

**IN THE IOWA SUPREME COURT  
NO. 17-1934**

POTTAWATTAMIE COUNTY NO. LACV113851

---

MANDI MUMM,  
Plaintiff-Appellant,

vs.

JENNIE EDMUNDSON MEMORIAL HOSPITAL, d/b/a METHODIST  
JENNIE EDMUNDSON HOSPITAL, EMERGENCY PHYSICIANS OF  
WESTERN IOWA, L.L.C., and PAUL C. MILERIS, M.D.,  
Defendants-Appellees.

---

**PLAINTIFF –APPELLANT'S BRIEF AND  
REQUEST FOR ORAL ARGUMENT**

RANDALL J. SHANKS, #AT0007211  
EMILY A. SHANKS WARREN, #AT0011372  
SHANKS LAW FIRM  
409 West Broadway  
Council Bluffs, IA 51503  
Telephone: (712) 322-2600 Fax: (712) 323-5577  
E-Mails: [Randy@ShanksLaw.Net](mailto:Randy@ShanksLaw.Net) & [Emily@ShanksLaw.Net](mailto:Emily@ShanksLaw.Net)  
ATTORNEYS FOR PLAINTIFF-APPELLANT

## CERTIFICATE OF FILING/SERVICE

The undersigned certifies that Plaintiff-Appellant's Brief and Request for Oral Argument was filed and served on 10 the day of April, 2018, upon the following persons and upon the Clerk of the Supreme Court via EDMS:

Michael W. Ellwanger,

Laura Mommsen

522 4<sup>th</sup> Street, Suite 300

Sioux City, IA 51101-1624

Telephone: 712-277-2373

Facsimile: 712-277-3304

[mellwanger@rawlings-law.com](mailto:mellwanger@rawlings-law.com)

[lmommsen@rawlings-law.com](mailto:lmommsen@rawlings-law.com)

ATTORNEYS FOR JENNIE EDMUNDSON MEMORIAL HOSPITAL

d/b/a METHODIST JENNIE EDMUNDSON HOSPITAL

Thomas J. Shomaker

Robert Andrew Mooney

Sodoro, Daly, Shomaker & Seide, PC, LLO

200 Century Professional Plaza

7000 Spring Street

Omaha, NE 68106

Telephone: (712) 397-6200

Facsimile: (712) 397-6290

[tshomaker@sodorolaw.com](mailto:tshomaker@sodorolaw.com)

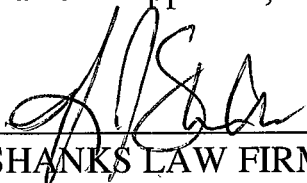
[rmooney@sodorolaw.com](mailto:rmooney@sodorolaw.com)

ATTORNEYS FOR EMERGENCY PHYSICIANS OF WESTERN IOWA and PAUL MILERIS M.D.

MANDI MUMM

Plaintiff- Appellant,

By:

  
SHANKS LAW FIRM

RANDALL J. SHANKS  
 EMILY SHANKS WARREN  
 409 West Broadway  
 Council Bluffs, IA 51503  
 Telephone: (712) 322-2600  
 Fax: (712) 323-5577  
[Randy@ShanksLaw.net](mailto:Randy@ShanksLaw.net)  
[Emily@ShanksLaw.net](mailto:Emily@ShanksLaw.net)  
 ATTORNEYS FOR PLAINTIFF-APPELLANT

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
Table of Authorities .....	4
Statement of Issue Presented for Review .....	5
Routing Statement.....	6
Statement of the Case .....	7
Statement of Facts .....	7
Argument.....	11
DURING DELIBERATIONS, THE TRIAL COURT ERRED WHEN IT FAILED TO PROPERLY ANSWER/PROVIDE FURTHER INSTRUCTION(S) CONCERNING THE JURY'S QUESTION REGARDING QUESTION NO. 5 IN THE VERDICT FORM.....	
Conclusion .....	16
Request for Oral Argument .....	17

