

NOTICE
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2018 IL App (5th) 170105-U

NO. 5-17-0105

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

BRANDY PICKELL, Mother and Next Friend of)	Appeal from the
ALIANA PICKELL, a Minor, and MONTY PICKELL,)	Circuit Court of
)	St. Clair County.
Plaintiffs-Appellants,)	
)	
v.)	No. 13-L-169
)	
EVERS PHARMACY, INC., d/b/a)	
Dauber Pharmacy, and JESSI WEBER,)	Honorable
)	Heinz M. Rudolf,
Defendants-Appellees.)	Judge, presiding.

JUSTICE CATES delivered the judgment of the court.
Justices Goldenhersh and Chapman concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court’s failure to give an instruction on the issues in the case, together with the giving of incomplete or inadequate instructions on admitted liability and burden of proof, created substantial deficiencies in the jury instructions, requiring a reversal of the judgment and a new trial.

¶ 2 The plaintiffs, Brandy Pickell, as mother and next friend of Aliana (Ali) Pickell, a minor, and Monty Pickell, appeal from a judgment entered on a jury verdict awarding \$9771.69 in medical expenses to Monty Pickell, under the Family Expense Act, and a total of \$5600 in noneconomic damages to Brandy Pickell on behalf of Ali Pickell. The plaintiffs contend that the judgment must be reversed and the case remanded for a new

trial where the jury's award of damages was manifestly inadequate and internally inconsistent, or the product of a compromise verdict. For reasons that follow, we reverse the judgment of the circuit court and remand the cause for a new trial.

¶ 3 The plaintiffs filed a complaint alleging that the defendants, Evers Pharmacy, Inc., d/b/a Dauber Pharmacy, and Jessi Weber, were negligent in that they dispensed a prescription for a medication called dapsona, filled with 100-milligram tablets, instead of 25-milligram tablets as prescribed by Ali's physician. The plaintiffs further alleged that as a result of the defendants' negligence, their daughter, Ali, suffered an overdose of the medication, which caused a severe adverse reaction known as methemoglobinemia, requiring hospitalization. The plaintiffs claimed that as a result of the defendants' negligence, Ali could no longer take dapsona, and was thereby deprived of the opportunity to take a medication to control the symptoms associated with her medical condition.

¶ 4 In answering the complaint, the defendants admitted they were negligent in filling the prescription. Subsequently, the defendants admitted that as a result of their negligence in filling the prescription, Ali suffered an overdose and was required to stay overnight in a hospital on July 30, 2012, for treatment of her methemoglobinemia. They also admitted they were responsible for Ali's hospital bill, and the pain and suffering associated with her overnight stay. The defendants denied that Ali sustained any long term or permanent effects as a result of the overdose, and they denied liability for any alleged injuries after Ali was discharged from the hospital. They claimed that Ali had to take stronger medications because of the natural progression of her medical condition, and that there

was no evidence that continued use of a proper dose of dapsone would have altered the progression of Ali's condition. The case was tried before a jury on the issues of proximate cause and damages. An overview of the evidence follows.

¶ 5 On May 29, 2012, Ali Pickell, then 12 years old, went to see Dr. Susan Bayliss, a pediatric dermatologist. Ali had been having recurring canker-type sores in her mouth, and had suffered from three episodes of sores in her genital area within the past year. After evaluating Ali, Dr. Bayliss diagnosed aphthosis. Aphthosis is a condition in which ulcers recur in the mouth and sometimes on the genitals. Dr. Bayliss noted that she had considered Behcet's syndrome in her differential diagnoses. Behcet's syndrome is an autoimmune disorder that can initially present much the same as aphthosis, with recurring sores in the mouth and genitals, but it is progressive, and may produce inflammation throughout other parts of the body, including the eyes, the joints, and the digestive system. Dr. Bayliss prescribed a topical corticosteroid medication and ordered blood tests. In a follow-up visit on July 23, 2012, Ali reported that the topical medication had not helped, and that she was getting sores every few weeks. Dr. Bayliss prescribed a drug called dapsone. Dapsone is an antibiotic used to treat dermatologic conditions, including aphthous ulcers. Dr. Bayliss wrote a prescription directing Ali to take a 25-milligram tablet of dapsone, twice a day. The defendants, however, erroneously filled the prescription, using 100-milligram tablets of dapsone, and dispensed it with instructions to the patient to take one tablet, twice a day. Accordingly, Ali ingested 200 milligrams of dapsone daily, rather than the prescribed 50 milligrams per day, for a period of six days.

