IN THE SUPREME COURT OF IOWA

NO. 18-0566

MARSHA WHITLOW, by and through her Conservator,
CONNIE WHITLOW,

Plaintiff/Appellant,

vs.

RON McCONNAHA, JODI McCONNAHA, and TIMOTHY NEWTON,

Defendants/Appellees.

APPEAL FROM THE IOWA DISTRICT COURT
FOR JACKSON COUNTY
THE HONORABLE STUART P. WERLING PRESIDING

APPELLEES, RON McCONNAHA and JODI McCONNAHA'S, BRIEF IN FINAL FORM AND REQUEST FOR ORAL ARGUMENT

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ROUTING STATEMENT

Appellees, Ron McConnaha and Jodi McConnaha (hereinafter, collectively, the "McConnahas"), agree with Plaintiff/Appellant that, pursuant to Iowa Rule of Appellate Procedure 6.1101(3)(a), this case should be transferred to the Iowa Court of Appeals, as the issues presented for review require the application of existing legal principles.

STATEMENT OF THE CASE

This case arises from a farm tractor-motorcycle accident which occurred on June 27, 2015 in Muscatine County, Iowa. (Petition ¶ 7, App. 9). Marsha Whitlow (hereinafter "Whitlow") was a passenger on a motorcycle driven by her fiancé, Timothy Newton (hereinafter "Newton") which attempted to pass a turning farm tractor operated by Ron McConnaha. (Petition ¶¶ 8–10, App. 9). Whitlow originally brought a negligence claim against only the McConnahas; the McConnahas filed an Answer denying Ron McConnaha's negligence and filed a third-party petition against Newton. (Answer/Third-Party Petition, App. 12). Only after the McConnahas sued Newton did Whitlow amend her petition to also assert a claim against Newton. (Amended Petition ¶ 24, App. 26).

This case proceeded to trial on February 26, 2018. (Motion for New Trial, App. 108). The six-day jury trial in this matter concluded on March 6,

2018, when jury deliberations began. (Tr. 12–13, App. 72–73). The jury returned its verdict on March 7, 2018, finding Ron McConnaha not at fault, answering Question No. 1 on the special verdict form, "No." (Civil Verdict, App. 104). As to Newton, the jury did not make a finding as to whether he was at fault, as the bracketed language below Question No. 1 of the verdict form instructed the jury not to answer any further questions if it found McConnaha was not at fault. (Civil Verdict, App. 104).

Following the verdict, Whitlow filed a combined Motion for Mistrial and, alternatively, Motion for New Trial on March 12, 2018, arguing that the jury failed to complete the verdict form. (Motion for Mistrial, App. 108). The District Court, by order dated March 28, 2018, correctly denied Whitlow's Motion for New Trial with regard to the McConnahas, as the question of the fault of Ron McConnaha was answered. (03/28/2018 Order, App. 140). The District Court did grant a new trial as to Whitlow's claim against Newton, as the jury did not answer the question of his fault. (03/28/2018 Order p. 4–5, App. 141). Whitlow timely filed a Notice of Appeal on March 29, 2018. (Notice of Appeal, App. 143).

STATEMENT OF FACTS

This matter arises from an accident which occurred on June 27, 2015 in rural Muscatine County, Iowa, when the motorcycle driven by Newton

and on which Whitlow was a passenger attempted to pass the left-turning farm tractor driven by Ron McConnaha. (03/28/2018 Order p. 1, App. 137). Specifically, Newton was driving south on Muscatine Road when he approached from the rear the farm tractor driven by Ron McConnaha, also traveling south at 10–15 miles per hour with his flashing hazard lights activated on the roof of his cab. (03/28/2018 Order p. 1–2, App. 137–38). As Ron McConnaha approached the farm field he was going to enter, he activated his left turn signal and slowed further. (03/28/2018 Order p. 2, App. 138). Ron McConnaha was completing his left turn into the field entrance when Newton attempted to pass the tractor on the left, striking the tractor. (03/28/2018 Order p. 2, App. 138). As a result of the motorcycle striking the tractor, Whitlow claims to have suffered injuries. (03/28/2018 Order p. 2, App. 138).

Whitlow initiated the present action by filing a Petition on or about June 20, 2016, seeking damages only against the McConnahas. (Petition, App. 8). The McConnahas denied the material allegations of the Petition and asserted a third-party claim against Newton. (Answer/Third-Party Petition, App. 12). Only after the McConnahas asserted claims against Newton did Whitlow amend her Answer to add a direct claim of negligence

against Newton. (Motion to Amend and Substitute Petition at Law, App. 21).

The jury trial in this matter began on February 26, 2018. (Tr. 12–13, App. 72–73). On March 6, 2018, at the conclusion of the evidence, counsel for the parties convened for a conference on jury instructions and then to make a formal record on objections to the instructions. (Tr. 12–13; Final Jury Instructions, App. 72–73, 91). Counsel for Whitlow made no objection to the verdict form submitted to the jury. (Tr. 2–17, App. 62–77). That verdict form, in pertinent part, correctly asked the following with respect to Whitlow's claim against the McConnahas:

> **QUESTION NO. 1:** Was Ron McConnaha at fault?
>
> Answer "yes" or "no."
>
> ANSWER: _____

(Civil Verdict, App. 104). The bracketed language below Question No. 1 stated:

> [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.]

