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.

PLAINTIFF'S/APPELLEE'S FINAL BRIEF

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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. 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 (Defendant) under the Federal Employers' Liability Act, 45 U.S.C. §§ 51, *et sequitur* (FELA) pursuant to the concurrent jurisdiction provisions of 45 U.S.C. § 56. The substantive law that applies to the case is federal law as applied in federal courts, but the procedural law is the law of the forum. *St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409, 411 (1985.) The right to trial by jury is an important federal, substantive right under the FELA. *Rogers v. Mo. Pac. R. Co*., 352 U.S. 500, 507-511 (1957.)

On July 31, 2017, Defendant was negligent in failing to provide Plaintiff a reasonably safe place to work, and Defendant's negligence caused, in whole or in part within the meaning of the FELA, injury and damages to Plaintiff. Plaintiff brought the FELA action to recover those damages.

Course of Proceedings

Plaintiff filed his Complaint on June 25, 2019. (APP. 5-12) The Iowa District Court for Polk County conducted trial from August 30, 2021, through September 8, 2021. (Trial Transcript) On September 8, 2021, the jury returned a unanimous verdict, finding Defendant at fault, apportioning 100% of the fault to Defendant, and awarding itemized damages totaling $6,210,280.00. (APP. 292-293) On September 23, 2021, the trial court issued an Entry of Judgment affirming the jury's verdict. (APP. 294-297)

On September 23, 2021, Defendant filed a Motion for New Trial. (APP. 298-895) Plaintiff filed his resistance. (APP. 896-1073) Defendant filed its reply to Plaintiff's resistance (APP. 1074-1188), and on November 5, 2021, hearing was held on Defendant's Motion for New Trial. (APP. 1189-1278) The trial court denied Defendant's Motion for New Trial on March 4, 2022, (APP. 1279-1303) and Defendant filed a timely notice of appeal on April 1, 2022. (APP. 1304-1306)

At page 10 of Defendant/Appellant's Proof Brief (Defendant's Proof Brief), Defendant writes that it appeals from the trial court's March 4, 2022, final order denying Defendant's Motion for New Trial "and from all adverse rulings and orders inhering therein." Defendant, however, does not direct its appeal to any adverse rulings and orders of the trial court other than the ones

presented in Defendant's Proof Brief, and only two allegations of error presented in Defendant's proof brief were preserved by objection at trial. (*See* Trial Transcript and Defendant's Proof Brief.)

Specifically, Defendant did not object on the grounds alleged in Point I of its proof brief, but Defendant did object on the grounds alleged in Point II of its proof brief. Defendant combines five allegations of error into the single Point III of its proof brief, and only preserved one of those five allegations of error by objecting on the alleged grounds at trial.

STATEMENT OF THE FACTS

Defendant's trains run on what is called "continuous welded rail." (Transcript, Vol. III, 63:19-22.) As its name implies, the rail is not jointed. Each rail is one, long rail that may extend for miles. (Transcript, Vol. III, 63:19-22.) The Federal Railroad Administration sets deadlines for the removal of rail when it becomes defective, and July 31, 2017, was the deadline for removal of a length of defective rail on Defendant's bridge in Afton, Iowa.

To remove the defective rail and to replace it with new rail, Defendant assigned three crews from two of its departments. (Transcript, Vol. V, 142:22-143:21.) Two crews worked in Defendant's Maintenance of Way (MoW) department. The MoW department is responsible for the inspection,

maintenance, and repair of Defendant's track. The third crew worked in Defendant's Bridge and Building (B&B) department.

The crew that was responsible for cutting out the old rail and replacing it with new rail was the section crew. (Transcript, Vol. IV, 145:16-20.) This was a MoW crew on which Plaintiff was the foreman, also called the EIC or Employee-in-Charge. (Transcript, Vol. III, 62:3-4.) Mr. Richard Rutledge was the boom truck driver and operator, and Mr. Bobby Bowen was the laborer. (Transcript, Vol. III, 62:4-6.)

The second crew was responsible for welding the ends of the new rail to the ends of the continuous welded rail. (Transcript, Vol. III, 65:21-66:2.) This was the welding crew whose foreman/EIC was Mr. Wayne Nielsen. Mr. Shane Close was Mr. Nielsen's helper. (Transcript, Vol. III, 60:11-16.)

The third crew was the B&B crew. Mr. Zach Shaffer was the foreman/EIC of the B&B crew, and the other members were Mr. Chris Jokisch and Mr. Charles "Toby" Wiliams. (Transcript, Vol. III, 62:7-11.) Their responsibility that day was to assist the other two crews with their fall protection and to spread, also called "slew," the ties where the welding would be performed. (Transcript, Vol. II, 169:15-25.) The ties are wooden and slewing them angles them away from the heat of the welding process so that they do not catch fire. (Transcript, Vol. III, 65:16-20.)

Changing out rail on a bridge is dangerous work, and Plaintiff had never done it before. (Transcript, Vol. II, 116:10-11, 174:13-15; Vol. IV, 138:19-21.) Nor had Plaintiff ever been trained how to do it. (Transcript, Vol. IV, 138:19-21.) He told his wife and Mr. Rutledge that he had a bad feeling about the work that day, and Mr. Rutledge prayed for their safety. (Transcript, Vol. II, 110:1-7; Vol. IV, 111:3-17.)

Mr. Nielsen also was concerned. No supervisory coordination had been arranged for the work that day. (Transcript, Vol. II, 138:5-139:14.) The supervisor for the MoW crew, Roadmaster Tyler Kuzee, was not on site that day. (Transcript, Vol. II, 101:22-102:3.) Neither was his supervisor, Division Engineer Adam Moe. (Transcript, Vol. VI, 60:11-18.) Defendant did not designate any one of the employees assigned to the bridge that day to perform the responsibilities of Roadway-Worker-in-Charge as required by FRA regulation, and Defendant did not designate or authorize any of the employees on the bridge that day to supervise or coordinate the work of the three crews. 49 C.F.R. § 214.315 (c). (Transcript, Vol. III, 60:15-21.) In the absence of coordinating supervision, Mr. Nielsen took certain responsibility for organizing the work at the job site. (Transcript, Vol. III, 60:22-61:25.) For instance, he took it upon himself to obtain the 49 C.F.R. § 214.315 on-track protection for the three crews. (Transcript, Vol. III, 60:22-61:25.)

Because there was not enough fall protection for all of the employees, Mr. Nielsen directed Mr. Rutledge to keep close to the boom truck and to make sure other employees stayed in the clear. (Transcript, Vol. II, 162:21-163:3.)

Mr. Nielsen also was concerned that there were too many people assigned to work on the bridge at the same time. Therefore, he called Mr. Kuzee for permission to "stage" the work. (Transcript, Vol. II, 212:23-213:6.) He requested permission to organize the work such that one set of employees would do their work and all other employees would keep off the bridge until it was time for their work. (Transcript, Vol. II, 212:23-213:6.) Mr. Kuzee refused Mr. Nielsen's request because of the time pressure they were under to get the repair done by the day's deadline. (Transcript, Vol. IV, 140:5-12.) Mr. Nielsen, therefore, proceeded with the work without staging it.

On the bridge there were two sets of main line railroad tracks separated by a walkway. (APP. 134-135) The tracks ran generally east and west. (Transcript, Vol. II, 160:4-7.) It was the north rail of the north set of tracks that had to be cut out and replaced. (Transcript, Vol. III, 159:22-160:7.)

When it came time to cut the rail, Plaintiff used a rail saw to cut the west end of the defective rail first, and then he cut the east end. When he

attempted to cut the east end, however, he was unable to cut it all the way through. (Transcript, Vol. IV, 149:4-9.) To do this required him to move to the north side of the north rail, but the five-foot-long tether of his fall protection was attached to the south rail of the north set of tracks, and he could not cross the north rail to finish the cut. (Transcript, Vol. IV, 149:4-9.) Therefore, he had a member of the B&B crew, Mr. Shaffer, cut the rail from the north side (Transcript, Vol. IV, 149:10.) Mr. Shaffer was wearing a type of fall protection called "fall arrest" that gave him greater access to the north side of the rail. (Transcript, Vol. III, 65:1-13.)