Certificate of Compliance.....17

Attorney’s Cost Certificate .....17

**TABLE OF AUTHORITIES**

<b><u>Cases</u></b>	<b><u>Page</u></b>
<i>Bollenbach v. United States</i> , 326 U.S. 607, 612-13, 90 L. Ed. 350, 66 S. Ct. 402 (1946).....	14
<i>Everett v. State</i> , 2010 Iowa App. LEXIS 20 (Iowa Ct. App. Jan. 22, 2010). ....	13, 16
<i>Harrington v. Beauchamp Enters.</i> , 158 Ariz. 118, 761 P.2d 1022, 1025 (Ariz. 1988).....	13, 14
<i>People v. Brouder</i> , 168 Ill. App. 3d 938, 523 N.E.2d 100, 106, 119 Ill. Dec. 632 (Ill. App. Ct. 1988).....	13, 14
<i>Nissho-Iwai Co. v. Occidental Crude Sales, Inc.</i> , 729 F.2d 1530, 1538 (1984 U.S. App).....	15
<i>Stacks v. Rushing</i> , 518 S.W.2d 611, 614 (Tex. Civ. App. 1974).....	12
<i>State v. Bennett</i> , 503 N.W.2d 42, 45 (Iowa Ct. App. 1997).....	16
<i>State v. Juan, 2010 - NMSC 041</i> , 148 N.M. 747, 242 P.3d 314, 320 (N.M. 2010).....	14
<i>State v. Martens</i> , 569 N.W.2d 482, 485 (Iowa 1997).....	12, 13
<i>State v. McCall</i> , 754 N.W.2d 868, 871 (Iowa 2008).....	11
<i>State v. McKee</i> , 312 N.W.2d 907, 915 (Iowa 1981).....	11
<i>United States v. Duran</i> , 133 F.3d 1324, 1334 (10th Cir. 1998) .....	15
<i>United States v. Southwell</i> , 432 F.3d 1050, 1053 (9th Cir. 2005).....	13, 14
<b><u>Other Authorities:</u></b>	
Iowa R. App. P. 6.903(2)(d).....	6
Iowa R. App. P. 6.1101(3)(a).....	6

Iowa R. Civ. P. 1.915(9).....	11
Iowa R. Civ. P. 1.924.....	16
Iowa R. Civ. P. 1.925.....	11, 12
Iowa Code §668.2(3).....	9
Iowa Civil Jury Instruction 100.18.....	12
75 Am. Jur. 2d Trial §1109, at 632-33 (1991).....	13

**STATEMENT OF THE ISSUE PRESENTED FOR REVIEW**

DURING DELIBERATIONS, THE TRIAL COURT ERRED WHEN IT FAILED TO PROPERLY ANSWER/PROVIDE FURTHER INSTRUCTION(S) CONCERNING THE JURY'S QUESTION REGARDING QUESTION NO. 5 IN THE VERDICT FORM.....11

<u>Cases</u>	<u>Page</u>
<i>State v. McKee</i> , 312 N.W.2d 907, 915 (Iowa 1981).....	11
<i>State v. McCall</i> , 754 N.W.2d 868, 871 (Iowa 2008)....	11
<i>State v. Martens</i> , 569 N.W.2d 482, 485 (Iowa 1997).....	12, 13
<i>Stacks v. Rushing</i> , 518 S.W.2d 611, 614 (Tex. Civ. App. 1974).....	12
<i>Harrington v. Beauchamp Enters.</i> , 158 Ariz. 118, 761 P.2d 1022, 1025 (Ariz. 1988). .....	13, 14
<i>People v. Brouder</i> , 168 Ill. App. 3d 938, 523 N.E.2d 100, 106, 119 Ill. Dec. 632 (Ill. App. Ct. 1988).....	13, 14
<i>Everett v. State</i> , 2010 Iowa App. LEXIS 20 (Iowa Ct. App. Jan. 22, 2010). ....	13, 16

