No. _____

In the Supreme Court of the United States

MARCO GONZALEZ,

Petitioner,

v.

SALEM SHAHIN, MD; CAROL GILMORE, MD, RICHARD MARTIN, MD; PAUL ANDELIN, MD, JEFFREY ADAMS, PA-C; MERCY MEDICAL CENTER; MCKENZIE COUNTY HEALTHCARE SYSTEMS, INC.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court has made clear that the time requirements contained in the civil rules are claim-processing requirements that are subject to waiver and forfeiture, rather than mandatory and jurisdictional. Yet, largely as an artifact of what this Court described as a prior "profligate" use of the term "jurisdiction," the lower courts have retained the jurisdictional bar when a district court has improperly extended the time for post-judgment motions granted without objection. The first Question Presented is:

Does an unobjected-to extension of time to file a post-judgment motion, even though unauthorized by the civil rules, permit appellate review of the underlying judgment when the notice of appeal is timely when measured from the disposition of that motion?

This case also presents a second Question:

Are a judge's comments belittling the import of evidence that courts usually treated as establishing a prima facie case and impugning the motives of counsel, which the judge later wrote was only a "joke," cured at the end of a trial by a generic instruction that the jury should reach its own verdict?

PARTIES TO THE PROCEEDING

The Petitioner is Marco Gonzalez, the appellant below and plaintiff in the district court.

Respondents are Salem Shahin, Carol Gilmore, Richard Martin, Carol Gilmore, Paul Andelin, Jeffrey Adams, Mercy Medical Center, and McKenzie County Healthcare Systems, Inc., appellees below and defendants in the district court.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *Gonzalez v. Shahin*, No. 22-2012, U.S. Court of Appeals for the Eighth Circuit. Judgment entered August 16, 2023.

- *Gonzalez v. Shahin*, No. 1:17-CV-157, U.S. District Court for the District of North Dakota. Judgment entered November 19, 2021 and amended on April 27, 2022.

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PETITION FOR A WRIT OF CERTIORARI

Marco Gonzalez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Eighth Circuit is reported at 77 F.4th 1183 and included in the Appendix ("App.") at App. 1a. The district court's judgment is unreported. Its opinion denying a new trial is unreported but found at 2022 WL 1564794 and at App. 16a.

JURISDICTION

The judgment of the Eighth Circuit was entered on August 16, 2023, App. 1a, and a petition for rehearing en banc was denied on September 21, 2023. App. 32a. On December 14, 2023, Justice Kavanaugh extended the time to file this Petition to January 19, 2024. No. 23A540. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

28 U.S.C. § 2707(a) provides:

> . . . no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a

> civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

Federal Rule of Appellate Procedure 4(a)(1)(A) provides:

> In a civil case, . . . the notice of appeal . . . must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.

Federal Rule of Appellate Procedure 4(a)(4)(A) provides:

> If a party files in the district court any of the following motions under the Federal Rules of Civil Procedure--and does so within the time allowed by those rules--the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion: . . .
>
> (v) for a new trial under Rule 59; . . .
>
> Federal Rule of Civil Procedure 6(b)(2) provides:
>
> A court must not extend the time to act under Rules . . . 52(b), ..."

INTRODUCTION

The decision below reflects a hybrid approach to enforcement of civil time requirements that is internally contradictory and denies appellate jurisdiction over the underlying judgment but permits review of the post-judgment ruling, even though the timing requirements for both is triggered by the same event. The differential treatment of the notice of appeal for these two purposes is emblematic of confusion and conflict among the circuits and confounding to counsel.

The Eighth Circuit in this case held that the district court erred by extending the time to file a motion for a new trial. App. 7a. As a consequence, the approved extension, to which no defendant objected, was deemed ineffective to toll the time to file a notice of appeal, depriving the appellate court of jurisdiction to review the original judgment, even though the court understood that Rule 6(b)(2), which "prohibits extending the deadline for Rule 59 motions—is a nonjurisdictional rule subject to forfeiture." App. 7a-8a.

Then, however, the court treated the same rule, Rule 6(b)(2), as nonjurisdictional and subject to forfeiture only for another purpose: to assume jurisdiction over the district court's rulings on the motion for a new trial. In other words, the court regarded Rule 6(b)(2)'s time requirements as a claim-processing rule only for one of the two bases of appeal. Yet, none of the underlying facts changed about the validity of the Rule 59(b) motion.

The resulting ruling on the court's jurisdiction is insensible and fails to accord Rule 6(b)(2) with the uniform claim-processing status that this Court's precedents assign it. It also perpetuates problems this Court has identified in the misuse of the word "jurisdiction," while it encourages piecemeal appeals of the same issues from the trial under two different standards of review, when a grant of the new-trial motion would moot the first notice of appeal, potentially well after a briefing schedule was established. It further conflicts with the standard practice of divesting a district court of jurisdiction over the merits while the case is pending in the appellate court.

This recurring and disruptive issue about the timing and jurisdictional status of time requirements under the civil rules requires the attention of this Court to resolve, as the circuits are intractably split.

In addition to presenting an issue about claim-processing rules and jurisdiction, the Eighth Circuit held that the district judge's denigrating comments about a key evidentiary aspect of the case, usually treated under state law as establishing a prima facie case and about the motives of plaintiff's counsel, which he later wrote was only a "joke," App. 20a, was insignificant and cured at the end of a trial by a generic instruction that the jury should reach its own verdict. Although the Eighth Circuit labeled the comments "ill-advised," App. 11a, its cavalier treatment of the issue only encourages judges to put their thumbs on the scales of justice as long as they also tell the jury to be fair.

Allowing improper supplemental comments that the judge denominated as an "additional instruction," App. 27a, which were delivered when the jury was presented with the evidence and completely focused on it, effectively licenses that type of behavior when it should not be tolerated in a system of fair and impartial justice. Given the significant turnover within the federal judiciary over the past decade with many new judges often unfamiliar with many of the requirements at trial, as this judge was about the rule limiting extensions of motions for a new trial, drains the promise of due-process's fairness requirement at a time when trials are difficult to come by. The issue is one of great national importance and one where the circuits are hopelessly conflicted, lacking guidance about when those judicial comments go too far.

STATEMENT

A. Underlying Facts.

Complaining of urinary urgency and frequency, Gonzalez sought treatment from Dr. Salem Shahin, a urologist at Mercy Medical Center in Williston, North Dakota, and received a prescription to take an antibiotic, Bactrim, twice daily for a month, even though testing indicated there was no infection for the antibiotic to address. App. 2a. Two weeks later, Gonzalez returned to Mercy Medical, this time to the emergency room for treatment for blurred vision, drainage from his eyes, a sore throat, and plaque on his tongue. The doctor who examined him, Dr. Richard Martin, did not believe the Bactrim caused these symptoms because there was no telltale rash. App. 3a. He instructed

Gonzalez to continue taking Bactrim, along with a new prescription for conjunctivitis. App. 3a.

With no improvement occurring Gonzalez soon went to the emergency room at McKenzie County Memorial Hospital, where he was seen by Jeffrey Adams, PA-C and Ashlee Schaff, R.N. Even though Gonzalez expressed the belief that he was having an allergic reaction to Bactrim, these medical personnel, again detecting no rash, advised that it would be unwise to discontinue Bactrim. App. 3a.

The following morning Gonzalez was back at the Mercy Medical emergency department, complaining of worsening pain and displaying a visibly swollen face, throat, and eyes. Dr. Carol Gilmore diagnosed Gonzalez with bilateral conjunctivitis, a tonsil infection, and an infection of the gums, administered an IV antibiotic for that condition, and discharged Gonzalez with instructions to continue taking Bactrim. App. 3a-4a.

Gonzalez returned a day later, again seeing Dr. Gilmore, who consulted with Dr. Paul Andelin. This visit, the rash associated with Stevens–Johnson Syndrome (SJS) was visible, and on August 2, Dr. Andelin diagnosed Gonzalez with SJS resulting from the Bactrim and admitted him to the hospital. App. 4a. SJS is a rare, acute, serious, and potentially fatal disorder of the skin and mucous membranes that is usually a reaction to medication and starts with flu-like symptoms, eye problems, and is followed by a painful rash that spreads and blisters.

On August 3 from his hospital bed, Gonzalez called 911 and was subsequently flown by air ambulance to the Burn Unit at the University of Colorado Hospital in Denver, where he underwent eye surgery and spent three weeks in treatment for SJS.

B. Proceedings Below.

1. District Court.

Gonzalez brought a medical-malpractice action, alleging that the defendant health-care providers misdiagnosed him and negligently kept him on Bactrim, which caused him to develop SJS. Central to his theory of medical negligence was the undisputed failure of each defendant to consult the readily available Physician's Desk Reference (PDR), a widely used compendium of drug information that is "published annually and supplemented quarterly," "distributed to the medical profession free of charge, at the expense of the drug manufacturers," and can be "*prima facie evidence of the standard of care in using the drug*." 82 A.L.R.4th 166 (Originally published in 1990) (emphasis added).

Upon admission of the warning label in the PDR, the district court instructed the jury, in accordance with consultation with the parties, that the warning label did not constitute conclusive evidence of the medical providers' standard of care but was relevant to establishing the standard of care and the jury's determination of whether any provider fell below the standard of care.

Following that agreed-upon instruction, the judge added additional commentary of his own, which he described to the jury as "an additional instruction." App. 27a. The judge told the jury that he was concerned that they might give the label too much weight, also noted that most courts do not usually permit the label to go back into the jury room in order to prevent over-reliance on it. The court then added:

> Keep in mind these are written by drug companies and lawyers that include all sorts of information to protect principally drug companies from having a lawsuit like this; so they'll include all sorts of information in those documents. Because if they know of a concern and they don't put it into an insert like that and they have a lawsuit as a result, it's a case that I'm sure [plaintiff's counsel] Mr. Leventhal would love to take on behalf of somebody who is injured as a result of that type of conduct. So keep it in perspective.

App. 28a.

The Court rejected an objection that the "additional instruction" was prejudicial and diminished the import and purpose of the label by introducing "evidence" that the primary purpose of the label was to protect drug companies, an assertion that did not reflect any evidence in the record. *See* App. 29a (objecting because the comment "introduced to the jury evidence which is not endorsed from any expert witness"). Orally, the court rejected the objection by describing it merely as "a matter of common sense" and

therefore appropriate and available for defense counsel to use, presumably in closing argument. App. 30a. When counsel continued to argue, the district court instructed counsel to appeal. App. 30a-31a. The jury subsequently returned defense verdicts on November 18, 2021, with judgment being entered the following day. App. 5a, 35a.

Plaintiffs' counsel moved for and the district court granted, without objection, an extension of time to file a motion for a new trial by January 13, 2022. App. 5a-6a. In denying the motion in a written order filed April 27, 2022, the district court denied that "specific objection" about the Bactrim warning or about trial counsel was voiced when the comments at issue were made[1] and reviewed under a plain-error rule. In ruling, the district court said its "comment on drug companies' avoiding liability was . . . appropriate," citing a New Jersey Supreme Court opinion that said that "limit[ing] the manufacturer's liability" was one of "many reasons" manufacturers write these warnings. App. 19a (citing *Morlino Medical Center of Ocean County,* 152 N.J. 563, 706 A.2d 721, 729 (N.J. 1998)).