(Civil Verdict, App. 104). The jury returned its verdict on March 7, 2018, answering "No" to Question No. 1 and finding McConnaha not at fault. (Civil Verdict, App. 104). Given the bracketed instruction telling the jury

not to answer any further questions, the jury did not answer Question No. 2 regarding causation relating to the McConnahas or any further questions regarding Newton's fault or causation. (Civil Verdict, App. 104). The jury having followed the verdict form's instructions and entering a valid verdict for the McConnahas, Judge Werling dismissed the jury. (03/28/2018 Order p. 3, App. 139). Whitlow subsequently filed a Motion for Mistrial and, Alternatively, Motion for New Trial, arguing her claims against not only Newton but the McConnahas needed to be retried due to an "incomplete" verdict. (Motion for New Trial, App. 108).

ARGUMENT

First and foremost, Whitlow makes no attempt to argue that the jury's finding of no fault as to Ron McConnaha was unsupported by sufficient evidence. Therefore, there is no dispute on appeal that the jury's verdict, finding the McConnahas not at fault, was supported by sufficient evidence. In other words, Whitlow does not even argue that there is any evidentiary basis to retry the fault issue as to the McConnahas.

Instead, Whitlow relies exclusively on the argument that the verdict form completed by the jury —a verdict form which plainly and clearly indicates that the McConnahas were not at fault—was somehow incomplete or inconsistent as it applies to her claims against them. This not only ignores

the evidence presented in this case over the course of six days but also the unanimous finding of the jury of no fault as to Ron McConnaha.

In her Brief, Whitlow spends the majority of her word-count discussing the principles of comparative fault, citing Iowa Code section 668.3(6) and arguing that those principles demand that the fault of the parties in a comparative fault case be "considered simultaneously." However, the concept of comparative fault is inapplicable to the issue before this Court on appeal. As the District Court correctly stated in its Order denying Whitlow's Motion for New Trial:

> [T]he jury found Ron McConnaha was not at fault and the principles of comparative fault do not apply. Simply put, the verdict was complete and consistent as to the McConnahas. They were exonerated of all fault.

(03/28/2018 Order p. 4, App. 140). The plain truth is that, during trial, Whitlow presented all of her evidence, arguments were heard, and the jury was properly instructed on the law. In answering Question No. 1 of the special verdict form, the jury then unanimously found that Ron McConnaha was not at fault. (Civil Verdict, App. 104). The fact that the jury was not asked by Whitlow to make a finding of fault as to her fiancé, Newton, had zero effect on her claims against the McConnahas. It is pure speculation for Whitlow to claim that the jury could have come to a different conclusion if, after submitting its verdict, it had been instructed to make a finding of fault

as to Newton. The jury heard arguments of Whitlow's counsel, even as to how to complete the verdict form and read the instructions. The jury's deliberations resulted in a finding of no fault as to Ron McConnaha, which, as conceded by Whitlow, was supported by substantial evidence. The jury's verdict should not be disturbed simply because, in following the instructions on the verdict form, it did not make any finding as to Whitlow's claim against Newton. For the reasons set forth more fully below, Whitlow's argument is supported neither by Iowa law nor common sense, and the District Court's rulings on her Motion for Mistrial and Motion for New Trial should be affirmed.

I. WHITLOW WAIVED ANY ARGUMENT THAT THE VERDICT WAS INCONSISTENT BY FAILING TO OBJECT TO THE VERDICT FORM

As Whitlow has not and cannot argue that the verdict finding no fault as to the McConnahas was unsupported by substantial evidence, Whitlow must focus on the verdict form. However, it is undisputed that counsel for Whitlow failed to object to the verdict form that the jury filled out. Thus, Whitlow waived any argument that the verdict form was misleading or otherwise improper by failing to object to the verdict form during trial. The District Court properly denied Whitlow's Motion for Mistrial and Motion for New Trial on this basis alone.

Iowa Rule Civil Procedure 1.924 requires any objection to the verdict form to be made in writing or dictated into the record, out of the jury's presence, specifying the matter objected to and on what grounds. Iowa R. Civ. P. 1.924. No other grounds or objections shall be asserted thereafter, or considered on appeal. Iowa R. Civ. P. 1.924. As clearly stated, "[t]o preserve error for our review, a party must specify the subject and grounds of the objection." *Sievers v. Iowa Mut. Ins. Co.*, 581 N.W.2d 633, 638 (Iowa 1998). Further, "[t]he objection must be sufficiently specific to alert the district court to the basis of the complaint so that if there is error the court may correct it before submitting the case to the jury." *Id.* (citing *Grefe & Sidney v. Watters*, 525 N.W.2d 821, 824 (Iowa 1994)). Here, Whitlow did not object to the verdict form submitted to the jury. Now Whitlow argues that the jury's verdict finding Ron McConnaha not at fault could somehow be changed, if the jury had answered subsequent questions about another party's fault. This is wrong, and Whitlow waived this audacious argument.

