IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 22-0587

Polk County No. LACL144908

BNSF RAILWAY COMPANY,

Defendant-Appellant,

vs.

SCOTT D. OLSON,

Plaintiff-Appellee.

DEFENDANT'S/APPELLANT'S FINAL BRIEF

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Iowa R. Evid. 5.403

ROUTING STATEMENT

This case may be transferred to the Iowa Court of Appeals for decision because it presents the application of existing legal principles. Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

This case was brought by Plaintiff-Appellee Scott D. Olson ("Plaintiff") against Defendant-Appellant BNSF Railway Company ("BNSF") under the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* ("FELA"). Plaintiff alleges that on July 31, 2017 he was injured while working as an employee for BNSF. Plaintiff filed this lawsuit under FELA seeking to recover damages for his alleged injuries.

Course of Proceedings

Plaintiff filed his Complaint on June 25, 2019. (APP. 5-12.) The Iowa District Court for Polk County conducted a trial from August 30, 2021 through September 8, 2021. (Transcript, Vol. I to Vol. VII.) On September 8, 2021, the jury returned a Verdict Form awarding Plaintiff $6,210,280.00. (APP. 292-293.) The trial court issued an Entry of Judgment on September

23, 2021 in the amount of $6,210,280.00 in favor of Plaintiff and against BNSF. (APP. 294-297.)

On September 23, 2021 BNSF filed a Motion for New Trial. (APP. 298-895.) The trial court issued a Ruling on Motion for New Trial on March 4, 2022 denying BNSF's Motion. (APP. 1279-1303.) On April 1, 2022 BNSF timely filed a Notice of Appeal. (APP. 1304-1306.) BNSF appeals to the Supreme Court of Iowa from the final order entered by the Iowa District Court for Polk County on March 4, 2022, which is the Ruling on Motion for New Trial following the Entry of Judgment on September 23, 2021, and from all adverse rulings and orders inhering therein. (APP. 1304-1306.)

STATEMENT OF THE FACTS

Plaintiff alleges that on July 31, 2017 he was working as a section foreman for BNSF to repair a rail defect. (APP. 6, ¶10.) Plaintiff was working with his crew tasked with cutting out and replacing a section of the rail on a bridge near Afton, Iowa. (*Id.*) Plaintiff alleges his co-worker Richard Rutledge was operating the boom of the section truck and attempted to lift a piece of cut rail. (APP. 7, ¶12.) The boom became overloaded and the rail suddenly flew into the air and struck Plaintiff causing him injury. (*Id.*) Plaintiff filed this action against BNSF alleging it was negligent under FELA and seeking damages for his injuries.

A. Plaintiff's Negligence Claims

Plaintiff filed a Complaint setting forth his specific allegations of negligence against BNSF. Plaintiff's negligence claims are contained in Paragraph 13, subparts (a) through (j). (APP. 7-10, ¶13.) The claims in paragraphs 13(a) through 13(f) relate to the *condition* of the section truck boom. (APP. 7-9, ¶¶13(a)-(f).) The claims in paragraphs 13(g) through 13(j) relate to the *operation* of the section truck boom and training of its operator, and protecting employees against the "foregoing acts and omissions." (APP. 9-10, ¶¶13(g)-(j).) The operator of the section truck boom was Richard Rutledge. (APP. 6-7, ¶11.)

Plaintiff's negligence claims in the Complaint were subsequently narrowed. Specifically, during trial BNSF moved for a directed verdict on Plaintiff's claims in paragraphs 13(a) through 13(f) of the Complaint on the basis there was no evidence that there was anything wrong with the condition of the section truck boom. (Transcript, Vol. V, 61:14-63:2.) Plaintiff agreed admitting there was nothing wrong with the boom truck:

> [THE COURT:] On behalf of the plaintiff, your response?
>
> MR. LEACH: Yes, Your Honor.
>
> As to paragraphs 13A, B, C, D, and E, and F of the petition, we agree. There was nothing wrong with the boom truck. There's no evidence to that.

(Transcript, Vol. V, 64:15-19.) Plaintiff's counsel therefore dismissed the negligence claims in paragraphs 13(a) through 13(f):

> THE COURT: And so just so the record is clear, Mr. Leach, on behalf of the plaintiff, you would be dismissing the allegations contained within paragraph 13A through F; is that correct?
>
> MR. LEACH: Yes, Your Honor.

(Transcript, Vol. V, 66:13-17.) The trial court confirmed on the record that Plaintiff's allegations of negligence in paragraphs 13(a) through 13(f) were dismissed:

> THE COURT: All right. Thank you, Ms. Pezewski.
>
> Again, so the record is clear, the Court is dismissing 13A through F of the allegations made within Plaintiff's petition.

(Transcript, Vol. V, 68:4-6.)

Therefore, the only negligence claims at issue against BNSF were the claims in paragraphs 13(g) through 13(j) of Plaintiff's Complaint:

> 13. Plaintiff's injuries were directly caused, in whole or in part, by the negligence of BNSF, including in the following respects, to-wit: Defendant, by and through the acts and omissions of its officers, agents, and employees other than Plaintiff, negligently failed to provide Plaintiff a reasonably safe place for work, reasonably safe conditions for work, reasonably safe methods for work, and reasonably safe appliance with which to work in that Defendant:
>
> . . .
>
> g. **Caused**, permitted, and allowed **the subject section truck boom system to be operated** in such a way as to

overstress the rail and cause it to explode when Defendant knew, or in the exercise of ordinary care should have known, that it was reasonably likely that employees, including Plaintiff, would be injured thereby.

h. **Failed to reasonably train**, educate, and instruct **the person who was operating the subject section truck boom system** at the time of the incident at issue in reasonably safe methods of operating and using the subject section truck boom system, including so as not to overstress rail and cause it to explode, when Defendant knew, or in the exercise of ordinary care should have known, that it was reasonably likely that employees, including Plaintiff, would be injured thereby.

i. **Failed to** draft, promulgate, follow, and enforce reasonable rules, customs, practices, policies, and procedures to prohibit and **protect employees against the foregoing acts and omissions** when Defendant knew, or reasonably should have known, that it was reasonably likely that employees, including Plaintiff, would be injured thereby.

j. **Failed to** reasonably train, educate, and instruct its officers, agents, and employees in reasonable rules, customs, practices, policies, and procedures to prohibit and **protect employees against the foregoing acts and omissions** when Defendant knew, or reasonably should have known, that it was reasonably likely that employees, including Plaintiff, would be injured thereby.

(APP. 9-10, ¶¶13(g)-(j)) (emphasis added). The claims at issue related to operation of the section truck boom and training of Mr. Rutledge as its

operator, and protecting against the foregoing acts and omissions which refer back to the operation and operator training. (APP. 9-10, ¶¶13(g)-(j).)

There are no claims in Plaintiff's Complaint alleging any crew member other than Mr. Rutledge as the operator of the section truck boom was not sufficiently trained, or that Plaintiff was not sufficiently trained. (*See* APP. 5-12.) Plaintiff never alleged in discovery before trial that Plaintiff or crew members other than Mr. Rutledge lacked training. For example, on August 16, 2021, two weeks before trial, Plaintiff submitted proposed jury instructions setting forth Plaintiff's negligence claims, consistent with the pleadings and discovery in the case:

> Your verdict must be for the plaintiff and against defendant if all of the following elements have been proved:
>
> *First*, defendant failed to provide a reasonably safe place to work in that defendant
>
> > failed to provide coordinating supervision for the three gangs it assigned to work on the bridge, and/or
> >
> > failed to reasonably train its boom operator in how to properly operate the boom controls, and/or
> >
> > by and through its boom operator, failed to properly operate the boom controls
>
> *Second*, defendant in any one or more of the ways described in Paragraph *First* was negligent; and
>
> *Third*, that negligence played any part in causing injury to the plaintiff.

> If any of the above elements has not been proved, then your verdict must be for defendant.

(APP. 95.)

BNSF accordingly proceeded to trial with the understanding that Plaintiff's negligence claims against BNSF were that it failed to provide coordinating supervision, failed to train the boom operator, and the boom operator failed to properly operate the boom.

