ELECTRONICALLY FILED FEB 14, 2023 CLERK OF SUPREME COURT

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-APPELLEE'S APPLICATION TO THE SUPREME COURT FOR FURTHER REVIEW OF JANUARY 25, 2023, COURT OF APPEALS' DECISION

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QUESTIONS PRESENTED FOR REVIEW

1. Through footnote 4 of *Whitlow*, did the Iowa Supreme Court announce an exception to the mandatory requirements of Iowa Rule of Civil Procedure 1.924 that nullifies the duty to object in civil and criminal cases?

2. Have the principles of jury instruction review that require the instructions to be read as a whole and that presume the jury followed the instructions been supplanted by a "very possibly could have misunderstood the instructions" standard?

3. Are Iowa trial courts no longer permitted to use general verdict forms and other verdict forms that reference combined case elements in general terms?

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I. Statement Supporting Further Review

A. Overview

This is a personal injury action involving a railroad.

Iowa R. Civ. P. 1.924 provides:

> Before jury arguments, the court shall give to each counsel a copy of its instructions in their final form, noting this fact of record and granting reasonable time for counsel to make objections, which shall be made and ruled on before arguments to the jury. ***Within such time, all objections to giving or failing to give any instruction must be made*** in writing or dictated into the record, out of the jury's presence, ***specifying the matter objected to and on what grounds***. ***No other grounds or objections shall be asserted thereafter, or considered on appeal***.

Iowa R. Civ. P. 1.924 (emphasis added).

In *Whitlow v. McConnaha*, 935 N.W.2d 565, 569 (Iowa 2019) the trial court erroneously directed the jury not to fill out the verdict form as to one defendant if it found in favor of another defendant. When the jury found in favor of the one defendant, the jury followed the trial court's erroneous directive and did not fill out the verdict form as to the other defendant, thereby failing to render a verdict as to that other defendant. *Id.,* 568-569. Without citing, discussing, or in any way referring to or mentioning Iowa R. Civ. P. 1.924, this Court wrote in footnote 4:

> We agree with the court of appeals and district court that Whitlow preserved error notwithstanding her failure to object to the erroneous verdict form. She had proposed the correct form, all

> counsel and the court overlooked the error in the verdict form proposed by McConnaha and submitted by the court, and Whitlow timely moved for a mistrial or new trial.

Whitlow, 935 N.W.2d at 569, fn. 4. Nowhere in this footnote or in the opinion did this Court state that it was announcing a three-part exception to Iowa R. Civ. P. 9.124 or an exception to the long and well-established duty to object.

After *Whitlow* and before the instant case, no party has attempted to avoid the duty to object by contending that *Whitlow* footnote 4 establishes a new, three-part exception to the duty. In this case, Defendant-Appellant BNSF Railway Company (BNSF) made this argument, and it persuaded the Court of Appeals that *Whitlow* footnote 4 establishes such an exception. The Court of Appeals found that BNSF had not waived its objection to the verdict form in this case despite the fact that 1) BNSF did not object to the verdict form at trial, and 2) the issue with the verdict form was not overlooked by the trial court and the parties at trial, and therefore, the second part of the posited, three-part *Whitlow* footnote 4 test was not satisfied.

As the special concurrence to the Court of Appeals' opinion correctly notes, "'(e)rror preservation is a fundamental principle of law with roots that extend to the basic constitutional function of appellate courts.' *State v. Harrington*, 893. N.W.2d 36, 42 (Iowa 2017). In Iowa, this requirement dates back to the founding and has been repeatedly and recently affirmed. See, e.g.,

State v. Rutledge, 600 N.W.2d 324, 325 (Iowa 1999); *Danforth, Davis & Co. v. Carter*, 1 Iowa 546, 553 (1855)." It would be highly unusual and unexpected for this Court to make a foundational change in the requirement of error preservation, a change that touches upon the basic constitutional function of appellate courts, without clearly announcing and explaining that it is doing so. It would be highly unusual for this Court to make such a change without explaining the effect of its ruling upon the law on point, including Iowa R. Civ. P. 1.924. Yet this is what the Iowa Court of Appeals presumes this Court did. It is what the special concurrence believes courts are required to presume this Court did absent further guidance from this Court. "Unless and until the supreme court revisits *Whitlow*, I am compelled under stare decisis to join the majority." *Olson v. BNSF Ry. Co.*, 2023 Iowa App. LEXIS, *12-*13, 2023 WL 386709 (Iowa App. 2023) (J. Buller, concurring specially).

