

IN THE SUPREME COURT OF IOWA

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NO. 18-0566

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

Plaintiff/Appellant,

vs.

RON McCONNAHA, JODI McCONNAHA, and TIMOTHY NEWTON,

Defendants/Appellees.

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APPLICATION FOR FURTHER REVIEW OF THE COURT OF  
APPEALS DECISION FILED MAY 1, 2019

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Patrick L. Woodward AT0008728  
McDONALD, WOODWARD & CARLSON, P.C.  
3432 Jersey Ridge Road  
Davenport, IA 52807  
Telephone No. (563) 355-6478  
Fax No. (563) 355-1354  
E-mail: [pwoodward@mwilawyers.com](mailto:pwoodward@mwilawyers.com)

ATTORNEYS FOR DEFENDANTS/APPELLEES  
RON McCONNAHA and JODI McCONNAHA

## QUESTIONS PRESENTED FOR REVIEW

- I. Did the Court of Appeals err in holding Whitlow preserved her claim of error arising from a verdict form instruction despite making no objection to the same?
- II. Did the Court of Appeals err in holding the trial court's denial of Whitlow's Motion for Mistrial or Alternatively Motion for New Trial as to McConnaha was an abuse of discretion when the jury unanimously found McConnaha was not at fault and the basis for Whitlow's Motion was subsequent erroneous verdict form language?

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## STATEMENT SUPPORTING FURTHER REVIEW

The Court of Appeals justified its decision ordering a mistrial and new trial as to all defendants based upon the mistaken belief that “. . . a complete new trial . . . delivers justice for all the parties.” (App. Decision, p. 12). In reversing the trial court’s denial of plaintiff Marsha Whitlow’s (“Whitlow”) Motion for New Trial as to Ronald and Jodi McConnaha (hereinafter “McConnaha”),<sup>1</sup> after unanimous jury found that McConnaha was not at fault, the Court of Appeals erroneously decided that not only had Whitlow preserved error despite the clear language of Iowa Rule of Civil Procedure 1.924, but that the bracketed verdict form instruction coming after finding McConnaha was not at fault somehow denied Whitlow a fair trial as to McConnaha and that the District Court erred in not granting Whitlow’s Motion for Mistrial as McConnaha.

Briefly, plaintiff Whitlow was a passenger on a motorcycle driven by her fiancé, Timothy Newton, (hereinafter “Newton”) on June 27, 2015. (App. Decision, p. 3). As McConnaha turned his farm tractor left into a farm lane, Newton, who was behind McConnaha, tried to pass on the left, striking the tractor and seriously injuring Whitlow. (Id.) Initially, Whitlow sued only

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<sup>1</sup> Jodi McConnaha was a defendant as an owner only.

McConnaha; McConnaha in turn filed a third-party claim against Newton. Eventually, Whitlow asserted her own claim against her fiancé, Newton.

After six days of trial, the District Court provided a proposed set of jury instructions and a special verdict form consisting of six questions to counsel. While there were objections made to certain instructions, no objections were made by plaintiff to the verdict form which in part read:

We the jury, find the following verdict on the questions submitted to us:

**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.]

Thereafter, Question No. 2 dealt with McConnaha’s causation, Question No. 3 Newton’s negligence, Question No. 4 Newton’s causation, Question No. 5 comparative fault, and Question No. 6 damages. (App. Decision, p. 4). The jury deliberated and returned a unanimous verdict answering Question No. 1, “Was Ronald McConnaha at fault?,” **No.** (emphasis added). Following the erroneous bracketed instruction after Question No. 1, the jury answered no further questions; the District Court discharged the jury before it was realized

that the jury had not answered the questions regarding Newton's fault and Whitlow's damages.

The plaintiff subsequently filed post-trial motions seeking a mistrial or in the alternative, a new trial; the District Court correctly denied the Motion for Mistrial and granted the Motion for New Trial as to Newton only. The District Court's clear and concise reasoning was that Whitlow was "entitled to a new trial as all issues not fully litigated and determined by the jury," but that the verdict was "complete and consistent" as to McConnaha, as he was "exonerated of all fault."

Contrary to Iowa Rule of Civil Procedure 1.924 and *Olson v. Sumpter*, 728 N.W.2d 844 (Iowa 2007), the Court of Appeals held that Whitlow's failure to object to the verdict form language after Question No. 1 was not waiver, finding that Whitlow was not appealing the erroneous verdict form language, but the denial of her Motion for Mistrial.