On the third day of trial, the trial court conducted a sidebar conference during a recess from the testimony of Plaintiff's expert, Mr. Lydick. (Transcript, Vol. III, 134:2-11.) Plaintiff's counsel requested the trial court allow him to question Mr. Lydick on the training of all BNSF employees that were present at the time of Plaintiff's injury. (Transcript, Vol. III, 134:12-138:7.) Plaintiff characterized his request by stating he wanted to lay foundation for Mr. Lydick's testimony. (*Id.*) The trial court responded by noting Mr. Lydick's expert report was specific only to Mr. Rutledge having not been properly trained. (Transcript, Vol. III, 137:2-10.) BNSF objected to Plaintiff's request on the basis Mr. Lydick had no foundation for the new opinions, and any opinions regarding the training of other employees had never been disclosed. (Transcript, Vol. III, 138:9-139:3; 143:23-144:8.) However, the trial court granted Plaintiff's request over

BNSF's objection and Mr. Lydick was permitted to testify to new opinions that none of the employees present at the time of Plaintiff's injury had been properly trained. (Transcript, Vol. III, 144:9-13; 169:15-171:10.)

In closing argument, Plaintiff's counsel's primary negligence theory was that there was a lack of training of all crew members. (Transcript, Vol. VII, 6:12-8:24.) He argued Plaintiff's life was altered because of the unreasonable place to work created by BNSF, and that the reason it was unsafe was due to a lack of training to the men on the job. (Transcript, Vol. VII, 6:12-20.) Plaintiff's counsel argued Plaintiff had never received training on this particular job, yet he was the foreman. (Transcript, Vol. VII, 6:24-7:2.) He continued his argument that "people don't rise to the occasion, they fall to their level of training. That's what happened on the bridge on July 31, 2017." (Transcript, Vol. VII, 7:8-10.) Counsel for Plaintiff reiterated the theme throughout his closing argument, stating: "You cannot know what you have not been taught. You cannot know what you have not been trained in." (Transcript, Vol. VII, 9:5-7.)

B. Misconduct by Plaintiff's Counsel

Plaintiff's counsel engaged in multiple levels of misconduct during rebuttal closing argument. (Transcript, Vol. VII, 69:21-108:4.) Counsel for Plaintiff improperly employed the golden rule and "reptile" theory

arguments. He made disparaging comments regarding counsel for BNSF. Plaintiff's counsel made improper rebuttal argument that was duplicative of Plaintiff's closing argument. Lastly, plaintiff's counsel criticized jury instructions, thereby implying to the jury that they need not be followed. (*Id.*)

Prior to trial BNSF filed a motion in limine to prevent reptile and golden rule arguments. (APP. 120-122.) BNSF requested the trial court preclude Plaintiff from improperly asking the jury to "step into" Plaintiff's shoes, or make determinations based on personal or "community safety." (*Id.*) Plaintiff did not oppose BNSF's motion in limine and the trial court granted the same. (APP. 131.) Despite the fact the trial court expressly prohibited golden rule and reptile arguments, Plaintiff's counsel made such arguments during his rebuttal closing argument:

> Last thing I'll say about that. And this is what's really bad, which is if this thing -- this PowerPoint thing is supposed to be so important to **everybody's safety -- if it's so important to everybody's safety, think if you were working** -- not you -- if this is so important to safety, **think about these guys who are working on the railroad today**. Think about them out there today. They've got junk in their head. They don't really know what happened to Scott Olson.
>
> **They're out there today.** If today there is a bridge where they've crowded three crews on that bridge with no supervisory -- coordinating supervision, **they put them in exactly the same position these guys were in,** and think about that, for instance. Oh, everybody said you're well-trained, everything is fine.

(Transcript, Vol. VII, 104:5-19) (emphasis added).

In rebuttal closing argument Plaintiff's counsel disparaged counsel for BNSF by suggesting BNSF's counsel lacked ethics and candor:

> **In the ethics rules that pertain to us,** for instance, the ethics rules don't say, don't say anything that's not true in court. That's not what they say. They say that, of course. I mean, that is in there. But what they also say is you have to exhibit candor to the tribunal.
>
> **"Candor" means you don't get plausible deniability.** You don't get to come up and say, I can say that, I'm going to tell them this, because I think I can say this because I think I can use these words here and I can use these words here and get away with it. That's a breach of candor, and if you get caught doing that, and if it's clear that what you've done is you've tried to mislead just because maybe you can plausibly do so, **the ethics rules that apply to us say, hey, that's the same as if you stood up and lied to somebody.** That's how it should be.
>
> Now, I want to be exceptionally careful about something. I am not saying anything personal about Mr. Haws or any of the defense attorneys.

(Transcript, Vol. VII, 74:19-75:11) (emphasis added).

There had been no indication throughout the course of this case that BNSF or its counsel lacked ethics or candor toward the trial court or the jury. Yet, Plaintiff's counsel's rebuttal argument suggested so, despite a self-serving statement that he was not directing his comments at BNSF's counsel. (*Id.*)

Plaintiff's counsel also engaged in misconduct by a rebuttal closing argument that was repetitive and beyond proper rebuttal. Plaintiff divided his closing argument between two attorneys. During rebuttal closing argument one of Plaintiff's attorneys argued many of the same issues already addressed by Plaintiff's other attorney in closing argument. (*Compare* Transcript, Vol. VII, pp. 5-28 *with* Transcript, Vol. VII, pp. 69-108.) Plaintiff's rebuttal closing argument lasted exactly as long as BNSF's closing argument.[1] BNSF objected to Plaintiff's rebuttal argument as being repetitive and beyond proper rebuttal, but the trial court overruled the same. (Transcript, Vol. VII, 105:9-13; 110:4-23; 113:13-14.)

Lastly, counsel for Plaintiff improperly argued in rebuttal closing argument that he disagreed with the jury instructions, thereby implying that the jury need not follow the same. Plaintiff's counsel's argument specifically addressed Instruction No. 22 concerning inconsistent statements made by Plaintiff's witness Wayne Nielsen. (Transcript, Vol. VII, 77:18-78:11.) Plaintiff's counsel argued there ought to be a higher standard to

[1] The court reporter did not record times in the Transcript, but BNSF's closing argument is 39 pages in length, the same as Plaintiff's rebuttal. (*Compare* Transcript, Vol. VII, pp. 28-67 *with* Transcript, Vol. VII, pp. 69-108.)

receive that instruction and he intended to work with the Iowa Bar after the case was over to change the standard because the instruction was not fair:

> Now, some could argue there ought to be a higher standard than that, and I think so. And as a member of the Iowa Bar, after this case is over, **I intend to work on that with the Bar, because I think that's too low a standard to get an instruction like that.**
>
> And I know this, even if that is not too low of a standard, if that isn't something we ought to work on as lawyers and the judicial system, **I know in this case that wasn't fair.**

(Transcript, Vol. VII, 78:12-20) (emphasis added). Plaintiff's counsel's argument that the instruction was not fair and should be changed implies and suggests to the jury that it should disregard the same.

C. Jury Instructions

The trial court failed to instruct the jury on all material issues as it omitted from the jury's determination the issue whether BNSF was negligent. BNSF submitted proposed jury instructions and verdict form containing the three material issues Plaintiff was required to prove under FELA. (APP. 17-82.) BNSF utilized the model Iowa Civil Jury Instruction 300.4 Verdict for its submission, which requires the jury specifically make determinations whether BNSF was at fault, whether the fault of BNSF was a cause of any item of damage to Plaintiff, and the amount of damage sustained by Plaintiff. (APP. 52-53.) *See* Iowa Civil Jury Instruction 300.4 Verdict (2020). "Fault" was defined in the jury instructions as "negligence",

consistent with the model Iowa Civil Jury Instruction 400.1 Fault – Defined. (APP. 54.) *See* Iowa Civil Jury Instruction 400.1 Fault – Defined (2020).

Negligence is the first required element under FELA. Negligence was a significant, material issue in this case. However, the trial court omitted the threshold question, "Was BNSF at fault?", i.e., negligent, in the Verdict Form it submitted to the jury. (APP. 292-293.) The trial court's Verdict Form began with the question of causation, which is the second required element under FELA. (APP. 292-293.) The jury was asked, "Was the fault of the defendant a cause of any item of damage to the plaintiff?" (APP. 292-293.) Given the verdict form omitted the first question "Was BNSF at fault?", it provided no opportunity for the jury to find in favor of BNSF on the issue of negligence. (APP. 292-293.)