After he cut the rail, Mr. Shaffer informed Plaintiff that he was unable to cut it all the way through and that he had left a small burr. (Transcript, Vol. IV, 149:10-12); (APP. 154) To break the burr, from his position still tethered to the south rail of the north tracks, Plaintiff took a sledgehammer and swung it across the north rail, striking it on the rail's north side. (Transcript, Vol. V, 45:3:46:13.) The burr did not break free with the first strike, so Plaintiff struck the rail again. This time the burr broke free. (Transcript, Vol. IV, 154:2-13.) The rail fell down onto its pondral plate, it wobbled, and it made a distinctive noise, all indicating that the burr had been broken and that the rail was free. (Transcript, Vol. V, 44:19-45:2; Vol. IV, 154:6-13.)

The next job was for Plaintiff to attach rail tongs hanging from the boom to the rail. (Transcript, Vol. V, 10:13-20.) Mr. Rutledge would operate the boom from a remote control device that would allow him to position himself to see the movements of the boom and the load. (Transcript, Vol. III, 86:9-18.) It also allowed him to see if anyone was in a position of danger as he raised and moved the rail. (Transcript, Vol. III, 86:19-20.)

The trial evidence showed that Mr. Rutledge had not received any training on the boom for five to six years. (Transcript, Vol. II, 102:14-21.) This is a violation of federal regulations that require annual training of boom operators such as Mr. Rutledge. (Transcript, Vol. III, 91:22-92:6.) The evidence also indicated that the boom's operator's manual was not kept on the truck. (Transcript, Vol. III, 72:23-73:8.) This was a violation of federal regulations that required the manual to be on the truck and available to the boom operators. (Transcript, Vol. III, 91:1-17.) In his testimony, both at trial and in his deposition, Mr. Rutledge displayed significant lack of understanding of how to operate the boom's remote control. (Transcript, Vol. III, 96:11-20; Vol. II, 103:1-16.)

On the day of the incident, Mr. Rutledge's operation of the boom, and specifically the remote control, displayed significant lack of proper training. (Transcript, Vol. II, 106:15-107:8.) Evidence showed that the whole work

area was a danger area defined by the length of the boom and the attached rail. (Transcript, Vol. III, 80:5-81:16.) It is an area that Mr. Rutledge should have made sure was clear of employees. (Transcript, Vol. V, 201:16-202:20.) His failure to do so indicated that he was not properly trained in this aspect of his work either. (Transcript, Vol. V, 202:21-:203:7.)

The actions of all the employees on the bridge that day indicated that they had not been properly trained in the danger area involved in their work. (Transcript, Vol. III, 112:18-114:2.) When the rail was lifted, they all were in the danger area, including Plaintiff. (Transcript, Vol. III, 81:2-16.) They knew where they were standing, and they could see where each other was standing, including Plaintiff, but none of them moved out of the danger area, and none of them did anything to move any of the other employees out of the danger area because they mistakenly believed they were in the clear. (Transcript, Vol. II, 105:21-106:14, 121:5-10, 160:25-161:3, 167:2-7, 189:4-8, 198:7-16; Vol. III, 85:19-86:1, 88:4-89:1; Vol. IV, 158:17-159:12; Vol. V, 7:13-8:1, 43:17-44:2, 51:18-52:2; Vol. VI, 10:3-9, 43:10-16.)

The trial testimony also demonstrated that the employees training was dangerously confusing. The railroad used many, various terms for the same danger area; terms such as Circle of Safety, Circle of Danger, Line of Fire, Danger Area of the Crane, and Fall Zone of the Load. (Transcript, Vol. III,

74:4-77:14.) In opening statement, Defendant conceded that it was "confusing," and the employee testimony demonstrated their confusion. (Transcript, Vol. I, 57:17-22.) For instance, the MoW crews' supervisor, Mr. Kuzee, testified that he was not familiar with the term Circle of Danger and that Plaintiff was outside the Circle of Safety at the time of the incident. (Transcript, Vol. V, 150:23-151:25.) In cross-examination of Mr. Nielsen, Defendant elicited testimony that the Circle of Danger or Circle of Safety "is a little bit different than the line of fire," but Mr. Kuzee testified that if an employee is outside the Circle of Safety they should not expect to be injured. (Transcript Vol. II, 187:4-15; Vol. V, 159:3-12, 162:3-7.)

One of the B&B crew, Mr. Williams, did not have experience with slewing ties, and the B&B crew as a whole demonstrated a lack of training when they slewed the ties at the wrong time for the work being performed. (Transcript, Vol. III 127:17-128:22.) The trial evidence showed that after Plaintiff freed the rail but before Mr. Nielsen gave Mr. Rutledge the signal to lift the rail, the B&B crew slewed the rail. (Transcript, Vol. II, 170:2-7; Vol. III, 67:21-68:4, 133:8-12.) This caused the metal devices that hold the rail in place on the ties to bind against the base of the rail. (Transcript, Vol. II, 171:11-17; Vol. III, 69:4-14, 70:13-71:7.) Therefore, when Mr. Rutledge

attempted to lift the rail, the boom was unable to do so, and the overload function activated. (Transcript, Vol. II, 103:1-16, 166:14-167:1.)

The overload function shuts off the boom, but it does not release the pressure on the rail. (Transcript, Vol. II, 106:15-18, 106:25-107:4.) To release the pressure on the rail, the boom operator needs to push a button on the remote control that overrides the overload function and allows the operator to lower the boom. (Transcript, Vol. II, 167:8-13, 168:2-17.) Once the overload override button is pushed, it takes approximately one and one-half seconds for the overload function to be overridden and for the operator then to be able to lower the load. (Transcript, Vol. III, 96:14-20.) Mr. Rutledge, however, demonstrated his lack of training when he was unable to operate the remote control to lower the load. (Transcript, Vol. II, 103:1-16, 106:15-107:8.) Post-incident inspection indicated that there was nothing wrong with the boom or the remote control at the time of the lift. (Transcript, Vol. III, 96:25-97:4; Vol. IV, 207:20-23; Vol. V, 64:16-20, 173:11-174:1.) The problem was with Mr. Rutledge, not with the equipment.

Unable to override the overload function using the remote, Mr. Rutledge decided to go to the manual controls on the boom truck to see if he could override it there. (Transcript, Vol. II, 103:1-16.) While he was attempting to do this, the rail exploded under the pressure, flying head-high

into the air and striking Plaintiff in the left hand and left leg when it came down. (Transcript, Vol. II, 173:8-25, 224:14-16; Vol. III, 5:1-7, 123:3-7; Vol. IV, 156:23-157:4, 159:13-19; Vol. V, 186:2-5.)

At trial, Defendant did not seriously contest that the incident caused Plaintiff's injuries. Defendant's Proof Brief pp. 30 and 31.[1] Defendant admitted that the injuries were serious. "BNSF HAS NEVER DISPUTED OLSON SUSTAINED A SERIOUS INJURY TO HIS HAND AND LEG." (APP. 247) Plaintiff's injuries were and remain serious. (Transcript, Vol. II, 223:15-224:16, 225:8-10, 226:6-8, 21-24, 227:23-228:4, 228:13-229:13, 229:24-230:14; Vol. III, 5:1-19:7, 35:7-36:6, 36:22-37:9, 40:19-42:10, 46:8-16; APP. 136-141)

Defendant's medical expert and Plaintiff's medical expert were in so much agreement as to the nature and extent of Plaintiff's orthopedic injuries that Defendant did not call its medical expert at trial. (Transcript, Vol. II, 17:21-18:17, 222:3-8, 229:14-24; Vol. III, 15:19-21.) Likewise, Defendant's Post-Traumatic Stress Disorder (PTSD) expert and Plaintiff's counselor were in so much agreement as to the nature and extent of Plaintiff's PTSD that Defendant did not call its PTSD expert to testify at trial. (*See generally*

[1] Although Defendant did not "concede" causation as it writes at page 32 of its proof brief.

Trial Transcript.) Defendant's vocational expert and Plaintiff's vocational expert were in so much agreement that Defendant did not call its vocational expert to testify at trial. (Transcript, Vol. IV, 16:20-17:9, 31:25-32:23.) Defendant presented no expert economic evaluation of Plaintiff's damages. (*See generally* Trial Transcript.)