*United States v. Southwell*, 432 F.3d 1050, 1053 (9th Cir. 2005).....13, 14

*State v. Juan*, 2010 - NMSC 041, 148 N.M. 747, 242 P.3d 314, 320 (N.M. 2010)l.....14

*Bollenbach v. United States*, 326 U.S. 607, 612-13, 90 L. Ed. 350, 66 S. Ct. 402 (1946)....14

*United States v. Duran*, 133 F.3d 1324, 1334 (10th Cir. 1998).....15

*Nissho-Iwai Co. v. Occidental Crude Sales, Inc.*, 729 F.2d 1530, 1538 (1984 U.S. App).....15

*State v. Bennett*, 503 N.W.2d 42, 45 (Iowa Ct. App. 1997).....16

**Other Authorities:**

Iowa R. Civ. P. 1.925.....11, 16

Iowa Civil Jury Instruction 100.18.....12

Iowa R. Civ. P. 1.915(9).....11

75 Am. Jur. 2d Trial §1109, at 632-33 (1991).....13

Iowa R. Civ. P. 1.924.....16

**ROUTING STATEMENT**

Pursuant to Iowa R. App. P. 6.903(2)(d) and 6.1101(3)(a), Mumm asserts that this case should be transferred to the Court of Appeals as it involves the application of existing legal principles.

## **STATEMENT OF THE CASE**

The jury returned its verdict in this matter on September 8, 2017.

On September 15, 2017, Mumm filed her Motion for New Trial.

On November 6, 2017, the Court overruled said motion.

On December 1, 2017, Mumm filed her Notice of Appeal.

## **STATEMENT OF FACTS**

In early 2014, Mandi Mumm (Mandi) was released from prison to the custody of a half-way house (CH) to prepare her for the transition back into the community after her period of confinement. (App. P. 7)

On February 11, 2104, while a resident at CH, Mandi became ill and received permission from CH to go to the West Broadway Clinic for medical care. There, Mandi had complaints of headache, neck pain and dizziness. Mandi was diagnosed with a headache and acute sinusitis. Mandi returned to CH where she continued to have similar symptoms that waxed and waned. (App. P. 7)

On February 14, 2014, Mandi again received permission to go to the emergency room at Jennie Edmundson Hospital (JEH). There, Mandi had complaints of constant headache, nausea, vomiting, dizziness and photophobia. Mandi had a CT scan of her head which was read as normal and Mandi was discharged back to CH with the diagnosis of headache and dizziness/vertigo. The discharge instructions provided that Mandi was to follow up with her primary care physician at West

Broadway Clinic within three to five days. Mandi continued to have similar symptoms. At all times on February 14, 2014, JEH designated and assigned Dr. Mileris to be Mandi's emergency room physician. (App. P. 7)

On February 16, 2014, Mandi's condition worsened. Mandi became very ill and began exhibiting signs of having a stroke. Mandi again requested permission from CH employees to access medical care. One of the CH employees checked on Mandi and found that she looked ill, was sweating, her throat was swollen, she could not breathe and the right side of her face was drooping. This employee contacted a CH supervisor, Strnad and reported the findings concerning Mandi's medical condition. Despite these findings, Strnad denied Mandi access to medical care. Mandi remained at CH in this condition for approximately 24 hours before being taken to the emergency room at JEH on February 17, 2014. (App. P. 7)

On February 17, 2014, Mandi arrived at the emergency room at JEH. JEH again designated and assigned Dr. Mileris to be Mandi's emergency room physician. After a considerable delay in diagnosis and treatment, Mandi was diagnosed as having a cerebral stroke with vertebral dissection. Because of the seriousness of her condition, Mandi was transferred to the University of Nebraska Medical Center (UNMC) on February 18, 2014. (App. P. 8)

When she arrived at UNMC, Mandi was already intubated and was put on a



ventilator until she was stabilized. Mandi was hospitalized at UNMC until April 29, 2014, when she was transferred to Madonna Rehabilitation. Mandi received rehabilitation services at Madonna until her discharge on July 11, 2014. Mandi is confined to a wheel chair and suffers bilateral paralysis from her neck down. (App. P. 8)