The Court should revisit *Whitlow* because the way the Court of Appeals applies footnote 4 from the case conflicts with Iowa case law, the Iowa Constitution, and the Iowa Rules of Civil Procedure in so many respects that each of the grounds for further review set out in Iowa Rule of Appellate Procedure 6.1103(b) are met for numerous reasons. Below is an explanation of each of the grounds for further review, with citation to the cases, provisions

of the Iowa Constitution, and rules of civil procedure that are in irreconcilable conflict with the Court of Appeals' opinion.

B. Nullification of Iowa Rule of Civil Procedure 1.924

Iowa R. Civ. P. 1.024 is perfectly specific as to the time and procedure for preserving error directed to jury instructions: "Before jury arguments, … all objections to giving or failing to give any instruction must be made … specifying the matter objected to and on what grounds. No other grounds or objections shall be asserted thereafter, or considered on appeal." Beyond the subject of jury instruction, the duty to object at trial is equally clearly established in Iowa law. *See Olson,* 2023 Iowa App. LEXIS, at *8-*9 (J. Buller, concurring specially), *citing State v. Harrington*, 893 N.W.2d 36, 42 (Iowa 2017), *State v. Rutledge*, 600 N.W.2d 324, 325 (Iowa 1999), *and Danforth, Davis, & Co. v. Carter*, 1 Iowa 546, 553 (1855).

The exception urged by BNSF and adopted by the Court of Appeals will nullify this rule and the duty to object generally. In every case, the losing party will be able to contend that there was plain error at trial and that the plain error was not objected to because it was "overlooked." *Whitlow,* 935 N.W.2d at 569, fn. 4. It will be able to do so regardless of whether:

1. The alleged error was overlooked.

2. The party suffering the adverse verdict did not believe the subject ruling was error when it was made at trial.

3. The party suffering the adverse verdict still does not believe the subject ruling was error when it was made at trial, but it believes there is argument that it could be alleged to be error, and it is worth taking a chance on alleging the error on appeal in the hopes of securing new trial.

4. The party believed the ruling was erroneous at trial and made a strategic decision that the error benefited its case.

5. At trial, the party believed the ruling was erroneous and made a strategic decision to withhold objection so that later, if the verdict was adverse to the party, it would be able to claim reversible error and secure new trial.

Under such an exception, appeals will require scrutiny of the record, argument, and appellate fact finding to determine whether the issue truly was "overlooked," or whether there is another reason why objection was not made.

An exception to the duty to object that requires appellate fact finding to determine what a party's counsel did or did not know, was or was not thinking, or what counsel's strategy was or was not, works a fundamental change in appellate practice in this state.

C. "Sandbagging" Now Authorized

As the special concurrence explains, the Court of Appeals' opinion allows parties in Iowa courts to withhold objection at trial and secretly save it to use later as a get-out-of-jail-free card should the verdict be adverse to them. The Court of Appeals opinion creates "incentive … for future litigants to sit

silently, gamble on a favorable outcome, and take a relatively easy appeal if the verdict does not go their way". *Olson*, 2023 Iowa App. LEXIS at *10-*11 (J. Buller, concurring specially). For the first time in Iowa law, parties will be allowed to "sandbag." *Id*., at *10.

D. <u>Prohibitive Cost of Justice in Iowa Courts</u>

If *Whitlow* footnote 4 creates the exception that BNSF urges and the Court of Appeals has found, the exception will affect all Iowa citizens who seek and depend upon justice in the courts of Iowa. In civil cases, the result of the new plain error rule will be that Iowa citizens who spend all the time and money resources necessary to obtain justice will see that justice taken away, and those time and money resources wasted, due to alleged error that never was presented to the trial court or ruled upon when it could have been corrected. Iowa citizens, including those of little or no means to overcome such unnecessary waste of time and money resources, "must now bear the financial and emotional costs of appeal, retrial, and potentially still more appeals down the road." *Olson*, 2023 Iowa App. LEXIS at *11 (J. Buller, concurring specially).