Defendant's defense in the case was focused almost exclusively on proving that Plaintiff was contributorily negligent and that his contributory negligence caused his injury. Specifically, Defendant's claims agent went to the scene the day of the injury and worked with Plaintiff's supervisor, Mr. Kuzee. (Transcript, Vol. III, 66:10-17; Vol. IV, 197:2-17.) In personal injury cases Defendant's claims agents perform the initial investigation and "at the end of the day, if they decide to settle the case, that's what they would do." (Transcript, Vol. II, 176:20-25.) Working with Defendant's claims agent, Mr. Kuzee produced what he called an "Incident Description" that purported to be the result of his investigation. (Transcript, Vol. V, 107:18-24; APP. 151-157)

Mr. Kuzee testified that the Incident Description was created as a training tool to teach employees what happened at the time Plaintiff was injured so that they could protect themselves from the same thing happening to them. (Transcript, Vol. V, 106:23-107:1, 107:10-17.) He testified that the

Incident Description was such an important training tool that it could be a "matter of life and death." (Transcript, Vol. V, 140:13-141:9.) However, Mr. Kuzee admitted at trial that he had few qualifications to conduct such an investigation. (Transcript, Vol. V, 155:2-156:23, 172:3-22.) He did not do the most obvious things that one would be expected to do conducting such an investigation. (Transcript, Vol. V, 167:2-9, 197:18-200:20; Vol. VI, 12:10-16:3.)

The conclusion of the Incident Description was that Plaintiff had struck the rail under pressure, thereby causing the load to break free, fly up, and injure him. (APP. 151-157) The Incident Description pointed to one of the sledgehammer marks on the rail Plaintiff made when he freed the rail before the rail was lifted and claimed that the mark was made while the rail was being lifted under pressure. (*Id.*)

Throughout the course of the litigation and at trial, the story told in the Incident Description was the story Defendant told in its contributory negligence defense to liability. (Transcript, Vol. II, 67:14-21, 72:22-73:9, 76:4-19.) This was Defendant's defense despite the fact that Defendant presented no testimony of any co-worker who claims to have seen Plaintiff strike the rail when it was under pressure. (Transcript, Vol. II, 177:8-24; Vol. III, 66:18-25.) It was Defendant's defense despite the fact that Mr. Nielsen

and Plaintiff both testified that it never happened. (Transcript, Vol. II, 200:18-23; Vol. V, 53:5-17.) Most importantly, Defendant maintained this defense even though the evidence showed that it was physically impossible to have happened. If Plaintiff had struck the rail under pressure, the fact that he was tethered to the south rail and would have had to reach across the rail with the sledgehammer to strike it meant that he would have been differently and much more severely injured or killed. The rail would have exploded upward into the area of his head and body as they were leaning across the rail and likely killed him. (Transcript, Vol. V, 46:15-23.)

ARGUMENT

I. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON ALL MATERIAL ISSUES AS THE VERDICT FORM AND THE INSTRUCTIONS AS A WHOLE PROPERLY INCLUDED THE THRESHOLD QUESTION WHETHER BNSF WAS NEGLIGENT

A. Failure to Preserve for Review

Defendant presents three grounds for the Court to find either that Defendant preserved its allegation of error regarding the verdict form or that the Court should review the allegation of error even though Defendant failed to preserve the error. The first two grounds Defendant asserts are as follows: "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 the Motion for New Trial." Defendant's Proof Brief, p. 26.

Defendant here implies that the standard for preserving allegations of trail court error is whether a motion for new trial and timely notice of appeal were filed. This is not the standard. *Top of Iowa Coop. v. Sime Farms, Inc*., 608 N.W.2d 454, 470 (Iowa 2000) ("one purpose of our error preservation rules is to ensure that the opposing party and the district court are alerted to an issue at a time when corrective action can be taken or another alternative pursued"); *Oakes v. Peter Pan Bakers, Inc*., 138 N.W.2d 93, 99 (Iowa 1965) ("Plaintiff is not entitled to urge other objections or grounds thereof upon this appeal nor could he do so in his motion for new trial"); *Manning v. Burlington, C. R. & N. R. Co.*, 20 N.W. 169 (Iowa 1884.)

Iowa R. Civ. P. 1.924 specifically mandates that this rule be followed when the allegation of error is directed to jury instructions: "…all objections to giving or failing to give any instruction must be made and ruled on before arguments to the jury…specifying the matter objected to and on what grounds. No other grounds or objections shall be asserted thereafter, or considered on appeal." The transcript of the jury instruction conference shows that Defendant did not object to the verdict form on the grounds

asserted in its motion for new trial and here on appeal. (Transcript, Vol. VI, 68:2-109:3.)

Under the general rule requiring contemporaneous objection at trial, and under the specific requirements of Iowa R. Civ. P. 1.924, Defendant did not preserve the subject allegations of error for review in this appeal. *Loehr v. Mettille*, 806 N.W.2d 270, 278-279 (Iowa 2011) (no discretion to entertain allegation of instructional error if proper Iowa R. Civ. P. 1.924 objection was not made at trial.)

At pages 33 and 34 of Defendant's proof brief, Defendant anticipates that the Court will apply the foregoing authorities and find that Defendant did not preserve this allegation of error. Defendant argues that even when the standard of these authorities is not met, error still may be preserved under the unique circumstances of *Whitlow v. McConnaha*, 935 N.W.2d 565 (Iowa 2019.) According to Defendant, "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…" Defendant's Proof Brief, p. 34. Thus, Defendant represents *Whitlow* as standing for the proposition that instructional error is preserved if the following conditions are met: 1) The verdict form was erroneous. 2) The

error in the verdict form was overlooked by all parties and the trial court. 3) The appellant submitted the correct verdict form to the trial court. None of these elements are met in this case.

The first requirement of Defendant's proposed standard is not met because the verdict form was not erroneous. To the contrary, the verdict form the trial court submitted to the jury was required to prevent juror confusion and error. The verdict form the trial court submitted was necessary for the questions section of the verdict form to conform to the apportionment section. In short, the apportionment section of the verdict form asked the jury to assess a single percentage of causal fault for each party. Because there was only a single percentage of causal fault for each party, the trial court asked only one question for each party to report whether it found each party to have any causal fault for the injury. Because this was proper to bring the question section of the verdict form into accord with the apportionment section, it was not error for the trial court to do so, and the first point of the standard Defendant urges is not met in this case.

Regarding the second element of the standard Defendant urges, what Defendant alleges as error in the verdict form was not overlooked by the trial court, Plaintiff, or Defendant itself. To the contrary, it was the subject of discussion at the jury instruction conference. The trial court and the parties

discussed the fact that in the apportionment section of Defendant's verdict form Defendant combined fault and causation into single percentages of causal fault for each party, but at the same time, in the questions section of the verdict form Defendant uncoupled causal fault into fault and causation in separate questions. After discussion, the parties agreed that the verdict form would not combine causal fault in one section and the uncombine it in another. The jury would be asked if they found causal fault on the part of each party, and then it would report a single percentage of causal fault for each party in the apportionment section of the verdict form. The parties agreed upon this solution, and neither party objected to the trial court's verdict form that implemented it. (Transcript, Vol. VI, 71:2-8, 82:25-87:5, *especially* 86:9-24, 93:7-94:1, 102:11-106:19.)

Nor is the third element of the standard Defendant urges met. Defendant did not request the proper verdict form. First, as stated above and discussed below, the verdict form Defendant requested combined fault and causation into a single percentage of causal fault in the apportionment section of its verdict form, but uncombined fault and causation in the questions section of its verdict form. This was determined not to be a proper verdict form for use in this particular package of FELA instructions.

Secondly, the verdict form Defendant requested was contrary to the substantive law of the FELA. In direct contravention of the plain language provisions of 45 U.S.C. § 53, Defendant's verdict form instructed the jury that Plaintiff could not recover if he were found to be "more than 50% at fault." Defendant's verdict form erroneously would have instructed the jury that if it found Plaintiff to be more than 50% at fault, "do not answer Question No. 8." Question No. 8 was the itemization of damages portion of the verdict form Defendant requested.

For the foregoing reasons, Plaintiff respectfully submits that Defendant did not preserve the error it alleges on appeal regarding the verdict form.

B. Scope of Review

Plaintiff agrees with Defendant's statement of the scope of review as set out in the authorities Defendant cites. *Sleeth v. Louvar*, 659 N.W.2d 210, 213 (Iowa 2003); *Grimm v. Chilcote*, 906 N.W.2d 205 (Iowa Ct. App. 2017); *Rivera v. Woodward Res. Ctr*., 865 N.W.2d 887, 902 (Iowa 2015.) However, the scope of review does not apply if the allegation of error to which it is directed was not preserved. If the allegation of error is not preserved, the allegation should not be reviewed.