Moreover, the Court of Appeals erroneously reversed the ruling of the District Court that limited a new trial as to Newton only, holding that despite the unanimous verdict that McConnaha was not at fault, Whitlow was entitled to a new trial as to both Newton and McConnaha. In doing so, the Court of Appeals mistakenly found that the verdict as to McConnaha was somehow tainted and that "the remedy of a complete new trial, therefore, delivers justice

for all of the parties.” (App. Decision, p. 12). It is clear that the Court ignored not only the decision of *Bryant v. Parr*, 822 N.W. 366 (Iowa 2015), but misunderstood this Court’s holding in *Jack v. Booth*, 858 N.W.2d 711 (Iowa 2015) and that the erroneous verdict instruction after Question No. 1 did not affect Whitlow’s case as to McConnaha.

### ARGUMENT

**I. CONTRARY TO IOWA R.CIV.P. 1.924, THE COURT OF APPEALS HELD THAT WHITLOW’S FAILURE TO OBJECT TO THE VERDICT FORM DID NOT WAIVE HER APPEAL OF THE UNANIMOUS JURY VERDICT FOR RONALD McCONNAHA.**

At the conclusion of a six day jury trial, counsels’ arguments, and the Court’s instructions, a unanimous jury answered the first question on the verdict form “No,” finding that Whitlow had failed to prove her claim that Ronald McConnaha was at fault in causing the accident. (Erroneous language instructing the jury what to do after Question 1 led the jury to not reach a decision as to the fault of Newton or Whitlow’s damages.) The trial court, addressing the issue of erroneous language on the verdict form for the first time on post-trial motions, correctly ruled that as to McConnaha, the jury trial was complete and entered an Order denying Whitlow’s requested relief as to McConnaha, but granting Whitlow a new trial as to defendant Newton only. In reversing the District Court, the Court of Appeals held that Whitlow’s



failure to object to the verdict form until the post-trial motions did not violate Iowa R.Civ.P. 1.924, as the Court characterized Whitlow's appeal as to McConnaha as a denial of the Motion for Mistrial, and not the erroneous language underlying the motion.<sup>2</sup>

In ignoring Iowa R.Civ.P. 1.924, the Court of Appeals disregards the unambiguous language of the Rule that says "before jury arguments, the Court shall give to each counsel a copy of its instructions in their final form . . . . Within such time, all objections to giving or failing to give any instruction must be made . . . . No other grounds or objections **shall be asserted thereafter, or considered on appeal.**" Iowa R.Civ.P. 1.924 (emphasis added). As this Court found in *Olson v. Sumpter*, 728 N.W.2d 844, 849-50 (Iowa 2007), Iowa R.Civ.P. 1.924 applies to jury instructions or corresponding verdict form and if objections are not made, subsequent challenges are waived. In finding that the plaintiff somehow preserved error, the Court made several mistaken findings. First, the Court of Appeals states that "the jury was, in fact misled . . . ." This unsupported assertion ignores the undisputed fact that the jury did exactly what they were told. There was no confusion, no question, and no prejudice.

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<sup>2</sup> It should be clear that there is no question that Whitlow is entitled to a new trial as to her claims against her fiancé, Timothy Newton. Newton took no part in this appeal and as to Newton, the new trial as to all issues is appropriate.

Second, the Appellate Court in characterizing Whitlow's appeal as one from the denial of mistrial instead of from the verdict form, ignores the fact that the only ground for the claimed mistrial was the erroneous verdict form language. As such, Iowa R.Civ.P. 1.924 still provides that error was not preserved.

Finally, the Court of Appeals focuses on what transpired after the unanimous jury answered Question No. 1 and the failure to complete the verdict form. Again, this result only flowed from the erroneous verdict form language Whitlow did not object to.

In summary, the Court of Appeals ignored Iowa R.Civ.P. 1.924. It should have found Whitlow waived this ground of appeal and affirmed the trial court.

**II. THE COURT OF APPEALS ERRED IN FINDING THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING WHITLOW'S MOTION FOR NEW TRIAL AS TO McCONNAHA WHERE THE VERDICT FORM LANGUAGE OCCURRED AFTER THE FINDING OF NO FAULT AND IS CONTRARY TO THE IOWA SUPREME COURT CASES OF *BRYANT V. PARR* AND *JACK V. BOOTH*.**

The decision of the Court of Appeals ordering a new trial as to Whitlow's negligence claim against McConnaha ignores the fact that the jury reached a unanimous verdict on the issue of fault and that proceeding with a new trial only as to defendant Newton places the plaintiff in the exact position

she was in when the jury was discharged. As stated in *Bryant v. Parr*, 822 N.W.2d 366, 380 (Iowa 2015), courts may “narrow the scope of retrial under certain circumstances . . . .” The key to whether all issues should be retried or if they can be narrowed is whether the “issue is to be tried is distinct and separate from the other issues, and that the new trial can be had without danger of complications with other matters.” *Id.* In the present case, context is important. All the evidence was in, arguments were complete, and the error occurred after Question No. 1 was answered. The error in no way affected the jury determination as to McConnaha. As such, the unanimous jury verdict finding that McConnaha was not at fault is no different than if the Court granted McConnaha a directed verdict at the close of all the evidence. Whitlow would not be entitled to a new trial and as the trial court held, Whitlow was placed in the exact same position she was as to Newton. She can proceed with her evidence as to Newton’s fault and prove up her damages. Under *Bryant*, the District Court correctly found the outstanding issues after the erroneous language were separate and distinct and that the trial of the issues against Newton could be conducted alone.

