IN THE SUPREME COURT OF IOWA

Supreme Court Case No. 22-0918
Linn County Case No. LACV092819

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JENA McCOY,
Plaintiff/Appellee,

v.

THOMAS L. CARDELLA & ASSOCIATES,
Defendant/Appellant.

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APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR LINN COUNTY
HONORABLE JUDGE VALERIE L. CLAY

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# AMENDED FINAL BRIEF OF APPELLANT

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# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**Page(s)**

## Cases

**Statutes**



**Rules**



**Other Authority**

## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. The Plaintiff, Jena McCoy, sued her former employer, Thomas L. Cardella & Associates ("TLCA"), "by reason of the fact that she was consistently sexually harassed at her work." *See* Petition, ¶ 1. McCoy never filed a civil rights charge or pursued remedies under the Iowa Civil Rights Act. She instead pursued claims of negligent hiring and retention. Did the District Court err by failing to dismiss the claims based on ICRA preemption, including by failing to grant TLCA's motion to dismiss, motion for summary judgment, motion for a directed verdict, motion for judgment notwithstanding the verdict, and motion for a new trial?

*Magnusson Agency v. Public Entity Nat'l Co.-Midwest*, 560 N.W.2d 20 (Iowa 1997)
*Clinton Physical Therapy Services, P.C. v. John Deere Health Care, Inc.*, 714 N.W.2d 603 (Iowa 2006)
*L.F. Noll Inc v. Eviglio*, 816 N.W.2d 391 (Iowa 2012 )
*Haskenhoff v. Homeland Energy Solutions, LLC*, 897 N.W.2d 553 (Iowa 2017)
*Cole v. Wells Fargo Bank, N.A.*, 437 F. Supp. 2d 974 (S.D. Iowa 2006)
*Smidt v. Porter*, 695 N.W.2d 9 (Iowa 2005)
*Vaughn v. Ag Processing, Inc.*, 459 N.W.2d 627 (Iowa 1990)
*Greenland v. Fairtron Corp.*, 500 N.W.2d 35 (Iowa 1993)
Iowa Civil Jury Inst. 1900.1-1900.2
Iowa Civil Jury Inst. 1900.3-1900.4
*Lynch v. City of Des Moines*, 454 N.W.2d 827 (Iowa 1990)
*Boyle v. Alum-Line, Inc.*, 710 N.W.2d 741 (Iowa 2006)
*Gustafson v. Genesco, Inc.*, 320 F. Supp. 3d 1032 (S.D. Iowa 2018)
Iowa Code § 216.15(13)
Iowa R. Civ. P. 1.1003(1)(2)-1.1004(1)(6)(8)

II. McCoy sought to disguise and recast her sexual harassment claims as tort claims, asserting that TLCA negligently failed to prevent an assault and battery allegedly committed by McCoy's co-workers. The Iowa Supreme Court conclusively has held that "actions for negligent hiring, negligent supervision, or negligent retention are barred by the exclusivity provision" of the Workers Compensation Act. *Estate of Harris v. Papa John's Pizza*, 679 N.W.2d 673, 681 (Iowa 2004). Did the District Court err by failing to dismiss her claims based on preemption and exclusivity under the Workers Compensation Act, including by failing to grant

TLCA's motion for summary judgment, motion for a directed verdict, motion for judgment notwithstanding the verdict and motion for a new trial?

*Magnusson Agency v. Public Entity Nat'l Co.-Midwest*, 560 N.W.2d 20 (Iowa 1997)
*Clinton Physical Therapy Services, P.C. v. John Deere Health Care, Inc.*, 714 N.W.2d 603 (Iowa 2006)
*L.F. Noll Inc v. Eviglio*, 816 N.W.2d 391(Iowa 2012 )
*Haskenhoff v. Homeland Energy Solutions, LLC*, 897 N.W.2d 553 (Iowa 2017)
*Estate of Harris v. Papa John's Pizza*, 679 N.W.2d 673 (Iowa 2004)
Larson's Workers' Compensation Law § 103.07 (2003)
*Nelson v. Winnebago Industries*, 619 N.W.2d 385 (Iowa 2000)
*Otterberg v. Farm Bureau Mutual Ins. Co.,* 696 N.W.2d 24 (Iowa 2005)
Iowa Code § 85.3(1)
*Thayer v. State*, 653 N.W.2d 595 (Iowa 2002)
*Baker v. Bridgestone/Firestone*, 872 N.W.2d 672 (Iowa 2015).
*Harned v. Farmland Foods, Inc.*, 331 N.W.2d 98 (Iowa 1983)
*Dunlavey v. Economy Fire and Cas. Co.*, 526 N.W.2d 845 (Iowa 1995)
*Heartland Specialty Foods v. Johnson*, 731 N.W.2d 397(Iowa Ct. App. 2007)
*Nelson v. Winnebago Industries, Inc.*, 619 N.W.2d 385
*Schoff v. Combined Ins. Co. of America*, 604 N.W.2d 43 (Iowa 1999)
*Godar v. Edwards*, 588 N.W.2d 701(Iowa 1999)

III. Irregularities occurred in the proceedings when the Trial Court permitted McCoy's expert witness to testify to new opinions at trial after barring her deposition testimony shortly before trial.

*Haskenhoff v. Homeland Energy Solutions, LLC*, 897 N.W.2d 553 (Iowa 2017)
Iowa R. Civ. P. 1.1004(1)
*Doe v. Central Iowa Health System*, 766 N.W.2d 787, 792-93 (Iowa 2009)
Iowa R. Civ. P. 1.500.2(c)

IV. Other irregularities and misconduct occurred throughout the four-day jury trial, including: (1) Plaintiff violated a motion in limine by using sexual terminology to describe her work environment; and (2) Plaintiff's counsel referenced the salary of a professional basketball player in closing argument to frame Plaintiff's damages claims. Did the District Court err in failing to grant TLCA's motion for a new trial?

*Kipp v. Stanford,* 949 N.W.2d 249 (Iowa Ct. App. 2020)
*Kinseth v. Weil-McLain,* 913 N.W.2d 55 (Iowa 2018)
*Mays v. C. Mac Chambers Co.,* 490 N.W.2d 800 (Iowa 1992)
*Hoover v. First American Fire Ins. Co. of New York,* 218 Iowa 559, 255 N.W. 705 (Iowa 1934)
*McCabe v. Mais,* 580 F. Supp. 2d 815 (N.D. Iowa 2008)
*McCabe v. Parker*, 608 F.3d. 1068

V. The jury verdict form found TLCA separately liable for negligently hiring or supervising two former employees: John Thompson and Mitch Turner. The same verdict form found that Turner did not commit an assault or battery. Iowa law requires an underlying wrongful act by an employee such as Turner before an employer may be held liable for negligent hire or supervision. Is the verdict form inconsistent, requiring a new trial?