The district court further excused its comment, saying that it was harmless to say plaintiffs' counsel had a "desire to sue a drug manufacturer," noted it took only "a matter of seconds during the course of a twelve-day complex medical malpractice jury trial,"

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[1] Counsel chose to make objection outside the jury's presence because the jury had seen numerous prior objections and counsel feared further antagonistic comments from the court. At the time the objection was made and denied, the district court said that it was preserved for appeal. App. 30a.

and claimed it "was also a joke." App. 19a-20a. The court also dismissed the comments by further stating, that, "assuming it was [inappropriate], or maybe it was a bade [sic] joke," no evidence shows it impacted the jury's decision or prejudiced his case in any way." App. 20a. The court also claimed the potential prejudicial impact "was also effectively cured by the Court in the final instructions," where the judge told the jury that "I have not intended to suggest what I think your verdict should be." App. 20a.

2. Court of Appeals.

The Eighth Circuit held it lacked jurisdiction to review the original judgment because Gonzalez's Rule 59 motion was untimely, having been filed under the district court's order more than 28 days after entry of judgment. It cited Fed. R. Civ. P. 6(b)(2) in support because the rule states that a "court must not extend the time to act under" Rule 59(b). App. 7a. The Court ruled that the extension to file the motion "was granted in error." App. 7a.

The Court acknowledged that defendants did not object to the extension and that Rule 6(b) "is a nonjurisdictional rule subject to forfeiture," App. 7a-8a, but that

> means only that the district court had the authority to rule on Gonzalez's Rule 59 motion. It does not mean that we have jurisdiction to review the underlying judgment.

App. 8a.

On the comments made by the district court, which the Eighth Circuit held were properly before it on review of the court's denial of a motion for a new trial, that court recognized that any expression of opinion by the judge must be fair and impartial and "'not preclude a fair evaluation of the evidence by the jury.'" App. 10a (citation omitted). It further "acknowledge[d]" Gonzalez's concerns" and labeled the comments "ill-advised," but, "after considering 'the complete charge to the jury,'" held no abuse of discretion occurred. App. 11a.

It stated that the comment about counsel was a single remark and Gonzalez did not explain how it affected the outcome of the trial. App. 11a. Without more, it held "we cannot conclude that this remark was sufficiently pervasive or that it resulted in a miscarriage of justice." The court affirmed.

Rehearing en banc was denied on September 21, 2023. App. 32a.

REASONS FOR GRANTING THE PETITION

A claim-processing rule does not become jurisdiction-denying for purposes of review of the underlying judgment, but shed that status to review post-judgment rulings. The same set of facts and the same filings cannot generate such significant differences about jurisdiction.

This Court has made clear that claim-processing rules do not implicate jurisdiction and are subject to waiver or forfeiture. That holding vanishes in the circuits when, as here, Rule 6(b)(2) is invoked, but no

amount of alchemy changes the rule's providence so that it acquires statutory status and becomes jurisdictional in nature.

The circuits' evident confusion becomes tangible when they treat the Rule's time requirement depending on what decision is the subject of appeal, the underlying judgment or a post-judgment ruling. Yet, if rules-based time requirements are truly claim-processing obligations subject to waiver, the treatment should be uniform regardless of the appellate topic and should never implicate the appellate court's jurisdiction, especially when this Court has strained to prevent that misuse.

The resulting inconsistency, contrary to this Court's recent precedents, warrants this Court's review. Often, the same issues for appeal appear in the underlying judgment and a post-judgment motion. But when a court entertains only the latter, it engages in a less searching review standard, thereby diminishing the value of the appeal.

The need for closer appellate scrutiny than the review undertaken by the Eighth Circuit permitted becomes obvious when considering the second Question Presented, where the Eighth Circuit excused the significant adverse "additional instruction" the judge gave to the jury, conveying his own views about a critical piece of evidence that was at odds with both the record and with its legal import. A later generic instruction about the jury making its own decision about the evidence could hardly be deemed curative, but the standard of review for a post-trial motion

allowed the Eighth Circuit to let it slide. Not only does the approach adopted by the Eighth Circuit create license for commentary by judges that will make trials less fair and less impartial, but it takes an approach that other circuits have deemed too cavalier. The situation calls for further guidance from this Court.

I. THIS CASE PRESENTS A NEW APPLICATION OF A RECURRING ISSUE THAT THIS COURT HAS ATTEMPTED TO CLARIFY BEFORE AND THAT REMAINS OF GREAT NATIONAL IMPORTANCE.

Although this Court has decided cases about the proper timing of a notice of appeal and when, under both statutory and civil rules time requirements, a late filing deprives a circuit court of jurisdiction and when it does not, the timing issue when expressed in a civil rule continues to bedevil the circuits and confuse counsel. While it is clear that erroneous district court orders extending the filing deadline contained in a statute cannot remove the jurisdictional bar to hearing the appeal, *Bowles v. Russell*, 551 U.S. 205, 210-13 (2007), the non-jurisdictional status of time requirements in civil rules has proven intractably difficult for the lower courts, although it need not be.

Nowhere is that confusion on clearer display than the differential treatment of appellate jurisdiction after post-judgment motions for purposes of plenary appeal and for appeal of the denial of the new motion. Fed. R. App. P. 4(a)(1)(A) generally gives counsel 30 days after entry of the judgment or order appealed from to file a notice of appeal. Fed. R. App. P.

4(a)(4)(A) extends the time to file when certain post-judgment motions, including a motion for a new trial, are filed. Then, the time for a notice of appeal is measured from the entry of an order disposing of the motion. Fed. R. Civ. P. 6(b)(2) does not authorize extensions of time for those post-judgment motions, but courts still enlarge the time.

The timing requirements in the civil rules constitute claim-processing rules, which this Court has described as "not jurisdictional," even when mandatory. *See Cameron v. EMW Women's Surgical Ctr.*, P.S.C., 595 U.S. 267, 275 (2022). Yet, the decision below holds, and other circuits continue to hold, inappropriately, that they deprive a court of appellate jurisdiction. This case presents an excellent vehicle to resolve the continuing controversy.

A. This Court's Repeated Efforts to Clarify the Applicable Law Demonstrates the National Importance of the Issue.

Despite the seeming clarity of the holding in *Bowles*, this Court has recognized that significant confusion exists, both in its own decisions and those of the lower courts, about the distinction between statutory and rules' deadlines. The latter are "mandatory and jurisdictional." *Bowles*, 551 U.S. at 209. The former are claim-processing rules, subject to waiver or forfeiture. *Hamer v. Neighborhood Housing Serv. of Chicago*, 583 U.S. 17, 19-20 (2007). Decisions at all levels were often "'mischaracteriz[ing] claim-processing rules or elements of a cause of action as jurisdictional limitations." 583 U.S. 17, 20 (2017) (ellipsis in orig.)

(quoting *Reed Elsevier, Inc. v. Muchnick,* 559 U.S. 154, 161 (2010)). Despite *Reed's* earlier acknowledgment of the problem, the mischaracterization remains unabated. *Hamer* explained that "[s]everal Courts of Appeals . . . have tripped over our statement in *Bowles* that 'the taking of an appeal within the prescribed time is 'mandatory and jurisdictional.'" *Id*. at 26 (quoting *Bowles*, 551 U.S. at 209, quoting *Griggs v. Provident Consumer Discount Co.,* 459 U.S. 56, 61 (1982) (per curiam)).

Thus, in *Hamer*, this Court once again clarified the difference by declaring that Fed. R. App. P. 4(a)(5)(C)'s 30-day limitation on extensions of time to file a notice of appeal was a claim-processing rule that was subject to forfeiture in the absence of an objection. *Id*. at 27. That status meant that the timing requirement was not jurisdictional. *Id*.

The confusion, however, continues today, and is especially acute with respect to Fed. R. App. P. 4(a)(4)(A) and its treatment of motions for a new trial. As *Reed Elsevier* observed, the differences between jurisdictional limits and those subject to waiver, "[w]hile perhaps clear in theory . . . can be confusing in practice." 559 U.S. at 161. The decision below, and those of sister circuits, reflect that difficulty because the decision treats the confluence of applicable rules as jurisdictional. Many circuits adhere to their pre-*Hamer* precedents.

In this case, even though the new-trial motion was filed within the time ordered by the district court without objection from Respondents, the Eighth

Circuit held that the *rule* limiting the time for extensions rendered it and the notice of appeal untimely, depriving the court of jurisdiction. App. 7a. It thus treated a claim-processing rule to which there was no defense objection the same as a statutory limit, in conflict with the teachings of this Court in *Bowles* and *Hamer*, tripped up, it seems, by the application of two rules simultaneously. The Eighth Circuit, like several other circuits, confused permission to file late under the statutory rule with permission to file late under the procedural rule as jurisdictionally significant. Yet, in reviewing the appeal of the new-trial motion, the Eighth Circuit permitted the same confluence of rules to yield the opposite result for purposes of reviewing the district court's new-trial ruling. The two rulings within the same decision cannot be reconciled.

B. The Internal Contradiction in the Treatment of the Notice of Appeal as Jurisdiction-Depriving for One Purpose and Jurisdictionally Insignificant for Another Is an Artifact of an Earlier, Now-Abandoned Jurisprudence that Only this Court Can Correct.

Today's approach, contrasting statutory and rules-based time requirements for their jurisdictional implications, marked a departure from earlier decisions that had misused the term "jurisdiction." *See Reed Elsevier,* 559 U.S. at 161. Before this Court's more recent efforts, the cases were legion in holding that the rule's 30-day time limit on a notice of appeal was "mandatory and jurisdictional." Thus, for example, in 1978 relying on cases as old as the civil rules

themselves, this Court held that an untimely filing under the civil rules "could not toll the running of time to appeal under Rule 4(a)," and left the court of appeals without jurisdiction to review the case. *Browder v. Dir., Dep't of Corr. of Ill.*, 434 U.S. 257, 265 (1978).

Yet, *Hamer* found that "[s]everal Courts of Appeals, including the Court of Appeals in Hamer's case, have tripped over our statement . . . that "the taking of an appeal within the prescribed time is 'mandatory and jurisdictional,'" and mistakenly applying a "characterization left over from days when we were 'less than meticulous' in our use of the term 'jurisdictional.'" 583 U.S. at 26-27 (citations and footnote omitted). Still, *Hamer* held

> "mandatory and jurisdictional" is erroneous and confounding terminology where, as here, the relevant time prescription is absent from the U.S. Code. Because Rule 4(a)(5)(C), not § 2107, limits the length of the extension granted here, the time prescription is not jurisdictional.

Id. at 27.

Unfortunately, artifacts of the earlier caselaw continue to plague decisions in the lower courts, resulting in an illogical treatment of how post-judgment motions, untimely filed under the rule but in compliance with a court order and without an adversarial objection, are treated, non-jurisdictional claim-processing requirements for notices of appeal for some purposes but not for others. The conflicting treatment of the same filing for the purpose of noticing an appeal

is at odds with the modern approach to treating statutory deadlines only as jurisdiction-barring.

C. This Court's Attempts to Curb the Misuse of "Jurisdiction" Have Gone Unheeded.

In 2007, *Bowles* addressed when a late notice of appeal deprives an appellate court of jurisdiction and held that *statutory* time limits were jurisdictional requirements, leaving courts with "no authority to create equitable exceptions." 551 U.S. at 214. *Bowles* also acknowledged that "recent decisions have undertaken to clarify the distinction between claim-processing rules and jurisdictional rules." *Id*. at 210. One of those decisions, emphatically stated that "[c]larity would be facilitated if courts and litigants used the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004).

Despite what *Bowles* said, the distinction drawn between statutory and rules-based deadlines continued to (and still continues to) baffle courts.[2] A mere three years after *Bowles*, in *Reed Elsevier,* this Court conceded that the differences between the two "can be confusing in practice." 559 U.S. at 161.

