

IN THE IOWA SUPREME COURT

NO. 17-1934

MANDI MUMM,
Plaintiff – Appellant,

v.

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.

**APPLICATION FOR FURTHER REVIEW OF
THE COURT OF APPEALS'
DECISION OF OCTOBER 10, 2018**

**PETITIONER-APPELLANT'S
APPLICATION FOR FURTHER REVIEW**

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QUESTION PRESENTED FOR REVIEW

DURING DELIBERATIONS, SHOULD THE TRIAL COURT HAVE ANSWERED OR PROVIDED FURTHER INSTRUCTION(S) CONCERNING THE QUESTIONS SUBMITTED BY THE JURY REGARDING QUESTION NO. 5 ON THE VERDICT FORM?

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STATEMENT SUPPORTING FURTHER REVIEW

After hearing nine days of testimony in a case involving issues of negligence, medical negligence, released parties and the application of comparative principles, the case was ready to be submitted to the jury. The trial judge instructed the jury that its sole interest was to find the truth and do justice. The jury took an oath to render a true verdict based solely on the evidence introduced and in accordance with the instructions of the court.

As the members of the jury began their deliberations, they were confused by question number five on the verdict form that dealt with comparative fault. The jury did not understand the effect their comparative fault assessment would have upon the damages Mandi would receive. To clear up their confusion, the jury asked the trial judge for help. The jury sent 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 trial judge then had a telephone conference with counsel to discuss the questions. Mandi's counsel argued that the jury had a right to know the effect a comparative fault finding would have upon the ultimate damages awarded to Mandi. The effect of a comparative fault finding was not contained

in the court's previously submitted instructions. A "Yes" answer to the jury's first question would be a correct statement of the law in Iowa and would clearly address the jury's confusion. As to the second question, Mandi's counsel argued that this was adequately covered in the instructions and the jury should be told to revisit the previously submitted instructions.

Defense counsel took the position that, as to both questions, the trial court should instruct the jury to reread the instructions.

The trial court instructed the jury as follows:

“Please follow the instructions already given to you based upon the evidence presented at trial.”

(App. P. 55)

After receiving this instruction, the jury returned a defense verdict. Mandi filed a motion for new trial which was denied. The Court of Appeals affirmed this decision in spite of a well-reasoned dissent.

Pursuant to Iowa R. App. P. 1.6903(1)(b)(1), this case warrants further review because the Court of Appeals' decision is in conflict with the decisions in *Haskenhoff v. Homeland Energy Sols., LLC*, 897 N.W.2d 553 (Iowa 2017), *Rivera v. Woodward Res. Ctr.*, 865 N.W.2d 887 (Iowa 2015), other authorities throughout the country, *State v. Bennett*, 503 N.W.2d 42 (Iowa Ct. App. 1997) and Iowa R. Civ. P. 1.924.

From the questions posed by the jury, it is obvious the members were confused and seeking help from the trial court. In order for the jury to follow its mandate to do justice and render a true verdict in accordance with the instructions, the jury was entitled to know the effect of its decision. Figuring out the ramifications of our comparative fault statute can be challenging for even the most seasoned practitioner let alone lay people on a jury. The trial court had a responsibility to instruct the jury as to the law on all material issues supported by the evidence. Iowa R. Civ. P. 1.924. Jury instructions must convey the applicable law in such a way that the jury has a clear understanding of the issues it must decide. *Rivera v. Woodward Res. Ctr.*, 865 N.W.2d 887, 892 (Iowa 2015). 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. *State v. Bennett*, 503 N.W.2d 42, 45 (Iowa Ct. App. 1997). A new trial was warranted when an instruction fails to convey a central principle of liability. *Haskenboff v. Homeland Energy Sols., LLC*, 897 N.W.2d 553, 579 (Iowa 2017).

Mandi respectfully requests that the Supreme Court take further review of this case.

BRIEF IN SUPPORT OF APPLICATION

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 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). Dr. Mileris was Mandi's emergency room physician. (App. P. 7) In the ER, 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.

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. Again, Mileris was 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, on February 18, 2014, Mandi was transferred to the University of Nebraska Medical Center (UNMC). (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. Mandi's counsel 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 appealed. The Court of Appeals affirmed despite a strong dissent.

ARGUMENT

DURING DELIBERATIONS, THE TRIAL COURT SHOULD HAVE ANSWERED OR PROVIDED FURTHER INSTRUCTION(S) CONCERNING THE QUESTIONS SUBMITTED BY THE JURY REGARDING QUESTION NO. 5 ON THE VERDICT FORM?

