IN THE SUPREME COURT OF IOWA

NO. 18-0566

MARSHA WHITLOW,

Plaintiff-Appellant,

v.

RON McCONNAHA,
JODI McCONNAHA, and
TIMOTHY NEWTON

Defendants-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT – MUSCATINE COUNTY
THE HONORABLE STUART WERLING, JUDGE
SEVENTH JUDICIAL DISTRICT
MUSCATINE LAW NO. LACV023538

PLAINTIFF-APPELLANT'S FINAL REPLY BRIEF

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ARGUMENT

McConnaha asks this Court to allow a comparative fault case involving multiple potential tortfeasors to be tried in sequential fashion where the fault of each party is viewed in a vacuum and then potentially disparate verdicts must be reconciled with each other. That approach flies in the face of the theory underlying comparative fault and Iowa's comparative fault statute itself. For example, the comparative fault statute mandates that the court instruct the jury to make findings indicating "the percentage of total fault allocated to *each*…defendant." Iowa Code 668.3(2) (emphasis added). "In determining the percentages of fault, the trier of fact *shall* consider…the nature of the conduct of *each* party." Iowa Code 668.3(3) (emphasis added). Further, "the court *shall* determine the amount of damages payable to each claimant by *each other* party." Iowa Code 668.3(4) (emphasis added).

The comparative fault system embodied in Iowa law envisions a scenario in which the fault of multiple potentially liable tortfeasors is presented, analyzed and adjudicated – not in isolation but simultaneously. The District Court's ruling upholding a verdict as to the McConnahas and ordering a new trial as to Newton effectively splits the comparative fault trial into piecemeal adjudication that contravenes the comparative fault statute. It is McConnaha, and not Whitlow, who is engaging in speculation about

whether the jury properly analyzed the facts under the comparative fault framework. It is entirely possible that this jury analyzed only the fault of the McConnahas without deliberating on the fault of Newton. The only way to ensure that the comparative fault of the two potentially liable tortfeasors is weighed simultaneously – as envisioned by Iowa Code 668.3 – is to order a complete new trial with respect to both defendants.

I. DISCUSSION OF SUBSTANTIAL EVIDENCE IS AN IRRELEVANT AND MISLEADING ISSUE

Ms. Whitlow does not concede the issue of substantial evidence, however, McConnaha's discussion of "substantial evidence" is a straw-man argument irrelevant to the issues before the Court. Substantial evidence is defined as "more than a mere scintilla." *Willey v. Riley*, 541 N.W.2d 521, 526 (Iowa 1995). Evidence is substantial when a reasonable mind would find the evidence adequate to reach a finding on the element in question. *Id.* The issue before this Court is not a review of the evidence, particularly because Ms. Whitlow concedes the jury could have found against her. The question is whether the jury properly completed their task and whether the trial court properly followed the comparative fault statute. In sum, there was more than a mere scintilla of evidence in this case for and against both McConnaha and Newton's fault, and the jury should be asked to determine on which side of the issue falls the preponderance of evidence. The jury failed to complete that

task and was improperly dismissed, creating a mistrial and necessitating a new trial.

II. WHITLOW DID NOT WAIVE ARGUMENTS MADE ON APPEAL

McConnaha argues that because Whitlow failed to object to the verdict form, that she has waived any arguments to the verdict form. Whether the Court views this issue under the framework for a mistrial or the framework for a new trial framework, McConnaha's argument is wrong. Whitlow addressed the waiver/preservation issue thoroughly in her initial brief. *See* Plaintiff-Appellant's Brief at pp. 21-22, 30-32. Whitlow's basis for appeal here is an inconsistent verdict. That issue is preserved for appeal by filing a motion for mistrial or for new trial, which Whitlow did in a timely fashion, immediately upon the grounds for a mistrial or new trial becoming apparent.

III. A MISTRIAL SHOULD HAVE BEEN GRANTED

McConnaha expends considerable effort discussing the *Wederath* and *Jack* cases without admitting the central holding of both cases – where a jury fails to answer a verdict question, a mistrial has occurred. Presumably, McConnaha concedes this fact.

McConnaha instead claims the *Wederath* case supports the district court's actions here. This is incorrect. In *Wederath*, a partial mistrial was declared because the unanswered jury questions dealt entirely with damages

and all liability questions were answered. *Wederath v. Brant*, 319 N.W.2d 306, 308-10 (Iowa 1982). McConnaha also claims the *Jack* case supports the district court's actions here. That is also incorrect. The *Jack* case involves negligence by two separate parties on two separate occasions (two distinct acts of negligence) and did not include application of Iowa's comparative fault act. *Jack v. Booth*, 858 N.W.2d 711, 718 (Iowa 2015). McConnaha claims Ms. Whitlow is alleging two distinct acts of negligence against McConnaha and Newton – which is factually untrue. The case before this Court involves a single collision between two motor vehicles – not two separate acts on different occasions.

In assessing the application of *Wederath* and *Jack* to this case, the simplest approach is to ask, "when may a trial be bifurcated?" A trial may bifurcate liability from damages and be tried separately. Therefore, a partial mistrial in *Wederath* is appropriate. Similarly, a plaintiff may join claims against multiple defendants, but if the two defendants are alleged to have injured a plaintiff in two severable acts, the trial may be severed (bifurcated) and tried separately against each defendant. Therefore, the partial mistrial in *Jack* is appropriate.

