IN THE SUPREME COURT OF IOWA

No. 22-0587

SCOTT D. OLSON,

Plaintiff-Appellee,

vs.

BNSF RAILWAY COMPANY,

Defendant-Appellant.

DEFENDANT-APPELLANT'S RESISTANCE TO APPLICATION FOR FURTHER REVIEW OF IOWA COURT OF APPEALS DECISION FILED JANUARY 25, 2023

David J. Schmitt
LAMSON DUGAN & MURRAY LLP
10306 Regency Parkway Drive
Omaha, NE 68114-3743
Tel: (402) 397-7300
Fax: (402) 397-7824
dschmitt@ldmlaw.com

Daniel A. Haws
HAWS-KM, P.A.
30 East Seventh Street, Suite 3200
St. Paul, MN 55101-4919
Tel: (651) 227-9411
Fax: (651) 223-5199
dhaws@hkmlawgroup.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

OTHER AUTHORITIES

DISPUTATION OF "QUESTIONS PRESENTED FOR REVIEW"

Defendant-Appellee BNSF Railway Company ("BNSF") disagrees with Plaintiff-Appellee Scott D. Olson's ("Plaintiff") three Questions Presented For Review. BNSF will therefore set forth the issues at stake in this case and presented by the decision of the Court of Appeals, which demonstrate the case fails to satisfy the requirements of Iowa R. App. P. 6.1103(1)(b) to warrant further review.

Question 1. This case is not about whether the Iowa Supreme Court in *Whitlow* nullified Iowa R. Civ. P. 1.924. This case is about what counts as a preserved error where the parties are unaware a potential error exists. In *Whitlow*, the Court addressed a limited, specific scenario where the trial court submitted an erroneous jury verdict form, despite the appellant's correct proposed form, that was overlooked by the trial court and parties. Because the error was overlooked, no one objected as they—the trial court included—did not appreciate the error existed. The Court in *Whitlow*, in a unanimous decision, held that under that limited, narrow circumstance, the error was preserved for appeal as three conditions were met. First, the appellant proposed the correct verdict form. Second, the trial court and counsel overlooked the error in the verdict form given to the jury. Third, the appellant timely moved for a new trial. The purpose of Rule 1.924 in

requiring that parties object to jury instructions is to alert the trial court so it may correct the error. *See Shams v. Hassan*, 905 N.W.2d 158, 168-69 (Iowa 2017). But the purpose of the rule would not apply when the error is overlooked as parties would have no basis or reason to object. *Whitlow* accordingly only addressed the limited factual scenario where, through no fault of the party, an erroneous verdict form was submitted to the jury because the error was overlooked by the trial court and parties. The Supreme Court found the error is preserved for appeal, provided three specific conditions are met—all of which exist in this case.

Question 2. The Court of Appeals applied long-standing principles of jury instruction review and did not supplant any standards. It read the instructions as a whole: "In reaching that conclusion, we have considered the jury's obligation to read the instructions as a whole." *Olson v. BNSF Ry.*, 2023 Iowa App. LEXIS 46, at *5, No. 22-0587 (Iowa App. 2023) (citation omitted). It applied settled principles that define jury instructions as misleading or confusing when it is "very possible" the jury could have interpreted them incorrectly. *Olson*, 2023 Iowa App. LEXIS 46, at *4-5 (citations omitted). Rather than opposites or alternatives as Plaintiff's proffered question suggests, the "read as a whole" and "very possible" tests are to be construed together. And here, when read as a whole, the Court of

Appeals found the instructions misleading and confusing because one instruction said "negligence was an element to be proved," and the verdict form provided that negligence was "to be presumed." *Olson*, 2023 Iowa App. LEXIS 46, at *5. Therefore, the Court of Appeals did not supplant any standard and instead applied established principles of jury instruction review.

Question 3. The issue in this case is that the verdict form given by the trial court was erroneous so the instructions were misleading and confusing. *Olson*, 2023 Iowa App. LEXIS 46, at *4-6 (citations omitted). Iowa courts are free to use general verdict forms or other types of forms they choose, provided they are not misleading or confusing as required by established Iowa law.

