IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 22-0918
Linn County Law No. LACV092819

JENA MCCOY, an individual,

Plaintiff-Appellee,

vs.

THOMAS L. CARDELLA & ASSOCIATES, a corporation;

Defendant-Appellant.

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

PLAINTIFF-APPELLEE
Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case Law

Iowa Court Rules

Other Authorities

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. ARE JENA MCCOY'S CLAIMS AGAINST THOMAS L. CARDELLA & ASSOCIATES WHICH ARE BASED UPON A RECOGNIZED THEORY OF RECOVERY, NEGLIGENT SUPERVISION AND/OR RETENTION, PREEMPTED BY THE IOWA CIVIL RIGHTS ACT?

Godar v. Edwards, 488 N.W.2d 701, 709 (Iowa 1999)

Schoff v. Combine Insurance Company of America, 604 N.W.2d 43, 52-53 (Iowa 1999)

Haverly v. Kytec, Inc., 169 Ver.360, 738 A.2d 86, 91 (Vermont 1999)

Stricker v. Cessford Construction Company, 179 F.Supp.2d 987, 1018, 1019 (N.D. Iowa 2001)

Greenland v. Fairtron Corp., 500 N.W.2d 36, 38-39 (Iowa 1993)

Grahek v. Voluntary Hosp. Coop. Ass'n of Iowa, Inc., 473 N.W.2d 31, 34 (Iowa 1991)

Vaughn v. Ag Processing, Inc., 459 N.W.2d 627, 639 (Iowa 1990)

Thomas v. St. Luke's Health Sys. Inc., 869 F.Supp.1413, 1438-39 (N.D. Iowa 1994), aff'd, 61 F.3d 908, 1995 WL 416214 (8th Cir. 1995)

Restatement (Second) of Agency § 213

II. IS JENA MCCOY'S CLAIM FOR NEGLIGENT SUPERVISION OR RETENTION PREEMPTED BY THE IOWA WORKER'S COMPENSATION ACT, WHEN SAID CLAIM FOCUSES ON THE WILLFUL ASSAULT AND BATTERY INFLICTED UPON HER BY HER SUPERVISOR, JOHN THOMPSON?

Delgado-Zuniga v. Dickey & Campbell Law Firm, PLC, 908 N.W.2d 882 (Iowa Ct. App. 2017)

Nelson v. Winnebago Industries, 619 N.W.2d 385, 389 (Iowa 2000)

Cedar Rapids Community School v. Reginald DeWayne Cady, deceased, et. al., 278 N.W.2d 298 (IA S. Ct. 1979)

III. WHERE THE ZOOM TESTIMONY OF KARA CRAIN, LICENSED MENTAL HEALTH COUNSELOR, IN NO WAY REFERENCED ARGUABLE SEXUAL HARASSMENT IN THE WORKPLACE BY JOHN THOMPSON TOWARD JENA MCCOY, WAS IT AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO ALLOW SUCH TESTIMONY, WHERE REASONABLE SAFEGUARDS WERE IMPLEMENTED TO INSURE THAT SUCH TESTIMONY WOULD NOT BE PREJUDICIAL TO THE DEFENDANT?

Ganrud v. Smith, 206 N.W.2d 311, 316 (Iowa 1973)

Pastour v. Kolb Hardware, Inc. 173 N.W.2d 116, 124 (Iowa 1969)

In re Estate of Ronfeldt, 261 Iowa 12, 27, 152 N.W. 837, 846 (1967)

Bever v. Spangler, 93 Iowa 576, ___, 61 N.W. 1072, 1080 (1895)

IV. DID THE TRIAL COURT ABUSE ITS DISCRETION BY FAILING TO GRANT THOMAS L. CARDELLA'S MOTION FOR A NEW TRIAL BASED UPON ALLEGED MISCONDUCT WHEN THERE WAS NO MISCONDUCT DURING THE COURSE OF THE TRIAL AND/OR BECAUSE ANY SUCH ALLEGED MISCONDUCT WAS NOT PREJUDICIAL TO THE DEFENDANT?

Mays v. Mac Chambers Co., 490 N.W.2d 800, 803 (Iowa 1992)

Jones v. Iowa State Highway Commission, 185 N.W.2d 746, 752 (Iowa 1971)

V. DID THE TRIAL COURT CORRECTLY FIND THAT, BASED UPON THE LANGUAGE OF THE JURY INSTRUCTIONS, THE VERDICT WAS NOT INCONSISTENT AND DID NOT JUSTIFY THE GRANT OF A NEW TRIAL?

Moser v. Stallings, 387 N.W.2d 599, 605 (Iowa 1986)

Mora v. Savereid, 222 N.W.2d 417, 422 (Iowa 1974)

Clinton Physical Therapy Services, P.C. v. John Deere Healthcare, Inc., 714 N.W.2d 603, 613 (Iowa 2006)

ROUTING STATEMENT

The issues presented on review simply require determination as to whether the factual record supports the submission of the legal theories with which the Trial Court instructed the Linn County jury; because of that, this case does not unleash enormous financial risk for employers which would merit review by the Supreme Court pursuant to Iowa Rule of Appellate Procedure 6.1101(c)(d). Instead, this case may justifiably be reviewed by the Iowa Court of Appeals.

STATEMENT OF THE CASE

Jena McCoy sued her former employer, Thomas L. Cardella & Associates, for negligent supervision and/or retention of one of its supervisors, John Thompson, who consistently engaged in unwanted touching of Jena McCoy's body while making comments to her that contained sexual innuendo.

After a four (4) day trial, a Linn County jury returned a verdict in favor of Plaintiff Jena McCoy in the amount of four hundred thousand dollars ($400,000). Defendant Thomas L. Cardella & Associates has pursued this appeal. Importantly, the same issues raised in this appeal were raised by Defendant Thomas L. Cardella & Associates on multiple occasions both before and after the jury verdict.

Initially, the issues raised in this appeal were raised in a Motion to Dismiss, filed on May 30, 2019 (App. 16-18). Plaintiff McCoy resisted that Motion (Plaintiff's Resistance to Motion to Dismiss, June 10, 2019, App. 19-25). The Honorable Judge Christopher L. Bruns, District Court Judge for the Sixth Judicial District of Io0wa, denied the motion to dismiss on June 25, 2019 (App. 26-30).

Defendant Thomas L. Cardella & Associates filed a Motion for Summary Judgment on January 6, 2020 (App. 31-32). Plaintiff McCoy resisted that Motion (Plaintiff's Resistance to Motion for Summary Judgement, March 3, 2020, App. 33-36). On April 6, 2020, in another detailed and well-written ruling, the Honorable Judge Mitchell E. Turner, District Court Judge for the Sixth Judicial

District of Iowa, denied Defendant Thomas L. Cardella's motion for summary judgment (App. 37-44).

Just before the trial of the case, a third motion was filed which raised the same issues. Defendant's Motion for Judgment on the Pleadings was filed on September 15, 2020 (App. 45-47). Again, Plaintiff McCoy resisted the new Motion (Plaintiff's Resistance to Motion for Judgment on the Pleadings, September 17, 2020, App. 48-57). On September 17, 2020, The Honorable Judge Mitchell E. Turner, District Court Judge for the Sixth Judicial District of Iowa, likewise denied the motion for judgment on the pleadings (App. 58-60).

The trial date was continued until 2022 due to the ongoing COVID crisis. The case proceeded to trial on February 9, 2022. At the close of Plaintiff's case in chief, a Motion for Directed Verdict was made by the Defendant (Day 3 Tr., pp. 55-66, App. 297-307). The Honorable Judge Valerie Clay, District Court Judge for the Sixth Judicial District of Iowa, likewise overruled or denied Defendant Thomas L. Cardella's motion for directed verdict (*Id.*). There was no renewed motion for directed verdict filed at the close of all the evidence.

Following the jury's verdict, a judgment entry in verdict form was filed by the Honorable Judge Valerie L. Clay on February 14, 2022 (App. 82-84). Thereafter, Defendant Thomas L. Cardella & Associates filed post-trial motions. (See Defendant's Combined Motion for Judgment Notwithstanding the Verdict and

Motion for New Trial filed February 28, 2022, App. 85-87). A brief in support of Defendant's combined motion for judgment notwithstanding the verdict and motion for a new trial was likewise filed. Within this combined motion, Defendant Thomas L. Cardella & Associates again raised the issues that McCoy's claims were preempted by the Iowa Civil Rights Act and that McCoy's claims were preempted by the Iowa Worker's Compensation Act, two of the same issues raised in this appeal. (See Defendant's Combined Motions for Judgment Notwithstanding the Verdict and New Trial, App. 85-87). In the post-trial motions and the brief filed in support, Defendant Thomas L. Cardella & Associates also raised the same additional issues as what it raised in this appeal, including the argument that the jury's verdict was inconsistent and irreconcilable; the argument that the Court erroneously allowed Kara Crane to testify; and the argument that there was misconduct of the prevailing party which would justify a new trial. Plaintiff Jena McCoy resisted Defendant's post-trial motions (Plaintiff's Resistance to Defendant's Post-Trial Motions, dated March 15, 2022 (App. 88-112). On May 15, 2022, the Honorable Judge Valerie Clay, District Court Judge for the Sixth Judicial District of Iowa, entered her rulings on Defendant's Motion for Judgment Notwithstanding the Verdict and Motion for New Trial. Judge Clay denied and overruled the Defendant's Motion for Judgment Notwithstanding the Verdict and the Motion for New Trial in their entirety. (App. 113-121).

A notice of appeal was timely filed by Defendant Thomas L. Cardella & Associates on May 27, 2022 (App. 122). Thomas L. Cardella & Associates filed its proof brief on October 18, 2022.