Shortly after expressing that concern, this Court held that the Federal Circuit misapplied *Bowles* and

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[2] In addition to the Eighth Circuit's holding in this case, at least six other circuits continue to treat Rule 4's thirty-day time limit as jurisdictional. *See* pp. 25-27 *infra*.

erroneously treated as jurisdictional the 120-day deadline for filing an appeal for a disability claim in Veterans Court. *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428 (2011). The Court explained that "*Bowles* did not hold categorically that every deadline for seeking judicial review in civil litigation is jurisdictional." *Id.* at 436.

Even after that correction, this Court again had to remind other courts that "[t]o ward off profligate use of the term 'jurisdiction,' we have adopted a 'readily administrable bright line' for determining whether to classify a statutory limitation as jurisdictional." *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013) (quoting *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 516 (2006)).

Then, in *Hamer* in 2017, this Court sought to clarify the distinction between statutory and rules-based time requirements yet again, given continued misuse of the relevant terminology in the lower courts. 583 U.S. at 19. It reiterated that an appeal noticed outside the time period set by statute was jurisdictionally defective and "not subject to waiver or forfeiture." *Id.* at 17. Still, this Court held "'mandatory and jurisdictional' is erroneous and confounding terminology where, as here, the relevant time prescription is absent from the U.S. Code." *Id.* at 27. Instead, because "Rule 4(a)(5)(C), not § 2107, limits the length of the extension granted here, the time prescription is not jurisdictional." *Id.*

In *Hamer*, the plaintiff was granted, without objection from the defendants, a two-month extension of

the notice-of-appeal filing date just six days before the original deadline was due to expire, even though Fed. Rule App. Proc. 4(a)(5)(C) limited such extensions to 30 days. *Id.* at 21. Because the extension was made without objection, the time limit contained in otherwise mandatory claim-processing rules was deemed waived or forfeited, rendering the Seventh Circuit's decision that it deprived that court of jurisdiction erroneous. *Id.* at 20.

Here, as the Seventh Circuit held and was reversed in *Hamer*, the Eighth Circuit stated that a court-granted extension for filing a motion for a new trial motion that was unauthorized by the rules, deprived it of jurisdiction so it could not address the principal appeal, but could hear an appeal about the denial of a new-trial. It did so even while acknowledging that the violation was of a "nonjurisdictional rule subject to forfeiture," and to which the defendants had raised no objection. App. 7a-8a. The Eighth Circuit felt compelled nonetheless to label this rules-based timing issue "jurisdictional" because of its reading of an in-circuit, pre-*Hamer* precedent, *Arnold v. Wood*, 238 F.3d 992, 995, 998 (8th Cir. 2001). *Arnold* held that a post-judgment motion that would otherwise toll the period for filing a notice of appeal was untimely under Rule 4 and therefore deprived the court of jurisdiction. That holding is at odds with *Hamer* and this Court's other more recent precedents that take pains to explain the inapplicability of "jurisdiction" to claim-processing rules and should not have compelled that result.

In *Arnold* and the decision below, the Eighth Circuit made a distinction between the underlying judgment and the issues raised in the new-trial motion. Yet, if, as a claim-processing rule it was waived for one purpose, it was waived for all purposes. The only logical explanation is that *Arnold* and its progeny exemplify one of the misuses of the term "jurisdiction" that this Court has condemned. That this artifact of an erroneous jurisprudence stalks the process of appeals of right, even as this Court has attempted to bring more clarity to the issue to be of great national importance, which only this Court can resolve.

D. The Decision Below Deepens the Conflict in the Circuits.

The circuits are in deep and irreconcilable conflict about the issues the Eighth Circuit addressed in this case. At least three circuits have indicated that this Court's modern approach to claim-processing rules would permit an untimely post-judgment motion to allow a subsequent appeal of the underlying judgment. Four circuits have adopted an approach that conforms to the Eighth Circuit's ruling, finding that the untimely post-judgment motion deprived the court of the ability to hear the underlying appeal, with some labeling the bar "jurisdictional," despite this Court's instructions to the contrary. And, three circuits continue to hold that the time period in the rule is jurisdictional, providing a complete bar to hearing an appeal, even though *Hamer* holds otherwise. The circuit split will not be resolved without this Court's intervention and has percolated long enough.

1. Three circuits hold that an improperly extended time to file a post-judgment motion does not deprive a court of jurisdiction.

The Eighth Circuit's decision declaring a jurisdictional bar to a notice of appeal on the underlying judgment when the appellant relies on an untimely post-judgment motion, despite a court's permission and an opposing party's acquiescence, stands in stark contrast to decisions and analysis from at least the District of Columbia, Second, and Sixth Circuits, all of which found this Court's more recent jurisprudence compelled the opposite conclusion.

In *Obaydullah v. Obama*, 688 F.3d 784 (D.C. Cir. 2012) (per curiam), the D.C. Circuit held that an extension of time granted in violation of Rule 6(b)(2) did not deprive the court of jurisdiction over the subsequent appeal because the violation was of a claim-processing rule subject to waiver, rather than a statutory bar on jurisdiction. *Id.* at 788.

The Second Circuit has adopted a similar analysis to that of the D.C. Circuit. It noted that the circuit had once held that time limits in the civil rules were jurisdictional, but now understands this Court's decisions render them "non-jurisdictional, claim-processing rules" that are "subject to waiver or equitable exception." *Legg v. Ulster Cnty.*, 820 F.3d 67, 78-79 (2d Cir. 2016). Their unobjected-to violation provides "no bar to jurisdiction . . . even though the district court was without authority to grant an extension under Rule 6(b)(2)." *Id.* Notably, in a second appeal of the same case, the court held that relief for violation of claim-

processing rules is afforded only to a party properly raising them, but do not compel the same result if the party forfeits them." *Legg v. Ulster Cnty.*, 979 F.3d 101, 111 (2d Cir. 2020).

The 2016 decision said the circuit was joining every circuit to have considered the question up to that time to hold that Rule 6(b)'s restriction on granting extensions was not jurisdictional. *Id.* at 79.[3] Yet, as its inclusion of the Eighth Circuit in that list demonstrates, the concept remains "confusing in practice." as *Reed Elsevier* noted. 559 U.S. at 161.

While *Legg* appears to suggest that the Second Circuit would rule differently than the Eighth Circuit did about reviewing the underlying judgment rather than only the post-judgment ruling, a decision one year earlier enhances that supposition. In *Weitzner v. Cynosure, Inc.*, 802 F.3d 307, 312 (2d Cir. 2015), the court held that "Rule (a)(4)(A)(vi)'s 28-day time limit should be deemed a claim-processing rule that allows for equitable exceptions," in a case where the post-judgment motions were late due to compliance with a local rule.

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[3] In support of the proposition, the Second Circuit cited *Mobley v. C.I.A.*, 806 F.3d 568, 577 (D.C. Cir. 2015); *Blue v. Int'l Brotherhood of Elec. Workers Local Union 159*, 676 F.3d 579, 584-85 (7th Cir. 2012); *Advanced Bodycare Sols., LLC v. Thione Int'l, Inc.*, 615 F.3d 1352, 1359 n.15 (11th Cir. 2010); *Art Attacks Ink, LLC v. MGA Entm't Inc.*, 581 F.3d 1138, 1142-43 (9th Cir. 2009); *Dill v. Gen. Am. Life Ins. Co.*, 525 F.3d 612, 618-19 (8th Cir. 2008); *Nat'l Ecological Found. v. Alexander*, 496 F.3d 466, 474 (6th Cir. 2007).

Finally, among this group of circuits, the Sixth Circuit held that it could exercise jurisdiction over an appeal, albeit a denial of a post-judgment motion, because the "time limits set by Rules 6 and 59(e) constitute an affirmative defense to an untimely Rule 59(e) motion, which the party opposing the motion is capable of forfeiting." *Nat'l Ecological Found. v. Alexander*, 496 F.3d 466, 474 (6th Cir. 2007).

More recently, the Sixth Circuit made clear that *Nat'l Ecological* remains the law of the circuit and stands for the proposition that an untimely Rule 59 motion tolls Rule 4's thirty-day limit regardless of the nature of the appeal, contrasting its decision with those of circuits that rejected the same premise. *See Wallace v. FedEx Corp.*, 764 F.3d 571, 584 & n.7 (6th Cir. 2014).

2. Four circuits, in addition to the Eighth Circuit here, hold that an untimely post-judgment motion fails to permit an appeal of the underlying judgment.

Joining the Eighth Circuit in holding an untimely post-judgment motion robs a court of jurisdiction or appellate authority on the underlying judgment are the First, Third, Seventh, and Tenth Circuits.

While no recent decision of the First Circuit explores this territory, the leading precedent holds that if a Rule 59 motion itself is untimely, the court will not toll the appeals limitations period." *Feinstein v. Moses*, 951 F.2d 16, 18 (1st Cir. 1991); *see also Vaqueria Tres Monjitas, Inc. v. Comas-Pagan*, 772 F.3d 956, 958 (1st Cir. 2014).

The Third Circuit also held that a district court's "erroneous consideration of an improper or untimely [post-judgment] motion cannot alter the timeliness requirements of Federal Rule of Appellate Procedure 4(a)." *State Nat'l Ins. Co. v. Cnty. of Camden*, 824 F.3d 399, 409-10 (3d Cir. 2016).

In the Seventh Circuit, the same approach adopted by the Eighth Circuit in this case prevails. There, an untimely post-judgment motion will not toll the time available to appeal from the underlying judgment but allows an appellate court to review the post-judgment orders. *Blue v. Int'l Bhd. of Elec. Workers Loc. Union 159*, 676 F.3d 579, 584 (7th Cir. 2012).

Explicitly rejecting the D.C. Circuit's ruling in *Obaydullah,* the Tenth Circuit found the dissenting opinion there persuasive, holding that "untimely post-judgment motions cannot toll the period in which to file a notice of appeal even where an opposing party does not object on timeliness grounds or the district court disposes of the motion on the merits." *In re Robertson*, 774 F. App'x 453, 465 (10th Cir. 2019); *see also Bunn v. Perdue*, 966 F.3d 1094, 1098 (10th Cir. 2020).

3. Four circuits continue to view compliance with Rule 4's thirty-day rule as jurisdictional.

Another four circuits, despite *Hamer*, continue to treat Rule 4's thirty-day rule to be a jurisdictional bar on hearing an appeal. On that basis, the Fourth, Fifth, Ninth, and Eleventh Circuits would presumably find no jurisdiction to hear an appeal of either the

underlying judgment or the post-judgment rulings based on an untimely filing.

Just last year, the Fourth Circuit continued to call the timely filing of an appeal a "jurisdictional requirement." *Shuler v. Orangeburg Cnty. Sheriff's Dep't*, 71 F.4th 236, 240 (4th Cir. 2023).

Recently, the Fifth Circuit flatly declared that the "timeliness [of a notice of appeal] is jurisdictional." *Ueckert v. Guerra*, 38 F.4th 446, 453 (5th Cir. 2022); *see also Overstreet v. Joint Facilities Mgmt., L.L.C.*, 496 Fed. App'x 421, 424 (5th Cir. 2012) (per curiam) (untimely Rule 59(e) motion did not toll the notice of appeal period, even if the district court addressed the late-filed motion on the merits).

In fact, the Fifth Circuit, joined by the Ninth Circuit, regards Rule 4's thirty-day time limit to be rooted in statute and thus still jurisdictional under *Bowles*. *See Frew v. Young*, 992 F.3d 391, 395 (5th Cir. 2021); *Nutrition Distribution LLC v. IronMag Labs, LLC*, 978 F.3d 1068, 1072 (9th Cir. 2020).