*Clinton Physical Therapy Services, P.C. v. John Deere Health Care, Inc.*, 714 N.W.2d 603(Iowa 2006)
Iowa R. Civ. P. 1.934
*Schoff v. Combined Ins. Co. of America*, 604 N.W.2d 43 (Iowa 1999)
*Holdsworth v. Nissly*, 520 N.W.2d 332 (Iowa Ct. App. 1994)

## ROUTING STATEMENT

The District Court improperly created and instructed the jury on an unrecognized tort theory in Iowa, contradicting Iowa's statutory framework and unleashing enormous financial risk for employers, meriting review by the Supreme Court pursuant to Iowa R. App. P. 6.1101(c)(d).

## STATEMENT OF THE CASE

After a four-day trial, a Linn County jury awarded the Plaintiff, Jena McCoy, $400,000 in emotional distress damages based on a legal theory that does not exist—negligent supervision against her employer. The District Court repeatedly erred by not dismissing her claims, because they are either preempted by the Iowa Civil Rights Act or the Iowa Workers Compensation Act.

McCoy briefly worked for the Defendant, Thomas L. Cardella & Associates ("TLCA") as a call center associate in 2017. McCoy sued TLCA in 2018, alleging TLCA negligently failed to prevent sexual harassment. Because she missed the administrative statute of limitations for a sexual harassment claim, however, she characterized the underlying conduct as assault and battery, rather than sexual harassment. TLCA filed a motion to dismiss the Petition based on preemption/exclusivity arising under the Iowa Civil Rights Act. The District Court denied the motion to dismiss, allowing McCoy to pursue a sexual harassment claim re-packaged as a tort.

TLCA renewed its exclusivity/preemption arguments via a summary judgment motion, including exclusivity and preemption under both the ICRA and workers compensation law. The District denied the summary judgment motion. Despite the controlling issue being solely a point of law, the District

Court held that factual disputes prevented summary judgment. *See* April 6, 2020 Ruling, at 5.

TLCA renewed its arguments via a motion for judgment on the pleadings. The District Court erred a third time by denying this motion.

TLCA filed multiple motions in limine, including that McCoy not be allowed to refer to sexual harassment at trial. The Court granted this motion in limine. The District Court nonetheless permitted McCoy and her counsel to make multiple references at trial to physical touching and a sexually-charged environment.

During the trial, TLCA made two motions for mistrial based on McCoy violating the motion in limine ruling and other misconduct. Post-trial, TLCA moved for a directed verdict and judgment notwithstanding the verdict. TLCA also filed a motion for a new trial. The Trial Court, in denying these motions, repeatedly failed to apply Supreme Court precedent. Instead, the Trial Court merely referenced the previous, erroneous rulings on TLCA's motion to dismiss, summary judgment motion, and motion for judgment on the pleadings.

Following the District Court's final ruling on post-trial motions, TLCA timely filed its appeal. This Court should reverse the District Court's flawed rulings, vacate the verdict and judgment, and remand for entry of judgment in favor of TLCA.

## STATEMENT OF THE FACTS

The Plaintiff, Jena McCoy, formerly worked as a sales representative at TLCA's call center in Ottumwa, Iowa. (App. 189, Tr. 107:10-12) Sales associates provide sales and customer service functions for TLCA's clients. (App. 359, Tr. 22:12-24:7) McCoy started with TLCA when the Ottumwa facility opened in January 2017; she separated 3-4 months later. (App. 196, Tr. 121:18-23; App. 217, Tr. 144:1-6; App. 243, Tr. 178:11-15)

McCoy claims her supervisor, John Thompson, groped her and was sexually inappropriate throughout her employment. (App. 197-208, Tr. 122:13-133:19; App. 227-229, Tr. 154:21-156:19) She characterized Thompson's conduct as "engaging in unwanted touching and unwanted sexually charged comments." (App. 229, Tr. 156:13-19) This allegedly included touching her breasts. (App. 228, Tr. 155:8-11) Thompson admitted physical interaction in the workplace, but testified it was mutual, as "I thought we basically were in a relationship." (App. 126 at 17:2-24)

McCoy also claims another employee, Mitch Turner, made inappropriate, sexually-oriented comments to her. (App. 215, Tr. 140:2-8; App. 218, Tr. 145:1-6; App. 246, Tr. 190:9-12; App. 270-272, Tr. 23:23-25:1; App. 274-296, Tr. 31:14-53:14) She alleges Turner made these comments in a locker area at the facility, making her feel trapped and afraid. (App. 219, Tr. 146:15-24; App. 270-272, Tr. 23:23-25:1)

McCoy's testimony regarding Turner evolved considerably over the course of the trial, which bears on TLCA's arguments relating to an inconsistent verdict. During her initial trial testimony, McCoy only asserted that Turner made "inappropriate comments" toward her and other females. (App. 215, Tr. 140:3-8). She said the comments occurred in a locker space and had "sexual overtones." (App. 219-220, Tr. 146:15-147:8) Although McCoy claimed the comments made her fearful to walk to her car after work, she struggled on cross examination to articulate what she was fearful of. (App. 246-248, Tr. 190:9-192:6)

The next trial day, McCoy took the stand again and her testimony expanded. McCoy's counsel asked her the specifics of Turner's comments. The Court sustained TLCA's objection that the answer likely would violate the in limine order regarding sexual harassment. (App. 273, Tr. 26:1-20) McCoy then made an offer of proof. During this offer of proof, McCoy for the first time testified that Turner "trapped her" in the locker area while making sexually-charged comments. (App. 275, Tr. 32:3-10) This new testimony persuaded the Court to allow McCoy to testify about the sexually-charged comments to the jury, over TLCA's objection that McCoy essentially was fixing her testimony to shoehorn her sexual harassment claim into an assault setting. (App. 279-282, Tr. 36:21-39:25) McCoy told the jury that Turner said she

"looked fuckable" and her clothes "would make my breasts or butt look nice." (App. 284-285, Tr. 41:24-42:9)

Despite the sexual commentary and touching allegedly occurring for most of McCoy's employment at TLCA, she never filed a civil rights charge with the Iowa Civil Rights Commission alleging sexual harassment, which is a prerequisite to bringing a sexual harassment lawsuit. *See* Petition (nowhere alleging exhaustion of administrative remedies).

