IN THE IOWA SUPREME COURT
NO. 17-1934

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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.

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APPEAL FROM THE IOWA DISTRICT COURT IN AND FOR POTTAWATTAMIE COUNTY AT COUNCIL BLUFFS
NO. LACV113851
HONORABLE GREGORY STEENSLAND

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# DEFENDANTS-APPELLEES EMERGENCY PHYSCIANS OF WESTERN IOWA, L.L.C. AND PAUL C. MILERIS, M.D.'S FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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## ROUTING STATEMENT

Pursuant to Iowa R. App. P, 6.903(2)(d) and 6.1101(3)(a), Emergency Physicians of Western Iowa ("EPWI") and Dr. Mileris (hereinafter collectively "Dr. Mileris") state 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 medical malpractice action. It was tried to a jury which returned its unanimous verdict in favor of all Defendants on September 8, 2017.

Plaintiff Mandi Mumm filed a Motion for New Trial on September 15, 2017, which Dr. Mileris and EPWI resisted. The Trial Court overruled the Motion for New Trial on November 6, 2017. Ms. Mumm filed her Notice of Appeal on December 1, 2017.

## STATEMENT OF THE FACTS

Ms. Mumm was taken from CH, Inc., the halfway house where she lived, to the Emergency Department at Jennie Edmundson Memorial Hospital ("the Hospital") on February 14, 2014. (Appendix pp. 17-18)

Ms. Mumm was treated by Dr. Mileris at the Hospital. Id. The medical treatment she received was alleged by Ms. Mumm to have been negligent. (App. p. 9)

Dr. Mileris was the only defendant who allegedly was negligent. His employer, EPWI, was a defendant due to its potential vicarious liability. The Hospital was a defendant based on the apparent authority of a physician (Dr. Mileris) treating patients in the Hospital's Emergency Department. (App. p. 17) If Dr. Mileris was not negligent, then none of the defendants were liable to Ms. Mumm. (App. p. 52)

CH, Inc. was a "released party" at the time of trial. I.C.A. § 668.7 (2017). CH, Inc. was therefore included on the verdict form. (App. pp. 52-53)

During deliberations, the jury submitted two written questions to the Trial Court. The first question gave hypothetical allocations of fault between CH, Inc. and Dr. Mileris, then asked what the effect of those allocations would be. The second question was why CH, Inc. was still in the lawsuit since it had been released. (App. p. 55) The Trial Court responded by directing the jury to follow the jury instructions based on the evidence from the trial. (App. p. 55)

The jury continued its deliberations and no further questions were asked. A unanimous verdict was returned in favor of Dr. Mileris and all other Defendants. (App. pp. 52-54)

## ARGUMENT

### How the Issue Was Preserved For Review

Dr. Mileris agrees that the proper manner of preserving error on an objection to a jury instruction given after closing argument would be through a Motion for New Trial. Iowa R. Civ. P. 1.925; Olson v. Sumpter, 728 N.W.2d 844, 848–49 (Iowa 2007) (citing Iowa R. Civ. P. 1.924). Dr. Mileris does not believe Ms. Mumm has a proper and sufficient record on appeal.

### Scope and Standard of Appellate Review

Dr. Mileris concurs with Ms. Mumm that the standard of review is abuse of discretion, as "the decision to give a supplemental instruction, or to refrain from doing so, rests within the sound discretion" of the Trial Court. State v. McCall, 754 N.W.2d 868, 871 (Iowa App. 2008). As to that discretion:

> An abuse of discretion occurs when "the court exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. A ground or reason is untenable when it is not supported by substantial evidence or when it is based on an erroneous application of the law.

Graber v. City of Ankeny, 616 N.W.2d 633, 638 (Iowa 2000) (emphasis added) (quoting Waits v. United Fire & Cas. Co., 572 N.W.2d 565, 569 (Iowa 1997)).

### 1. The Jury Applied the Instructions to the Evidence and Its Verdict Should Be Affirmed.

Ms. Mumm has not challenged on appeal the main set of jury instructions which were given, so they are presumed to have been proper. Huff v. Aulman, 28 N.W. 440, 442 (Iowa 1886) (noting "[w]e will presume, in the absence of any showing to the contrary, that the jury were properly instructed"). When the jury submitted its written questions, the Trial Court told the jury to "[p]lease follow the instructions already given to you based upon the evidence presented in trial." (App. p. 55) The rule is that, "[u]nless the contrary is shown, a jury is presumed to follow the court's instructions." Schwennen v. Abell, 471 N.W.2d 880, 887 (Iowa 1991) (citing Hoekstra v. Farm Bureau Mut. Ins. Co., 382 N.W.2d 100, 110 (Iowa 1986)). We must therefore presume that the jury reread and understood the jury instructions and applied them to the evidence in reaching the defense verdict. Ms. Mumm has presented nothing on appeal to rebut that presumption.