STATEMENT OF THE FACTS

Jena McCoy began working at Thomas L. Cardella & Associates in late January 2017 (McCoy testimony, Day 2 Tr., 243:11-15). Her employment continued until April 25, 2017 (McCoy testimony, Day 2 Tr., 243:11-15). Jena McCoy was 25 years of age when she started at Cardella (McCoy testimony, Day 2 Tr., 196:16-21). She voluntarily left her employment on April 25, 2017, after having gone to the person whom she believed was the human resource representative at the Ottumwa location, Samantha Teague, and Mark Grego, the site manager, complaining of the conduct and comments of both John Thompson and Mitch Turner (McCoy testimony, Day 2 Tr., 217:10-19). Grego's response to her complaints was to change her supervisor from John Thompson to Mitch Turner, one of the individuals about whom she was voicing her concerns (McCoy testimony, Day 2 Tr., 217:10-19; Day 2 Tr., 222:20-21). Jena McCoy was never terminated by Defendant Thomas L. Cardella & Associates (McCoy testimony, Day 2 Tr., 217:1-4). Even John Thompson, the person who was her immediate supervisor throughout much of her employment, agreed (Thompson deposition pp. 16-17, App. 125:24-126:1). Notwithstanding that fact, her new supervisor, Mitch

Turner, as of the date that she resigned, filled out a termination form alleging that she was a no-call no-show for three (3) different shifts, even though Jena McCoy was never even told that they had her scheduled to work those shifts (McCoy testimony, Day 2 Tr., 225:1-24, 217:1-14).

Jena McCoy provided the jury with a timeline of how her employment with Thomas L. Cardella & Associates deteriorated over time. During the first three (3) weeks, including the orientation period, things went well (McCoy testimony, Day 2 Tr., 194:3-13). It was during this time that Jena McCoy first formulated an interest in becoming a supervisor at Thomas L. Cardella & Associates (McCoy testimony, Day 2 Tr., 205:24-206:6). At that point in time, she loved her job. She enjoyed interacting with people all around the country during her phone calls, meeting new coworkers, and was energized by the challenge of her new position (McCoy testimony, Day 2 Tr., 194:3-13).

However, after approximately three (3) weeks, John Thompson began consistently touching her against her will, in intimate areas of her body, including her inner thigh (Thompson deposition App. 126:2-128:16; McCoy testimony, Day 2 Tr., 122:16-25). He even resorted to unwanted kisses on the top of her head which Jena McCoy believes occurred on at least one (1) occasion in close proximity to the site manager, Mark Grego (McCoy testimony, Day 2 Tr., 227:21-228:7). The unwanted touching continued throughout the period of time that John

Thompson was her supervisor (McCoy testimony, Day 2 Tr., 229:13-19). When Thompson offered her training to become a supervisor, he would frequently ask her to stay after hours (McCoy testimony, Day 2 Tr., 207:4-10). Even though Jena McCoy was one of three individuals being trained as a supervisor, Jena was the only one he asked to stay after hours (McCoy testimony, Day 2 Tr., 207:11-14; Day 3 Tr., 268:10-14). Mark Grego, the site manager, was aware of the late training sessions, having observed Jena staying after hours with Thompson on at least five (5) occasions (McCoy testimony, Day 3 Tr., 268:15-269:16).

Every time it occurred, she asked him to stop and her request fell on deaf ears (McCoy testimony, Day 2 Tr., 198:13-199:24, 207:4-208:24, 212:5-11). The unwanted touching was accompanied by inappropriate comments containing sexual innuendo (McCoy testimony, Day 2 Tr., 198:13-199:24, 207:4-208:24, 212:5-11). Like the unwanted touching, she asked him to stop with the inappropriate comments without any success. Thompson even went as far as to inappropriately text her prompting her to block him on her phone (McCoy testimony, Day 2 Tr., 244:20-25; Day 3 Tr., 265:2-20). She even had to block him on Facebook (McCoy testimony, Day 3 Tr., 266:3-8). Thompson even continued to try to contact Jena McCoy after she left her employment with Cardella and after she told him to leave her the f _ _ _ alone (McCoy testimony, Day 3 Tr., 266:22-267:5).

Jena McCoy was not attracted to John Thompson (McCoy testimony, Day 2 Tr., 230:5-7). Thompson was approximately 20 years older than her (McCoy testimony, Day 2 Tr., 197:1-4, 230:1-4). He always wore sunglasses and he frequently dressed in black (McCoy testimony, Day 2 Tr., 230:1-4; Grego testimony, Day 3 Tr., 322:25-325:3). Although Thompson testified he thought he and McCoy were "moving toward a relationship," McCoy made it clear to the jury that she had never done anything to lead him on. Contrary to Thompson's testimony; she never sent him a note bragging about her skills at fellatio; and she had consistently asked him to stop every time he inappropriately touched her or made inappropriate comments to her. (McCoy testimony, Day 2 Tr., 198:7-201:19, 207:4-208:24, 212:5-24; Thompson deposition testimony, 126:2-128:16).

John Thompson was not the only person making inappropriate comments with sexual overtones to Jena McCoy while she was at work at Cardella. Another individual by the name of Mitch Turner was also making such comments. His comments were usually made to Jena McCoy in the small locker room as she was preparing to leave work for the day, often at a time when it was dark outside (McCoy testimony, Day 2 Tr., 219:15-223:6; 246:9-248:4). McCoy estimated that Turner made inappropriate comments to her 10 to 20 times (McCoy testimony, Day 3 Tr., 271:13-21). During an offer of proof as to the specifics of Turner's comments, Jena McCoy went into greater detail about why she was scared of

Turner when he made the comments to her. Jena would have her locker door open and Turner would come and put his arm up against the lockers next to her. She described it as almost as if she were trapped there in the locker room with Turner (McCoy testimony, Day 3 Tr., 274:14-276:6). Thereafter, Judge Clay changed her ruling excluding the specifics of what Turner said and allowing McCoy to retake the stand in the presence of the jury and share what Turner said to her. (Day 3 Tr., 279:20-284:6). The specifics of Turner's comments were as follows: he would tell Jena McCoy she looked f_ _ _ able in the dress she was wearing; or that what she was wearing made her breasts or her butt look nice. (McCoy testimony, Day 3 Tr., 284:18-288:14).

When it became obvious that her request that Thompson stop his conduct was having no effect, she reported Thompson's conduct on three (3) different occasions to Samantha Teague and/or Mark Grego (McCoy testimony, Day 2 Tr., 209:11-216:17). Samantha Teague was the person whom Jena McCoy was told at her orientation was the onsite human resources employee (McCoy testimony, Day 2 Tr., 210:23-211:14). Mark Grego was the top person at the Ottumwa location; his position was that of site director (Grego testimony, Day 3 Tr., 309:21-310:4). On the second and third occasions that Jena McCoy went to Samantha Teague and/or Mark Grego, she was accompanied by a co-employee by the name of Bonnie Sullivan (McCoy testimony, Day 2 Tr., 214:20-216:17, 223:7-224:25;

Sullivan testimony, Day 2 Tr., 176:2-180:13). Both Teague and Grego deny that any of the three meetings ever took place and when McCoy was confronted with that discrepancy in the sworn testimony, McCoy calmly testified in front of the jury that she thought both Teague and Grego were lying (McCoy testimony, Day 2 Tr., 245:5-246:8).

After Jena McCoy reported her concerns about Thompson and Turner to Grego and Teague, Jena McCoy testified that John Thompson's interactions toward her turned "mean" (McCoy testimony, Day 2 Tr., 229:20-25). He even went as far as to tell her that he would sabotage her desire to become a supervisor (McCoy testimony, Day 2 Tr., 251:15-252:9). Incredibly, after he was rebuked by Jena McCoy at Thomas L. Cardella & Associates, John Thompson turned his sights to another Cardella & Associates employee and even fathered a child with that individual (Thompson deposition, 29:10-31:1).

Interestingly, the jury also learned that Mark Grego had personally trained John Thompson and frequently interacted with John Thompson after work hours (Grego testimony, Day 3 Tr., 317:7-319:23). Thompson's training amounted to a significant investment of time and money to Cardella, lasting four (4) weeks (Grego testimony, Day 3 Tr., 317:7-318:10). Further, the jury learned that it was an ongoing challenge to find quality individuals at the Ottumwa call center for Mark Grego and Samantha Teague (Grego testimony, Day 3 Tr., 321:4-15, 333:24-

334:17). Further, Samantha Teague was known to have a friendship with John Thompson – McCoy personally observed Samantha Teague and John Thompson interact socially after hours (McCoy testimony, Day 2 Tr., 213:5-19). Grego likewise socialized with Thompson (Grego testimony, Day 3 Tr., 318:22-319:23). Grego himself admitted in the presence of the jury that after investing in his training of Thompson, it might cause him to be reluctant to terminate him (Grego testimony, Day 3 Tr., 321:16-24, Gilchrist testimony, Day 4 Tr., 366:3-19).

In the face of those revelations, the jury learned that nothing was done in response to Jena McCoy's complaints about John Thompson or Mitch Turner. In fact, Grego's response to the complaints about the inappropriate comments being made toward her by Mitch Turner was to change her supervisor from John Thompson to the very person who was making those inappropriate comments to her, Mitch Turner (McCoy testimony, Day 2 Tr., 217:5-19, 222:17-223:1; Sullivan testimony, Day 2 Tr., 179:21-180:13). It was the lack of response and in particular, the decision to change her supervisor to Mitch Turner that prompted Jena McCoy to resign from her position at Thomas L. Cardella & Associates on April 25, 2017 (McCoy testimony, Day 2 Tr., 217:5-19).