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

In the case at bar, there can be no question that the jury was confused and did not understand Question five. As a preliminary matter, in order to get to Question five, 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 Mileris and CH 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 five 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 its sworn duty to find the truth and do justice.

A jury's sole interest is to find the truth and do justice. 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. Iowa R. Civ. P. 1.915(9). There can be no room for confusion or misunderstanding in the fulfillment of these responsibilities. 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.* Iowa R. Civ. P. 1.925 permits the trial court to give additional instructions to the jury.

As noted in the dissenting opinion in this case, "Jury instructions 'must convey the applicable law in such a way that the jury has a clear understanding of the issues it must decide.'" *Rivera v. Woodward Res. Ctr.*, 865 N.W. 2d 887, 892 (Iowa 2015). The dissent continued with, "Section 668.3(5) mandates a court inform the jury of the effects of comparative fault as applied to the jury's answers concerning fault. The court's failure to answer the jury's first question runs counter to the statutory mandate, and I conclude the court erred."

Following the analysis in the dissenting opinion, the question then became, was the error prejudicial to Mandi? *DeBoom v. Raining Rose, Inc.*, 772 N.W.2d 1, 5 (Iowa 2009). Prejudice occurs and reversal is required when jury instructions contain a "material misstatement of the law" or are misleading or confusing. *Rivera*, 865 N.W.2d at 902. "We assume prejudice unless the record affirmatively establishes that there was no prejudice." *Id.* at 903. "When an instruction fails to convey a central principle of liability, this warrants a new trial." *Haskenboff v. Homeland Energy Sols., LLC*, 897 N.W.2d 553, 579 (Iowa 2017) (internal citations omitted). The dissent concluded by stating that the failure to

convey the effects of the application of comparative fault to the jury was the substantial equivalent of a material misstatement of the law thereby entitling Mandi to a new trial.

In addition to the law in Iowa, cases throughout the country have held that if there is evidence of jury confusion, the court has a duty to address that confusion. *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 held 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 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.").

The jury instructions in this case did not explain the effect the comparative fault finding in Question five 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 challenging legal concept. It is obvious the jury wanted Mandi to receive 25% of her damages from Mileris. In order to fulfill their duty to find truth and do justice, the jury wanted this question answered. All the trial court had to do was answer, "Yes". Mandi was prejudiced by the trial court's refusal to do so. Directing the jury to reread the instructions provided no remedy for the jury's confusion.

CONCLUSION

Mandi respectfully requests that her Application for Further Review be granted and a new trial be ordered. The trial court abused its discretion in failing to address the jury's question regarding the effect of assessing 25% fault to Mileris. The jury's confusion and the trial court's failure to address the same was a material misstatement of the law which prejudiced Mandi thereby entitling her to a new trial.

REQUEST FOR ORAL ARGUMENT

Petitioner-Appellant respectfully requests oral argument concerning this Application for Further Review.

CERTIFICATE OF FILING

I hereby certify that on the 26 day of October, 2018, I e-filed the attached Petitioner-Appellant's Application for Further Review to the Clerk of Supreme Court for filing. Pursuant to Iowa R. Civ. P. 16.1221(2), a document that is served through the electronic management, system requires no additional service to registered filers.

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 2,765 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

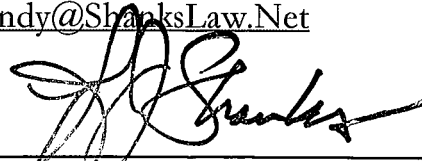
This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been proportionally spaced typeface using Microsoft Office Word in 14 point Garamond font.

ATTORNEY'S COST CERTIFICATE

I, Randall J. Shanks, attorney for the Petitioner-Appellant, hereby certify that the actual cost of reproducing the necessary copies of the preceding Application for Further Review was \$0.00.

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9.8.17 2:01pm

① As related to Question 5:
If we attribute 25%
fault to Dr. Paul Milenis
and 75% to CH, Inc would
Mandi only get 25% since
CH has been released?

CLERK DISTRICT COURT
OTTAWA COUNTY
IOWA

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FILED

② If CH, Inc. has been released
how are they still named in
the lawsuit?

Rebecca Vannier
foreperson

Lori Johanner court attendant

Answer: Please follow the instructions already given to you based upon the evidence presented in trial.

