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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 REPLY BRIEF

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ARGUMENT

Defendant-Appellant BNSF Railway Company ("BNSF") is entitled to a new trial for three reasons: (1) the trial court committed error as a matter of law in failing to include in the jury verdict form the threshold issue whether BNSF was negligent; (2) the trial court erred as a matter of law in allowing Plaintiff-Appellee Scott D. Olson ("Plaintiff") to submit new negligence claims during trial that Plaintiff had not been previously alleged in pleadings or discovery; and (3) misconduct by Plaintiff's counsel at trial caused prejudice to BNSF. Plaintiff devotes a significant portion of his brief discussing matters not pertinent to this Court's disposition of these issues. For example, in the Statement of Facts, Plaintiff devotes over 12 pages characterizing his version of essentially the entire case, including discussing minute details of work being performed that are not material; employees who are not at issue; medical, mental and vocational experts despite no errors alleged about those experts; and witnesses that BNSF did not present at trial, which is entirely irrelevant. (*See generally* Appellee's Proof Brief, pp.10-22.) It appears Plaintiff's tactic is to attempt to divert this Court's attention from the matters at issue on appeal with the goal that it decide this case based on emotion. For example, the incident at issue was simply a piece of cut rail being lifted momentarily got stuck and then dislodged and

flew up in the air. Plaintiff characterizes that event for dramatic purposes claiming the rail "exploded," despite of course that no explosion occurred. (Appellee's Proof Brief, pp.19, 22.)

Most of Plaintiff's discussion has nothing to do with the three issues on appeal. Plaintiff's argument that the errors were not preserved is erroneous as each of the matters raised by BNSF are properly before this Court for resolution on the merits. Plaintiff has failed to demonstrate why the trial court's errors on each of these issues should be overlooked and permitted to stand. Accordingly, this Court should reverse and remand the case for a new trial.

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. BNSF Preserved This Issue

Generally, under Iowa R. Civ. P. 1.924, "error in jury instructions is waived if not raised before closing arguments are made to the jury." *Olson v. Sumpter*, 728 N.W.2d 844, 848 (Iowa 2007). However, under *Whitlow v. McConnaha*, 935 N.W.2d 565 (Iowa 2019), error regarding an improper verdict form is preserved where, "notwithstanding [a] failure to object . . . [the party] had proposed the correct form, all counsel and the court overlooked the error in the verdict form . . . and [the party] timely moved for

a mistrial or new trial." *Id.* at 569 n.4. Plaintiff refers to *Whitlow*'s plain direction, quoted above, as "Defendant's proposed standard." (Appellee's Proof Brief, p.25.) But this standard is not something BNSF simply proposes; rather, it is a direct statement of law by the Iowa Supreme Court. Plaintiff's characterizations to the contrary should be disregarded. Despite implying *Whitlow*'s finding is not the law, Plaintiff proceeds to argue under *Whitlow*'s framework. But, as the trial court determined, BNSF preserved this error and it respectfully asks that this Court agree.

First, Plaintiff argues *Whitlow* does not apply here because the verdict form employed by the trial court was not erroneous. But the trial court in *Whitlow*, like here, used a verdict form that forbade the jury from reaching a finding it should have been able to make. *Id.* at 567-69. Specifically, where *Whitlow*'s verdict form instructed the jury to forgo analyzing whether one defendant was negligent, the verdict form here directed the jury to assume BNSF's negligence. *Id.*

Plaintiff next suggests this error was not preserved because the trial court and parties *intended*—in a case where Plaintiff sued BNSF for alleged negligence—that the jury need not be asked whether BNSF was negligent. (Appellee's Proof Brief, pp.26-27.) But this argument is contradicted by BNSF's submissions to the Court and the trial transcript. First, as the trial

court found on BNSF's motion for new trial, BNSF submitted a verdict form that asked this missing question: "Was the Defendant BNSF at fault?" (APP. 52.) Plaintiff's brief does not engage with this straightforward demonstration that BNSF intended the question to be asked.

Second, the trial transcript confirms the question's omission was not intentional. Plaintiff cites five portions of the trial transcript in an attempt to demonstrate the parties' intention, but review of the transcript shows Plaintiff's paraphrasing does not. (Appellee's Proof Brief, p.27.)