The jury heard significant testimony about the supervisory responsibility of Mark Grego at the Ottumwa location; in fact, the jury heard that it was not just Mark Grego who had a responsibility to supervise employees at that location, it

was all members of the management team which included the following: Mark Grego, Samantha Teague, and any of the supervisors at that location (Grego testimony, Day 2 Tr., 332:3-11, 340:6-341:20; Gilchrist testimony, Day 4 Tr., 367:1-370:17). In fact, Mark Grego and Myka Gilchrist both acknowledged that if John Thompson were inappropriately touching Jena McCoy in the workplace, which was contrary to the code of conduct as set forth for Thomas L. Cardella & Associates employees in the employee handbook. (Gilchrist testimony, Day 4 Tr., 365:9-12). In addition, if he was making inappropriate comments with sexual innuendo to Jena McCoy in the workplace, that too was contrary to the code of conduct at Thomas L. Cardella & Associates as outlined in the employee handbook (Grego Testimony, Day 3 Tr., 337:20-338:10; Gilchrist testimony, Day 4 Tr., 364:23-365:16).

The jury also learned that John Thompson moved Jena McCoy's workstation into a cubicle which sat right next to his desk (McCoy Testimony, Day 2 Tr., 226:5-227:8; Sullivan Testimony, Day 2 Tr., 180:24-184:13). Thompson's desk and Jena McCoy's workstation were only twenty (20) to thirty (30) feet from the offices of Teague and Grego (Sullivan Testimony, Day 2 Tr., 185:14-186:19; Grego Testimony, Day 3 Tr., 327:15-331:25). The walls of Jena McCoy's workstation were low enough that they should not have impaired Grego or Teague's ability to observe Thompson's conduct toward Jena McCoy (Gilchrist

Testimony, Day 4 Tr., 371:14-373:20; Sullivan Testimony, Day 2 Tr., 180:24-182:21). Grego and Teague's offices had doors (Grego Testimony, Day 3 Tr., 327:15-331:25; Sullivan Testimony, Day 2 Tr., 185:21-186:19). In addition, both offices had windows (Grego Testimony, Day 3 Tr., 329:9-24; Sullivan Testimony, Day 2 Tr., 185:21-186:19).

The jury heard testimony that it was the duty of Mark Grego to observe inappropriate conduct or comments being made on the floor by supervisors toward Thomas L. Cardella & Associates' employees (Grego Testimony, Day 3 Tr., 326: 4-14). Bonnie Sullivan testified that it was common knowledge within the Ottumwa location that John Thompson had an obsession with Jena McCoy (Sullivan Testimony, Day 2 Tr., 187:21-188:3).

It was against that factual record that the jury was instructed on negligent supervision and/or retention and returned a verdict against Thomas L. Cardella for having negligently supervised John Thompson. The jury believed Jena McCoy and her witnesses; the jury did not believe Thomas L. Cardella's witnesses. The jury verdict was in the amount of four hundred thousand dollars ($400,000) for past and future emotional distress damages.[1]

[1] The jury's determination of an appropriate amount of past and future emotional distress damages was supported by the sworn testimony of Kara Crane, the licensed mental health counselor who had evaluated and treated Jena McCoy. Kara Crane's specific testimony in support of those damages will be discussed in detail in Brief Point III. Of course, Jena McCoy herself testified as to the impact the conduct and comments of John Thompson have had on her as she has attempted to move forward in her life. (McCoy Testimony, Day 2 Tr., 209:5-10, 231:5-237:19). An attempt to demonstrate Jena McCoy's noncompliance in returning to see Kara Crain failed after the jury heard about the circumstances in her

ARGUMENT

Summary of Appellees' Argument

The trial court did not err in submitting this case to the jury on a theory of negligent supervision and/or retention based upon the conduct and/or comments of co-employees John Thompson and Mitch Turner because the negligent supervision and/or retention theory of recovery has clearly been recognized in Iowa as a separate legal duty on the part of the employer. *See Godar v. Edwards,* 488 N.W.2d 701 (Iowa 1999); *Schoff v. Combine Insurance Company of America*, 604 N.W.2d 483 (Iowa 1999); *Stricker v. Cessford Construction Company*, 179 F.Supp.2d 987, 1019 (N.D. Iowa 2001). The argument that Jena McCoy's claims were preempted by either the Iowa Civil Rights Act or the Iowa Worker's Compensation Act was presented to three (3) different judges in this case throughout the course of the litigation in a motion to dismiss, a motion for summary judgment, a motion for judgment on the pleadings, a motion for directed verdict, a motion for a new trial, and a motion for judgment notwithstanding the verdict. Judge Bruns, Judge Turner, and Judge Clay considered the argument of Thomas L. Cardella & Associates and rejected that argument each time it was presented.

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life which made follow-up a challenge, including an unexpected surgery, the death of her grandfather and the outbreak of COVID (McCoy testimony, Day 2 Tr., 249:9-250:25).

Further, the additional items of err at the trial court level are governed by an abuse of discretion standard; Judge Clay, both throughout the trial as documented in the trial court record and in her post-trial rulings gave thoughtful consideration to the arguments renewed in this appeal and either gave direction which took into consideration the interest of both parties during the trial or denied the allegations of err in Defendant's post-trial motions. For the reasons argued in more detail as follows, Plaintiff Jena McCoy respectfully urges the Court to reject Defendant's arguments and allow the jury verdict to stand.

I. JENA MCCOY'S CLAIMS AGAINST THOMAS L. CARDELLA & ASSOCIATES ARE BASED UPON A RECOGNIZED THEORY OF RECOVERY, NEGLIGENT SUPERVISION AND/OR RETENTION, AND ARE NOT PREEMPTED BY THE IOWA CIVIL RIGHTS ACT.

A. Preservation of Error and Standard for Review (Brief Point I):

Appellee/Plaintiff Jena McCoy agrees with the Appellant's recitation of how error was preserved with regard to Brief Point I and the Standard of Review governing this Court's consideration of Brief Point I. However, Appellee/Plaintiff McCoy would again emphasize as was noted in the summary of her argument that this issue has been presented to the lower court on six (6) different occasions and based upon the legal authorities provided by Plaintiff Jena McCoy as concluded that there was legal support for the submission of her case to the jury. Judge Clay

effectively balanced the interest of both parties in a way that allowed both parties to present their claim and/or defense to the jury without being prejudiced.

B. Introduction:

The underlying legal theory upon which Jena McCoy's claim was based was negligent higher, supervision, or retention of John Thompson and/or Mitch Turner. During the final argument, Plaintiff's counsel conceded that there was a lack of evidence upon which the negligent hire claim would be based. (Day 4 Tr., 378:22-379:3). As such, the only remaining legal theory was negligent supervision and/or retention of John Thompson and Mitch Turner.

As the Court explained in its instructions, the negligent supervision and/or retention theory against Thomas L. Cardella & Associates flowed from the conduct and/or comments of John Thompson and Mitch Turner. The jury found that Plaintiff Jena McCoy had proven both assault and battery regarding the conduct and comments of John Thompson. (Judgment Order, Feb. 14, 2022, App. 82-84). The evidence in support of that finding will be included in a later subsection. With regard to Mitch Turner, the Court only instructed on assault because there was no evidence that he had ever engaged in unwanted touching of Jena McCoy's body. The jury did not find that the evidence supported the theory of assault against Mitch Turner but did find that Thomas L. Cardella was negligent in supervising and/or retaining Mitch Turner. *Id.*

Defendant argues that such a finding is inconsistent on its face. **Plaintiff strongly disagrees.** This jury obviously believed Jena McCoy and she testified that she first went to Samantha Teague with complaints about John Thompson; then she returned for a second visit to Samantha Teague at which time Mark Grego was asked to become involved. Bonnie Sullivan accompanied her for that visit. Jena McCoy's testimony was that she advised both Teague and Grego of the comments that Mitch Turner had directed toward her, including the comment that she "looked fuckable" in a certain outfit. ***The response of Mark Grego to that complaint was to assign Jena McCoy to a new supervisor and the person they chose as her new supervisor was the very same individual that made the crude comments referenced above, Mitch Turner.*** That fact supports the finding of this jury that Thomas L. Cardella was negligent in supervising and/or retaining Mitch Turner even if they felt the comment of Turner did not rise to the level of an assault. A section will be included concerning Mitch Turner also.

C. <u>The legal theories which form the basis for Jena McCoy's claim against Thomas L. Cardella have been recognized in Iowa:</u>

The legal argument component of Defendant Thomas L. Cardella's appeal was made initially in a motion to dismiss and was overruled by the Honorable Judge Christopher Bruns. (Order of Judge Bruns denying Motion to Dismiss, June 25, 2019, App. 26-30). It was made again in a motion for summary judgment and was overruled by the Honorable Judge Mitchell E. Turner (Order of Judge Turner

denying Motion for Summary Judgment, April 6, 2020, App. 37-44). It was raised in a motion for judgment on the pleadings and rejected again just before the original trial date by Judge Turner. (Order of Judge Turner denying Motion for Judgment on the Pleadings, September 17, 2020, App. 48-57). It was raised again in a motion for directed verdict at the close of Plaintiff's case and rejected by the Honorable Valerie Clay (Day 3 Tr., 297:21-307:25). It was again raised by the Defendant in its post-trial motions and rejected by the Honorable Valerie Clay (Ruling of Judge Clay denying Motions for Judgment Notwithstanding the Verdict and New Trial, May 15, 2022, App. 113-121). The essence of the argument is that Jena McCoy's exclusive remedy for this conduct was either a civil rights complaint to the Iowa Civil Rights Commission or a worker's compensation claim to the Iowa Worker's Compensation Commission.

As Plaintiff has consistently argued, the theory of recovery set forth in Plaintiff's Petition at Law recognizes an ***independent legal duty*** on the part of Thomas L. Cardella, Jena McCoy's employer, which does not flow from the provisions of the Iowa Civil Rights Act. The independent legal duty is the duty to protect customers and/or employees from the illegal conduct of its employees once the employer has been put on notice of that conduct. In *Godar v. Edwards*, 488 N.W.2d 701 (Iowa 1999), the Iowa Supreme Court relied on *Restatement (Second) of Agency* § 213 in recognizing a claim by an injured third party for negligent

hiring. *See also Schoff v. Combined Insurance Company of America,* 604 N.W.2d 43, 52-53 (Iowa 1999) (citing *Godar* 588 N.W.2d 709)). In *Schoff*, the Iowa Supreme Court further expanded upon its description of the legal duty imposed: [In *Godar*], stating that we held "that an employer has a duty to exercise reasonable care in hiring individuals, who because of their employment, may pose a threat of injury to members of the public (*Godar* 588 N.W.2d 709). This duty was extended to negligent retention and negligent supervision of employees (*Id.*)." (*Schoff*, 604 N.W.2d 53). Under Iowa law, the torts of negligent hiring, supervision, or training 'must include as an element an underlying tort or wrongful act committed by the employee.' (*Id.*) (quoting *Haverly v. Kytec, Inc.*, 169 Ver.360, 738 A.2d 86, 91 (Vermont 1999) (citing *Restatement (Second) of Agency* § 213)).

