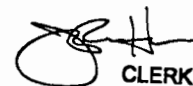


UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

FILED

JAN 07 2011


CLERK

BONNIE ROMERO,) CIV. 08-5040-JLV
)
Plaintiff,)
)
vs.) FINAL INSTRUCTIONS
) TO THE JURY
)
)
DENISE HANISCH, M.D.; and)
REGIONAL HEALTH)
PHYSICIANS, INC., d/b/a)
Edgemont Regional Medical)
Clinic and Custer Regional)
Medical Clinic,)
)
Defendants.)

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FINAL INSTRUCTION NO. 1 - INTRODUCTION

Members of the jury, I will take a few moments to give you the instructions that are to guide and govern you in arriving at a verdict. The law that applies to this case is contained in these instructions, and it is your duty to follow them. You must consider these instructions as a whole and not single out one instruction and disregard others. The order in which the instructions are given has no significance as to their relative importance. All instructions are equally binding on you and must be followed. Consider these instructions, together with all written and oral instructions given to you at the beginning and during the trial, and apply them as a whole to the facts of the case.

This is a civil case brought by Bonnie Romero against Dr. Denise Hanisch and Regional Health Physicians, Inc., doing business as Edgemont Regional Medical Clinic and Custer Regional Medical Clinic. Ms. Romero is the plaintiff in this case, and Dr. Hanisch and Regional Health Physicians, Inc., are the defendants. Ms. Romero alleges Dr. Hanisch was negligent in the care and treatment of her and this negligence legally caused injury to her. Ms. Romero alleges Regional Health Physicians, Inc., as Dr. Hanisch's employer, is also responsible for Dr. Hanisch's negligence. Dr. Hanisch and Regional Health Physicians, Inc., deny the allegations

This case is presented to you because the parties dispute certain facts. You will decide the facts from the evidence presented. 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. You may use reason and common sense to draw deductions or conclusions from facts that have been established by the evidence. You will apply those facts to the law I give you in these and in other instructions and in that way reach your verdict. You are the sole judges of the facts, but you must follow the law as stated in my instructions, whether you agree with the law or not.

It is vital to the administration of justice that each of you faithfully perform your duties as jurors. You must carefully and honestly consider this case with due regard for the rights and interests of the respective parties. Neither sympathy nor prejudice should influence you. Your verdict must be based on evidence and not upon speculation, guess, or conjecture. The law demands of you a just verdict unaffected by anything except the evidence, your common sense, and the law as I give it to you.

You should not take anything I said or did during the trial as an indication of what I think about the evidence or what I think your verdict should be. Similarly, do not conclude from any ruling or other comment I made that I have any opinion as to how you should decide the case. By the language of these instructions, I do not intend to imply what any of the disputed facts in this case are or what your verdict in this case should be.

FINAL INSTRUCTION NO. 2 - MATTERS TO BE DISREGARDED

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 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.

FINAL INSTRUCTION NO. 3 - DEFINITION OF EVIDENCE

I mentioned the word “evidence.” “Evidence” includes the testimony of witnesses, documents and other things received as exhibits, any facts that have been stipulated and any facts that have been judicially noticed.

Stipulated facts are facts that are formally agreed to by the parties. Judicially-noticed facts are facts which I say you may, but are not required to accept as true even without evidence. Certain things are *not* evidence. I shall list those things for you now:

1. Statements, arguments, questions, and comments by lawyers representing the parties in the case are not evidence. Opening and closing statements by lawyers are not evidence.
2. Objections and rulings on objections are not evidence. Lawyers have a right to object when they believe something is improper. You should not be influenced by the objection. If I sustained an objection to a question, you must ignore the question and must not try to guess what the answer might have been.
3. Testimony I struck from the record or told you to disregard is not evidence and must not be considered.
4. Anything you saw or heard about this case outside the courtroom is not evidence.

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

Finally, some of you may have heard the terms “direct evidence” and “circumstantial evidence.” You should not be concerned with those terms. The law makes no distinction between direct and circumstantial evidence. You should give all evidence the weight and value you believe it is entitled to receive.

FINAL INSTRUCTION NO. 4 - CREDIBILITY OF WITNESSES

You are the sole judges of all questions of fact and the credibility of witnesses. In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness says, only part of it, or none of it.

In deciding what testimony to believe, consider the witness's intelligence; the opportunity the witness had to see or hear the things testified about; the witness's memory; any motives the witness may have for testifying a certain way, including any apparent interest, bias, or prejudice; the manner of the witness while testifying; whether the witness said something different at an earlier time; the general reasonableness of the testimony; and the extent to which the testimony is consistent with any evidence you believe. In deciding whether or not to believe a witness, keep in mind people sometimes see or hear things differently and sometimes forget things. You need to consider whether a contradiction results from an innocent misrecollection or sincere lapse of memory or from an intentional falsehood or pretended lapse of memory.

The credibility of a witness may be attacked by introducing evidence that on some former occasion the witness made a statement on a matter of fact or acted in a manner inconsistent with his or her testimony in this case or on a matter material to the issues. You may consider evidence of this kind in connection with all other evidence in deciding the weight to give to the testimony of the witness.

If you believe that any witness 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. 5 - EXPERT WITNESSES

A witness may qualify as an expert and give an opinion on a matter at issue if the witness has special knowledge, skill, experience, training, or education concerning the matter on which the expert testifies. In deciding the weight to give the opinion, you should consider the expert's qualifications, credibility, and reasons for the opinion. You are not bound by that opinion. If you decide that the reasons for the expert's opinion are unsound or that other evidence outweighs the opinion, you may disregard the opinion entirely.

