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 FOR MUSCATINE COUNTY
THE HONORABLE STUART WERLING, JUDGE
SEVENTH JUDICIAL DISTRICT
MUSCATINE LAW NO. LACV023538

PLAINTIFFS-APPELLANT'S RESISTANCE TO DEFENDANTS-APPELLEES' APPLICATION FOR FURTHER REVIEW

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STANDARD FOR GRANTING FURTHER REVIEW

"Further review by the Supreme Court is not a matter of right, but of judicial discretion. An application for further review ***will not be granted in normal circumstances.***" IOWA R. APP. P. 6.1103(1)(b) (emphasis added).

Defendants-Appellees Ron and Jodi McConnaha (referred to collectively herein as "McConnaha") have not put before this Court appropriate issues for further review. In fact, McConnaha's application sets out two questions for review that are facially inconsistent with Iowa Rules of Procedure. First, McConnaha improperly asks whether the Court of Appeals erred in holding Plaintiff-Appellant Whitlow ("Whitlow") preserved her claim of error. (McConnaha's App. for Further Rev., 2.) Second, McConnaha improperly asks whether the Court of Appeals erred in holding an abuse of discretion occurred in the trial court's failure to grant a mistrial. *Id.* Iowa Rule of Appellate Procedure 6.1103(1)(b) outlines the character of the reasons the Supreme Court considers in determining whether to grant further review. McConnaha fails to identify which of the four reasons he relies upon in seeking further review – leaving Whitlow to speculate as to whether McConnaha relies upon any of the bases in the rule at all.

It appears upon review of McConnaha's brief that McConnaha must concede this case involves no questions of constitutional law. *See* IOWA R.

APP. P. 6.1103(1)(b)(2). Further, the cases cited by McConnaha are Supreme Court cases meaning this case involves no questions which "have not been settled by the supreme court." *See Id.* There is no allegation this case involves questions of changing legal principles. *See* IOWA R. APP. P. 6.1103(1)(b)(3). Lastly, this case impacts only the parties to the matter and does not involve issues of broad public importance. *See* IOWA R. APP. P. 6.1103(1)(b)(4). Thus, Whitlow surmises McConnaha intended to argue the Court of Appeals entered a decision in conflict with a decision of the Supreme Court and resists hereinafter on that basis.

If, in fact, McConnaha is claiming a conflict with a prior Supreme Court decision, McConnaha must establish both a conflict and that the conflict concerns an important matter. McConnaha's brief cites three Iowa Supreme Court cases, without going into further detail, which it appears McConnaha believes are in conflict with the Appellate Court's decision: *Olson v. Sumpter*, 728 N.W.2d 844 (Iowa 2007); *Bryant v. Parr,* 822 N.W. 366 (Iowa 2015); and *Jack v. Booth,* 858 N.W.2d 711 (Iowa 2015). However, McConnaha fails to identify any conflict between the Appellate Court holding and any of these cases. Rather, McConnaha complains of the application of the cases to the facts of this matter, which is tantamount to re-litigating factual issues that have been decided. In the absence of a conflict between the Appellate Court ruling

and the prior holdings of *Olson*, *Bryant*, and *Jack*, Appellants have not satisfied the requirement of Rule 6.1103(1)(b)(1) and further review should be denied.

ARGUMENT

I. THERE IS NO CONFLICT WITH A SUPREME COURT DECISION IN THE APPELLATE COURT'S RULING RELATING TO PRESERVATION OF ERROR IN THE TRIAL COURT

McConnaha's first allegation is that the Appellate Court "ignored" Iowa rule of civil procedure 1.924 and "disregarded" the unambiguous language of the rule. (McConnaha's App. for Further Rev., 9.) These allegations are inappropriate, and certainly not a valid basis for further review. The only relevant statement McConnaha makes in his entire first argument for further review is where McConnaha states:

> As this Court found in *Olson v. Sumpter*, 728 N.W.2d 844, 849-50 (Iowa 2007), Iowa R.Civ.P. [sic] 1.924 applies to jury instructions or corresponding verdict form and if objections are not made, subsequent challenges are waived.

(McConnaha's App. for Further Rev., 9.)