As was noted in *Stricker v. Cessford Construction Company*, 179 F.Supp.2d 987, 1018: "Although the court in *Godar* did not articulate the elements of ***negligent retention or supervision claim*** – as distinguishable from a negligent hiring claim – its analysis indicates that for such claims, the "knowledge" element would concern what the employer knew at the time of the alleged wrongful conduct by the employee. *Godar*, 709. ("The evidence does not show any reason for school district officials to be suspicious of Edwards' interactions with students either on or off school district premises. In fact, the superintendent testified that it was normal for Edwards to be present in the schools and to have interaction with

students."). Based upon that, in *Stricker v. Cessford Construction Company*, 179 F.Supp.2d 987, 1019 (N.D. Iowa 2001), the court set forth the elements of a negligent retention or supervision claim to be as follows:

> (1) The employer knew or in the exercise of ordinary care should have known its employee's unfitness at the time the employee engaged in wrongful or tortuous conduct;
>
> (2) The negligent retention or supervision of the employee, the employee's incompetence, unfitness or dangerous characteristics proximately caused injuries to the plaintiffs;
>
> (3) There is some employment agency or relationship between the employee and the defendant employer.

(*Id.*)

The negligent retention and supervision theory is clearly viable under Iowa law. Further, ***the Iowa Supreme Court has held that assault and battery claims are not preempted by the Iowa Civil Rights Act when they are not bound up in a discrimination complaint***. *Greenland v. Fairtron Corp.*, 500 N.W.2d 36, 38-39 (Iowa 1993). This court, in its various rulings, went to extraordinary measures to protect the jury from being presented with any arguments of sexual harassment. Instead, this case was tried with a focus on the conduct of Thompson and Turner which would satisfy the legal definitions of **assault and battery**. While Plaintiff has argued at various stages of this litigation that there can be and usually is some overlap between conduct that would constitute assault and battery and conduct that would constitute sexual harassment, not once in this litigation did Plaintiff or her

counsel refer to the conduct of Thompson and/or Turner as "sexual harassment." Even though the employee handbook was initially put into evidence without objection from the Defendant, Plaintiff's counsel never referred to by name the section on "sexual harassment." When Plaintiff's counsel referred to the steps that an employee was to take in response to conduct that could be considered sexual harassment, he did not reference the title of that section and when an objection was made, he withdrew the offer of the handbook from evidence. The jury never saw that portion of the handbook on sexual harassment. (Day 3 Tr., 255:9-264:2).

So, as is clearly pointed out above, the legal theory upon which Jena McCoy brought her claim has clearly been recognized in Iowa. In fact, in *Stricker v. Cessford Construction Company*, 179 F.Supp.2d 987, 1019 (N.D. Iowa 2001) the court overruled the motion for summary judgment filed against the plaintiff's negligent retention and supervision claims because it was based upon conduct that would constitute assault and battery and because the Iowa Supreme Court had authorized such claims notwithstanding the fact that the assault and battery occurred in the workforce. The legal theory pursued by Plaintiff in this case had been allowed previously as is demonstrated by the *Stricker* case. From the opinion of Judge Bennett in the *Stricker* case:

> This leaves the question of whether these claims are preempted by the ICRA. As the Iowa Supreme Court explained, preemption by the ICRA occurs unless the claims are separate and independent and therefore incidental causes of action. *Greenland v. Fairtron Corp.*,

> 500 N.W.2d 36, 38 (Iowa 1993); *Grahek v. Voluntary Hosp. Coop. Ass'n of Iowa, Inc.*, 473 N.W.2d 31, 34 (Iowa 1991); *Vaughn v. Ag Processing, Inc.*, 459 N.W.2d 627, 639 (Iowa 1990); *Thomas v. St. Luke's Health Sys. Inc.*, 869 F.Supp.1413, 1438-39 (N.D. Iowa 1994), *aff'd*, 61 F.3d 908, 1995 WL 416214 (8th Cir. 1995). The claims are not separate and independent when, under the facts of the case, success on the claim not brought under Chapter 216 requires proof of discrimination. *Greenland,* 500 N.W.2d 38. As the **Plaintiff's point out, in *Greenland*, the Iowa Supreme Court concluded that claims for assault and battery, although based on sexual touching, were not preempted by the ICRA, because 'claims for assault and for battery are not bound up in [the plaintiffs'] discrimination complaints' but instead 'are complete without any reference to discrimination.' *Greenland* 500 N.W.2d 39. Similarly, where the negligent retention and supervision claim must be based on wrongful or tortuous conduct committed by the employee, see *Schoff*, 604 N.W.2d 53, the plaintiffs here have alleged assault and battery as underlying torts and those torts are not themselves preempted by the ICRA, *see Greenland* 500 N.W.2d 39, the plaintiffs' negligent retention and supervision claims are not preempted by the ICRA but are instead separate and independent from the ICRA claims.**

Stricker, 179 F.Supp.2d 1019 (emphasis added).

1. The evidence of assault and battery against John Thompson:

The testimony of Jena McCoy was that John Thompson engaged in conduct that satisfied the legal definition of both assault and battery as given in the jury instructions by the trial court (see Instructions No. 11 and 13, App. 71, 73). He would consistently sit down in her cubicle to assist her in closing out a sale that she might have made and in doing so, he would consistently touch her body. Jena McCoy testified that he touched numerous areas of her body including her hair (where he at least on one occasion bent down and kissed her hair in close

proximity to Mark Grego, the manager of the Ottumwa facility); her shoulders, her butt, her breasts, and her inner thighs. In addition, Jena McCoy testified that she rebuked him on each such occasion and asked him to stop but he did not. The definition of battery, as contained in the Court's Instruction No. 13 was as follows: "An act done with the intent to cause physical pain or injury or ***insulting or offensive bodily contact***." (Instruction No. 13, App. 73). The only evidence contrary to the testimony of Jena McCoy was the testimony of John Thompson himself. **The jury chose not to believe the testimony of John Thompson which it had the right to do per the Court's instruction.** Specifically, Instruction No. 5 stated, "You may believe all, part or none of any witness' testimony." (Instruction No. 5, App. 69).

The jury also found that John Thompson assaulted Jena McCoy. Instruction No. 11 contained the definition of an assault as follows: "*An act which was done with the intent to put McCoy in fear of physical pain or injury or in fear of physical contact which would be insulting or offensive*." Jena McCoy testified that John Thompson consistently made comments to her that had sexual overtones. She also testified that she asked him to stop with those comments and he did not. Cardella attempted to counter that testimony by eliciting testimony that all of the communication which Jena McCoy did in her cubicle was recorded or could be listened to. Jena McCoy countered by saying she had multiple breaks and there

were many times when John Thompson would time his comments to the time of her breaks. (McCoy testimony, Day 4 Tr., 374:3-376:9). She was even told to bring things to do in her cubicle during her breaks. As such, the jury could have rejected any suggestion that there is no way that John Thompson made those comments because every time she was in her cubicle, everything that was said in that cubicle could have been overheard by Thompson's supervisors.

There was substantial evidence to support Jena McCoy's claim that John Thompson was guilty of assault and battery. Any evidence to the contrary was rejected by this jury in favor of the testimony of Jena McCoy. In addition, Jena McCoy's testimony was corroborated in part by the testimony of Bonnie Sullivan, one of her coworkers who came and testified live at trial. (Sullivan testimony, Day 2 Tr., 174:2-180:13). As such, Thomas L. Cardella & Associates has no viable argument that the evidence did not support the finding of assault and battery against John Thompson. The Court's very instructions directed the jury and the evidence substantially supported their findings.

2. <u>The allegations of assault against Mitch Turner:</u>

Multiple sidebars accompanied the issue of what evidence the jury would be allowed to hear concerning the comments of Mitch Turner. Plaintiff's counsel consistently argued that Turner's comments, in and of itself, constituted an assault. (Day 3 Tr., 274:14-284:6). The Court made it clear that she had concerns about

whether Jena McCoy believed that the act would be carried out immediately (see ¶ 3 of Instruction No. 11, App. 71). During Jena McCoy's testimony, Plaintiff's counsel took her right up to the question of what Mitch Turner said to her. He had her describe in detail where he would routinely make the comments. She testified it was in the locker room. She testified that Mitch Turner would come up to her locker and put his arm up on the locker so that she felt somewhat trapped in that locker room. Once the Court heard that testimony, the Court determined that there was enough evidence to support the premise that Jena McCoy believed that the act would be carried out immediately. Then the jury was allowed to hear the comments that Mitch Turner made on more than one occasion that "she looked f---able." (McCoy testimony, Day 3 Tr., 274:14-276:6).