Iowa courts have repeatedly and consistently held that objections to jury instructions and verdict forms are waived if not timely raised before the case is submitted to the jury. *See Sievers*, 581 N.W.2d at 638; *Boham v. City of Sioux City*, 567 N.W.2d 431 (Iowa 1997); *Morgan v. Perlowski*, 508

N.W.2d 724 (Iowa 1993). Further, an objection to a verdict form raised for the first time in a post-verdict motion is untimely. *Spry v. Lamont*, 132 N.W.2d 446 (Iowa 1965). The Iowa Supreme Court, in *Olson v. Sumpter*, 728 N.W.2d 844, 848–49 (Iowa 2007), recently confirmed this fundamental concept. In *Olson*, the court found the district court erred in granting a new trial, finding plaintiff's failure to object to jury instructions and verdict forms waived plaintiff's new trial arguments. *Id.* Specifically, the Court held plaintiff "failed to expressly object to [the instruction] or the jury verdict form" and, thus, waived any right to object or raise issues relating to them in asking for a new trial. *Id.* at 848.

It is undisputed that Counsel for Whitlow did not object to the verdict form submitted by the Court to the jury. Consequently, Whitlow waived any argument that the verdict form was misleading, was otherwise improper, or that the jury's verdict was inconsistent based on the verdict form. Any objection to the verdict form needed to be made prior to submission of the case to the jury; it is insufficient to raise the issue in a post-trial motion. *See Sievers*, 581 N.W.2d at 638; *Spry*, 132 N.W.2d at 448. Whitlow tries to frame the issue as one involving an "inconsistent verdict;" thus, according to Whitlow, an objection to the verdict form need not have been raised in order to preserve this issue for appeal. This misstates the real issue that Whitlow

now complains of—the verdict form instructed the jury not to answer any questions if they answered "no" to Question No. 1. There was simply no inconsistency in the jury's verdict; the jury found Ron McConnaha was not at fault and, following the instruction below Question No. 1, answered no further questions.

Due to Whitlow's waiver of any argument that the verdict form was incorrect, the District Court properly denied her Motion for Mistrial and Motion for New Trial.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING WHITLOW'S MOTION FOR MISTRIAL

A. Preservation of Error

The McConnahas agree that, in her Motion for Mistrial, Whitlow raised in the District Court the same arguments she submits on appeal. However, the McConnahas deny that Whitlow preserved raising an objection to the content of the verdict form, as Whitlow's counsel failed to object to the verdict form in the District Court. *See Olson*, 728 N.W.2d at 848–49. Therefore, Whitlow waived any argument that the jury's verdict was inconsistent or that the verdict was otherwise invalid due to the verdict form.

B. Standard of Review

The McConnahas agree that the proper scope of review for the denial of a motion mistrial is abuse of discretion. *State v. Newell*, 710 N.W.2d 6, 32 (Iowa 2006).

C. Discussion

Whitlow first claims that the District Court abused its discretion in denying her Motion for Mistrial, claiming the jury's failure to answer the questions with regard to the fault of Newton amounted to an incomplete verdict. However, the jury followed the very instructions contained in the verdict form and stopped after answering Question No. 1; thus, the verdict was not "incomplete." In any event, Whitlow's claim against the McConnahas was in no way prejudiced by the jury not answering subsequent questions as to causation with respect to the McConnahas or Newton's fault. The jury fully and completely considered the evidence as to the McConnahas and returned a completed verdict with respect to Question No. 1. Therefore, the District Court properly denied Whitlow's Motion for Mistrial as to Ron and Jodi McConnaha.

Although the issue and remedy under both are identical—and were filed as combined motions in the District Court—Whitlow submits separate arguments for her Motion for Mistrial and Motion for New Trial.

Presumably, this is because Whitlow, citing *Wederath v. Brant*, 319 N.W.2d 306, 308–10 (Iowa 1982), mistakenly urges this Court to find that an unanswered verdict question amounts to a hung jury and, consequently, an automatic mistrial. However, Whitlow misconstrues *Wederath* and its holding. First and foremost, the jury in this case did not fail to answer any questions on the verdict form that it was instructed to answer. The instruction following Question No. 1 instructed the jury not to answer any further questions if it found no fault on the part of Ron McConnaha. That is precisely what the jury did; thus, the jury did not "fail" to answer any questions that were submitted to it.

More to the point, contrary to Whitlow's assertion, *Wederath* did not treat a jury's failure to answer a special interrogatory as a hung jury. *Id.* Instead, the court held that the jury's inability to answer questions 3 and 4 of the special verdict amounted to a hung jury to those questions only. *Id.* at 307. *Wederath* involved a holdover tenant on farm property, and the jury was asked to answer four special verdicts; the first two asked for the rental value of the property during the two-year holdover and the second two asked whether the defendant willfully held over during those two years. *Id*. The jury determined the rental value of the property during the two years but hung six-to-six on the determination of willfulness. *Id.* Plaintiff moved for

retrial on all special verdict questions, including on the rental value issue which the jury decided. *Id*. The appellate court held that retrial should have been granted but only with regard to the special verdicts on which the jury was hung. *Id.* at 310. Here, the jury unanimously found the McConnahas were not at fault.

When actually examined, the holding in *Wederath* supports the District Court's denial of Whitlow's Motion for Mistrial with regard to the McConnahas, as the court in *Wederath* found a retrial on all four special verdicts was not proper. *Id.* at 310 ("In this case no necessity exists to retry the issues involved in verdicts 1 and 2, but the trial court should have directed retrial of the issues in verdicts 3 and 4."). Just as with the special interrogatory questions in *Wederath*, the jury in the present case already decided the question of fault with regard to Ron McConnaha. Therefore, a retrial involving all Defendants is unnecessary, just as the District Court found in its ruling denying Whitlow's combined Motions.