With regard to "still more appeals down the road," the plain error rule and sandbagging that result in retrial after one trial also will be available to cause retrial of second and subsequent trials. Only Iowa citizens with sufficient

resources to withstand such a legal war of attrition will be able to obtain justice in Iowa courts.

E. Release of Properly Convicted Criminal Defendants

Iowa citizens have an interest in the effective administration of justice in their criminal courts. Iowa R. Civ. P. 1.924 applies to criminal cases. *State v. Fouts*, 2023 Iowa App. LEXIS 66, *2, 2023 WL 382296 (Iowa App. 2023). If *Whitlow* has created the exception to the rule the Court of Appeals has determined it does, this exception will apply in criminal courts where withholding objection is a literal get out-of-jail-free card.

Applied to criminal trials, the Court of Appeals' interpretation of *Whitlow* footnote 4 will result in criminal defendants withholding objection and then, upon conviction, obtaining reversal and release. Double jeopardy will operate to prevent those criminal defendants from ever being brought to justice. *Olson*, 2023 Iowa App. LEXIS at *11 (J. Buller, concurring specially). "This perverts notions of fair play and substantial justice even more than the outcome here." *Id.*

F. Implications for the Constitutional Authority of Iowa Appellate Courts

Abrogating the duty to object and establishing this new plain error rule, the Court of Appeals opinion not only overrules and reverses a long history of

well-established Iowa case law and nullifies Iowa R. Civ. P. 1.924, the special concurrence in this case explains that the exception also implicates the constitutional authority of the Iowa appellate courts.

> "Error preservation is a fundamental principle of law with roots that extend to the basic constitutional function of appellate courts." *State v. Harrington, 893 N.W.2d 36, 42 (Iowa 2017)*). In Iowa, this requirement dates back to the founding and has been repeatedly and recently reaffirmed. *See, e.g., State v. Rutledge, 600 N.W. 2d 324, 325 (Iowa 1999)*; *Danforth, Davis & Co. v. Carter, 1 Iowa 546, 553 (1855)*. Preserving error is likely constitutionally required. *See Iowa Const. art. V, § 4* ("The supreme court . . . shall constitute a court for the correction of errors at law . . . ."); *State v. Tidwell, 842 N.W.2d 680, 2013 WL 6405367, at *2 (Iowa Ct. App. 2013)* McDonald, J.) ("If a litigant fails to present an issue to the district court and obtain a ruling on the same, it cannot be said that we are correcting an error at law.").

Olson, 2023 Iowa App. LEXIS at *8-*9 (J. Buller, concurring specially).

G. <u>Court of Appeals' Revision of Supreme Court's Opinion in *Whitlow*</u>

In addition to interpreting *Whitlow* in a way that would create a direct and irreconcilable conflict between *Whitlow* and the foregoing authorities, the Court of Appeals' opinion directly conflicts with the very interpretation of *Whitlow* its opinion establishes.

The Court of Appeals holds that footnote 4 of *Whitlow* creates a three-part test that, if met, absolves a party of the duty to object at trial. The second of these three elements requires that "all counsel and the court overlooked the

error in the verdict form." *Whitlow*, 935 N.W.2d at 569, fn. 4; *Olson*, 2023 Iowa App. LEXIS at *3.

The alleged error in this case is that the trial court should not have combined "fault" and "causation" into "causal fault" in the special interrogatories on the verdict form. The Court of Appeals' opinion acknowledges that this issue was not overlooked at trial. The opinion acknowledges that this issue was discussed at the jury instruction conference. *Olson*, 2023 Iowa App. LEXIS at *2, fn. 2 ("The parties discussed 'fault' and 'causal fault' during the jury instruction conference…"). The appellate record is clear on this point. Attachment B (Transcript, Vol. VI, 86:10-24.)

