

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

FILED

NOV 18 2011

CIV. 09-4166-KES

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CLERK

BRENDA J. NISSEN, and
THOMAS NISSEN,

Plaintiffs,

vs.

DR. MATTHEW R. JOHNSON,

Defendant.

**FINAL
INSTRUCTIONS
TO THE JURY**

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VERDICT FORM

FINAL INSTRUCTION NO. 1 – INTRODUCTION AND DEFINITIONS

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. This is true even though some of those I gave you at the beginning of and during the trial are not repeated here.

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 oral instructions. Again, all instructions, whenever given and whether in writing or not, must be followed.

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.

FINAL INSTRUCTION NO. 2 – IMPEACHMENT

In Preliminary Instruction No. 3, I instructed you generally on the credibility of witnesses. I now give you this further instruction on how the credibility of a witness can be “impeached” and how you may treat certain evidence.

A witness may be discredited or impeached by contradictory evidence; by a showing that the witness testified falsely concerning a material matter; or by evidence that at some other time the witness said or did something, or failed to say or do something, that is inconsistent with the witness’s present testimony. If earlier statements of a witness were admitted into evidence, they were not admitted to prove that the contents of those statements were true. Instead, you may consider those earlier statements only to determine whether you think they are consistent or inconsistent with the trial testimony of the witness, and therefore whether they affect the credibility of that witness.

If you believe that a witness has been discredited or impeached, it is your exclusive right to give that witness’s testimony whatever weight you think it deserves.

If you believe that any witness testifying in this case has knowingly sworn falsely to any material matter in this case, then you may reject all of the testimony of the witness.

FINAL INSTRUCTION NO. 3 – BURDEN OF PROOF

In civil actions, the party who asserts the affirmative of an issue must prove that issue by the greater convincing force of the evidence.

Greater convincing force means that after weighing the evidence on both sides there is enough evidence to convince you that something is more than likely true than not true. In the event that the evidence is evenly balanced so that you are unable to say that the evidence on either side of an issue has the greater convincing force, then your finding upon the issue must be against the party who has the burden of proving it. In determining whether or not an issue has been proved by the greater convincing force of the evidence, you should consider all of the evidence bearing upon that issue, regardless of who produced it.

FINAL INSTRUCTION NO. 4 – MEDICAL MALPRACTICE

Dr. Johnson is liable for damages proximately caused by medical malpractice if each of the following are established by Brenda Nissen by the greater weight of the evidence:

One, that Dr. Johnson violated the standard of care owed to Brenda Nissen in performing the cervical spine surgery on her;

In performing professional services for a patient, a specialist in a particular field of medicine has the duty to possess that degree of knowledge and skill ordinarily possessed by physicians of good standing engaged in the same field of specialization in the United States. A specialist also has the duty to use that care and skill ordinarily exercised under similar circumstances by physicians 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 is employed. A failure to perform any such duty is medical malpractice.

The fact that an unfortunate or bad condition resulted to Brenda Nissen does not alone prove that Dr. Johnson committed medical malpractice, but it may be considered, along with other evidence, in determining the issue of medical malpractice.

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

And two, that such failure is the legal cause of any damage, injury, or loss suffered or experienced by Brenda Nissen.

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.

The term “legal cause” means an immediate cause which, in the natural or probable sequence, produced the injury complained of. For legal cause to exist, the harm suffered must be a

foreseeable consequence of the act complained of. In other words, liability cannot be based on mere speculative possibilities or circumstances and conditions remotely connected to the events leading up to an injury. Dr. Johnson's conduct must have such an effect in producing the harm as to lead reasonable people to regard it as a cause of Brenda Nissen's injuries.

The legal cause need not be the only cause, nor the last or nearest cause. It is sufficient if it concurs with some other cause acting at the same time, which in combination with it causes the injury. However, for legal cause to exist, you must find that the conduct complained of was a substantial factor in bringing about the harm.

In considering whether conduct is a substantial factor in producing harm to another, the following considerations are important:

- (1) The number of other factors which contributed in producing the harm;
- (2) The extent to which any other factors produced the harm;
- (3) Whether Dr. Johnson's conduct created a force or series of forces which were in continuous and active operation up to the time of the harm, or instead created a harmless situation which became harmful only after the operation of other forces for which Dr. Johnson is not responsible; and
- (4) Lapse of time.

If you find that both of these elements have been proved by the greater convincing force of the evidence, your verdict must be for Brenda Nissen on her medical malpractice claim. You should then determine the amount of damages that she is entitled to, if any. If, on the other hand, either of these elements have not been proved by the greater convincing force of the evidence, then your verdict must be for Dr. Johnson.

FINAL INSTRUCTION NO. 5 – RES IPSA LOQUITUR

You may also find Dr. Johnson liable for the injuries suffered by Brenda Nissen through the legal doctrine known as “res ipsa loquitur.” Dr. Johnson is liable under this doctrine if each of the following are established by Brenda Nissen by the greater weight of the evidence:

One, the instrumentality which caused the injury must have been under the full management and control of Dr. Johnson or his servants;

Two, the accident was such that, according to knowledge and experience, does not happen if those having management or control had not been negligent;

And three, Brenda Nissen’s injury must have resulted from the accident.

If you find that all of these elements have been proved by the greater convincing force of the evidence, your verdict must be for Brenda Nissen on her medical malpractice claim. You should then determine the amount of damages that she is entitled to, if any. If, on the other hand, one of these elements have not been proved by the greater convincing force of the evidence, then your verdict must be for Dr. Johnson.