C. Argument

At the jury instruction conference the parties discussed the fact that Defendant's requested verdict form combined fault and causation into single percentages of causal fault in the apportionment section of the verdict form but decoupled them into separate fault and causation questions in the questions section of the verdict form. (Transcript, Vol. VI, 86:9-24; APP. 52-53) It was determined that asking the jurors to combine and uncombine causation and fault in the two separate portions of the verdict form would tend to confuse the jurors.

The trial court was required to avoid giving instructions that had a propensity to confuse the jury. *Rivera*, *supra*, 865 N.W.2d at 902, *citing McElroy v. State*, 637 N.W.2d 488, 500 (Iowa 2001.) Therefore, it was decided that the verdict form would present causal fault as a single percentage in the apportionment section and in a single question directed to each party in the questions section. Consistent with this decision, wherever causal fault was the subject of an instruction elsewhere in the jury instruction set, the instruction referred to "fault" as opposed to "negligence." (APP. 272-274, 282) In this way, each instruction where causal fault is the subject used the same terminology as the verdict form. (APP. 292-293)

The trial court and both parties agreed with this solution, neither party objected to it, and Defendant explained it to the jury in its closing argument.

Defendant showed the jury how to find in Defendant's favor using the verdict form. (Transcript, Vol. VII, 34:12-22, 57:18-58:4.)

Defendant did not object to the trial court's verdict form until its motion for new trial. (APP. 298-1188, 1279-1303) In its motion for new trial and on appeal, Defendant contends that by using the verdict form it did, the trial court did not submit the question of Defendant's fault to the jury. According to Defendant, "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," and "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." Defendant's Proof Brief, pp. 20 and 29 (emphasis in original.)

What Defendant would have the Court overlook is that before the jurors could determine each party's causal fault to fill out the verdict form, answer the causal fault questions directed to each party, and enter each party's single percentage of causal fault, the jurors had to determine whether each party was at fault. Defendant would have the Court review only the verdict form and ignore the balance of the instructions where the jury was instructed clearly that they could not find for Plaintiff unless they found Defendant at fault.

The jury instructions are to be read as a whole, and it is assumed that the jury did so, especially when the very first instruction informed them, "You ***must*** consider all the instructions together because no one instruction contains all the applicable law." (APP. 263, emphasis added.) Instruction No. 9 made clear that Plaintiff must prove Defendant was negligent to recover, and further, that it was Plaintiff's burden of proof to do so. (APP. 271) It is presumed that the jurors followed these instructions. *Whitlow*, *supra*, 935 N.W.2d at 571, *quoting Auto. Underwriters Corp. v. Harrelson*, 409 N.W.2d 688, 691 (Iowa 1987.) Moreover, both Plaintiff and Defendant made abundantly clear in their closing arguments that Plaintiff had to prove Defendant's negligence and that Plaintiff had to meet his burden of proof to do so. (Transcript, Vol. VII, 5:21-25, 9:18-23, 32:8-20, 57:4-8.)

The idea that the verdict form somehow overrode all the other instructions and directed the jury to find Defendant at fault or required the jury to assume fault on the part of Defendant is refuted when one looks at the jury's contributory negligence determination. The verdict form instructed the jury on Plaintiff's causal fault with the same question and apportionment language as it instructed the jury on Defendant's causal fault. The verdict form required the jury to have the same understanding in determining Plaintiff's causal fault as was required for the jury to determine

Defendant's causal fault. (APP. 292-293) If the language used by the verdict form for the jury's determination of Defendant's causal fault directed a finding of fault on the part of Defendant or required the jury to assume fault on the part of Defendant, then the same language used for the jury's determination of Plaintiff's causal fault would have required the jury to find or assume fault on the part of Plaintiff. But the jury did not read the language to require it to find and assume fault on the part of Plaintiff. This is clear because the jury did not find fault on the part of Plaintiff. The jury's answer to the causal fault question was "No." (APP. 292-293)

The jury demonstrated that it understood the jury instructions when it found no fault on the part of Plaintiff and apportioned to him 0% of the total causal fault among the parties. (APP. 292-293) Had the jury believed that the questions section of the verdict form directed them to find or assume fault on the part of the parties, then the jury would have found fault on the part of Plaintiff and Defendant. The fact that the jury did not find fault on the part of Plaintiff means that it did not read the causal fault questions as requiring or assuming findings of fault as Defendant contends.

Defendant's requested verdict form also was erroneous as a matter of federal substantive law. It directly contradicted the directive of 45 U.S.C. § 53 that "the fact that the employee may have been guilty of contributory

negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee…" Emphasis added.

The verdict form Defendant requested told the jury that Plaintiff's contributory negligence would bar his recovery if it exceeded 50%. (APP. 52-53) It then instructed the jury that if it found Plaintiff to be greater than 50% at fault, it should not determine Plaintiff's damages. (*Id*.) In other words, in direct contravention of 45 U.S.C. § 53, Defendant's requested verdict form told the jury that if it found Plaintiff more than 50% at fault, it should bar Plaintiff's recovery and not proceed to determine Plaintiff's damages. The verdict form Defendant requested told the jury that if it found Plaintiff to be greater than 50% at fault, it should stop and not make the findings of fact necessary for Plaintiff's damages to be diminished "in proportion to the amount of negligence attributable to such employee." 45 U.S.C. § 53.

Had the trial court submitted the verdict form requested by Defendant, and if the jury had found Plaintiff to have been contributorily negligent in an amount between 50% and 100%, Plaintiff would have been entitled under 45 U.S.C. § 53 for his damages to be reduced by the amount of contributory negligence and for the remaining proportion of damages to be awarded in

the jury's verdict. The verdict form Defendant requested, however, would have prevented the jury from awarding these damages. To bring Defendant's requested verdict form into accord with the applicable, substantive law, the trial court removed the language that told the jury that Plaintiff could not recover if he was more than 50% at fault, and the trial court removed the language that told the jury not to proceed to determine Plaintiff's damages if it found Plaintiff to be greater than 50% at fault.

Plaintiff respectfully submits that the trial court did not err in rejecting Defendant's verdict form as it was drafted. The trial court did not err in drafting the verdict form to submit the single question of each party's causal fault in the questions section as it submitted the single question of each party's proportion of the causal fault with single percentages in the apportionment section. It would have been error for the trial court to have submitted Defendant's verdict form to the jury and Point I of Defendant's proof brief should be denied.

II. THE TRIAL COURT PROPERLY SUBMITTED PLAINTIFF'S CLAIMS THAT PLAINTIFF HAD PREVIOUSLY ALLEGED IN PLEADINGS AND IN DISCOVERY

A. Preservation for Review

Plaintiff agrees that Defendant preserved for review the allegation of error presented under this point of Defendant's proof brief.

B. Scope of Review

Plaintiff agrees with Defendant's statement of the scope of review as set out in the authorities Defendant cites. *Wolbers v. The Finley Hosp*., 673 N.W.2d 728 (Iowa 2003); *Dopheide v. Schoeppner*, 163 N.W.2d 360 (Iowa 1968); *Carter v. Wise Corp*., 360 N.W.2d 122 (Iowa Ct. App. 1984.)

C. Argument

Defendant's second point on appeal is that Plaintiff failed to disclose theories that Defendant failed to properly train Plaintiff and his co-workers, other than Mr. Rutledge, who were working with Plaintiff at the time of the incident. Defendant writes, "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." Defendant's Proof Brief, p. 38 (emphasis added.) "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." Id., p. 45 (emphasis added.) Defendant's contention is that Plaintiff somehow failed to refer to these theories prior to trial even though, "Plaintiff's primary

theory of liability against BNSF…was a lack of training on the part of [sic] Plaintiff and all the crew members." Id., pp. 40-41.

Plaintiff respectfully submits that not only is it implausible that Plaintiff could or would conceal his primary theory of liability from Defendant for the whole course of the case until trial, it also simply did not happen. From the time the Complaint was served, Defendant was on notice that Plaintiff intended to prove that the railroad failed to provide Plaintiff a reasonably safe place to work because it failed to reasonably train its employees, including Plaintiff and Mr. Rutledge, how to work around the dangers of the boom system. Paragraph 13 h, i, and j of Plaintiff's Complaint stated these theories:

> Plaintiff's injuries were directly caused, in whole or in part, by the negligence of BNSF, including in the following respects, to-wit:…
>
> h. Failed to reasonably train, educate, and instruct the person who was operating the subject 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…
>
> i. Failed to draft, promulgate, follow, and enforce reasonable rules, customs, practices, policies, and procedures **to…*protect employees*** against the foregoing acts and omissions…
>
> j. Failed to reasonably ***train, educate, and instruct its officers, agents, and employees*** in reasonable rules,

> customs, practices, policies, and procedures ***to…protect employees*** against the foregoing acts and omissions…

Emphasis added. These allegations of negligence encompassed that Mr. Rutledge should have been properly trained to operate the boom, he should have been trained to protect the employees on the bridge from his operation of the boom, and the employees assigned to work with him on the bridge, including Plaintiff, should have been trained in how to protect themselves and each other from Mr. Rutledge's operation of the boom.