McCoy testified she reported some of the unwelcome conduct to call center director Mark Grego and recruiter Samantha Teague. (App. 209-216, Tr. 134:11-141:17) Both Grego and Teague deny McCoy ever complained. (App. 245-246, Tr. 189:12-190:3; App. 311-314, Tr. 74:14-77:23; App. 335-339, Tr. 120:4-124:13; App. 132 at 7:9-133 at 11:15; App. 355-358, Tr. 18:16-21:17) No written record of any such complaints exists. (App. 363-363, Tr. 42:14-43:8) McCoy alleges that Grego offered to resolve her conflict with Thompson by removing him as supervisor and having Turner supervise her instead. (App. 217, Tr. 144:10-14; App. 221-222, Tr. 148:20-149:21) After McCoy repeatedly failed to show up for work, TLCA terminated her employment for poor attendance, with her final day of work April 25, 2017. (App. 221, Tr. 148:15-22; App. 225, Tr. 152:1-6; App. 316, Tr. 79:14-15)

McCoy testified that all the objectionable conduct occurred at TLCA during the workday, as she went about her job duties. (App. 238-242, Tr.

167:8-171:14) McCoy never reported any physical or emotional injuries to Cardella. (*Id.*) She never filed a workers compensation claim. (*Id.*)

McCoy sued TLCA alleging negligent hire and negligent retention/supervision.[1] The Petition claims TLCA negligently failed to respond to her complaints of sexual harassment. Having failed to pursue a civil rights charge, McCoy framed the claim as a tort, based on an underlying theory that Thompson committed assault and battery and Turner committed an assault.

McCoy sought only damages for emotional distress. She relied primarily on the testimony of her therapist, Kara Crain. McCoy originally planned for Crain to testify via her deposition. Before trial, however, TLCA filed a motion to strike Crain's testimony, because Crain testified that all of McCoy's emotional distress arose from her "sexual harassment" while employed at TLCA. The District Court granted the motion and struck the deposition testimony, reasoning that sexual harassment was not a theory in the case. *See* App. 66-67.

Over TLCA's protest, the District Court then allowed Crain to testify via Zoom at trial. TLCA objected, noting that "[t]he witness almost certainly is likely to change the expert opinion to generate an opinion not previously

[1] McCoy abandoned the negligent hire claim at trial. (App. 378-379, Tr. 83:22-84:3)

offered, and it will – it will be related to a different theory of liability, namely assault and battery." (App. 141, Tr. 19:18-21) The Court overruled the objection, and, as predicted, Crain repackaged her causation testimony to avoid any references to sexual harassment. The District Court also allowed McCoy's counsel to narrate McCoy's entire theory of the case in a supposed "hypothetical" given to Crain, despite objection.

Throughout the trial, McCoy and her counsel repeatedly characterized words and conduct as being sexual in nature. This flouted the District Court's pre-trial ruling forbidding testimony about sexual harassment.

McCoy sought $750,000 in emotional distress damages. During closing, McCoy's counsel suggested this was a fair amount by referencing the multimillion dollar salary of a professional basketball player. Cardella objected and sought a mistrial, which the Court denied.

The jury ultimately awarded $400,000 in emotional distress damages. The jury found that TLCA negligently trained/supervised both Thompson and Turner. On the verdict form, however, the jury also found that Turner did not assault McCoy. TLCA sought a new trial based on the inconsistent verdict, among other things. The District Court denied TLCA any post-trial relief.

## ARGUMENT

TLCA will summarize its arguments, then address five issues: (1) McCoy's claims are preempted by the Iowa Civil Rights Act; (2) McCoy's

claims alternatively are preempted by the Iowa Workers Compensation Act; (3) the District Court erred by allowing Kara Crain to testify; (4) the District Court erred by not declaring a mistrial based on misconduct; and (5) the District Court erred by allowing an inconsistent verdict.

## I. Summary of the Argument

The District Court repeatedly erred by allowing McCoy to evade statutory remedies that govern her claims. Her manufactured tort claim is preempted by either the Iowa Civil Rights Act or the Iowa Workers Compensation Act. No recognized tort claim exists for "negligent hire" or "negligent supervision" by an employee against an employer, other than a negligence claim under the ICRA statutory framework.

If McCoy's claim somehow is viewed as existing outside the ICRA, despite her focus on sexual misconduct at trial, the claim necessarily becomes a workplace tort for which workers compensation provides the exclusive remedy. On multiple occasions, the District Court ignored these preemption and exclusivity principles.

The District Court also erred by permitting McCoy to repackage the testimony of her expert witness at trial, which testimony the Court earlier disallowed because it was based entirely on allegations of sexual harassment.

The District Court also erred by not granting TLCA's motions for mistrial and new trial. McCoy violated pre-trial rulings by repeatedly

referencing a sexually-charged environment and sexually-charged comments. McCoy also committed misconduct in closing argument by framing her damages against a professional basketball player's multimillion dollar salary.

Finally, the District Court erred by allowing an inconsistent verdict to stand. The jury found TLCA liable for negligently supervising both Thompson and Turner, but also absolved Turner of any tortious conduct. The verdict cannot be reconciled.

## II. McCoy's Claims are Preempted by the Iowa Civil Rights Act.

The District Court erred by not dismissing McCoy's claims based on exclusivity/preemption under the Iowa Civil Rights Act, Code Chapter 216.

### a. Preservation of Error

TLCA preserved error in its Motion to Dismiss, Summary Judgment Motion, Motion for Judgment on the Pleadings, Motion for Directed Verdict, objections to jury instructions, Motion for Judgment Notwithstanding the Verdict, and Motion for New Trial. *See* foregoing pleadings; App. 297-298, Tr. 55-66; App. 347-354.

### b. Standard of Review

Review is for errors at law, because the Court denied each of TLCA's motions on legal grounds and because the Court erred in instructing the jury on a non-existent negligence theory. *Magnusson Agency v. Public Entity Nat'l Co.-Midwest*, 560 N.W.2d 20, 25 (Iowa 1997) (judgment notwithstanding the

verdict); *Clinton Physical Therapy Services, P.C. v. John Deere Health Care, Inc.*, 714 N.W.2d 603, 609 (Iowa 2006) (motion for a new trial); *L.F. Noll Inc v. Eviglio*, 816 N.W.2d 391, 393 (Iowa 2012 ) (interpretation of a statute is reviewed for corrections of errors at law); *Haskenhoff v. Homeland Energy Solutions, LLC*, 897 N.W.2d 553, 570 (Iowa 2017) (jury instructions).