And, the Eleventh Circuit appears to adhere to pre-*Hamer* holdings as well and would deny also jurisdiction. It holds that a timely notice of appeal in a civil case is a jurisdictional requirement and that untimely post-judgment motions will not toll the time for filing an appeal. *Ruiz v. Wing*, 991 F.3d 1130, 1137–38 (11th Cir. 2021) (relying on *Green v. DEA*, 606 F.3d 1296, 1300 (11th Cir. 2010)).

The split among the circuits, evincing the same problem with understanding the application of

jurisdiction that this Court has sought to correct, makes the Question Presented eminently certworthy.

II. THE JURISDICTIONAL RULING OF THE COURT BELOW IS WRONG.

Hamer makes clear that time requirements in the civil rules constitute mandatory claim-processing rules that are "less stern" than congressionally set deadlines. 583 U.S. at 20. They may require mandatory compliance when invoked, "but they may be waived or forfeited." *Id.* (citation omitted). Under party-presentation principles, they provide "relief to a party properly raising them, but do not compel the same result if the party forfeits them." *Id.* (citation omitted). On the other hand, subject-matter jurisdictional prerequisites, as set by statute, may be raised at any time, and "federal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction, and therefore they must raise and decide jurisdictional questions that the parties either overlook or elect not to press." *Shinseki*, 562 U.S. at 434.

Although Rule 4 creates a 30-day limit on the filing of a notice of appeal, the rule also ameliorates that requirement so that certain post-judgment motions, like a motion for a new trial, when "seasonably made and entertained," delays the time for appeal so it "does not begin to run until the disposition of the motion." *Leishman v. Associated Wholesale Elec. Co.*, 318 U.S. 203, 205 (1943). The language found in the rule permitting it has a venerable lineage. *See Brockett v. Brockett*, 43 U.S. (2 How.) 238, 241 (1844).

Then, where no objection is assayed to the timing of the post-judgment motion, it is "seasonably made," and provides no justification for a decision that asserts its timing deprives a court of appellate jurisdiction, particularly because *Hamer* makes plain that jurisdiction is not implicated by time requirements in the civil rules. 583 U.S. at 19.

To be sure, the Eighth Circuit found support for its jurisdictional ruling in the Advisory Note accompanying Rule 4, which the court said established that "the time within which to file a notice of appeal under Rule 4 'is not altered by, for example, a court order that sets a due date that is later than permitted by the Civil Rules' or a party's 'failure to object to the motion's lateness.'" App. 8a (quoting Fed. R. App. P. 4 advisory committee's note to 2016 amendments (emphasis removed).

Yet, that observation by the Advisory Committee does not render the rule's timeline jurisdictional, as the Eighth Circuit held. After all, "it is axiomatic that the Federal Rules of Civil Procedure do not create or withdraw federal jurisdiction." *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 370 (1978).

Moreover, the note has only persuasive value. As the original advisory committee stated in its first set of notes:

> The notes are not part of the rules, and the Supreme Court has not approved or otherwise assumed responsibility for them. They have no official sanction, and can have no

> controlling weight with the courts, when applying the rules in litigated cases.

Quoted in Henry P. Chandler, *Some Major Advances in the Federal Judicial System 1922-1947*, 31 F.R.D. 307, 503 (1963).

That persuasive value entirely dissipates in light of *Hamer*, which was rendered after the notes quoted by the Eighth Circuit.

As a practical matter, the bar imposed by the Eighth Circuit makes little sense. It would compel parties to file a notice of appeal after an adverse judgment, even while awaiting a decision on a motion for a new trial, which if granted would moot the appeal. If the court, as the district court in this case, took months to decide the new-trial motion, it could lose jurisdiction over the case to the court of appeals, which would then unnecessarily decide the same issues that the district court likely could have resolved. *See Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58-59 (1982) (per curiam) (holding that "[t]he filing of a notice of appeal . . . divests the district court of its control over those aspects of the case involved in the appeal" because of the "danger a district court and a court of appeals would be simultaneously analyzing the same judgment.").

Finally, the ruling would encourage yet another departure from the rationale behind the final-judgment rule contained in u, which is intended to "promote[] efficient judicial administration while at the same time emphasizing the deference appellate courts owe to the district judge's decisions on the many

questions of law and fact that arise before judgment." *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 430 (1985). The Eighth Circuit's approach would encourage piecemeal appeals, something that is contrary to federal legal policy. *Switzerland Cheese Ass'n, Inc. v. E. Horne's Mkt., Inc.*, 385 U.S. 23, 24 (1966). The issues, likely to be duplicative, may readily be resolved by the district court in a way that makes an appeal unnecessary. Thus, both law and policy rebel against the Eighth Circuit's approach.

III. THE DECISION BELOW ON THE IMPACT OF THE JUDGE'S EVIDENCE-DENIGRATING "ADDITIONAL INSTRUCTION" IMPLICATES THE NATION'S DRUG-SAFETY REGIME AND DUE PROCESS, MAKING IT AN ISSUE OF NATIONAL IMPORTANCE.

The district court made plain to the jury at the time it was obtaining its first impression of the warnings available for Bactrim, the drug responsible for Gonzalez's injuries, that there was a danger the jury would accord the warning too much weight. After giving the agreed-to instruction, the judge gave an "additional instruction" that they should not give too much weight to the warning label, that most judges withhold the warning label from the jury room, to avoid that consequence, and that they labels are written, not to help doctors as much as to predatory lawyers, like that of the plaintiff, from suing the drug manufacturers. App. 20a.

In doing so, the judge introduced evidence of his own making, prejudiced the jury, undermined the

central premise of the case, encouraged the defense lawyers to make use of the comments, which they did by claiming no doctor consults those warnings. He overstepped his authority. He further undermined the regulatory regime that assures drug safety, implicating much more than medical malpractice trials.

A. The Additional Instruction Was At Odds with the Nation's Drug Safety Regime.

Congress has long insisted on an extensive testing regime to assure the safe use of pharmaceutical drugs by enacting the Federal Food, Drug, and Cosmetic Act (FDCA), ch. 675, 52 Stat. 1040, as amended, 21 U.S.C. § 301 *et seq*. *Wyeth v. Levine*, 555 U.S. 555, 566 (2009). Since 1962, Congress has placed the burden on manufacturers "to demonstrate that its drug was 'safe for use under the conditions prescribed, recommended, or suggested in the proposed labeling' before it could distribute the drug." *Id*. at 567. That responsibility was further enhanced in 2007, when Congress granted the Food and Drug Administration statutory authority to require a manufacturer to change its drug label based on safety information that becomes available after a drug's initial approval. *Id*.

Detailed regulations require that a drug's label contain recommended dosages, note critical differences among population subsets, as well as provide other clinically significant clinical pharmacologic information, contraindications, and warnings and precautions that include "information that would affect decisions about whether to prescribe a drug, recommendations for patient monitoring that are critical to

safe use of the drug, measures that can be taken to prevent or mitigate harm," and a "list of the most frequently occurring adverse reactions, . . . along with the criteria used to determine inclusion (e.g., incidence rate)." 21 C.F.R. § 201.57(7)-(11); *see also* 21 U.S.C. §§ 355(b), (d). A drug's label must bear "such adequate warnings against use . . . as are necessary for the protection of users." 21 U.S.C. § 352(f)(2).

The information produced and the warnings required for prescription drugs are largely intended for use by medical professionals so that they can gauge the appropriateness of prescribing a drug in any particular situation. Under the "learned intermediary" doctrine, the vast majority of states treat that information as necessary for physicians, rather than patients. *See Centocor, Inc. v. Hamilton*, 372 S.W.3d 140, 158 (Tex. 2012) (listing decisions in 35 states adopting the doctrine, and then adding Texas to that list). Typically, where the learned intermediary doctrine prevails, a doctor's deviation from the warning labels is treated as "prima facie evidence of negligence." *Mulder v. Parke Davis & Co.*, 181 N.W.2d 882, 887 (Minn. 1970). Although the number of states adopting the doctrine has since expanded, even in states that have not adopted the learned intermediary doctrine, such as North Dakota, the jurisdiction at issue in the instant case, a physician's deviation from a drug's instructions can constitute prima facie evidence of negligence. *See Winkjer v. Herr*, 277 N.W.2d 579, 585 (N.D. 1979); *cf.* 82 A.L.R.4th 166.

The district court's comments instead told the jury that the label's only purpose was to avoid liability.

B. The Comments Implicated Due Process.

Although the judge described his statement to the jury as an "additional instruction," they constituted comments on the evidence. This Court has recognized that judicial commentary on the evidence is a longstanding tradition at common law that allows a judge to call attention to key components of the evidence and express certain opinions on the facts. *Vicksburg & Meridian R. Co. v. Putnam,* 118 U.S. 545, 553 (1886).

Nearly a century ago, however, Chief Justice Hughes, writing for this Court, noted that a judge's comments have "inherent limitations," must "be exercised in conformity with the standards governing the judicial office," and cannot "assume the role of a witness" or "distort [the evidence] or add to it." *Quercia v. United States*, 289 U.S. 466, 470 (1933). The Eighth Circuit, relying on *Quercia*, understands that a judge's comments to a jury are "'necessarily and properly of great weight'" and "'[their] lightest word or intimation is received with deference, and may prove controlling.'" *United States v. Brandom*, 479 F.2d 830, 835 (8th Cir. 1973) (quoting *Quercia*, 289 U.S. at 470); see also *Galloway v. United States*, 319 U.S. 372, 400 (1943) (citing *McLanahan v. Universal Ins. Co.*, 26 U.S. (1 Pet.) 170 (1828) (recognizing the outsized influence that judicial comments can have on juries).

Two constitutional imperatives apply. As *Quercia* suggests, due process requires that a tribunal be a neutral arbiter. *See Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) ("The Due Process Clause entitles a

person to an impartial and disinterested tribunal in both civil and criminal cases."). Courts must strive for "both the appearance and reality of fairness." *Id.*; *see also In re Murchison*, 349 U.S. 133, 136 (1955) (mandating the prevention of "even the probability of unfairness."). Thus, impartiality is not just an aspirational objective but a constitutional command because a "fair trial in a fair tribunal is a basic requirement of due process." *Id.*

The second constitutional imperative is the authority as judges of facts that the Seventh Amendment invests in juries. That constitutional assignment of responsibility assures that juries make credibility determinations, weigh evidence, and draw legitimate inferences from the facts, not the judge. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Where a judge undertakes that task, the impact and influence on the jury is so significant that the jury is robbed of its authority. To avoid invasion of the jury's province, one treatise on jury instructions advised that judicial comments on the evidence or witness credibility is permissible "but only after cautioning the jury that they are the sole judges of the facts and are free to disregard the comments of the court." 1 Fed. Jury Prac. & Instr. § 7:5 (6th ed.) (footnotes omitted).

Judge Weinstein expressed the belief that even more is necessary. He wrote, a judge should "write out his proposed remarks in advance, distribute copies to the parties, and discuss them in a precharge conference before he lets the jury hear them. Jack B. Weinstein, *The Power and Duty of Federal Judges to Marshall and Comment on the Evidence in Jury Trials*

and Some Suggestions on Charging Juries, 118 F.R.D. 161, 170 (1988). He warned that even "well-intentioned and seemingly innocuous the judge's remarks" can engender appellate issues. *Id*.

IV. The Eighth Circuit's Finding a Generic Instruction about the Jury's Responsibility to Reach its Own Verdict Conflicts with More Pointed Curative Instructions Required in Other Circuits.

The Eighth Circuit, employing a clear abuse of discretion standard because it chose only to review the district court's ruling about the comments in the context of the new-trial motion, held that the judge's "ill-advised" comments were cured by a basic instruction that the jury should reach its own conclusions, including the import of the Bactrim label." App. 10a. The jury was not told that the judge's opinions should not influence them, as is common in other circuits.