Iowa R. App. P. 6.1103(1)(b). Plaintiff's application fails to satisfy the requirements of Iowa R. App. P. 6.1103(1)(b). "Further review by the supreme court is not a matter of right, but of judicial discretion. An application . . . will not be granted in normal circumstances." Iowa R. App. P. 6.1103(1)(b). The Court of Appeals applied established, settled law. The three questions Plaintiff "Presented For Review" are mischaracterizations of the applicable law and inconsistent with the decision of the Court of Appeals.

BRIEF IN RESISTANCE TO APPLICATION FOR FURTHER REVIEW

A. The Trial Court Committed Error Of Law In Omitting From The Verdict Form The Threshold Question Of Whether Or Not BNSF Was Negligent.

Under the Federal Employers' Liability Act (FELA), Plaintiff was required to prove three material issues in this case: first, that BNSF was negligent; second, that BNSF's negligence caused in whole or in part Plaintiff's damage; and third, the nature and extent of Plaintiff's damage. *Tennant v. Peoria & P.U. Ry.*, 321 U.S. 29, 32, 64 S. Ct. 409, 411 (1944). FELA is a negligence-based act so a plaintiff has the burden of proving all of the traditional elements of negligence. *Richardson v. Missouri Pac. R.R.*, 677 F.2d 663 (8th Cir. 1982); *Davis v. Burlington Northern, Inc.*, 541 F.2d 182, 185 (8th Cir.), *cert. denied*, 429 U.S. 1002, 97 S. Ct. 533 (1976).

BNSF submitted proposed jury instructions and a verdict form containing the three material issues Plaintiff was required to prove under FELA. (APP. 17-82.) BNSF utilized the model Iowa Civil Jury Instruction 300.4 Verdict for its proposed verdict form, which requires the jury specifically make determinations whether BNSF was at fault, whether the fault of BNSF was a cause of any item of damage to Plaintiff, and the amount of damage sustained by Plaintiff. (APP. 52-53.) *See* Iowa Civil Jury Instruction 300.4 Verdict (2020). "Fault" was defined in the jury

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

Negligence is the first required element under FELA. Negligence was a significant, material issue in this case. However, the trial court omitted the threshold question, "Was BNSF at fault?", i.e., negligent, in the verdict form it submitted to the jury. (APP. 292-293.) Instead, the trial court's verdict form skipped the pivotal question of whether or not BNSF was at fault and began with the question of causation, which is the second required element under FELA. (APP. 292-293.) In this case, the jury was only asked, "Was the fault of the defendant a cause of any item of damage to the plaintiff?" (APP. 292-293); fault was presumed within the wording of the question. This first jury question is identical to the model Iowa Civil Jury Instruction question of *causation*, the second element of a FELA action. *See* Iowa Civil Jury Instruction 300.4 Verdict (2020). A simple comparison of the verdict form given by the trial court with the model Iowa Civil Jury Instruction 300.4 Verdict demonstrates the glaring omission and error of law in failing to require the jury to determine, as the initial and pivotal issue, whether or not BNSF was negligent.

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

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

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

Here, the trial court omitted Question No. 1, requiring the jury presume BNSF was at fault and only determine whether BNSF caused Plaintiff any damage:

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

(APP. 292-293.)

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

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

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

The verdict form essentially directed a verdict for Plaintiff on the issue of negligence. The jury answered the question "Yes" on the verdict form given BNSF did not dispute that the July 31, 2017 incident caused Plaintiff injury. However, the jury was not given an option to find in favor of BNSF on the issue of negligence. As the jury had no ability find BNSF was *not* negligent, the verdict form directed a verdict for Plaintiff on that material issue.

B. The Court of Appeals Directly Applied *Whitlow*, A Decision Which Is Indistinguishable From The Facts Of This Case.

The Court of Appeals directly applied the Supreme Court's decision in *Whitlow* in determining the trial court's erroneous verdict form requires a new trial. *Whitlow* is indistinguishable from the facts of this case.