**c. Argument**

The Iowa Civil Rights Act prohibits a hostile work environment, otherwise known as harassment, based on sex. Iowa Code § 216.6(1); *Haskenhoff,* 897 N.W.2d at 571. The ICRA provides the exclusive remedy for sexual harassment claims. *Cole v. Wells Fargo Bank, N.A.*, 437 F. Supp. 2d 974, 980 (S.D. Iowa 2006), citing *Smidt v. Porter*, 695 N.W.2d 9, 16 (Iowa 2005); *see also Vaughn v. Ag Processing, Inc.*, 459 N.W.2d 627 638 (Iowa 1990) (ICRA provides exclusive remedy "to correct a broad pattern of behavior."). Preemption occurs if McCoy's tort claims are supported by conduct also prohibited by the ICRA. *Smidt*, 695 N.W.2d at 17. "To the extent the ICRA provides a remedy for a particular discriminatory practice, its procedure is exclusive and the claimant asserting the practice must pursue the remedy it affords." *Id.*. "Preemption occurs unless the claims are 'separate and independent, and therefore incidental, causes of action.'" *Id.*, citation omitted. *But see Greenland v. Fairtron Corp.*, 500 N.W.2d 35, 37-39 (Iowa 1993) (allowing assault and battery claims to proceed independently from ICRA claims at the

motion to dismiss stage in circumstances where a managerial employee engaged in appropriate touching).[2]

Harassment is a species of discrimination and is broadly defined to occur if the conduct affects a term, condition or privilege of employment and the workplace is permeated with discriminatory intimidation, ridicule and insult sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. *Haskenhoff*, 897 N.W.2d at 571 (punctuation and citation omitted). An employee such as McCoy may bring a negligence claim against her employer for co-worker harassment, but the claim still arises exclusively under the ICRA. *See id.* That is, an employer that negligently fails to prevent or respond to harassment faces liability under the statute.

In this case, the ICRA preempts McCoy's theory of recovery. From the onset of the case and continuing through trial, McCoy advanced a claim of sexual harassment. The Petition specifies, for example:

**Paragraph 1:** "[McCoy] is bringing this lawsuit by reason of the fact that *she was consistently sexually harassed* at her work for Thomas L. Cardella & Associates by her trainer, John Thompson, and that her complaints to Human

[2] Even under the reasoning in *Greenland*, McCoy's tort claims still are preempted by workers compensation. *See* Section III. The employer in *Greenland* does not appear to have raised the issue of workers compensation preemption.

Resources about the *sexual harassment* did not bring an end to the *ongoing sexual harassment*…"

**Paragraph 10**: "That Plaintiff Jena McCoy again reported John Thompson in April 2017 for *unwanted and illegal sexual harassment.*"

**Paragraph 14 (page 6):** "Stated another way, the resulting harms and losses to Jena McCoy *as a result of the sexual harassment* and retaliation of John Thompson and Mitch Turner is the very type of harms and losses which will likely occur when an employer like Thomas L. Cardella & Associates makes the decision to hire and retain employees like John Thompson and Mitch Turner."

The Petition establishes McCoy's theory of the case, something the District Court repeatedly ignored. *See Smidt*, 695 N.W.2d at 17 (noting that Plaintiff's pleadings established the same set of facts for an ICRA claim and a tort claim, and rejecting the tort claim). The Petition nowhere alleges the elements of assault. The Petition does not allege, for instance, that Thompson performed an act intended to put another in fear of physical pain or injury or an acted intended to put another in fear of physical conduct which a reasonable person would deem insulting or offensive and the victim reasonably believes that the act may be carried out immediately. *See* Iowa Civil Jury Inst. 1900.1-1900.2. The Petition equally never alleges the elements of battery, i.e. Thompson committed an act resulting in bodily contact causing physical pain

or injury or an act resulting in bodily contact which a reasonable person would deem insulting or offensive. *See* Iowa Civil Jury Inst. 1900.3-1900.4.

McCoy continued to emphasize sexual harassment at trial. In opening statement, counsel referenced unwanted touching of "her inner legs," "her inner thighs" and "her butt," and also referenced "comments with sexual overtones." (App. 135-137, Tr. 11:7-13:19[3]) McCoy herself testified about unwelcome conduct based on groping and sexually commentary, often over TLCA's objections. Her counsel framed both argument and witness questioning along the lines of a sexual harassment claim. In questioning Cardella's human resources director, counsel asked:

Q: If John Thompson were engaging in unwanted – unwanted touching of Jena McCoy, that would be contrary to your formal policies; correct?

A: Absolutely.

Q: If John Thompson were making sexual comments to Jena McCoy in the workplace during working hours, that would be contrary to the formal policy of Cardella; true?

[3] TLCA's counsel objected to this commentary during opening statement, resulting in a sidebar. (App. 137, Tr. 13:20-25) However, the resulting discussion with the Court did not get reported, something that occurred several times during the trial.

A: Yes. It's in our handbook.

(App. 365, Tr. 52:9-16.)

Counsel also emphasized sexual harassment during closing argument, referencing "unwanted touching" and "sexually charged comments - - being directed to Jena McCoy in the workplace." (App. 377, Tr. 82:10-17) Counsel argued that "an employer has an obligation to protect its employees from unwanted touching and inappropriate comments in the workplace." (App. 380, Tr. 103:4-6)

All of these complaints involve hallmarks of sexual harassment claims. *See*, e.g., *Lynch v. City of Des Moines*, 454 N.W.2d 827, 834 (Iowa 1990) (referencing "sexually-charged language"); *Boyle v. Alum-Line, Inc.*, 710 N.W.2d 741, 745 (Iowa 2006) (sexual harassment included comments about plaintiff's breasts and coworker putting his hand down her blouse); *Gustafson v. Genesco, Inc.*, 320 F. Supp. 3d 1032 (S.D. Iowa 2018) (sexual harassment included inappropriate text messages, inappropriate comments, and slapping plaintiff's buttocks).

McCoy's allegations present nearly a textbook claim of sexual harassment. But she never pursued such a claim. She instead pursued a tort theory, due to her failure to file a civil rights charge. *See* Iowa Code § 216.15(13) (requiring a charge to be filed within 300 days of the harassing conduct). This failure should have ended the matter, yet the District Court improperly excused

McCoy from ignoring the statutory framework by reasoning that a potential overlap might exist between her assault/battery and sexual harassment. *See*, e.g. App. 114-115 ("As Plaintiff has argued throughout, there is indeed overlap between assault and battery (of a sexual nature) and sexual harassment.").

