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 FINAL BRIEF

/s/ Pressley Henningsen

/s/ Benjamin P. Long
Pressley Henningsen AT0003402
Benjamin P. Long AT0010155
RSH Legal, P.C.
425 Second Street SE, Suite 1140
Cedar Rapids, IA 52401
Telephone: (319)-365-9200
Email: phenningsen@fightingforfairness.com
blong@fightingforfairness.com
ATTORNEYS FOR PLAINTIFFS-APPELLEES

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ROUTING STATEMENT

This appeal presents legal issues well-established by statutes or case law and the district court's application of those legal principles. Accordingly, Plaintiff-Appellant (Whitlow) welcomes the opportunity to present this matter to the Iowa Supreme Court; however, review by the Iowa Court of Appeals may be appropriate pursuant to Iowa R. App. P. 6.1101.

STATEMENT OF THE CASE

I. NATURE OF THE PROCEEDINGS

Marsha Whitlow filed suit on June 20, 2016, against Ron and Jodi McConnaha for negligence stemming from a collision between the McConnahas' farm tractor and the motorcycle on which Whitlow was a passenger. (Ruling on Motion For Mistrial and New Trial, p. 1) App. 137. The McConnahas then brought a third-party claim against Timothy Newton, the driver of the motorcycle Marsha Whitlow was riding. (Ruling, p. 1) App. 137. Trial commenced on February 26, 2018. (Plaintiff's Motion for Mistrial pg. 1) App.108.

On March 6, 2018, upon the conclusion of the presentation of evidence, the parties convened for an informal conference on jury instructions followed by a formal record as to objections and exceptions. (Tr. 12-13; Court's Preliminary and Final Jury Instructions, p. 1) App. 72-73; App. 83; App. 91.

At the conference, Whitlow, through counsel, objected to proposed instruction thirteen and was overruled. (Tr. 12, 13) App. 72-73. The district court declined to submit Whitlow's proposed instruction relating to legal duties to wear a helmet on a motorcycle. Whitlow also objected to and was overruled on that issue. (Tr. 15) App. 75.

As part of the final instructions, the jury received a verdict form including six separate special interrogatories regarding the comparative fault of the defendants. (Ruling pgs. 2, 3) App. 138-139. The form included bracketed guidance on how the form was to be completed. The jury answered the first interrogatory, "no" indicating the McConnahas were not negligent. (Ruling pg. 3) App. 139. The jury—mislead by the inaccurate bracketed guidance below the first interrogatory—failed to answer the remaining five interrogatories and signed the incomplete form. (Ruling pg. 3) App. 139. The judge received the form and dismissed the jury without catching or correcting the error. (Ruling pg. 3) App.139. Once the incomplete verdict was discovered Whitlow immediately moved for a mistrial. (Ruling pg. 2) App. 138. Whitlow's motion also included a request for a new trial. (Ruling pg. 4) App. 140.

II. DISPOSITION OF THE CASE IN THE DISTRICT COURT

The District Court summarily granted a new trial of Whitlow's claim against Mr. Newton only and entered judgement against Whitlow as to her claim against the McConnahas. (Ruling pg. 5) App. 141. The District Court denied the motion for mistrial. (Ruling pg. 4) App.140. Whitlow filed her timely notice of appeal on March 29, 2018, pursuant to Iowa R. App. P 6.101(1)(d). (Notice of Appeal 1) App. 143.

STATEMENT OF THE FACTS

On June 27, 2015, Marsha Whitlow and her fiancé, Timothy Newton, were riding on Mr. Newton's Harley Davidson motorcycle in Eastern Iowa, headed south on Muscatine road. (Ruling pg. 1) App. 137; (Defendant McConnaha's Settlement Conference Statement pg. 3) App. 41. Mr. Newton was driving the motorcycle and Ms. Whitlow was riding as his passenger. (Ruling pg. 1) App. 137. The weather was clear, with no precipitation, and the pavement was dry. (Defendant McConnaha's Statement pg. 3) App. 41. The speed limit on this stretch of Muscatine road was fifty-five miles per hour. (Ruling pg. 2) App. 137.

Around 4 p.m., the motorcycle came upon Ron McConnaha driving his farm tractor with hay rake in tow at ten to fifteen miles per hour in the

southbound lane. (Ruling pg. 2) App. 138. The section of Muscatine road where the motorcycle came upon the tractor allows for two-way traffic and is a passing zone. (Defendant's Statement pg. 3) App. 139. As Mr. Newton approached the tractor, he attempted to pass Mr. McConnaha on the left. (Ruling 2) App. 138. Just as Mr. Newton began to pass Mr. McConnaha on the left, Mr. McConnaha turned left—across Muscatine road—into a private driveway. (Ruling pg. 2) App. 138. The parties collided, causing Ms. Whitlow serious injuries. (Ruling pg. 2) App. 138.