Whitlow next cites to the Iowa Supreme Court case, *Jack v. Booth*, 858 N.W.2d 711 (Iowa 2015) but, once again, her reliance on the *Jack* decision is misplaced. In *Jack*, the Iowa Supreme Court actually affirmed the longstanding rule that a new trial may be granted as to less than all defendants in a case. 858 N.W.2d at 718 (citing Iowa R. Civ. P. 1.1004; 58

Am. Jur. 2d New Trial § 29, at 102 (2012) ("The granting of a new trial as to one defendant does not require that the plaintiff be granted a new trial with regard to claims against another defendant.")). *Jack* involved a medical malpractice case against two doctors. *Id.* at 713–14. The plaintiff claimed one doctor negligently performed a caesarean section, while the other doctor was negligent in inserting an IV in her right arm. *Id.* During trial, a juror fainted, prompting one of the doctors to give her medical attention. *Id.* at 714. Counsel for the Plaintiff immediately moved for a mistrial but was denied by the trial court. *Id.* at 715. The case was ultimately submitted to the jury, which found neither doctor at fault. *Id.* On appeal, the Iowa Supreme Court held that a mistrial should have been granted, but only as to the doctor who provided the medical attention to the juror. *Id.* at 721. The verdict finding no fault as to the other doctor was allowed to stand. *Id.*

Whitlow argues, however, that the holding in *Jack* implies that comparative fault cases, in general, are "so intertwined" that a retrial must include all defendants. No such implication can be construed from a fair reading of the *Jack* decision. Whitlow primarily points to the following language in the decision:

> Here, however, the alleged negligence of Dr. Sweetman and that of Dr. Booth arose in different circumstances. There was no

> legal relationship, such as an employment or credentialing relationship, between them. The jury was asked to and did determine each defendant's negligence separately without any weighing of comparative fault.
> Thus, the issues are not "so intertwined as to necessitate a new trial for both" defendants.

Id. at 720. First, this passage came in the context of the court reviewing other decisions involving retrials where a defendant-doctor treated a juror during trial. The court was simply remarking that, where there is no relationship between the defendants and no overlapping acts of negligence, a new trial against only the attending doctor can be ordered. In other words, the prejudice that might result from the jury witnessing a defendant-doctor "in action," is not likely to affect the jury's verdict against the non-attending doctor, as there is little relation between the defendants and the respective causes of action.

Second, an important distinction between *Jack* and the present case is that the basis for the mistrial—the defendant-doctor treating a juror—***arose during trial.*** Here, the error, if any, occurred in the submission of the verdict form—and only as to Whitlow's claim against Newton. It did not occur during the presentation of evidence or otherwise affect the evidence heard by the jury. This is not a situation similar to that found in *Jack*, where the potentially prejudicial conduct occurred during the course of trial. The concern in *Jack* was that the defendant-doctor's treatment of the juror may

prejudice the plaintiff's claims against both doctors. In the present case, the content of the verdict form had no effect on how the jury might view the parties or the evidence, and the jury did, in fact, find Rob McConnaha not at fault.

Just as in *Jack*, Whitlow made independent claims of negligence against the McConnahas and Newton. Whitlow had a full and fair trial against the McConnahas and lost; the jury unanimously found that Ron McConnaha was not negligent and not at fault for the accident. The jury was instructed separately on Whitlow's claim of negligence against the McConnahas and her claim of negligence against Newton; the verdict form asked the jury to make separate findings on their respective negligence. A new jury can certainly now determine whether Newton was negligent and what, if any, damages his negligence caused. Whitlow would be in the same situation she would have otherwise been; the jury would not answer Question No. 2 and proceed to the subsequent questions regarding Newton. Her rights would in no way be affected. The jury on retrial will then decide whether Newton was at fault, just as this jury would have done had it been instructed to proceed after answering Question No. 1 in the present case. Therefore, the District Court correctly denied Whitlow's Motion for Mistrial.

Whitlow next cites to the Iowa Court of Appeals case, *Cedar Rapids Merch. Co. v. Brokaw Indus., Inc.*, 710 N.W.2d 258 (Iowa Ct. App. 2005) (unpublished decision). This case involved an asset purchase agreement between competing vending businesses. *Id.* at *1. Both parties asserted claims of breach of contract, with one party bringing a conversion claim and request for punitive damages. *Id.* The trial court refused to instruct the jury on the conversion or punitive damages claims. *Id.* at 4. The Iowa Court of Appeals found this was error and remanded for a retrial on all claims. *Id.* The reasoning of the court in ordering a new trial on all claims was as follows: "Competing claims of breach of contract are intrinsically related in that one party's breach, if found to be material, would relieve the other party from performing under the contract." *Id.* This case is easily distinguishable from the present matter. The claims in *Brokaw* had a direct effect on one another; the facts on which the conversion and breach of contract claims were based were identical, the submission of which could result in a different verdict. The case at hand involves separate claims of negligence, based on separate acts, by separate defendants.