What the District Court failed to appreciate is that the tort claims are completely preempted if the conduct supporting the tort claims constitutes conduct also prohibited by the ICRA. *See Smidt,* 695 N.W.2d at 17. The conduct here is one and the same—sexual commentary and unwanted sexual touching. The District Court's own language confirms that the conduct coincides in precisely this way, as the District court characterized the "overlapping" conduct as "battery (of a sexual nature)." Under *Smidt*, the ICRA was her exclusive remedy.

The Trial Court's decision to allow McCoy's claims to go to the jury also resulted from the Trial Court failing to independently evaluate TLCA's arguments. The Trial Court instead simply referenced prior rulings in the case, including when the Trial Court denied TLCA's motion for directed verdict. The Trial Court stated: "the arguments initially raised by the defendant regarding this being preempted by the Iowa Civil Rights Act and/or the Iowa Workers Compensation Act have both been fully addressed by this Court in previous rulings. I'll not upend those rulings today…" (App. 306-307, Tr. 64:22-65:2). The Trial Court further stated that "I do find that this does boil

down to whether there is a sufficient *factual* basis at this time for this to be submitted to the jury," *see id,* App. 307, Tr. 65:2-4 (emphasis supplied), even though TLCA was arguing purely legal points.

By not "upending" prior rulings, the Trial Court permitted the same mistake to permeate the case all the way through jury deliberations. The Trial Court instructed the jury on a theory that does not exist. "Prejudicial error results when instructions materially misstate the law or have misled the jury." *Haskenhoff*, 897 N.W.2d 553, 570 (Iowa 2017). Instructing the jury on negligence constitutes reversible error, meriting reversal and/or a new trial. Iowa R. Civ. P. 1.1003(1)(2)-1.1004(1)(6)(8).

The Court's errors continued post-trial. In the Court's written ruling following TLCA's post-trial motions, the Trial Court again merely cited prior rulings, noting that TLCA "has not raised any new arguments in support of this requested relief." App. 115. This analysis withstands no scrutiny. TLCA had no obligation to make "new" arguments when the legal basis for its position held constant. There were no new arguments to make. The law never changed. The Trial Court had an obligation to measure the trial evidence against the preemption and exclusivity arguments that TLCA urged throughout the case. The Trial Court's deference to prior rulings in the case merely allowed the same mistake to be repeated again and again.

## III. McCoy's Claims Alternatively are Preempted by the Iowa Workers Compensation Act.

### a. Preservation of Error

TLCA preserved error in its Motion for Judgment on the Pleadings, Motion for Summary Judgment, Motion for Directed Verdict, objections to jury instructions, Motion for Judgment Notwithstanding the Verdict, and Motion for New Trial. (*See* foregoing pleadings; App. 297-308, Tr. 55-66; App. 347-354, Tr. 6:8-13:4)

### b. Standard of Review

Review is for errors at law, because the Court denied each of TLCA's motions on legal grounds and because the Court erred in instructing the jury on a negligence theory. *Magnusson Agency v. Public Entity Nat'l Co.-Midwest*, 560 N.W.2d 20, 25 (Iowa 1997) (judgment notwithstanding the verdict); *Clinton Physical Therapy Services, P.C. v. John Deere Health Care, Inc.*, 714 N.W.2d 603, 609 (Iowa 2006) (motion for a new trial); *L.F. Noll Inc v. Eviglio*, 816 N.W.2d 391, 393 (Iowa 2012 ) (district court's interpretation of a statute is reviewed for corrections of errors at law); *Haskenhoff v. Homeland Energy Solutions, LLC*, 897 N.W.2d 553, 570 (Iowa 2017) (jury instructions).

### c. Argument

The District Court alternatively erred by not dismissing McCoy's claims based on preemption under the Iowa Workers Compensation Act. In order for the District Court to reject ICRA preemption, the District Court necessarily accepted McCoy's characterization of her claims as arising in tort. Thus, the District Court adopted McCoy's assault and battery theory, and then allowed McCoy to establish liability against TLCA via theories of negligent supervision. This approach fails under multiple Supreme Court precedents, all of which confirm that workers compensation provides the exclusive remedy for employees claiming workplace injuries. *See*, e.g., *Estate of Harris v. Papa John's Pizza*, 679 N.W.2d 673 (Iowa 2004).

TLCA will focus initially on *Harris*, because its holding should end the inquiry. In *Harris*, an employee died when his supervisor punched him in the chest. The employee's estate brought a negligent supervision claim against the employer (exactly the same claim McCoy asserted at trial). The District Court granted summary judgment to the employer. The Iowa Supreme Court affirmed. In language that compels judgment for TLCA here, the Supreme Court stated: "A corporation's negligent failure to prevent an assault on the plaintiff employee is clearly within the boundaries of the workers' compensation act, and therefore cannot form the basis for a suit in tort. *In the same vein, actions for negligent hiring, negligent supervision, or negligent retention are barred*

*by the exclusivity provision*." *Harris*, 679 N.W.2d at 681, quoting 6 Arthur Larson and Lex K. Larson, *Larson's Workers' Compensation Law* § 103.07 (2003) (emphasis supplied); *see also Nelson v. Winnebago Industries*, 619 N.W.2d at 388 (holding "as a matter of law" that the employer is not responsible for a battery committed by a supervisory employee, because plaintiff's remedies fall under workers' compensation).

McCoy's case should have ended with *Harris*, which TLCA cited repeatedly in the proceedings below. (*See*, e.g., Summary Judgment Motion, Motion for Judgment on the Pleadings, App. 299, Tr. 57:15-21) Allowing McCoy to pursue a tort claim directly contradicts the Iowa legislature's determination that workers compensation provides the exclusive relief for workplace injuries—both physical and mental/emotional. "[O]ur legislature has adopted the workers compensation system. This system supplants the common law, *and we no longer recognize a cause of action for negligence by an employee against the employer or co-employee*." *Otterberg v. Farm Bureau Mutual Ins. Co.*, 696 N.W.2d 24, 30 (Iowa 2005) (emphasis supplied). "Our workers compensation system bars employee tort actions for work-related injuries…" *Id.*

Specifically, Iowa Code Section 85.3(1) provides that "every employer, not specifically excepted by the provisions of this chapter, shall provide, secure, and pay compensation according to the provisions of this chapter for any and

all injuries sustained by an employee arising out of and in the course of employment, and in such cases*, the employer shall be relieved from other liability for recovery of damages or other compensation for such personal injury*." Iowa Code § 85.3(1) (emphasis supplied); *see also Thayer v. State*, 653 N.W.2d 595, 599 (Iowa 2002) ("In general, an injured employee's right to workers' compensation is the employee's exclusive remedy against the employer.").