Before and at trial, Defendant demonstrated that it was precisely aware of Plaintiff's claims. At page 9 of Defendant's Trial Brief, Defendant specifically wrote: "It is BNSF's position that it…provided sufficient training to its employees…" Then, in *voir dire*, Defendant questioned the venire-persons on the issues Defendant intended to present at trial regarding employee training. It asked the members of the venire whether they agreed that employees must follow their training and safety instructions. (Transcript, Vol. I, 118:14-127:14.) It explored what members of the venire thought about their own duties to follow safety rules in their jobs, and Defendant asked them whether they considered following their employer's safety rules to be taking care of themselves. (Transcript, Vol. I, 121:17-21.)

In its opening statement, Defendant stated that it intended to prove that it trained its workers how to do their jobs safely and to follow Defendant's rules. (Transcript, Vol. II, 53:17-23, 54:3-12 ("That's what we think this case was about"), 58:13-17.) Defendant told the jurors that it intended to prove that it provided Plaintiff a reasonably safe place to work because it had provided its employees training and direction, and that Defendant had a right to expect that "our people," including Plaintiff, who were trained to follow safety rules would do so. (Transcript, Vol. II, 56:5-13.) Defendant specifically and precisely told the jurors, "So the issues for the jury are going to end up being whether an employee at a job site, whether they were trained properly by BNSF, and whether or not – whether they knew and understood how to conduct themselves in a reasonably safe manner." (Transcript, Vol. II, 56:25-57:4.)

At trial, Defendant then presented the evidence it had prepared to show that it had properly trained its employees, including Plaintiff. (Transcript, Vol. V, 145:3-9; Vol. VI, 25:5-26:10; Vol. VII, 47:6-48:17; APP. 142-150) Defendant argued in closing argument that it had provided a reasonably safe place to work because it had properly trained its employees, including Plaintiff. (Transcript, Vol. VII, 31:16-22; APP. 160 and 164)

Defendant expressly stated that it was "right on" in anticipating Plaintiff's trial claims. (Transcript, Vol. VII, 31:16-32:7,)

Outside the record available to the Court in this appeal, Defendant repeatedly claims that nowhere in the discovery exchanged during litigation was there any indication that Plaintiff claimed Defendant failed to adequately train Plaintiff and Defendant's other employees. Defendant makes this assertion of fact in the body of its Point II, it makes this assertion in its Conclusion at page 60 of its proof brief, and it makes this assertion or alludes to it seven times at pages 37, 38, 39, 40, 44, and 45 of its proof brief. Defendant makes this claim but 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. (*See* Defendant's/Appellant's Designation of Appendix.) Were Defendant to provide the Court that discovery, the Court would see that in response to interrogatories and requests for production of documents specifically directed to the theories set out in Plaintiff's Complaint regarding training of Plaintiff and co-employees, Defendant provided responses contending that it had properly trained these people, explained what that training consisted of, and produced training materials it claimed substantiated this training. (APP. 13-16)

Plaintiff respectfully submits that the proof is overwhelming that Defendant was aware of the theories that it claims it was not aware of, including during through discovery, and Defendant's Point II should be denied.

III. PLAINTIFF'S COUNSEL DID NOT EMPLOY GOLDEN RULE AND REPTILE THEORY ARGUMENTS, DISPARAGE COUNSEL FOR BNSF, PRESENT IMPROPER REBUTTAL, OR CRITICIZE JURY INSTRUCTIONS IMPLYING THAT THEY NEED NOT BE FOLLOWED, AND THEREFORE, DID NOT CAUSE PREJUDICE TO BNSF

A. Failure to Preserve for Review

Point III of Defendant's Proof Brief presents five allegations of error directed toward Plaintiff's rebuttal closing argument: 1) Plaintiff disparaged Defendant's counsel. 2) The rebuttal closing made improper Golden Rule / Reptile Theory arguments. 3) Plaintiff argued for jury nullification of Instruction No. 22. 4) The rebuttal closing argument was duplicative of Plaintiff's closing argument and beyond the scope of Defendant's closing argument. 5) The foregoing four improper arguments together constituted one improper argument that was unified by a common, improper theme.

In Point III A of Defendant's Proof Brief, Preservation for Review, Defendant neither alleges nor shows that Defendant objected at trial on any of these grounds. Defendant writes only, "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 the Motion for New Trial." Defendant's Proof Brief, p. 46. However, a motion for new trial and timely notice of appeal does not preserve error for appellate review. *Top of Iowa Coop. v. Sime Farms, Inc*., 608 N.W.2d 454, 470 (Iowa 2000); *Oakes v. Peter Pan Bakers, Inc*., 138 N.W.2d 93, 99 (Iowa 1965); *Manning v. Burlington, C. R. & N. R. Co.*, 20 N.W. 169 (Iowa 1884.) Therefore, Defendant fails to show that it preserved these five allegations of error for review.

At pages 58 and 59 of its proof brief, Defendant appears to argue that if the Court finds that Defendant's fifth allegation of error is correct, that is, that the four alleged improper arguments together constituted one unified whole under one, improper theme, then the contemporaneous objection is not necessary under the authority of *Bronner v. Reicks Farms, Inc*., 919 N.W.2d 766, 2018 Iowa App. LEXIS 541 (Iowa Ct. App. 2018.)

There are two problems with this argument. First, the exception *Bronner* made to the rule requiring contemporaneous objection only applies when new trial is granted. In footnote 4 at page *16, *Bronner* explicitly follows and quotes *Loehr v. Mettille*, 806 N.W.2d 270, 279 (Iowa 2011) stating that there is no exception to the contemporaneous objection rule when new trial is denied. In footnote 4, *Bronner* explains that exception was

made to the rule in that case because "here, the motion for new trial was granted." In the case before this Court, new trial was ***not*** granted. It was denied. Therefore, in this case, there can be no one, unified whole improper rebuttal closing argument exception to the rule requiring contemporaneous objection.

The other problem with Defendant's argument is that the four alleged errors are separate and distinct. They do not constitute one, unified, improper whole. They have nothing in common other than Defendant's contention that each was improper, and even then, Defendant contends that each was improper for a different reason.

While the foregoing is true, in the body of the Argument section of Point III of Defendant's Proof Brief, at page 54, Defendant correctly states that "BNSF objected regarding the repetitive nature, but the trial court overruled the same." Plaintiff agrees, and therefore, states that this allegation of error is preserved, but the other allegations of error in Defendant's Point III are not preserved.

B. Scope of Review

Plaintiff agrees with Defendant's statement of the scope of review as set out in the authorities Defendant cites. *Oldsen v. Jarvis*, 159 N.W.2d 431 (Iowa 1968); *Loehr*, *supra*, 806 N.W.2d 270; *Mays v. C. Mac. Chambers*

Co., 490 N.W.2d 800 (Iowa 1992); Iowa R. Civ. P. 1.1004(2.) However, the scope of review does not apply if the allegation of error to which it is directed was not preserved. If the allegation of error is not preserved, the allegation should not be reviewed.

C. Argument

Alleged Disparagement of Counsel

Defendant's closing argument continued and brought to its climax a theme Defendant sustained throughout the course of the case. The theme disparaged the administration of justice and lawyers. Presumably, the intended effect was to dishearten the jury and thereby produce a mean result grounded in something other than law, facts, and reason.

Throughout the case, counsel for both parties made references to themselves, each other, and the administration of justice. (Transcript, Vol. I, 48:11-49:5, 87:20-22, 110:23-111:14, 145:10-17; Vol. II, 10:16-20, 212:1-4; Vol. VII, 28:24-29:5.) Whenever Plaintiff referred to the administration of justice and lawyers, he did so in a way to promote the jurors' confidence in the integrity of the judicial system and lawyers. In *voir dire*, when Plaintiff's counsel explained that his grandfather hated lawyers but ended up with three as grandchildren, he explained:

> But in all honesty, that's not what you have here. These are good and honest lawyers. We're going to be as open and honest

> as we can about everything in this trial. And I want to make sure that anybody here doesn't come in this trial thinking just because these people, Mr. Olson and BNSF, are represented by attorneys, there's something wrong with that.