A. Many Circuits Recognize Prejudice More Handily or Require More Connected Curative Instructions.

Perhaps the conflict with the Eighth Circuit's holdings is most sharp with the Ninth Circuit. In a defamation case that turned on the credibility of the opposing parties, the court found that the trial judge commentary self-evidently "was not a carefully balanced appraisal of the voluminous conflicting evidence" or the party's credibility, and "went too far," becoming "in essence, a personal character reference

for the man." *Maheu v. Hughes Tool Co.*, 569 F.2d 459, 471, 472 (9th Cir. 1977).

The Ninth Circuit held that a jury instruction that told the jury it was "free to disregard" the judge's comments on the evidence "was not sufficient to cure the error" because the timing of the comments likely had a "strong impact" and left the court with " no choice but to reverse the judgment on the ground that the trial court's one-sided characterization of [the favored party] came close to directing a verdict in his favor, thus denying [the disfavored party] a fair trial." *Id*. at 471-72.

Similar rulings have occurred in the Second, Fourth, and Fifth Circuits. *See Bentley v. Stromberg–Carlson Corp*., 638 F.2d 9, 11 (2d Cir. 1981) (trial judge's comments to the jury gave all the arguments for the defendant, being "tantamount to directing a verdict" for defendant); *Spencer v. Ashcroft*, 147 F. App'x 373, 375 (4th Cir. 2005) ("judge's lengthy instructions, both at the beginning and end of the trial [about ignoring judicial commentary that suggests what the verdict should be "cured any prejudice that might have arisen from these comments."). The Fifth Circuit requires that potential prejudice when a judge comments be cured by "instructions to the jury both at the beginning and at the end of the trial to ignore his comments and to be the sole judge of the facts." *Johnson v. Helmerich & Payne, Inc*., 892 F.2d 422, 426 (5th Cir. 1990). In contrast, the Eighth Circuit allowed attenuated comments about the jury's role without mention of the judge's comments to suffice.

The standard utilized in the Eleventh Circuit, while deferential to the judge, also requires a more searching inquiry and more pointed curative instruction than the Eighth Circuit undertook. *See United States v. Hope*, 714 F.2d 1084, 1088 (11th Cir. 1983) ("[a] trial judge may comment upon the evidence as long as he instructs the jury that it is the sole judge of the facts and that it is not bound by his comments and as long as the comments are not so highly prejudicial that an instruction to that effect cannot cure the error.").

B. The First Circuit Appears Far More Deferential, Much Like the Eighth.

The Eighth Circuit's approach may be closest to that of the First Circuit. That circuit generally holds that an appellate "court must evaluate the judge's actions 'according to a standard of fairness and impartiality, recognizing that each case tends to be fact-specific.'" *Logue v. Dore*, 103 F.3d 1040, 1045 (1st Cir. 1997) (citation omitted). During the review process, the court must "differentiate between expressions of impatience, annoyance or ire, on the one hand, and bias or partiality, on the other hand." *Id.* Neither is desirable, as "the former are not to be encouraged, the latter are flatly prohibited." *Id.*

In *Logue*, the court regarded accusations of hostility when the judge posed questions as overwrought, reference to one party in the jury's presence as "the accuser" as "innocuous, particularly when its likely impact is evaluated on the entire record," and merely expressing "grave doubts anent [the party's]

credibility when the judge told the appellant outside the jury's presence that

> I just want to put it on the record that I totally disbelieve the plaintiff in this case. I think he's an absolute and incorrigible liar. And it's my intention at the conclusion of this case to request the United States Attorney to conduct an investigation into these matters relative to seeking an indictment for perjury.

Id. at 1046.

As for the judge's disparaging remarks about counsel throughout the trial, the court found none "beyond the pale, . . . even if better left unsaid." *Id*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, FILED AUGUST 16, 2023

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 22-2012

MARCO GONZALEZ,

Plaintiff-Appellant,

v.

SALEM SHAHIN, MD; CAROL GILMORE, MD; RICHARD MARTIN, MD; PAUL ANDELIN, MD; JEFFREY ADAMS, PA-C; MERCY MEDICAL CENTER; MCKENZIE COUNTY HEALTHCARE SYSTEMS, INC.,

Defendants-Appellees.

Appeal from United States District Court
for the District of North Dakota – Western

Submitted: February 16, 2023
Filed: August 16, 2023

Before COLLOTON, BENTON, and KELLY, Circuit Judges.

Appendix A

KELLY, Circuit Judge.

Marco Gonzalez was prescribed an antibiotic and suffered serious adverse effects. He sued the healthcare providers and hospitals that were involved in his treatment for medical negligence, and a jury found in favor of the defendants. Gonzalez filed a motion for a new trial, challenging the district court's comments to the jury and its evidentiary rulings. The district court[1] denied the motion, and then awarded costs to the defendants as the prevailing parties. Gonzalez now appeals the judgment entered pursuant to the jury's verdict, the denial of his new-trial motion, and the award of costs. Because we lack jurisdiction to review Gonzalez's appeal of the underlying judgment, we review only the district court's denial of his motion for a new trial and the award of costs. We affirm.

I.

After experiencing symptoms of urinary urgency, frequency, and straining, Gonzalez went to a urology clinic on July 16, 2015, and was seen by Dr. Salem Shahin, a urologist employed by Mercy Medical Center. A urine test came back negative for infection, but Dr. Shahin determined that Gonzalez's symptoms were consistent with a chronic prostate infection and prescribed Bactrim, an antibiotic. He instructed Gonzalez to take the antibiotic twice daily for a month.

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1. The Honorable Daniel Mack Traynor, United States District Judge for the District of North Dakota.

A few weeks later, on July 30, Gonzalez experienced blurred vision and drainage from his eyes. He went to the emergency room at Mercy Medical, where he was seen by another doctor, Dr. Richard Martin. Dr. Martin was aware that Gonzalez was taking Bactrim, but seeing no "Bactrim rash"—a common symptom of an adverse reaction to Bactrim—he did not believe Gonzalez was having a reaction to the antibiotic and decided not to discontinue it. Dr. Martin instead believed Gonzalez had a viral eye infection and prescribed a medicated ointment for his eyes.

By that evening, Gonzalez had developed sores on his lips, and his eyes were red and painful. Gonzalez went to the emergency room at McKenzie County Healthcare Systems, where he was seen by physician assistant Jeff Adams. Gonzalez expressed that he felt his symptoms were possibly a reaction to the Bactrim. He still had not developed any rash, however. Adams took note of Gonzalez's concern. But Adams, believing the symptoms were not indicative of a reaction to Bactrim and knowing that it was prescribed by a urologist, decided it would not be wise to discontinue the Bactrim and instead instructed Gonzalez to return to Dr. Shahin. Based on Gonzalez's symptoms that evening, Adams diagnosed him with a viral infection, and possibly an environmental allergy, and treated him accordingly.

The next day, July 31, Gonzalez returned to the Mercy Medical emergency room due to pain, particularly in his eye. There, an emergency room provider, Dr. Carol Gilmore, conducted a physical exam and ordered a CT

scan. Based on her assessment, Dr. Gilmore diagnosed Gonzalez with bilateral conjunctivitis, a tonsil infection, and an infection of the gums. She developed a plan of care for Gonzalez and discharged him. She did not discontinue the Bactrim and instructed Gonzalez to continue taking the antibiotic as prescribed.

The following day, Gonzalez returned to the Mercy Medical emergency room, reporting worsening symptoms. He had also developed a rash. Gonzalez was admitted to the hospital, where he was again examined by Dr. Gilmore. Dr. Paul Andelin was consulted, and he decided to discontinue the Bactrim. Soon after, Dr. Andelin diagnosed Gonzalez with Stevens-Johnson Syndrome, a rare disorder that can be caused by taking Bactrim. Some of Gonzalez's symptoms improved on August 2, but when Dr. Andelin saw that Gonzalez's rash was worsening, he transferred Gonzalez to a burn center for treatment.[2]

Gonzalez sued doctors Shahin, Gilmore, Martin, and Andelin; physician assistant Adams; and Mercy Medical Center and McKenzie County Healthcare Systems for medical negligence. An eleven-day jury trial was held. At trial, Gonzalez offered into evidence the Physicians' Desk Reference[3] drug label for Bactrim (the Bactrim

2. Gonzalez received extensive treatment and underwent eye surgery at the burn center. According to a medical expert who testified at trial, Gonzalez has since regained function in his eyes but has lingering symptoms like mild dry eye and inflammation.

3. The Physicians' Desk Reference is a collection of information about medical drugs, including information from drug manufacturers.

label), which noted that Bactrim's "most common adverse effects" include "allergic skin reactions (such as rash and urticaria)." The label also cautioned that fatalities, "although rare, have occurred due to severe reactions, including Stevens-Johnson Syndrome . . . ." Gonzalez argued that his medical providers had negligently treated him with Bactrim and failed to discontinue the antibiotic without consulting the Bactrim label. The defendants argued in response that the providers reasonably prescribed the Bactrim and acted with due care given Gonzalez's symptoms.

Both Gonzalez and the defense presented testimony from expert witnesses, for which the district court set time limits to manage the length of the trial. As relevant to this appeal, Dr. Gordon Leingang, an expert witness for the defense, was allotted one hour for direct examination and 30 minutes for cross-examination. After cross-examining Dr. Leingang for the allotted 30 minutes, Gonzalez requested 10 additional minutes, which the district court denied.

On November 18, 2021, the jury returned a verdict in favor of all defendants, and the next day the district court entered judgment accordingly. Gonzalez requested an extension of time to file post-trial motions, and the defendants did not object. The district court granted the extension, instructing Gonzalez to file his posttrial motions by January 13, 2022. On January 13, Gonzalez filed a motion for new trial, *see* Fed. R. Civ. P. 59(a)(1), challenging some of the district court's comments to the jury and the district court's limitations on his cross-

examination of Dr. Leingang. The defendants—without raising any objection to the timeliness of Gonzalez's motion—responded on the merits. The defendants also filed motions for costs as the prevailing parties, which Gonzalez opposed.

On April 27, 2022, the district court denied Gonzalez's motion for new trial and granted the defendants' motions for costs. Gonzalez now appeals, seeking a reversal of the judgment, a remand for a new trial, and a reversal of the award of costs.

II.

At the outset, we address the question of jurisdiction. *See Dill v. Gen. Am. Life Ins. Co.*, 525 F.3d 612, 616 (8th Cir. 2008). The defendants contend we lack jurisdiction to review the underlying judgment on the verdict because Gonzalez filed an untimely notice of appeal. Central to our consideration of this issue is the timeliness of Gonzalez's Rule 59 motion.

Generally, a party in a civil case "must file a notice of appeal 'within 30 days after entry of the judgment.'" *Perficient, Inc. v. Munley*, 43 F.4th 887, 889 (8th Cir. 2022) (quoting Fed. R. App. P. 4(a)(1)(A)); *see id.* (explaining that "a timely notice of appeal is mandatory and jurisdictional"). But if a party timely files a Rule 59 motion for a new trial, then the 30-day period in which to file the notice of appealing the judgment is tolled under Federal Rule of Appellate Procedure 4(a)(4). *See* Fed. R. App. P. 4(a)(4)(A)(v) (explaining that a timely Rule 59

motion causes "the time to file an appeal" to "run[] for all parties from the entry of the order disposing of the . . . motion").