71:2-8: Here, the parties are discussing what would become Instruction No. 9, which sets forth the Plaintiff's burden of proof, not the verdict form. (Transcript, Vol. VI, 71:2-8.)

82:25 – 87:5: This range first covers the parties' debate over what would become Instruction No. 12—where the jury weighed whether the Plaintiff was negligent. Notably, Plaintiff's counsel insisted that the "instruction be patterned the same as what we call verdict directive instructions," and then expressly requested the instruction include—as a first question—whether "[o]ne, Plaintiff was negligent." (*Id.* at 83:15-18.) The verdict directing form, of course, would later omit that same question that would have applied to BNSF. This conversation continues in the transcript through pages 84 and 85. (*Id.* at 84:1-85:25.)

On Page 86, in response to BNSF's counsel asking that "negligence," for the purposes of what would become Instruction No. 12, be defined, the parties refer back to what would become Instruction No. 8, which defines negligence. (*Id.* at 82:25-87:5.) BNSF's counsel expressly states: "you can say 'yes' to negligence and 'no' to cause," (*Id.* at 86:16), after which Plaintiff's counsel acknowledges the verdict form, as counsel understood it to be, "separates them out,"—them being the issues of negligence and fault. (*Id.* at 86:22-23.) This passage thereafter concludes and resulted in a contributory negligence instruction that asked the jury to weigh:

> 1. [Whether] Plaintiff was negligent.
>
> 2. [Whether] Plaintiff's negligence resulted in whole or in part in his injury.

(APP. 274.)

93:7 - 94:1: This portion of the transcript is not about the verdict form. Rather, it is about what would become Instruction No. 19, which forbids the jury from issuing a quotient verdict. "Verdict form," as referenced in this passage, corresponds to the employed-verdict form's Question No. 3, which is not at issue in this appeal. (Transcript, Vol. VI, 93:7-94:1.)

<u>102:11 – 106:19</u>: This span contains BNSF's request for a mitigation instruction (*Id.* at 102:16-104:5), and request for clarification on the damage category instruction (*Id.* at 104:6-19.) It contains no mention of the verdict form. (*Id.*)

Plaintiff paraphrases the transcript portions cited above to claim the verdict form "was the subject of discussion at the jury instruction conference" and that "[a]fter discussion, the parties agreed that the verdict form would not combine causal fault in one section and the[n] uncombine it in another." (Appellee's Proof Brief, p.26.) But, as shown above, that paraphrasing contradicts the transcript. To the extent the transcript discussed the verdict form, Plaintiff's counsel's statement, on the transcript, provides the best summary of what was understood the verdict form stated at that time: "[p]roblem is the verdict form separates them out. . . ." (Transcript, Vol. VI, 86:22-23.) The transcript then shows no additional change was made to the verdict form; rather, the change was only to Instruction No. 12, which indeed then separated the questions of whether Plaintiff was negligent, and whether that negligence caused his injury. If the parties intended that instruction to match the verdict form, then the verdict form should have first asked whether BNSF was negligent. To the extent there is any remaining question regarding the trial court's intention, the best

evidence the court did not intend to issue the erroneous verdict form is that the court—applying *Whitlow*'s preservation test that specifically requires that "all counsel and the court overlooked the error in the verdict form"—found the error preserved. (APP. 1282.) Here, the trial court itself found this situation met *Whitlow*'s preservation threshold so this Court should reject Plaintiff recharacterizing the trial court's intent.

Last, Plaintiff claims the error was not preserved because BNSF, he claims, did not submit the proper verdict form. Again, the trial court disagreed. "In the present case, BNSF submitted its proposed jury instructions . . . including, a proposed verdict form . . . that sets forth Question 1 as 'Was the Defendant BNSF at fault?'" (*Id.*) That Plaintiff argues otherwise contradicts the record in the case.

Against this, Plaintiff attempts to construct its own test—distinct from the one set forth in *Whitlow*. (Appellee's Proof Brief, p.27.) Under Plaintiff's argument, it is not enough that the verdict form omitted its most important question—whether BNSF was in fact negligent. Rather, Plaintiff proposes that two other changes the trial court made to BNSF's proposed verdict form—entirely unrelated to the glaring omission of an element of Plaintiff's prima facie case—prevent *Whitlow*'s application here.