Instead, the trial court gave the following Verdict Form to the jury directing the jury to make findings on only two of the three material issues in the case – causation and damages:

> We find the following verdict on the questions submitted to us:
>
> Question No. 1: Was the fault of the defendant a cause of any item of damage to the plaintiff?
>
> Answer "yes" or "no."
>
> ANSWER: _____
>
> [If your answer is "no", do not answer any further questions.]

Question No. 2: Was the fault of the plaintiff a cause of any item of his damages?

Answer "yes" or "no."

ANSWER: _____

Question No. 3: Using 100% as the total combined fault of the plaintiff and the defendant which was a cause of the plaintiff's damage, what percentage of such combined fault do you assign to the plaintiff and what percentage of combined fault do you assign to the defendant?

ANSWER:	Plaintiff	_____%
	Defendant	_____%
	TOTAL	100%

Question No. 4: State the amount of damages sustained by the plaintiff by the defendant's fault as to each of the following items of damages. If the plaintiff has failed to prove any item of damage, or has failed to prove that any item of damage was caused by the defendant's fault enter 0 for that item.

1. Loss of Time – Earnings $_____

2. Loss of Future Earning Capacity $_____

3. Loss of Full Body – Past $_____

4. Loss of Full Mind – Past $_____

5. Loss of Full Body – Future $_____

6. Loss of full Mind – ~~Past~~ *Future sg* $_____

7. Physical & Mental Pain & Suffering – Past $_____

8. Physical & Mental Pain & Suffering – Future $_____

TOTAL (add the separate items of damage) $_____

_____
FOREPERSON

*To be signed only if verdict is unanimous.

_____ Juror**	_____ Juror**
_____ Juror**	_____ Juror**
_____ Juror**	_____ Juror**
_____ Juror**	

**To be signed by the jurors agreeing to it after six hours or more of deliberation.

(APP. 292-293.)

In its Verdict Form, the trial court used part of Iowa Civil Jury Instruction 300.4 Verdict as a model, but it inexplicitly omitted the first question from the model instruction whether BNSF was at fault. For comparison, Iowa Civil Jury Instruction 300.4 Verdict correctly directs juries to make findings on all three material issues—negligence, causation and damages—and provides as follows:

> **300.4 Verdict – Single Plaintiff – Single Defendant – Cases Governed By Chapter 668.**
>
> We find the following verdict on the questions submitted to us:

Question No. 1: Was the defendant at fault?
Answer "yes" or "no."
ANSWER:

[If your answer is "no," do not answer any further questions.]

Question No. 2: Was the fault of the defendant a cause of any item of damage to the plaintiff?
Answer "yes" or "no."
ANSWER:

[If your answer is "no", do not answer any further questions.]

Question No. 3: Was any item of damage to the plaintiff within the scope of defendant's liability?
Answer "yes" or "no."
ANSWER

[If your answer is "no", do not answer any further questions.]

Question No. 4: Was the plaintiff at fault?
Answer "yes" or "no."
ANSWER:

[If your answer is "no," do not answer Questions No. 5 or 6.]

Question No. 5: Was the plaintiff's fault a cause of any damage to the plaintiff?
Answer "yes" or "no."
ANSWER:

[If your answer is "no," do not answer Question No. 6.]

Question No. 6: Was any item of damage to the plaintiff within the scope of plaintiff's liability?
Answer "yes" or "no."
ANSWER

[If your answer is "no," do not answer Question No. 7.]

> Question No. 7: Using 100% as the total combined fault of plaintiff and defendant which was a cause of plaintiff's damage [and within the scope of liability], what percentage of such combined fault do you assign to the plaintiff and what percentage of such combined fault do you assign to the defendant?
>
> ANSWER: Plaintiff _____%
> Defendant _____%
> TOTAL 100%
>
> [If you find plaintiff to be more than 50% at fault, do not answer Question No. 8.]
>
> Question No. 8: State the amount of damages sustained by the plaintiff by defendant's fault [and within the scope of defendant's liability] as to each of the following items of damage. Do not take into consideration any reduction of damages due to plaintiff's fault. If the plaintiff has failed to prove any item of damage, or has failed to prove that any item of damage was caused by defendant's fault [or within the scope of defendant's liability], enter 0 for that item.
>
> *1.Past medical expenses $_____
> 2. Future medical expenses $_____
> 3. Past pain and suffering $_____
> 4. Future pain and suffering $_____
> TOTAL (add the separate items of damage) $_____

Iowa Civil Jury Instruction 300.4 Verdict (2020) (emphasis added).

On September 8, 2021 the jury completed the Verdict Form finding BNSF was a 100% cause of Plaintiff's damage and awarding Plaintiff damages in the amount of $6,210,280.00. (APP. 292-293.) On September 23, 2021 the trial court issued an Entry of Judgment in favor of Plaintiff and against BNSF for $6,210,280.00. (APP. 294-297.) BNSF filed a Motion for New Trial, but on March 4, 2022 the trial court issued a Ruling on Motion

for New Trial denying the same. (APP. 1279-1303.) On April 1, 2022 BNSF timely filed a Notice of Appeal. (APP. 1304-1306.)

ARGUMENT

I. THE TRIAL COURT FAILED TO INSTRUCT THE JURY ON ALL MATERIAL ISSUES AS THE VERDICT FORM IMPROPERLY OMITTED FROM THE JURY'S DETERMINATION THE THRESHOLD QUESTION WHETHER BNSF WAS NEGLIGENT.

A. Preservation for Review

BNSF preserved this issue for review by filing a Motion for New Trial, and filing a timely Notice of Appeal on April 1, 2022 after the trial court entered its final order on March 4, 2022, which was the Ruling on Motion for New Trial.

B. Scope of Review

The scope and standard of appellate review for challenges to jury instructions is correction of errors of law. *Sleeth v. Louvar,* 659 N.W.2d 210, 213 (Iowa 2003). The trial court is required to instruct the jury as to the law applicable to all material issues in the case. Iowa R. Civ. P. 1.924. Jury instructions may be considered erroneous if they contain a material misstatement of the law, are not supported by the evidentiary record, or are conflicting and confusing. *Grimm v. Chilcote,* 906 N.W.2d 205 (Iowa Ct. App. 2017). Prejudice occurs and a new trial is generally required "when instructions are misleading and confusing." *Rivera v. Woodward Res. Ctr.,*

865 N.W.2d 887, 902 (Iowa 2015). The Iowa Supreme Court has held: "An instruction is misleading or confusing if it is 'very possible' the jury could reasonably have interpreted this instruction incorrectly." *Id.* (citing *McElroy v. State*, 637 N.W.2d 488, 500 (Iowa 2001)).

C. Argument

The Jury Instructions and Verdict Form given by the trial court failed to instruct the jury as to all material issues in the case as required by Iowa R. Civ. P. 1.924. The Verdict Form omitted from the jury the threshold question whether BNSF was negligent. The Jury Instructions and Verdict Form were conflicting and confusing, misled the jury regarding the material issues in the case, and the jury could have interpreted them incorrectly. The Court should reverse due to those errors of law by the trial court and remand this case for a new trial.

Under the FELA, Plaintiff was required to prove three material issues in this case: first, that BNSF was negligent; second, that BNSF's negligence caused in whole or in part Plaintiff's damage; and third, the nature and extent of Plaintiff's damage. *Tennant v. Peoria & P.U. Ry.*, 321 U.S. 29, 32, 64 S. Ct. 409, 411 (1944). FELA is a negligence-based act so a plaintiff has the burden of proving all of the traditional elements of negligence. *Richardson v. Missouri Pac. R.R.*, 677 F.2d 663 (8th Cir. 1982); *Davis v.*

Burlington Northern, Inc., 541 F.2d 182, 185 (8th Cir.), *cert. denied*, 429 U.S. 1002, 97 S. Ct. 533 (1976). Therefore, FELA does not make the employer a guarantor or insurer of the safety of employees while they are on duty; the basis of liability is negligence and not the fact that injuries occur. *Conrail v. Gottschall*, 512 U.S. 532, 543, 114 S. Ct. 2396, 2404 (1994) (citing *Ellis v. Union Pac. R.R.*, 329 U.S. 649, 67 S. Ct. 598 (1947)).