As a result of CH and Strnad's denial of access to medical care on February 16, 2014, and the failure of JEH to timely diagnose and treat Mandi's stroke, the effects of the cerebral stroke and vertebral dissection were significantly worsened. (App. P. 8)

Mandi filed negligence claims against CH and Strnad alleging that they were negligent in refusing to allow Mandi access to medical care on February 16, 2014, and that said negligence was a cause of permanent injury and damage to Mandi. (App. P. 9)

Mandi settled her case against CH and Strnad before trial. During the trial, CH and Strnad were considered released parties pursuant to Iowa Code §668.2(3).

Mandi filed medical negligence claims against the other Defendants alleging a failure to diagnosis and treat Mandi's stroke condition. These were the claims that were tried to the jury.

At the conclusion of the evidence, the Court submitted Jury Instructions and Verdict Form and Special Interrogatories to the jury. The first four questions on the

verdict form addressed whether the Defendants were negligent and whether said negligence was a cause of any item of damage to Mandi. (App. P. 52-53) Question five asked the jury what percentage of fault it attributed to Dr. Paul Mileris and to CH, Inc. (App. P. 53)

During deliberations, the jury posed the following two questions to the Court:

- a) As related to Question 5: If we attribute 25% fault to Dr. Paul Mileris and 75% to CH, Inc, would Mandi only get 25% since CH has been released; and
- b) If CH, Inc. has been released, how are they still named in the lawsuit.

(App. P. 55)

The Court contacted trial counsel to discuss the questions and a response thereto. Counsel for the Plaintiff moved the Court to answer “Yes” to the first question and refer the jury to the previously given jury instructions to answer the second. (App. P. 56) Counsel for the Defendants requested that the Court refer the jury back to the jury instructions.

The Court submitted the following answer to the jury’s questions: “Please follow the instructions already given to you based upon the evidence presented at trial.” (App. P. 55)

After receiving the Court's response, the jury returned a defense verdict. (App. P. 52)

Mandi filed a Motion for New Trial, which was denied by the Court. Mandi appeals this ruling.

## ARGUMENT

### **DURING DELIBERATIONS, THE TRIAL COURT ERRED WHEN IT FAILED TO PROPERLY ANSWER/PROVIDE FURTHER INSTRUCTION(S) CONCERNING THE JURY'S QUESTION REGARDING QUESTION NO. 5 IN THE VERDICT FORM.**

#### Preservation of Error

Mumm preserved error by timely filing her Notice of Appeal after the Court's ruling denying her Motion for New Trial. See Iowa R. Civ. P. 1.925; see also *State v. McKee*, 312 N.W.2d 907, 915 (Iowa 1981)(when jury directed question to judge asking for a definition and the court gave an additional instruction concerning a vital issue in the case, "defendant was obliged to complain of the instruction by motion for new trial...").

#### Standard of Review

The standard of review is for abuse of discretion. Iowa R. Civ. P. 1.925 provides, "... while the jury is deliberating, the court may in its discretion further instruct the jury...". When a defendant challenges the district court's answer to a jury's question ... we review for an abuse of discretion. *State v. McCall*, 754 N.W.2d 868, 871 (Iowa 2008).

## Argument

Where there is confusion, there can be no justice. Here, the jury's questions demonstrated their confusion and lack of understanding. In this situation, should a trial court give additional instructions so the jury understands the effect of the decision they have been entrusted to make?

A jury's sole interest is to find the truth and do justice. See Iowa Civil Jury Instruction 100.18. Jurors take an oath promising to render a true verdict based solely on the evidence introduced and in accordance with the instructions of the court. See Iowa R. Civ. P. 1.915(9).