But *Whitlow* does not make this demand. *Whitlow,* 935 N.W.2d at 569-70. Instead, the "error in the verdict form" that the Iowa Supreme Court found preserved was the instruction that forbade the jury from finding whether a party was negligent. Contrary to Plaintiff's argument, there is no additional requirement in *Whitlow* that all remaining portions of a proposed verdict form—excepting the error—must be perfect.

Therefore, each of Plaintiff's arguments regarding this error's preservation fail, and BNSF respectfully asks that the Court find this error preserved on appeal.

B. Scope of Review

BNSF and Plaintiff agree with respect to the Court's scope of review on this issue. (Appellee's Proof Brief, p.28.) However, the parties disagree as to whether this issue was preserved. (*Id.*) As discussed in the preceding section, BNSF asks that the Court find this issue was preserved.

C. Argument

Plaintiff's argument here, first, asks the court to disbelieve the trial court's statement of its own analysis, and second, tries to distract the Court with irrelevant matters outside the scope of BNSF's appeal. BNSF respectfully asks the Court to disregard these attempts and remand this case for new trial.

To merit a new trial, BNSF must demonstrate it was prejudiced by a misleading or confusing instructions, or by instructions that misstate the law. *Rivera v. Woodward Res. Ctr.*, 865 N.W.2d 887, 892 (Iowa 2015). "A material misstatement of the law in a jury instruction, of course, ordinarily requires reversal." *Id.* at 902. "An instruction is misleading or confusing if it is 'very possible' the jury could reasonably have interpreted the instruction incorrectly." *Id.*

Relevant here, where instructions preclude the jury from reaching a finding it could otherwise make, Iowa courts have approved conducting a new trial. *See, e.g.*, *Whitlow*, 935 N.W.2d at 570-72 (affirming grant of new trial where verdict form prevented jury from considering negligence of second tortfeasor); *Hunter Landing, LLC v. City of Council Bluffs*, 919 N.W.2d 637 (Table), 2018 Iowa App. LEXIS 472, *8-10 (Iowa Ct. App. 2018) (ordering new trial when lower court neglected to instruct on only two of three legal theories under which the plaintiff could prevail).

As discussed in BNSF's initial brief, the error at issue in *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. *Whitlow,* 935 N.W.2d at 568-69. That is what happened here—the verdict form's question directed the jury to assume BNSF's negligence. If the Court had simply

asked the jury to determine whether BNSF was negligent, the jury would have been instructed not to answer any further questions if the jury answered "no." Therefore, the verdict form's assumption precluded the jury from finding that BSNF was not negligent.

Against this, Plaintiff first claims the trial court intended to omit the question at the very center of Plaintiff's case—whether BNSF was negligent. (Appellee's Proof Brief, pp.28-30.) Plaintiff spends two pages of his brief arguing the trial court's omission was intentional. But where Plaintiff asks this Court to draw inferences from the trial transcript regarding the trial court's intent, it could instead simply read the trial court's prior decision to gauge whether it purposefully omitted the question from its verdict form.

To review, under *Whitlow*, a verdict form error can be preserved where the appellant "proposed the correct form, all counsel *and the court* overlooked the error in the verdict form . . . submitted by the court, and [the appellant] timely moved for a mistrial or new trial. *Whitlow,* 935 N.W.2d at 569 n.4 (emphasis and alterations added). Therefore, for an issue to be preserved under *Whitlow*, a trial court must have overlooked an issue. *Id.* Relying on *Whitlow*, the trial court stated it "finds this issue was sufficiently preserved." (APP. 1282.) A necessary subcomponent of that finding, of

course, is that the trial court overlooked the error. This accordingly rules out the possibility that the trial court omitted the question with intent.

Unable to rewrite the trial court's explanation of why *Whitlow* applies, Plaintiff also spends considerable effort arguing matters that have no bearing on this appeal. (Appellee's Proof Brief, pp.32-34.) BNSF is not appealing because it claims the trial court applied the wrong source of substantive law. Nor is BNSF appealing because it believes Iowa's Comparative Fault Act should intervene to bar Plaintiff's recovery. To the contrary—the FELA provides the substantive law that governs this case, and BNSF is appealing because the trial court failed to instruct the jury under the FELA. Plaintiff's arguments on these irrelevant issues—devoid of any citation to Iowa authority—are simply a distraction that should be disregarded.