The trial court was required to submit jury instructions and a verdict form that instructed the jury as to all material issues in this case. Iowa R. Civ. P. 1.924. The trial court utilized portions of model Iowa Civil Jury Instruction 300.4 Verdict for the Verdict Form it submitted to the jury, but committed an error of law by failing to include the first question: "Was the defendant at fault?" (APP. 292-293.) "Fault" was defined in the Jury Instructions as "negligence":

INSTRUCTION NO. 11

> Fault means one or more acts or omissions towards the person of the actor or of another which constitutes negligence or unreasonable failure to avoid an injury.

(APP. 273.)

The trial court's error prevented the jury from making a determination whether BNSF *was* at fault, i.e., negligent, a required element of Plaintiff's FELA case. (*See* APP. 292-293.) Instead, the trial court's Verdict Form

skips the question of whether BNSF was at fault and goes directly to the question of causation. A simple comparison of the Verdict Form given by the trial court with the model Iowa Civil Jury Instruction 300.4 Verdict demonstrates the glaring omission and error of law.

Iowa Civil Jury Instruction 300.4 Verdict plainly requires the jury *first* answer the question whether the defendant was at fault; and *second*, to answer the question on causation:

> Question No. 1: Was the defendant at fault?
> Answer "yes" or "no."
> ANSWER:
>
> [If your answer is "no," do not answer any further questions.]
>
> Question No. 2: Was the fault of the defendant a cause of any item of damage to the plaintiff?
> Answer "yes" or "no."
> ANSWER:
>
> [If your answer is "no", do not answer any further questions.]

Iowa Civil Jury Instruction 300.4 Verdict (2020). If a jury determines a defendant is not at fault, the jury is instructed to not answer any further questions. (*Id.*)

Here, the trial court omitted Question No. 1, requiring the jury assume BNSF was at fault and only determine whether BNSF caused Plaintiff's damages:

> Question No. 1: Was the fault of the defendant a cause of any item of damage to the plaintiff?
> Answer "yes" or "no."
>
> ANSWER:
>
> [If your answer is "no", do not answer any further questions.]

(APP. 292-293.)

The jury found for Plaintiff on the issue of causation, although it would be expected given causation was not a significant dispute in the case. Specifically, BNSF did not deny that the July 31, 2017 incident caused Plaintiff injury and it clearly admitted the same in closing argument:

> We've never disputed in this case -- and I think you realize that from the evidence here -- we didn't bring anybody in to dispute the -- the injury to his hand and his arm -- or excuse me -- his hand and his leg. Those injuries exist. They're real, and no one's disputed that.

(Transcript, Vol. VII, 58:8-12.)

Similarly, the Verdict Form omitted the question of Plaintiff's negligence and instead began with the question of causation:

> Question No. 2: Was the fault of the plaintiff a cause of any item of his damages?
>
> Answer "yes" or "no."
>
> ANSWER: _____

(APP. 292-293.) The jury answered "no," which again is expected given causation was not a significant dispute as BNSF admitted the July 31, 2017 incident caused Plaintiff injury.

The primary disputes were whether BNSF was negligent and the amount of Plaintiff's damages caused by the July 31, 2017 incident; not whether the July 31, 2017 incident caused plaintiff any injury. Therefore, the jury returning the Verdict Form answering Question No. 1 on the issue of causation in favor of Plaintiff does not mean the jury also found BNSF negligent.

It cannot reasonably be argued that the jury impliedly found that BNSF was negligent because it made a determination on causation. The Jury Instructions, and specifically Instruction No. 9, make clear negligence and causation are separate material elements for which Plaintiff had the burden of proof. (APP. 271.) Importantly, the Verdict Form is the *only* basis for the jury to render a decision on each of the three required elements: negligence, causation and damages. Here, the jury was never given an opportunity to determine whether BNSF was negligent. Indeed, the jury was given no opportunity in the Verdict Form to find BNSF was *not* negligent.

If it is assumed that Question No. 1 combined both negligence and causation, the Verdict Form essentially directed a verdict for Plaintiff on the

issue of negligence. Stated differently, the jury could *not* find in favor of BNSF on the issue of negligence while also finding in favor of Plaintiff on the issue of causation. If the jury answered the question "No" believing no negligence, there would be a conflicting simultaneous determination on the issue of causation in light of BNSF's admission that the July 31, 2017 incident caused Plaintiff injury. The jury answered the question "Yes" because causation was not a significant dispute. The jury had no ability to simultaneously make a finding that BNSF was *not* negligent, essentially directing a verdict for Plaintiff.

BNSF submitted proposed jury instructions and a verdict form following the model Iowa Civil Jury Instruction 300.4 Verdict that required the jury make findings on each of the three material issues in the case: negligence, causation and damages. The trial court failed to give that verdict form. "Iowa law requires a court to give a requested jury instruction if it correctly states the applicable law and is not embodied in other instructions." *Alcala v. Marriott Int'l, Inc.*, 880 N.W.2d 699, 707 (Iowa 2016).

Under Iowa law, the trial court had an obligation to instruct the jury on all material issues in the case. In *Whitlow v. McConnaha*, 935 N.W.2d 565 (Iowa 2019), the Iowa Supreme Court found an error affecting a verdict form warranted a new trial, and that the issue was properly preserved despite

that no party objected to the verdict form's offering. *Id.* at 569-72. *Whitlow* involved a personal injury action stemming from an automobile accident where the plaintiff sued two co-defendants. *Id.* at 566-67. One of the co-defendants, Ronald McConnaha, filed a third-party complaint against a previously uninvolved party, Timothy Newton, claiming the third-party was responsible for the plaintiff's injuries. *Id.* at 567. The case proceeded to trial, and when it came time to instruct the jury, the jury was presented a verdict form with the following first question:

> QUESTION NO. 1: Was Ronald McConnaha at fault?
>
> Answer "yes" or "no."
>
> ANSWER:
>
> [If your answer is no, do not answer any further questions and sign the verdict form. If your answer is yes, answer Question No. 2.]

Id. at 568. The jury did not believe McConnaha was at fault, so the jury answered the first question "no" and stopped its deliberation. *Id.* at 568-69. But this precluded the jury from assessing Newton's potential liability, as Newton's liability was the subject of the verdict form's second question. *Id.* Neither attorney nor the Court noticed this error. *Id.* After realizing this error, the plaintiff moved for mistrial or new trial, arguing that the jury's failure to answer a question that was central to the claim of liability "was

tantamount to a hung jury." *Id.* at 569. The trial court granted the plaintiff a new trial to determine Newton's liability, from which an appeal followed—first to the Iowa Court of Appeals and then to the Iowa Supreme Court. *Id.*

The Iowa Supreme Court summarily disposed of the issue of error preservation, finding that an error involving an erroneous verdict form that was overlooked by all parties and the Court itself is preserved when the appellant originally submitted the correct verdict form:

> We agree with the court of appeals and district court that Whitlow preserved error notwithstanding her failure to object to the erroneous verdict form. She had proposed the correct form, all counsel and the court overlooked the error in the verdict form proposed by McConnaha and submitted by the court, and Whitlow timely moved for a mistrial or new trial.

Id. at 569 n.4.

The Iowa Supreme Court approved the grant of a new trial to adjudicate issues that were left unaddressed due to an erroneous verdict form. *Id.* at 568-71. Because the verdict form instructed the jury to stop its analysis after answering whether McConnaha was liable—an issue central to the parties' pleadings—the jury never determined whether the third-party, Newton, was liable. *Id.* at 568-69. Accordingly, the Court ordered a subsequent trial to address that core issue of liability that went unanswered by the jury. *Id.* at 570-71.

Whitlow demonstrates why the Court should reverse and remand this case for a new trial. As in *Whitlow*, the trial court's instruction to this jury omitted the key determinant of BNSF's liability—whether BNSF was negligent. Negligence was a significant, material issue in the case. Also, like *Whitlow*, BNSF submitted the correct verdict form and timely moved for a new trial. This error prejudiced and materially affected BNSF's substantial rights in a manner that could not be waived, particularly given the trial court's own independent obligation to correctly instruct on the law and all material issues in the case.

Any argument in this case that the jury could infer that it needed to find BNSF negligent before it answered the presented question on causation is also contrary to the Iowa Supreme Court's holding in *Whitlow*. The Court did not leave it to the jury to wade through a logically inconsistent verdict form. Instead, the error at the heart of *Whitlow* was that the verdict form directed the jury to analyze the case in a way that had the effect of precluding it from reaching a particular finding. *Id.* This is precisely what the Verdict Form did in this case. The Verdict Form's question directed the jury to assume BNSF's negligence. If the trial court had properly asked the jury to determine whether BNSF was negligent, the jury would have been instructed not to answer any further questions, all of which dealt with

causation and damages, if the jury answered "no." Therefore, the Verdict Form's assumption precluded the jury from finding that BSNF was not negligent.