ARGUMENT

The trial of this matter resulted in an incomplete verdict caused solely by erroneous bracketed guidance that was intended to lead the jury in completing the verdict form. Like signs directing the jury to the bathroom or guidance on how to submit a mileage reimbursement report, this bracketed guidance is not equivalent under the law to a jury instruction. In other words, in this appeal Whitlow does not allege that the special interrogatories themselves are incorrect. Rather, Whitlow argues that the erroneous bracketed guidance resulted in an outcome that necessitates either a mistrial or the granting of a new trial.

At the heart of this case is whether this small oversight now requires that no jury will ever consider the fault of both defendants simultaneously,

potentially trapping Whitlow in a vexing catch-22. Given that nature of the underlying suit as a comparative fault case, the only proper remedy – the only remedy that avoids having to speculate about jury intent – is to order a retrial as to all parties. Anything less deprives Ms. Whitlow of the right to have a jury *simultaneously* consider and determine the fault of all potential tortfeasors.

Finally, Whitlow also appeals two separate issues related to the jury instructions, specifically instruction number thirteen and the denial of a proposed instruction concerning how the jury may or may not use evidence related to helmet use.

I. THE NATURE OF COMPARATIVE FAULT REQUIRES THE SIMULTANEOUS CONSIDERATION AND DETERMINATION OF THE FAULT OF ALL POTENTIAL TORTFEASORS

English courts recognized comparative fault as early as 1706 in admiralty cases. *Noden v. Ashton*, 167 Eng. Rep. 577 (1706). The rule of equal division of damages in admiralty cases came to the United States as late as the mid-nineteenth century. Owen & Moore, *Comparative Negligence in Maritime Personal Injury Cases*, 43 La. L. Rev. 941, 941 n.8 (1983). The first state to implement comparative fault for all personal injury actions was Mississippi in 1910, and by the early 1980s the clear majority of states had

adopted comparative fault. Robert D. Cooter, *An Economic Case for Comparative Negligence*, 61 N.Y.U. L. Rev. 1067, 1069 n7, (1986).

The Iowa Supreme Court adopted pure comparative negligence in 1982. *Goetzman v. Wichern*, 327 N.W.2d 742, 754 (Iowa 1982), *superseded by statute*, 1984 Iowa Acts ch. 1293 (codified as amended at Iowa Code ch. 668), *as recognized in Slager v. HWA Corp.*, 435 N.W.2d 349, 350 (Iowa 1989). In 1984, the Iowa legislature modified that system. *See*, 1984 Iowa Acts ch. 1293; *Eurich v. Bass Pro Outdoor World, L.L.C.*, 909 N.W.2d 443 (Iowa Ct. App. 2017). In 2009, the Court broadened the understanding of common law duties to one another and clarified the scope of legal causation in comparative fault cases. *Thompson v. Kaczinski*, 774 N.W.2d 829, 833 (Iowa 2009).

Comparative fault was chosen as the replacement for contributory negligence mainly because of the harsh outcomes in application of contributory negligence. One court noted that,

> The predominant argument for its abandonment rests, of course, upon the undeniable inequity and injustice in casting an entire accidental loss upon a plaintiff whose negligence combined with another's negligence in causing the loss suffered, no matter how trifling plaintiff's negligence might be.

Scott v. Rizzo, 96 N.M. 682, 689 (1981).

Another court noted that because of the harshness of contributory negligence, comparative fault creates more consistent outcomes than contributory negligence:

> Every trial lawyer is well aware that juries often do in fact allow recovery in cases of contributory negligence, and that the compromise in the jury room does result in some diminution of the damages because of the plaintiff's fault. But the process is at best a haphazard and most unsatisfactory one.

Li v. Yellow Cab Co., 13 Cal. 3d 804, 811 (1975).

Inherent to both justifications is that the liability of all parties must be weighed simultaneously to ensure a complete and just resolution to the case. The Iowa legislature codified this policy of simultaneous consideration of fault in Iowa Code Section 668.3(6):

> In an action brought under this [comparative fault] 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, and if inconsistencies exist the court shall do all of the following:
>
> a. Inform the jury of the inconsistencies.
>
> b. Order the jury to resume deliberations to correct the inconsistencies.
>
> c. *Instruct the jury that it is at liberty to change any portion or portions of the verdicts to correct the inconsistencies*.

Iowa Code § 668.3(6)(emphasis added).

The final subsection (c), which invites the jury to re-deliberate on all issues – including a different party's fault – makes clear that the issues in a

comparative fault case shall be considered simultaneously with one another. *Godbersen v. Miller*, 439 N.W.2d 206, 208 (Iowa 1989) ("In general, the purpose of section 668.3 is to make defendants pay in proportion to their fault."); *Schwennen v. Abell*, 471 N.W.2d 880, 887 (Iowa 1991) (noting that parties may argue during closing arguments what percentage of total fault should be allocated to the parties and how those percentages would affect plaintiff's total recovery).