These two arguments disposed of, what remains is a narrow argument contained between pages 30 and 32 of Plaintiff's brief. The argument asks the Court to hope the jury got it right. (Appellee's Proof Brief, pp.30-32.) After all, the jurors were instructed "[y]ou must consider all of the instructions together because no one instruction includes all of the applicable law." (APP. 263.) Plaintiff's brief points to this instruction and argues it, in conjunction with Instruction No. 9's definition of negligence, is sufficient to guarantee that the jury considered whether BNSF was negligent.

(Appellee's Proof Brief, pp.30-32.) But as discussed in BNSF's initial brief, Instruction No. 9 informs its reader that the question of negligence is distinct from and not subsumed by the question of causation. (APP. 271.) Therefore, answering one question does not answer the other.

Though Plaintiff addresses *Whitlow* in its arguments as to whether this error is preserved, Plaintiff does not engage with the case to weigh the merits of BNSF's appeal. Rather than do so, as discussed above, Plaintiff just states that the jury was equipped by the other instructions to infer they had to make a negligence finding. But this goes against *Whitlow*. There, the trial court, faced with its own error, did not simply hope the jury, though misled by the verdict form, would proceed past an erroneous instruction and weigh whether the other party was negligent. *Whitlow,* 935 N.W.2d at 568-69. Rather, the trial court allowed a new trial to correct the verdict form's error—a decision this Court affirmed. *Id.* at 571-72. Here, like *Whitlow*, the verdict form prevented the jury from reaching a legal conclusion the trial court should have permitted it to reach. Therefore, the Court should reverse and remand 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. BNSF Preserved This Issue

Both parties agree BNSF preserved this issue. (Appellee's Proof Brief, p.34.)

B. Scope of Review

Both parties agree regarding the scope of review that applies to this issue. (*Id.* at pp.34-35.)

C. Argument

Plaintiff's negligence claims before trial were that the boom truck operator Mr. Rutledge was not properly trained and Mr. Rutledge negligently operated the boom, and that BNSF failed to coordinate supervision. Prior to trial Plaintiff never alleged negligence claims in pleadings or discovery that Plaintiff and all crew members on the job were not properly trained. However, as Plaintiff admits in his brief, the lack of training of Plaintiff and all crew members became "his primary theory of liability" at trial. (Appellee's Proof Brief, p.36.)

The fact Plaintiff did not allege, before trial, negligence claims of a lack of training of the Plaintiff and all employees is plainly demonstrated by Plaintiff's proposed jury instructions he submitted only two weeks before

trial. In those instructions Plaintiff sets forth his negligence claims as follows:

> 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 [Mr. Rutledge] in how to properly operate the boom controls, and/or**
>>
>> **by and through its boom operator [Mr. Rutledge], 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) (emphasis added). The only negligence claim regarding lack of training concerned the boom operator, Mr. Rutledge. Plaintiff does <u>not</u> allege lack of training of Plaintiff and all employees.

Plaintiff argues in his brief that those negligence claims were alleged in the complaint; a simple review demonstrates they were not. In the complaint, Plaintiff alleges lack of training and negligence of the boom

operator Mr. Rutledge and protecting employees from the "foregoing acts and omissions," which refers to Mr. Rutledge's lack of training and operation. (APP. 9-10, ¶¶13(g)-(j).) If Plaintiff had in fact alleged negligence claims of a lack of training of Plaintiff and all crew members, he would have certainly included those negligence claims in his proposed jury instructions submitted immediately before trial. He does not. (APP. 95.)

Plaintiff mischaracterizes statements made by BNSF in pretrial submissions and *voir dire* to argue BNSF "was aware of the theories . . ." (Appellee's Proof Brief, p.40.) To the contrary, BNSF's statements addressed Plaintiff's negligence claim of the lack of training of Mr. Rutledge, and BNSF's claim that Plaintiff was contributorily negligent.