D. <u>The argument that her claim is preempted by the Iowa Civil Rights Act:</u>

Jena McCoy's claim has not been preempted by the Iowa Civil Rights Act. As was discussed in the preceding subsection, in the case entitled *Greenland v. Fairtron Corp.*, 500 N.W.2d 36, 38-39 (Iowa 1993), the Iowa Supreme Court held that an assault and battery claim is not preempted by the Iowa Civil Rights Act when they are not bound up in a discrimination complaint. The *Greenland v. Fairtron Corp.* case continues to be the law in Iowa. Plaintiff's counsel notes that in Judge Bruns' ruling denying the motion to dismiss, he states on p. 4 of his

ruling, the last sentence of the next to the last paragraph before his ruling, as follows:

> **"In the pending Motion, ***Defendant acknowledges*** that the Iowa Supreme Court has held that assault and battery claims are not preempted by the ICRA when they are not bound up in a discrimination complaint. See *Greenland v. Fairtron Corp.*, 500 N.W.2d 36, 38-39 (Iowa 1993).**

(See Order of Judge Christopher L. Bruns, District Court Judge, 6th Judicial District of Iowa, filed June 25, 2019, p. 4, App. 29) (emphasis added).

However, not once in Defendant's brief in support of its combined motions for judgment notwithstanding the verdict and motion for new trial is there any reference to the *Greenland v. Fairtron Corp.*, 500 N.W.2d 36 (Iowa 1993). It is briefly referenced on page 19 of Appellant's Proof Brief, but the significance of the *Greenland* case is glossed over. It is the combination of the Greenland case, coupled with the recognition of the legal theory of negligent supervision and/or retention that provides the legal vehicle for this case.

There was no formal filing of a Civil Rights Complaint on behalf of Jena McCoy. She brought her claim in the District Court in and for Linn County. Her Petition at Law had one Count, negligent hire, supervision, and retention. (Petition at Law and Jury Demand, App. 8-15). It describes as the basis for that theory of recovery the conduct of John Thompson and Mitch Turner, which arguably falls in

the categories of assault and battery as well as sexual harassment. The question is not how it was pled. The question is how the jury was instructed and whether how the case was tried was improper and prejudiced against the Defendant. In this case, the gist of the conduct complained of by Jena McCoy by either John Thompson and/or Mitch Turner included sexually charged comments. The hallmark of a fair trial is whether the court recognized the **interests of both parties** in the case and ruled in a way that protected the respective interests of both parties. Plaintiff respectfully disagrees with defense counsel that sexual harassment was ever introduced into this case. It would have been fundamentally unfair to Jena McCoy to not allow her to tell the jury that the comments being made by Thompson and Turner were sexually charged. Those comments can fall within the category of assault and battery. Regarding John Thompson, the jury found it fell under the category of both assault and battery. Not once did Plaintiff's counsel use the words sexual harassment. In addition, Plaintiff prepared each of its witnesses to stay away from the words sexual harassment and they did. This case was not preempted by the Iowa Civil Rights Act but instead was pursued under existing case law as discussed above. Appellant's argument that Jena McCoy's claim against Thomas L. Cardella and Associates for negligent supervision and/or retention is without legal support and should be rejected again.

II. BECAUSE JENA MCCOY'S CLAIM FOR NEGLIGENT SUPERVISION OR RETENTION FOCUSES ON THE WILLFUL ASSAULT AND BATTERY INFLICTED UPON HER BY HER SUPERVISOR, JOHN THOMPSON, IT IS NOT PREEMPTED BY THE IOWA WORKER'S COMPENSATION ACT.

A. Preservation of Error and Standard for Review (Brief Point II):

Appellee/Plaintiff Jena McCoy agrees with the Appellant's recitation of how err was preserved with regard to Brief Point I and the Standard of Review governing this Court's consideration of Brief Point I. However, Appellee/Plaintiff McCoy would again emphasize as was noted in the summary of her argument that this issue has been presented to the lower court on six (6) different occasions and based upon the legal authorities provided by Plaintiff Jena McCoy as concluded that there was legal support for the submission of her case to the jury. Judge Clay effectively balanced the interest of both parties in a way that allowed both parties to present their claim and/or defense to the jury without being prejudiced.

B. Jena McCoy's claim is not preempted by the Iowa Worker's Compensation Act:

Judge Mitchell Turner entered a ruling on April 6, 2020, denying Defendant's motion for summary judgment which was based upon an argument that Jena McCoy's claim was preempted by the Iowa Civil Rights Act and likewise preempted by the Iowa Worker's Compensation Act. Plaintiff references Judge Turner's ruling for two important reasons: (1) he addresses the issue raised by

Plaintiff's counsel that the *Estate of Harris* case is clearly distinguishable from Jena McCoy's case because, in Jena's case, she never experienced a physical injury. Further, Judge Turner acknowledged that in the *Estate of Harris* case, Papa Johns, the employer, did not know and had no reason to know the supervisor would turn violent toward Harris. Finally, Plaintiff argued in the motion for summary judgment hearing that the claim against Defendant Thomas L. Cardella & Associates is independent of the injury that flowed from the conduct of Thompson and Turner. Judge Turner found all of those arguments persuasive.

In addition, he referenced a case cited by Plaintiff entitled *Delgado-Zuniga v. Dickey & Campbell Law Firm, PLC*, 908 N.W.2d 882 (Iowa Ct. App. 2017). In that case, the Iowa Court of Appeals explained that because the plaintiff had a *cognizable claim under the Iowa Civil Rights* Act, he could **not** also file a case under the Iowa Worker's Compensation Act. In this case, Jena McCoy could have filed a claim under the Iowa Civil Rights Act but did not. Because of that, she could not also file a claim under the Iowa Worker's Compensation Act and therefore there is no merit to an argument that her claim is preempted by the Iowa Worker's Compensation Act. Judge Turner's ruling speaks for itself but it deserves to be emphasized in this resistance. On p. 6 and 7 of his ruling on the motion for summary judgment, Judge Turner states as follows:

> "In this case, Plaintiff uses this holding [the holding in the Delgado-Zuniga case] to argue that an employer's immunity is the quid pro quo by which

employers give up their normal defense and assume automatic liability while employees give up their rights to common law verdicts. The court in *Delgado* explained that the two claims did not merely overlap like two circles in a Venn diagram. They were the same claim, and therefore, the agency was without jurisdiction to hear the claim.

The Court, when viewing the facts in the light most favorable to Plaintiff, finds that the present case is distinguished from the *Estate of Harris* because Plaintiff is not claiming injury caused by the initial alleged assaulters. *Harris* represents a set of facts where a supervisor unexpectedly punched an employee, causing death. Plaintiff is claiming she was injured when human resources did not take action based on her complaints. This is not a "failure to prevent assault" claim as is mentioned in the rationale of *Harris*. This is a negligent hiring and supervising claim that arose when plaintiff informed defendant twice of the unwanted touching. Plaintiff is not claiming that defendant had a duty to prevent the assault. She is claiming the Defendant had a duty to respond to her complaints. The Court in *Harris* barred a claim of negligent hiring, negligent supervision, and negligent retention. This language, though, applies to cases with situations and claims similar to *Harris*. The present case, again, accuses the defendant of negligent conduct arising once it was put on notice of the assault. Plaintiff is not accusing defendant of being responsible for the initial unwanted assault as was the case in Harris. When the facts are viewed in the light most favorable to plaintiff, the Court cannot find that Plaintiff's claims are barred as a matter of law for the reasons stated by Defendant.

Further, Plaintiff claims injuries in the form of lost wages, lost benefits, harm to reputation and mental anguish. These injuries are, in large part, not physical in nature. The Court in *Nelson v. Winnebago Industries,* explained:

> "If the essence of the tort, in law, is non-physical, and if the injuries are of the usual non-physical sort, with physical injury being at most added to the list of injuries as a make weight, ***the suit should not be barred***. But if the essence of the action is recovery for physical injury or death, including "physical" the kinds of mental or nervous injury that caused disability, the action should be barred if it can be cast in the form of a normally non-physical tort.

> *Nelson v. Winnebago Industries*, 619 N.W.2d 385, 389 (Iowa 2000) (quoting *Arthur Larson and Lex K. Larson the Law of Worker's Compensation* § 68.21(a) 13-113 (1994)).
>
> Because Plaintiff is not seeking relief for physical injuries, pursuit is not barred by the IWCA. Plaintiff has pursued legal claims that fall outside the IWCA. Applying the standard for motions for summary judgment and viewing the facts in a light most favorable to Plaintiff, the Court cannot conclude as a matter of law, that Plaintiff's claims are barred in this case. Summary judgment is not appropriate.

(Ruling of the Honorable Judge Mitchell E. Turner, dated April 6, 2020, pp. 6-7, App. 42-43).

There is an even more fundamental reason Jena McCoy's claim is not preempted by the Workers' Compensation Act. Iowa Code section 85.16 provides that "no compensation shall be allowed for an injury caused by a third party's intent to willfully injure another.' *See Cedar Rapids Community School v. Reginald DeWayne Cady, deceased, et. all.*, 278 N.W.2d 298 (IA S. Ct. 1979). In this case, the factual record before the jury clearly demonstrated that John Thompson intended to touch Jena McCoy and continued to do so despite her consistently telling him to stop. His actions met the definition of battery upon which the jury was instructed (See Instructions No. 11, 12, 13, 14, and 15, App. 71-75). He also made comments which put Jena McCoy in immediate fear of harmful or offensive contact with her body. Those comments met the definition of assault upon which the jury was instructed. *Id.* The jury found John Thompson engaged in conduct that amounted to both assault and battery. (Judgment Order,

Feb. 14, 2022, App. 82-84). John Thompson, as a so-employee and third party, willfully injured Jena McCoy emotionally, and therefore, this case falls outside the Iowa Workers' Compensation Act by reason of the willful injury exception of Iowa Code section 85.16.

There is nothing that changes the reasoning of Judge Turner's ruling on the motion for summary judgment. There was no evidence of physical injury in this case. The only expert testimony was from a mental health counselor. Plaintiff never alleged in this case that Thomas L. Cardella had a duty to stop the conduct of John Thompson and/or Mitch Turner until such time as they were put on notice of that conduct. This is a negligent supervision and retention case and it has clearly been recognized by the Iowa Supreme Court. Further, the Trial Court did an admirable job of clearly instructing the jury as to the legal basis for the claim and the jury followed the Court's instructions and rendered its verdict.