Whitlow goes on to cite several federal cases, claiming the general rule in federal court is to retry all issues following a mistrial. It is vital to again point out that the basis on which Whitlow sought a mistrial—the

jury's failure to answer questions as to Newton's fault—did not arise during trial. In other words, this is not a situation where the plaintiff claims some prejudicial act by counsel or ruling by the court may have affected the entire case. Explaining why a full retrial is needed in those situations, the Third Circuit stated:

> The grant of a partial new trial is appropriate 'only in those cases where it is plain that ***the error which has crept into one element of the verdict did not in any way affect the determination of any other issue.'***

Elcock v. Kmart Corp., 233 F.3d 734, 758 (3d Cir. 2000) (internal quotations omitted). In no way did the content of the verdict form affect the jury's determination of fault as to Ron McConnaha. It did not influence the evidence the jury heard or the instructions they were provided. The case was presented to the jury, and it filled out the verdict form using the instructions given, finding Ron McConnaha was not negligent and, therefore, not at fault.

Whitlow's argument that the claims she asserted against the McConnahas and the claims she asserted against Newton cannot be separated is simply wrong. Whitlow tried the case against the McConnahas and lost—she is not entitled to a second "bite of the apple." The District Court correctly denied Whitlow's Motion for Mistrial as to Ron and Jodi McConnaha.

Finally, Whitlow's reliance on Iowa Code section 668.3(6) is misplaced. Section 668.3(6) generally prohibits the court from discharging the jury until the verdict is reviewed for inconsistencies. Iowa Code § 668.3(6). Whitlow posits that, if that had been done in this case, the jury would have been required to reconsider the fault of Ron McConnaha and could have changed its verdict. This argument is unconvincing for several reasons. First, ***there was no inconsistency in the verdict.*** Section 668.3(6) states in pertinent part as follows:

> In an action brought under this chapter and tried to a jury, the court shall not discharge the jury until the court has determined that the verdict or verdicts are ***consistent with the total damages and percentages of fault*** . . .

Iowa Code § 668.3(6) (emphasis added). The purpose of section 668.3(6) is to ensure that the jury's verdict is consistent with the percentage of fault assigned to a particular party and the damages awarded. The jury in the present case did neither of those things—it did not assign percentages of fault or award damages. The jury merely followed the instructions on the verdict form and found Ron McConnaha not at fault. Even if the Court had not discharged the jury and discovered that the jury had not answered Question No. 3, there would be no "inconsistency" requiring the Court to order the jury to resume deliberations. Section 668.3(6) has no applicability

and did not require the District Court to order the jury to resume deliberations.

Whitlow further argues that, if the jury was forced to resume deliberations pursuant to section 668.3(6), it could have reconsidered the actions of both Newton and McConnaha together and modified its verdict. Whitlow relies on the idea that, since the jury did not answer Question No. 3, it must not have considered their fault together. This is wholly inconsistent with the instructions provided to the jury. Before beginning its deliberations, the jury was instructed to consider all of the surrounding circumstances of the accident, "together with the conduct of Ronald McConnaha and Timothy Newton . . . ." (Final Jury Instructions No. 10, App. 93). The jury was given marshaling instructions setting forth the elements needed to establish the claims against Newton and McConnaha. (Final Jury Instructions Nos.14, 17, App. 95, 98) The jury was also instructed to consider all of the instructions together. (Preliminary Jury Instructions No. 1, App. 85). It is beyond pure speculation by Whitlow to claim that the jury did not consider the actions of both McConnaha and Newton prior to filling out the verdict form. *See Automobile Underwriters Corp. v. Harrelson*, 409 N.W.2d 688, 691 (Iowa 1987) (holding jurors are assumed to have followed the court's instructions).

D. Conclusion

Whitlow's argument for mistrial rests on her incorrect assertion that the jury's verdict was incomplete or inconsistent as to the McConnahas. The jury was presented all of the evidence, heard arguments of counsel, and was instructed on the law, only after which it found Ron McConnaha not at fault. There was no inconsistency in the verdict, and it is pure speculation to assert that the jury would have changed its verdict with regard to the McConnahas if it was told to go back and make a finding on fault as to Newton. For this and the foregoing reasons, the District Court's ruling denying Whitlow's Motion for Mistrial should be affirmed.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING WHITLOW'S MOTION FOR NEW TRIAL

A. Preservation of Error

The McConnahas agree that, in her Motion for New Trial, Whitlow raised in the District Court the same arguments she submits on appeal. However, the McConnahas deny that Whitlow preserved raising an objection to the content of the verdict form, as Whitlow's counsel failed to object to the verdict form in the District Court. *See Olson*, 728 N.W.2d at 848–49. Therefore, Whitlow waived any argument that the jury's verdict was inconsistent or that the verdict was otherwise invalid due to the verdict form.

B. Standard of Review

The McConnahas agrees that the proper scope of review for the denial of a motion for new trial is abuse of discretion. *Newell*, 710 N.W.2d at 32.