There can be no room for confusion or misunderstanding in the fulfillment of these responsibilities. The generally accepted rule is that the court may, at the request of the jury, give further instructions, since the interest of justice requires that the jury have a full understanding of the case. *State v. Martens*, 569 N.W.2d 482, 485 (Iowa 1997). It is usually said to be the duty of the court to give additional instructions when requested and a prejudicial refusal to do so has been held reversible error. *Id.* (citing 89 C.J.S. Trial §475, at 118-19 (1955); see also *Stacks v. Rushing*, 518 S.W.2d 611, 614 (Tex. Civ. App. 1974) (court's failure to clarify issues when requested by the jury was reversible error where failure to do so resulted in prejudice because of misinterpretation of issue by jury).

A number of courts have held that if the jury expresses confusion or lack of

understanding of a significant element of applicable law, it is the court's duty to give an additional instruction. *State v. Martens*, 569 N.W.2d 482, 485 (Iowa 1997). The refusal of a jury's request for an additional instruction in this situation may constitute reversible error. *Id.* (citing 75 Am. Jur. 2d Trial §1109, at 632-33 (1991); see also *Harrington v. Beauchamp Enters.*, 158 Ariz. 118, 761 P.2d 1022, 1025 (Ariz. 1988) (court erred in not giving answer to jury's question where question demonstrated confusion on the jury's behalf); *People v. Brouder*, 168 Ill. App. 3d 938, 523 N.E.2d 100, 106, 119 Ill. Dec. 632 (Ill. App. Ct. 1988) (trial court committed reversible error when it refused defense counsel's tendered instruction where jury requested instruction, demonstrating confusion as to a question of law)).

In *Everett v. State*, a question posed by the jury showed their confusion of the meaning of crucial terms in the instruction. 2010 Iowa App. LEXIS 20 (Iowa Ct. App. Jan. 22, 2010). In response to the question, the district court simply directed the jury to reread the instructions. The Court of Appeals held that this instruction provided no remedy to the jury's confusion regarding the point of law. *Id.* Thus, it is likely the jury's confusion influenced the result. *Id.* The Court of Appeals granted *Everett* a new trial. *Id.*

This same type of reasoning has been applied in cases throughout the country. If there is evidence of jury confusion, the court has a duty to address that confusion. See *United States v. Southwell*, 432 F.3d 1050, 1053 (9th Cir. 2005) ("Because it is not

always possible when instructing the jury to anticipate every question that might arise during deliberations, the district court has the responsibility to eliminate confusion when a jury asks for clarification of a particular issue." (internal quotations omitted)); see also *Harrington v. Beauchamp Enters.*, 158 Ariz. 118, 761 P.2d 1022 1025 (Ariz. 1988) (holding that when jurors "express confusion or lack of understanding of a significant element of the applicable law it is the court's duty to give additional instructions on the law to adequately clarify the jury's doubt or confusion"); *State v. Juan*, 2010 - NMSC 041, 148 N.M. 747, 242 P.3d 314, 320 (N.M. 2010) ("[W]hen a jury requests clarification regarding the legal principles governing a case, the trial court has a duty to respond promptly and completely to the jury's inquiry."). In such situations, the court has a duty to give additional instructions on the law to adequately clarify the jury's doubt or confusion. See *Southwell*, 432 F.3d at 1053; *Harrington*, 761 P.2d at 1025; *Juan*, 242 P.3d at 320. This is true even when the jury is initially given correct instructions. *People v. Brouder*, 168 Ill. App. 3d 938, 523 N.E.2d 100, 105, 119 Ill. Dec. 632 (Ill. App. Ct. 1988); see also *Harrington*, 761 P.2d at 1025 (holding that the court has a duty to respond to the jury even when "the original instructions were complete and clear").

The Supreme Court has instructed that "when a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." *Bollenbach v. United States*, 326 U.S. 607, 612-13, 90 L. Ed. 350, 66 S. Ct. 402 (1946); see also *United States v. Duran*, 133 F.3d 1324, 1334 (10th Cir. 1998) ("When a jury indicates through

*States v. Duran*, 133 F.3d 1324, 1334 (10th Cir. 1998) ("When a jury indicates through its queries that it is confused as to important legal standards in a case, particularly where there is an apparent basis for the confusion, it is plain error for the district court not to clarify that confusion."). A trial judge may order a new trial if he suspects that the jury verdict reflects confusion. *Nissho-Iwai Co. v. Occidental Crude Sales, Inc.*, 729 F.2d 1530, 1538 (1984 U.S. App.).