Crucially, McConnaha does not clearly state what portion of the Appellate Court's decision is in conflict with *Olson*. This is likely because the Appellate decision is not in conflict. The Appellate Court also quoted the language from *Olson* relied upon by McConnaha. (App. Order, 7.) The

Appellate Court then went on to state:

> Whitlow's objection on appeal is not to the faulty directions on the verdict form, but rather to the incomplete or inconsistent nature of the verdict. Her post-verdict motion for mistrial or new trial preserved those claims. *See Clinton Physical Therapy*, 714 N.W.2d at 610 (finding consent to a sealed verdict did not foreclose ability to request a new trial alleging an inconsistent verdict).

(App. Order, 8) (*citing Clinton Physical Therapy Servs., P.C. v. John Deere Health Care, Inc.*, 714 N.W.2d 603, 609 (Iowa 2006)).

Therefore, the Appellate Court did not conflict with *Olson*, but rather, explicitly distinguished *Olson* consistently with, and according to, another Iowa Supreme Court decision in *Clinton Physical Therapy*. The only reason McConnaha believes there is a conflict with *Olson* is that McConnaha continues to attempt to frame the legal dispute inaccurately. If McConnaha is in fact arguing the Appellate Court decision conflicts with *Olson*, McConnaha is incorrect and further review by the Supreme Court should not be granted on this basis.

II. THERE IS NO CONFLICT WITH A SUPREME COURT DECISION IN THE APPELLATE COURT'S FINDING OF AN ABUSE OF DISCRETION BY THE TRIAL COURT FAILING TO GRANT A MISTRIAL

McConnaha's second argument more explicitly states that McConnaha believes the Appellate decision is in conflict with *Bryant* and *Jack*. However,

both McConnaha and the Appellate decision cite *Bryant* favorably for the premise that courts may narrow the scope of a retrial under specific circumstances. The Appellate Court then looked to other cases to determine whether this matter is an example of one where the district court should have limited the scope of retrial or not. There is no conflict with *Bryant*.

Upon examination, it is evident the Appellate Court is not in conflict with *Jack* either – the Appellate Court actually considered and relied upon *Jack* in reaching its conclusion. McConnaha's argument essentially alleges the Appellate Court misinterpreted *Jack* and its clear language on limited-scope new trials in cases involving comparative fault. McConnaha is incorrect and has not asserted a valid basis for further review.

In *Jack v. Booth*, 858 N.W.2d 711 (Iowa 2015), the plaintiff sued two doctors for malpractice based on separate and distinct instances of negligent treatment. *Id.*[1] The Court affirmed a retrial of the plaintiff's claim against one doctor and affirmed entry of judgement for the plaintiff's claim against the other doctor. *Id.*[2] The Court in *Jack* noted that the reason a partial mistrial

[1] Plaintiff alleged Dr. Booth, an Ob-Gyn specialist, was negligent in two surgeries over the course of two days related to Plaintiff's pregnancy. Plaintiff alleged Dr. Sweetman, an anesthesiologist, was negligent when during the second surgery he caused an IV infiltration and arm injury. *Jack*, 858 N.W.2d at 713.

[2] During trial, a juror took ill and Dr. Sweetman treated the juror in view of the other jurors. *Id.* at 714-15. The jury returned separate "no negligence" verdicts in favor of both doctors on each individual claim. *Id.* at 716-17. Plaintiff moved for mistrial.

could be granted was because the two doctors' respective negligence "arose in *different* circumstances." *Id*. at 720 (emphasis added).

Crucially, the *Jack* Court held that a retrial in a comparative fault suit must include all defendants. *Id.* The Court reached the conclusion that the plaintiff's claims were not "so intertwined as to necessitate a new trial for both defendants" precisely because the suit was not a comparative fault action:

> Our case is distinguishable from the foregoing malpractice cases in which the courts ordered new trials against all defendants. Those cases involved a single injury and claims for that injury against both the doctor who treated the plaintiff and the facility where the treatment took place. Here, however, the alleged negligence of Dr. Sweetman and that of Dr. Booth arose in different circumstances…. ***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. (emphasis added) (citations omitted).

Implicit in *Jack* is the holding that the actions and potential resulting fault of multiple defendants in a comparative fault action are so intertwined that a retrial for one defendant necessitates a retrial for the other. *Id*. In *Jack v. Booth*, this Court held that only when a plaintiff's claim against multiple defendants stems from ***different alleged instances*** of negligence can a mistrial

be declared for one defendant but not another. 858 N.W.2d 711, 720 (Iowa 2015) (emphasis added). The Appellate Court relied upon this language and entered an order consistent with *Jack*.