Greg W. Stewart
Judge

IN THE COURT OF APPEALS OF IOWA

No. 17-1934
Filed October 10, 2018

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, Gregory W. Steensland, Judge.

Mandi Mumm appeals the order denying her motion for new trial after a jury found in favor of the defendants on her medical-malpractice claim. **AFFIRMED.**

Randall J. Shanks and Emily A. Shanks Warren of Shanks Law Firm, Council Bluffs, for appellant.

Michael W. Ellwanger and Laura L. Mommsen of Rawlings, Ellwanger, Mohrhauser & Nelson, L.L.P., Sioux City, for appellee Jennie Edmundson Memorial Hospital.

Mary M. Schott, Thomas J. Shomaker, and Robert A. Mooney of Sodoro Daly Shomaker PC LLO, Omaha, Nebraska, for appellee Emergency Physicians of Western Iowa, L.L.C., and Paul C. Mileris, M.D.

Considered by Vaitheswaran, P.J., and Doyle and Mullins, JJ.

PER CURIAM.

Mandi Mumm appeals the order denying her motion for new trial after a jury found in favor of the defendants on her medical-malpractice claim.

Our review of rulings on motions for new trial is based on the grounds raised in the motion. See *Jack v. Booth*, 858 N.W.2d 711, 718 (Iowa 2015). Because Mumm's motion was based on the trial court's response to questions received from the jury, our review is for an abuse of discretion. See Iowa R. Civ. P. 1.925 ("While the jury is deliberating, the court may in its discretion further instruct the jury, in the presence of or after notice to counsel."); *Jack*, 858 N.W.2d at 718 ("To the extent the motion is based on a discretionary ground, we review it for an abuse of discretion."); *McConnell v. Aluminum Co. of America*, 367 N.W.2d 245, 250 (Iowa 1985) (finding trial court did not abuse its discretion in denying plaintiff's objection to the form of its responses to the jurors' questions). "An abuse of discretion exists when the district court's ruling 'rests upon clearly untenable or unreasonable grounds.'" *Willard v. State*, 893 N.W.2d 52, 58 (Iowa 2017) (citation omitted). A ruling is untenable when the court bases it on an erroneous application of the law. See *State v. Plain*, 898 N.W.2d 801, 811 (Iowa 2017). In other words, an error of law constitutes an abuse of discretion. *State v. Kingery*, No. 17-1529, 2018 WL 3650352, at *2 (Iowa Ct. App. Aug. 1, 2018) (citing *State v. Smith*, 753 N.W.2d 562, 564 (Iowa 2008)).

On appeal, the defendants assert Mumm failed to preserve error in not objecting to the court's response to the jury's question at the time it was made. However, when a court further instructs a jury during deliberations, "any objections thereto shall be made in a motion for new trial." Iowa R. Civ. P. 1.925, see also

Everett v. State, 789 N.W.2d 151, 156-57 (Iowa 2010); *Olson v. Sumpter*, 728 N.W.2d 844, 849 (Iowa 2007); *State v. McKee*, 312 N.W.2d 907, 915 (Iowa 1981).

Mumm did raise the issue in her motion for new trial and properly preserved the error.

The first five questions on the verdict form submitted to the jury were as follows:

QUESTION NO. 1: Was Dr. Paul Mileris negligent?

Answer "yes" or "no."

ANSWER: _____

[If your answer is "no," do not answer any of the following questions.]

QUESTION NO. 2: Was the negligence of Dr. Paul Mileris a cause of any item of damage to Plaintiff?

Answer "yes" or "no."

ANSWER: _____

[If your answer to either Question No. 1 or No. 2 is "no," then you shall not assign any fault to Dr. Paul Mileris, and you will not answer any further questions.]

If the answer to both Questions 1 and 2 are yes, then you will answer the following questions.

QUESTION NO. 3: Was CH, Inc., negligent?

Answer "yes" or "no."

ANSWER: _____

[If your answer is "no," do not answer Question No. 4.]

QUESTION NO. 4: Was the negligence of CH, Inc., a cause of any item of damage to Plaintiff?

Answer "yes" or "no."

ANSWER: _____

[If your answer to either Question No. 3 or No. 4 is "no," then you shall not assign any fault to CH, Inc.]

QUESTION NO. 5: What percentage of the total fault do you attribute to Defendant, Dr. Paul Mileris and what percentage of the total fault do you attribute to CH, Inc.? The percentages must total 100%.