A Rule 59 motion for a new trial is timely if filed "no later than 28 days after the entry of judgment." Fed. R. Civ. P. 59(b). A court may not extend this 28-day deadline. *See* Fed. R. Civ. P. 6(b)(2) (providing that "[a] court must not extend the time to act under" Rule 59(b)). Here, the district court granted Gonzalez an extension of time to file his Rule 59 motion. The district court later denied that motion on April 27, 2022, and Gonzalez subsequently filed his notice of appeal on May 13—well beyond the 30-day period after entry of the judgment, but within 30 days of the order denying his Rule 59 motion.

We only have jurisdiction to review the judgment, then, if the time to file the notice of appeal was tolled by Gonzalez's Rule 59 motion. We conclude it was not. Although the district court granted Gonzalez an extension of time to file his Rule 59 motion, such an extension was granted in error. *See* Fed. R. Civ. P. 6(b)(2). Accordingly, because the Rule 59 motion was not "file[d] in the district court . . . within the time allowed by" the applicable rules, the time for Gonzalez to file his appeal was not tolled. Fed. R. App. P. 4(a)(4).

Gonzalez contends that the defendants failed to object when the district court granted the extension and thus forfeited their timeliness challenge. The defendants indeed failed to raise any concerns about the extension to the district court. And Rule 6(b)—the rule that

prohibits extending the deadline for Rule 59 motions—is a nonjurisdictional rule subject to forfeiture. *See Dill*, 525 F.3d at 619 (explaining that Rule 6(b)'s "prohibition against extending" the time periods for filing certain motions is a "nonjurisdictional claim-processing rule[]," meaning that such "timeliness requirements may be forfeited if they are not timely raised"); *cf. Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 17, 199 L. Ed. 2d 249 (2017) (holding that the time prescription in Appellate Rule 4(a)(5)(C) "is not jurisdictional" because it is "a time limit prescribed only in a court-made rule," not one set by Congress).

However, the defendants' failure to object means only that the district court had the authority to rule on Gonzalez's Rule 59 motion. It does not mean that we have jurisdiction to review the underlying judgment. *Cf. Arnold v. Wood*, 238 F.3d 992, 998 (8th Cir. 2001) (explaining that an appeal from a denial of a Rule 60(b) motion does not present the underlying judgment for appellate review). As the Advisory Committee Notes on Appellate Rule 4 explain, the time within which to file a notice of appeal under Rule 4 "is not altered by, for example, a court order that sets a due date that is later than permitted by the Civil Rules" or a party's "*failure to object to the motion's lateness*." Fed. R. App. P. 4 advisory committee's note to 2016 amendments (emphasis added). In other words, the defendants' failure to object to the extension did not alter Gonzalez's deadline for appealing the judgment within 30 days after its entry.

In sum, because Gonzalez filed the notice of appeal more than 30 days after the entry of the judgment on

the verdict, we lack jurisdiction to review the judgment. We do, however, have the authority to review the district court's ruling on the Rule 59 motion because Gonzalez's notice of appeal[4] was filed within 30 days of that ruling. *See* Fed. R. App. P. 4(a)(1)(A). We therefore review only the district court's denial of the motion for a new trial, and not the underlying judgment.[5]

III.

Gonzalez contends that the district court improperly denied his motion for a new trial. He maintains that the district court (1) made improper comments about the Bactrim label and about his lawyer; and (2) erroneously limited his cross-examination of Dr. Leingang.[6] "We review the denial of a motion for a new trial for a 'clear' abuse of discretion." *White Commc'ns, LLC v. Synergies3 Tec Servs., LLC*, 4 F.4th 606, 613 (8th Cir. 2021) (quoting *Hallmark Cards, Inc. v. Murley*, 703 F.3d 456, 462 (8th Cir. 2013)).

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4. To the extent Gonzalez argues that the defendants should have anticipated that his notice would be late-filed and thus should have raised a timeliness objection to the district court, we disagree. The defendants were not required to preemptively object to a notice of appeal before it was filed.

5. For the same reason, we have the authority to review the district court's award of costs, which was granted on the same day as the Rule 59 ruling.

6. To the extent the defendants argue that the district court was required to treat Gonzalez's late-filed Rule 59 motion as a Rule 60 motion, the defendants did not raise this argument before the district court, and we see no need to address it here given that we affirm the denial of the motion.

Appendix A

A.

Gonzalez first challenges the district court's comments to the jury about the Bactrim label. "We review whether a district court's comment on the evidence was improper under an abuse of discretion standard." *Reed v. Malone's Mech., Inc.*, 765 F.3d 900, 910 (8th Cir. 2014). A district court "has broad discretion in commenting on evidence and may do so in order to give appropriate assistance to the jury." *Id.* at 910 (quoting *Warren v. State Farm Fire & Cas. Co.*, 531 F.3d 693, 698 (8th Cir. 2008)). Thus, a court "may express [its] opinion upon the facts" so long as it does so "fairly and impartially" and "makes it clear to the jury that all matters of fact are submitted to their determination." *Id.* at 911 (quoting *Gant v. United States*, 506 F.2d 518, 520 (8th Cir. 1974)). "The only limitation" is that the district court's "comments must not preclude a fair evaluation of the evidence by the jury." *Id.* at 910-11 (quoting Warren, 531 F.3d at 701). The propriety of the district court's comments "must be viewed in the context of the complete charge to the jury." *United States v. Neumann*, 867 F.2d 1102, 1104 (8th Cir. 1989).

After the Bactrim label was admitted into evidence at trial, the district court read Jury Instruction 19, which addressed the label. But the district court first stated that it wanted to "make sure" the jury did not "give [the label] more weight than it deserves." And after reading the instruction, the court told the jury that such manufacturer-provided materials "are written by drug companies and lawyers that include all sorts of information to protect principally drug companies from having a

lawsuit like this." The parties stipulated to the instruction, but not to this additional commentary.

We acknowledge Gonzalez's concerns—the district court's supplemental comments were ill-advised. Nevertheless, the district court emphasized that it was the jury's choice to determine the "measure of weight" and the importance of the label. And the court instructed the jury that manufacturer information was "competent evidence" to consider "in determining whether each medical professional met the standard of care in this case." On the whole, it was made clear to the jury that all factual questions—including the import of the Bactrim label to Gonzalez's case—were to be resolved by them. We conclude, after considering "the complete charge to the jury," that the district court did not abuse its discretion. *Neumann*, 867 F.2d at 1104.

Gonzalez next challenges the district court's commentary about his lawyer. Because Gonzalez did not raise this objection at trial, we review for plain error. *See Russell v. Anderson*, 966 F.3d 711, 719-20 (8th Cir. 2020) (reviewing "only for plain error" because the appellant "did not object at trial" to the district court's comments to the jury). Gonzalez points to a single remark where the district court opined that his lawyer would "love to take on" a lawsuit involving drug companies and their labels. But Gonzalez does not explain how this comment affected the outcome of the trial. Without more, we cannot conclude that this remark was sufficiently pervasive or that it resulted in a miscarriage of justice. *See id.* at 722 ("When reviewing for plain error, this court 'will reverse

only when a judge's comments were so pervasive as to affect the outcome of the trial and result in a miscarriage of justice.'" (citation omitted)).

B.

Gonzalez also argues that the district court erred by limiting his crossexamination of Dr. Leingang, the emergency-medicine expert for defendant Adams. A district court has broad discretion over evidentiary and trial management decisions. *See Russell*, 966 F.3d at 730 ("This court reviews for abuse of discretion evidentiary rulings and reverses only for clear and prejudicial abuse of discretion." (cleaned up and citation omitted)); *Jackson v. Allstate Ins. Co.*, 785 F.3d 1193, 1203 (8th Cir. 2015) (explaining that a trial court's imposition of time limits on the presentation of evidence is "reversed only for an abuse of discretion").

Specifically, Gonzalez asserts that the district court erroneously precluded him from questioning Dr. Leingang about an admitted exhibit: McKenzie County Healthcare's policy on medication administration. We need not address whether this ruling by the district court was an abuse of discretion because any error was harmless. *See Cooper v. City of St. Louis*, 999 F.3d 1138, 1140 (8th Cir. 2021) (declining to "address the merits of whether the [expert testimony] exclusion was a gross abuse of discretion" because "any error was harmless" (cleaned up and citation omitted)); *Hall v. Arthur*, 141 F.3d 844, 850 (8th Cir. 1998) (holding that this court will consider an erroneous evidentiary ruling as harmless unless "the

jury was substantially swayed by the result of that error" (cleaned up and citation omitted)).

At trial, Dr. Leingang testified that he had never seen or reviewed the policy document and did not know whether such a policy was in effect at the time Adams examined Gonzalez. Accordingly, when defense counsel objected to additional cross-examination of Dr. Leingang about the policy document, the district court sustained the objection because Leingang "indicated an unfamiliarity with" the document. Gonzalez does not specify what testimony he would have elicited from Dr. Leingang had he been able to continue questioning the doctor about the policy document. We see no reversible error here. *See Cooper*, 999 F.3d at 1140 (holding that the exclusion of expert testimony did not merit a new trial because any error was harmless, since that testimony would not have added anything to the admitted evidence).

Gonzalez also contends that the district court erroneously denied his request for an additional ten minutes to cross-examine Dr. Leingang. A trial court may "impose reasonable time limits on the presentation of evidence to prevent undue delay, waste of time, or needless presentation of cumulative evidence." *Cedar Hill Hardware & Constr. Supply, Inc. v. Ins. Corp. of Hannover*, 563 F.3d 329, 352 (8th Cir. 2009) (quoting *Life Plus Int'l v. Brown*, 317 F.3d 799, 807 (8th Cir. 2003)). To preserve this issue, the party "must have timely objected and made an offer of proof of the evidence excluded by the time limits." *Harris v. Chand*, 506 F.3d 1135, 1141 (8th Cir. 2007).

Gonzalez failed to make an offer of proof at trial,[7] so we review for plain error. *See id.* (noting that plain error review may be appropriate when "no offer of proof was made at trial"). Accordingly, we will reverse "only if the error was so prejudicial as to have affected substantial rights resulting in a miscarriage of justice." *Walker v. Kane*, 885 F.3d 535, 541 (8th Cir. 2018) (citation omitted). Gonzalez is unable to articulate how the district court's denial of an additional ten minutes to cross-examine Dr. Leingang resulted in a miscarriage of justice. He merely asserts that Dr. Leingang was an important witness whose opinions he needed to adequately "explore." This broad assertion, without more, does not persuade us that Gonzalez was prejudiced.[8] Indeed, with his last few minutes remaining, Gonzalez asked generalized questions that were not focused on the particular facts of his case. Although we caution district courts to ensure that time limits are "sufficiently flexible" during trial, we discern no plain error here. *Harris*, 506 F.3d at 1141.

IV.

Lastly, Gonzalez challenges the district court's award of costs for certain deposition transcripts and videos, which we review for an abuse of discretion. *Marmo v.*

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7. Gonzalez concedes that he did not "make an express offer of proof" at trial. To the extent Gonzalez argues that one was implied in his "cross-examination questions, Defendants' objections, and the Court's rulings," we are unpersuaded.

8. Gonzalez also asserts that he would have elicited testimony from Dr. Leingang about the hospital policy document, but as discussed above, the district court precluded that line of questioning, and we discern no reversible error as to that ruling.

Tyson Fresh Meats, Inc., 457 F.3d 748, 762 (8th Cir. 2006). Federal Rule of Civil Procedure 54(d) provides that costs other than attorneys' fees "should be allowed to the prevailing party." *See* 28 U.S.C. § 1920 (enumerating costs that are recoverable). A district court may tax deposition transcript and video costs if the deposition was "necessarily obtained for use in a case' and was not 'purely investigative.'" *Marmo*, 457 F.3d at 762 (quoting *Smith v. Tenet Healthsystem SL, Inc.*, 436 F.3d 879, 889 (8th Cir. 2006)); *see Craftsmen Limousine, Inc. v. Ford Motor Co.*, 579 F.3d 894, 898 (8th Cir. 2009) (holding that the "costs of video depositions are included under § 1920").

