

FILED

NOV 19 2009


CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

RANDALL LATCHAM,
Plaintiff,

vs.

GAYLON EAVES and
JIM O'NEAL, individually and doing
business as S&L Trucking,
Defendants.

CIV. 08-5037-KES

**FINAL
INSTRUCTIONS
TO THE JURY**

TABLE OF CONTENTS

FINAL INSTRUCTION

NO. 1 – INTRODUCTION AND DEFINITIONS	1
NO. 2 – BURDEN OF PROOF	2
NO. 3 – IMPEACHMENT	3
NO. 4 – AGENCY	4
NO. 5 – NEGLIGENCE	5
NO. 6 – CONTRIBUTORY NEGLIGENCE	7
NO. 7 – ASSUMPTION OF RISK	10
NO. 8 – ASSUMPTION OF RISK AND CONTRIBUTORY NEGLIGENCE COMPARED	11
NO. 9 – DAMAGES	12
NO. 10 – FUTURE DAMAGES	14
NO. 11 – PRESENT VALUE	15
NO. 12 – DUTIES DURING DELIBERATIONS	17

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 – BURDEN OF PROOF

In these instructions you are told that your verdict depends on whether you find certain facts have been proved. The burden of proving a fact is upon the party whose claim or defense depends upon that fact. The party who has the burden of proving a fact must prove it by the greater weight of the evidence. To prove something by the greater weight of the evidence is to prove that it is more likely true than not true. It is determined by considering all of the evidence and deciding which evidence is more believable. If, on any issue in the case, the evidence is equally balanced, you cannot find that issue has been proved.

The greater weight of the evidence is not necessarily determined by the greater number of witnesses or exhibits a party has presented.

FINAL INSTRUCTION NO. 3 – 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. 4 – AGENCY

Defendants are sued as principal and agent. O'Neal is sued as the principal, and Eaves is sued as his agent. Defendants admit that an agency relationship existed. As a result, if you find that Eaves is liable to Latcham, then both O'Neal and Eaves are liable to Latcham. If you find that Eaves is not liable to Latcham, then neither Eaves nor O'Neal is liable to Latcham.

FINAL INSTRUCTION NO. 5 – NEGLIGENCE

Latcham claims that defendants are liable because Eaves drove negligently and caused Latcham to sustain injuries and other damages. To establish that defendants are liable for negligence, Latcham must prove the following two elements by the greater weight of the evidence:

One, that Eaves was negligent;

The parties have stipulated—that is, they have agreed—that Eaves was negligent.

And two, that the negligence was a legal cause of Latcham’s injuries.

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 conduct must have such an effect in producing the harm as to lead reasonable people to regard it as a cause of the plaintiff’s injury.

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.

If you find that “legal cause” has been proved by the greater weight of the evidence, you should consider whether Latcham was contributorily negligent as explained in Final Instruction No. 6 and/or whether Latcham assumed the risk

as explained in Final Instruction No. 7. If, on the other hand, “legal cause” has not been proved by the greater weight of the evidence, then your verdict must be for defendants on this claim.

FINAL INSTRUCTION NO. 6 – CONTRIBUTORY NEGLIGENCE

Defendants claim that Latcham was contributorily negligent.

Contributory negligence is negligence on the part of a plaintiff which, when combined with the negligence of a defendant, contributes as a legal cause in bringing about the injury of the plaintiff.

A plaintiff who is contributorily negligent may still recover damages if that contributory negligence is slight, or less than slight, when compared with the negligence of the defendant.

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

One, whether Latcham was also negligent;

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 the facts similar to those shown by the evidence. That is for you to decide.

And two, if Latcham was also negligent, whether Latcham's negligence was (a) slight or less than slight, or (b) more than slight in comparison with the negligence of Eaves.

The term "slight" means small when compared with the negligence of Eaves.

In making this determination, you must make a direct comparison between the conduct of Latcham and of Eaves.

If you find Latcham's contributory negligence is more than slight when compared with the negligence of Eaves, then Latcham is not entitled to recover any damages.

In considering Eaves' negligence, you are instructed that statutes in this state provide:

- (1) It is unlawful for any person to make a left turn or semicircular or U-turn through an opening in the dividing curb section, separation, or line which has been designated and marked for use by maintenance and authorized vehicles only.
- (2) A driver of any vehicle upon a highway before starting, stopping, or turning from a direct line shall first see that such movement can be made in safety, and whenever the operation of any other vehicle may be affected by such movement, shall give a signal by means of the hand and arm or by an approved mechanical or electrical signal device, plainly visible to the driver of such other vehicle of the intention to make such movement.
- (3) On a roadway divided into lanes, a vehicle shall be driven as nearly as practicable entirely within a single lane and may not be moved from such lane until the driver has first ascertained that such movement can be made with safety.