The Iowa Supreme Court reiterated and explained this point as recently as 2015. "In the grand bargain removing workers compensation matters from the civil justice system, employers receive immunity from potentially large tort lawsuits and jury verdicts on the condition that they pay compensation benefits for injuries arising out of and in the course of employment without regarding to fault." *Baker v. Bridgestone/Firestone*, 872 N.W.2d 672, 676-77 (Iowa 2015). ""The legislature has plainly tried . . . to protect employers from facing lawsuits brought by injured employees."" *Id.*, at 677, quoting *Harned v. Farmland Foods, Inc.*, 331 N.W.2d 98, 100 (Iowa 1983).

McCoy's claims for mental health injuries fall squarely into workers' compensation. "An injury arises out of and in the course of employment when there is a causal connection between the employment and the injury and the injury and employment coincide as to time, place, and circumstances." *Harris*, 679 N.W.2d at 680 (internal punctuation and citation omitted). McCoy's trial testimony leaves no doubt the alleged injuries arise out of her employment:

Q: The – the conduct that you object to and find inappropriate that you've talked about to the jury this afternoon, all that occurred at Cardella's Ottumwa facility; is that correct?

A: Yes.

Q: It all occurred during work hours; is that correct?

A: Yeah.

Q: It occurred by fellow employees at Cardella, mainly Thompson and Turner?

A: Yes.

Q: What you've described as objectionable and inappropriate conduct occurred as you went about your workdays?

A: Sorry. Can – can you repeat that?

Q: Yeah. The conduct that you're - - you've told us about occurred while you were going about your work duties at Cardella –

A: Yes.

Q: -- in the course of your workday?

A: Yeah.

(App. 238-239, Tr. 167:8-168:3)

"An injury 'arises out of and in the course of employment' when 'there is a causal connection between the employment and the injury' and the injury and the employment coincide as to time, place, and circumstances.'" *Harris*, 679

N.W.2d at 680, quoting *Thayer v. State*, 653 N.W.2d at 599-600. McCoy never has contested that her supposed injuries arose in the employment context. Indeed, at the risk of stating the obvious, for McCoy to pursue negligence liability against TLCA at all, she necessarily concedes the underlying events arose in the workplace. Otherwise, TLCA would have no duty of care.

Nor does it help McCoy that her alleged harm was merely emotional, rather than physical. Emotional or mental injuries fall under workers compensation. *Dunlavey v. Economy Fire and Cas. Co.*, 526 N.W.2d 845, 851 (Iowa 1995) (an employee's pure nontraumatic mental injury arising out of and in the course of the employment is compensable under chapter 85); *Heartland Specialty Foods v. Johnson*, 731 N.W.2d 397, 401 (Iowa Ct. App. 2007) (psychological conditions resulting from work-related trauma are compensable); *Nelson v. Winnebago Industries, Inc.*, 619 N.W.2d 385, 389 (Iowa 2000) (if the gist of an employee's claim is for physical or mental injury, employee's remedy falls exclusively under workers' compensation law, barring a suit for battery against the employer).

TLCA recognizes that negligent hire, training and supervision claims do exist under Iowa law, but only in narrow circumstances that do not apply here. First, negligent hire/supervision claims can be brought by strangers to the workplace, i.e. a non-employee. *See Schoff v. Combined Ins. Co. of America*, 604 N.W.2d 43, 52-53 (Iowa 1999) (identifying situations where the tort exists such

as school employee sexually abusing a student, apartment employee raping tenant); *Godar v. Edwards*, 588 N.W.2d 701, 709 (Iowa 1999) (specifying that negligent hiring claim protects against injuries to *the public*, not co-employees). No such fact pattern exists here.

Second, the Iowa Supreme Court has suggested that a negligence theory by an employee directly against the employer might exist if "the employer has commanded or expressly authorized the assault." *Harris*, 679 N.W.2d at 681. Again, no such fact pattern exists here. McCoy offered no evidence that TLCA's management "expressly authorized" Thompson's alleged conduct.

Third, a negligence theory exists under sexual harassment law, i.e. the ICRA, to hold the employer liable for a co-employee's or supervisor's sexual harassment. *See Haskenhoff*, 897 N.W.2d 553. But McCoy never pursued a sexual harassment claim under the ICRA, foreclosing this negligence theory.

Given IWCA preemption, the District Court erred by denying TLCA's summary judgment motion, motion for a directed verdict, motion for judgment notwithstanding the verdict, and motion for a new trial.

## IV. The District Court Erred by Allowing Kara Crain to Testify.

### a. Preservation of Error

Cardella preserved error via its pretrial motion to strike, objections to Crain's live testimony, and objections to improper questioning. (App. 140-142, Tr. 18:2-20:5; App. 152-153, Tr. 32:19-33:25)

### b. Standard of Review

The standard of review regarding the admission of expert testimony is for abuse of discretion. *Haskenhoff*, 897 N.W.2d at 599.

### c. Argument

This Court should grant a new trial based on the District Court's erroneous decision to allow McCoy's expert witness, Kara Crain, to present re-fashioned testimony at trial. This decision constitutes "irregularity in the proceedings" under Rule 1.1004(1). *See* Iowa R. Civ. P. 1.1004(1).

Before trial, the District Court granted TLCA's motion to exclude Crain's deposition testimony, which McCoy intended to present via video. App. 66-67. The basis for excluding the testimony was that Crain had opined that McCoy's "sexual harassment" experience at work caused McCoy's emotional distress. Crain never referred to assault or battery in her deposition. As such, the Court disallowed her deposition testimony.

The District Court's correct pretrial decision to exclude Crain's deposition testimony severely damaged McCoy's case, because she needed expert testimony to establish causation for her emotional distress damages. *Doe v. Central Iowa Health System*, 766 N.W.2d 787, 792-93 (Iowa 2009). However, over TLCA's objections, the Court allowed McCoy to fix her predicament by calling Crain live at trial via videoconference. This enabled Crain to repackage her testimony to equate sexual harassment as being synonymous with assault and battery. This unfairly prejudiced TLCA for several reasons.