[If you previously found that Defendant Dr. Paul Mileris or CH, Inc., was not at fault, or did not cause damage to Plaintiff, then enter "0" after its name.]

ANSWER:

Dr. Paul Mileris _____ %

CH, Inc. _____ %

TOTAL: 100%

During deliberations, the jury sent the court two questions concerning the apportionment of fault between the defendants:

1. If we attribute 25% fault to Dr. Paul Mileris and 75% to CH, Inc. would Mandi only get 25% since CH has been released?
2. If CH, Inc. has been released how are they still named in the lawsuit?

The court conferred with counsel. Mumm's counsel advocated that the court answer "yes" to the first question and to refer the jury back to the instructions in answer to the second; counsel for the defendants requested that the court refer the jury back to the instructions in response to both questions. The court's written answer to the jury stated, "Please follow the instructions already given to you based upon the evidence presented at trial." Ultimately, the jury returned a verdict form answering "no" to question one, which asked whether Dr. Mileris was negligent. Excepting for the foreperson's signature, the remainder of the verdict form was left blank.

Mumm moved for new trial, alleging the jury's questions about apportionment of fault and its subsequent finding that Dr. Mileris was not negligent indicated it "was clearly confused." In Mumm's view:

[T]he jury was clearly confused when answering 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 both Dr. Mileris and CH, Inc. were negligent and that their negligence was a cause of Mandi's damages. For all intents and purposes, the jury was trying to figure out a way to award Mandi 25% of her damages. The jury was obviously confused as to Question 5 and the effect it would have on the damage amount awarded to Mandi. Plaintiff respectfully asserts that the Court should have answered "Yes" to the jury's question to clear up this confusion. By not answering "Yes" and simply referring the jury back to the instructions was an abuse of discretion.

In denying Mumm's motion for new trial, the district court stated:

While it makes some sense that subsequent questions shouldn't be or need not be discussed until question 1 is answered in the affirmative, it is not particularly realistic to think that juries don't discuss the whole package before going back and answering questions. This Court concludes that the question does not reflect confusion by the jury so much as it reflects a complete discussion of the case by all jurors. It would not be unusual for some jurors to want to discuss other questions in order to help them decide the case. Ultimately, this inheres in the verdict and in the discussions carried on by the jury. This Court finds no reason to set aside or interfere with the jury's judgment in this case.

We are unable to find the district court's ruling rests on clearly untenable or unreasonable grounds. Having found no abuse of discretion, we affirm the order denying Mumm's motion for new trial.

AFFIRMED.

All judges concur except Doyle, J who dissents.

DOYLE, Judge (dissenting).

I respectfully dissent. I, too, do not find the district court's reasoning to be clearly untenable or unreasonable. And having agreed with the majority on that point, the controversy would ordinarily come to an end.

But wait, there's more.

Application of comparative fault principles can be confusing. For that reason, the legislature has mandated: "If the claim [subject to comparative fault] is tried to a jury, the court *shall* give instructions and permit evidence and argument with respect to the effects of the answers to be returned to the interrogatories submitted under this section." Iowa Code § 668.3(5) (2017) (emphasis added).¹ Presumably, Iowa Civil Jury Instruction 400.3, entitled "Comparative Fault – Effects of Verdict," was drafted to implement the statutory mandate. Instruction 400.3 provides:

After you have compared the conduct of all parties, if you find the plaintiff, _____, was at fault and the plaintiff's fault was more than 50% of the total fault, the plaintiff, _____, cannot recover damages.

However, if you find the plaintiff's fault was 50% or less of the total fault, then I will reduce the total damages by the percentage of plaintiff's fault.

Seemingly, Instruction 400.3 would have no applicability to this case as there was no contention Mumm was at fault. It naturally follows that the instruction was not requested by either party and was not given upon submission of the case to the jury. But that does not end the matter. The jury was asked to compare the fault,

¹ A transcript of the trial was not ordered, so we do not know what the lawyers argued to the jury with respect to the effects of the answers to be returned to the comparative fault interrogatories. Iowa Code section 668.3(5) was not raised or argued on appeal.

if any, between Dr. Mileris and CH, Inc., a released defendant. Confused, or merely curious, the jury asked the court: “If we attribute 25% fault to Dr. Paul Mileris and 75% to CH, Inc. would Mandi only get 25% since CH has been released?” Clearly, the jury wanted to know the effects of the application of comparative fault upon its answers to interrogatories—and it was entitled to know. Submitting uniform instruction 400.3, as suggested below, would have satisfied the jury’s legitimate quest for answers.