FINAL INSTRUCTION NO. 6 – DAMAGES

If you decide for Brenda Nissen on the question of liability on her medical malpractice cause of action, you must then fix the amount of money which will reasonably and fairly compensate her 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 Dr. Johnson's conduct, whether such loss or harm could have been anticipated or not, namely:

- (1) The disability and disfigurement suffered by Brenda Nissen;
- (2) 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 injuries sustained by Brenda Nissen;
- (3) 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;
- (4) The earnings Brenda Nissen has lost, if any, from any sources from the date of the injury until the date of trial. The factors to be considered in determining the measure of damages for loss of earning capacity include:
 - (a) what Brenda Nissen earned before the injury;
 - (b) what Brenda Nissen is capable of earning after the injury;
 - (c) the prior ability of Brenda Nissen;
 - (d) the extent to which the injury affects Brenda Nissen's power to earn;
 - (e) age;
 - (f) life expectancy;

- (g) physical condition;
- (h) occupation;
- (i) skill; and
- (j) habits of industry.

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

FINAL INSTRUCTION NO. 7 – LOSS OF CONSORTIUM

If you find that Dr. Johnson is liable to Brenda Nissen, you must then determine the amount of money which will reasonably compensate Thomas Nissen for any of the following elements of damages which you find were suffered by Thomas Nissen and legally caused by Dr. Johnson's medical malpractice:

- (1) The reasonable value of Brenda Nissen's services, aid, comfort, society, companionship, and conjugal affections that Thomas Nissen has been deprived of in the past and the present cash value of the services, aid, comfort, society, companionship, and conjugal affections of Brenda Nissen which Thomas Nissen is reasonably certain to be deprived of in the future.

Whether this element of damages has been proved by the greater weight of the evidence is for you to determine.

FINAL INSTRUCTION NO. 8 – FUTURE DAMAGES

The law allows damages for detriment reasonably certain to result in the future. By their nature, all future happenings are somewhat uncertain. The fact and cause of the loss must be established with reasonable certainty. Once future 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, recovery is not barred by uncertainty as to the measure or extent of damages, or the fact that they cannot be measured with exactness. On the other hand, an award of future damages cannot be based on conjecture, speculation, or mere possibility.

If you should find that the Nissens are entitled to a verdict, and further find that the evidence in this case establishes

- (1) a reasonable likelihood of future medical expenses; or
- (2) a reasonable likelihood of loss of future earnings by Brenda Nissen; or
- (3) a reasonable likelihood of future loss of consortium by Thomas Nissen,

then you must ascertain the present value in dollars of such future damages, because 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 Nissens will in effect be reimbursed in advance of the loss, and so will have the use of money which the Nissens 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 the Nissens 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; (3) reduce, or in effect deduct from, the total amount of future loss, whatever the 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.

Bear in mind that your duty to discount to present value applies only to future medical expenses, Brenda Nissens's loss of future earnings, or Thomas Nissen's future 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.

There has been evidence presented to you concerning the claim for future medical expenses and Brenda Nissen's future earnings in the form of expert testimony. However, it is your duty to determine whether the expert's adjustment for present value was reasonable, and if not, you should make your own adjustment for present value of any sum you determine the Nissens are entitled for the above the losses, if any.

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.

FINAL INSTRUCTION NO. 9 – PREJUDGMENT INTEREST

Any person who is entitled to recover damages is entitled to recover interest thereon from the day that the loss or damage occurred except:

- (1) During a period of time, the person liable for the damages was prevented by law, or an act of the person entitled to recover the damages from paying the damages, or
- (2) Interest is not recoverable on damages which will occur in the future or intangible damages such as pain and suffering, emotional distress, loss of consortium, injury to credit, reputation or financial standing, loss of enjoyment of life, or loss of society and companionship.

You must decide:

- (1) The amount of damages, if any; and
- (2) The amount of damages which are subject to prejudgment interest, if any; and
- (3) The date or dates on which the damages occurred.

If you return a verdict for Brenda Nissen, you must indicate on the verdict form whether you find that she is entitled to prejudgment interest, and if so, the amount of damages upon which interest is granted and the beginning date of such interest. Based upon your findings, the court will calculate the amount of interest Brenda Nissen is entitled to recover.

FINAL INSTRUCTION NO. 10 – DUTIES DURING DELIBERATIONS

In conducting deliberations and returning your verdict, there are certain rules 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 discussions 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 do so without violence to individual judgment, because a 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. But do not come to a decision simply because other jurors think it is right, or simply to reach a verdict. Remember at all times that you are not partisans. You are judges—judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

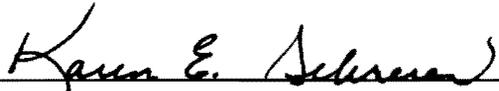
Third, if you need to communicate with me during your deliberations, you may send a note to me through the court security officer, signed by one or more jurors. I will respond as soon as possible either in writing or orally in open court. **Remember that you should not tell anyone—including me—how your votes stand numerically.**

Fourth, your verdict must be based solely on the evidence and on the law which I have given to you in my instructions. The verdict must be unanimous. Nothing I have said or done is intended to suggest what your verdict should be—that is entirely for you to decide.

Finally, the verdict form is simply the written notice of the decision that

you reach in this case. You will take this form to the jury room, and when each of you has agreed on the verdict, your foreperson will fill in the form, sign and date it, and advise the court security officer that you are ready to return to the courtroom.

Dated November 17, 2011.



KAREN E. SCHREIER
CHIEF JUDGE