The policy to simultaneously issue verdicts on the fault of multiple defendants in a comparative fault case is similarly consistent with caselaw on when it is appropriate to sever comparative fault cases. This Court, in *Lucas v. Pioneer Inc*, held that (parenthetical).*See also, Lucas v. Pioneer Inc.*, 256 N.W.2d 167, 177 (Iowa 1977) (Severing parties whose claims involved substantial common questions of law a nd fact constituted reversable error and was "analogous to wielding an axe when a scalpel would have been the appropriate tool."); *Hyde v. Buckelew*,393 N.W.2d 800, 804 (Iowa 1986) ("We emphasize, however, that the modern and enlightened trend is to combine in one action for all claims and actions involving several persons injured in a single incident 'even though there may be differences in the rules of law applicable to the parties as drivers or passengers or differences in testimony and instructions relating to damages.'") (internal citations omitted).

This broad policy and legislative mandate applies to the comparative fault case at hand where the jury was tasked with *simultaneously* considering what fault, if any, was attributable to Mr. Newton and Mr. McConnaha. This need to simultaneously consider the fault of all parties in a comparative fault case forms the backdrop on which Whitlow's motion for mistrial and motion for a new trial rest.

II. THE DISTRICT COURT ABUSED ITS DISCRETION BY DENYING WHITLOW'S MOTION FOR MISTRIAL

The district court should have granted Whitlow's motion for a mistrial because it is well-settled law in Iowa that an incomplete special verdict amounts to a hung jury. A complete retrial on all issues is necessary.

A. Preservation Of The Issue For Appellate Review

To preserve appeal of a denial of a motion for mistrial, the appealing party must have made the motion for mistrial once "the grounds therefor first became apparent." *State v. Jirak*, 491 N.W.2d 794, 796 (Iowa Ct. App. 1992) (citing *State v. Gibb,* 303 N.W.2d 673, 678 (Iowa 1981)); *State v. Leggio*, 778 N.W.2d 219 (Iowa Ct. App. 2009). The purpose of the preservation rule is to "aid the trial court in understanding the nature of the error claimed and [provide] an opportunity for the court to correct any error committed." *State v. Reese*, 259 N.W.2d 771, 775 (Iowa 1977).

The district court's denial of Whitlow's motion for a mistrial was adequately preserved for appeal. The jury returned an incomplete verdict on March 6, 2018 and was improperly dismissed the same day. (Ruling pg. 3) App. 139. With no intervening events, Whitlow filed a motion for a mistrial on March 12, 2018. (Plaintiff's Motion For Mistrial) App.108. The motion for a mistrial was made the as soon as the grounds for the mistrial became apparent. The trial court was fully apprised of the grounds for that motion and had ample opportunity to correct the error by ordering a mistrial. Thus, the issue was properly preserved for appeal.

B. Standard Of Review

A trial court's denial of a motion for mistrial is reviewed for abuse of discretion. *Boyd v. Legislative Servs. Agency*, 854 N.W.2d 74 (Iowa Ct. App. 2014). A court abuses its discretion when its ruling is based on grounds that are unreasonable or untenable. *In re Trust No. T-1 of Trimble*, 826 N.W.2d 474, 482 (Iowa 2013). The grounds for a ruling are unreasonable or untenable when they are based on an erroneous application of the law. *Id*. *See also*, *State v. Rodriquez*, 636 N.W.2d 234, 239 (Iowa 2009).

C. The District Court Abused Its Discretion When It Denied Whitlow's Mistrial Motion Because Unanswered Special Verdict Questions Amount To A Hung Jury

A jury's failure to answer interrogatories constitutes a hung jury; the grant of a full mistrial is mandatory. A jury's failure to answer special interrogatories or special verdict questions is not a finding against the plaintiff; omission of answers is a hung jury, at least as to the unanswered questions. *Wederath v. Brant*, 319 N.W.2d 306, 310 (Iowa 1982) ("A plaintiff in a civil action generally has the burden of persuasion but a hung jury does not amount to a finding against him; it constitutes a mistrial, and the issues stand for retrial."). A hung jury creates "a manifest necessity for a mistrial." *State v. Connelly*, 551 N.W.2d 329, 332 (Iowa Ct. App. 1996). *See also*, Iowa R. Civ. P. 1.928. The district court's failure to grant the mistrial violates clear law and as such is an abuse of discretion.

D. Whitlow Was Prejudiced By The District Court's Denial Of Whitlow's Motion Because Whitlow's Claims Against The Mcconnahas And Mr. Newton Are Not Properly Separable

The purpose of a mistrial is to reverse a significant error during trial by placing the parties back in their original positions so that the controversy is resolved justly. *Harden v. Illinois Cent. R. Co.*, 118 N.W.2d 76, 77 (Iowa 1962). "A mistrial is declared because of some circumstance indicating that justice may not be done if the trial continues, and it [requires] the discharge of the jury and the impaneling of another jury to try the case anew." *Curley v.*

Boston Herald-Traveler Corp., 314 Mass. 31, 32, (1943). A partial retrial cannot resolve Whitlow's claims justly because Whitlow's claims against the McConnahas and Mr. Newton are not properly separable.