First, it allowed McCoy to present causation/opinion evidence at trial that differed qualitatively from the opinions Crain testified about in discovery. Crain's *only* opinions disclosed in discovery related to sexual harassment. *See* App. 117 ("The Court is just as baffled now as it was when reviewing the transcripts three months ago why Plaintiff's counsel repeatedly asked Crain about 'sexual harassment,' given the Court's prior rulings on Motions to Dismiss and for Summary Judgement [sic] and defense counsel's repeated objections to the use of 'sexual harassment' during the deposition."). Given Crain's focus on sexual harassment, her opinions were inadmissible and properly stricken. The District Court should not have permitted McCoy to advance new expert theories at trial, as this essentially forced TLCA to simultaneously conduct discovery and cross-examination.

Second, Crain's testimony became hopelessly prejudicial when the Court allowed McCoy's counsel to present a "hypothetical" that essentially spoon-fed Crain (and the jury) with McCoy's entire theory of the case. (App. 152-155, Tr. 32:19-35:4) At this point, Crain no longer was testifying as a treating provider, but rather became an expert witness offering heretofore undisclosed opinions about causation based on alleged hypothetical facts. McCoy's counsel used this approach in a transparent effort to get Crain to agree that certain conduct might cause emotional distress, without Crain labeling the conduct as "sexual harassment" as she had during her deposition. In essence, counsel gave the jury and the witness a "hypothetical" describing sexual harassment, stripped the hypothetical of the term "sexual harassment," and asked Crain to opine that the conduct would cause mental health symptoms. The questioning unfairly prejudiced TLCA by allowing McCoy to introduce new expert opinions at trial without disclosing them in discovery. *See* Iowa R. Civ. P. 1.500.2(c).

TLCA was prejudiced by Crain's revamped trial testimony. In closing, McCoy's counsel emphasized Crain's role, arguing "There's only one mental health witness here. There's only one expert that shared any opinions on that, and that was Kara Crain." (App. 381, Tr. 107:9-11). The problem is that Krain provided these opinions for the first time at trial, spoon-fed with a "hypothetical" that was not a hypothetical, resulting in a complete sand-bagging of TLCA. The appropriate remedy under these circumstances is not merely a

new trial, but rather a complete and final vacating of the verdict because McCoy did not properly disclose an expert.

## V. The District Court Erred by Not Granting a Mistrial and New Trial Based on Misconduct.

### a. Preservation of Error

Cardella preserved error via its motion to limine to preclude references to sexual harassment, its trial objections, and its oral motion for mistrial on the third and fourth days of trial (Motion in limine; App. 255-260, Tr. 4:9-9:6; App. 381-382, Tr. 107:20-108:11; App. 384-385, Tr. 134:12-135:9).

### b. Standard of Review

The standard of review is for abuse of discretion. *Kipp v. Stanford*, 949 N.W.2d 249, at *5 (Iowa Ct. App. 2020) (unpublished opinion).

### c. Argument

The Court should grant a new trial because McCoy and her counsel engaged in misconduct in two ways: (1) references to sexual harassment; and (2) misconduct during closing argument. "To warrant a new trial based on attorney misconduct, the complained of misconduct 'must have been prejudicial to the interest of the complaining party.'" *Kinseth v. Weil-McLain*, 913 N.W.2d 55, 67 (Iowa 2018), quoting *Mays v. C. Mac Chambers Co.*, 490 N.W.2d 800, 803 (Iowa 1992). "A new trial should not be ordered unless the attorney's misconduct, viewed cumulatively, is prejudicial to the complaining party and a

different result would have likely occurred but for the misconduct." *Kinseth*, 913 N.W.2d at 73. *See also Hoover v. First American Fire Ins. Co. of New York*, 218 Iowa 559, 255 N.W. 705, 707 (Iowa 1934) (cumulative references to an inadmissible settlement offer "could not be other than prejudicial to appellant.").

**i. Misconduct Regarding Sexual Harassment.**

McCoy and her counsel violated the Court's in limine ruling prohibiting references to sexual harassment. McCoy's counsel made references to sexual harassment throughout the case, including opening statement, witness examinations, and closing argument. In opening statement, counsel referenced unwelcoming touching in connection with a sexual harassment policy in Cardella's employee handbook. During witness examination, counsel specifically referred to the handbook section regarding sexual harassment. Witnesses also were questioned about "sexually charged" comments and alleged groping and kissing behavior. Counsel made similar comments in closing, twice referencing "sexually charged" comments. The "cumulative effect" of these comments "could not be other than prejudicial" to Cardella. *Hoover*, 255 N.W. at 707.

### ii. Plaintiff's Counsel Engaged in Misconduct in Closing Argument.

Separate from the improper references to sexual harassment in closing, McCoy's counsel also engaged in misconduct by urging a higher damages award based on references to a professional basketball player's salary. This was particularly prejudicial to TLCA, because McCoy only sought "soft" damages, i.e. damages for emotional distress. The jury had no real evidence to support the amount she requested.

Fearing this, McCoy's counsel referenced an ESPN report he saw on television the morning of closing arguments. (App. 381-382, Tr. 107:20-108:19) He referenced NBA player James Harden, who had just been traded and is paid tens of millions of dollars per year. Counsel suggested Harden's salary somehow put McCoy's damages request in perspective. This constitutes misconduct warranting a new trial. *See Kipp*, 949 N.W.2d 249, at *6-8 ("counsel has no right to create evidence by his or her arguments, nor may counsel interject personal beliefs into argument," as "melodramatic argument does not help the jury decide their case but instead taints their perception to one focused more on emotion rather than law and fact."); *Kinseth*, 913 N.W.2d at 71 (improper to impress upon the jury that it should assign damages using a reference point other than the plaintiff's own situation, violating order on motion in limine); *McCabe v. Mais*, 580 F. Supp. 2d 815, 834 (N.D. Iowa 2008),

*affirmed in part, reversed in part* as *McCabe v. Parker*, 608 F.3d. 1068 (8th Cir. 2010), (closing argument was "unfairly prejudicial and improper" when it included references to professional athletes' and entertainers' salaries, and ordering a new trial on damages).

In *Kinseth*, the Iowa Supreme Court granted a motion for a new trial based on counsel's violation of a motion in limine relating to the Defendant's wealth. In language especially apropos in this case, the Court noted: "juries often consider and valuate how much pain and suffering a plaintiff has experienced. When making challenging decisions about potentially nebulous concepts, juries will inevitably take cues from attorneys during their respective closing arguments. In such instances, we observe a heightened sensitivity to inflammatory rhetoric and improper statements, which may impress the jury that it can look beyond the facts and law to resolve a case." *Kinseth*, 913 N.W.2d at 73.