C. Discussion

Iowa law is clear that a new trial is not a matter of right. *Riniker v. Wilson*, 623 N.W.2d 220, 230 (Iowa Ct. App. 2000). Rather, motions for new trial are governed by Iowa Rule Civil Procedure 1.1004. In addition to the bases set forth in rule 1.1004, the court may grant a new trial if the verdict does not effectuate "substantial justice" between the parties. *Houvenagle v. Wright*, 340 N.W.2d 783 (Iowa Ct. App. 1983). In ruling on a motion for new trial, the court has broad, although not unlimited, discretion. *Holdsworth v. Nissly*, 520 N.W.2d 332, 337 (Iowa Ct. App. 1994). The exercise of its discretion must be based on sound judicial reasons. *Wilson v. IBP, Inc.*, 558 N.W.2d 132, 144 (Iowa 1996). A trial court has no right to set aside a verdict just because it might have reached a different conclusion. *Lubin v. Iowa City*, 131 N.W.2d 765, 767 (Iowa 1964). Rather, the court's discretion must be founded upon matters which fairly appear in the records. *Id.* Generally, a jury's verdict finds sufficient support in the record if a reasonable mind would accept the evidence as adequate to reach the same conclusion as the jury. *See Dettmann v. Kruckenberg*, 613

N.W.2d 238, 251 (Iowa 2000).

Without identifying any basis found in Rule 1.1004, Whitlow claims the District Court abused its discretion in denying his Motion for New Trial, wherein she claimed the jury's verdict was "inconsistent." There simply was no inconsistency in the jury's verdict, particularly with regard to Whitlow's claim against the McConnahas. The jury performed exactly as instructed by the bracketed guidance on the verdict form; it answered "No" to Question No. 1 on whether Ron McConnaha was at fault, answered no further questions, and signed the verdict form. No "inconsistency" exists to support the granting of a new trial against the McConnahas. Thus, the District Court properly exercised its discretion in denying Whitlow's Motion for New Trial with respect to the McConnahas.

In her Brief, Whitlow goes on to argue that the District Court "speculated" about the intent of the jury by denying her Motion for New Trial. However, as has been stated throughout this Brief, there was no speculation needed to find that the jury returned a valid and consistent verdict with respect to the McConnahas. The jury heard all factual evidence presented by the parties, including testimony and argument on the actions of both Ron McConnaha and Timothy Newton. The jury considered all of the circumstances of the accident in unanimously deciding that Ron McConnaha

was not at fault. *See Automobile Underwriters Corp.*, 409 N.W.2d at 691 (holding jurors are assumed to have followed the court's instructions). The jury then answered Question No. 1 in the negative. In fact, the only speculation comes from Whitlow, who, without citing any legal authority, posits that the jury "could have" reconsidered the fault of Ron McConnaha and answered "yes" to Question No. 1. The only allowable inference is that the jury properly followed its instructions, considering all of the evidence, and found Ron McConnaha not at fault. There was no abuse of discretion in the District Court's partial denial of Whitlow's Motion for New Trial.

Whitlow concludes her argument on the Motion for New Trial by claiming the District Court abused its discretion in ordering a new trial against Newton only. Neither Iowa law nor good judgment supports the granting of a full new trial. Iowa courts have long held that a new trial may be granted as to less than all defendants in a case. *Jack*, 858 N.W.2d at 718 (citing Iowa R. Civ. P. 1.1004; 58 Am. Jur. 2d New Trial § 29, at 102 (2012) ("The granting of a new trial as to one defendant does not require that the plaintiff be granted a new trial with regard to claims against another defendant.")). The court in *Jack* gave several examples of cases where a new trial was ordered for less than all defendants. 858 N.W.2d at 719. One of those examples is the Iowa Court of Appeals case, *Houvenagle*, where a

pedestrian who was injured when struck by a moving car sued both the car's driver and the dealership that had sold the car, alleging a defective carburetor. 340 N.W.2d at784–85. The jury did not award damages against either defendant, and the district court ordered a new trial against the driver only, reasoning there was no evidence the carburetor had been defective. *Id.* at 785. The court of appeals upheld the grant of a new trial as to one defendant only. *Id.* at 785–86. The court explained, "In general, a new trial may be granted in favor of any of the parties where that can be done without affecting the rights of the other parties." *Id.* at 786.

The court in *Jack* also provided useful analysis and guidance on when it is feasible to order a new trial against less than all defendants. The court held that a new trial against the first doctor was feasible and, thus, declined to order a new trial against the doctor-physician who did not render treatment to the juror. *Id.* The court stated:

> In the present case, a new trial could be ordered against Dr. Sweetman alone. Dr. Sweetman's alleged negligence pertained to the monitoring of an IV in Jack's arm during the second surgery; Dr. Booth's alleged negligence related to treatment decisions before the second surgery. ***As the instructions and the verdict forms make clear, the jury assessed each defendant's negligence independently.***
>
> . . .
>
> Thus, the issues are not "so intertwined as to necessitate a new trial for both" defendants. *Sheridan*, 25 P.3d at 97. . . . ***[A] new***

> ***jury would then determine whether Dr. Sweetman was negligent in monitoring the IV during that surgery and, if so, what the resulting damages were.***

Id.