These statutes set the standard of care of a reasonable person. If you find that a party violated any of these statutes, such violation is negligence.

If you find Latcham's contributory negligence is slight, or less than slight, when compared with the negligence of Eaves, then Latcham is entitled to recover damages unless he assumed the risk as explained in Final

Instruction No. 7. However, Latcham's damages must be reduced in proportion with the amount of his contributory negligence.

FINAL INSTRUCTION NO. 7 – ASSUMPTION OF RISK

Defendants claim that they are not liable for negligence because Latcham assumed the risk. If a person assumes the risk of injury or damage, the person is not entitled to any recovery. To support an assumption of the risk defense, defendants must prove the following three elements by the greater weight of the evidence:

One, that Latcham had actual or constructive knowledge of the existence of the specific risk involved;

A person has constructive knowledge of a risk if the risk is so plainly observable that anyone of competent faculties could be charged with knowledge of it.

Two, that Latcham appreciated the risk's character;

A person can be deemed to appreciate a risk if it is a risk that no adult person of average intelligence could deny.

And three, that Latcham voluntarily accepted the risk, having had the time, knowledge, and experience to make an intelligent choice.

If you find that each of the three elements has been proved by the greater weight of the evidence, then defendants are not liable for negligence, and your verdict must be for defendants on this claim.

FINAL INSTRUCTION NO. 8 – ASSUMPTION OF RISK AND CONTRIBUTORY NEGLIGENCE COMPARED

While the same conduct on the part of Latcham may amount to both assumption of risk and contributory negligence, the two defenses are distinct. Assumption of the risk involves a voluntary or deliberate decision to encounter a known danger whereas contributory negligence frequently involves the inadvertent failure to notice danger. In addition, contributory negligence must be a legal cause of the injury in order to be a defense, while assumption of the risk need not cause the injury in order to bar recovery.

FINAL INSTRUCTION NO. 9 – DAMAGES

If you decide for Latcham on the question of negligence, you must then fix the amount of money which will reasonably and fairly compensate Latcham for any of the following elements of loss or harm suffered in person or property and proved by the evidence to have been legally caused by defendants' 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 disability and disfigurement;
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 injury;
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 Latcham has lost, if any, from any source from the date of the injury until the date of trial; and
5. Such sum as will reasonably compensate Latcham for whatever loss of earning capacity you find that he has suffered as a result of the injury.

The factors to be considered in determining the measure of damages for loss of earning capacity include: what the plaintiff earned before the injury, what the plaintiff is capable of earning after the injury, the prior ability of the plaintiff, the extent to which the injuries affect the plaintiff's power to earn, age, life expectancy, physical condition, occupation, skill, and habits of industry.

Even if the plaintiff is earning more money now than before the injury, the plaintiff is still entitled to recover for a loss of earning capacity reasonably certain to be suffered during the remainder of the plaintiff's life expectancy.

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

If you find that Latcham was contributorily negligent as discussed in Final Instruction No. 6, and that Latcham's contributory negligence was slight, or less than slight, when compared with the negligence of Eaves, then you must reduce Latcham's damages in proportion with the amount of his contributory negligence.

FINAL INSTRUCTION NO. 10 – 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.

FINAL INSTRUCTION NO. 11 – PRESENT VALUE

If you should find that Latcham 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 of loss of future earnings

then you must 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 be sustained until some future date.

Under these circumstances, the result is that Latcham will in effect be reimbursed in advance of the loss, and so will have the use of money which he 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 Latcham 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 whatever that amount 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 of anticipated future loss.

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

There has been evidence presented to you concerning the claim for future medical expenses and future earnings in 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 Latcham is entitled for the above 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. 12 – 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.

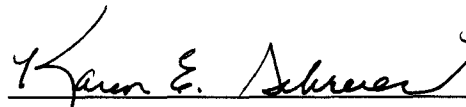
Third, if you need to communicate with me during your deliberations, you may send a note to me through the marshal or court security officer, signed by one or more jurors. I will respond as soon as possible either in

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 marshal or court security officer that you are ready to return to the courtroom.

Dated November 19, 2009.



KAREN E. SCHREIER
CHIEF JUDGE