McConnaha makes additional arguments related to Iowa Code section 668.3(6). The Appellate Court correctly applied the statutory law of Iowa. McConnaha's entire argument is premised upon the preliminary finding the jury had completed its task and not returned an inconsistent verdict. McConnaha argues that the jury's incomplete verdict somehow removes the application of the Iowa comparative fault statute (amounting in effect to a "summary verdict" instead of summary judgment). *Cf* IOWA CODE § 668. McConnaha's argument is logically flawed and the Appellate Court's decision accurately followed the law of Iowa. *See* IOWA CODE § 668.3(6).

McConnaha also questioned the Appellate Court's citation to an Oklahoma case, *Hutson ex. Rel. Estate of Hutson v. Sureddi*, 41 P.3d 993 (Okla. App. 2001). Citation to a case from another jurisdiction is not in itself inappropriate. In this instance, the Appellate Court specifically quoted from *Hutson*, "In some circumstances, the rights of the parties involved may be so intertwined that justice requires a new trial as to all parties and all issues." (App. Order, 11.) This language quoted from *Hutson* is consistent with the Iowa cases relied upon by the Appellate Court, including *Bryant*, *Jack*, and

Wederath v. Brant, 319 N.W.2d 306 (Iowa 1982) (potentially the central case to the Appellate Court's decision that a mistrial should have been granted and unmentioned by McConnaha in his application for further review). Further, *Hutson* has been previously cited by this Court in *Jack*:

> Courts in other jurisdictions have more recently set forth standards for evaluating when it is appropriate for a court to grant a new trial against fewer than all defendants. *See, e.g., Williams v. Slade*, 431 F.2d 605, 608 (5th Cir. 1970) ("[P]artial new trials [as to one defendant and not as to another] should not be resorted to unless no injustice would result."); *Buffett v. Vargas*, 1996 - NMSC 012, 121 N.M. 507, 914 P.2d 1004, 1010 (N.M. 1996) (stating the standard governing partial new trials should be "'whether there is a clear showing that the issues in the case are so distinct and separable that a party may be excluded without prejudice'" (quoting *Watson v. Navistar Int'l Transp. Corp*., 121 Idaho 643, 827 P.2d 656, 682 (Idaho 1992))); ***Hutson v. Sureddi*, 2002 OK CIV APP 28, 41 P.3d 993, 998 (Okla. Civ. App. 2001)** ("[I]n granting a new trial to only one defendant, a trial court must consider the furtherance of justice and any potential prejudice to the remaining parties.").

Jack, 858 N.W.2d at 719 (emphasis added). It is not inconsistent with an Iowa Supreme Court decision to cite favorably an Oklahoma case this Court has previously favorably cited. Further Review is not appropriate because the Appellate Court decision is consistent with *Bryant* and *Jack*.

CONCLUSION

McConnaha has failed to establish that grounds for further review exists. The Court of Appeals examined the applicable appellate case law and applied it to the facts in this case. The resulting ruling is consistent with the holdings of *Olson*, *Bryant* and *Jack*. To the extent the Appellate Court reached a different result, that result is a factual issue, not a legal one. McConnaha's disagreement with the decision of the Court of Appeals does not suddenly create a new or conflicting issue of law that merits this Court's attention on further review. The arguments that McConnaha puts forth in his Application for Further Review are factual disputes, which do not constitute grounds for further review.

WHEREFORE, Plaintiff-Appellant respectfully requests this Court deny McConnaha's application for further review.

CERTIFICATE OF SERVICE AND FILING

The undersigned hereby certifies that on May 23, 2019, Plaintiff-Appellant e-filed this document with the Clerk of the 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 Resistance Brief was the total sum of $0.00.

By *__/s/ Benjamin P. Long__*
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ATTORNEY'S COMPLIANCE CERTIFICATE

The undersigned hereby certifies that:

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(l) because this brief contains 2,083 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(l).

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 Word 2007 in Times New Roman 14 pt. type.

Dated: May 23, 2019

By *__/s/ Benjamin P. Long__*
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