse issues).

This Court wants to make it clear that, on balance, the evidence presented should have resulted in any event with a significant award to Plaintiff. However, the award given by the jury here exceeds anything that a logical and dispassionate examination of the evidence could support. While there have been medical expenditures, they are dwarfed by the award for future medical expenses, which is over 70 times greater. This sum exceeds what a thorough review of the evidence might reasonably suggest for such an award, especially given the fact that J.K. has not been in therapy since 2012. Further, the award for pain and suffering, both past and future, goes beyond what a close and balanced examination of the evidence reveals with respect to Plaintiff's future prospects as a functioning human being.

It is not the Court's intention to ignore or belittle the effects that the assault had on the victim. However, a significant amount of evidence presented by Defendant at trial demonstrated marked improvement in J.K.'s total functioning as he has aged. It is apparent to this Court that the jury appears to have completely ignored that evidence and instead sought to "send a message" to Defendant due to the prejudicial arguments made by Plaintiff.

Accordingly, this Court believes that the cumulative effect of the specified statements were so prejudicial and inflammatory that they poisoned the jury against Defendant. The prejudice caused a verdict that was excessive and thus denied Defendant a fair trial. As such, the Court grants its motion for a new trial.

3) Plaintiff's arguments do not defeat the motion for a new trial

Plaintiff argues several points in opposition to this motion. However, none of the arguments are sufficient to defeat the motion.

a) There was no waiver of objections in this case

Plaintiff asserts that Defendant waived its right to object, arguing that there was no contemporaneous objection to some of the conduct now asserted by Defendant to be improper. Defendant objected during the opening statement and subsequently moved more formally for a mistrial after opening statements were completed. During subsequent argument on the matter, Defendant's counsel asserted both that liability issues and settlement negotiations had been impermissibly delved into. Tr. 259:17-260:25.

This Court finds that the issue was not waived due to the existence of a contemporaneous objection and the fact that Defendant moved for a mistrial at the end of the opening statement. In any case, this Court is permitted to declare a mistrial when remarks have resulted in prejudice to a party even without a contemporaneous objection. *Westbrook State Bank,* 358 N.W.2d at 425-26. In *Westbrook State Bank*, there was no objection to prejudicial arguments in the closing statement of a party, and the Court of Appeals affirmed the judge's decision to grant a mistrial. *Id*.

As the Court has determined that there was a prejudicial effect on the jury, there shall be a new trial.

b) This is not invited error

Plaintiff also asserts that none of the conduct described above was their fault and rather that it was the fault of Defendant. In their view, the fact that Defendant chose to contest the notion that J.K. was raped (or even call it into question) polarized the case and thus resulted in invited error.

The first problem with this argument is that invited error does not relate to situations such as this. Instead, it is a doctrine that applies in appellate review where a party has made a strategic error that naturally caused damage to their case. *Krenik v. Westerman*, 275 N.W. 849, 852 (Minn.

1937) (Peterson, J., dissenting).[7] This is not what has occurred here. Plaintiff indicates that the "error" was that Defendant simply *invited* this result upon themselves because they chose a strategy that *obviously* exposed them to great risk due to the strategy's alleged repugnance. In their view, the fact that Defendant chose to contest the disputed facts was an error that naturally exposed them to Plaintiff's counsel's improper conduct. This conduct then became proper since Defendant had chosen to accept the risk. Q.E.D.

This is circular reasoning. Plaintiff's argument only makes sense if we actually assume that Defendant's assertion of the facts (i.e. that J.K. had basically recovered and/or that there had not been a sexual assault) was false and thus argued with an ill motive. This was the key dispute in the case and cannot be assumed. If we took Plaintiff's logic to its endpoint, there would basically never be a time when a new trial could be required in cases of attorney misconduct or imposed prejudice. This is because we could simply assume that the position chosen by a party on the factual disputes in the given case were invited error on the basis of them having lost the case. It is probably for this reason that the Court cannot find any cases where this argument has been used.

As in *Hanskett*, we are "dealing here with the record not of a trial but of a game, a play of wits attempting not the presentation of facts, but the framing of abuse and innuendo." *Hanskett*, 195 N.W. at 795. This game cannot be permitted. Defendant's motion for a new trial is granted.

ISB

[7] Curiously, Plaintiff's brief omitted the fact that they were citing to the dissent.