

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
SOUTHERN DIVISION

**FILED**  
JAN 17 2008

*[Signature]*  
CLERK

\*\*\*\*\*

PATRICIA K. ERICKSON, as Personal  
Representative of the Estate of Kelvin D.  
Hofer,

Plaintiff,

-vs-

JESSICA LYNN RILEY,

Defendant.

CIV. 06-4122

JURY  
INSTRUCTIONS

\*\*\*\*\*

Attorneys for Plaintiff:

Mr. Robert Christenson  
Christenson Law Office, P.C.  
311 E. 14<sup>th</sup> Street  
Sioux Falls SD 57104

Mr. Daniel Brendtro  
Attorney At Law  
412 W. 9<sup>th</sup> Street  
Sioux Falls, SD 57104

Attorneys for Defendant:

Ms. Susan Sabers  
Ms. Hillary Williamson  
7521 S. Louise Avenue  
Sioux Falls, SD 57108

## INSTRUCTION NO. 1

### EXPLANATORY

MEMBERS OF THE JURY: Now that you have heard the evidence, it becomes my duty to give you the instructions of the Court as to the law applicable to this case.

It is your duty as jurors to follow the law as I will state it to you, and to apply that law to the facts as you find them from the evidence in the case. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law. You must continue to follow the instructions I gave you earlier, as well as those I give you now.

Nothing I say in these instructions is to be taken as an indication that I have any opinion about the facts of the case, or what that opinion is. It is not my function to determine the facts, but rather yours.

You must perform your duties as jurors without bias or prejudice as to any party. The law does not permit you to be governed by sympathy, prejudice or public opinion. All parties expect that you will carefully and impartially consider all of the evidence, follow the law as it is now being given to you, and reach a just verdict, regardless of the consequences.

The instructions I am about to give you 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.

INSTRUCTION NO. 2

**EVIDENCE TO BE CONSIDERED**

It is your duty as a jury to determine the facts, and you must do this from the evidence that has been produced here in open court. This consists of the testimony of the witnesses and the exhibits which have been received. This evidence is governed by various rules of law. Under these rules, it has been my duty as judge to rule on the admissibility of the evidence from time to time. You must not concern yourselves with the reasons for these rulings, and you must not consider any exhibit which was not received in evidence or any testimony which has been ordered stricken. Such things you must put out of your mind.

And you must not consider anything you may have heard or read about this case other than the evidence which has been properly admitted herein.

INSTRUCTION NO. 3

**ATTORNEYS' ARGUMENTS NOT EVIDENCE**

The attorneys for the respective parties will present to you their arguments of the case for your assistance in coming to a decision. The order of their appearance and the length of the time of their arguments is regulated by the court. While the final argument of counsel is intended to help you in understanding the evidence and applying the law as set forth in these instructions, their remarks are not evidence. Any argument or any statement or any remark of counsel which has no basis in the evidence should be disregarded by you. (However, an admission of fact by an attorney for a party is binding on that party.)

INSTRUCTION NO. 4

**COMMON EXPERIENCES**

In weighing the evidence in this case, you have a right to consider the common knowledge possessed by all of you, together with the ordinary experiences and observations in your daily affairs of life.

INSTRUCTION NO. 5

**QUOTIENT VERDICT NOT ALLOWED**

If you should determine that the plaintiff should recover a verdict, you should not return what is known as a quotient verdict in this case. By a quotient verdict is meant one which is reached pursuant to a prior agreement made by all the jurors to add up the amount which each of the several jurors would award and divide such sum by the number of jurors and treat the quotient or result of such division as the amount of the verdict to be returned by the jury.

If you find the issues in favor of the plaintiff, the verdict you are to return must be for such an amount as you all agree upon as the proper amount in this case. A verdict reached by adding the amounts suggested by the several jurors and then dividing in the manner I have indicated would not be the judgment of the individual jurors and such a method is likely to produce a verdict at variance with the sound judgment of each member of the jury. The rights of the parties to a suit should never be finally determined in this manner. It is for you to determine by the use of your best judgment the verdict which you should return in this case without resort to chance or the method above indicated.

INSTRUCTION NO. 6

**NOTES**

If you took notes during the trial, your notes should be used only as memory aids. You should not give your notes precedence over your independent recollection of the evidence. If you did not take notes, you should rely on your own independent recollection of the proceedings and you should not be influenced by the notes of other jurors. I emphasize that notes are not entitled to any greater weight than the recollection or impression of each juror as to what the testimony may have been.