### 2. The Record Does Not Support Reversal.

Ms. Mumm has presented essentially no factual record on appeal. It is the appellant's duty to provide a record on appeal affirmatively disclosing the

alleged error relied upon. State v. Ludwig, 305 N.W.2d 511, 513 (Iowa 1981). The court may not speculate as to what took place or predicate error on such speculation. Id. "For want of record we have nothing to review. Remarks must be preserved in some manner for us to pass upon them and it is the burden of the objecting party to attend such preservation." State v. Means, 211 N.W.2d 283 (Iowa 1973). As the record does not support reversal, the jury verdict for Defendants and denial of a new trial for Ms. Mumm should be affirmed.

The basis for Ms. Mumm's recitation of underlying facts is mainly her Petition. However, the Petition was not designated by Ms. Mumm as part of the Appendix. EPWI and Dr. Mileris were not named as defendants in the Petition.

The Petition was amended. The operative pleading at the time of trial was the *Third* Amended Petition. Bigelow v. Williams, 193 N.W.2d 521, 524 (Iowa 1972) (citing Shipley v. Reasoner, 87 Iowa 555, 557, 54 N.W. 470, 471 (1893) (stating "withdrawn or superseded pleadings are not to be considered")). *See also* Clubb v. Osborn, 149 N.W.2d 318, 320, 260 Iowa 223, 227 (Iowa 1967) (noting when pleading is amended or withdrawn, "superseded portion disappears from the record"). The Third Amended

Petition is part of the Appendix, but it is not cited in the fact section of Ms. Mumm's Brief.

EPWI and Dr. Mileris denied the allegations of the Third Amended Petition. That being the case, "the plaintiff must then prove the proof of the allegations within his or her pleading." Mohr v. Langerman, 2014 WL 5243364, at *6 (Iowa App.) (citing Gen. Cas. Co. of Wisconsin v. Hines, 156 N.W.2d 118, 121 (Iowa 1968)). Thus citing to the allegations of the Petition is not the same as citing to facts in the record, or evidence that was considered and passed upon by the jury.

The Jury Questions and Response are in the appellate record. From that document, it is known that the jury posed two written questions to the Trial Court, and the Trial Court asked the jury to go back to their written jury instructions. The unanimous defense verdict form is also in the record.

The Statement of the Facts portion of Ms. Mumm's Brief also cites Ms. Mumm's Motion for New Trial. The statements in her Motion are not evidence and are insufficient as the basis of an appeal.

According to Ms. Mumm's Motion for New Trial, she purportedly asked the Trial Court to respond to the jury questions in a certain manner. No transcription of arguments of counsel has been requested by Ms. Mumm for this appeal. Notably, Ms. Mumm does not claim that she objected to the

proposed response to the jury question; she states in her Motion only that she suggested "yes" as a response to jury question No. 1. There is no record of an objection by Ms. Mumm to the Trial Court's course of action. Nor is there a written request for a different response to the jury, or a transcript of the telephonic colloquy among counsel and the Trial Court. Instead, Ms. Mumm cites to her Motion for New Trial to attempt to demonstrate on appeal that she requested a certain response. Such an approach on appeal has been found wanting.

For example, Miller was convicted of supplying alcohol to a minor. State v. Miller, 2012 WL 664734, at *1–6 (Iowa App. 2012). Miller did not object to the jury instructions. During deliberations, the jury sent questions to the Trial Court. Miller did not object to the supplemental instruction given in response to the questions, which was "You must consider the instructions as they have been given to you." The jury convicted Miller.

Miller filed a Motion for New Trial, asserting the Trial Court should have given a different response to the jury questions. Id. at *4. The Motion was overruled, and Miller appealed.

The Iowa Court of Appeals found that the instructional error had been waived by failing to object to the instructions or response to the jury question. Miller had not provided specific alternative language to the Trial Court. The

rule cited is that, "[w]hen an instruction is correct as given but is not as complete or explicit as a party would like, he must request an additional instruction designed to remedy the defect." Id. at 5 (citing State v. Smith, 240 N.W.2d 693, 695 (Iowa 1976)). Miller argued on appeal that she had preserved error on that issue through her Motion for New Trial, in similar fashion to Ms. Mumm in the case sub judice. Miller at *5. That position was rejected.

The record in this appeal does not show that Ms. Mumm objected to the response to the jury question. Failure to object should foreclose a new trial on the basis of the response to the jury questions.

### 3. There Was No Abuse Of Discretion In Failing To Give A Different Response To The Jury Question.

An Iowa case was cited by Ms. Mumm for the proposition that it is error for the Trial Court not to further instruct a jury when the jury asks a question. *See* State v. Martens, 569 N.W.2d 482, 483–87 (Iowa 1997). Upon analysis the case is inapposite.