For example, Plaintiff claims BNSF wrote in its pretrial brief that it "provided sufficient training to its employees," but that statement concerned BNSF's training of <u>Mr. Rutledge</u>, which was the only training at issue. (Appellee's Proof Brief, p.37.) Plaintiff claims that in *voir dire* BNSF questioned members of the jury whether employees must follow the safety rules in their job. (*Id.*) Yes, BNSF did ask that question, but it was for the purpose of <u>Plaintiff's</u> contributory negligence and his failure to follow the safety rules. Contrary to Plaintiff's representations to this Court, BNSF did not know at the time of its pretrial submissions or in *voir dire* that it would

be forced to defend new negligence claims in the middle of trial that BNSF failed to train Plaintiff and all crew members.

Plaintiff does correctly note that BNSF argued in closing that it properly trained Plaintiff and all employees. But that argument was made in closing after Plaintiff was improperly permitted to add those new negligence claims during trial. Plaintiff's primary negligence theory in closing was a lack of training of all crew members. (Transcript, Vol. VII, 6:12-8:24.) BNSF therefore, of course, argued in closing that it had properly trained all employees.

The fact Plaintiff did not allege those negligence claims in pleadings and discovery before trial is plainly demonstrated by the fact that on the third day of trial, Plaintiff requested permission from the trial court to express those new opinions. (Transcript, Vol. III, 134:12-138:7.) BNSF objected, arguing that such opinions from Plaintiff's expert had never been disclosed. (Transcript, Vol. III, 138:9-139:3; 143:23-144:8.) The trial court recognized those opinions had not been disclosed stating Plaintiff's expert's report only claimed Mr. Rutledge did not receive proper training. (Transcript, Vol. III, 137:4-8.) Nevertheless, the trial court permitted Plaintiff to present the new negligence claims over BNSF's objection. (Transcript, Vol. III, 137:13-138:7; 143:23-144:19.)

Plaintiff argues in his brief that BNSF "does not provide the Court the discovery exchanged during the course of the litigation to show whether or not it is devoid of any such notice" of Plaintiff's negligence claims. (Appellee's Proof Brief, p.39.) Plaintiff accordingly asks BNSF to prove a negative, arguing it apparently should have provided this Court with every single page of discovery conducted in the litigation to prove something is not contained in those pages. This would have created an insurmountable burden on this Court, presenting it with thousands to perhaps tens of thousands of pages of records to prove something is absent. Instead, BNSF provided this Court with direct proof that Plaintiff never made those negligence claims, including Plaintiff's own proposed jury instructions submitted immediately before trial, and the trial transcript where Plaintiff requested the trial court grant him leave in the middle of trial to allege the new opinions.

BNSF was severely prejudiced at trial. Had it known Plaintiff's negligence claims before trial it would have had the opportunity to retain different expert witnesses to address those claims, present different and additional fact witnesses at trial, and conduct different discovery. As Plaintiff admits, his negligence claim regarding a lack of training of Plaintiff and all co-workers was his "primary theory of liability" at trial. (Appellee's

Proof Brief, p.36.) This new negligence claim was not a minor allegation, but rather Plaintiff's primary claim, so certainly this caused significant prejudice to BNSF given it prepared its defense on different liability claims.

It is unknown why Plaintiff failed to disclose the negligence claims before trial, but perhaps it was because Plaintiff's counsel was still developing and creating his negligence theory as the trial progressed. But Plaintiff's failure to timely develop his liability theory before trial should not have been permitted to prejudice BNSF at trial. It is well settled under Iowa law that a plaintiff's failure to disclose negligence claims before trial should preclude a plaintiff from presenting the negligence claims at trial. Plaintiff does not argue with any of the cases cited by BNSF in its brief regarding this issue, including the firmly established Iowa law that 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 has existed for more than 100 years in Iowa. *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."). BNSF cites numerous cases from the Iowa Supreme Court and the Iowa Court of Appeals demonstrating the trial court committed reversible error as a matter

of law in permitting Plaintiff to present the new negligence claims at trial. (Appellant's Proof Brief, pp.41-45.) BNSF therefore respectfully requests this Court reverse 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. BNSF Preserved This Issue

This portion of BNSF's appeal focuses on the conduct of Plaintiff's counsel during rebuttal closing arguments. Generally, "[w]hen an improper remark is made by counsel in the course of jury argument, it is the duty of the party aggrieved to timely voice objection." *Kinseth v. Weil-Mclain*, 913 N.W.2d 55, 67 (Iowa 2018) (quoting *Andrews v. Struble*, 178 N.W.2d 391, 401 (Iowa 1970)). But objections during closing arguments present a distinct issue:

> Continued objections by counsel to prejudicial statements of opposing counsel in his argument to the jury could place the former in a less favorable position with the jury, and thus impose an unfortunate consequence upon his client which was actually caused by the wrongful conduct of opposing counsel. This he is not required to do. Attorneys engaged in the trial of cases to a jury know or ought to know the purposes of arguments to juries. When they depart from the legitimate purpose of properly presenting the evidence and the conclusions to be drawn therefrom, they must assume the responsibility for such improper conduct. They are in no position to demand that opposing

> counsel shall jeopardize his position with the jury by constant objections to their improper conduct.