¶ 6 On July 30, 2012, Ali experienced difficulty catching her breath while she was warming up before softball tryouts. She had trouble speaking because she could not get any air. She was sweating profusely, felt light-headed, and had chest pain and a blue pallor to her skin. Ali testified that she was frightened because she had never felt like this before and she did not know what was happening to her. Ali told her coach, who quickly located Ali's mom, Brandy. Brandy escorted Ali to an "ambulance base" where Ali's oxygen levels were measured at 85%, which was abnormal. Brandy then took Ali to Children's Hospital for further evaluation and treatment. Ali was seen in the emergency department, and she was immediately placed on oxygen and given an IV. A technician drew arterial blood for testing. Ali testified that the process of drawing blood from her wrist was very painful. Brandy recalled that the technician had difficulty finding Ali's artery, and was poking around before finally drawing blood. A few hours later, Ali was diagnosed with methemoglobinemia, resulting from the dapsone overdose. Methemoglobinemia reduces the ability of the blood to carry and deliver oxygen to organs and tissues in the body, resulting in hypoxia. Dr. Andrew White, a rheumatologist at Children's Hospital, evaluated Ali and ordered methylene blue to reverse the effects of the dapsone overdose. The methylene blue was administered through an IV. Ali underwent a second arterial blood draw that afternoon, followed by a second dose of methylene blue. Ali was discharged from the hospital the next day.

¶ 7 During a follow-up visit one week later, Dr. White noted that Ali had not taken dapsone or any other medication upon discharge from the hospital, and that Ali's ulcers had resolved. Dr. White indicated that he and his colleagues in the rheumatology clinic

planned to monitor Ali for recurrences of oral and genital ulcers. In September 2012, Ali returned to the rheumatology clinic for a follow-up visit. At that time, Ali had recurring ulcers, and she was given a prescription for colchicine. Colchicine is an anti-inflammatory medication. Common side effects of colchicine include diarrhea, nausea, and stomach pain. Over the next two years, Ali took colchicine to control her symptoms. During this period, steroids were prescribed intermittently to treat ulcer flare-ups. In August 2015, Ali began to experience more frequent flare-ups, and the dosage of colchicine was increased. When colchicine was no longer effective in controlling Ali's symptoms, Dr. White's team prescribed other drugs which were more toxic and more expensive, and caused very unpleasant side effects.

¶ 8 Ali's doctors have not prescribed dapsone since the overdose, and dapsone is listed under "allergies" on Ali's medical records. When asked about prescribing dapsone for Ali in the future, Dr. Bayliss testified that she would consider dapsone if Ali's condition failed to improve on other medications. Dr. White testified that he would consider using dapsone again if he determined that it was the most appropriate drug for Ali's symptoms. He stated that it was possible that dapsone would have controlled the symptoms of Ali's disease, and that it was also possible that dapsone might not have controlled the symptoms. Plaintiffs' counsel asked Dr. White if he agreed with a note written by Dr. Vogel, a resident who treated Ali in the rheumatology clinic, indicating that Dr. Vogel would not prescribe dapsone for Ali because of the risk of methemoglobinemia. Dr. White replied that he did not object to Dr. Vogel's assessment.

¶ 9 Ali recalled that the sores in her mouth had gotten smaller during the week that she had taken dapsone. She testified that ever since she was discharged from the hospital, no doctor has prescribed dapsone for her. Ali stated that she was not willing to take dapsone again because it is listed as an allergy for her and because she is at a higher risk for a recurrence of methemoglobinemia. Ali's mother, Brandy, testified that Ali's sores had resolved after taking the dapsone, and that dapsone appeared to have been effective in controlling Ali's symptoms. Brandy stated that she wished dapsone remained an option for Ali. Ali's father, Monty, testified that the doctors told the family to note that Ali was "allergic" to dapsone. Both parents testified that Ali gets scared when she has to take new medications because of her experience with the dapsone overdose.

¶ 10 Dr. James T. O'Donnell, an associate professor of pharmacology, testified as an expert witness in the plaintiffs' case. Dr. O'Donnell testified that methemoglobinemia is a recognized adverse reaction associated with dapsone, and that its toxicity is dose-related. He acknowledged that some patients get methemoglobinemia when given the correct dose of dapsone, but he also noted that the toxic reaction is not generally as severe in those patients. Dr. O'Donnell opined that Ali had a severe reaction because of the overdose, and that it was reasonably prudent and advisable to avoid exposing Ali to dapsone, because she experienced significant toxicity as a result of the overdose. Dr. O'Donnell stated that the dapsone overdose made it more likely that Ali would develop symptomatic methemoglobinemia with any subsequent dose of dapsone. He also noted that dapsone was classified as an "allergy" in Ali's medical records, and that, as such, the drug would be contraindicated in her case. Dr. O'Donnell opined that as a result of the

defendants' negligence, Ali was required to take more expensive and more toxic drugs than were originally prescribed.