In holding the District Court abused its discretion, the Court of Appeals cited *Jack v. Booth*, 858 N.W.2d 711 (Iowa 2015) in support of its decision. However, that reliance is misplaced. In *Jack*, the issue was whether conduct

of one defendant occurring during the trial itself **tainted** the jury as to both defendants and precluded the plaintiff from a fair trial. That certainly is not the case here; the plaintiff had her fair trial as to McConnaha. The Court of Appeals, however, interpreted *Jack* as essentially holding in comparative fault cases, there cannot be a new trial without all the parties. While that may be true where the alleged error or conduct occurs during trial and affects the jury's view of the evidence or parties, that is not true in the present case. Nothing about the erroneous language affected the fairness of Whitlow's claims against McConnaha.

Next, the Court of Appeals cites to *Estate of Houston, v. Sureddi*, 41 P.3d 993 (Okla. App. 2001) in support of its holding that the District Court abused its discretion. In *Houston*, the Oklahoma Court of Appeals ordered a new trial as to all defendants because of juror misconduct which occurred at the outset of the trial. As the misconduct occurred from the outset, it conceivably affected the other jurors and the entire jury deliberations. Again, this is entirely different than the present case. Nothing tainted the verdict as to McConnaha. There is no issue as to what transpired during the trial or the jury's answer to Question No. 1 on the verdict form.

Finally, the Court of Appeals cites to Iowa Code, §668.3(6) in support of its finding of abuse of discretion, but such reliance is also misplaced. As

this Code section is focused on comparative fault and damages, it would be relevant only if the jury had not decided McConnaha's fault before the erroneous language, but with the unanimous verdict finding McConnaha not at fault, §668.3(6) is not applicable.

In summary, the Court of Appeals in reversing the District Court's Order as to McConnaha ignored the overriding principles not only of fairness, but that the jury verdict should be upheld if at all possible. The erroneous language did not affect the unanimous verdict finding McConnaha was not at fault, and the District Court was correct in its ruling on Whitlow's post-trial motions.

### CONCLUSION

The decision of the Court of Appeals should be reversed and the District Court's Order of a new trial as to Newton only should be reinstated. The Court of Appeals erred first in finding Whitlow preserved the alleged error contrary to Iowa R.Civ.P. 1.924. The Court of Appeals thereafter compounded its error by holding that under *Bryant v. Parr*, *Jack v. Booth* and Iowa Code §668.3(6) required a new trial as to McConnaha; the error on the verdict form occurred after the unanimous finding of no fault on the part of McConnaha and, therefore, the Court of Appeals' holding that Whitlow was entitled to a new trial as to McConnaha should be reversed.

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

By: /s/ Patrick L. Woodward  
Patrick L. Woodward (AT0008728)

McDonald, Woodward & Carlson, P.C.  
3432 Jersey Ridge Road  
Davenport, IA 52807  
Telephone: (563) 355-6478  
Facsimile: (563) 355-1354  
[pwoodward@mwilawyers.com](mailto:pwoodward@mwilawyers.com)

ATTORNEYS FOR APPELLEES  
RON McCONNAHA and JODI  
McCONNAHA

**CERTIFICATE OF COMPLIANCE WITH TYPEFACE TYPE-  
VOLUME LIMITATION**

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, and contains 2,491 words, excluding the parts of the Application exempted by Iowa R. App. P. 6.1103(4)(a).

/s/ Patrick L. Woodward

Patrick L. Woodward

May 13, 2019

Date

**CERTIFICATE OF SERVICE AND FILING**

I certify that on the 13<sup>th</sup> day of May, 2019, I, the undersigned, did file electronically this Appellee's Application for Further Review with the Clerk of the Iowa Supreme Court using the Electronic Document Management System.

I certify that on the 13<sup>th</sup> day of May, 2019, I, the undersigned, did serve this Appellees' Application for further Review 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.

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

By: /s/ Patrick L. Woodward  
Patrick L. Woodward (AT0008728)

McDonald, Woodward & Carlson, P.C.  
3432 Jersey Ridge Road  
Davenport, IA 52807  
Telephone: (563) 355-6478  
Facsimile: (563) 355-1354  
[pwoodward@mwilawyers.com](mailto:pwoodward@mwilawyers.com)

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McCONNAHA