INSTRUCTION NO. 7

**DEPOSITION TESTIMONY**

During the trial, certain evidence was presented to you by deposition. The witness testified under oath at the deposition, just as if the witness were in court, and you should consider this testimony together with all other evidence received.



INSTRUCTION NO. 8

**CREDIBILITY OF WITNESSES**

You are the sole judges of all facts and credibility of witnesses. In deciding what testimony to believe, you may consider:

- (1) the witnesses' ability and opportunity to observe;
- (2) their intelligence;
- (3) their memories;
- (4) their manner while testifying;
- (5) whether they said or did something different at an earlier time;
- (6) their qualifications and experience;
- (7) any apparent interest, bias, or prejudice they may have; and
- (8) the reasonableness of their testimony in light of all the evidence in the case.

INSTRUCTION NO. 9

**FALSE TESTIMONY**

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.

INSTRUCTION NO. 10

**IMPEACHMENT**

The credibility of a witness may be attacked by introducing evidence that on some former occasion the witness made a statement or acted in a manner inconsistent with the witness's testimony in this case on a matter material to the issues. Evidence of this kind may be considered by you in connection with all the other facts and circumstances in evidence in deciding the weight to be given to the testimony of that witness.

INSTRUCTION NO. 11

**ISSUES TO BE DECIDED**

The issues to be determined by you in this case are these:

Was the defendant negligent?

If you find the defendant was not negligent, you will return a verdict for the defendant. If you find the defendant was negligent, you have a second issue to determine, namely:

Was that negligence a legal cause of any injury to Kelvin Hofer?

If you find the defendant's negligence was not a legal cause of Kelvin Hofer's injury, Plaintiff is not entitled to recover and you will return a verdict for defendant.

If you find the defendant's negligence was a legal cause of Kelvin Hofer's injury, you must find on a third issue:

Was Kelvin Hofer also negligent?

If you find that Kelvin Hofer was not negligent, you then must fix the amount of Plaintiff's damages and return a verdict for the Plaintiff.

If you find that Kelvin Hofer was also negligent, you must determine a fourth issue, namely:

Was that negligence a legal cause of Kelvin Hofer's injury?

If you find it was not a legal cause of Kelvin Hofer's injury, you then must fix the amount of plaintiff's damages and return a verdict for the plaintiff.

INSTRUCTION NO. 11 (Continued)

If you find that Kelvin Hofer's negligence did contribute as a legal cause of his injury, the Plaintiff may still recover if you find that such contributory negligence of Kelvin Hofer was slight in comparison with the negligence of the defendant. If you find that Kelvin Hofer was negligent, but that such Kelvin Hofer's negligence is under the circumstances slight in comparison with defendant's negligence, the Plaintiff is still entitled to recover, but the damages to be awarded Plaintiff must be reduced in proportion to the amount of Kelvin Hofer's contributory negligence. If you find that such contributory negligence of Kelvin Hofer is more than slight in comparison with the negligence of the defendant, the Plaintiff cannot recover.

As indicated in this instruction, you should first determine the question of liability before you undertake to fix an amount that would compensate for damages, if any, found to have been suffered.

INSTRUCTION NO. 12

**NEGLIGENCE-DEFINITION**

Negligence is the failure to use reasonable care. It is the doing of something which a reasonable person would not do, or the failure to do something which a reasonable person would do, under facts similar to those shown by the evidence. The law does not say how a reasonable person would act under facts similar to those shown by evidence. That is for you to decide.

INSTRUCTION NO. 13

**CONTRIBUTORY NEGLIGENCE**

Contributory negligence is negligence on the part of Kelvin Hofer which, when combined with the negligence of Jessica Riley, contributes as a legal cause in the bringing about of the injury to Kelvin Hofer.

INSTRUCTION NO. 14

**COMPARATIVE NEGLIGENCE**

If Kelvin Hofer was contributorily negligent, Plaintiff may still recover damages if Kelvin Hofer's contributory negligence was slight, or less than slight, when compared with the negligence of Jessica Riley. The term "slight" means small when compared with the negligence of Jessica Riley.

In determining this issue you must determine the answer to two questions:

- (1) Whether Kelvin Hofer and Jessica Riley were negligent; and
- (2) If both were negligent, whether Kelvin Hofer's negligence was
  - (a) "slight" or less than "slight", or
  - (b) more than "slight" in comparison with Jessica Riley's negligence.

In answering the second question you must make a direct comparison between the conduct of Kelvin Hofer and Jessica Riley.