The legal claim that Jena McCoy's lawsuit was preempted by the Iowa Worker's Compensation Act is without merit and should therefore be rejected as it has consistently been rejected at the trial court level.

III. WHERE THE ZOOM TESTIMONY OF KARA CRANE, LICENSED MENTAL HEALTH COUNSELOR, IN NO WAY REFERENCED ARGUABLE SEXUAL HARASSMENT IN THE WORKPLACE BY JOHN THOMPSON TOWARD JENA MCCOY, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ALLOWING SUCH TESTIMONY WHERE REASONABLE SAFEGUARDS WERE IMPLEMENTED TO THAT SUCH

TESTIMONY WOULD NOT BE PREJUDICIAL TO THE DEFENDANT.

A. <u>Preservation of Error and Standard for Review (Brief Point III):</u>

Appellee/Plaintiff Jena McCoy agrees with the Appellant's articulation of its preservation of error and the standard of review for this Court for Brief Point III (which is actually Brief Point IV in Appellant's Brief).

B. <u>Argument:</u>

Kara Crain's testimony was unrefuted in this record. In response to Plaintiff's hypothetical question, which will be discussed later in this Brief Point, Kara Crain, a licensed mental health counselor, testified as to her four (4) different mental health diagnoses for Jena McCoy. She testified that the events which had occurred at Jena McCoy's place of employment, Thomas L. Cardella & Associates, to a reasonable degree of mental health counseling certainty, was a cause of three (3) of the four (4) of those diagnoses. (Crain testimony, Day 2 Tr., 161:18-164:10). However, by reason of the fact that Jena McCoy had a preexisting condition, she also testified that the events at Thomas L. Cardella & Associates was the cause of a worsening of all of her preexisting mental health diagnoses. (Crain testimony, Day 2 Tr., 164:11-165:9). She also testified that Jena McCoy was more susceptible to mental health challenges in the aftermath of the events at

Thomas L. Cardella & Associates by reason of her preexisting mental health condition. (Crain testimony Day 2 Tr., 143:21-169:15, 170:1-173:18).

Defendant offers two reasons why the offering of the Zoom trial testimony of Kara Crain prejudiced Defendant to the extent that it should be granted a new trial. Both reasons lack merit.

First, Defendant argues without any specific references to the video deposition of Crain to the trial zoom testimony of Crain that Crain's testimony "differed qualitatively from the opinions Crain testified about in discovery." Secondly, Defendant argues that the use of a hypothetical question directed at Kara Crain was somehow prejudicial because it "essentially spoon-fed Crain (and the jury) with McCoy's entire theory of the case." As the Court will discern below, neither argument has merit.

The first complaint is interesting because Defendant makes a conclusory statement that the trial testimony differed from the testimony contained in Crain's video deposition which was taken before trial (the deposition which the Court excluded in its pretrial rulings because of the twenty-one references to "sexual harassment"). It is important to point out two important points concerning the first argument. First of all, if Kara Crain's testimony differed so dramatically from her earlier testimony, why then did the defense counsel not impeach her credibility during the trial by pointing out those differences? Secondly, even in its post-trial

motions, Defendant does not provide the Court with any specifics as to how the trial testimony differed from the earlier video testimony. The reason there are no specifics is that there were no appreciable differences between the two, except for the fact that the words "***sexual harassment***" were **totally excluded** from the trial Zoom testimony. That is precisely what Defendant asked the Court to do in its pretrial motions. The presentation of the Zoom trial testimony of Kara Crain, excluding any reference to "sexual harassment" constituted a reasoned approach that took into consideration the interests of both parties to this litigation.

To follow the rulings of the Court concerning Crain's testimony, Plaintiff's counsel implemented the hypothetical question, a technique that has been a staple in our civil jurisprudence since the beginning. In discussing the hypothetical question that Plaintiff's counsel posed to Kara Crain, it is first important to emphasize that there were ***no objections*** to the contents of the hypothetical question. Stated another way, defense counsel never objected that the hypothetical question failed to incorporate key facts into the hypothetical. Instead, his objection was to the use of a hypothetical question at all. That objection has no merit. The Iowa Supreme Court has long put its stamp of approval on the use of hypothetical questions. *See* Ganrud *v. Smith*, 206 N.W.2d 311, 316 (Iowa 1973) (holding in part that reversible error may not be predicated upon an objection to a hypothetical question which does not specifically tell the court the ground upon which it is

based, citing to *Pastour v. Kolb Hardware, Inc*. 173 N.W.2d 116, 124 (Iowa 1969); *In re Estate of Ronfeldt*, 261 Iowa 12, 27, 152 N.W. 837, 846 (1967).

There was no objection to the factual completeness of the hypothetical because the hypothetical was factually complete. From an evidentiary perspective, it became important to determine the extent to which Kara Crain was aware of the specifics that had taken place at Jena McCoy's place of employment, Cardella & Associates. After asking the hypothetical question, Plaintiff's counsel asked Kara Crain whether the hypothetical question was consistent with the information she had learned in her clinical interactions with Jena McCoy and she answered that the hypothetical question and the facts contained therein were consistent with what she had learned clinically with one exception which did not go to the essence of the hypothetical---that is what had happened to Jena McCoy in the work setting. (Crain testimony, Day 2 Tr., App. 159:1-161:21; Ruling on Post-Trial Motions, p. 5, footnote 1, App. 117). Thus, the use of the hypothetical question in the Zoom trial testimony effectively established for the Court that her use of the words "sexual harassment" in her earlier testimony was referring to the same conduct that the jury found to constitute assault and battery concerning John Thompson. The method utilized by Plaintiff's counsel has long been used and there is nothing about the use of the hypothetical question in this case that prejudiced the Defendant. What prejudiced Defendant Cardella, is the fact that Kara Crain's

testimony went unrefuted and the fact that Kara Crain demonstrated herself to be a qualified mental health expert who shared opinions that she testified would have been the same *with or without pending litigation.* (Crain testimony, Day 2 Tr., 169:10-13).

Perhaps a quote from another Iowa Supreme Court opinion from way back in 1895 puts Defendant's challenge to Kara Crain's testimony and the use of the hypothetical question in perspective:

> Next, it is insisted that the hypothetical question propounded to the expert witness for contestants was unfair, inaccurate, distorted and untrue in many particulars, and that objections to it should have been sustained. The rule heretofore announced by this court with reference to such questions, in the case of *Meeker v. Meeker*, 74 Iowa 357, 37 N.W. 773 is as follows: 'It is a general rule that hypothetical questions put to experts ***should be based upon facts which the evidence tends to show***…. It is not required that the questions should be based upon conceded facts, nor is technical accuracy required in framing the questions. If they are entirely without the support of evidence, they should be excluded. ***Ordinarily, opposing counsel will not be slow in re-examination of the witness to correct the hypothesis upon which the question is based if it be incorrect***.' In propounding such a question, ***counsel may assume the facts in accordance with his theory of them***. It is not essential that he state the facts as they exist, but the hypothesis should be based on a state of facts which the evidence tends to prove. ***Under familiar rules of practice, each side has its theory of what is the true state of facts and assumes that it has or can prove them to the satisfaction of the jury, and, so assuming, shapes hypothetical questions to experts accordingly***.

Bever v. Spangler, 93 Iowa 576, ___, 61 N.W. 1072, 1080 (1895) (emphasis added).

In this case, Plaintiff's counsel simply utilized a technique that has long been approved for use in trials for more than 125 years. Further, Kara Crain's testimony that the facts contained in the hypothetical were consistent with what she had learned from her clinical interactions with Jena McCoy. Not once did Kara Crain reference "sexual harassment" in her trial testimony. If anything, the specific facts set forth in the hypothetical question demonstrate a concept that even this Court conceded early during some of her pretrial interaction with the attorneys involved: facts giving rise to sexual harassment may overlap with facts proving assault and battery. That is clearly the case here. Kara Crain's testimony was not prejudicial to Defendants for either of the two reasons asserted and does not provide the Court with a viable reason for overriding the decision of the jury and sending this case back to the trial court for another trial.

To demonstrate the thoughtful consideration that Judge Clay gave to Defendant's argument with regard to Kara Crain's testimony, one only has to read her ruling on the post-trial motions beginning at p. 4 and continuing through the end of p. 5. However, Judge Clay's last paragraph is particularly telling. It reads as follows:

> Crain is a mental health professional, not a legal expert. During the deposition [which was excluded because of references to sexual

> harassment], it appears that she was merely parroting back the language used by Plaintiff's counsel; she was not giving legal opinions as to whether the actions McCoy recounted to her constituted sexual harassment versus assault/battery. If anything, the Court is more convinced of this now – *after* hearing Crain's testimony and response to the hypothetical offered to her by Plaintiff's attorney – then when issuing its pre-trial rulings. Defense counsel was granted the opportunity to *voir dire* Crain during her direct examination, at which time she testified that all but one of the "hypothetical" facts posed by counsel were previously described to her by McCoy. Crain testified, specifically, that McCoy told her about unwelcomed touching by her supervisor and a peer. Further, and from the Court's perspective most importantly, Crain's testimony regarding her opinions *as to the effects upon McCoy of what transpired at Cardella* did not change. For these reasons, the Court finds that Defendant was not prejudiced by the Court's decision to allow Crain to testify. Defendant's third argument for new trial is overruled and denied.

(Ruling concerning Defendant's Motion for Judgment Notwithstanding the Verdict and Motion for New Trial dated May 15, 2022, p. 5, App. 117). The only fact in the hypothetical that Crain was not aware of is the reference to the fact that Thompson bought McCoy a teddy bear and left it in her cubicle. (Crain testimony, Day 2 Tr., 159:23-160:7). As Judge Clay noted in her ruling, that fact had little relevance to Crain's opinions (Clay Ruling on Post Trial Motions, p. 5, footnote 1, App. 117).

