

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 REPLY BRIEF

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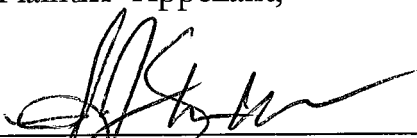
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REPLY ARGUMENTS

REPLY TO ARGUMENT OF JENNIE EDMUNDSON MEMORIAL HOSPITAL d/b/a METHODIST JENNIE EDMUNDSON HOSPITAL:

I. MANDI IS ENTITLED TO A NEW TRIAL BASED UPON THE REFUSAL OF JUDGE STEENSLAND TO PROPERLY ANSWER/PROVIDE ADDITIONAL JURY INSTRUCTIONS.

Harrington v. Beauchamp Enters., 158 Ariz. 118, 761 P.2d 1022, 1025 (Ariz. 1988)..5

REPLY TO ARGUMENT OF EMERGENCY ROOM PHYSICIANS OF WESTERN IOWA, L.L.C. AND PAUL C. MILERIS, M.D.:

I. THE JURY'S VERDICT SHOULD NOT BE AFFIRMED.

Harrington v. Beauchamp Enters., 158 Ariz. 118, 761 P.2d 1022, 1025 (Ariz. 1988)..7

II. THE RECORD DOES SUPPORT REVERSAL.

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III. THE COURT ABUSED ITS DISCRETION BY NOT PROPERLY RESPONDING TO THE JURY.

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IV. THE COURT'S RESPONSE TO THE JURY REGARDING ALLOCATION OF DAMAGES AFFECTED THE RESULT AND IS GROUNDS FOR REVERSAL.

V. JURY CONFUSION JUSTIFIES A NEW TRIAL

REPLY ARGUMENT

REPLY TO ARGUMENT OF JENNIE EDMUNDSON MEMORIAL HOSPITAL d/b/a METHODIST JENNIE EDMUNDSON HOSPITAL

I. MANDI IS ENTITLED TO A NEW TRIAL BASED UPON THE REFUSAL OF JUDGE STEENSLAND TO PROPERLY ANSWER/PROVIDE ADDITIONAL JURY INSTRUCTIONS.

Jennie Edmundson Memorial Hospital (JEMH) begins its argument with a discussion of whether the legal principles governing jury confusion should be the same in both criminal and civil cases. As a reply, jury confusion is jury confusion. There should not be separate standards.

JEMH next agrees that *Harrington* stands for the proposition that when jurors express confusion or lack of understanding of a significant element of applicable law, it is the court's duty to give additional instructions to adequately clarify the jury's doubt or confusion. *Harrington v. Beauchamp Enters.*, 158 Ariz. 118, 761 P.2d 1022, 1025 (Ariz. 1988). If a *Harrington* type of analysis is to be followed, the issues are as follows: 1) Did the jury express confusion or lack of understanding of a significant element of applicable law; and 2) If so, did the court's response adequately clarify the jury's doubt or confusion?

Is there any question that the determination of the parties' comparative fault and effect of that determination on the damages awarded to the plaintiff qualify as a significant element of law? Making a determination of fault and damages is a significant part of the jury's duties. Complicating this task was the fact that CH was a "released party". It is obvious from the question submitted by the jury that it wanted to make sure that Mileris and JEMH were only going to be responsible for 25% of Mumm's damages. In order to find the truth and do justice, the jury wanted some confirmation of this from the court.

Did the court's response adequately clarify the jury's confusion or lack of understanding? The obvious answer is no. Rather than simply answering "Yes" to the jury's question, the court referred the jury back to the instructions. Unfortunately, the instructions did not answer the jury's question. Asking to reread the instructions was really no answer at all and 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.

JEMH then claims that Mumm was engaging in speculation when she stated that it was obvious that the jury wanted her to receive 25% of her damages from Mileris. While being critical of Mumm's alleged speculation, in the very next paragraph, JEMH speculates that the jury was just "looking ahead" because it was curious about the workings of the Iowa Comparative Fault Statute. Setting aside speculation, the issue is whether the jury's question expressed confusion or lack of

understanding of a significant element of applicable law and whether the court's response adequately clarified the jury's doubt or confusion. Mumm respectfully states that the jury's confusion/lack of understanding was not adequately clarified by the court's response. The court abused its discretion by not answering "Yes" or some similar response. Mumm was prejudiced by the court's response.

REPLY TO ARGUMENT OF EMERGENCY ROOM PHYSICIANS OF WESTERN IOWA, L.L.C. AND PAUL C. MILERIS, M.D.