Any assumption that the jury impliedly must have made a determination of negligence in its Verdict Form is also speculation and conjecture. Simply, it cannot be stated with certainty that the jury made a negligence determination given the question was never asked.

The Jury Instructions and Verdict Form were conflicting, misleading and confusing, and the jury reasonably could have interpreted them incorrectly. This caused BNSF prejudice requiring a new trial. *See Rivera v. Woodward Res. Ctr.*, 865 N.W.2d 887 (Iowa 2015). The Verdict Form in this case is a direct analog to the erroneous verdict form in *Whitlow v. McConnaha,* 935 N.W.2d 565 (Iowa 2019), where the Iowa Supreme Court approved a grant of new trial. Due to the errors of law by the trial court, BNSF respectfully requests the Court reverse and remand the case for a new trial.

II. THE TRIAL COURT ERRED BY ALLOWING PLAINTIFF TO SUBMIT NEW CLAIMS DURING TRIAL THAT PLAINTIFF HAD NOT PREVIOUSLY ALLEGED IN PLEADINGS OR DISCOVERY.

A. Preservation for Review

BNSF preserved this issue for review by filing a Motion for New Trial, and filing a timely Notice of Appeal on April 1, 2022 after the trial court entered its final order on March 4, 2022, which was the Ruling on Motion for New Trial.

B. Scope of Review

The trial court's decision to allow Plaintiff to submit new claims during trial that were not previously alleged by Plaintiff in the pleadings or discovery is reviewed for errors of law. Iowa's law is clear: a party's legal theory may only be submitted to the jury if the theory is supported by the pleadings and by substantial evidence. *See, e.g., Wolbers v. The Finley Hosp.*, 673 N.W.2d 728, 732 (Iowa 2003); *Carter v. Wise Corp.*, 360 N.W.2d 122, 132 (Iowa Ct. App. 1984). In fact, "it is reversible error to submit an issue not raised by the pleadings and proof." *Dopheide v. Schoeppner*, 163 N.W.2d 360, 364 (Iowa 1968).

C. Argument

The trial court committed reversible error of law in permitting Plaintiff to submit new negligence claims during trial that were not

previously alleged by Plaintiff in pleadings or discovery. Specifically, during trial Plaintiff developed and presented new claims that the Plaintiff and all crew members present on the date of the incident were not properly trained. Prior to trial, in the pleadings and discovery throughout the case, Plaintiff only claimed the section truck boom operator Mr. Rutledge was not properly trained. (*See* APP. 5-12, 95.)

Plaintiff's allegations of negligence against BNSF were set forth in paragraph 13 of his Complaint. (APP. 7-10.) Those claims were subsequently narrowed as Plaintiff agreed to BNSF's motion for directed verdict and the trial court dismissing paragraphs 13(a) through 13(f). The dismissed claims related to the condition of the section truck boom as there was no evidence of any problems with the same. (Transcript, Vol. V, 61:14-63:2; 64:15-20; 66:13-17; 68:4-6.) Therefore, after paragraphs 13(a) through 13(f) were dismissed, only the allegations in 13(g) through 13(j) remained and they were the only permissible claims that should have been submitted to the jury:

- BNSF allowed the boom truck to be operated in a dangerous way. (APP. 9, ¶13(g).)
- BNSF failed to train the boom truck operator. (APP. 10, ¶13(h).)
- BNSF failed to draft rules and procedures to protect Plaintiff from the boom truck driver's dangerous operation. (APP. 10, ¶13(i).)

- BNSF failed to train in the rules and procedures to protect Plaintiff from the boom truck driver's dangerous operation. (APP. 10, ¶13(j).)

Consistent with the pleadings and discovery, Plaintiff submitted proposed jury instructions two weeks before trial setting forth his specific negligence claims: BNSF failed to provide coordinating supervision; BNSF failed to train the boom operator how to operate the boom; and the boom operator failed to properly operate the boom. (APP. 95.)

However, during the third day of trial, Plaintiff's counsel requested Plaintiff's expert Mr. Lydick be permitted to express testimony and opinions that all BNSF employees present at the time of Plaintiff's injury were not properly trained. (Transcript, Vol. III, 134:12-138:7.) The trial court correctly noted that Mr. Lydick's expert report only identified Mr. Rutledge as allegedly not receiving proper training. (Transcript, Vol. III, 132:2-10.) Plaintiff characterized his request claiming he needed to lay foundation for Mr. Lydick's testimony. *Id.* BNSF objected, arguing Mr. Lydick had no foundation for the new opinions, and any opinions regarding the training of other employees had never been disclosed. (Transcript, Vol. III, 138:9-139:3; 143:23-144:8.) The trial court overruled the objection permitting Mr. Lydick to render new opinions that none of the employees present at the time had been properly trained by BNSF. (Transcript, Vol. III, 144:9-13;

169:15-171:10.) Its allowance of new claims not alleged in the pleadings or during discovery of the case is an error of law. "Issues not pled or which have no substantial evidentiary support are entitled to no consideration." *Seaway Candy, Inc. v. Cedar Rapids YMCA*, 283 N.W.2d 315, 316 (Iowa 1979). "It is the rule of this state, long established by the decisions of this court, that it is error to submit issues to the jury not presented by the pleadings." *Cary v. Waybill,* 203 N.W. 8, 9 (Iowa 1925).

The trial court's error of law prejudiced BNSF's defense. Had BNSF known the actual nature of Plaintiff's claims before trial, it would have been given the opportunity to conduct different discovery, retain different experts, and present different and additional witnesses at trial. This caused undue prejudice to BNSF. The prejudicial nature of allowing Plaintiff to proceed with these new claims is evidenced most clearly through Plaintiff's closing argument. Plaintiff's primary theory of liability against BNSF, as demonstrated by Plaintiff's counsel in closing argument, was a lack of training on the part of Plaintiff and all the crew members. (Transcript, Vol. VII, 6:12-8:24.) Specifically, Plaintiff's counsel argued that Plaintiff's life was altered because of the unreasonable place to work created by BNSF, due to a lack of training of the crew present on the date of the incident. (Transcript, Vol. VII, 6:12-20.) Plaintiff's counsel also claimed Plaintiff

was never trained for the particular job. (Transcript, Vol. VII, 6:24-7:2.) He argued "You cannot know what you have not been taught. You cannot know what you have not been trained in. (Transcript, Vol. VII, 9:5-7.) Plaintiff's counsel continued arguing the new negligence claim, stating "people don't rise to the occasion, they fall to their level of training. That's what happened on the bridge on July 31, 2017." (Transcript, Vol. VII, 7:8-10.)

The trial court permitting Plaintiff to present new claims during the middle of trial that were not alleged in the pleadings is an error of law. In Iowa negligence actions, "[a] plaintiff is required to identify the specific acts or omissions relied upon to generate questions for the trier of fact." *See, e.g., Eisenhauer v. Henry Cty. Health Ctr.*, 735 N.W.2d 1, 10 (Iowa 2019); *Herbst v. State*, 616 N.W.2d 582, 585 (Iowa 2000); *Welte v. Bello*, 482 N.W.2d 437, 439 (Iowa 1992). Further, a party may only submit a legal theory to the jury if the theory is supported by the pleadings and by substantial evidence. *See, e.g., Wolbers v. The Finley Hosp.*, 673 N.W.2d 728, 732 (Iowa 2003); *Thompson v. City of Des Moines*, 564 N.W.2d 839, 846 (Iowa 1997); *Hullinger v. Hintz*, 742 N.W.2d 605, 2007 WL 3085948, at *6 (Iowa Ct. App. 2007) (Iowa Ct. App. Oct. 24, 2007) (quoting *Wolbers*, 673 N.W.2d at 732); *Carter v. Wise Corp.*, 360 N.W.2d 122, 132 (Iowa Ct.

App. 1984). The Iowa Supreme Court has held "it is reversible error to submit an issue not raised by the pleadings and proof." *Dopheide v. Schoeppner*, 163 N.W.2d 360, 364 (Iowa 1968). This principle of law has existed for more than 100 years. *See Kempe v. Bennet & Binford*, 111 N.W. 926, 927 (Iowa 1907) (stating "It is sufficient to say that the case was submitted to the jury on a different theory than that outlined in the preliminary statement, and this is a sufficient ground for reversal.").