At the jury instruction conference, Olson suggested that the term "negligence" should be used on the verdict form instead of "fault." Attachment B (Transcript, Vol. VI, 86:10-14.) BNSF opposed Olson, stating "That's not okay," and specifically arguing that "negligence" and "cause" should be combined into the term "fault" to conform to the apportionment section of the verdict form where the jury is directed to assign each party a percentage of "causal fault." BNSF expressly advocated for "the combination of negligence and cause" and that the instructions "use that terminology in order to get to the verdict form." *Id.* (Transcript, Vol. VI, 86:15-18.) Olson

then pointed out that the terms should not be combined and then uncombined. *Id.* (Transcript, Vol. VI, 86:22-24.)

The trial court drafted the verdict form to combine fault and causation into causal fault in one special interrogatory directed to each party. In this way, the special interrogatories tracked the apportionment section of the verdict form. One special interrogatory was directed to the causal fault of each party, and one line of percentage apportionment was directed to the apportioned causal fault of each party. *See* Attachment C (APP. 292-293, verdict form completed by jury).

The Court of Appeals' opinion and the appellate record show that the issue was not overlooked at the jury instruction conference. Therefore, if *Whitlow* establishes a three-part test for absolving a party of the duty to object, the Court of Appeals' opinion deletes the second element of that test and rewrites *Whitlow's* three-part test as a two-part test, something *Whitlow* neither did nor authorizes.

II. Brief

A. The Court of Appeals Erred in Finding that *Whitlow* Created an Exception to the Duty to Object that Applies Beyond the Unique and Extremely Rare Procedural Facts of that Case

In the absence of guidance from this Court as to how the result in *Whitlow* can be harmonized with the duty to object and Iowa R. Civ. P. 1.924, the Court

of Appeals majority grasped for a way to harmonize *Whitlow* for itself. It reasoned that "Whitlow did not make reference to the rule, presumably because the jury-instruction issue concerned an undisputed mistake on an accepted verdict form rather than a question of whether an instruction should or should not have been given." *Olson*, 2023 Iowa App. LEXIS at *4, fn. 3. The majority opinion, however, does not explain how or why these facts would bring the issue in *Whitlow* outside the scope of the rule. The majority cites no authority and offers no reason why verdict form error is not instructional error within the scope of the Iowa R. Civ. P. 1.924. The case law is clear that verdict forms are jury instructions within the scope of the rule. *See e.g., C2P Pigs, LLC v. Fedie,* 2022 Iowa App. LEXIS 564, *27, *33-*34, 2022 WL 2824742 (Iowa App. 2022).

For its part, the special concurrence candidly confesses, "I am not sure why *Whitlow* did not address the rule, but I see no easy way to square the footnote with the rule's plain text." *Olson*, 2023 Iowa App. LEXIS at *12 (J. Buller, concurring specially). The special concurrence then explains why the exception that the majority reads into *Whitlow* cannot be harmonized with the duty to object and Iowa R. Civ. P. 1.924. The special concurrence identifies numerous ways in which "bypassing the rule" will do foundational damage to the administration of justice. Id., at *8-*13.

The answer to the question how the result in *Whitlow* can be harmonized with the duty to object and Iowa R. Civ. P. 1.924 is found in *Whitlow* itself. It is found in the unique procedural facts of the case and in not attempting to extend *Whitlow* to cases that do not present those same, unique procedural facts. *Whitlow* is a case in which the trial court erroneously directed the jury not to return a verdict as to one defendant if it found in favor of the other defendant. *Whitlow*, 935 N.W.2d at 568. When the jury found in favor of the one defendant, it followed the trial court's direction and did not fill out the verdict form reporting any verdict as to the other defendant. Therefore, no verdict was rendered as to that defendant. *Id.*, at 566.

The allegation of error in *Whitlow* was not that the verdict was rendered in error, or that it very possibly might have been. The error in *Whitlow* was that there was no verdict at all as to one of the parties. "Whitlow argued the jury's failure to answer the question regarding Newton's fault was tantamount to a hung jury…" *Whitlow*, 935 N.W.2d at 569. The Court of Appeals correctly stated in its *Whitlow* opinion that "***Whitlow's objection on appeal is not to the faulty directions on the verdict form***, but rather to the incomplete and inconsistent nature of the verdict." *Whitlow v. McConnaha*, 928 N.W.2d 685, 2019 Iowa App. LEXIS 433, *8 (Iowa App. 2019) (emphasis added, hereinafter *Whitlow I*).