Andrews, 178 N.W.2d at 402. To be sure, *Andrews* raises this discussion and states, ordinarily, that to be timely a party's objection should be raised, at the latest, before submission to the jury. *Id.* But Iowa's Supreme Court has acknowledged that a party's remarks during its closing arguments "can be 'so flagrantly improper and evidently prejudicial' as to warrant a new trial even in the absence of an objection." *Buboltz v. Birusingh*, 962 N.W.2d 747, 759 (Iowa 2021) (quoting *Shover v. Iowa Lutheran Hosp.*, 107 N.W.2d 85, 91 (Iowa 1961)); *see also Pose v. Roosevelt Hotel Co.*, 208 N.W.2d 19, 31 (Iowa 1973) (referring to *Buboltz*'s proposition, quoted above, as "well-established").

Analysis of whether an issue *is* preserved under *Buboltz* dovetails with whether a new trial should be granted. *See Pose*, 208 N.W.2d at 31-32. If the conduct is sufficiently flagrant, the issue can both be considered on appeal and should merit reversal. *See State v. Hutchison*, 341 N.W.2d 33, 39 (Iowa 1983) (collecting cases where Iowa's Supreme Court, "[i]n the past, [has] granted new trials despite insufficient objections"). Moreover, when determining whether this appeal merits reversal under this line of cases, the Court can consider the cumulative effect of the conduct discussed below. *See State v. McIntyre*, 212 N.W. 757, 759 (Iowa 1927) (ordering new trial

after discussing conduct by counsel that occurred throughout trial). For instance, in *McIntyre*, the Iowa Supreme Court granted a new trial where the prosecutor "repeatedly and knowingly went outside the record in opening and closing argument to appeal to passion and prejudice the jury." *Hutchison*, 341 N.W.2d at 39 (in parenthetical, describing fact pattern in *McIntyre*). Compare that to here, where in closing rebuttal Plaintiff's counsel—without evidence—accused BNSF's counsel of lying to the jury. (Transcript, Vol. VII, 74:19-75:11) (Plaintiff's counsel, in reference to his allegation that BNSF lacked candor, stating, "hey, that's the same as if you stood up and lied to somebody.") This characterization of Plaintiff's counsel's conduct is not controversial; here, the trial court's ruling on BNSF's motion for new trial specifically noted the connection drawn by Plaintiff's counsel's line of argument. (APP. 1299-1300.) Simply stated, Plaintiff's counsel's misconduct meets the threshold to find this error preserved.

As set forth below, Plaintiff's counsel engaged in an array of improper conduct during his rebuttal closing argument—the cumulative effect of which was prejudicial to BNSF. BSNF respectfully asks the Court to find this issue preserved, and consider the merits of BNSF's arguments.

B. Scope of Review

BNSF and Plaintiff agree with respect to the Court's scope of review on this issue. (Appellee's Proof Brief, pp.42-43.) However, the parties disagree as to whether this issue was preserved. (*Id.*) As discussed in the preceding section, BNSF asks that the Court find this issue was preserved.

C. Argument

BNSF is entitled to a new trial given the individual acts and cumulative nature of misconduct by Plaintiff's counsel at trial. Plaintiff's counsel purposefully waited until rebuttal closing argument to make his improper statements to the jury given BNSF would have no opportunity to respond and they would be fresh in the jurors' minds who were to immediately begin deliberations.

Plaintiff devotes over 11 pages of his brief attempting to justify his disparagement of BNSF's counsel. (Appellee's Proof Brief, pp.43-54.) Plaintiff's excuses include an attempt to shift the focus to BNSF, claiming it "consistently disparaged the administration of justice and lawyers." (Appellee's Proof Brief, p.45.) Not only is Plaintiff's allegation untrue, Plaintiff curiously believes such an argument would justify Plaintiff's counsel's conduct in disparaging the candor and ethics of BNSF and its counsel. It does not.