For example, in *Keller v. Dodds*, 277 N.W. 467 (Iowa 1938), the Iowa Supreme Court reversed a plaintiff's verdict, in part, because the trial court submitted a jury instruction that proposed the defendant could be negligent in a way not plead by the plaintiff. *Keller* involved a motor vehicle accident where the jury found the defendant had negligently operated his truck and caused a collision while he and the plaintiff, who was driving a car, passed in opposite directions on a hill. *Id.* at 468.

The plaintiff's original plead theories were that (1) the defendant was negligent because he was operating his truck at a dangerous speed, (2) that he failed, as Iowa law required, to pull to the side and cede the road to the plaintiff, and (3) that he was operating a truck of a size that required electric lights or reflectors and it was not equipped with either. *Id.* at 472-74. However, the court's instruction to the jury expanded on the plaintiff's

negligence theory to matters beyond the plaintiff's pleading. *Id.* at 473. The jury was not restricted to the three specifications of negligence plead by the plaintiff; rather, the instruction informed the jury it could find negligence if the defendant failed to operate the truck in a reasonably careful and prudent sense *in any conceivable fashion*. *Id.* Referring to this as an "almost a dragnet specification of general negligence," the Court ruled that the trial court's instruction on a negligence specification not plead constituted reversible prejudicial error. *Id.* at 473-74.

The Court should also consider its prior decisions involving aggrieved plaintiffs' appeals from cases where trial courts *refused* to give their requested negligence specification instructions. For instance, in *Kester v. Bruns*, 326 N.W.2d 279 (Iowa 1982), the Iowa Supreme Court considered a plaintiff's appeal of an adverse verdict where the trial court refused to instruct the jury that the defendant could be negligent if he failed to stop his vehicle within an "assured clear distance." *Id.* at 283. The record on appeal showed, however, that the plaintiff never based her case on this theory. *Id.* at 283-84. The specification was not contained in the pleadings, was not stated in response to discovery requests, and was not listed in the pretrial order on relevant issues in the case. *Id.* Therefore, the Court found no reversible error in the trial court's refusal to instruct. *Id.*

Like a trial court's provision of an improper instruction to the jury, a trial court's refusal to give a requested jury instruction is reviewed for errors of law. *Alcala v. Marriott Int'l Inc.*, 880 N.W.2d 699, 707 (Iowa 2016). These cases—where the Iowa Supreme Court has affirmed trial court decisions that refused to instruct the jury on un-plead negligence theories—stand as authority in favor of BNSF's appeal. *See, e,g.*, *Cronin v. Hagan*, 221 N.W.2d 748, 753-54 (Iowa 1974) (affirming refusal to instruct, "[s]ince plaintiff failed to plead this specification of negligence, she had no right to have it submitted to the jury"); *Stimmel v. Johnson*, 199 N.W.2d 356, 359 (Iowa 1972) (affirming trial court's refusal to instruct jury on negligence specification the plaintiff did not plead). Just as trial courts properly refuse to instruct juries on liability theories not plead, so too do trial courts commit reversible error when they instruct on un-plead theories.

As stated by the Iowa Supreme Court nearly one hundred years ago, "the law is well settled that, when the plaintiff, in a pleading, chooses the ground upon which he bottoms his action, he must stand or fall on the ground thus chosen by him." *Phelan v. Foutz*, 204 N.W. 240, 241 (Iowa 1925). "The court [has] no right to permit the jury to consider any other ground of negligence than that set out by the plaintiff in his petition." *Id.* *See also Irons v. Community State Bank*, 461 N.W.2d 849, 856 (Iowa Ct.

App. 1990) (determining court committed reversible error when it instructed on legal theory not clearly raised by pleadings); *Stewart v. Hilton*, 77 N.W.2d 637 (Iowa 1956) (reversing plaintiff's trial verdict, in part, because court instructed jury on un-plead theory of negligence).

Here, the trial court committed an error of law in allowing Plaintiff to present new negligence claims that were not alleged in his Complaint. Plaintiff never asserted negligence claims based on the alleged lack of training of any crew member other than Mr. Rutledge in pleadings or in discovery before trial. Allowing Plaintiff to submit new claims during trial caused BNSF prejudice in the preparation and ability to defend the new claims. The Court should reverse due to the errors of law by the trial court and remand the case for a new trial.

III. MISCONDUCT BY PLAINTIFF'S COUNSEL IN EMPLOYING GOLDEN RULE AND REPTILE THEORY ARGUMENTS, DISPARAGING COUNSEL FOR BNSF, IMPROPER REBUTTAL, AND CRITICIZING JURY INSTRUCTIONS IMPLYING THEY NEED NOT BE FOLLOWED, CAUSED PREJUDICE TO BNSF REQUIRING A NEW TRIAL.

A. Preservation for Review

BNSF preserved this issue for review by filing a Motion for New Trial, and filing a timely Notice of Appeal on April 1, 2022 after the trial court entered its final order on March 4, 2022, which was the Ruling on Motion for New Trial.

B. Scope of Review

Appellate courts apply a lenient review to a trial court's determination of whether a party was prejudiced by counsel's improper arguments and misconduct to warrant a new trial. *See, e.g.*, *Oldsen v. Jarvis,* 159 N.W.2d 431, 436 (Iowa 1968) (stating "[w]e will not interfere with its determination of such a question unless it is reasonably clear the discretion has been abused"). However, the Court is "slower to interfere with the grant of a new trial than with its denial." *Loehr v. Mettille,* 806 N.W.2d 270, 277 (Iowa 2011). Under Iowa R. Civ. P. 1.1004(2), a motion for new trial may be granted if misconduct of the prevailing party materially affected the movant's substantial rights. *Loehr,* 806 N.W.2d at 277. "[T]he general rule is that in order for the granting of a new trial based upon attorney misconduct be warranted, the objectionable conduct ordinarily must have been prejudicial to the interest of the complaining party." *Mays v. C. Mac. Chambers Co.,* 490 N.W.2d 800, 803 (Iowa 1992).

C. Argument

Misconduct by Plaintiff's counsel during Plaintiff's rebuttal closing argument was prejudicial to BNSF and the trial court abused its discretion in failing to grant BNSF a new trial. Plaintiff's counsel engaged in four categories of misconduct, the cumulative effect of which was extremely

prejudicial to BNSF's interests and defense. Plaintiff's counsel violated Iowa's prohibition against the golden rule argument by asking the jury to place itself in the position of Plaintiff and the use of reptile theory arguments, disparaging counsel for BNSF, improper rebuttal, and criticizing jury instructions thereby implying to the jury that they need not be followed. Plaintiff's counsel strategically waited until rebuttal closing argument when BNSF was afforded no opportunity to respond, and Plaintiff's counsel's improper statements would be fresh in the minds of the jury during deliberations. Given this prejudicial misconduct, BNSF should be granted a new trial.

Prior to trial BNSF filed a motion in limine to preclude Plaintiff from making reptile theory and golden rule arguments that ask the jury to step into Plaintiff's shoes or make determinations based on personal or community safety. (APP. 120-122.) Such arguments are improperly aimed at arousing the jury's emotion and sympathy toward Plaintiff, encouraging the jury to act from passion and prejudice rather than from a dispassionate consideration of the evidence. "Reptile" arguments based on community safety ignore and contravene the standard of care imposed by FELA, and thus confuse and mislead the jury as to the duty owed by BNSF to Plaintiff. Iowa R. Evid. 5.403. Arguments regarding "personal safety" or "community

safety" are akin to golden rule arguments, which are wholly improper in Iowa. *See Russell v. Chicago, R.I. & P.R. Co.*, 86 N.W.2d 843, 848 (Iowa 1957).