A complete mistrial is necessary where unanswered jury questions "are necessary to judgement." *Wederath*, 319 N.W.2d at 310. In *Wederath*, the Court faced a rental property holdover case where four questions were presented to the jury – two related to essentially liability and two related to valuation. When it returned the verdict, the jury left unanswered the two liability-type questions as to whether the defendant willfully held over on the property. The jury had answered the valuation questions. Similar to how a personal injury case might be bifurcated as to liability and damages, the *Wederath* Court did allow the jury's valuation of the rental property to stand but a mistrial of the liability issues holding the failure to answer those questions amounted to a hung jury. *Id.* at 312.

Here – like in *Wederath* – the jury split the liability issues in the case, failing to give a complete finding on liability. Like in *Wederath*, a finding of a hung jury is appropriate.

More on point is the Iowa Supreme Court's holding in *Jack v. Booth*, 858 N.W.2d 711 (Iowa 2015). In *Jack*, the plaintiff sued two doctors for malpractice based on separate and distinct instances of negligent treatment.

Id. 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.* The Court in *Jack* noted that the reason a partial 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*.

The McConnahas are also likely to argue a district court may order a partial mistrial in cases involving multiple defendants. However, in *Jack v. Booth*, the Iowa Supreme 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).

Finally, in *Cedar Rapids Merch. Co. v. Brokaw Indus., Inc.*, the Iowa Court of Appeals found that a contract and a tort claim were so intertwined as to require a complete retrial because the claims arose from "the same constellation of facts and overlap[ped] in the context of the actual damage remedy claimed." 710 N.W.2d 258 (Iowa Ct. App. 2005). The court further noted that where two claims arise from the "same constellation of facts" the interest of judicial economy "must give way to the need to retry… all issues." *Id*.

The *Jack*, *Wederath*, and *Brokaw* decisions place Iowa in line with the federal approach to determining if a full mistrial is necessary. In federal court, "the general practice after a mistrial is a full retrial of all issues in the case." *Nissho–Iwai Co. v. Occidental Crude Sales*, 729 F.2d 1530, 1538 (5th Cir.1984). All issues must be retried unless "it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone

may be had without injustice." *Gasoline Prod. Co. v. Champlin Ref. Co.*, 283 U.S. 494, 500–01 (1931) (finding that the determination of damages for a counterclaim was so interwoven with the plaintiff's claim for liability that a whole retrial was necessary); see also *Payton v. Abbott Labs*, 780 F.2d 147, 154–55 (1st Cir. 1985) (where two jury questions involved considering the same evidence "as to the nature, extent, and results of the [plaintiff's] injuries" the two issues were so intertwined that a partial retrial was impossible because of the risk of jury confusion). As another Court of Appeals wrote, "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) (citation omitted).

Here, the error in one element of the verdict inherently affects the determination of other issues. Iowa law requires the Court in a comparative fault action to review the verdict form for inconsistencies. IOWA CODE § 668.3(6). If inconsistencies are identified, upon returning the jury to deliberate further, the jury is to be told specifically it may change any portion or portions of the verdicts. IOWA CODE § 668.3(6)(c). Unfortunately, in this matter the Court did not recognize the inconsistency until after the jury had been discharged.

This case presents comparative fault claims arising from the same constellation of facts. Because the jury failed to answer all interrogatories, the fault of the defendants was not compared and balanced. Iowa Code Chapter 668 creates and recognizes the intertwined nature of comparative fault claims. IOWA CODE § 668.2 ("the court… shall instruct the jury to answer special interrogatories… indicating… the percentage of fault allocated to each… defendant."). Further, the statute inherently recognizes that a jury's consideration of one party's fault is inseparably intertwined with the consideration of another party's fault: the jury is at liberty to, "change any portion or portions of the verdicts to correct the inconsistencies." IOWA CODE § 668.3(6)(c). Failure to grant a mistrial amounts to a finding by the district court that the instruction to a jury in sub-section (6)(c) that it may change portions of its verdict responses as it proceeds to answer the remaining responses is irrelevant and inconsequential. The district court inherently concluded the claims are not intertwined when the statute recognizes otherwise. By not ordering a mistrial, the district court speculated that had the jury been instructed to continue it would not have revisited the questions already answered. This type of speculation is impermissible in light of 668(6)(c). The only way to avoid such speculation is to return the case in its

entirety to a new jury who will consider the potential tortfeasors'' fault in conjunction.

Without a full retrial, we will never know what a jury considering Mr. Newton's behavior would decide about the McConnahas' behavior.

Had the jury been directed to return to deliberate further, one of four possible outcomes would have occurred:

- The jury would have deliberated further on the fault of Timothy Newton and decided that he too was not at fault or not the cause of injury. This outcome would result in a complete defense verdict.

- The jury would have decided Timothy Newton was 100% at fault and the cause of Plaintiff's injury. This outcome would result in a plaintiff's verdict against Timothy Newton and a defense verdict with regard to Ron McConnaha.

