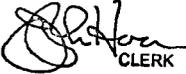


IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

FILED

JUL 27 2007


CLERK

Edwin Allen and)
Joan Allen, (spouse))

Plaintiffs,)

vs.)

Civ. 05-1021

Brown Clinic, P.L.L.P.,)
a South Dakota limited Liability)
Partnership, d/b/a Brown Clinic and)
Edwin Gerrish, M.D., an individual,)

FINAL JURY INSTRUCTIONS

Defendants.)

GENERAL INSTRUCTIONS

F-1

Members of the jury, the instructions I gave at the beginning of the trial and during the trial remain in effect. I now give you some additional instructions.

You must, of course, continue to follow the instructions I gave you earlier, as well as those I give you now. You must not single out some instructions and ignore others, because all are important.

The instructions I am about to give you now, as well as those I gave you earlier, are in writing and will be available to you in the jury room. I emphasize, however, that this does not mean they are more important than my earlier instructions. Again, all instructions, whenever given and whether in writing or not, must be followed.

JUDGE'S OPINION

F-2

Neither in these instructions nor in any ruling, action or remark that I have made during the course of this trial have I intended to give any opinion or suggestion as to what your verdict should be.

During this trial I have occasionally asked questions of witnesses. Do not assume that because I asked questions I hold any opinion on the matters to which my questions related.

You will also be instructed on the subject of the measure of damages in this case because it is my duty to instruct you as to all of the law that may become pertinent to your deliberations. The fact that you have been instructed on the subject of damages must not be considered as intimating any view of my own on the issue of liability or as to which party is entitled to your verdict.

DUTY TO ACCEPT LAW FROM COURT

F-3

While you are the sole judges of fact in this case, it is your duty to accept the law as it is given to you by the Court in these instructions and to apply the law to the facts as you should find them to have been proved. You have no right to disregard the law and look for any theory unsupported by credible evidence upon which to build a verdict one way or the other, nor to return a verdict based upon your own notions of what the law is or ought to be.

FAIR TREATMENT UNDER THE LAW

F-4

You must be fair and impartial. Everyone is equal under the law. All are entitled to fair treatment. You should not be prejudiced against or biased for a person for such reasons as race, gender, religion, political views, social views, wealth, or poverty. Your decision must not be influenced by sympathy or emotion.

AGENCY--BOTH PRINCIPAL AND AGENT SUED

F-5

The defendants are sued as principal and agent. Brown Clinic is the principal and Dr. Edwin Gerrish is its agent. If you find the agent is liable, then you must find the principal is also liable. However, if you find the agent is not liable, then you must find that the principal is not liable.

DUTY OF PHYSICIAN OR SURGEON

F-6

In performing professional services for a patient, a physician or surgeon in a particular field of medicine has the duty to possess that degree of knowledge and skill ordinarily possessed by physicians or surgeons of good standing engaged in the same field of specialization in the United States.

A physician or surgeon also has the duty to use that care and skill ordinarily exercised under similar circumstances by physicians or surgeons in good standing engaged in the same field of specialization in the United States and to be diligent in an effort to accomplish the purpose for which the physician or surgeon is employed.

A failure to perform any such duty is negligence.

One who is negligent is liable to another who suffers loss or harm that is legally caused thereby.

LEGAL CAUSE-DEFINITION

F-7

A legal cause is a cause that produces a result in a natural and probable sequence, and without which the result would not have occurred.

A legal cause does not need to be the only cause of a result. A legal cause may act in combination with other causes to produce a result.

EXPERT WITNESS AS TO PROFESSIONALS KNOWLEDGE, SKILL, AND CARE

F-8

You must decide whether the defendant possessed and used the knowledge, skill, and care which the law demands based on the testimony and evidence of members of the profession who testified as expert witnesses.

However, you are permitted to consider the opinions and conclusions of lay witnesses on those subjects which are within the common knowledge and comprehension of people who have ordinary education, experience, and opportunity for observation.

MEDICAL JUDGMENT

F-9

You are instructed that a mere difference in views between practitioners as to treatment, or as to medical judgment exercised, is not sufficient to support an action for malpractice where it is shown that the procedure preferred by each, or the judgment exercised, is an acceptable and customary method of performing the treatment.

The fact that an unfortunate or bad condition resulted to the patient does not prove that the defendant was negligent.