The objection that no verdict was rendered at all as to one of the parties is the objection that the Court of Appeals found preserved in *Whitlow* despite not having been made at trial. "Her post-verdict motion for mistrial or new trial preserved those claims." *Whitlow I,* 2019 Iowa App. LEXIS 433, at *8. This Supreme Court approved the Court of Appeal's finding. "We agree with the court of appeals and the district court that Whitlow preserved error notwithstanding her failure to object to the erroneous verdict form." *Whitlow*, 935 N.W.2d at 569, n. 4.

When a jury is discharged after not rendering a verdict, there is nothing that can be done other than to retry the case. Whether a party objected at trial or not, whether an allegation of error is considered preserved for appellate review or not, and whether the appellate court finds such an allegation of error meritorious or not, no appellate decision can create a verdict where none was rendered. Therefore, the only option for the trial court, the Court of Appeals, and this Court in *Whitlow* was to grant new trial, which is what each court did. *Whitlow*, 935 N.W.2d at 566 and 572; *Whitlow I*, 2019 Iowa App. LEXIS 433, at *6 and *14. In footnote 5, this Court admonished "counsel and trial courts to carefully scrutinize verdict forms before submission" so this would not happen again. *Whitlow*, 935 N.W.2d at 570, n. 5.

When the verdict form is not filled out as to one of the parties, and therefore, no verdict is rendered as to that party, not only is there no option but to order new trial, the question of error has no pertinence. The question of error is only pertinent if there is a verdict that a party claims was the result of error. If there is no verdict, there is no verdict that was or was not the result of error. There is no verdict that was or was not the result of error that was or was not objected to at the time of trial or that was or was not preserved for appellate review. When there is no verdict, the question of error and the question of error preservation have no meaning.

Because the jury did not fill out the verdict form in *Whitlow*, and therefore, because there was no verdict that could be the product of error, preserved or not, the *Whitlow* decision was not about error preservation. It was not about establishing a new exception to the duty to preserve error. It was about the fact that when there is no verdict, the question of error preservation is obviated.

This is why this Court did not announce in *Whitlow* that it was creating an exception to the duty to object. This is why the *Whitlow* opinion does not state that the facts of the case recited in footnote 4 of the opinion constitute a three-part test that establishes a new exception to the duty to object. This is why the *Whitlow* opinion neither cites, addresses, discusses, nor

acknowledges Iowa R. Civ, P. 1.924, and this is why *Whitlow* assigns no relevance to that rule. Neither the general duty to object nor the rule applied because there was no verdict that was or was not produced by error that should or should not have been objected to. There was no verdict at all.

The case before this Court is one in which the jury did fill out the verdict form as to all parties and did render its verdict as to all parties. Therefore, this case does not come within the scope of *Whitlow*. It is a case that comes within the scope of the duty to object and Iowa R. Civ. P. 1.924. It is a case in which BNSF did not object at trial, and therefore, its objection was not preserved for appellate review. It is a case like every other case in which the duty to object and Iowa R. Civ. P. 1.924 apply.

B. The Court of Appeals Erred in Applying a "Very Possibly Could Have Interpreted the Verdict Form Incorrectly" Standard and in Not Reading the Instructions as a Whole and Presuming the Jury Followed the Instructions

The Court of Appeals' opinion directly conflicts with *Whitlow* when the Court of Appeals' opinion does not apply the standard for jury instruction review set out in *Whitlow* and the authority cited by *Whitlow*. *Whitlow* expressly affirms the well-settled principles that, "'we assume that jurors follow the court's instructions,'" and "(w)e liberally construe jury verdicts to give effect to the intention of the jury." *Whitlow*, 935 N.W.2d at 569, *quoting*

Underwriters Corp. v. Harrelson, 409 N.W.2d 688, 691 (Iowa 1987). The Court of Appeals' opinion acknowledges the "obligation to read the instructions as a whole." *Olson*, 2023 Iowa App. LEXIS at *5, *citing Giza v. BNSF Ry. Co*., 843 N.W.2d 713, 726 (Iowa 2014).