- The jury would have considered Timothy Newton's fault and decided to reconsider Ron McConnaha's fault consistent with Iowa Code Section 668.3(6)(c) and changed their previous special verdict answer. This would result in a plaintiff's verdict against both defendants.

- The jury would have considered Timothy Newton's fault and its relationship to Ron McConnaha's fault and decided that it could not reach a verdict resulting in a hung jury and mistrial.

Any of these potential outcomes would have been supported by substantial evidence. Each party might argue for what they "think" would have happened; however, the Court may not engage in that type of speculation as to jury intent in order to reform a verdict or to attempt to reconcile an

inconsistency. *Bryant v. Rimrodt*, 872 N.W.2d 366, 380 (Iowa 2015); *Clinton Physical Therapy Servs., P.C. v. John Deere Health Care, Inc.*, 714 N.W.2d 603, 614 (Iowa 2006). It would be inappropriate at this point to guess which of the four outcomes would have occurred or to impeach the jury's verdict. *Id.*; *See also,* Iowa R. Evid. 5.606. The fact that the district court did not give Whitlow the statutory right to determine which of the four outcomes would have occurred, and then failed to grant a mistrial as to the hung jury, prejudiced Whitlow's attempt to have a full jury trial of her claims.

III. THE DISTRICT COURT ABUSED ITS DISCRETION BY DENYING WHITLOW'S MOTION FOR A NEW TRIAL

Even if the district court properly denied Whitlow's motion for a mistrial, it should have granted Whitlow's motion for a complete new trial because the jury returned an inconsistent verdict. By ordering a partial new trial, the district court impermissibly speculated as to the intent of the jury. Under the Iowa Rules of Civil Procedure, a complete new trial is the only remedy available for an inconsistent verdict where the jury has been dismissed.

A. Preservation Of The Issue For Appellate Review

In order to be preserved for review, a motion for new trial must be made within fifteen days after filing the verdict or discharge of the jury without a verdict in order to be preserved for review. Iowa R. Civ. P. 1.1007. A party

must raise an objection at "the earliest opportunity in the progress of the case." *State v. Milner*, 571 N.W.2d 7, 12 (Iowa 1997).

When the jury returns a sealed verdict, complaints about the consistency of that jury verdict are preserved by a motion for new trial. *McGinnis v. Vischering, L.L.C.*, 808 N.W.2d 756 (Iowa Ct. App. 2011) (noting that the ordinary requirement for an immediate objection once the verdict is returned is relaxed when the jury returns a sealed verdict). *See also*, *Clinton*, 714 N.W.2d at 616 (finding that a motion for new trial was sufficient to preserve the issue of an inconsistent verdict for appeal because the parties consented to a sealed verdict). Further, the Iowa Supreme Court has repeatedly cautioned that it is the duty of the trial court to ensure that the jury is not dismissed before the verdict can be reviewed for any inconsistencies. *Bryant*, 872 N.W.2d at 377.

Whitlow does not concede that the bracketed guidance that led to error in this case actually constitutes jury instructions. Nonetheless an objection to the jury instructions is not ever necessary to preserve an inconsistent verdict for appeal. *McGinnis*, 808 N.W.2d at 756 ("We disagree the plaintiffs waived their right to challenge the verdict as inconsistent by failing to object to the court's instructions."). *See also*, *Cowan v. Flannery*, 461 N.W.2d 155, 160 (Iowa 1990) (rejecting the defendant's waiver argument that plaintiffs cannot

object to the inconsistent verdict when counsel failed to object to the jury instructions). Preservation rules are relaxed when the record indicates that the trial court and counsel all understood the grounds for the motion. *Forbes v. Nat'l Serv. Co. of Iowa*, 791 N.W.2d 431 (Iowa Ct. App. 2010) (citing *State v. Williams*, 695 N.W.2d 23, 27 (Iowa 2005).

The trial court's denial of Whitlow's motion for a new trial was adequately preserved for appeal. The jury returned a sealed verdict on March 6, 2018 and was immediately dismissed before the inconsistency was discovered. (Ruling pg. 3) App.139. In this case, the Court relied on a proposed verdict form submitted by Defendant Ron McConnaha. McConnaha's proposed form included bracketed guidance which was incorrect—it guided the jury to stop deliberating if the jury answered "no" on the first special interrogatory. (Ruling pgs. 3-4) App. 139-140. This, of course, was incorrect guidance given that the case involved the comparative fault of multiple defendants. Whitlow submitted a competing proposed verdict form with the correct bracketed guidance below special interrogatory number one. (Plaintiff's Amended and Revised Proposed Jury Instructions pg. 10) App. 58. Once the inconsistency was discovered, Whitlow immediately filed a motion for a new trial on March 12, 2018. (Plaintiff's Motion for Mistrial pg. 1) App. 108.

B. Standard Of Review

Just as a trial court's denial of a motion for a mistrial, the trial court's decision to not grant a new trial is for abuse of discretion. *Boyd v. Legislative Servs. Agency*, 854 N.W.2d at 74.