DAMAGES

F-10

If you decide for the Plaintiff Edwin Allen on the question of liability you must then fix the amount of money which will reasonably and fairly compensate him for any of the following elements of loss or harm suffered in person or property proved by the evidence to have been legally caused by the Defendant's conduct, taking into consideration the nature, extent, and duration of the injury, whether such loss or harm could have been anticipated or not, namely:

1. The aggravation of any pre-existing injury or condition.
2. The disability and/or disfigurement.
3. The pain and suffering, mental anguish, and loss of capacity of the enjoyment of life experienced in the past and reasonably certain to be experienced in the future as a result of the injury.
4. The reasonable value of necessary medical care, treatment, and services received and the reasonable value of the necessary expense of medical care, treatment and services reasonably certain to be received in the future. In this regard the parties have agreed that the value of past medical care incurred is \$175,000 and that cost of any future esophageal dilations is \$1,000 each.
5. The reasonable value of necessary household service, nursing, and attendance, even if such services were furnished gratuitously by family members or others, which has been required as a result of the injury and the value of such services reasonably certain to be required in the future

Whether any of these elements or damages have been proved by the evidence is for you to determine. Your verdict must be based on evidence and not upon speculation, guesswork, or conjecture.

DAMAGES-AGGRAVATION OF PRE-EXISTING INJURY OR
CONDITION-MEASURE OF DAMAGES

F-11

If you find that plaintiff had an injury or condition prior to the conduct of the defendant at issue in this case, you may not award damages for any previous or later injuries or conditions unrelated to the defendant's conduct.

However, if you find that the defendant's conduct caused an aggravation of the plaintiffs pre-existing injury or condition, you may award damages for that aggravation. Before awarding these damages, plaintiff must prove that the conduct of the defendant was a substantial factor in bringing about the harm alleged.

An aggravation of a pre-existing injury or condition is a worsening of that pre-existing injury or condition that makes that pre-existing injury or condition more difficult to treat.

DAMAGES-AGGRAVATION OF PRE-EXISTING INJURY OR CONDITION-
NON-APPORTIONMENT EXCEPTION F-12

If you find that the plaintiff is entitled to recover for an aggravation of a pre-existing injury or condition, but you cannot logically, reasonably or practically apportion the plaintiffs present and future injuries between the injury caused by the pre-existing injury or condition and the aggravation caused by the defendant's conduct, then you may award damages for all present and future injuries caused by both the pre-existing injury or condition and the defendant's conduct.

INJURY TO SPOUSE

F-13

If you find that Defendants are liable to Plaintiff Joan Allen, you must then determine the amount of money which will reasonably compensate her for the following elements of damages which you find were suffered by her and legally caused by the negligence of Defendants:

1. The reasonable value of the services, aid, comfort, society, companionship, and conjugal affections of the spouse of which the plaintiff has been deprived and the present cash value of the services, aid, comfort, society, companionship, and conjugal affections of the spouse of which the Plaintiff is reasonably certain to be deprived in the future.
2. The reasonable value of home care provided by Plaintiff to the spouse and the reasonable value of home care reasonably certain to be provided in the future together with the expenses incurred in rendering said care.

Whether any of the elements of damages have been proved by the evidence is for you to determine.

FUTURE DAMAGES

F-14

The law allows damages for detriment reasonably certain to result in the future. By their nature, all future happenings are somewhat uncertain. The law simply requires that facts exist which establish a basis for measuring any claimed future damages with reasonable certainty. The requirement of reasonable certainty applies only to whether future damages exist; once such detriment is established, the law does not require certainty as to the amount of such damages. Thus, once the existence of such damages is established, uncertainty as to the measure or extent of damages or the fact that they cannot be measured with exactness does not bar their recovery. On the other hand, conjecture, speculation, or the mere possibility of future damages does not warrant such an award.

FUTURE DAMAGES-MORTALITY TABLE

F-15

According to the mortality table, the remaining life expectancy of a 79-year old person is 9 years.

The court takes judicial notice of this fact, which is now evidence for you to consider.

You should note the restricted significance of this evidence. Life expectancy shown by the mortality table is merely an estimate of the probable average length of life of all persons of a given age in the United States. It is an estimate because it is based on a limited record of experience. Because it reflects averages, the table applies only to one who has the same health and exposure to danger as the average person that age.

Therefore, in connection with the mortality table evidence, you should also consider other evidence bearing on life expectancy. For example, you should consider the occupation, health, habits, and activities of the person whose life expectancy is in question.