The Court of Appeals' opinion directly violates these principles and authorities when it finds that the jury was properly instructed but reverses nonetheless. The Court of Appeals' opinion specifically finds that "(t)he instructions apprised the jury that negligence was an element to be proved, not that it was an element to be presumed," but then reverses on the grounds that combining fault and causation into causal fault in the special interrogatories made it "very possible" the jury interpreted the verdict form to presume negligence. *Olson*, 2023 Iowa App. LEXIS at *5 and *6, *citing Rivera v. Woodward Resource Ctr*., 865 N.W.2d 887, 891-892 (Iowa 2015), and *quoting McElroy v. State*, 637 N.W.2d 488, 500 (Iowa 2001).

The Court of Appeals misreads *Rivera* and *McElroy* when it represents those cases as standing for the proposition that a case must be reversed for instructional error if "it is 'very possible' the jury could have interpreted the verdict form incorrectly." *Olson*, 2023 Iowa App. LEXIS at *4 and *6. This is an oversimplification of the standard of review and omits the key elements of the standard that are dispositive to the proper analysis.

Rivera devoted a two-page section of its opinion to "a review of Iowa caselaw regarding challenges to jury instructions." *Rivera*, 865 N.W.2d at 902-904. Under the proper standard of review, the question is whether the "instructions are misleading or confusing," and the definition of "misleading or confusing" is "if it is 'very possible' the jury could reasonably have interpreted the instruction incorrectly." *Id*., at 902, *quoting McElroy*, 637 N.W.2d at 500. Whether it is "'very possible' the jury could reasonably have interpreted the instruction incorrectly" requires the instructions to be read as a whole, "not piecemeal." Rivera, 865 N.W.2d at 904. "(W)e look to the instructions as a whole and do not require perfection," and the ultimate question is whether "the instructions taken as a whole accurately reflect the law." Rivera, 865 N.W.2d at 902-903. The *Rivera* Court looked to whether "a reasonable jury would read the sentences (in the instruction at issue) harmoniously." *Id.*, at 904. These are the standards that must be applied when determining whether "it is 'very possible' the jury could reasonably have interpreted the instruction incorrectly." *Id*., at 902.

In the instant case it is not possible to conclude that the jury instructions, read as a whole and presuming they were followed, could have confused the jury as to whether it had to find BNSF at fault in order to award damages. Instruction No. 9 (Attachment D, APP. 271) specifically directed the jury that

"(t)he plaintiff must prove all of the following propositions: 1. Defendant was negligent … ***If the plaintiff has failed to prove any of these propositions, then he is not entitled to damages***." Emphasis added. The verdict form itself limited the damages award to damages "caused by the defendant's fault." Attachment C (APP. 292-293, "If the plaintiff…has failed to prove that any item of damage was caused by the defendant's fault, enter 0 for that item.") Hence, the Court of Appeals correctly summarized the import of these instructions: "The instructions apprised the jury that negligence was an element to be proved, not that it was an element to be presumed." *Olson*, 2023 Iowa App. LEXIS at *5.

Even if the standard of review allowed the reviewing court to extract the special interrogatory at issue from its context, to separate it from the other instructions and the other directives of the verdict form, it is not possible to read "Question No. 1: Was the fault of the defendant a cause of any item of damage to the plaintiff" to confuse the jury whether it had to find BNSF at fault before finding that BNSF caused damages. For the jury to have been confused about this, it would have had to read the question in a highly unusual way. It would have had to read the question to allow it to answer "yes" that "fault of the defendant was a cause" even if it did not first find that there was "fault of the defendant" to be the cause.

In ordinary speaking, if one asks whether Person A's fault was a cause of X, one may respond a number of ways. One may respond no because Person A was not at fault. Meaning the same thing, one may respond no because there was no fault of Person A to cause X. Alternatively, one may respond no because even though Person A was at fault, that fault was not a cause of X. Under no circumstances would one who did not find that Person A was at fault respond: Person A was not at fault but the fault of Person A that does not exist was a cause of X.