C. The Jury Returned An Inconsistent Verdict

A jury verdict is inconsistent if "the verdict is so logically and legally…irreconcilable within the context of the case." *Garber v. Hosmer*, 851 N.W.2d 547 (Iowa Ct. App. 2014) (citing *State v. Fintell*, 689 N.W.2d 95, 101 (Iowa 2004)). A verdict must be consistent with the jury instructions, the evidence, or reasonable inferences that could be drawn from the evidence. *Crow v. Simpson*, 871 N.W.2d 98, 107 (Iowa 2015). Furthermore, any answers that are internally inconsistent "neutralize, nullify, or destroy each other" and amount to an inconsistent verdict. *Halterman v. Jackson*, 746 N.W.2d 278 (Iowa Ct. App. 2008).

The verdict returned by the jury in this case was inconsistent because the jury only addressed the fault of one defendant when it was tasked with determining whether and to what extent multiple defendants were at fault. The special verdict returned by the jury only contained an answer regarding the McConnahas' liability, not Mr. Newton. (Ruling, pg. 3) App.139. This omission is irreconcilable with the very nature of the action the jury was called to decide because the jury had a duty to judge Mr. Newton and had the ability

to reassess the McConnahas' fault in light of their deliberation of Mr. Newton's fault. The scope of the suit was exhibited by the name of the case, the number of parties in the courtroom, and the structure of trial presentations. *See e.g.* (Ruling pg. 1) App. 137. The jury's verdict was inconsistent.

D. The District Court Erred By Speculating About The Intent Of The Jury

The power to harmonize inconsistent answers is very limited and is only available to correct "mistakes or errors in the verdict that are technical or ministerial in nature" because the court cannot "substitute its judgement for the judgement of the jury." *Clinton*, 714 N.W.2d at 614. The court may not attempt to reconcile an inconsistency by speculating about the intent of the jury. *Bryant*, 872 N.W.2d at 377. Even if the court can fashion a "perfectly logical explanation" to harmonize a seemingly inconsistent verdict, a new trial is necessary to avoid even "some degree" of speculation. *Clinton*, 714 N.W.2d at 614.

When the jury returns a sealed verdict that is "the result of confusion or is inconsistent" the trial court should grant a new trial because after the jury dismissed, "*any* attempt to reconcile the inconsistencies in a verdict *must* be based on mere speculation about the jury's intent." *Id*. (quoting with approval *Ex parte Alfa Mut. Ins. Co.*, 799 So.2d 957, 962 (Ala.2001)) (emphasis added).

The inconsistency in this case was undeniably the result of confusion, namely the faulty bracketed guidance the jury was given. (Ruling pgs. 2-3) App.138-139. The district court acknowledged this was the source of the inconsistency in its partial order for new trial. (Ruling pg. 4) App.140. Further, the verdict was a sealed verdict, so it was not possible to send the jury back for further deliberations. It would amount to impermissible speculation to conclude from the jury's incomplete and inconsistent verdict that the jury had fully and completely assessed the fault of both Defendants. As stated earlier, there are four possible ways the jury could have acted after they answered the first special interrogatory. There is no way to know whether or to what extent examination of the subsequent interrogatories may have impacted the one already decided. A full retrial is the only option that avoids speculation about the intent of the jury.

E. A Complete New Trial Is The Only Remaining Remedy To The Inconsistent Verdict

Iowa Rules of Civil Procedure 1.933 and 1.934—governing special verdicts and special interrogatories, respectively—are construed together. *Crookham v. Riley,* 584 N.W.2d 258, 269 (Iowa 1998). *See also, Pavone v. Kirke*, 801 N.W.2d 477, 498 (Iowa 2011) (recognizing the rules governing internally inconsistent special interrogatory answers apply equally to internally inconsistent answers in a special verdict). Thus, rules governing

inconsistent special interrogatory answers would apply to inconsistent answers in a special verdict. *Clinton*, 714 N.W.2d at 612. In both cases, answers must be internally consistent, and if they are not, the court must either resume deliberations or grant a new trial. *Id*.; Iowa R. Civ. P. 1.933, 1.934.

In comparative fault cases, juries are given special interrogatories that are treated just like special verdicts. Iowa Code § 668.3(2) (1984). Special verdicts are in effect puzzle pieces for the jury during deliberations. *Clinton*, 714 N.W.2d at 612 (Iowa 2006). When special verdicts are used, the jury selects the puzzle pieces, gives them to the court, and the court assembles a cogent picture and enters judgement. *Id*. The benefit of special verdicts is that if the court discovers that the puzzle pieces do not fit together correctly, the court can "attempt to fix the puzzle instead of starting over again with a new jury." *Id.* However, the court cannot construct a complete and cogent puzzle when the jury does not turn in all necessary puzzle pieces. *Id*.