In the case at bar, there can be no question that the jury was confused by and did not understand Question 5. First, in order to get to Question 5, the jury would have had to answer Questions 1, 2, 3 and 4 in the affirmative. That would mean that the jury found that both Dr. Mileris and CH, Inc. were negligent and that their negligence was a cause of Mandi's damages. The jury was obviously confused and did not understand the effect their answer to Question 5 would have on the damage amount awarded to Mandi. For all intents and purposes, the jury was trying to figure out a way to award Mandi 25% of her damages. If the Court would have answered "Yes" to the jury's first question, the result in this case would have been substantially different. By not answering "Yes" and simply referring the jury back to the instructions was no answer at all. Simply telling the jury to reread the instructions did not remedy the jury's confusion. If anything, the Court's response further confused and frustrated the jury in fulfilling their sworn duty to find the truth and do justice.

The trial court has a duty to instruct the jury as to the law on all material issues supported by the evidence. Iowa R. Civ. P. 1.924. Jury instructions are designed to explain the applicable law to the jurors so the law may be applied to the facts proven at trial. *State v. Bennett*, 503 N.W.2d 42, 45 (Iowa Ct. App. 1997). Beyond the duty of instructing the jury, the trial court also has the duty to ensure the jury understands both the issues and the law it must apply. *Id.* That is the reason that the trial court is allowed to give additional instructions pursuant to Iowa R. Civ. P. 1.925.

The jury instructions in this case did not explain the effect the comparative fault finding in Question 5 would have on the ultimate dollar amount awarded to Mandi. The jurors were confused by this and asked the Court for help in understanding this legal concept. It is obvious the jury wanted Mandi to receive 25% of her damages from Dr. Mileris. In order to fulfill their duty to find truth and do justice, the jury wanted this question answered. Mandi was prejudiced by the trial court's refusal to do so. As stated in *Everett*, directing the jury to reread the instructions provided no remedy for the jury's confusion.

### **CONCLUSION**

Mandi respectfully requests that a new trial be ordered based upon the trial court's abuse of discretion in failing to the answer the jury's question regarding the effect of assessing 25% fault to Dr. Mileris. The jury's confusion and the trial court's



failure to address the same materially affected Mandi's substantial rights thereby entitling her to a new trial.

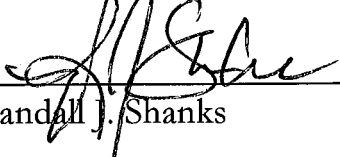
**REQUEST FOR ORAL ARGUMENT**

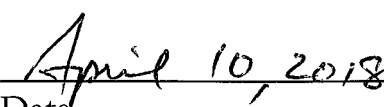
Mandi respectfully requests oral argument.

**CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 2425 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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 proportionally spaced typeface using Microsoft Office Word 2010 in 14 point Garamond font.

  
\_\_\_\_\_  
Randall J. Shanks

  
\_\_\_\_\_  
Date

**ATTORNEY'S COST CERTIFICATE**

I, Randall J. Shanks attorney for the Plaintiff-Appellant, hereby certifies that the actual cost of reproducing the necessary copies of the preceding Brief was \$0.00.

**SHANKS LAW FIRM**

409 West Broadway

Council Bluffs, Iowa 51503

Telephone #: (712) 322-2600

Facsimile #: (712) 323-5577

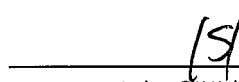
Randy@ShanksLaw.net

Emily@ShanksLaw.net



---

RANDALL J. SHANKS



---

EMILY A. SHANKS WARREN  
**ATTORNEYS FOR PLAINTIFF-  
APPELLANT**