¶ 11 The defendants did not call any witnesses. At the close of the evidence, the jury received instructions and retired to deliberate. The jury was given two forms of the verdict in favor of the plaintiffs, Verdict Form A and Verdict Form A-1. The jury was not given a verdict form in favor of the defendants because the defendants admitted that they were negligent and that they were responsible for Ali's hospital bill. Following deliberations, the jury returned Verdict Form A-1, awarding \$9771.69 to Monty for the medical expenses for treatment of the methemoglobinemia under the Family Expense Act. The jury also returned Verdict Form A, awarding to Brandy, on Ali's behalf, the sum of \$5600 for noneconomic damages. The verdict was itemized as follows: \$2400 for physical pain and suffering experienced in the past and reasonably certain to be experienced in the future; \$2200 for mental pain, suffering, and distress experienced in the past and reasonably certain to be experienced in the future; \$0 for reasonable expenses of necessary medical care, treatment, and services received, and to be received in the future; and \$1000 for loss of normal life experienced in the past and reasonably certain to be experienced in the future.

¶ 12 The plaintiffs filed a posttrial motion and requested a new trial, asserting that the jury's verdicts were internally inconsistent, and that the damages awarded were grossly inadequate and against the manifest weight of the evidence. The plaintiffs argued that the jury may have been confused by jury instructions which did not accurately state the law, and which invited the jury to ignore evidence presented by the plaintiffs. The plaintiffs

also argued that the defendants' partial admission of liability, together with faulty jury instructions, may have resulted in confusion or a compromise verdict. The plaintiffs' motion for a new trial was heard and denied.

¶ 13 On appeal, the plaintiffs contend that the trial court erred in denying the request for a new trial. The plaintiffs claim that a new trial is warranted because the jury's verdicts were internally inconsistent, and that damages award was grossly inadequate and against the manifest weight of the evidence. The plaintiffs argue that the jury could have been confused by improper jury instructions crafted by the parties with the assistance of the trial court, or that the defendants' partial admission of liability, together with faulty jury instructions, may have resulted in confusion or a compromise verdict. The defendants contend that the plaintiffs cannot seek a reversal of the verdict based on jury instructions which they tendered, that the damages award was consistent with the evidence presented at trial, and that there is no evidence to suggest a compromise verdict.

¶ 14 A trial court's order granting or denying a new trial based on a claim of an internally inconsistent verdict presents a question of law that is reviewed *de novo*. *Redmond v. Socha*, 216 Ill. 2d 622, 642, 837 N.E.2d 883, 895 (2005). A trial court's order granting or denying a new trial based on a claim that the verdict is against the manifest weight of the evidence is reviewed for an abuse of discretion. *Redmond*, 216 Ill. 2d at 651. If a trial court finds, in its discretion, that a verdict is against the manifest weight of the evidence, it should grant a new trial. *Redmond*, 216 Ill. 2d at 651. Where there is sufficient evidence to support the jury's verdict, it is an abuse of discretion for the trial court to grant a motion for a new trial. *Redmond*, 216 Ill. 2d at 642.

¶ 15 The record in this case shows that an instruction conference was held at the close of the evidence. During the conference, the trial court and counsel for both parties spent a significant period of time crafting and redrafting the issues instruction and the burden of proof instruction to account for the fact that the defendants had admitted they were negligent in filling and dispensing the prescription, but had denied any liability for expenses and damages after Ali was discharged from the hospital on July 31, 2012. According to the record, the issues instruction tendered by the defendants and the burden of proof instruction tendered by the plaintiffs were substantially modified during the instruction conference, and the trial court was an active participant in modifying these instructions. Under these unique circumstances, we do not find that the plaintiffs are attempting to seek relief from an invited error. Furthermore, a reviewing court, in furtherance of its responsibilities, may override considerations of waiver that stem from the adversarial nature of our system. *Dillon v. Evanston Hospital*, 199 Ill. 2d 483, 505, 771 N.E.2d 357, 371 (2002).

¶ 16 The purpose of jury instructions is to provide jurors with the correct principles of law applicable to the evidence submitted to them. *Dillon*, 199 Ill. 2d at 507. Jury instructions must state the law fairly and distinctly, and must not mislead the jury or prejudice a party. *Dillon*, 199 Ill. 2d at 507. The parties are entitled to have the jury instructed on the issues presented, the applicable principles of law to be applied, and the necessary facts that must be proven to support its verdict. *Dillon*, 199 Ill. 2d at 505. While jury instructions are generally reviewed for an abuse of discretion, the question of whether a jury instruction accurately conveys the applicable law is reviewed *de novo*.