There is no merit to the Appellant's argument with regard to the testimony of Kara Crain. Judge Clay gave thoughtful consideration to the positions of both parties with regard to her testimony and as her ruling, quoted in part above,

demonstrates, Judge Clay clearly did not abuse her discretion in allowing the testimony.

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY FAILING TO GRANT THOMAS L. CARDELLA'S MOTION FOR A NEW TRIAL BASED UPON ALLEGED MISCONDUCT BECAUSE THERE WAS NO MISCONDUCT DURING THE COURSE OF THE TRIAL AND/OR BECAUSE ANY SUCH ALLEGED MISCONDUCT WAS NOT PREJUDICIAL TO THE DEFENDANT.

Defendant argues two grounds of misconduct in the proceedings. Neither ground has merit. They include the following:

A. Preservation of Error and Standard for Review (Brief Point IV):

Appellee/Plaintiff Jena McCoy agrees with the Appellant's articulation of its preservation of error and the standard of review for this Court for Brief Point IV (which is Brief Point V in Appellant's Brief).

B. References to Sexual Harassment:

Plaintiff's counsel went to great lengths to make sure there was no reference to "sexual harassment" by him or any of his witnesses throughout the course of this trial. While the record speaks for itself, Plaintiff believes that during the course of this trial, there was no mention of sexual harassment. Plaintiff's counsel acknowledges that during one line of questioning, he referred to a portion of the employee handbook under the category of sexual harassment to highlight what

Jena McCoy was required to do to report inappropriate touching or inappropriate comments within the workplace. However, during that line of questioning, there was no reference to the words "sexual harassment." There was no emphasis on the fact that the language referenced in the question was under a category within the handbook entitled "Sexual Harassment." Further, where defense counsel made a record on the issue, Plaintiff's counsel offered to withdraw the handbook as an exhibit (it had already been received into evidence, **without objection**, as Exhibit 2). The Court allowed the exhibit to be withdrawn and then allowed the Defendant to offer portions of the handbook into evidence, portions which were received without objection from Plaintiff's counsel.

The only other comments which apparently are being highlighted as impermissible comments in violation of the court's pretrial ruling on the Motions in Limine is when Plaintiff's counsel referred to comments made by both Thompson and Turner as "sexually charged "or having "sexual overtones." There are arguably two components of the Court's pretrial ruling on the Motions in Limine which are relevant: Section of the Court's Ruling concerning Defendant's Motions in Limine and Section III of the Court's Rulings concerning Defendant's Motions in Limine.

The first is Section I of the Defendant's Motions in Limine entitled "References to Sexual Harassment." (See Ruling on Motions in Limine and

Motion to Exclude Testimony dated February 3, 2022, pp. 1-2, App. 61-62). The last sentence of the ruling states: ***"The parties shall be precluded from offering any evidence or argument related to alleged sexual harassment***." Of course, that section of the ruling was also addressed at the same time as the parties and the Court had ongoing dialogue as to whether the video deposition of Kara Crain would be allowed because she referenced "sexual harassment" some twenty-one times in her original deposition. Of course, Kara Crain's testimony was indeed presented to the jury via Zoom and throughout that testimony, there were ***no references to sexual harassment***. Likewise, Plaintiff challenges Defendant to find one instance in this record where the words "sexual harassment" was included in a question by Plaintiff's counsel or in an answer by any of Plaintiff's witnesses. The rulings on Defendant's Motions in Limine never limited Plaintiff or her counsel from describing the verbal comments from Thompson or Turner as being sexually charged or having sexual overtones. Keep in mind, the jury also heard testimony that Turner was touching Jena McCoy's inner thighs, her butt, her breasts, and her hair without permission. There was no objection to any of that testimony. How one is to present an assault and battery case involving crass and impermissible comments without allowing the jury to know that the comments were sexually charged or had sexual overtones is hard to fathom. There has to be something associated with the comments which would put the recipient in immediate fear,

consistent with the Court's instruction. The carefully chosen words of Plaintiff's counsel used to describe the comments made by Thompson and Turner were nothing more than an attempt to put those comments in context without violating the Court's prohibition on referring to "sexual harassment."

The second component of the Court's ruling on Defendant's Motions in Limine was section III entitled "References to Mitch Turner's Alleged Sexual Commentary." (See Ruling on Motions in Limine and Motion to Exclude Testimony dated February 3, 2022, pp. 2-3, App. 62-63). That section speaks for itself. The Court did not exclude those comments and it was not until the Court was satisfied that there was enough context to allow specifics as to Turner's comments that Plaintiff's counsel asked Jena McCoy to share with the jury specifically what was said. Even then, the words "sexual harassment" were never uttered. There was no violation of the ruling on the Motion in Limine concerning sexual harassment as set forth in Section I of the Court's pretrial rulings on Defendant's Motions in Limine. Further, there was no violation of Section III of that same ruling. Plaintiff's counsel and his witness never uttered the words sexual harassment. The words "sexual harassment" from the Employee Handbook were never referenced. In fact, the offer of the handbook as evidence was withdrawn to make sure the jury was not exposed to that language. In short, this case was tried with due respect to the Court's language as set forth in its pretrial rulings on the

Motions in Limine. Given the backdrop of the legal theories of recovery pursuant to which this case was tried, the evidentiary record presented to the jury admirably balanced the interests of both parties to this litigation. (See discussion earlier in this Brief pp. 18-29).

C. <u>Alleged Misconduct during Final Argument:</u>

The second allegation of misconduct which Defendant has claimed in support of its post-trial motions focuses on comments made during final argument referencing the annual salary of James Harden, an NBA basketball player. The transcript will speak for itself, but Plaintiff's counsel had seen a story on ESPN that morning before coming to the courthouse about Harden being traded to the Philadelphia 76ers, and during the story, there was a banner scrolling along the bottom of the screen noting that Harden was being paid $43 million a year to play basketball. Counsel used that merely to highlight the extent we value as a society a fully functioning human being in our society. Jena McCoy, based upon the unrefuted testimony from her licensed mental health counselor is not a fully functioning human being and her mental health counselor made it clear that what she had endured at Cardella was a cause of her mental health dysfunction. An objection was made during Plaintiff's counsel's argument. A sidebar was held. Plaintiff's counsel defended his use of that reference and advised the reason for

that reference, further emphasizing that it was argument and that latitude is routinely given in the final argument. Following the sidebar, no further reference was made to James Harden. Plaintiff's counsel heeded the comments of the Court.

From the opening statement in the case, the jury was advised that at the close of the case the jury would be asked to return a verdict of $750,000 to Jena McCoy. In the final argument, that request was repeated. The jury returned a verdict of only $400,000 far less than what was asked of the jury. Further, the breakdown of the verdict was $100,000 for past emotional distress damages and $300,000 for future damages. Jena McCoy is a young woman and Kara Crain made it clear to the jury that the events at Cardella impacted Jena McCoy in two important ways: given Jena's pre-existing mental health diagnoses, Jena McCoy was more susceptible to an exacerbation of her mental health condition by the conduct of Thompson and/or Turner. In addition, Kara Crain testified that the events at Cardella did make Jena McCoy's pre-existing mental health condition worse. The jury was so instructed on those legal concepts (see Instructions 19A and 19B). The jury's verdict demonstrates that this jury was not influenced by the reference to James Harden. It did not return a verdict for more than what was asked of them. In addition, the quantitative difference between the jury's verdict and Harden's salary is strong evidence that the jury understood the point made by the reference to Harden's salary but was not influenced by it. This jury was instructed that "the amount you

assess for mental pain and suffering cannot be measured by any exact or mathematical standard. You must use your sound judgment based upon an impartial consideration of the evidence. Your judgment must not be exercised arbitrarily, or out of sympathy or prejudice for or against the parties. The amount you assess for any item of damage must not exceed the amount caused by the Defendant as proved by the evidence." (see Instruction 19). Of course, Cardella does not like the jury's verdict. However, when a jury deliberates for more than seven (7) hours, it is hard to suggest that this jury did not take its responsibility seriously. It is important to emphasize that the damage testimony from Jena McCoy and from her treating mental health counselor, Kara Crain, went **unrefuted** in this trial. The jury believed both Jena McCoy and Kara Crain and its determination of a fair amount of damages was clearly supported by substantial evidence which went unrefuted during the trial.

D. Important legal concepts which govern the consideration of alleged misconduct as a ground for a new trial and/or judgment notwithstanding the verdict

"The general rule is that in order for the granting of a new trial based upon attorney misconduct to be warranted, the objectionable conduct ordinarily ***must have been prejudicial*** to the interest of the complaining party." *Mays v. Mac Chambers Co.*, 490 N.W.2d 800, 803 (Iowa 1992) (citations omitted). "Unless it

appears ***probable a different result would have been reached but for the claimed misconduct of counsel*** for the prevailing party, we are not warranted in granting a new trial." *Id.* (emphasis added) *See also Jones v. Iowa State Highway Commission*, 185 N.W.2d 746, 752 (Iowa 1971).

Further, "we have held that the trial court 'has ***considerable discretion*** in determining whether alleged misconduct, ***if there was such***, was prejudicial.'" *Id.* (emphasis added). In this case, Plaintiff first challenges the allegation of whether misconduct even occurred. There was no prohibition articulated in the Court's rulings on Defendant's Motions in Limine which precluded Plaintiff or her counsel from describing the comments made by both Thompson and/or Turner. As being sexually charged or having sexual overtones. Such a description was necessary to provide the jury with some context from which to decide whether there was adequate proof of either assault or battery. Not once did Plaintiff or her witnesses ever insert the words "sexual harassment" into this record, in deference to the Court's pretrial ruling on Defendant's Motions in Limine. Plaintiff's counsel was exceedingly cautious when exploring the comments from Mitch Turner and it was not until the Court gave him permission to elicit from Jena McCoy what specifically Turner said to her that such a question was asked. This Court managed competing interests well and it resulted in a fair trial for both parties. The interests of both sides were managed by this court admirably.