In *Whitlow v. McConnaha*, 935 N.W.2d 565 (Iowa 2019), the Iowa Supreme Court found an error affecting a verdict form warranted a new trial, and that the issue was properly preserved despite that no party objected to the verdict form's offering. *Id.* at 569-72. *Whitlow* involved a personal injury action stemming from an automobile accident where the plaintiff sued two co-defendants. *Id.* at 566-67. One of the co-defendants, Ronald McConnaha, filed a third-party complaint against a previously uninvolved party, Timothy Newton, claiming the third-party was responsible for the plaintiff's injuries. *Id.* at 567. The case proceeded to trial, and when it came time to instruct the jury, the jury was presented a verdict form with the following first question:

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

Id. at 568. The jury did not believe McConnaha was at fault, so the jury answered the first question "no" and stopped its deliberation. *Id.* at 568-69. But this precluded the jury from assessing Newton's liability, as Newton's liability was the subject of the verdict form's second question. *Id.* Neither

attorney nor the trial court noticed this error. *Id.* After realizing this error, the plaintiff moved for mistrial or new trial. *Id.* at 569. The trial court granted the plaintiff a new trial to determine Newton's liability, from which an appeal followed—first to the Iowa Court of Appeals and then to the Iowa Supreme Court. *Id.*

The Iowa Supreme Court reasoned that the plaintiff preserved this error, as it involved an erroneous verdict form that was overlooked by all parties and the trial court itself, despite that the plaintiff originally submitted the correct verdict form:

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

Id. at 569 n.4.

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

subsequent trial to address that core issue of liability that went unanswered by the jury. *Id.* at 570-71.

Here, the Court of Appeals directly applied *Whitlow*, which is indistinguishable from the facts of this case. As in *Whitlow*, the trial court's verdict form omitted the key determinant of BNSF's liability—whether BNSF was negligent. Negligence was a significant, material issue in the case. Also, just as in *Whitlow*, BNSF proposed the correct verdict form, and BNSF timely moved for a new trial.

Plaintiff's argument—that *Whitlow* establishes that three elements must be satisfied, but that the Court of Appeals "deletes the second element of that test and rewrites *Whitlow's* three-part test as a two-part test"—is contrary to the Court of Appeals decision. (*See* Plaintiff-Appellee's Application, p.14.) The Court of Appeals specifically states it relies on *Whitlow* and its three criteria:

> *Whitlow* indeed states a claimed error in a verdict form is preserved where, "notwithstanding [a] failure to object . . . [(1) the party] had proposed the correct form, [(2)] all counsel and the court overlooked the error in the verdict form . . . and [(3) the party] timely moved for a mistrial or a new trial." [*Whitlow*, 935 N.W.2d at 569 n.4.] *This is precisely the situation here.*

Olson, 2023 Iowa App. LEXIS 46, at *3 (emphasis added). Thus, the Court of Appeals expressly relied on all three criteria of *Whitlow*; not only two criteria as Plaintiff claims.

The trial court acknowledges it overlooked the error, and it believes the parties overlooked the error. In ruling on BNSF's motion for new trial, the trial court relied on *Whitlow* and stated it "finds this issue was sufficiently preserved." (APP. 1282.) A necessary subcomponent of that finding by the trial court, of course, is that the trial court and parties overlooked the error.