When a jury fails to return necessary puzzle pieces by returning an inconsistent special verdict the simplest remedy is to send the jury back to deliberate further. Iowa R. Civ. P. 1.934; *See also McGinnis v. Vischering, L.L.C.*, 808 N.W.2d at 756. A judge faced with an inconsistent verdict may also enter judgement on the interrogatories if the answers to special interrogatories are internally consistent but inconsistent with the general

verdict. *Id*. However, a judge may not enter judgement where the answers are "inconsistent with each other and are inconsistent with the verdict." In that situation, the judge may only send the jury back to deliberate further or order a complete new trial. Iowa. R. Civ. P. 1.934; *see e.g.*, *Bryant*, 872 N.W.2d at 376.

Unfortunately, in this case it was not possible to send the jury back because by the time the inconsistent verdict was discovered, the jury had already been dismissed. The only remaining remedy, therefore, is a new trial. *Id*. at 377 ("we repeat [our] prior admonition that '[t]he trial court should not discharge the jury until it determines the special verdict is consistent and supported by evidence.'") (citation omitted); *see also*, IOWA CODE § 668.3 (1984) ("the court shall not discharge the jury until the court has determined that the verdict…[is] consistent with…the percentages of fault.").

The lower court erred when it entered judgement on the inconsistent verdict instead of ordering a complete new trial because the only recourse available to the court once the inconsistency was discovered was to order a complete new trial. Rule 1.934. ("If the answers are inconsistent with each other, and any is inconsistent with the verdict, *the court shall not order judgment*, but either send the jury back or order a new trial.") (emphasis added).

F. A Complete New Trial Is Necessary To Avoid Confusion And Preserve The Policy Goals Of Comparative Fault

The district court's order for a partial new trial does not adequately protect Whitlow's interest in a comprehensive adjudication of the negligence of all parties involved in the 2015 accident. Without a new trial that includes the McConnahas, the jury in the new trial will be unable to consider the fault of all parties, and the goal of section 668.3—that all parties pay according to their fault—cannot be guaranteed. Whitlow will be denied the opportunity to have a jury consider the fault of both parties in context of one another, instead putting the jury in the confusing position of examining only one defendant in a vacuum.

IV. THE DISTRICT COURT ERRED BY OVERRULING WHITLOW'S OBJECTIONS TO JURY INSTRUCTION THIRTEEN AND REFUSING WHITLOW'S PROPOSED INSTRUCTIONS

The district court should have amended instruction thirteen consistent with Whitlow's objection. Instruction thirteen, as it was submitted to the jury, was a misleading and incomplete mere fact instruction that was inconsistent with what the Iowa Supreme Court envisioned in *Koslow*. A complete new trial is necessary because prejudice is assumed when an instruction materially misstates the law.

A. Preservation Of The Issue For Appellate Review

To preserve an objection to jury instructions for appeal, a party must object to the proposed instruction and specify the "matter objected to and on what grounds." *Rivera v. Woodward Res. Ctr.*, 865 N.W.2d 887, 892 (Iowa 2015). *See also*, Iowa R. Civ. P. 1.924 (noting objections to jury instructions must specify the "matter objected to and on what grounds"). The objection must be specific enough to alert the trial court about the basis of the complaint, so the court can correct the error. *Id.*

Whitlow preserved her objection to instruction thirteen for appeal. Whitlow objected to the court's proposed instructions during the February 26th pre-trial conference where the jury instructions were finalized. Whitlow objected to proposed instruction thirteen, the mere fact instruction, because it did not present the mere fact instruction as contemplated by *Smith v. Koslow*. (Tr. 13) App. 73. After Whitlow's timely objection, the court overruled Whitlow's objection to instruction thirteen. (Tr. 13) App. 73. Whitlow also preserved the district court's denial of her proposed instruction for appeal by objecting to the denial at the pre-trial conference. (Tr. 15) App. 75.

B. Standard Of Review

The law given in jury instructions is reviewed for correction of errors at law. *Alcala v. Marriott Int'l, Inc.*, 880 N.W.2d 699, 707 (Iowa 2016) (citing

with approval *DeBoom v. Raining Rose, Inc.*, 772 N.W.2d 1, 5, 11–14 (Iowa 2009)). Likewise, the trial court's determination that there is sufficient evidence to warrant an instruction is reviewed for correction of errors of law. *Summy v. City of Des Moines*, 708 N.W.2d 333, 340 (Iowa 2006), *overruled on other grounds by Alcala v. Marriott Int'l, Inc.*, 880 N.W.2d 699 (Iowa 2016). If an instruction misstates the relevant law, it is inherently prejudicial. *State v. Kern*, 307 N.W.2d 22, 28 (Iowa 1981).

C. Instruction Thirteen Incorrectly Stated The Law Such That It Was Misleading And Incomplete

Instructions must correctly state the law and present it in such a way so "that jurors understand the issues and [are] not mislead." *Haskenhoff v. Homeland Energy Sols., LLC*, 897 N.W.2d 553, 616 (Iowa 2017). Decisions that utilize misleading or confusing instructions will be reversed. *Rivera*, 865 N.W.2d at 902–03 (Iowa 2015). An instruction is misleading or confusing if it is "very possible" the jury could reasonably have interpreted the instruction incorrectly. *Id.; see also State v. Horrell*, 260 Iowa 945, 954 (1967) (requiring new trial when instructions are "obviously confusing").