(Transcript, Vol. I, 88:3-9.)

In opening statement, referring to Gerry Spence's analogy, Plaintiff told the jurors that Plaintiff would help guide the jurors through the woods, and then Defendant would help guide them through the woods. (Transcript, Vol. II, 5:24-6:21.) Plaintiff explained that the jurors embody the truth. (Transcript, Vol. II, 7:18-8:25.)[2] He explained that the judge embodies the law. (*Id.*) He explained that these are the reasons why we all stand when the judge and the jurors enter the room. (*Id*.) He explained that we lawyers are charged by our oaths to demean ourselves before the administration of justice out of respect and acknowledgement of its importance. (*Id*.) He explained that lawyers do their best to show the jury what they found in their preparation of the case. (*Id*.) Plaintiff made clear that whenever Plaintiff disagreed with Defendant, Plaintiff was not "throwing stones." (Transcript, Vol. II, 24:22-25:4.) He explained that he has the highest respect for Defendant's counsel and its defense team. (*Id*.)

[2] In closing argument, he explained that their job is so important that it is the only thing we, as a people, draft each other to do. (Transcript, Vol. VII, 70:8-19.)

Defendant, on the other hand, consistently disparaged the administration of justice and lawyers. 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…" (Transcript, Vol. I, 143:6-11.) In its opening statement, when discussing the restrictions that Plaintiff's health care providers placed upon him, Defendant insinuated that those restrictions were not the result of Plaintiff's injuries, but rather, they were something Plaintiff's lawyers created for purposes of the litigation. "He wasn't given any restrictions to walking on ballast at that time. That was later. Of course, he got attorneys involved." (Transcript, Vol. II, 81:7-15.) This comment foreshadowed that, in the examination of Dr. Gaines, Defendant would suggest that there was something improper in Plaintiff's counsel providing Dr. Gaines, his own medical expert, copies of the medical records in the case, and further, that it was Plaintiff's counsel who ordered the FCE that, in fact, Dr. Nwosa had ordered. (Transcript, Vol. III, 21:7-9, 23:8-24; Vol. IV, 172:21-173:1.)

In closing argument, Defendant further concentrated its attacks on the administration of justice and lawyers. Defendant told the jury that Plaintiff's claims regarding Mr. Rutledge's training were suspect because they were being brought "now, through the attorneys." (Transcript, Vol. VII, 31:23-

32:2.) Defendant stated that Mr. Rutledge should be known for how others viewed him, not how the lawyers viewed him, suggesting that Plaintiff had personally disparaged Mr. Rutledge when the record shows that this did not happen. (Transcript, Vol. VII, 33:16-18.) Defendant contended that the fact Mr. Nielsen previously had been represented by Plaintiff's counsel should be a strike against his credibility. (Transcript, Vol. VII, 42:1-6.) Defendant argued that Mr. Kuzee's testimony about how Plaintiff was injured should be given heightened credibility because he arrived at his conclusion, "Before any attorneys or lawsuit…," even though the record showed that Defendant's claims agent began his work in anticipation of litigation on the day of the incident and in coordination with Mr. Kuzee. (APP. 230; Transcript, Vol. VII, 53:10-17.) Defendant argued that Plaintiff would get better after the lawsuit because this is what happens in "many cases." (Transcript, Vol. VII, 63:21-64:2.)

All of Defendant's disparagement of the administration of justice and lawyers was in support of the main point of Defendant's closing argument: What lawyers like Plaintiff's counsel say is not important. What is important is what the testimony of the witnesses was, as recorded in the trial transcript, and Defendant is the exclusive bearer of that truth. (*See e.g.,* Transcript, Vol. VII, 41:6-12.)

To represent to the jury that it was Defendant who was showing them the truth of what was said in the trial transcript, not Plaintiff, Defendant created a 104-page PowerPoint presentation comprised of slides on which Defendant reproduced excerpts from the Uncertified Rough Transcript (the "dailies"). Defendant, however, did this in violation of the trial court's directive that the dailies could not be used at trial for any purpose. Every evening after trial when the parties received their copies of the dailies, the cover page admonished them that "This realtime computerized transcript… ***may not be quoted in any pleadings or for any other purpose***, may not be filed with any court and may not be distributed to any other party." (Dailies cover page, emphasis added.) As the trial court explained after closing argument, this directive was an order from the trial court. (Transcript, Vol. VII, 112:17-113:9.)

It is reasonable to infer that Defendant calculated that Plaintiff would comply with this order, not prepare to display the dailies to the jury, and therefore not be able to counter Defendant's argument that the jury should only listen to the party that showed it the actual transcript of what the witnesses said at trial. If this was Defendant's calculation, it was correct.

Plaintiff prepared his closing argument in compliance with the trial court's order that the dailies "may not be quoted in any pleadings or for any

other purpose, may not be filed with any court and may not be distributed to any other party." He did not prepare to display the dailies to the jury during closing argument, and the record shows that he did not display daily trial transcript excerpts to the jury during closing argument. When Defendant began displaying dailies to the jury, Plaintiff objected on the grounds of the trial courts' order. (Transcript, Vol. VII, 36:6-9, 111:12-112:15.) The trial court, however, overruled the objection. (Transcript, Vol. VII, 36:9-10.) The trial court later stated that this ruling was a mistake, but it was after the damage was done. (Transcript, Vol. VII, 112:17-113:9.) Because the trial court did not realize the mistake until after closing arguments, Defendant was free to use the daily transcript excerpts it had prepared to disparage Plaintiff's arguments as the product of lawyers who should not be trusted in our litigation system.

In his rebuttal closing argument, Plaintiff responded to the theme and purported substance of Defendant's closing argument. With regard to the theme, Plaintiff explained that the administration of justice does not allow lawyers to do the things Defendant accused lawyers of doing. Lawyers do not seek to change the truth in litigation. Their responsibility is to make sure they present a true and just case. (Transcript, Vol. VII, 70:20-71:6, 72:9-17.) They not only have to be truthful, they have to be candid. (Transcript, Vol.

VII, 74:19-75:8.) This means that they cannot say things merely because they can. (*Id.*) They cannot plausibly deny what they know to be true, as Defendant suggested when it argued that lawyers in this case attempted to change the truth in the litigation. (*Id.*)

Plaintiff explained candor is important to the administration of justice because of the nature of how human beings receive information. Human beings cannot block out bad information and receive in their minds only good information. They cannot protect themselves against the "garbage in / garbage out" problem. Plaintiff demonstrated the point with an illustration. Plaintiff explained that because the bad and the good information come into a person's mind the same, a person has to use their reason to distinguish between the two. (Transcript, Vol. VII, 72:20-74:18.)

Plaintiff explained that he wanted to be very careful to make clear that he was not insinuating that Defendant had taken advantage of the fact of how humans receive information. (Transcript, Vol. VII, 75:9-11.) He explained how hard it is to be clear that one is not making such an insinuation because of how our language requires him to refer to Defendant's counsel when referring to Defendant's counsel's arguments. (Transcript, Vol. VII, 76:10-23.) He explained that there were a number of reasons why he would not attribute anything disparaging to Defendant's

counsel. First, because he did not believe there was anything disparaging to attribute to Defendant's counsel. (Transcript, Vol. VII, 75:11-14.) Secondly, because to do so would be a distraction. It would be a distraction from what the jury needed to focus upon to do its work. It would be a distraction from the law, facts, and reason. (Transcript, Vol. VII, 75:16-76:1.)

It would have been wholly illogical for Plaintiff to have disparaged Defendant's counsel in rebuttal to Defendant's counsel's theme disparaging the administration of justice and lawyers. Disparaging Defendant's counsel would have demonstrated the very demeaning of the administration of justice and lawyers that would only serve to prove Defendant's theme valid. Plaintiff's intention was to rebut, not prove Defendant's theme.