BNSF never disparaged the ethics and candor of Plaintiff's counsel; nor does Plaintiff make that express argument in his brief. Instead, Plaintiff argues a slightly different theory, that BNSF "disparaged the administration of justice and lawyers." (Appellee's Proof Brief, p.43.) In an effort to create this impression, Plaintiff argues, "In *voir dire*, Defendant told the jury that Plaintiff and his counsel were going to 'come in and ask for a lot of money...that's the society we live in now...'" (Appellee's Proof Brief, p.45.) Throughout his brief Plaintiff takes statements out of context by quoting an incomplete portion of the record. Here, Plaintiff first fails to quote the entirety of BNSF's statement:

> So in terms of the damages, you heard a lot that they're going to come in asking for a lot of money, and, again, we're going to talk about what's reasonable and fair when we get into the evidence in this case. That's the society we live in now. So we'll do that, talk about what all that means.

(Transcript, Vol. I, 143:6-11.) Plaintiff then fails to advise this Court that BNSF was referring to statements Plaintiff's counsel had just made, and that BNSF told the jury the issue it would decide is what is fair and reasonable. Specifically, Plaintiff's counsel told the jury in *voir dire*:

> More importantly, this is a case where <u>we are at the end of the case going to ask for a significant amount of money</u> on behalf of Mr. Olson for all of his harm and losses. We'll be asking for more than a million dollars. . . . Anyone in this first 19 think that if we're asking for a million or 2 or <u>5 million dollars</u> in this case, that we should be held to a higher burden of proof?

(Transcript, Vol. I, 61:24-62:11) (emphasis added). Plaintiff's counsel also discussed at length in *voir dire* the "different types of damages" he would seek to justify significant compensation, including Plaintiff's physical injuries, pain, anguish, psychological pain, inability to work, future inability to earn money, and future pain, anguish, and mental health issues. (Transcript, Vol. I, 66:21-68:10.) Accordingly, BNSF was simply responding to Plaintiff's counsel's statements that he would ask for a "significant amount of money" of possibly 5 million dollars. Nowhere does BNSF "disparage the administration of justice and lawyers."

In another effort, Plaintiff refers to BNSF using parts of the daily transcripts in closing argument. The daily transcripts contained a statement within five paragraphs written by the court reporter that it was an unedited, non-certified transcript and there could be errors so it may not be quoted in pleadings or used for any other purpose. First, the use of portions of the daily transcripts is irrelevant and has nothing to do with the issue on appeal. Second, the daily transcripts were the only transcripts available at the time of closing as the final certified transcripts had not yet been prepared. However, Plaintiff makes no claim that the language quoted from the daily transcripts was incorrect regarding the actual testimony at trial. Third, the trial court never ordered the parties not use the daily transcripts and Plaintiff's counsel

in fact admits the same: "Now, to be fair, the Court never said I couldn't use them; but from this Court's court reporter, it said we couldn't use them." (Transcript, Vol. VII, 112:11-13.) Regardless of whether the use of daily transcripts was proper as Plaintiff argues, it is irrelevant and certainly in no way justified Plaintiff's counsel's misconduct by disparaging BNSF and its counsel from lacking ethics and candor.

Plaintiff goes to great lengths with various excuses to justify his misconduct, claiming he only disparaged BNSF's counsel because BNSF disparaged justice, but then arguing he did not actually disparage counsel for BNSF, and then further arguing if he did disparage, it was because he was rusty. "As 'rusty' as Plaintiff's counsel may have been, Plaintiff respectfully submits that he still did his best to make the point that he was not casting aspersions upon Defendant's counsel." (Appellee's Proof Brief, p.53.)

Regardless of Plaintiff's excuses, this is precisely what Plaintiff's counsel did in closing argument—suggest BNSF and its counsel lack 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).

In ruling on BNSF's motion for new trial, the trial court stated it "does not condone the comments by [Plaintiff's] counsel. His comments were inappropriate . . ." (APP. 1300.) Despite finding misconduct, the trial court erred by finding the comments did not rise to the level of prejudice requiring a new trial. *Id.* 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). This proposition applies for arguments by counsel, the same as questioning which impugns dishonesty. 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).