Barth v. State Farm Fire & Casualty Co., 228 Ill. 2d 163, 170, 886 N.E.2d 976, 980 (2008).

¶ 17 In this case, the defendants admitted that they were negligent in filling the prescription, and that their negligence was a proximate cause of Ali's hospitalization to treat the methemoglobinemia resulting from the overdose. The defendants denied the plaintiffs' claims that Ali sustained any residual or permanent injury from the misfilled prescription and resulting overdose. The plaintiffs claimed, as a theory of damages, that Ali lost her chance to take an effective, less toxic drug, dapsona, as a result of the defendants' negligence. Thus, the defendants admitted negligence, but they acknowledged only partial liability for the injuries claimed. After reviewing the record, we find that the jury was not accurately instructed on these contested issues in this case.

¶ 18 During the instruction conference, the parties and the trial court together amended an IPI issues instruction that had been tendered by the defendant. The parties, with significant suggestions from the court, crafted an instruction regarding the plaintiffs' claims, and the defendants' admission of negligence and partial admission of liability, by modifying defendants' Illinois Pattern Jury Instruction (IPI) 20.01 (Illinois Pattern Jury Instructions, Civil, No. 20.01 (2011) (hereinafter IPI Civil (2011))). Once the parties agreed on the modified language, the court asked defendants' counsel to type up the modified instruction and counsel agreed to do so. Then, later in the conference, there was some indication that the court's clerk would assemble and provide complete copies of the instructions to the parties and the court. In any event, for reasons not clear from the record, the modified issues instruction was not read or given to the jury, and there is no

indication it was withdrawn. The purpose of the issues instruction is to inform the jurors about what points are contested by the parties, and thereby simplify the task of applying the facts to the law. IPI Civil (2011) No. 20.00, Introduction, at 90; *Howat v. Donelson*, 305 Ill. App. 3d 183, 186, 711 N.E.2d 440, 442-43 (1999). In this case, the jury was not given an instruction on the contested issues in the case.

¶ 19 Compounding this error, the jury was not properly instructed on the issue of admitted liability, or the burden of proof. The defendants tendered IPI Civil No. 1.03A. According to the Notes on Use, IPI Civil No. 1.03A should be given at the outset of the trial, as part of the cautionary instructions (IPI Civil (2011) No 1.03, Notes on Use, at 21), and should not be repeated at the close of the case (IPI Civil (2011) No. 23.00, Notes on Use, at 132). The Notes on Use further indicate that either IPI 23.01A or IPI 23.01B should be used at the close of the case, depending upon the scope of the admission of fault. See IPI Civil (2011) No. 23.01, Notes on Use, at 132. In this case, the jury was not properly instructed on the scope of the defendants' admission as it related to proximate cause and damages.

¶ 20 In addition, the parties, with substantial assistance from the court, crafted a burden of proof instruction by modifying the plaintiffs' tendered IPI Civil 21.02. The modified instruction stated, in part, that the parties agreed that the plaintiffs do not have to prove damages for the injuries that occurred between July 23, 2012, and July 31, 2012. This instruction is not an accurate statement regarding the necessary facts to be proven. While the defendants admitted liability for any damages for the period from July 23, 2012, through July 31, 2012, and specifically admitted that they were responsible for \$9771 to

cover the expenses of Ali's hospital stay, the plaintiffs were required to prove the nature and extent of their noneconomic damages during this period. During closing arguments, defendants' counsel suggested that the plaintiffs were entitled to receive an award for physical and emotional pain and suffering and loss of a normal life for the two-day period of hospitalization, and suggested that a \$1000 per day might be appropriate for each item of noneconomic damage. The jury could have been confused or misled by the language in modified instruction 21.02 and the failure to instruct at all on the contested issues in this case, and erroneously concluded that the parties had stipulated to the defendants' suggested amount for noneconomic damages.

¶ 21 In *Dillon*, our supreme court reminded us that juries are composed of laypersons who are not trained to separate issues and disregard irrelevant matters, and that the function of jury instructions is to convey to the jury the correct principles of law applicable to the submitted evidence. *Dillon*, 199 Ill. 2d at 507. In this case, the jury was not instructed at all on the contested issues, including the plaintiffs' theory that Ali lost a chance to take an effective, less toxic drug because of the defendants' negligence, and the jury was inadequately instructed on admitted liability and the burden of proof. A party is entitled to have the jury instructed on his or her theory of the case, and the failure to do so may require a new trial. In this case, we find that the instructions, when considered as a whole, did not fairly and correctly state the principles of law pertaining to the case, and this prejudiced the plaintiffs' right to a fair trial. Accordingly, we must reverse the judgment of the circuit court, and remand the case to the circuit court for a new trial.

¶ 22 Reversed and remanded.