IN THE IOWA SUPREME COURT
NO. 17-1934

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.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POTTAWATTAMIE COUNTY
LACV113851
HONORABLE GREGORY STEENSLAND

DEFENDANT-APPELLEE JENNIE EDMUNDSON MEMORIAL HOSPITAL d/b/a METHODIST JENNIE EDMUNDSON HOSPITAL'S BRIEF AND REQUEST FOR ORAL ARGUMENT

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

I. WHETHER APPELLANT IS ENTITLED TO A NEW TRIAL BASED UPON THE REFUSAL OF JUDGE STEENSLAND TO GIVE ADDITIONAL JURY INSTRUCTIONS.

Everett v. State, 2010 Iowa App. Lexis 20 (Iowa Ct. App. Jan. 22, 2010).

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

State v. Martens, 569 N.W.2d 482, 485 (Iowa 1997).

State v. McCall, 754 N.W.2d 868, 871 (Iowa 2008).

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Berryhill v. State, 603 N.W.2d 243, 245 (Iowa 1999).

Harrington v. Beauchamp Enters., 158 Ariz. 118, 761 P.2d 1022 1025 (Ariz. 1988).

Warner v. Sw. Desert Images, LLC, 218 Ariz. 121, 180 P.3d 986 (Ct. App. 2008).

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Ott v. Samaritan Health Service, 127 Ariz. 485, 491, 622 P.2d 44, 50 (App 1980).

Nissho-Iwai Co. v. Occidental Crude Sales, Inc., 729 F.2d 1530 (5th Cir. 1984).

ROUTING STATEMENT

Pursuant to Iowa R. App. P. 6.903(2)(d) and 6.1101(3)(a), Jennie Edmundson Memorial Hospital d/b/a Methodist Jennie Edmundson Hospital states that this case should be transferred to the Iowa Court of Appeals as it involves the application of existing legal principles.

STATEMENT OF THE CASE

This is a civil case. The jury returned a verdict for Defendants on September 8, 2017. The Trial Court overruled Appellant's Motion for New Trial on November 6, 2017. A Notice of Appeal was filed by Appellant on December 1, 2017.

STATEMENT OF FACTS

We accept Plaintiff's Statement of Facts with the following exceptions:

1. We disagree with Appellant that there was a "considerable delay in diagnosis and treatment" on February 14, 2014.

2. We disagree with Appellant that the "considerable delay in diagnosis and treatment" "significantly worsened" the effects of the cerebral stroke.

ARGUMENT

I. APPELLANT IS NOT ENTITLED TO A NEW TRIAL BASED UPON THE REFUSAL OF JUDGE STEENSLAND TO GIVE ADDITIONAL JURY INSTRUCTIONS.

A. Criminal Cases

Appellant's Brief cites five Iowa cases--all of them criminal cases. Everett v. State, 2010 Iowa App. Lexis 20 (Iowa Ct. App. Jan. 22, 2010); State v. Bennett, 503 N.W.2d 42, 45 (Iowa Ct. App. 1997); State v. Martens, 569 N.W.2d 482, 485 (Iowa 1997); State v. McCall, 754 N.W.2d 868, 871 (Iowa 2008); and State v. McKee, 312 N.W.2d 907, 915 (Iowa 1981). It is unclear whether the legal principles in deciding this issue in a criminal case and a civil case are the same. This section of the Brief will deal with the criminal standards. The only case of the foregoing five Iowa criminal cases, in which it was held that the appellant should get a new trial, was Everett v. State, No. 08-1540 (October 1, 2010). This case was a decision of the Iowa Court of Appeals and was discussed in Appellant's Brief at pages 7 and 10. The court held that a criminal defendant had the right to be present, while the jury was deliberating, when the jury asked a question of the judge concerning instructions. The court held that because the criminal defendant was not present during that phase, there was a presumption of prejudice. The court further held that the evidence "did not disclose any facts to

overcome the presumption of prejudice beyond a reasonable doubt." The court further held that the District Court's answer directing the jury to reread the jury instructions "provided no remedy to the jury's confusion regarding the point of law. Thus, it is likely the jury's confusion influenced the result." Id. at pp.5-6. (During deliberations the jury asked the court "is it first degree robbery if the defendant represents that he has a dangerous weapon, but does not actually have or show it?" The court told the jury to reread the instructions.)