Gonzalez makes a conclusory assertion that the depositions whose costs he challenges were unnecessary, but he "fails to offer any specific basis to rebut the presumption in favor of awarding" the defendants their costs. *Craftsmen Limousine*, 579 F.3d at 897. Gonzalez points to the fact that there were "disparate" transcript and video charges "claimed by the Defendants for the same deposition," but he does not dispute the veracity of the charges. And an inconsistency in the costs submitted by the defendants, alone, does not bear on the district court's ability to impose them. *See Marmo*, 457 F.3d at 762. The district court did not abuse its discretion.

V.

For the foregoing reasons, we affirm.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA, FILED APRIL 27, 2022

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

April 27, 2022, Decided;
April 27, 2022, Filed

Case No. 1:17-cv-157

MARCO GONZALEZ,

Plaintiff,

v.

SALEM SHAHIN, M.D.; CAROL GILMORE, M.D.; RICHARD MARTIN, M.D.; PAUL ANDELIN, M.D.; JEFFREY ADAMS, PA-C; MERCY MEDICAL CENTER; AND MCKENZIE COUNTY HEALTHCARE SYSTEMS, INC.,

Defendants.

ORDER DENYING MOTION FOR NEW TRIAL

[¶1] THIS MATTER comes before the Court on Plaintiff Marco Gonzalez's ("Gonzalez") Motion for New Trial filed on January 13, 2022. Doc. No. 281. Defendant McKenzie County Healthcare Systems, Inc. ("McKenzie County") filed its Response on February 16, 2022. Doc. No.

295. Defendant Salem Shahin, MD ("Dr. Shahin") filed his Response on February 17, 2022. Doc. No. 296. Defendants Jeffrey Adams, PAC, ("PA Adams") filed his Response on February 18, 2022. Doc. No. 297. Finally, Defendants Paul Andelin, MD ("Dr. Andelin"), Carol Gilmore, MD ("Dr. Gilmore"), Richard Martin, MD ("Dr. Martin") and Mercy Medical Center ("Mercy Medical) filed their Response on February 18, 2022. Doc. No. 298. Gonzalez filed Reply briefs on March 10, 2022. Doc. Nos. 302, 303, 304, 305. For the reasons set forth below, Gonzalez's Motion for New Trial is **DENIED**.

LEGAL STANDARDS

[¶2] Gonzalez brings his Motion for New Trial pursuant to Rule 59 of the Federal Rules of Civil Procedure. A court may grant a new trial "after a jury trial, for any reasons for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(a)(1)(A). In reviewing a motion for new trial, the Court considers "whether a new trial is necessary to prevent a miscarriage of justice." *Hallmark Cards, Inc. v. Murley,* 703 F.3d 456, 462 (8th Cir. 2013). The Eighth Circuit has cautioned, "[a] new trial should be granted only if the evidence weighs heavily against the verdict." *Id.* A new trial may be ordered "only if the error misled the jury or had a probable effect on its verdict." *Id.* (citation and quotation marks omitted). "Deciding a motion for new trial is a matter committed to the sound discretion of the trial court." *O'Dell v. Hercules, Inc.,* 904 F.2d 1194, 1200 (8th Cir. 1990).

Appendix B

DISCUSSION

[¶3] Gonzales moved for a new trial on four separate grounds. First, Gonzalez contends the Court made improper comments relating to the Bactrim label and trial counsel. Second, Gonzalez argues the Court improperly limited the time of trial and examination and cross-examination of witnesses. Third, Gonzalez claims the Court improperly overruled his objections to the cross-examination of defense expert Dr. Leingang while limiting and sustaining objections to Plaintiff's cross-examination of Dr. Leingang. Finally, Gonzalez argues the Court allowed impermissible cross-examination of Gonzalez's lifecare planner relating to his ability to afford treatment. The Court will take each in turn.

I. Comments Relating to Bactrim Insert and Plaintiff's Counsel

[¶4] Gonzalez argues the Court improperly commented on the purpose of the Bactrim label being to prevent liability for the drug manufacturer. Gonzalez further argues the Court improperly commented on trial counsel's hypothetical desire to sue a drug manufacturer on behalf of an injured person. The Defendants all argue the Court did not err in these comments.

[¶5] Gonzalez never made this specific objection relating to the Court's statement about the purpose of the Bactrim insert or the Court's comment regarding trial counsel at the time the statement was made. Absent a specific objection at that time, the Court's analysis is

limited to plain error. *See Rush v. Smith,* 56 F.3d 918, 922 (8th Cir. 1995) ("When the complaining party has failed to object to the court's statements at trial, our review is for plain error only.") "Under plain error review, an error not identified by a contemporaneous objection is grounds for reversal only if the error prejudices the substantial rights of a party and would result in a miscarriage of justice if let uncorrected." *Id.*

[¶6] The Court's instruction on the Bactrim label properly informed the jury it is not conclusive evidence of the medical providers' standard of care. *See* Doc. No. 254, ¶ 33. As to the Court's comment on drug companies' avoiding liability, this was likewise appropriate. *See Morlino Medical Center of Ocean County,* 152 N.J. 563, 706 A.2d 721, 729 (N.J. 1998) ("Manufacturers write drug package inserts and PDR warnings for many reasons including compliance with FDA requirements, advertisement, the provision of useful information to physicians, and an attempt to limit the manufacturer's liability."). The Final Jury Instructions likewise gave the jury the requirements for establishing the standard of care, "Evidence as to the standard of care, the failure to meet that standard of care, and proximate cause ***must be established by expert testimony***." Doc. No. 254, ¶ 32. Accordingly, there was no plain error in the Court explaining the purpose of the Bactrim label.

[¶7] Finally, as to the Court's comment relating to Mr. Leventhal's desire to sue a drug manufacturer, the Court concludes there was no harm in making this comment. The comment must be viewed in the context of the length and

nature of the trial. It was a comment made in a matter of seconds during the course of a twelve-day complex medical malpractice jury trial. It was also a joke. Gonzalez merely contends the Court's comment was inappropriate. Even assuming it was, or maybe it was a bade joke, Gonzalez has failed to show it impacted the jury's decision or prejudiced his case in any way. *See Reed v. Malone's Mechanical, Inc.*, 765 F.3d 900, 910-11 (8th Cir. 2014) ("The trial court has broad discretion in commenting on evidence and may do so in order to give appropriate assistance to the jury. The only limitation on the discretion is that the comments must not preclude a fair evaluation of the evidence of the jury." (internal citations and quotation marks omitted)); *see also Rush,* 56 F.3d at 922 ("While this court previously stated that a few improper comments are not necessarily enough to require reversal, we also recognized at the same time that each case of allegedly prejudicial comments made by the trial judge must turn on its own circumstances." (citation and quotation marks omitted)).

[¶8] The potential prejudicial impact of these comments was also effectively cured by the Court in the final instructions. The Court instructed the Jury at the close of trial, "I have not intended to suggest what I think your verdict should be by any of my rulings or comments during trial." Doc. No. 254, ¶ 4. "A jury is presumed to follow the instructions given." *In re Prempro Products Liability Litigation,* 514 F.3d 825, 832 (8th Cir. 2008). The Court therefore presumes the jury followed the instruction that the Court's comments do not suggest what the Court believes the verdict should be. Gonzalez has failed to provide any basis the jury failed to follow the

instruction that the Court's comments are not intended to suggest what the verdict should be.

[¶9] Accordingly, Gonzalez has failed to show a new trial is warranted based on the Court's comments on the Bactrim package insert.

II. Court Imposed Time Limitations

[¶10] Gonzalez argues a new trial is necessary because the Court improperly restricted his time to present his case and in cross-examining the Defendants and their experts. The Defendants argue the Court did not abuse its discretion in limiting the time for trial and applied the restrictions evenhandedly.

[¶11] It is well established trial courts have wide discretion in placing "reasonable time limits on the presentation of evidence to prevent undue delay, waste of time, or needless presentation of cumulative evidence." *Johnson v. Ashby,* 808 F.2d 676, 678 (8th Cir. 1987). The overcrowded dockets of courts require the courts to "exercise strict control over the length of trials." *Id.* (quoting *Flaminio v. Honda Motor Co., Ltd.,* 733 F.2d 463, 473 (7th Cir. 1984)). Limiting the length of trial that results in exclusion of "probative, non-cumulative evidence" may be an abuse of discretion. *Id.* When limiting the length of trial, courts should be flexible enough to recognize when the restrictions may be too rigid. *Id.*

[¶12] The time restrictions in this case were reasonable. The Court evenhandedly restricted the presentation of

Gonzalez and the Defendants. When the Parties could not agree on how to split the twelve days available for trial, they asked the Court to intervene. The Parties submitted proposed times for each witness and the Court made reductions to those times to accommodate for the trial length. Multiple times throughout the trial, the Court permitted additional questioning by the Parties when requested. Sometimes the Court denied such requests when it was apparent the evidence sought with additional questioning was going to be cumulative or a waste of time. In addition, Gonzalez has not made an offer of proof or even a suggestion of what evidence was omitted due to the time constraints put in place by the Court. Gonzalez simply asserts probative, non-cumulative evidence was omitted without illustrating any information relating to what evidence was not admitted.

[¶13] Accordingly, Gonzalez has failed to show a new trial is warranted based on the time restrictions imposed by the Court.

III. Evidentiary Rulings Regarding Dr. Leingang's Testimony

[¶14] Gonzalez next argues the Court erred in limiting his ability to cross-examine Dr. Leingang, specifically regarding Exhibit 17, which was McKenzie County's policy on medication administration. Gonzalez also argues the Court erred in overruling his objections to the leading questions by Defense Counsel on re-direct examination. Finally, Gonzalez contends the objections and time limitations prevented him from fully questioning

Dr. Leingang. The Defendants argue the Court properly ruled on the objections during Dr. Leingang's testimony.

[¶15] "The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence" in order to ensure the process effectively determines the truth, avoids wasting time, an protects witnesses from harassment and embarrassment. Fed. R. Evid. 611(a). Cross-examination generally should not go beyond the scope of direct examination. Fed. R. Evid. 611(b). Generally, leading questions should be prohibited on directed examination but permitted on cross-examination or when a hostile witness, adverse party, or witness identified with an adverse party is called. Fed. R. Evid. 611(c). The Court may allow for leading questions on direct examination when "necessary to develop the witness's testimony." *Id.* The Court has discretion over the use of leading questions during trial. *United States v. Butler,* 56 F.3d 941, 943 (8th Cir. 1995).

[¶16] The Court explained to the jury the reason for prohibiting Dr. Leingang from testifying regarding Exhibit 17 was due to Dr. Leingang not being familiar with the contents of the exhibit. Without that knowledge, he would be unable to testify about the exhibit. Any further questioning would have been a waste of time. As for the leading questions on re-direct examination, the court permitted it as an efficient and necessary way to develop Dr. Leingang's testimony. *See* Fed. R. Evid. 611(c). Finally, as to the general assertion of the objections and time limitations preventing full examination of Dr. Leingang, Gonzalez did not raise this objection at the time of trial.

He has not provided what, if any, additional testimony he would have elicited from Dr. Leingang. The final question asked by Gonzalez's counsel was how many physician's assistants are there in America? With that being the final question, the Court concluded no additional time was necessary to cross-examine Dr. Leingang.