If you find Kelvin Hofer's contributory negligence is more than slight when compared with the negligence of Jessica Riley, then the plaintiff is not entitled to recover any damages.

If you find the Kelvin Hofer's contributory negligence is slight, or less than slight, when compared with the negligence of Jessica Riley, then the plaintiff is entitled to recover damages. However, the plaintiff's damages must be reduced in proportion with the amount of Kelvin Hofer's contributory negligence.



INSTRUCTION NO. 15

**LEGAL CAUSE**

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.

INSTRUCTION NO. 16

**LEGAL CAUSE--DEFINITION**

The term "legal cause" means an immediate cause which, in the natural or probable sequence, produces 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. The defendant's conduct must have such an effect in producing the harm as to lead reasonable people to regard it as a cause of the Kelvin Hofer's injury.

INSTRUCTION NO. 17

**LEGAL CAUSE—SUBSTANTIAL FACTOR**

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 the legal cause to exist, you must find that the conduct complained of was a substantial factor in bringing about the harm.

INSTRUCTION NO. 18

**CONCURRENT NEGLIGENCE**

More than one person may be responsible for causing injury to another. If you find that the defendant was negligent and that the defendant's negligence was a legal cause of Kelvin Hofer's injury, it is not a defense that some third person, not a party to this action, was partly responsible.

INSTRUCTION NO. 19

**SUDDEN EMERGENCY**

When a person is confronted with a sudden emergency, the person has a duty to exercise the care that an ordinarily prudent person would exercise in the same or similar situation. Jessica Riley is relieved of liability because of a sudden emergency if you find:

1. that Jessica Riley was confronted with a sudden and unexpected danger;
2. that Jessica Riley's own negligence did not bring about the dangerous situation;
3. that Jessica Riley had at least two courses of action available after perceiving the dangerous situation; and
4. that Jessica Riley's choice of action after confronting the danger was a choice that a reasonably prudent person would have taken under similar circumstances, even though it may later develop that some other choice would have been better.

INSTRUCTION NO. 20

**RIGHT TO ASSUME OTHER'S GOOD CONDUCT**

A person who is exercising ordinary care has a right to assume that others will perform their duty. Unless there is reasonable cause for thinking otherwise, people can assume that they are not exposed to danger from another person's violation of duty of care.

INSTRUCTION NO. 21

**DUTY OF DRIVER USING HIGHWAY**

The driver of any vehicle using a public highway has a duty to exercise ordinary care at all times to avoid placing the driver or others in danger and to exercise ordinary care to avoid an accident.

While a driver may assume that others will exercise due care and obey the law, a driver may not for that reason omit any care which the law demands; and any person driving on a public highway is bound to anticipate the presence on the highway of other persons, vehicles, and objects.

INSTRUCTION NO. 22

**JUDICIAL NOTICE OF FACTS**

I have decided to accept as proved the following facts:

A motor vehicle traveling:

- at zero (0) miles per hour travels at 0.0 feet per second;
- at five (5) miles per hour travels at 7.35 feet per second;
- at ten (10) miles per hour travels at 14.70 feet per second;
- at fifteen (15) miles per hour travels at 22.05 feet per second;
- at twenty (20) miles per hour travels at 29.40 feet per second;
- at twenty-five (25) miles per hour travels at 36.75 feet per second;
- at thirty (30) miles per hour travels at 44.10 feet per second;
- at thirty-five (35) miles per hour travels at 51.45 feet per second;
- at forty (40) miles per hour travels at 58.80 feet per second;
- at forty-five (45) miles per hour travels at 66.15 feet per second;
- at fifty (50) miles per hour travels at 73.50 feet per second;
- at fifty-five (55) miles per hour travels at 80.85 feet per second;
- at sixty (60) miles per hour travels at 88.20 feet per second; and
- at sixty-five (65) miles per hour travels at 95.55 feet per second.

You must accept these facts as proved.



INSTRUCTION NO. 23

**MERE FACT THAT AN ACCIDENT HAPPENED**

The mere fact that an accident happened does not mean that it was caused by anyone's negligence.

INSTRUCTION NO. 24

**ELEMENTS OF PLAINTIFF'S DAMAGES**

If you decide for the plaintiff on the question of liability you must then fix the amount of money which will reasonably and fairly compensate Plaintiff for damages. In awarding damages, you may consider the following elements of loss or harm proved by the evidence to have been legally caused by the negligence of the defendant, whether such loss or harm could have been anticipated or not, namely:

If you find that the plaintiff is entitled to recover, you must then fix the amount of money which will reasonably and fairly compensate the next of kin of the decedent for their pecuniary loss as a result of the death of the decedent.