If use of the term "the fault" in Question No. 1 somehow directed the jury to find that BNSF was at fault, then the same use of the term "the fault" when directed to Olson in Question No. 2 somehow directed the jury to find Olson at fault. The jury's verdict refutes that the term "the fault" carried any such direction because the jury did not find Olson at fault. It is unreasonable and a violation of the applicable standard for review for one to conclude that the term "the fault" carried a direction to find fault when directed to one party, but the same term "the fault" did not carry that direction when directed to the other party.

The fact that the jury responded to one question that used the term "the fault" by finding the one party not at fault means that the jury equally could have responded to the other question that used the term "the fault" and found

the other party not at fault. The fact that the jury found one party at fault in response to the term, but did not find the other party at fault in response to the term, means the jury necessarily read the instructions as a whole and followed them, only finding a party causally at fault in response to Question Nos. 1 and 2 on the verdict form if it first found the party at fault under the fault instructions.

C. Creation of Impossible Standard for Jury Instruction

Because the Court of Appeals' opinion does not apply the principles of judicial review thoroughly explained in *Rivera* and reaffirmed by this Supreme Court in *Whitlow*, and therefore does not read the instructions as a whole and assume the jury followed them, the opinion makes unprecedented demands upon the verdict form. The opinion would mean that Iowa trial courts no longer may use general verdict forms or otherwise combine elements in general terms on verdict forms. This would be a significant impediment to the ability of trial courts to use plain and easy-to-understand language, tailored to the specific case, on the verdict form.

Iowa practice, the Iowa Civil Jury Instructions, the Eighth Circuit Model Civil Jury Instructions, the practice in all other state and federal courts, and 45 U.S.C. § 53, all provide for general verdict forms and for use of general terms to submit combined elements of the case. *See* Iowa Civil Jury

Instruction 300.2; Eighth Circuit Model Civil Jury Instruction 15.81. 45 U.S.C. § 53 may be read to require a general verdict form under which "the damages shall be diminished ***by the jury*** in proportion to the amount of negligence attributable to such employee…" Emphasis added. (*See* Eighth Circuit Model Civil Jury Instruction 15.80, Committee Comments (discussion of this question of Federal Employers' Liability Act, 45 U.S.C. §§ 51, *et sequitur*, law and its treatment in various model instruction systems).

If the Court of Appeals' opinion is allowed to stand, trial courts in Iowa now will be required to submit special interrogatories on the verdict form as to each element and constituent sub-element of the case or the jury will be deemed to have been improperly instructed on them. Trial courts will be required to do so even when, as in this case, the reviewing court finds that the jury was properly instructed on those elements in the instructions as a whole. *Olson*, 2023 Iowa App. LEXIS at *6 ("(t)he instructions apprised the jury that negligence was an element to be proved, not that it was an element to be presumed").

The verdict form the Court of Appeals would approve in this case could not withstand the new standard for jury instruction that its opinion would establish. The verdict form the Court of Appeals would approve would use the terms "fault" or "negligence" in special interrogatories, but it would fail

to submit special interrogatories on the notice and reasonable foreseeability of harm elements of fault or negligence.

Had the verdict form the Court of Appeals would approve in this case been given in this case, BNSF still could have withheld objection and secured reversal on appeal by arguing that the notice and reasonable foreseeability of harm elements of fault or negligence were combined into the terms fault or negligence in the special interrogatories, and therefore, these elements were not properly submitted to the jury. BNSF could have obtained review and reversal even though the instructions as a whole properly instructed the jury that it must find notice and reasonable foreseeability of harm before it could find fault or negligence. *See* Attachments C, D, and E. (Verdict Form and Instructions Nos. 9, and 8, APP. 292-293, 271, 270.) The Court of Appeals' opinion would remand for retrial where BNSF will be authorized to do exactly this.

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that on February 14, 2023, a copy of Plaintiff-Appellee's Application To The Supreme Court for Further Review 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 COMPLIANCE

This application complies with the typeface and type-volume requirements of *Iowa R. App. P. 6.1103 (4)* because this application has been prepared in a proportionally spaced typeface using Times New Roman in 14-point plain-style font, and contains 5,594 words, excluding the parts of the application exempted by *Iowa R. App. P. 6.1103 (4)(a)*.

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

February 14, 2023
Date