Another example where a court found that a new trial should be granted with respect to less than all defendants is the Oregon Supreme Court case, *McIntosh v. Lawrance*, 469 P.2d 628 (Or. 1970). In *McIntosh*, the court held that an error in the instructions relating to a cause of action against one codefendant but not the other could not form a basis for a new trial against the second codefendant. *Id.* at 629. The erroneous instruction related to the burden of proof on the claim against the first codefendant. *Id.* The plaintiff moved for a new trial as to both defendants, which was granted. *Id.* The appellate court reversed the trial court's order, reasoning as follows: "The questioned instructions related solely to plaintiff's case against the defendant Lawrance and, therefore, could not have prejudiced her case against the defendant Jones." *Id.* The court found that the trial court should have granted a new trial against only the defendant that the instruction pertained to. *Id.*

The reasoning in both *Jack* and *McIntosh* is sound—where the alleged error did not prejudice the plaintiff's case against a particular defendant, a new trial should only be ordered against the other defendant. Following the

unanimous verdict in favor of Ron McConnaha, Plaintiff has not provided the Court with a single practical or legal reason for granting a new trial as to the McConnahas. Plaintiff had independent claims of negligence against the McConnahas and Newton, and the jury found that Ron McConnaha was not at fault. After the jury's verdict of no fault against Ron McConnaha, the only issue remaining is Plaintiff's claim against Newton, which can be retried without affecting the rights of the parties. A subsequent jury would simply then decide whether Newton was at fault, just as this jury would have done had it been instructed to proceed after answering Question No. 1 in the present case. It is hard to imagine a better example of a case where a new trial should proceed against less than all defendants. The District Court properly exercised its discretion in denying Whitlow's Motion for New Trial with regard to her claim against the McConnahas.

D. Conclusion

Just as with her Motion for Mistrial, Whitlow's argument for a New Trial fails. The jury properly found in favor of the McConnahas with respect to fault. The fact that the verdict form instructed the jury to not answer any questions with regard to Newton does not alter this finding. The subsequent jury on the retrial against Newton can simply pick up right where this jury left off and move on to Question No. 3. For this and the foregoing

reasons, the District Court's ruling denying Whitlow's Motion for New Trial should be affirmed.

IV. THE DISTRICT COURT DID NOT ERR IN OVERRULING WHITLOW'S OBJECTIONS TO JURY INSTRUCTIONS OR IN REFUSING WHITLOW'S PROPOSED CAUTIONARY INSTRUCTION

A. Preservation of Error

The McConnahas agree that Whitlow preserved these issues for review on appeal.

B. Standard of Review

The McConnahas agree that the proper scope of review for a court's refusal to give a jury instruction is for errors at law. *Alcala v. Marriott Int'l, Inc.*, 880 N.W.2d 699, 707 (Iowa 2016). Thus, the District Court's decision to instruct the jury with Instruction No. 13 is reviewed for legal error.

However, a court's refusal to give a cautionary jury instruction is reviewed for abuse of discretion. *State v. Kimball*, 176 N.W.2d 864, 869 (Iowa 1970); *Lolkus v. Vander Wilt*, 141 N.W.2d 600, 607 (Iowa 1966). Therefore, the District Court's refusal to instruct the jury on helmet use is subject to an abuse of discretion standard of review.

C. The District Court did not Err in giving Instruction No. 13

Whitlow claims that the Court erred in giving jury Instruction No. 13, the "mere fact" instruction, arguing that the instruction misstated the law.

Instruction No. 13, a form-instruction, accurately stated the law and did not mislead the jury. The Court committed no error, and its ruling in that regard should be upheld.

Instruction No. 13 stated as follows: "The mere fact that an accident occurred or a party was injured does not mean that a party was negligent or at fault." (Final Jury Instructions p. 13, App. 94). This instruction mirrors the uniform instruction authored by the special committee on uniform court instructions of the Iowa State Bar Association. *See* Iowa Uniform Jury Instruction 700.8. The instruction also accurately reflects the fundamental concept that mere evidence of an injury, without more, does not establish negligence of the defendant. *Smith v. Koslow*, 757 N.W.2d 677, 680 (Iowa 2008), *overruled on other grounds by Alcala v. Marriott Int'l, Inc.*, 880 N.W.2d 699 (Iowa 2016) ("It is a fundamental tenet of tort law that the fact a plaintiff has suffered an injury, without more, does not mean the defendant was negligent.") (citing *Novak Heating & Air Conditioning v. Carrier Corp.*, 622 N.W.2d 495, 497 (Iowa 2001); *Brewster v. United States*, 542 N.W.2d 524, 528 (Iowa 1996)). Evidence that Whitlow suffered injury in the subject accident does not establish that Ron McConnaha was negligent. Instruction No. 13 correctly stated this legal concept, and the District Court did not commit legal error in giving said instruction.

Whitlow cites to *Smith*, 757 N.W.2d at 682, arguing its holding requires a court giving a "mere fact" instruction must also instruct the jury that evidence of injury may still "be considered as some evidence of negligence." The Iowa Supreme Court in *Smith* made no such finding. First, and most importantly, the Court in *Smith* addressed the "mere fact" instruction specifically in the context of a medical malpractice case. *Id.* at 681 ("We agree with the majority of courts that the submission of the 'bad result/injury is not negligence' instruction to a jury ***in a standard medical malpractice action*** would not normally constitute prejudicial error." (emphasis added)). As it was a medical malpractice case, the concern in *Smith* was that the instruction may unduly emphasize a particular medical theory. *Id.* at 680 ("Smith claims the instruction served as a comment on the evidence by emphasizing Koslow's claim that the blood loss and death during the surgery was not the result of any negligence.").

The case at hand is not a medical malpractice case but, instead, a standard motor vehicle accident case. There was no concern—and Whitlow does not argue—that the giving of Instruction No. 13 overemphasized a particular theory of recovery. In fact, the court in *Smith* ultimately upheld the district court's giving of the "mere fact" instruction. ("[W]e conclude the district court did not err by giving the supplemental instruction.").