DAMAGES-PRESENT VALUE

F-16

If you should find that the plaintiff is entitled to a verdict, and further find that the evidence in the case establishes either:

- (1) a reasonable likelihood of future medical expense; or
- (2) a reasonable likelihood that the plaintiff's spouse is entitled to a verdict for deprivation of the services, aid, comfort, society, companionship, and conjugal affections of the spouse; then it becomes your duty to ascertain the present value in dollars of such future damage, since the award of future damages necessarily requires that payment be made now for a loss that will not actually be sustained until some future date.

Under these circumstances, the result is that the plaintiff will in effect be reimbursed in advance of the loss, and so will have the use of money which the plaintiff would not have received until some future date, but for the verdict. In order to make a reasonable adjustment for the present use of money representing a lump-sum payment of anticipated future loss, the law requires that you discount, or reduce to its present value, the amount of the anticipated future loss, by taking (1) the interest rate or return which such plaintiff could reasonably be expected to receive on an investment of the lump-sum payment together with (2) the period of time over which the future loss is reasonably certain to be sustained; and then reduce, or in effect deduct from, the total amount of future loss that amount which would be reasonably certain to earn or return, if invested at such rate of interest over such period of time; and include in the verdict an award for only the present worth-the reduced amount-on anticipated future loss.

This computation is made by using the so-called "present-value" table which will be provided for your use.

Bear in mind that your duty to discount to present value applies only to future medical expenses and loss of consortium. Damages for future pain and suffering, future mental anguish, disability, and disfigurement are not subject to any reduction for the present use of such money.

Finally, in determining the present value of future damages, you may also take into consideration the effect of inflation or deflation on the future damages.

PRESENT VALUE CALCULATIONS

F-17

The present value tables may be used to calculate the present value of future expenses. This calculation requires that you make three determinations.

First, determine the number of years that the future expenses will be incurred. That number is designated as "n" in the attached tables.

Then, determine the net discount rate. That net discount rate is the interest rate which plaintiff could reasonably be expected to receive on an investment of the lump-sum payment minus the inflation rate.

Finally, determine the annual amount of the future expenses to be incurred, without consideration of inflation.

Using the number of years (n value) and the net discount rate, ascertain the factor from the table. Multiply the annual amount of the future expenses by the appropriate factor from the table to calculate the present value of those future expenses.

GENERAL CLOSING INSTRUCTIONS

F-18

You will now go into the jury room and begin your deliberations. In conducting your deliberations and returning your verdict, there are certain rules which you must follow:

First, when you go to the jury room, you must select one of your members as your foreperson. That person will preside over your deliberations and speak for you here in court.

Second, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach an agreement if you can, because the verdict must be unanimous. Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors, and listened to the views of your fellow jurors. Do not be afraid to change your opinions if the discussion persuades you that you should. Do not come to a decision, however, simply because other jurors think it is right, or simply to reach a verdict. Remember there will not be a transcript of this trial available to you when you retire to the jury room.

Third, if you need to communicate with me during your deliberations, you may send a note to me through the marshal or bailiff. The note should be signed by one or more jurors. I will respond as soon as possible either in writing or orally in open court. Do not tell me or anyone else how you stand on your vote numerically or otherwise.

Fourth, your verdict must be based solely on the evidence you heard and saw in this courtroom and on the law which I have given to you in these instructions. Nothing I have said or done is intended to suggest what I think of the evidence or what I think your verdict should be — that is entirely for you to

decide. Remember, statements, arguments, questions, and comments by lawyers, or myself are not evidence.

Finally, a verdict form has been prepared for your convenience. This form is simply the written notice of the decision that you reach in this case. The original verdict form will be provided to you in the jury room. This form asks a number of questions which call for a “yes” or a “no” answer or other brief response. The answer to each question must be the unanimous answer of the jury. The foreperson will write the unanimous answer of the jury in the space provided opposite each question. As you will note from the verdict form, depending on your answers, it may not be necessary to answer each of the questions. Be sure to read the instructions on the jury verdict form carefully.

When each of you has agreed on a verdict, your foreperson will fill in the form, sign and date it, and advise the marshal or bailiff that you are ready to return to the courtroom. You will now take the case, try it fairly and impartially between the parties, and return such verdicts as are warranted under all the evidence and these instructions.