Plaintiff argues to this Court that the Court of Appeals "acknowledges that this issue was not overlooked at trial," despite the Court of Appeals making no such statement. (*See* Plaintiff-Appellee's Application, p.13.) Plaintiff cites discussion by the Court of Appeals on a different issue; namely, "fault" and "causal fault" in connection with the question on causation—not the missing question of whether BNSF was negligent. *See Olson*, 2023 Iowa App. LEXIS 46, at *2 n.2. Contrary to Plaintiff's argument, the Court of Appeals, after reviewing the record, expressly found the negligence element on the verdict form was overlooked:

> Both sides submitted proposed jury instructions with variants of the omitted question. Although BNSF's proposal referred to "fault" and Olson's referred to "negligence," the import was the same: the jury had to make a predicate finding that BNSF was negligent before proceeding to the question of causation. Neither side sought to modify this language during the jury instruction conference. While the parties agreed to add language to the causation element, they left the threshold element of BNSF's negligence intact. *It is clear, then, that the omission of the*

> *negligence element on the verdict form submitted to the jury was an oversight, just as it was in Whitlow.*

Olson, 2023 Iowa App. LEXIS 46, at *3-4 (emphasis added). Accordingly, the Court of Appeals directly applied *Whitlow*, a unanimous decision by the Supreme Court which is factually indistinguishable from the facts of this case.

C. *Whitlow* Does Not Nullify Iowa R. Civ. P. 1.924 And Plaintiff's Arguments About Changing Iowa Jurisprudence Are Unsupported.

The Iowa Supreme Court in *Whitlow v. McConnaha*, 935 N.W.2d 565 (Iowa 2019), did not nullify Iowa R. Civ. P. 1.924 or create a fundamental change in Iowa jurisprudence. Plaintiff's arguments about "sandbagging," prohibitive cost of justice, release of criminal defendants, and implications for constitutional authority, are all unsupported. In fact, Plaintiff argues that "[a]fter *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." (Plaintiff-Appellee's Application, p.6.) Accordingly, Plaintiff's own argument demonstrates *Whitlow* has not changed Iowa jurisprudence and that his claims have no basis in actual events or the realities of Iowa litigation.

Whitlow presented a specific, limited factual scenario that exists in few cases. The Supreme Court in *Whitlow* held that the trial court's

erroneous verdict form could be considered on appeal in the absence of objection when three conditions were met: (1) the party proposed the correct verdict form; (2) the trial court and counsel overlooked the error in the verdict form submitted to the jury; and (3) the party timely moved for a new trial. Accordingly, *Whitlow* has only limited application.

The purpose of Rule 1.924 in requiring that parties object to instructions is to give notice to the trial court of the error so it has an opportunity to correct the same. *See Shams*, 905 N.W.2d at 168-69. But the intent and purpose of Rule 1.924 does not apply when the trial court and parties overlook the error, or when the trial court submits legally incorrect questions to the jury. If an error is overlooked, there is no basis or reason to object. *Whitlow* accommodates for this unique scenario by holding that when the three specific conditions are met, the error can be considered on appeal.

Plaintiff's arguments that Iowa jurisprudence has changed since *Whitlow* are unsupported. There can be no "sandbagging," given one condition established by *Whitlow* is that the party must propose the correct verdict form. A litigant proposing the correct verdict form will advise the trial court and parties of the correct form so errors can be corrected. A party

that "sandbags" by failing to offer the correct verdict form will have no remedy under *Whitlow*.

Plaintiff's argument that litigants will secretly withhold objection as a "get-out-of-jail-free card" defies common sense. Litigants as advocates will certainly pursue appropriate objections and not sit idly by to allow the trial court to issue erroneous verdict forms that are intentionally adverse to that party. It is counterintuitive for a party to purposefully sabotage jury instructions when presumably a party hopes to win at trial. And again, the first *Whitlow* element requires the appealing party to have offered the correct verdict form, which is far from incentivizing untoward gamesmanship in drafting or arguing the jury questions. *Whitlow* also requires as a further condition that the trial court and parties overlook the error in the verdict form submitted to the jury. If the error is not overlooked, *Whitlow* has no application.