It should be mentioned that the proceeding which brought this case to the Supreme Court was a claim of ineffective assistance of counsel. The court pointed to Iowa Rule of Criminal Procedure 2.27(1). This Rule applies to the giving of additional instructions by the court. If the defendant is absent while such a matter is being discussed, it gives rise to a presumption of prejudice necessitating reversal unless the record affirmatively shows the instruction had no influence on the jury's verdict prejudicial to the defendant.

Obviously the rules in these criminal cases do not apply to civil cases, because they derive from the Iowa Rules of Criminal Procedure. The Court did state that a trial court has discretion as to whether, and to what extent, a

jury inquiry should be answered. However, it has no discretion in deciding whether a criminal defendant and counsel need to be present. Id. at p.156.

Although the Iowa criminal cases which were cited by the Plaintiff would appear to have no direct relevance to the instant case, the opinion in Everett does confirm that the Trial Court has discretion as to what extent a jury inquiry should be answered. The Everett decision also stands for the proposition that the plaintiff must show that "actual prejudice resulted from the claim of error." Id. at p.156 (citing Berryhill v. State, 603 N.W.2d 243, 245 [Iowa 1999]). The obvious question, regardless of what the standard might be, is whether there could possibly be prejudice in this case, where the jury question related to the calculation of damages, and the jury subsequently found that Defendant was not negligent.

B. Civil Law

There does not appear to be anything in the Iowa Rules of Civil Procedure that govern juror questions. Additional instructions are authorized pursuant to Rule 1.925. Plaintiff cites no civil cases in Iowa on this issue.

Appellant argues Harrington v. Beauchamp Enters., 158 Ariz. 118, 761 P.2d 1022 1025 (Ariz. 1988), supports her position that the jury was confused on the issue of comparative fault and the court should have given

an additional instruction.[1] Defendant Jennie Edmundson Memorial Hospital grants the Harrington case held 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" (emphasis added).

Harrington can easily be distinguished from the instant case. In Harrington, plaintiff sued a subcontractor for injuries plaintiff sustained when a mirror fell from her apartment wall and shattered. During deliberations, the jurors asked: "how many years are [sic] a contractor liable for defects in workmanship and materials in comm. property. Contract reads one year. We want to know if another law foregoes contract." Harrington v. Beauchamp Enters., 158 Ariz. 118, 120, 761 P.2d 1022, 1024 (1988). The Supreme Court of Arizona ultimately held that "the jury's question quite clearly demonstrated the high likelihood that some or all of the jurors believed the one-year limitation provision in the contract had some bearing on the case. It did not." Id. at 1025.

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[1] It should be noted that Harrington v. Beauchamp Enters., 158 Ariz. 118, 761 P.2d 1022, 1025 (Ariz. 1988), on this very point has been distinguished by Warner v. Sw. Desert Images, LLC, 218 Ariz. 121, 180 P.3d 986 (Ct. App. 2008), and Russell v. Talley, No. 1 CA-CV 11-0165, 2012 Ariz. App. Unpub. LEXIS 294 (Ct. App. Mar. 6, 2012).

Here, the only argument Appellant has placed before this court is whether or not the trial court should have given an additional instruction in response to the jurors' question: "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?" Appellant admits that before they could answer Question No. 5 on the verdict form regarding comparative fault, they must first determine Dr. Mileris was negligent and his negligence was a cause of damage to Appellant. Because the jury determined Dr. Mileris was not negligent their question regarding distribution of damages due to percentage of comparative fault are not only far from a question on a "significant element of applicable law," the question is irrelevant.