Smith v. Koslow is on point for the necessary standard for mere fact instructions. In *Koslow*, the Court held that if a mere fact instruction is given, the jury should be informed that although an injury does not create a presumption of negligence, "it still may be considered as some evidence of

negligence." 757 N.W.2d 677, 682 (Iowa 2008)) (citing *Kennelly v. Burgess*, 337 Md. 562, 574 (1995) ("the fact of an accident, although not giving rise to a presumption of negligence, may nonetheless be taken into consideration in assessing negligence"), *overruled on other grounds by Alcala v. Marriott Int'l, Inc.*, 880 N.W.2d 699 (Iowa 2016).

Instruction thirteen was given 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 pg. 4) App. 94. This instruction did not adequately state the mere fact rule as envisioned in *Koslow* because it does not finish by instructing the jury that the presence of an injury may nonetheless be taken into consideration in determining negligence. Because this crucial instruction was omitted, instruction thirteen is misleading about the legal standard of the mere fact rule. Whitlow was prejudiced by this erroneous instruction because it is very possible that the jury misapplied the mere fact rule by completely disregarding Whitlow's injuries when assessing the fault of the McConnahas. *See also, Rivera*, 865 N.W.2d at 892 ("Prejudice occurs and reversal is required if jury instructions have mislead the jury, or if the district court materially misstates the law."). Therefore, the jury's decision as to the McConnahas' fault should be reversed because it was predicated upon an incomplete and misleading instruction.

D. The District Court Erred By Refusing Whitlow's Instruction On Motorcycle Helmets

Iowa law requires that a requested jury instruction be given if it "correctly states the applicable law and is not embodied in other instructions." *Sonnek v. Warren*, 522 N.W.2d 45, 47 (Iowa 1994). "The verb 'require' is mandatory and leaves no room for trial court discretion." *Alcala*, 880 N.W.2d at 707–08. When the district court refuses to provide a requested instruction that correctly states the law and is not redundant, prejudice is assumed unless the record conclusively demonstrates the absence of prejudice. *Haskenhoff*, 897 N.W.2d at 570. *See also, Rivera*, 865 N.W.2d at 903 ("We assume prejudice unless the record affirmatively establishes that there was no prejudice.").

In 1991, the Iowa Supreme Court held that in a comparative fault action, nonuse of a helmet by a person riding a moped or motorcycle could not be considered as evidence of fault. *Meyer v. City of Des Moines*, 475 N.W.2d 181, 190 (Iowa 1991) ("we therefore decline to hold that there is any common law duty for a moped operator to wear a helmet.").

As part of Whitlow's requested instructions, Whitlow submitted an instruction that read,

> You are instructed that there is no legal duty to wear a helmet while riding a motorcycle. There is no evidence in this case regarding the effect a helmet may have had or not had, if any. Do

> not consider a party's use or non-use of a helmet in your deliberations or verdict because it is irrelevant.

(Plaintiff's Second Proposed Jury Instructions pg. 3) App. 81.

This instruction reflects an accurate statement of the law of Iowa as described in *Meyer*, and no other instruction addressed the issue of helmet use. (Final Jury Instructions pg. 1-13) App. 91-103. Therefore, the district court was required to give this instruction and erred by refusing the instruction. Because the court refused this instruction, it is possible that when the jury decided the McConnahas were not negligent, the jury considered that Whitlow was not wearing a helmet at the time of the collision. That possibility is borne out by the fact that 22 jurors were struck for cause—many for the espoused inability to set aside prejudice resulting from helmet non-use. That possibility combined with the presumption of prejudice for a refused instruction means the decision of the district court should be reversed.

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.

REQUEST FOR ORAL ARGUMENT

Plaintiff-Appellant respectfully requests oral argument on all issues presented.

/s/ Pressley Henningsen

/s/ Benjamin P. Long

Pressley Henningsen AT0003402
Benjamin P. Long AT0010155
RSH Legal, P.C.
425 Second Street SE, Suite 1140
Cedar Rapids, IA 52401
Telephone: (319)-365-9200
Email: phenningsen@fightingforfairness.com
blong@fightingforfairness.com
ATTORNEYS FOR PLAINTIFFS-APPELLEES

CERTIFCATE OF SERVICE AND FILING

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

Matthew Nagle
P.O Box 2457
526 Second Avenue SE
Cedar Rapids, IA 52807

Patrick Lee Woodward
3432 Jersey Ridge road
Davenport, IA 52807

By */s/ Benjamin P. Long*
BENJAMIN P. LONG AT0010155

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.

By */s/ Benjamin P. Long*
BENJAMIN P. LONG AT0010155

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 7,055 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.

By */s/ Benjamin P. Long*
BENJAMIN P. LONG AT0010155