I. THE JURY'S VERDICT SHOULD NOT BE AFFIRMED.

Emergency Room Physicians of Western Iowa, L.L.C. and Paul C. Mileris, M.D. (Mileris) argue that because Mumm did not challenge the court's instructions on appeal then that precludes her from asserting her issue regarding jury confusion. As previously cited, the court has a duty to respond to the jury even when "the original instructions were complete and clear". *Harrington v. Beauchamp Enters.*, 158 Ariz. 118, 761 P.2d 1022 1025 (Ariz. 1988).

Not appealing the court's main set of jury instructions does not preclude Mumm from pursuing this appeal.

II. THE RECORD DOES SUPPORT REVERSAL.

Mileris asserts that Mumm has not presented any record from which she can appeal. Mileris also argues that Mumm did not object to the court's response to the jury's question. These positions are simply incorrect.

The issue on appeal is the trial court's response to the jury's question. According to Iowa R. Civ. P. 1.925, the proper way to object in this situation is through a motion for new trial. See *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 or satisfactorily explain his failure to do so"). Mumm properly raised this issue in her motion for new trial.

As concerns a lack of a factual record, the third amended petition (App. P. 5), statement of the case in the instructions (App. P. 17), motion for new trial (App. P. 56) and the ruling (App. P. 63) thereon provide sufficient basis to identify the error on appeal.

Mumm properly objected to the court's response to the jury's question.

III. THE COURT ABUSED ITS DISCRETION BY NOT PROPERLY RESPONDING TO THE JURY.

Mileris attempts to distinguish the *Martens* case cited by Mumm. 569 N.W.2d 482 (Iowa 1997). Mileris states that Mumm is different because the jury could answer its question by a review of the instructions. That is incorrect.

There was nothing in the instructions that explained the effect the jury's comparative fault finding would have on the amount of damages that would be assessed against Mileris. The jury was concerned about this and wanted confirmation from the court that Mumm would only receive 25% of her damages from Mileris

since CH had been released. The court failed to answer the jury's question about a significant element of the case. The interests of justice require that a jury have a full understanding of the case. *Martens*, 569 N.W.2d at 485. The jury wanted to make sure that justice was being done. The court abused its discretion by not answering "Yes" to this question. This resulted in prejudice to Mumm.

Mileris' argument is without merit.

IV. THE COURT'S RESPONSE TO THE JURY REGARDING ALLOCATION OF DAMAGES AFFECTED THE RESULT AND IS GROUNDS FOR REVERSAL.

The jury was charged with reading the instructions and answering the questions on the verdict form. The flaw with Mileris' argument is that if there was no confusion or misunderstanding, how did the jury get to discussing and asking about Question 5? Was it because they were just generally curious about the workings of the Iowa Comparative Fault Statute as suggested by JEMH? Or was it because the jury wanted to make sure that Mumm only received 25% of her damages from Mileris?

In order to get to Question 5, the jury would have had to find that both Mileris and CH were negligent and that their negligence was a cause of Mumm's damages. If the court would have answered "Yes" to the jury's first question, the result in this case would have been substantially different. Directing 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.

V. JURY CONFUSION JUSTIFIES A NEW TRIAL

Mileris argues that there is no evidence of jury confusion. Mumm disagrees. As previously discussed, if the jury was following the court's instructions and the questions in the verdict form, the jury would have never asked the two questions. The fact that the jury asked these two questions about significant elements of the case indicate that the jury was discussing fault and damages. Based on these questions, the jury had obviously gotten to the fault and damages portion of the verdict form. It was an abuse of discretion not to confirm the jury's question concerning the effect of its verdict. This resulted in prejudice to Mumm and warrants a new trial.

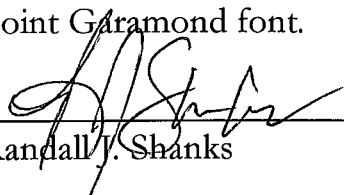
CONCLUSION

Mumm respectfully requests that a new trial be ordered based upon the trial court's abuse of discretion in failing to 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 Mumm's substantial rights thereby entitling her to a new trial.

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 1366 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.



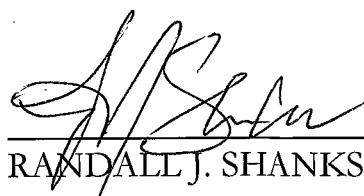
Randall J. Shanks

APRIL 10, 2018
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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.

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