In determining pecuniary loss, you may consider what benefits of pecuniary value, including money, goods and services, the next of kin might reasonably have expected to receive from the decedent had the decedent lived, bearing in mind, the following:

- (1) The decedent's contributions in the past;
- (2) The decedent's life expectancy at the time of death;
- (3) The decedent's health, age, habits, talents, and success;
- (4) The decedent's occupation;
- (5) The decedent's past earnings;
- (6) The decedent's likely future earnings; and prospects of bettering himself had the decedent lived;

INSTRUCTION NO. 24 (continued)

- (7) The decedent's personal living expenses, that is those amounts decedent customarily spent on himself;
- (8) The decedent's legal obligations to support the next of kin and the likelihood of fulfilling that obligation;
- (9) All reasonable expenses incurred for a funeral and for burial or other disposition of decedent's body;
- (10) The instruction, moral training and superintendence of education decedent might reasonably have given the decedent's next-of-kin had the decedent lived;
- (11) The counsel, guidance and aid decedent would reasonably have given the next of kin had the decedent lived;
- (12) The life expectancy, health and physical condition of the next of kin;
- (13) The loss of advice, assistance, companionship, society and protection the decedent would reasonably have given the next of kin had the decedent lived.

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.

INSTRUCTION NO. 25

**DAMAGES WRONGFUL DEATH FACTORS TO BE DISREGARDED**

The law does not permit you, and you must not, award plaintiff any sum for the sorrow, mental distress and grief that the next of kin may have suffered by reason of the death of the decedent, nor for any suffering of the decedent, if any, experienced before his death and caused by the injury in question nor for any pecuniary loss that the decedent may have personally suffered.

INSTRUCTION NO. 26

**FUTURE DAMAGES—MORTALITY TABLE**

According to the mortality table, the life expectancy of a 43 year old white male is 34.9 additional years. Kelvin Hofer was 43 years old at the time of his death.

According to the mortality table, the life expectancy of a 44 year old white female is 38 additional years. Deb Burnham is currently 44 years old.

According to the mortality table, the life expectancy of a 47 year old white female is 35.3 additional years. Patricia Erickson is currently 47 years old.

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.

INSTRUCTION NO. 27

**DAMAGES INSTRUCTION DOES NOT MANDATE FINDING OF LIABILITY**

You have been 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.

Your verdict must be based on evidence and not upon speculation, guesswork, or conjecture.

INSTRUCTION NO. 28

**BURDEN OF PROOF; ISSUES IN THE CASE**

In civil actions, the party who asserts the affirmative of an issue must prove that issue by 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 had the burden of proving it. In this action, the plaintiff has the burden of proving the following issues:

1. That the Defendant Jessica Riley was negligent;
2. The Defendant's negligence was the legal cause of injury to Kelvin Hofer;
3. The damages, if any, incurred by the Plaintiff.

The Defendant has the burden of proving the following issues:

1. That Kelvin Hofer was contributorily negligent;
2. That Kelvin Hofer's contributory negligence was the legal cause of his injuries;
3. That Kelvin Hofer's contributory negligence was more than slight when compared to the negligence, if any, of Defendant Jessica Riley.

In determining whether or not an issue has been proved by greater convincing force of the evidence, you should consider all of the evidence bearing upon that issue, regardless of who produced it.

INSTRUCTION NO. 29

**ELECTION OF FOREPERSON; DUTY TO DELIBERATE; COMMUNICATIONS WITH COURT; CAUTIONARY; UNANIMOUS VERDICT; VERDICT FORM**

In conducting your 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 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 marshal or bailiff, 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 marshal or bailiff that you are ready to return to the courtroom.

If more than one form was furnished, you will bring the unused forms in with you.



UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
SOUTHERN DIVISION

\*\*\*\*\*

PATRICIA K. ERICKSON,  
as Personal Representative of  
the Estate of Kelvin D. Hofer,

Plaintiff,

-vs-

JESSICA LYNN RILEY,

Defendant.

\*\*\*\*\*

\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*

CIV. 06-4122

VERDICT FOR PLAINTIFF

We, the jury, duly impaneled in the above-entitled action and sworn to try the issues therein,  
find for the plaintiff and assess plaintiff's damages at the sum of \$ \_\_\_\_\_.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Foreperson