Instruction No. 13 accurately stated the longstanding principle that mere evidence of an injury does not prove negligence; no error was committed by the District Court in giving the instruction.

D. The District Court did not Abuse its Discretion in Refusing Whitlow's Cautionary Instruction on Motorcycle Helmets

Whitlow lastly claims that the District Court abused its discretion in refusing to give a cautionary instruction on the use/nonuse of motorcycle helmets. The cautionary instruction was not relevant and was unnecessary, as the McConnahas were not claiming comparative fault based on helmet nonuse. Given its inapplicability and potential to mislead or confuse the jury, the District Court properly exercised its discretion in refusing to give the cautionary instruction.

"Generally, Iowa law requires that a court give a requested instruction when it states a correct rule of law having application to the facts of the case and the concept is not otherwise embodied in the other instructions." *See Stover v. Lakeland Square Owners Ass'n.*, 434 N.W.2d 866, 868 (Iowa 1989) (citing *Adams v. Deur*, 173 N.W.2d 100,105–07 (Iowa 1969)). Iowa courts employ the following three-part rationale for giving jury instructions:

1. Instructions should not marshal the evidence or give undue prominence to any particular aspect of a case;
2. Courts, when instructing the jury, should not attempt to warn against every mistake or misapprehension a jury may make;

3. Jurors must be left to their intelligent apprehension and application of the rules put forth in the instructions.

Stover, 434 N.W.2d at 868. Error in giving or refusing to give a jury instruction does not require reversal unless that error is prejudicial. *Rudolph v. Iowa Methodist Medical Center*, 293 N.W.2d 550, 555 (Iowa 1980). The jurors are assumed to have followed the court's instructions. *Automobile Underwriters Corp.*, 409 N.W.2d at 691.

In the case at hand, the jury was given complete instructions, including those on fault, and found that Ron McConnaha was not at fault. The McConnahas did not assert or argue that Whitlow was comparatively at fault in not wearing a motorcycle helmet. In fact, in its order dated February 22, 2018, the District Court prohibited the McConnahas from introducing any evidence of Whitlow's nonuse of a motorcycle helmet. The issue was not raised at trial with regard to either fault or damages. There was simply no basis for giving the jury a cautionary instruction on motorcycle helmet use, and the District Court correctly exercised its wide discretion in refusing to do so. *See Kimball*, 176 N.W.2d at 869.

E. <u>Conclusion</u>

The jury in this case was properly instructed and returned a verdict of "no fault" as to Ron McConnaha. Instruction No. 13 mirrored the uniform instruction and accurately stated the legal principle that evidence of an injury

does not prove a party was at fault. The holding in *Smith* did nothing to change this longstanding principle; in fact, the court in *Smith* approved the trial court giving a nearly-identical instruction. Likewise, the District Court did not abuse its discretion in refusing to give the jury a cautionary instruction on helmet use. The nonuse of a motorcycle helmet was not asserted as a defense or argued by the McConnahas at trial. A cautionary instruction on the subject was simply unnecessary and would have only resulted in confusion of the issues. The District Court did not abuse its discretion in refusing to give the instruction.

CONCLUSION

Following the six-day trial in this matter, the jury found Ron McConnaha not at fault, answering Question No. 1 on the verdict form, "No." Obeying the instruction below Question No. 1, the jury answered no further questions. Whitlow now seeks to retry her case against the McConnahas due to the content of the verdict form which was not objected to by her counsel. Further, despite presenting all evidence on her claims against the McConnahas and Newton—and not arguing that the verdict regarding the McConnahas was unsupported by substantial evidence—she claims the jury could have changed its mind regarding the fault of McConnaha if the jury was instructed to continue answering questions on

the verdict form with respect to Newton. This argument is wholly unsupported by Iowa law or practical sense. Therefore, the District Court did not abuse its discretion in denying Whitlow's Motion for Mistrial or Motion for New Trial as to the McConnahas, and its rulings thereon should be affirmed.

The District Court was also correct in submitting to the jury Instruction No. 13, which accurately set forth the "mere fact" principle, and by refusing to give a cautionary instruction on the use/nonuse of motorcycle helmets, as no claim of comparative fault against Whitlow was made in that regard. Therefore, the District Court's rulings on these jury instructions should also be affirmed.

REQUEST FOR ORAL ARGUMENT

The Appellees request to be heard at oral argument in connection with the issues raised in this appeal.

Ron McConnaha and Jodi McConnaha,
Defendants/Third-Party Plaintiffs/Appellees

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENT

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/s/ Ryan F. Gerdes — September 10, 2018

Ryan F. Gerdes — Date

CERTIFICATE OF SERVICE AND FILING

I certify that on the 10th day of September, 2018, I, the undersigned, did file electronically this Appellees' Brief in Final Form and Request for Oral Argument with the Clerk of the Iowa Supreme Court using the Electronic Document Management System.

I certify that on the 10th day of September, 2018, I, the undersigned, did serve this Appellees' Brief in Final Form on the attorney for Appellant via electronic service of the Electronic Document Management System. Upon information and belief, the attorney for Appellant is a registered filer pursuant to Iowa R. Civ. P. 16.201.

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