Further, the alleged misconduct during the final argument was immediately abandoned in response to Defendant's objection and the Court's comments during the sidebar. This is not a case where counsel repeatedly ignored the Court's admonishment and repeated the same alleged conduct. No, in this case, Plaintiff's counsel consistently adjusted his comments to comply with the Court's concerns. The verdict that this jury handed down in no way is suggestive that comments made by counsel during final argument about Harden in any way influenced this jury (see discussion in the section addressing alleged misconduct during final argument above, pages 18-20). As such, the argument of misconduct as grounds for a new trial or judgment notwithstanding the verdict must likewise fail.

Given the abuse of discretion standards governing this Court's review of the arguments that misconduct justified a new trial, it is important to again highlight the language contained within Judge Clay's ruling on the post-trial motions. She clearly gave significant time and thought to her ruling and in the final paragraph of that section stated as follows:

> Defendant's arguments on these issues [the alleged misconduct issues], and Plaintiff's responses thereto now are substantially the same as heard by the court on the oral motions for mistrial. Essentially, Defendant argues that the cumulative effect of Plaintiff's attorney's repeated "sexually charged" comments "could not be other than prejudicial" and that references to the "astronomical salary of a professional basketball player" constituted an impermissible effort to make McCoy's request for $750,000 damages "look more reasonable." (Defendant's Brief in Support of Combined Motions, pp. 14-16). In response, Plaintiff's attorney argues that he "went to great

> lengths to make sure that there was no reference to 'sexual harassment' by him or any of his witnesses throughout the course of the trial." And notes that "the rulings on Defendant's motions in limine never limited Plaintiff or counsel for describing the verbal comments from Thompson or Turner as being sexually charged or having sexual overtones." (Plaintiff's Resistance, pp. 16-17). As has been addressed throughout this case, there is indeed a certain degree of overlap between sexual harassment and assault or battery of a sexual nature. It appears that Defendant believes that all references to behavior being "sexual" – i.e. sexually charged, sexual overtones – should have been prohibited, and that failure to do so constitutes a prejudice. ***The Court simply does not agree***. As Plaintiff points out in her resistance (p. 17), "the jury also heard testimony that Turner was touching Jena McCoy's inner thighs, her butt, her breasts, and her hair without permission." Addressing the James Harden comment, Plaintiff points out in her resistance (p. 19) that the jury verdict was for barely half the amount Plaintiff requested. Plaintiff argues that this is "strong evidence that the jury understood the point made by the reference to Harden's salary but were not influenced by it." The jury was properly instructed on their role as finders of fact. They were properly instructed on what is, and what is not, evidence. They were properly instructed on how to assess judgments for mental pain and suffering. **Defendant's fourth argument for new trial is overruled and denied.**

(Ruling re: Defendant's Motions for Judgment Notwithstanding the Verdict and Motion for a New Trial, pp. 6-7, May 15, 2022, App. 118-119).

The argument that alleged misconduct is a justification for returning this case to be retried is likewise without merit. Again, Judge Clay gave thoughtful consideration to Appellant's argument at the trial level and her written ruling on its face demonstrates that she did not abuse her discretion with regard to the misconduct argument.

V. THE TRIAL COURT CORRECTLY FOUND THAT BASED UPON THE LANGUAGE OF THE JURY INSTRUCTIONS, THE VERDICT WAS NOT INCONSISTENT AND DID NOT JUSTIFY THE GRANT OF A NEW TRIAL.

A. Preservation of Error and Standard for Review (Brief Point V):

Appellee/Plaintiff Jena McCoy agrees with the Appellant's articulation of its preservation of error and the standard of review for this Court for Brief Point V (which is actually Brief Point VI in Appellant's Brief).

B. Argument:

The jury made an informed decision that the comments of Mitch Turner did **not** amount to an assault. However, the jury found that Cardella & Associates still were negligent in supervising and/or retaining Mitch Turner. There was substantial evidence to support such a finding. Instruction No. 10 was the negligent supervision and/or retention instruction. ¶ 2 of that instruction provided as follows: "Cardella knew, or in the exercise of ordinary care should have known, of John Thompson ***and/or*** Mitch Turner's dangerous characteristics at the time of their hiring or based on their conduct after being hired." (Instruction No. 10, ¶ 2, App. 70).

¶ 4 gave direction to the jury and said that Jena McCoy also had to prove that John Thompson ***and/or*** Mitch Turner committed an assault or battery against McCoy as explained in Instruction Nos. 11 and 13. It is Plaintiff's position that the

finding of negligent supervision and/or retention of Mitch Turner is supported by the testimony of Jena McCoy and Bonnie Sullivan that both Samantha Teague and Mark Grego were both informed of the repulsive comments that were made by Mitch Turner toward Jena McCoy but still chose to assign her to a new supervisor in response to her complaints, that supervisor being the very person that made the repulsive comments to her, to wit: Mitch Turner. How does a company choose, through its site manager, to reassign one of its workers, Jena McCoy, to a new supervisor who happens to be the very person about whom Jena McCoy had complained? The instructions gave the jury an option in finding Cardella guilty of negligent supervision or retention—an option to find either Thompson or Tuner committed an assault or battery against Jena McCoy to satisfy the requirements outlined in the jury instructions. However, a jury could also have concluded that it amounted to negligent supervision to assign Jena McCoy to Turner after McCoy reported his crass comments to Grego and Teague. A jury could reasonably find that such conduct amounted to negligent supervision or retention on the part of Thomas L. Cardella & Associates. **However, even if this Court concludes that the verdict is inconsistent with the jury instructions provided to the jury, it is a case of no harm, no foul. The jury found Thompson's conduct and comments to constitute both assault and battery which supports the negligent**

supervision and retention theory of recovery. The verdict should therefore stand.

The reasoning of Judge Clay as set forth in her ruling on the post-trial motions seems particularly informative when considering this issue. Judge Clay admits to having initially reacted to the verdict as being inconsistent but she changed her mind after looking again at the language of the instructions and the law. In her words:

> Upon initial review, the Court did share Defendant's concerns that the verdict, on its face, appeared to be inconsistent as to the jury's findings re Mitch Turner. However, given the nature and the inconsistency, and the Court's conclusion that an entirely new trial is not warranted on any of the other bases alleged by Defendant, the Court sought the input of counsel on the potential use of a remittitur. Counsel for both parties responded that a remittitur would be inappropriate in this case, albeit, for markedly different reasons. Plaintiff argues that there is "no relationship between the amount of damages found by this jury and any inconsistency in its verdict." (Plaintiff's Response to the Court's Request, p. 5). Defendant disputes Plaintiff's claims regarding the damages, arguing that "if any amount of damage correlates to the alleged wrongdoing of Turner (something McCoy emphasized at length at trial), then Cardella has been prejudiced." (Defendant's Reply Regarding Remittitur, p. 2). However, because Defendant firmly believes that the case should never have gone to the jury to begin with, it argues that a remittitur really would not satisfy its concerns. (Defendant's Status Report Regarding Remittitur). The Court appreciates counsels' responses and agrees that remittitur is not appropriate under the circumstances of the case.
>
> Plaintiff, in her response to the Court's request, points out that the "Court's analysis that the verdict is inconsistent and irreconcilable must begin with the jury instructions themselves." Plaintiff states her position is that "Instruction No. 10 fairly and adequately sets forth the

> law on negligent supervision and retention in Iowa." Plaintiff further argues that "a review of the instructions 'leads to the inevitable conclusion that the jury could not have misapprehended the issues,' and that because of that, any challenge that the jury's verdict is inconsistent and irreconcilable is without merit." (Referencing *Moser v. Stallings*, 387 N.W.2d 599, 605 (Iowa 1986); *Mora v. Savereid*, 222 N.W.2d 417, 422 (Iowa 1974).) Defendant also appears to concede that the jury was properly instructed on the law, specifically via Instruction No. 10. (Defendant's Brief in Support of Combined Motion, p. 9). As Plaintiff spells out, the jury was instructed that McCoy needed to prove that Cardella knew of the dangerous characteristics of "John Thompson and/or Mitch Turner," that the dangerous characteristics of "John Thompson and/or Mitch Turner" were a cause of damage to McCoy, and that "John Thompson and/or Mitch Turner" committed an assault of battery against McCoy." (Plaintiff's Resistance to Defendant's Motion, p. 7). 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. Similarly, Defendant's complaint that "the jury did not allocate which portions of emotional distress damages relates to its negligence vis-à-vis Turner versus the negligent finding vis-à-vis Thompson falls flat. (Defendant's Brief in Support of Combined Motion, p. 11). Neither party requested an additional jury instruction or special interrogatory which would have given the jury the option to allocate an amount or percentage of the damages to the negligence claims relating to Thompson and Turner, respectively. As cited by Defendant in its brief: "Ultimately, two answers are not inconsistent if they can be harmonized under the evidence and instructions." (*Clinton Physical Therapy Services, P.C. v. John Deere Health Care, Inc.*, 714 N.W.2d 603, 613 (Iowa 2006)). In this case, upon review of the jury instructions and verdict, and consideration of the evidence submitted to the jury, the Court finds that the jury's answers can be harmonized. Defendant's second argument for new trial is overruled and denied."

(Ruling re: Defendant's Motion for Judgment Notwithstanding the Verdict and Motion for New Trial, pp. 7-8, May 15, 2022, App. 119-120). Consistent with Judge Clay's analysis, this verdict should stand.

CONCLUSION

For the reasons set forth above, each and every ground urged by the Appellant/Defendant is without merit. Appellee/Plaintiff Jena McCoy respectfully urges this Court to reject Appellant's arguments thereby allowing the lower court verdict to stand.

REQUEST FOR ORAL ARGUMENT

JENA MCCOY, the Appellee herein, does hereby request oral argument on the issues raised for consideration in this appeal.

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CERTIFICATE OF SERVICE

The undersigned certifies that this document was served upon all parties to the above cause to the attorneys of record as follows:

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Said service was completed on December 28, 2022, by:

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