On the other hand, it is not appropriate to sever a comparative fault case such that the fault of one defendant is tried separately from the fault of a

second defendant with a third phase to compare fault. The comparative fault statute is plain that the claims must be tried together. Bifurcation or severance in this manner would be inappropriate, therefore only a complete mistrial should be allowed under these circumstances.

IV. McCONNAHA MISINTERPRETS IOWA CODE § 668.3(6)

McConnaha argues for an interpretation of Iowa Code Section 668.3(6) which is not supported by the remainder of the statute, the case law, or the practice in this state. Essentially, McConnaha takes a portion of the code section out of context in order to claim that the only time a trial judge sends a jury back to deliberate further is when the jury makes an error in the assignment of percentages or the calculation of damage amounts. McConnaha claims that because the jury did not answer questions on the verdict form, the code section does not apply. Essentially, McConnaha's claim is that a jury is sent back for further deliberation in the case of math errors, but that a verdict form that is incomplete due to unanswered questions is not contemplated by the section and the trial judge has no authority to send the jury back. In other words, McConnaha claims that if Judge Werling had caught the error on the form, he could not have ordered further deliberation because McConnaha asserts no "inconsistency."

However, the plain language of the statute states the judge has the authority to order the jury to further deliberate, and in doing so, must inform the jury of its ability to reconsider prior answers. It is not hard to imagine an alternative scenario where the jury, instead of returning an unanswered form, rather sends a note that they cannot reach consensus on one of the verdict form questions. In that event, a trial judge does not accept the form and "give partial credit" for the portions that have been answered. Where a jury cannot answer a question on the form, the case is a mistrial due to a hung jury and the parties never learn which portions were agreed to and which were not.

It is also not hard to imagine a third alternative scenario where a jury is deliberating a later question on a verdict form and returns to change a prior answer. In that scenario, the judge does not invalidate the change on the verdict form and confine the jury to their first response.

The jury in this case has not been given the opportunity to finish its deliberations. No one can know what the jury would have done during the later deliberations. It is possible the jury would not have changed a thing and McConnaha would have been determined to be faultless. However, the court and the parties do not have the luxury of speculating and assuming that is true. The case must be returned for a complete new trial to find out for sure.

V. IOWA RULE OF CIVIL PROCEDURE 1.1004 PROVIDES BASIS FOR A NEW TRIAL

Whitlow bases her motion for a new trial on Rule 1.1004 subsection (1) which provides for a new trial where the party's substantial rights are materially affected as a result of: "[i]rregularity in the proceedings of the court, jury, master, or prevailing party; or any order of the court or master or abuse of discretion which prevented the movant from having a fair trial."

The Supreme Court in *Costello v. McFadden*, 553 N.W.2d 607 (Iowa 1996) *s*ynthesized a number of cases from multiple jurisdictions, highlighting the various contexts which might give rise to irregularity in the proceedings necessitating a new trial. In sum, though, an irregular judgment has been defined as one: "not entered in accordance with the practice and course of proceeding where it was rendered" or "the failure to observe that particular course of proceeding which, conformable with the practice of the court, ought to have been observed in the case" or "the failure to follow required process or procedure in the conduct of a suit." *Id*. at 611-612 (internal citations omitted). Ultimately, the Court distilled the basic principles giving rise to an irregularity sufficient to warrant the grant of a new trial: first, the adverse ruling must be due to some action or inaction on the part of the court or court personnel; and second, "the action or inaction must be contrary to some prescribed rule, mode of procedure or court practice involving the conduct of

a lawsuit." *Id*. at 612. The underlying purpose of the irregularity rule is "to ensure that litigation is fair and orderly."

To be clear, McConnaha has not asserted in briefing that the bracketed guidance resulting in the inconsistent verdict was in fact the correct guidance. Implicitly, everyone is in agreement that there was an error made in the guidance given to the jury as to how to complete the verdict form. The overall thrust of the entire litigation was that a verdict was to be rendered in one trial as to the fault or lack thereof of *both* defendants. The normal response in litigation where a jury returns a verdict that does not conform to the course of the trial is for the judge to instruct the jury to resolve the issue. This is, in fact, precisely what Iowa Code section 668.3(6) mandates: that the court not discharge the jury until inconsistencies in the verdict are resolved.

As Ms. Whitlow argued more fully in her initial brief, the inconsistent verdict rendered in this action affected her substantial rights. That verdict arose out of an irregularity attributable to the court itself failing to follow the normal modes of procedure and practice. As a result, a new trial is warranted pursuant to Rule 1.1004(1).

CONCLUSION

A complete retrial of this case is necessary because the district court abused its discretion by denying Whitlow's mistrial motion; the district court

abused its discretion by granting a partial new trial; the district court erred by misleading the jury with an incomplete mere fact instruction; and the district court erred by refusing to submit Whitlow's correct jury instruction on the duty to wear a helmet.

WHEREFORE, Appellants respectfully request the Ruling reversed, and the case remanded for a complete retrial.

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CERTIFCATE OF SERVICE AND FILING

The undersigned hereby certifies that on September 21, 2018, Plaintiff-Appellant's Proof Brief was e-filed with the Clerk of Iowa Supreme Court and served by Iowa EDMS upon the following

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ATTORNEY'S COST CERTIFICATE

The undersigned certifies that the actual cost of printing the foregoing Plaintiff-Appellant's Proof Brief was the total sum of $0.00.

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ATTORNEY'S COMPLIANCE CERTIFICATE

Pursuant to Iowa R. App. P. 6.903(1)(g)(4), the undersigned certifies that:

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 1,907 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).
2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2013 in Times New Roman 14-point type.

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