Martens was tried for sexual abuse, which requires touching of the victim's genitals. The evidence was that he touched the victim's pubic hair. The jury's question was whether pubic hair is part of the genital area. Id. at 484. The Trial Court instructed the jury to continue to deliberate without any further information. Martens was convicted of sexual abuse.

Martens appealed, claiming ineffective assistance of counsel. The reason was that trial counsel failed to urge the Trial Court to tell the jury that pubic hair is not part of the genitals. The Iowa Supreme Court undertook an extensive analysis of genitalia and pubic hair in order to decide the legal question of whether pubic hair is part of the genitals, deciding that it is. Since the ineffective assistance of counsel claim was based on Martens' attorney failing to assert an incorrect position, the conviction was affirmed.

For our purposes, the critical distinction between Mumm and Martens is that the question in Mumm could be answered by consideration of the information the jury already had. The Martens jury asked a question which they had no way to answer without additional information from the Trial Court. In fact, it took research and analysis by the Iowa Supreme Court to answer the jury's question. In contrast, the effect of an allocation of fault was already contained in the evidence, argument, and jury instructions given to the Mumm jury.

When the jury asks a specific question during deliberations, the district court has the discretion to decide whether or not to provide an answer. State v. Stokes, 882 N.W.2d 873 (Iowa Ct. App. 2016) (citing Iowa R. Civ. P. 1.925). In Stokes, the Court of Appeals determined the Trial Court did not abuse its discretion when referring the jury back to an original instruction. Id.

*See also* State v. Wissing, 528 N.W.2d 561, 565 (Iowa 1995) (finding no prejudice where, in response to jury question, court instructed jury to reread instruction).

The language of Iowa R. Civ. P. 1.925 makes it clear that providing further instructions to the jury is discretionary:

> While the jury is deliberating, the court may in its discretion further instruct the jury, in the presence of or after notice to counsel. Such instruction shall be in writing, be filed as other instructions in the case, and be a part of the record and any objections thereto shall be made in a motion for a new trial.

Iowa R. of Civ. P. 1.925. The discretion of the Trial Court is confirmed in case law. *See, e.g.*, Stokes, 882 N.W.2d 873 (Iowa Ct. App. 2016) (finding no abuse of discretion in referring jury back to jury instruction); Wissing, 528 N.W.2d 561, 565 (Iowa 1995). The cases cited by Ms. Mumm do little to advance her appeal. They are generally distinguishable, and do not indicate further instructing a jury in circumstances similar to this case is anything other than discretionary. *See, e.g.*, Bollenbach v. United States, 326 U.S. 607 (1946) (reversing where trial court "was simply wrong" in further instructing jury); U.S. v. Southwell, 432 F.3d 1050 (9th Cir. 2005) (reversing for violation of constitutional right to unanimous criminal conviction); Stacks v. Rushing,

518 S.W.2d 611 (1974) (finding reversible error in failure to correct existing ambiguity); State v. Juan, 148 N.M. 747 (2010) (finding error where trial court declined to give any response at all to jury question, when response was mandatory); Harrington v. Beauchamp Enterprises, 158 Ariz. 118 (1988) (noting duty to further instruct "arguably" applies where initial instructions incomplete or ambiguous); People v. Brouder, 168 Ill.App 938 (1988) (finding error in failing to further instruct after jury requested assistance on several occasions). As noted by the Martens Court:

> [T]he 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. 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. at 485. The key words are "may" and "prejudicial." The language of the rule makes clear that further instructions are discretionary. Reversible error exists only when that failure to further instruct is prejudicial. Ms. Mumm has demonstrated no prejudice arising from the Trial Court's response.

### 4. The Further Instruction Regarding Allocation of Damages Did Not Affect the Result, and Is Not Grounds For Reversal.

As noted, Dr. Mileris was the only defendant who was allegedly negligent. If Dr. Mileris was not negligent, then none of the defendants were

liable to Ms. Mumm. The first question on the verdict form – and the only question the jury answered – was the following:

> **QUESTION NO. 1:** Was Dr. Paul Mileris negligent?
>
> Answer "yes" or "no."
>
> ANSWER: **No**
>
> [If your answer is "no", do not answer any of the following questions.]

The second question, which the jury never got to, involved causation. The third, fourth, and fifth questions, which the jury did not answer, involved possible negligence of the released party, CH, Inc., and allocating fault. The sixth question, which the jury likewise did not reach, concerned damages. Following the directions on the verdict form, the jury found there was no negligence, then stopped answering questions. The jury never reached allocation of fault or damages questions. (App. p. 53)

Ms. Mumm argues the verdict should be overturned due to a question and answer about damages. However, Ms. Mumm could not have been prejudiced by the response of the Trial Court about damages; damages were irrelevant since the jury unanimously determined there was no negligence. Damages and allocation of fault only matter if a party is first found to be negligent, and there is no reason to believe confusion over damages issues –

which the jury did not need to address when there was no negligence -- invalidate the verdict.