Furthermore, what Appellant fails to mention in her brief, is the Harrington court's holding that "[i]n general, the decision as to whether and how to respond to a question from the jury is the province of the district trial court. Absent an abuse of discretion, we will not disturb a trial court's rulings in this regard." Id. Citing Ott v. Samaritan Health Service, 127 Ariz. 485, 491, 622 P.2d 44, 50 (App 1980) (citations omitted). There was no abuse of discretion. Therefore, the trial court's decision to refer the jury back to the original set of jury instructions was proper and did not prejudice Appellant.

The second civil case Appellant cites is Nissho-Iwai Co. v. Occidental Crude Sales, Inc., 729 F.2d 1530 (5th Cir. 1984). In Nissho-Iwai Co., the court found "there was certainly evidence that the first jury misconstrued the judge's instructions. Confusion surfaced in the jury's decision to award punitive damages for fraud even though it had awarded no actual damages on the claim." Nissho-Iwai Co. v. Occidental Crude Sales, Inc., 729 F.2d 1530, 1538 (5th Cir. 1984). The court based its determination on the fact that the foreman admitted to the judge that he did not understand the interplay of compensatory and punitive damages.

In the Mumm case, the record is void of evidence that the jurors were confused about any "significant element" of the case. Appellant alleges in her brief "[i]t is obvious the jury wanted Mandi to receive 25% of her damages from Dr. Mileris" (p.10 of Appellant's Brief). This allegation is mere conjecture. If they wanted to give Plaintiff 25%, why did they answer "no" to the first question? Appellant makes additional unfounded leaps in logic when she argues "[i]f the court would have answered 'Yes' to the jury's first question, the result in this case would have been substantially different" (p.9 of Appellant's Brief). This argument is meritless. There is no evidence the jury had found that the Defendant was negligent and had "moved on" to the damage question.

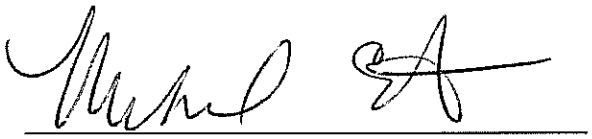
There is absolutely no evidence that the jury was confused about this issue. The fact that a juror "looked ahead" and was curious about the workings of the Iowa Comparative Fault Statute does not change that.

CONCLUSION

Defendant prays the Court to overrule Appellant's Motion for New Trial, to dismiss this case and to tax the costs to the Appellant.

REQUEST FOR ORAL ARGUMENT

Jennie Edmundson Memorial Hospital hereby requests to be heard in oral argument on this appeal.



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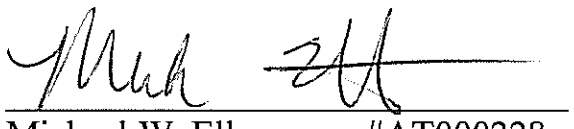
CERTIFICATE OF COMPLIANCE

This Brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this Brief contains 1,591 words, including 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 in 14 point Times New Roman font.

Date: April 19, 2018



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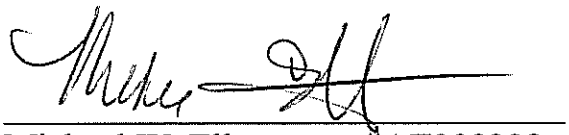
ATTORNEY'S COST CERTIFICATE

I, Michael W. Ellwanger, attorney for the Defendant-Appellee, hereby certifies that the actual cost of reproducing the necessary copies of the preceding Brief was $0.00.



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CERTIFICATE OF FILING / SERVICE

The undersigned hereby certifies that on the 19th day of April, 2018, the above and foregoing document was filed with the Clerk of the Iowa Supreme Court using the CM/ECF system, which will send a true and correct copy of the same to the following:

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