[¶17] Accordingly, Gonzalez has failed to show a new trial is warranted based on the Court's evidentiary rulings relating to Dr. Leingang's testimony.

IV. Evidentiary Rulings Regarding Gonzalez's Lifecare Planner Testimony

[¶18] Gonzalez argues the Court erred in allowing the Defense to cross-examine his lifecare planner's on Gonzalez's ability to afford his treatment. The Defendants argues Gonzalez misconstrues the cross-examination and that the cross-examination was on the treatment he did or did not receive since 2019.

[¶19] Gonzalez misconstrues what occurred during his lifecare planner's testimony. The lifecare planner estimated what needs Gonzalez will have beginning in 2019. The Defense questioned her on his actual costs in 2019. The questions did not relate to his ability to pay. Rather, the Defense focused on the lifecare planner's projections and how they compared to the actual medical expenses Gonzalez had in that time. This goes directly to the heart of the lifecare planner's credibility. The Defense did not improperly question her on Mr. Gonzalez's ability to pay. It was the lifecare planner who on her own began to

explain Gonzalez had a lack of funds. The Court specifically struck this testimony from the record. In other words, the Court told the jury to disregard that testimony. The Court presumes the jury followed the instruction to disregard the testimony and Gonzalez has now shown any probability the jury was unable to do so. *See Stults v. American Pop Corn Co.*, 815 F.3d 409, 415 (8th Cir. 2016) ("We normally presume that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an overwhelming probability that the jury will be unable to follow the court's instructions." (citations and quotation marks omitted)).

CONCLUSION

[¶20] In sum, Gonzalez has failed to establish a new trial is necessary in this matter. He has failed to show any of the Court's rulings prejudiced him in any way. The Court concludes there was no error in the comments or rulings made at trial. Accordingly, Gonzalez's Motion for New Trial is **DENIED**.

[¶21] **IT IS SO ORDERED**.

DATED April 27, 2022.

/s/ Daniel M. Traynor
Daniel M. Traynor, District Judge
United States District Court

APPENDIX C — TRANSCRIPT EXCERPTS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA, FILED JUNE 24, 2022

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

File No. 1:17-cv-157
Appeal No. 22-2012

MARCO GONZALEZ,

Plaintiff,

vs.

SALEM SHAHIN, M.D.; CAROL GILMORE, M.D.; RICHARD MARTIN, M.D.; PAUL ANDELIN, M.D.; JEFFREY ADAMS, PA-C; MERCY MEDICAL CENTER; AND MCKENZIE COUNTY HEALTHCARE SYSTEMS, INC.,

Defendants.

TRANSCRIPT OF JURY TRIAL
Volume III

Taken at
United States Courthouse
Bismarck, North Dakota
November 5, 2021

BEFORE THE HONORABLE DANIEL M. TRAYNOR
-- UNITED STATES DISTRICT COURT JUDGE --

Appendix C

[375]

* * *

I also need to give you an additional instruction. I've allowed Exhibit 78 into the record, and it will go back with you for your consideration during your deliberations. I can tell you that not every court would do that in a case like this. It's a discretionary matter. I made the decision to allow that to go back with you. Sometimes -- if it's not, it's flashed up on the screen, you're told that that's an opportunity for you to take a look at it. You have to keep notes and try to remember everything that it says, but the concern and the reason why it doesn't always go back is they don't -- judges, lawyers, parties, are concerned about the weight that jurors will give a particular item of evidence like [376]that. And so the measure of weight or how important something like that is, is a decision that you get to make. But we want to make sure that you don't give it more weight than it deserves. So I'm giving you an additional instruction regarding manufacturer information.

The information issued by manufacturers for the use of a drug are competent evidence to use in determining whether the appropriate standards of care are followed. However, they are not to be used as conclusive evidence of or to establish the standards of care required of each medical professional on their own.

Instead, you may consider them along with the other testimony presented in determining whether each medical professional met the standard of care in this case.

I'll include that as part of the closing instructions so that you have that item as an additional reference point but that applies to Exhibit 78, Plaintiff's Exhibit 78, which you'll recall is the Bactrim insert.

There may be some additional exhibits that we allow from the manufacturer. Keep in mind these are written by drug companies and lawyers that include all sorts of information to protect principally drug companies from having a lawsuit like this; so they'll include all sorts of information in those documents. Because if they know of a concern and they don't put it into an insert like that and they have a lawsuit as a [377]result, it's a case that I'm sure Mr. Leventhal would love to take on behalf of somebody who is injured as a result of that type of conduct. So keep it in perspective.

All right. I've also informed the attorneys that some members of the jury are having a difficult time hearing witnesses. I've told the attorneys that the jury may go like that (indicating) if they need to hear better and so please do so and we'll try to make sure that the microphone is brought in the face of the person who is testifying.

* * *

[440]

* * *

Mr. Leventhal, did you have an objection you wanted to make?

MR. LEVENTHAL: I do, Your Honor. The Court, when we began the session today, read your instruction about the label.

THE COURT: Right.

MR. LEVENTHAL: It also introduced to the jury evidence which is not endorsed from any expert witness from the defense, from the plaintiff, even though we've known the label is at issue about what the purpose of the label is and that the purpose of the label clearly protecting the drug companies from liability if they don't put something in the label. I want to [441]register an objection to that. I would request that the Court not allow the defense to pile on to that and question people do you agree with the judge or whether they use those words or not, that the label really -- the main purpose is to protect the drug companies. We don't think that it would be appropriate given that not one expert witness is endorsed to say that. This is not evidence that would come in. I suspect that if I had a witness try to say, well, what's the purpose of the label and not -- and they had objected, the Court probably would have sustained the objection.

And because of that I render -- I'm making a record with my objection, and also request that the defense not be allowed to open that up and even suggest that that's the purpose of the label at any other time during this trial.

THE COURT: Mr. Leventhal, your objection is noted. It's common sense.

But any response from the defense?

MS. KOLB: I will say this on behalf of my clients. I know my colleagues here want to comment as well. I did not plan to ask a question like that of Dr. Corre so to the extent there might be a concern about that.

THE COURT: Mr. Schwegman or Mr. Hanson?

MR. SCHWEGMAN: Your Honor, there was testimony -- there's testimony but certainly in my opening statement I talked about the Bactrim label in that introductory paragraph [442]and the purpose of that. So I don't think Mr. Leventhal's objection goes to the content of the Bactrim label and comments within that label because, for example, in that first paragraph when he reads the mandate that the Bactrim should only be prescribed if there is a proven or strongly suggested infection initially left out the part that talked about to prevent the development of bacteria-resistant antibiotics. So I fully intend to cross-examine witnesses on that and I just don't want his objection to be so overbroad that it prevents me from using portions of the sort of self-evident contents of the label.

THE COURT: It's not overbroad. I don't believe my comments were in any way inappropriate. I think that it's a matter of common sense that these items are drafted by drug companies when they are released as part of the offering of the prescription and the drug.

And so your objection is noted for the record, Mr. Leventhal, if you want to preserve the matter for an appeal, but I'm not going to sustain the objection. I'm going to overrule it. Counsel can use it. Refer to the

matter if they deem it appropriate but I don't, frankly, think that they're going to. It's just a matter of common sense that these things are produced by drug companies for the purpose of protecting them.

MR. LEVENTHAL: And as far as the second part of my request which was that they not be --

[443]THE COURT: Denied.

MR. LEVENTHAL: Pardon me?

THE COURT: Denied. I'm not going to place any limitations on the defense counsel based upon something that I said as an offhanded comment which is a matter of common sense, Mr. Leventhal, in my opinion.

MR. LEVENTHAL: Thank you.

THE COURT: Okay? You have a problem with it, take it to an appeals court.

You can call the jury.

* * * *

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, DATED SEPTEMBER 21, 2023

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 22-2012

MARCO GONZALEZ,

Appellant,

v.

SALEM SHAHIN, MD, *et al.*,

Appellees.

Appeal from U.S. District Court
for the District of North Dakota - Western
(1:17-cv-00157-DMT)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Erickson did not participate in the consideration or decision of this matter.

September 21, 2023

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX E — AMENDED JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA, FILED APRIL 27, 2022

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA

Case No. 1:17-cv-157

MARCO GONZALEZ,

Plaintiff,

vs.

SALEM SHAHIN, M.D.; CAROL GILMORE, M.D.; RICHARD MARTIN, M.D.; PAUL ANDELIN, M.D.; JEFFREY ADAMS, PA-C; MERCY MEDICAL CENTER; AND MCKENZIE COUNTY HEALTHCARE SYSTEMS, INC.,

Defendants.

AMENDED JUDGMENT IN A CIVIL CASE

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

☒ **Decision on Motion.** This action came before the Court on motion. The issues have been considered and a decision rendered.

Appendix E

☐ **Stipulation.** This action came before the court on motion of the parties. The issues have been resolved.

☐ **Dismissal.** This action was voluntarily dismissed by Plaintiff pursuant to Fed. R. Civ. P. 41(a)(1)(ii).

IT IS ORDERED AND ADJUDGED:

Pursuant to the jury's verdict entered on November 18, 2021, judgment is hereby entered in favor of defendants Salem Shahin, M.D., Carol Gilmore, M.D., Richard Martin, M.D., Paul Andelin, M.D., Jeffrey Adams, PA-C, Mercy Medical Center, and McKenzie County Healthcare Systems, Inc.

Pursuant to the Order filed on April 27, 2022, McKenzie County's Motion for Costs and PA Adams' Motion for Costs are GRANTED. The Mercy Medical Defendants' Motion for Costs and Dr. Shahin's Motion for Costs are GRANTED, IN PART. Accordingly, the Judgment t is amended to include the following awards of costs and disbursements: $20,339.48 to Defendant McKenzie County Healthcare Systems, Inc.; $19,437.59 to Defendant Jeffrey Adams, PA-C.; $21,205.16 to Carol Gilmore, M.D., Richard Martin, M.D., Paul Andelin, M.D., and Mercy Medical Center; and $15,618.15 to Salem Shahin, M.D.

Date: April 27, 2022

ROBERT J. ANSLEY, CLERK OF COURT
By: /s/ Melissa Fischer, Deputy Clerk

APPENDIX F — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA, FILED NOVEMBER 19, 2021

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA

Case No. 1:17-cv-157

MARCO GONZALEZ,

Plaintiff,

vs.

SALEM SHAHIN, M.D.; CAROL GILMORE, M.D.; RICHARD MARTIN, M.D.; PAUL ANDELIN, M.D.; JEFFREY ADAMS, PA-C; MERCY MEDICAL CENTER; AND MCKENZIE COUNTY HEALTHCARE SYSTEMS, INC.,

Defendants.

JUDGMENT IN A CIVIL CASE

☒ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

☐ **Decision on Motion.** This action came before the Court on motion. The issues have been considered and a decision rendered.

Appendix F

☐ **Stipulation.** This action came before the court on motion of the parties. The issues have been resolved.

☐ **Dismissal.** This action was voluntarily dismissed by Plaintiff pursuant to Fed. R. Civ. P. 41(a)(1)(ii).

IT IS ORDERED AND ADJUDGED:

Pursuant to the jury's verdict entered on November 18, 2021, judgment is hereby entered in favor of defendants Salem Shahin, M.D., Carol Gilmore, M.D., Richard Martin, M.D., Paul Andelin, M.D., Jeffrey Adams, PA-C, Mercy Medical Center, and McKenzie County Healthcare Systems, Inc.

Date: November 19, 2021

ROBERT J. ANSLEY, CLERK OF COURT
By: /s/ Roxanne Muffenbier, Deputy Clerk