Here, by referencing an astronomical salary of a professional basketball player in an effort to make McCoy's $750,000 damages request look more reasonable, McCoy's counsel resorted to emotional, inflammatory rhetoric that most surely was not part of the evidence. This Court should grant a new trial.

## VI. The District Court Erred by not Granting a New Trial Based on an Inconsistent Verdict.

### a. Error Preservation

TLCA preserved error its motion for judgment notwithstanding the verdict and motion for new trial.

### b. Standard of Review

The standard of review is for abuse of discretion. *Clinton Physical Therapy Services,* 714 N.W.2d at 609.

### c. Argument

The District Court erred by not granting a new trial based on an inconsistent verdict. The jury specifically found that Mitch Turner did not commit an assault against McCoy. *See* App. 80 at Question 1. But the jury also found that TLCA negligently hired, supervised or retained Turner. *See* App. 81 at Question 5. These findings cannot be reconciled.

TLCA believes the verdict form amounts to a general verdict with special interrogatories. *See* Iowa R. Civ. P. 1.934. Question No. 1 sets forth a special interrogatory asking whether Turner committed an assault (answer: "no."). Question No. 5 sets forth a special interrogatory asking whether TLCA negligently supervised Turner (answer: "yes"). These answers are inconsistent. The only way the jury could answer "yes" to Question No. 5 is if the jury also answered "yes" to Question No. 1, finding that Turner committed an assault.

This is true because in order for the negligence claim to attach to TLCA, Turner had to be found at fault for an underlying wrong (i.e. assault), as "the torts of negligent hiring, supervision, or training 'must include as an element an underlying tort or wrongful act committed by the employee.'" *Schoff v. Combined Ins. Co. of America*, 604 N.W.2d 43, 53 (Iowa 1999) (citation omitted). The jury was so instructed. *See* App. 70. Despite determining in Question No. 1 that Turner committed no underlying tort or wrongful act, the jury still found TLCA liable for negligently hiring, supervising or training Turner.

To test whether a verdict is inconsistent, the Court must consider how the jury could have viewed the evidence and how that view of the evidence fits into the requirements on the instructions or the law applicable to the case. *Clinton Physical Therapy Services,* 714 N.W.2d at 613. "Ultimately, two answers are not inconsistent if they can be harmonized under the evidence and instructions." *Id.* And while the Court is to liberally construe verdicts to give effect to the jury's intentions, "a judge cannot exercise the power to substitute its judgment for the judgment of the jury." *Id.*, at 614.

The inconsistency here requires a new trial. "If the [interrogatory] answers are inconsistent with each other, and any is inconsistent with the verdict, the *court shall not order judgment, but either send the jury back or order a new trial.* Iowa R. Civ. P. 1.934 (emphasis supplied). The Iowa Supreme Court unequivocally has held that "inconsistent answers constitute inconsistent

findings that cannot support a judgment." *Clinton Physical Therapy Services,* 714 N.W.2d at 611. "Where verdicts are clearly inconsistent and there is no way to determine which verdict is inconsistent with the jury's intent, the proper remedy is a new trial." *Holdsworth v. Nissly*, 520 N.W.2d 332, 337 (Iowa Ct. App. 1994) (citation omitted).

The outcome remains the same if the questions on the verdict form are considered special verdicts under Rule 1.933 rather than special interrogatories. "[T]he rules governing inconsistent special interrogatory answers would apply to inconsistent answers in a special verdict. Both answers constitute special findings in the case and must be internally consistent. If not, the court must resume deliberations or grant a new trial." *Clinton Physical Therapy Services*, 714 N.W.2d at 612.

The problems and inconsistency with the verdict form require a new trial. First, under the authority cited above, there is no way to harmonize the answers to Questions No. 1 and No. 5. This alone merits a new trial; TLCA has no obligation to show prejudice. With that said, however, the prejudice to TLCA is substantial. The jury did not allocate which portion(s) of emotional distress damages relate to its negligence finding vis-à-vis Turner versus the negligence finding vis-à-vis Thompson. If some of the damages were intended to compensate McCoy for the jury's belief that TLCA negligently supervised

Turner, then those damages must be removed, because Turner did not commit any "underlying tort or wrongful act." *Schoff*, 604 N.W.2d at 53.

The need to distinguish any alleged damages relating to Turner is particularly compelling given McCoy's decision to emphasize Turner's alleged conduct as the trial unfolded. She gradually unspooled testimony about him "trapping" her at her locker and making obscene comments that caused her fear, all occurring over a three-month period and making her vulnerable and afraid to leave the building at night. This jury easily could have increased the damages award based on this emotional testimony, even though the jury found no assault.

In ruling on TLCA's motion for a new trial, the District Court did not meaningfully address the inconsistent verdict. Instead, the District Court, without elaboration, simply stated that "the Court finds that the jury's answers can be harmonized." App. 120. The District Court prefaced this conclusion by stating, "In fact, *nowhere* within the written instructions was the jury told that they could only find negligence with regard to Turner if they also found that he had committed an assault." *Id.* TLCA disagrees. Instruction No. 10 explained to the jury that any finding of negligence against TLCA had to be predicated on Thompson and/or Turner committing an assault or battery. The assault or battery is a condition precedent to TLCA's negligence. While hindsight might suggest that Instruction No. 10 could have been improved by removing the

"and/or" phraseology, the instruction nonetheless communicates the essential point of law: for TLCA to be negligent vis-à-vis Turner, the jury had to find Turner committed an assault.

In short, because the answers to Questions 1 and 5 are inconsistent, and because no basis exists to determine whether some or all of the damages flow from the jury's determination TLCA negligently supervised Turner, the Court should grant a new trial.

## CONCLUSION

TLCA respectfully requests the Court reverse the District Court's decisions as set forth herein, vacate the judgment, and remand for entry of judgment in favor of TLCA; or, in the alternative, order a new trial.

## STATEMENT REGARDING ORAL ARGUMENT

Appellant requests oral argument.

Dated: January 9, 2023

*/s/ Vernon P. Squires*

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*/s/ Vernon P. Squires*
Vernon P. Squires

January 9, 2023
Date

## CERTIFICATE OF SERVICE

I certify that on January 9, 2023, I served the foregoing Final Brief of Defendant-Appellant by electronically filing the document with EDMS, which will notify all parties of the electronic filing.

*/s/ Vernon P. Squires*
Vernon P. Squires

## COST CERTIFICATE

I, the undersigned, hereby certify that the true cost of producing the necessary copies of the foregoing Proof Brief of Defendant-Appellant is $N/A and that the amount has been paid in full by Defendant-Appellant.

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