Disparaging Defendant's counsel also would have gone against Plaintiff's most fundamental beliefs about how cases should be tried. The record reflects Plaintiff's counsel's belief that a lawyer should try a case "happy." "As you can see, I like to try cases happy. I think that's the only way you win a case. Werner Herzog said, 'The truth has an ecstatic quality.' If you just stand there trying to tell the truth, this should be fun. We're awfully privileged to do it. This should be a joy to be in the courtroom. Every day we are in the courtroom. We're licensed to do so, and we should be awfully glad we have that." (Transcript, Vol. V, 74:24-75:6.)

In its Ruling on Motion for New Trial, the trial court addressed only one of the purposes of the subject portions of Plaintiff's closing rebuttal; that the administration of justice's method of information processing, exemplified by its insistence upon candor, is an exemplar for assessing the validity of Mr. Kuzee's investigation. The trial court found there was too much time between the mention of the administration of justice's standard and its application to Mr. Kuzee's investigation such that the jury could have made a connection connecting the argument to Defendant's counsel and not Mr. Kuzee. "It was not until later that he discussed plausible deniability in the context of Mr. Kuzee and his incident description. However, he did say he wanted to be 'exceptionally careful' about telling the jury that he was 'not saying anything personal about Mr. Haws or any of the defense attorneys.'" (APP. 1299-1300)

Plaintiff respectfully submits that because the trial court was unaware at the time it heard the arguments that Defendant had violated its orders regarding use of the daily transcripts, the trial court did not fully appreciate the argument Defendant was making with them. The trial court did not realize that Defendant had put Plaintiff in a position of rebutting Defendant's claim that it was the only party bringing the truth of the testimony into the courtroom by showing the actual, daily transcript of the witnesses' testimony

and that Plaintiff's arguments should be disregarded as lawyering. The trial court, therefore, did not appreciate the relevance of Plaintiff's argument in support of the administration of justice and lawyers, namely, that the justice system and lawyers in it do not just say what they can. Their standard is candor whether they display daily transcript excerpts to the jury (as Defendant did) or not (as Plaintiff did not). This is the argument that was made in the interim between the reference to the administration of justice and its application to Mr. Kuzee's Incident Description.

While it is rather embarrassing for Plaintiff's counsel, a reading of the trial transcript reveals another probable reason why the trial court did not quite understand Plaintiff's rebuttal argument. Plaintiff's counsel was "rusty." A better ordered, more well thought out, and better prepared response to Defendant's use of the daily transcript would have presented the points Plaintiff made more clearly, but the record directly reflects that Plaintiff's counsel was a bit "rusty." "Oh, forgive me. Okay. One more quick thing. Before I left for trial, my wife said, 'You haven't tried a case in a year-and-a-half. You're probably going to be rusty.' I'm said, 'Don't put that in my head. I don't feel rusty.' Here I look like Columbo up here. Don't tell her I said she was right." (Transcript, Vol. VII, 91:8-13.) 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. (Transcript, Vol. VII, 75:9-76:1)

Plaintiff's counsel regrets that he was so inarticulate that the trial court believed a connection could have been made between Plaintiff's point about candor and Defendant's counsel. Plaintiff respectfully submits that the record shows that Plaintiff did everything he could ***not*** to make this connection, and that it would have been illogical and counter-productive for him to have done so, especially in the context of the argument he was trying to rebut. Plaintiff respectfully submits that the trial court's ruling reflects that, at least to some extent, it appreciated these things when it found, "although the Court 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 those statements." (APP. 1300) Plaintiff respectfully submits that the trial courts finding in this regard should be sustained and Point III of Defendant's Proof Brief denied.

Alleged Golden Rule and Reptile Arguments

At pages 47 through 50 of Defendant's Proof Brief, Defendant takes a single, fourteen-line section from the trial transcript of Plaintiff's rebuttal

closing and contends that these fourteen lines of argument constituted "reptile theory and golden rule arguments." Defendant's Proof Brief, pp. 47-48. Defendant claims that in these fourteen lines Plaintiff asked "the jury to step into Plaintiff's shoes or make determinations based on personal or community safety." *Id.*

> 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.)

While it is well established what Golden Rule arguments are, neither in Defendant's motion in limine, at the hearing on the motion in limine, at trial, nor in its proof brief has Defendant explained what it means by a "Reptile Argument." *See* Defendant's Proof Brief, pp. 47-50 (absence of explanation of what "reptile theory" is.) (See APP. 106-125.) The arguments in Defendant's Proof Brief, applied to the portion of the trial transcript to which they are directed, indicate that Defendant treats Golden Rule

arguments and Reptile Arguments as synonymous in the context of this appeal.

With the fourteen-line portion of the trial transcript at issue, Defendant seizes upon a slip of the tongue wherein Plaintiff said "think if you were working" and then immediately corrected himself, "not you." The correction clearly was sufficient because Defendant did not object to it. If, in fact, this slip of the tongue was as horribly wrong and profoundly prejudicial as Defendant argues, then Plaintiff respectfully submits that Defendant would have objected at the time. However, Defendant did not object at the time, and Defendant did not even object after closing arguments when Defendant was given time to state all the grounds for the objections Defendant did make. (Transcript, Vol. VII, 110:4-25, 113:10-12.)

Nowhere in the rebuttal argument does Plaintiff ask the jurors to put themselves in the shoes of the employees for purposes of deciding the case based upon what result the jurors would want if they were those employees. Nor does Plaintiff suggest that the jurors should decide the case based upon taking care of the employee community, independently or as an extension of the jurors' community. This portion of rebuttal closing was directed specifically and precisely to rebutting Defendant's contention that Mr. Kuzee's investigation should be believed, and that the jury should adopt the

conclusions of his investigation as its own, because that investigation and the Incident Description it produced were important for training employees. (Transcript, Vol. V, 106:23-107:1, 107:10-17.) Defendant claimed their importance as a training vehicle make them "matters of life and death" for the employees. (Transcript, Vol. V, 140:13-141:9.)

In this part of Plaintiff's rebuttal closing, Plaintiff was showing that it is demonstrably untrue that the Incident Description was created for the alleged "life and death" purpose of training employees. This is proven if one imagines employees going to work on a bridge today with the findings of that Incident Description in their minds. Because of all the things Mr. Kuzee did not take into account in his investigation, because of all the things relevant to the cause of the incident that were not addressed in his investigation and in the Incident Description, and because the conclusion of the Incident Description that Plaintiff stuck the rail under pressure is a physical impossibility, employees would not know what really happened to cause the incident. They would not have the "life and death" information they need because the Incident Description clearly and provably does not provide it.

That this was the meaning of the fourteen lines to which Defendant directs its allegation of error is clear when these lines are read in context.

This is made clear in the nineteen lines that precede the fourteen to which Defendant's allegation of error is directed:

> Talk about plausible deniability and being candid, if somebody really wanted to investigate something and you're talking to that claims agent, and your purpose isn't to support what the claims agent is doing, your purpose is to know what's happening so you can produce this thing that is a matter of life and death for other employees. That's really what you're doing?
>
> Then you ask the claims agent, what did those men say in their statements? There's witnesses on that diagram all crowded around the bridge, who were right there. Mr. Haws told you, they could see everything that was going on. Don't you ask them what did they have to say? Mr. Kuzee said he didn't.
>
> More than that, if you're really drafting something that is a life or death thing, don't you say I want to see the statements? I want to see what they have to say. He didn't do that.
>
> His purpose wasn't to get out something telling you what the truth is. His purpose was to get out something that worked for him and worked for the railroad.

(Transcript, Vol. VII, 103:10-104:4.)

Because the argument at issue was in direct rebuttal to Defendant's stated grounds for the validity and reliability of the Incident Description, and because of the foundational role the Incident Description played in Defendant's defense and in Defendant's contributory negligence accusations, it would have been prejudicial error for the trial court not to have allowed Plaintiff to show that the grounds Defendant asserted for the validity and reliability of the Incident Description were not true. It would have been

prejudicial error if the trial court had instructed Plaintiff that he could not point out that the Incident Description clearly and obviously does not serve the purpose Defendant alleges for its employees.

Plaintiff respectfully submits that had Defendant objected to the ***substance*** of this portion of Plaintiff's rebuttal closing argument on the grounds Defendant asserts on appeal, the objection properly would have been overruled. It is reasonable to infer that the direct relevance of this closing rebuttal argument to the central ***substance*** of Defendant's closing argument based on the Incident Description is why it either did not occur to Defendant to object, or, if it did occur to Defendant to object, Defendant believed its objection properly would be overruled.