Many decisions have decided variations on this theme. *See, e.g.*, Shannon v. Gaar, 15 N.W.2d 257, 260, 234 Iowa 1360, 1365 (1944) (holding excluding evidence of amount or kind of damages "immaterial where the jury finds for the defendant"); Royal Tailors v. Stern, 190 N.W. 157, 159 (Iowa 1922) (finding error in damages instructions immaterial where jury found for defendant); Schultz v. Starr, 164 N.W. 163, 166 (Iowa 1917). The same holds true in this case: since the jury found Dr. Mileris was not negligent, Ms. Mumm was not prejudiced by the response to a question about damages.

### 5. Speculation About Possible Juror Confusion Does Not Justify Awarding a New Trial.

Ms. Mumm asserts that the jury was confused by Question 5 on the verdict form and did not understand the effect it would have on a damages award. There are multiple problems with this position.

There is no evidence of juror confusion, or at least no evidence any confusion persisted, or that any confusion was pertinent to the issue the jury ultimately decided. When the jury asked its two questions, the Court directed the jury to follow jury instructions they already had, based on the evidence from the trial. There were no further questions posed by the jury.

The question the jury asked about Question 5 was: "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?" (App. p. 55) Ms. Mumm argues the jury was confused and "trying to figure out a way to award Mandi 25% of her damages." (App. p. 57)

The most glaring problem with Ms. Mumm's position is that it is entirely speculative. Dr. Mileris can likewise speculate that the jury was not confused. Any number of theories can be advanced about the motivation behind the question. Perhaps the jury wanted CH, Inc. to pay damages but at the same time did not want to find Dr. Mileris negligent or liable. Perhaps the question was asked purely out of curiosity. All of these theories are pure speculation.

If the jury was confused when it posed its questions, all signs indicate the jury did not remain confused. It is reasonable to believe the jury wanted some clarification, received the response of the Trial Court, and its questions were resolved. Although the jurors obviously knew they could ask questions, and knew how to do so, the jury continued their deliberations without asking any further questions. It is more likely that the jurors' questions were resolved than that they deliberated for hours in a state of confusion.

This is reflected in the Trial Court's Order denying a new trial. (App. p. 63) The Trial Court noted the first jury question was about the fifth item

on the verdict form regarding allocation of fault. Ms. Mumm's position was the jury must have already found Dr. Mileris was negligent to reach Question No. 5. The Trial Court disagreed, finding:

> [I]t 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.

(App. p. 63) This well-reasoned Order does not demonstrate abuse of the sound discretion of the Trial Court.

What is not speculative is the unequivocal decision of the jury: Dr. Mileris was not negligent. Nothing about that verdict indicates any confusion whatsoever on the part of the jury. The jury answered Question No. 1 "No", then followed directions and did not answer any more questions. (App. pp. 52-54) If the jury had in fact been confused, surely it would have done something, anything, other than render a defense verdict.

Speculative arguments about jury confusion about or misunderstanding of jury instructions are routinely rejected by Iowa Courts. To take one example, the plaintiff asserted on appeal that the jury had "abdicated its responsibility by failing to follow the instructions." Dudley v. GMT Corp., 541 N.W.2d 259, 2560 (Iowa App. 1995). That contention was rejected by the Iowa Court of Appeals, which stated: "[T]he jury verdict form was very clear in directing the jurors to find and assign fault to the parties. The jury's responses indicate they were able to do this." Id. at 260-61. The same is true of the verdict form filled out in this case.

## CONCLUSION

Ms. Mumm has neither provided an adequate record on appeal, nor shown a basis for reversal. Defendants-Appellees Emergency Physicians of Western Iowa, L.L.C. and Paul Mileris, M.D. request that the decision of the Trial Court denying a new trial be affirmed, and the jury verdict in favor of Defendants be allowed to stand.

## REQUEST FOR ORAL ARGUMENT

Defendants-Appellees Emergency Physicians of Western Iowa, L.L.C. and Paul Mileris, M.D. hereby request to be heard in oral argument on this appeal.

/s/ Mary M. Schott
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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 4,652 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.

April 10, 2018
Date

/s/ Mary M. Schott
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## ATTORNEY'S COST CERTIFICATE

I, Mary M. Schott, attorney for the Defendants-Appellees, hereby certifies that the actual cost of reproducing the necessary copies of the preceding Proof Brief was $0.00.

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## CERTIFICATE OF FILING / SERVICE

The undersigned hereby certifies that on the 10th 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 same to the following:

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