Plaintiff's claim that *Whitlow* will render justice cost prohibitive is not borne out by the realities of litigation. There have certainly been many lawsuits filed in Iowa since the Supreme Court decided *Whitlow* and Plaintiff cites no case where *Whitlow* prevented justice. Plaintiff's argument also ignores that in personal injury cases like this case, plaintiffs typically retain counsel on a contingent fee basis. Litigants owe no attorney fees

unless they ultimately prevail, including after all appeals are exhausted, so they are not prevented from seeking justice. On the other hand, for Plaintiff to now argue that BNSF, through no fault of its own, should have no right to appeal a legally incorrect jury question is the antithesis of Iowa justice. BNSF was severely prejudiced by the trial court submitting the erroneous verdict form. All parties are entitled to a fair trial and should have the right to appropriate appeals.

Similarly, the argument that criminal defendants will be released again ignores that *Whitlow* is both limited and specific in its application. It is noteworthy Plaintiff has cited no case where a criminal defendant has been released since *Whitlow*. If Plaintiff's argument was accurate, since *Whitlow* criminal defendants would have been routinely released in the state of Iowa. They are not.

There are no implications for the constitutional authority as claimed by Plaintiff. *Whitlow* was decided by a unanimous Iowa Supreme Court. The Court of Appeals directly applied *Whitlow* and did not overrule a long history of Iowa caselaw or nullify Rule 1.924.

D. The Court Of Appeals Applied Established Caselaw By Reading The Instructions As A Whole And Finding Reversal Was Required Because The Instructions Were Misleading And Confusing.

The Court of Appeals reviewed the instructions as a whole and applied settled Iowa law. Under established Iowa law, a court must reverse when "instructions are misleading and confusing," which the Supreme Court defined as when "it is 'very possible' the jury could reasonably have interpreted the instruction incorrectly." *Olson*, 2023 Iowa App. LEXIS 46, at *4 (quoting *Rivera v. Woodward Res. Ctr.*, 865 N.W.2d 887, 902 (Iowa 2015); *McElroy v. State*, 637 N.W.2d 488, 500 (Iowa 2001)). Here, the Court of Appeals reviewed the instructions as a whole and found them misleading and confusing given the legal error in the verdict form, thereby requiring the case be reversed and remanded for new trial.

The error at the heart of *Whitlow* was that the verdict form directed the jury to analyze the case in a way that had the effect of precluding it from reaching a particular finding. That is precisely what the verdict form did in this case. Here, the Court of Appeals found:

> [T]he jury instructions required [Plaintiff] to prove that BNSF was negligent. The verdict form omitted a question on this element. Had the jury been afforded the opportunity to answer the question and had the jury answered the question in the negative, there would have been no determination of causation and no determination of damages. Omission of the question amounted to legal error.

Olson, 2023 Iowa App. LEXIS 46, at *4-5. In reviewing the instructions as a whole, the Court of Appeals found them to be misleading and confusing:

> BNSF was prejudiced by the jury's award of damages without a predicate finding of negligence. . . . Had the jurors been given the option of finding BNSF not negligent, they might not have reached the "causal fault" question or the question of how "causal fault" should be allocated between the parties. . . . Because it is "very possible" the jury could have interpreted the verdict form incorrectly, we reverse the denial of BNSF's new trial motion and remand for a new trial.

Olson, 2023 Iowa App. LEXIS 46, at *5-6 (citation omitted). The Court of Appeals rejected Plaintiff's argument that because the jury made a determination on causation, the jury also found BNSF was negligent: "While [Plaintiff] argues the [negligence] element was incorporated into the causation determination, the instructions provided otherwise." *Olson*, 2023 Iowa App. LEXIS 46, at *5. "[N]egligence and causation are separate elements" and the Plaintiff had the burden of proof on each. *Olson*, 2023 Iowa App. LEXIS 46, at *6. The verdict form was the *only* basis for the jury to render a decision on each of the three required elements: negligence, causation and damages. Here, the jury was never given an opportunity to determine whether or not BNSF was negligent. Indeed, the jury was given no opportunity in the verdict form to find BNSF was *not* negligent.