Had Defendant objected to Plaintiff's slip of the tongue, "you…-- not you," on the grounds that it suggested a Golden Rule argument, even though that was not the substance of the argument, and if the trial court had sustained that objection, any problem could have been cured at the time. Plaintiff could have clarified that this was a slip of the tongue, Plaintiff did not mean to suggest that the jurors should put themselves in the shoes of the employees and decide the case based upon the result they would want if they were employees. If that would call too much attention to the word, the trial court could have given a curative instruction. If Defendant thought even

more was necessary, which it would not have been, Defendant could have requested an opportunity to reply as is specifically provided for under Iowa R. Civ. P. 1.923. Defendant had abundant remedies available at trial to cure any perceived or actual problem with Plaintiff's "you…-- not you" slip of the tongue. Because Defendant did not object at trial, however, the new trial Defendant seeks in this appeal is not an available remedy, as it properly should not be.

Plaintiff respectfully submits that Point III of Defendant's Proof Brief should be denied.

Allegation of Argument to Nullify Instruction No. 22

From the time its claims agent went to the scene on the date of the incident and worked with Mr. Kuzee to develop the theory, Defendant's core defense in the case has been that Plaintiff struck the rail under pressure. Defendant maintained this defense despite the fact that no employee who was at the bridge at the time of the incident said that this happened. (Transcript, Vol. II, 177:8-24, 200:18-23; Vol. III, 66:18-25; Vol. V, 53:5-17.) Plaintiff testified that he did not do this, and Mr. Nielsen testified that Plaintiff did not do this. Moreover, and most importantly, it was a physical impossibility for Plaintiff to have done this and not been differently and more severely injured or killed.

With numerous eyewitnesses to the event and none of them saying that the event involved Plaintiff striking the rail under pressure, and with it being a physical impossibility for Plaintiff to have done this, Defendant resorted to saying that Mr. Nielsen said that Plaintiff did this. The only two witnesses Defendant presented at trial were Mr. Kuzee and his boss, Division Engineer Adam Moe. As the very last witness of the case, Mr. Moe testified that Mr. Nielsen said Plaintiff struck the rail under pressure. (Transcript, Vol. VI, 49:21-50:8.)

Based upon this testimony, the trial court gave Instruction No. 22 which states, "You have heard evidence claiming Wayne Nielsen made statements before this trial while not under oath which were inconsistent with what the witness said in this trial." As Defendant's counsel argued to the jury his belief that the itemization of damages in the verdict form improperly duplicated damages, in rebuttal closing argument Plaintiff's counsel stated his belief that the standard for giving Instruction No. 22 was too low. (Transcript, Vol. VII, 66:1-3, 77:10-79:8.) Consistent with the way counsel for both sides, throughout the case, explained the way the administration of justice works, and consistent with Plaintiff's efforts to show the integrity of the justice system, Plaintiff explained that the administration of justice provides ways for lawyers to help improve the

justice system when they believe it can be improved. He explained that the standard for giving this instruction is something that he intended to explore improving after trial. (Transcript, Vol. VII, 77:10-79:8.)

Plaintiff then explained that the jury instructions already reflect that the justice system is aware that the standard for giving Instruction No. 22 is low. This is why the justice system includes the counterbalancing provisions of Instruction No. 22 and other counterbalancing instructions that allow the jury to determine whether Mr. Nielsen truly said that Plaintiff struck the rail under pressure. Plaintiff directed the jury to Instruction No. 4 for this counterbalancing. (APP. 262-291)

Defendant did not object to this portion of Plaintiff's rebuttal closing argument. Defendant did not object and contend that Plaintiff's argument regarding Instruction No. 22 suggested that the jury should not follow the instruction. Defendant made no such objection because nowhere did Plaintiff ever tell the jurors or suggest that they should nullify Instruction No. 22 by disregarding it. To the contrary, Plaintiff showed them how Instruction No. 22 should be applied in context of the other instructions related to it. (Transcript, Vol. VII, 80:21-82:7.)

Plaintiff respectfully submits that this was a valid argument directly responsive to Defendant's arguments that relied upon the testimony of Mr.

Moe to prove that Plaintiff struck the rail under pressure. Because this was a valid argument in direct rebuttal to Defendant's closing argument, Defendant's Point III should be denied.

Allegation of Repetitive Arguments Beyond the Scope of Defendant's Closing Argument

At page 110, lines 11 through 23 of Volume VII of the Trial Transcript, Defendant objects to Plaintiff's rebuttal on the grounds that "it was repetitive…over 52 minutes…way beyond rebuttal matter…They talked about liability in their initial closing with Mr. Shumate, and then it was just expounded upon by Mr. Leach. I believe it was…beyond the scope of rebuttal…" The only thing Defendant writes regarding these objections is at pages 53 and 54 of its proof brief:

> 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 record the 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 II, pp. 5-28.) BNSF objected regarding the repetitive nature, but the trial court overruled the same. (Transcript, Vol. II, 105:9-13; 110:4-113:4.) The duplicative and repetitive nature of Plaintiff's rebuttal argument was also prejudicial to BNSF.

Defendant asks the Court to review Defendant's entire closing argument and to compare it to Plaintiff's rebuttal closing argument. Defendant asks the Court to determine for itself what subjects of Plaintiff's rebuttal closing argument were repetitive of Plaintiff's closing argument and not responsive to Defendant's closing argument.

Defendant does not tell the Court what those subjects are that it expects the Court to find. Nor does Defendant provide the Court the 104-page PowerPoint presentation containing numerous excerpts from the daily transcript that Defendant showed the jury. In rebuttal closing Plaintiff was responsible for responding to what Defendant showed the jury in those slides as well. (APP. 158-261)

Plaintiff respectfully submits that if the Court makes the comparison Defendant requests the Court to make, and if the Court compiles a list of subjects addressed in each party's closing and closing rebuttal arguments, and if the Court includes the 104-page PowerPoint Defendant showed the jury in its closing argument, the Court will see that Plaintiff's rebuttal closing was directly responsive to Defendant's closing argument and was not unduly repetitive. Defendant's Point III of its proof brief should be denied.[3]

[3] With regard to the length of Plaintiff's closing rebuttal argument, the Court will see that Defendant did not object until thirty-six pages into Plaintiff's

CONCLUSION

This was an exceptionally cleanly tried case. The trial court alluded to this when it stated on the record at the end of the trial, "With nothing more for the record, I do want to say thank you to the attorneys. Everyone in this proceeding was always very prepared, demonstrated a tremendous amount of professionalism and respect to the Court, and I do appreciate that. It was a pleasure working with all of you." (Transcript VII, 118:15-19.) Plaintiff submits that the trial court also alluded to this fact at page 23 of the Ruling on Motion for New Trial where it cited and quoted *Vaughan v. Must Inc*., 542 N.W. 2d 533, 543 (Iowa 1996), "In this case, although there was a plethora of testimony and evidence presented, the Defendant was able to present only three instances of alleged misconduct by Plaintiff's counsel." After over a week of trial, Defendant presents only three points on appeal, and of those only one point and one part of another present issues that were the subject of objection at trial.

In addition to being exceptionally cleanly tried, there was exceptional agreement among the parties at trial. Defendant conceded that Plaintiff was injured and that the injuries were serious. (APP. 247) Defendant did not

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thirty-nine page rebuttal closing, and Plaintiff then finished his rebuttal closing within three pages. Defendant's Proof Brief, p. 47.

substantially dispute that the injuries were caused by the incident. Defendant's Proof Brief, pp. 30 and 31. Defendant's and Plaintiff's medical and vocational experts agreed so substantially that Defendant did not call its medical and vocational experts. Defendant does not allege on appeal that there was insufficient evidence to support either the liability or the damages portions of the jury's verdict. The jury's verdict was unanimous. (APP. 292-293) It is highly unlikely that retrial would produce a more cleanly tried case or a different result.

For all of these reasons, as well as the arguments and authorities set forth in this final brief, Plaintiff respectfully requests the Court to deny Defendant's appeal and to sustain the trial court's judgment.

REQUEST FOR ORAL ARGUMENT

Plaintiff/Appellee respectfully requests that this matter be set for oral argument.

SCOTT OLSON,

Plaintiff/Appellee

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that on September 2, 2022, a copy of Plaintiff's/Appellee'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/ Christopher H. Leach
Attorney for Plaintiff / Appellee

CERTIFICATE OF COST

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

/s/ Christopher H. Leach
Attorney for Plaintiff/Appellee

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 13,009 words, excluding the parts of the Brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Christopher H. Leach
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