Plaintiff did not oppose BNSF's motion in limine and it was granted by the trial court. (APP. 131.) However, despite knowing golden rule and reptile-type arguments were precluded by the trial court, Plaintiff's counsel made such arguments during his rebuttal closing argument. He improperly told the jury to imagine if they were working out there, and after first asking them to put themselves in the position of Plaintiff, to think about the guys working on the railroad now. Plaintiff's counsel continued the misconduct, claiming it was important to everyone's safety that the jury should think about the guys working on the railroad today as BNSF has put them in the exact same position:

> Last thing I'll say about that. And this is what's really bad, which is if this thing -- this PowerPoint thing is supposed to be so important to **everybody's safety -- if it's so important to everybody's safety, think if you were working** -- not you -- if this is so important to safety, **think about these guys who are working on the railroad today**. Think about them out there today. They've got junk in their head. They don't really know what happened to Scott Olson.
>
> **They're out there today.** If today there is a bridge where they've crowded three crews on that bridge with no supervisory -- coordinating supervision, **they put them in exactly the same position these guys were in,** and think about that, for instance. Oh, everybody said you're well-trained, everything is fine.

(Transcript, Vol. VII, 104:5-19) (emphasis added).

Plaintiff's counsel directly placed in the minds of the jury that they should put themselves in the position of Plaintiff and others. Plaintiff's counsel's prejudicial misconduct by employing a golden rule argument intending to arouse the jury's emotion and sympathy toward Plaintiff was improper as it can subvert jurors' objectivity. *See Conn v. Alfstad*, 801 N.W.2d 33, 2011 WL 1566006, at *4 (Iowa Ct. App. 2011) (citing *Burrage v. Harrell*, 537 F.2d 837, 839 (5th Cir. 1976) ("The rationale for the golden-rule doctrine is to discourage improper arguments that play on jurors' emotions and sympathies.")). The argument by Plaintiff's counsel that the jury should think about the safety of other crews working today is not the relevant issue of whether BNSF provided Plaintiff a reasonably safe place to work on July 31, 2017. This is exactly the type of community safety based argument that is condemned by Iowa courts. *See Russell v. Chicago, R.I. & P.R. Co.*, 86 N.W.2d 843, 848 (Iowa 1957) ("Direct appeals to jurors to place themselves in the situation of one of the parties, to allow such damages as they would wish if in the same position, or to consider what they would be willing to accept in compensation for similar injuries are condemned by the courts.").

In ruling on BNSF's Motion for New Trial regarding Plaintiff's improper golden rule and reptile theory arguments, the trial court stated it "does not condone [Plaintiff's counsel's] statements." (APP. 1301.) However, the trial court then incorrectly proceeded to conclude that even if they were improper and constituted misconduct, they were insufficient to prejudice BNSF requiring a new trial. (APP. 1301.) BNSF respectfully submits the trial court abused its discretion in this decision that BNSF was not prejudiced, particularly given the cumulative nature of Plaintiff's counsel's misconduct.

Plaintiff's counsel also engaged in misconduct by disparaging counsel for BNSF. During his rebuttal closing argument, Plaintiff's counsel referenced the rules of ethics for attorneys, stating that candor means you do not get plausible deniability, and that attorneys trying to mislead is the same as standing up and lying to somebody under the ethics rules. Despite Plaintiff's counsel then going on to state that he was not saying anything personal about BNSF's attorneys, there was no other purpose or motivation to justify making those statements. (Transcript, Vol. VII, 74:19-75:14.) Plaintiff indirectly and implicitly disparaged BNSF's counsel as lacking candor and violating the rules of ethics, without any evidence suggesting the

same. This undoubtedly prejudiced BNSF. Plaintiff's counsel argued in rebuttal:

> **In the ethics rules that pertain to us**, for instance, the ethics rules don't say, don't say anything that's not true in court. That's not what they say. They say that, of course. I mean, that is in there. But what they also say is you have to exhibit candor to the tribunal.
>
> **"Candor" means you don't get plausible deniability.** You don't get to come up and say, I can say that, I'm going to tell them this, because I think I can say this because I think I can use these words here and I can use these words here and get away with it. That's a breach of candor, and if you get caught doing that, and if it's clear that what you've done is you've tried to mislead just because maybe you can plausibly do so, **the ethics rules that apply to us say, hey, that's the same as if you stood up and lied to somebody.** That's how it should be.
>
> Now, I want to be exceptionally careful about something. I am not saying anything personal about Mr. Haws or any of the defense attorneys.

(Transcript, Vol. VII, 74:19-75:11) (emphasis added).

In its ruling on BNSF's Motion for New Trial regarding those disparaging comments, the trial court stated it "does not condone the comments made by [Plaintiff's] counsel. His comments were inappropriate . . ." (APP. 1300.) However, the trial court then concluded that, although it "finds Counsel's comments inappropriate, the Court cannot conclude they rise to the level of prejudicing BNSF or that the jury's verdict would have been different but for these statements." (APP. 1300.)

The trial court abused its discretion in finding BNSF was not prejudiced. Iowa courts have long held that "[i]t is improper and censurable practice for an attorney to make statements, designed to prejudice a party to the suit, which are not justified by the record in the case; and a question which charges dishonesty may be as prejudicial as a direct statement to the same effect, even though unanswered." *George v. Swafford*, 39 N.W. 804, 807 (Iowa 1888). *Swafford* addressed questioning that impugned dishonesty, but the same proposition goes for arguments of counsel. In *Hein v. Waterloo, C.F. & N. Ry.*, 162 N.W. 772 (Iowa 1917), the Court stated:

> [W]here the trial court can see that counsel on one side is in good faith arguing his case according to the rules, and opposing counsel, for the purpose of seeking to obtain an advantage, goes out of the record, the court should on its own motion caution him, and if, on motion for new trial, the court is satisfied that the successful party has gained an advantage, and that the unsuccessful party has been prejudiced by remarks of counsel out of the record, then *the court should promptly sustain the motion for new trial*.

Id. at 775 (emphasis added).

This misconduct by Plaintiff's counsel was highly prejudicial to BNSF. It squarely planted in the jury's minds that BNSF through its attorneys lacked candor and was unethical, with the intent to influence and sway the jury's verdict. Plaintiff's counsel strategically made the comments during rebuttal when counsel for BNSF had no opportunity to respond, and

when the statements would be fresh in the minds of the jurors who were to immediately begin deliberations. Although the trial court correctly stated it did not condone those arguments and found them inappropriate, it abused its discretion in failing to find prejudice to BNSF. The decision of the trial court denying the Motion for New Trial should be reversed and the case remanded for a new trial.

Plaintiff's counsel also engaged in misconduct by a duplicative and improper rebuttal closing argument. Plaintiff split closing argument among two attorneys. Plaintiff's rebuttal closing argument lasted exactly as long as BNSF's closing argument. The court reporter did not note times in the Transcript, but BNSF's closing argument is 39 pages in length, the same as Plaintiff's rebuttal. (*Compare* Transcript, Vol. VII, pp. 28-67 *with* Transcript, Vol. VII, pp. 69-108.) During rebuttal argument one of Plaintiff's counsel argued many of the issues that were already argued in Plaintiff's closing argument by the other attorney. (*Compare* Transcript, Vol. VII, pp. 69-108 *with* Transcript, Vol. VII, pp. 5-28.) BNSF objected regarding the repetitive nature, but the trial court overruled the same. (Transcript, Vol. VII, 105:9-13; 110:4-113:14.) The duplicative and repetitive nature of Plaintiff's rebuttal argument was also prejudicial to BNSF.

Plaintiff's counsel also engaged in misconduct by making inappropriate comments regarding instructions, thereby implying to the jury that they need not be followed. His argument concerned Instruction No. 22 and the inconsistent statements made by Plaintiff's witness Wayne Nielsen. (Transcript, Vol. VII, 77:18-79:5.) Plaintiff's counsel argued that there ought to be a higher standard to receive Instruction No. 22, that he intended to work with the Iowa Bar after the case was over as he believed the standard was too low, and that the instruction wasn't fair:

> Now, some could argue there ought to be a higher standard than that, and I think so. And as a member of the Iowa Bar, after this case is over, **I intend to work on that with the Bar, because I think that's too low a standard to get an instruction like that.**
>
> And I know this, even if that is not too low of a standard, if that isn't something we ought to work on as lawyers and the judicial system, **I know in this case that wasn't fair.**

(Transcript, Vol. VII, 78:12-20) (emphasis added).