Due to the errors of law by the trial court, the Court of Appeals reversed and remanded this case for a new trial. As stated by the Court of Appeals, the issue in this case is "just as it was in *Whitlow*." *Olson*, 2023 Iowa App. LEXIS 46, at *4. *Whitlow* and the Court of Appeals' application of *Whitlow* is in harmony with Iowa R. Civ. P. 1.924. Specifically, if the intent of Rule 1.924 is to alert the trial court of an error by objecting so it has an opportunity to correct the jury instructions, the rule is inapplicable where all parties overlook the error, as was the case here. There is no opportunity for the parties to object because, by definition, the error is overlooked. That is precisely what occurred in *Whitlow* and this case.

E. The Court Of Appeals Applied Existing Standards For Jury Instructions.

The Court of Appeals applied established law and did not create new standards for jury instructions. In this case, the error of law by the trial court is that it submitted a verdict form that failed to require the jury determine whether BNSF was negligent. Instead, the verdict form presumed BNSF was negligent. The Court of Appeals applied established law and existing standards for jury instructions in finding the case must be reversed and remanded for a new trial.

Plaintiff argues the Court of Appeals created a new standard for jury instructions because it could require notice and reasonable foreseeability be

included in special interrogatories. This was never an issue decided by the Court of Appeals. Nevertheless, in response to Plaintiff's argument, notice and reasonable foreseeability were expressly included in the definition of negligence given by the trial court. (*See* APP. 270; Plaintiff's Att. E.) Therefore, Plaintiff's argument simply has no merit or application to the facts of this case. Also, nowhere does the Court of Appeals find or otherwise insinuate that Iowa trial courts may not use general verdict forms or other types of verdict forms. To the contrary, trial courts have used and will continue to use general verdict forms, or any other verdict forms they choose. The only condition is that the jury instructions and verdict forms they submit must be legally correct and neither misleading nor confusing. This is the same standard that has always existed under settled Iowa law. Here, the Court of Appeals simply applied that existing standard in determining whether a verdict form was erroneous.

CONCLUSION

Plaintiff's application fails to satisfy the requirements of Iowa R. App. P. 6.1103(1)(b). This case does not warrant further review by the Iowa Supreme Court. The Court of Appeals correctly, narrowly, and directly applied *Whitlow* and settled law in reviewing the jury instructions. It found the trial court committed error of law, as the verdict form improperly

omitted from the jury's determination the threshold question of whether or not BNSF was negligent. The error of law was properly preserved for appeal. BNSF proposed the correct verdict form, the trial court and counsel overlooked the error in the verdict form submitted to the jury, and BNSF timely moved for a new trial. Accordingly, Plaintiff's application for further review ought to be denied.

BNSF RAILWAY COMPANY,
Defendant-Appellant

By: */s/* David J. Schmitt

David J. Schmitt, #AT0007006
LAMSON DUGAN & MURRAY LLP
10306 Regency Parkway Drive
Omaha, NE 68114-3743
Tel: (402) 397-7300
Fax: (402) 397-7824
dschmitt@ldmlaw.com

– and –

Daniel A. Haws #AT0012086
HAWS-KM, P.A.
30 East Seventh Street, Suite 3200
St. Paul, MN 55101-4919
Tel: (651) 227-9411
Fax: (651) 223-5199
dhaws@hkmlawgroup.com

ATTORNEYS FOR
DEFENDANT-APPELLANT

CERTIFICATE OF SERVICE AND FILING

I hereby certify that on February 24, 2023, a copy of Defendant-Appellant's Resistance to Application 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/ David J. Schmitt
David J. Schmitt

CERTIFICATE OF COST

I hereby certify that because of the use of EDMS, there was no cost of printing or duplicating Defendant-Appellant's Resistance to Application for Further Review.

/s/ David J. Schmitt
David J. Schmitt

CERTIFICATE OF COMPLIANCE

This Resistance to Application for Further Review complies with the typeface and type-volume requirements of Iowa R. App. P. 6.1103(4) because this Resistance 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 Resistance contains 4,370 words, excluding the parts of the Resistance exempted by Iowa R. App. P. 6.1103(4)(a).

/s/ David J. Schmitt
David J. Schmitt

4857-5530-8882, v. 1