Although the body of uniform instruction 400.3 does not fit the facts of this case, there is language in the comments section following the instruction that does. Several notes in the comments section to the instruction explain the effects of the application of comparative fault in various situations:

Note: 1. Where consortium claims are involved, the fault of the person whose injury or death provides the basis for the consortium claim does bar or reduce the consortium recovery. Iowa Code section 668.3(1)(b), *overturning Schwennen v. Abell*, 430 N.W.2d 98 (Iowa 1988).

Note: 2. When the jury will be asked to allocate fault among more than two “parties” as defined in Iowa Code section 668.2, add: If you assign to a party less than 50% of the total fault, that party will only be liable to the extent of the percentage of fault assigned by you. Where concert of action among two or more parties is alleged, see *Reilly v. Anderson*, 727 N.W.2d 102 (Iowa 2007).

Note: 3. When there is more than one defendant, plaintiff can claim the entire amount of [earning capacity] [medical expenses] [other economic damages] awarded to the plaintiff from any defendant whose percentage of fault is found by you to be 50% or more.

Note: 4. If the jury is asked to compare fault of a third party defendant or more than one defendant, add; I will order the [defendants] [and third party defendant] to contribute to the payment of damages awarded on the basis of the percentages of fault you insert in your answers to the questions at the end of these instructions.

Note: 5. When there is a settling party, add: If you assign a percentage of fault to the settling party, I will reduce the amount of plaintiff’s recovery by that percentage.

Notes 2 and 5 are applicable here, and the court should have answered:

If you assign to a party less than 50% of the total fault, that party will only be liable to the extent of the percentage of fault assigned by you,” and “If you assign a percentage of fault to the settling party, I will reduce the amount of plaintiff’s recovery by that percentage.

Of course, by simply answering the jury’s first question, “Yes,” as requested by Mumm, would have accomplished the same purpose as giving the language suggested in notes 2 and 5—and probably would have been less confusing.

“Jury instructions ‘must convey the applicable law in such a way that the jury has a clear understanding of the issues it must decide.’” *Rivera v. Woodward Res. Ctr.*, 865 N.W.2d 887, 892 (Iowa 2015) (quoting *Thompson v. City of Des Moines*, 564 N.W.2d 839, 846 (Iowa 1997)). Section 668.3(5) mandates a court inform the jury of the effects of comparative fault as applied to the jury’s answers concerning fault. The court’s failure to answer the jury’s first question runs counter to the statutory mandate, and I conclude the court erred.

Next, was the error prejudicial to Mumm? Instructional errors do not merit reversal unless prejudice results. See *DeBoom v. Raining Rose, Inc.*, 772 N.W.2d 1, 5 (Iowa 2009). Prejudice occurs and reversal is required when jury instructions contain a “material misstatement of the law” or are misleading or confusing. *Rivera*, 865 N.W.2d at 902. “We assume prejudice unless the record affirmatively establishes that there was no prejudice.” *Id.* at 903. “When an instruction fails to convey a central principle of liability, this warrants a new trial.” *Haskenhoff v. Homeland Energy Sols., LLC*, 897 N.W.2d 553, 579 (Iowa 2017) (internal citations omitted). I think the same can be said for the failure to convey the effects of the application of comparative fault. Here, the instructions failed to convey to the jury

how application of comparative fault to its answers to interrogatories affected its verdict. Although it asked, the jury was not informed that allocating 25% fault to Dr. Mileris would limit his liability to that percentage and that allocating 75% fault to CH would reduce Mumm's total damages recovery by that amount.

With the failure to meet the mandate to be fully informed under section 668.3(5), particularly in view of the jury's question, the jury was left with a material omission of the law. I believe this omission to be the substantial equivalent of a material misstatement of the law. And, although the jury was not affirmatively misled by the instructions, it was not led at all.

With no guidance, the jury was left to blindly flop around on its own in those murky waters of comparative fault. I cannot say justice was served under the particular circumstances presented. I therefore believe Mumm is entitled to a new trial, *see id.* at 579-81, and I would reverse the order denying Mumm's motion for new trial and remand for further proceedings.



IOWA APPELLATE COURTS

State of Iowa Courts

Case Number
17-1934

Case Title
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