With these remarks, Plaintiff's counsel prejudicially commented on the propriety of Instruction No. 22, and its application to this case, thereby implying that the instruction need not be followed. Plaintiff's comment can be analogized to suggesting the jury not follow an instruction provided by the Court. *See State v. Willis*, 218 N.W.2d 921, 924 (Iowa 1974) ("We have long held in this jurisdiction that a district court jury is obliged not only to receive but to follow the court's instructions on the law. The instructions are

binding, not merely advisory."). To tell the jury to decide what the law is makes "the jury the trier of law as well as the facts" – a practice impermissible in Iowa. *Id*. Plaintiff's counsel's argument effectively informed the jury he felt an instruction was improperly given – his suggestion that "in this case [the instruction] wasn't fair" was prejudicial and suggested to the jury that the instruction was improper. Plaintiff's counsel's misconduct in this respect was prejudicial and entitles BNSF to a new trial.

The misconduct here resembles that of counsel's in *Kinseth v. Weil-Mclain*, 913 N.W.2d 55 (Iowa 2018), a case in which the Iowa Supreme Court vacated a $6.5 million plaintiff's verdict due to the prejudicial actions of his counsel during closing arguments. *Kinseth* was a toxic tort action brought by a plaintiff that alleged he developed mesothelioma after having inhaled asbestos while working for a boiler company as a young man. *Id.* at 62-63. In his 70s, the plaintiff was diagnosed with the disease and he filed suit against his former employer. *Id.* at 63-64.

Like here, the plaintiff's counsel in *Kinseth* committed a litany of actions that prejudiced the defendant in closing arguments. In *Kinseth*, plaintiff's counsel "improperly called into question the statute of repose," despite the trial judge ruling against the plaintiff on the statute of repose issue. *Id.* at 67. Plaintiff's counsel argued in closing for an amount of

compensatory damages that would "send a message" to the defendant, and repeatedly referenced the amount of money the defendant "spent on defending this and other cases." *Id.* Counsel for plaintiff also invoked a comparison between the relative wealth of the defendant and ordinary people like the plaintiff and referenced defendant's prior lawsuits. *Id.* at 71-72. The defendant argued that each action violated the trial court's motion in limine orders. *Id.* at 67-73. Confronted with this conduct, the Iowa Supreme Court engaged in an in-depth analysis that sought to determine (1) whether the actions at issue constituted attorney misconduct and (2) whether the cumulative effective of such actions prejudiced the defendant. *Id.*

Importantly, the Court did not find that plaintiff's counsel committed misconduct with respect to each action identified by the defendant. *Id.* Specifically, regarding plaintiff's counsel's statute of repose remarks, "while it was improper to cast doubt on the public policy motivating the statute of repose, counsel's statements did not amount to nullification." *Id.* at 72. Nor did all of plaintiff's counsel's remarks regarding the amount of money spent by the defendant constitute misconduct. *Id.* at 69-70. However, the Court determined that plaintiff had violated motions in limine rulings by implying to the jury that asbestos litigation involves large sums of money, by alerting the jury that the defendant can afford a substantial award by invoking a

comparison between the relative wealth of the parties and asking the jury to use its verdict to "send a message," and by referencing prior lawsuits involving the defendant. *Id.* at 67-73.

The Court began its analysis of whether the defendant was prejudiced stating its task was to review the cumulative effect of plaintiff's counsel's conduct. *Id.* at 73. It noted, "[w]hen attorneys approach the jury box to present their closing arguments, they carry with them an immense responsibility." Specifically, the Court opined:

> [J]uries are often tasked with deciding questions of fact and law that involve innately vague and difficult considerations. For example, 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 upon the jury that it can look beyond the facts and law to resolve the case. Attorneys have a duty to refrain from crossing the admittedly hazy line between zealous advocacy and misconduct.

Id. As noted, the Court found that not every action challenged by the defendant constituted attorney misconduct. *Id.* at 67-73. However, it stated that where "attorneys may occasionally make one or more isolated missteps during closing arguments . . . [i]t is a wholly distinct act of misconduct, however, to develop and present a theme for closing arguments that is premised upon improper jury considerations." *Id.* at 73. The Court

determined that the "inescapable theme" of plaintiff's counsel's closing remarks was to improperly impugn the defendant as a deep-pocketed entity that had spent "exorbitant sums" of money defending the action, and that the case offered the jury a chance to send a message. *Id.* Concluding this rhetoric prejudiced the defendant, the case was remanded for a new trial. *Id.*

Similarly, in *Bronner v. Reicks Farms, Inc.*, 919 N.W.2d 766, 2018 WL 2731618 (Iowa Ct. App. 2018), the Iowa Court of Appeals held the district court did not abuse its discretion in granting a new trial due to misconduct by plaintiff's counsel. There, plaintiff's counsel repeatedly made improper statements by vouching for the credibility of witnesses, stating defense counsel had misled the jury and was untruthful, and by imploring the jury to stand up for the plaintiff. *Id.* at *5. Plaintiff argued the error was not preserved because defendant did not make timely objections at trial. The Court stated it could consider the misconduct by counsel where the arguments were "flagrantly improper and evidently prejudicial," even though no exception was taken to the arguments at the time. *Id.* at *5-6 (citing *Shover v. Iowa Lutheran Hosp.*, 107 N.W.2d 85, 91 (Iowa 1961)). The plaintiff argued there was no evidence that the misconduct resulted in prejudice. The Iowa Court of Appeals rejected that argument stating the improper statements by plaintiff's counsel were calculated to, and with

reasonable probability did, influence the jury's verdict. *Id.* at *9. In finding prejudice, the Court reasoned:

> [P]laintiff's counsel strategically made the improper statements in the rebuttal closing argument in an effort to involve the emotions of the jury, establish the credibility of [plaintiff's] witnesses, and to attack the credibility of the defense counsel. The improper statements were made at a time when defense counsel was not afforded an opportunity to respond and when the statements would be fresh in the jury's mind for deliberations.

Id. The Court held that under those circumstances, it was probable the jury would have reached a different determination but for plaintiff's counsel's misconduct. Therefore the district court did not abuse its discretion in granting a new trial. *Id.*

Here, Plaintiff's counsel engaged in a continuing pattern of misconduct throughout rebuttal closing argument, which viewed cumulatively, was very prejudicial to BNSF and likely influenced the jury in reaching its decision. The misconduct evidently was sufficient to tip the scale against BNSF by inciting the jury to act from passion and prejudice. That the jury did so is confirmed by the fact it returned a very large verdict of over 6.2 million dollars. (APP. 292-293.) Plaintiff's counsel made the arguments during rebuttal closing argument so they would be fresh in the minds of the jury and counsel for BNSF would have no opportunity to respond. The significant nature of Plaintiff's counsel's cumulative

misconduct caused prejudice to BNSF. The Court should therefore reverse the decision of the trial court that denied BNSF's Motion for New Trial and remand the case for a new trial.

CONCLUSION

The Court should reverse the decisions of the trial court and remand this case for a new trial. First, the trial court committed error of law in failing to instruct the jury on all material issues as the Verdict Form incorrectly omitted from the jury's determination the threshold question whether BNSF was negligent. Second, the trial court committed error of law by allowing Plaintiff to argue new negligence claims during trial that had not been alleged in the pleadings and discovery. Third, the cumulative nature of Plaintiff's counsel's misconduct in rebuttal closing argument by improperly employing the golden rule and reptile theory arguments, disparaging counsel for BNSF, making duplicative and improper rebuttal arguments, and criticizing jury instructions implying they need not be followed, caused significant prejudice to BNSF. Accordingly, this Court should reverse the trial court's denial of BNSF's Motion for New Trial and its Entry of Judgment in favor of the Plaintiff, and the Court should remand the case for a new trial.

REQUEST FOR ORAL ARGUMENT

Defendant/Appellant BNSF Railway Company respectfully requests that this matter be set for oral argument.

BNSF RAILWAY COMPANY,
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CERTIFICATE OF SERVICE AND FILING

I hereby certify that on August 30, 2022, a copy of Defendant's/ Appellant's Final Brief was filed and served through the Electronic Document Management System on all counsel of record and the Clerk of the Iowa Supreme Court.

/s/ David J. Schmitt
David J. Schmitt

CERTIFICATE OF COST

I hereby certify that because of the use of EDMS, there was no cost of printing or duplicating Defendant's/Appellant's Final Brief.

/s/ David J. Schmitt
David J. Schmitt

CERTIFICATE OF COMPLIANCE

This Brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because this Brief has been prepared in a proportionally spaced typeface using Times New Roman font and utilizing Microsoft Word for Office 365 in 14-point font plain style. This Brief contains 11,672 words, excluding the parts of the Brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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