Here, the misconduct was highly prejudicial to BNSF and was made with the intent to influence and sway the jury's verdict. The misconduct by Plaintiff's counsel in accusing BNSF and its counsel of lacking ethics and candor required the trial court grant its motion for new trial.

Plaintiff also engaged in misconduct in employing golden rule and reptile arguments. Plaintiff's counsel's misconduct was not only improper under Iowa law, it violated the trial court's order on BNSF's motion in limine. The trial court's order prohibited Plaintiff's counsel from making golden rule and reptile arguments at trial. (APP. 131.) Despite that order, and Iowa law, Plaintiff's counsel's rebuttal closing argument improperly focused on community safety and asking the jurors to place themselves in the shoes of others, and after asking them to first put themselves in the position of the Plaintiff, to think about the guys working on the railroad now as this was important to everyone's safety:

> 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).

The trial court found Plaintiff's counsel's misconduct was improper, stating it "does not condone [Plaintiff's counsel's] statements." (APP. 1301.) However, the trial court erred by concluding that the statements were insufficient to prejudice BNSF to a degree requiring a new trial. (*Id.*) BNSF submits it was prejudicial, particularly in light of all of the cumulative misconduct by Plaintiff's counsel. In addition to the foregoing misconduct, Plaintiff's counsel gave a duplicative and improper rebuttal closing argument, and despite BNSF's objection at trial, the trial court overruled the same. (Transcript, Vol. VII, 105:9-13; 110:4-113:14.)

Plaintiff's counsel engaged in particularly serious misconduct by criticizing jury instructions, implying to the jury that they need not be followed. Plaintiff admits in his brief that he told the jury that the standard for giving Instruction No. 22 "was too low," and that "lawyers can work

within the justice system to improve instructions such as this if they believe they can be improved . . ." (Appellee's Proof Brief, pp.62-63.) Plaintiff's counsel told the jury:

> 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).

While Plaintiff claims in his brief he was not telling the jury that it could disregard the instructions, this was precisely what Plaintiff's counsel did and intended to do in his rebuttal closing argument. There was no other reason for Plaintiff's counsel to tell the jury that the standard for giving the instruction was "too low," that he intended to "work on that with the Bar" to get the instruction changed, and that giving the instruction in this case "wasn't fair." (Transcript, Vol. VII, 78:12-20.) Plaintiff's counsel's arguments are analogized to suggesting the jury not follow an instruction provided by the trial court, which is impermissible in Iowa. *See State v. Willis*, 218 N.W.2d 921, 924 (Iowa 1974). Plaintiff's counsel's misconduct in suggesting to the jury that it not follow jury instructions is of such an

egregious and prejudicial nature that it cannot be condoned by the Court and a new trial should be granted.

The misconduct by Plaintiff's counsel is clear. The trial court abused its discretion in finding that BNSF was not prejudiced, particularly given the cumulative nature of the four categories of misconduct committed by Plaintiff's counsel: disparaging BNSF and its counsel; improperly employing golden rule and reptile arguments; conducting a duplicative and improper rebuttal closing argument; and implying to the jury that it need not follow jury instructions. Plaintiff's counsel waited until rebuttal closing argument when BNSF would have no opportunity to respond and the misconduct would be fresh in the minds of all the jurors who were to begin deliberations. This was particularly prejudicial to BNSF. The decision of the trial court denying BNSF's motion for new trial should be reversed and the case remanded for new trial.

CONCLUSION

For the reasons set forth in BNSF's brief and this reply brief, the decisions of the trial court should be reversed and this case remanded for a new trial. First, the trial court committed errors of law in failing to properly instruct the jury on all material issues in the case. Second, the trial court committed errors of law in allowing Plaintiff to present new negligence

claims during trial that had not been previously alleged in pleadings and discovery. Third, the trial court abused its discretion in failing to find Plaintiff's counsel's individual and cumulative misconduct caused BNSF prejudice. Accordingly, BNSF respectfully requests the Court reverse the decision of the trial court denying BNSF's motion for new trial and the judgment entered in favor of the Plaintiff, and that this Court remand the case for a new trial.

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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 Reply 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 Reply 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 6,910 words, excluding the parts of the Brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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