FINAL INSTRUCTION NO. 6 - BURDEN OF PROOF

In civil actions, the party who has the burden of proving 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 likely true than not true. In the event the evidence is evenly balanced so that you are unable to say 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 this action, Ms. Romero has the burden of proving the following issues:

- (1) that Dr. Hanisch was negligent by violating the standard of care owed to Ms. Romero; and
- (2) that such negligence was the legal cause of any damage, injury, or loss experienced by Ms. Romero; and
- (3) the nature and extent of any damages, injuries, and losses experienced by Ms. Romero as a legal result of the negligence of Dr. Hanisch.

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.

FINAL INSTRUCTION NO. 7 - CLAIMS ASSERTED BY PLAINTIFF

Ms. Romero claims:

- (1) Dr. Hanisch failed to monitor Ms. Romero's liver function according to the standard of care for board-certified family practitioners;
- (2) Dr. Hanisch reported results of Ms. Romero's liver function tests when no such tests were done;
- (3) Dr. Hanisch continued Ms. Romero's prescription of anti-lipidemic medications without properly monitoring Ms. Romero's liver function;
- (4) Dr. Hanisch's failure to monitor Ms. Romero's liver function and continued prescription of anti-lipidemic medications were the legal cause of Ms. Romero's liver disease;
- (5) Ms. Romero's liver disease resulted in her liver failure and subsequent liver transplant; and that
- (6) Ms. Romero incurred damages as a result of Dr. Hanisch's acts or omissions.

Dr. Hanisch denies she was negligent or that any negligence by her legally caused injury to Ms. Romero.

FINAL INSTRUCTION NO. 8 - DEFINITION OF 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.

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

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.

FINAL INSTRUCTION NO. 9 - DUTY OF A SPECIALIST

In performing professional services for Ms. Romero, Dr. Hanisch had the duty to possess that degree of knowledge and skill ordinarily possessed by board-certified family practitioners of good standing engaged in that specialization in the United States.

Dr. Hanisch also had the duty to use that care and skill ordinarily exercised under similar circumstances by board-certified family practitioners in good standing engaged in that specialization in the United States and to be diligent in an effort to accomplish the purpose for which Dr. Hanisch was employed.

You must judge Dr. Hanisch's performance based on the standard of care applicable in April 2006.

A failure to perform any such duty is negligence.

FINAL INSTRUCTION NO. 10 - USE OF EXPERT WITNESS TESTIMONY

You must decide whether Dr. Hanisch possessed and used the knowledge, skill, and care which the law demands based on the testimony of 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.

FINAL INSTRUCTION NO. 11 - BAD RESULT

The fact that an unfortunate or bad condition resulted to Ms. Romero does not alone prove that Dr. Hanisch was negligent, but it may be considered along with other evidence in determining the issue of negligence.

FINAL INSTRUCTION NO. 12 -

DRUG MANUFACTURER'S RECOMMENDATION

You are instructed that where a drug manufacturer or other recognized authority recommends to the medical profession:

- (1) the conditions under which the drug should be prescribed;
- (2) the disorder it is designed to relieve;
- (3) the precautionary measures which should be observed; and
- (4) warns of the dangers which are inherent in its use,

a doctor's deviation from such recommendation is evidence of negligence if supported by competent medical evidence that the patient's injury resulted from the doctor's failure to adhere to the recommendations and it is incumbent upon the doctor to justify the reasons for deviating from such recommendation.

FINAL INSTRUCTION NO. 13 - DAMAGES

If you decide for Ms. Romero on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate Ms. Romero for any of the following elements of loss or harm proved by the evidence to have been legally caused by Dr. Hanisch'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 disability and disfigurement;
- (2) the pain and suffering 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; and
- (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.

Whether any of these elements of 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.

FINAL INSTRUCTION NO. 14 - DEFINITION OF 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. 15 - DEFINITION OF PRESENT VALUE

If you should find that Ms. Romero is entitled to a verdict and that the evidence in the case establishes a reasonable likelihood of future medical expense, 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 Ms. Romero will be reimbursed in advance of the loss and will have the use of money which she 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 considering (1) the interest rate or return which Ms. Romero 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.

This computation is made by using the so-called “present-value” table which is attached to the next instruction for your use.

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

FINAL INSTRUCTION NO. 16 - CALCULATING PRESENT VALUE

The attached table 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 table.

Then, determine the net discount rate. That net discount rate is the interest rate which Ms. Romero 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.

PRESENT VALUE TABLE

**PRESENT VALUE CALCULATIONS
PRESENT VALUE OF 1 PER PERIOD RECEIVED FOR n PERIODS
(Uniform Series)**

n	1%	2%	3%	4%	5%	6%	7%	8%
1	0.9901	0.9804	0.9709	0.9615	0.9524	0.9434	0.9346	0.9259
2	1.9704	1.9416	1.9135	1.8861	1.8594	1.8334	1.8080	1.7833
3	2.9410	2.8839	2.8286	2.7751	2.7232	2.6730	2.6243	2.5771
4	3.9020	3.8077	3.7171	3.6299	3.5460	3.4651	3.3872	3.3121
5	4.8534	4.7135	4.5797	4.4518	4.3295	4.2124	4.1002	3.9927
6	5.7955	5.6014	5.4172	5.2421	5.0757	4.9173	4.7665	4.6229
7	6.7282	6.4720	6.2303	6.0021	5.7864	5.5824	5.3893	5.2064
8	7.6517	7.3255	7.0197	6.7327	6.4632	6.2098	5.9713	5.7466
9	8.5660	8.1622	7.7861	7.4353	7.1078	6.8017	6.5152	6.2469
10	9.4713	8.9826	8.5302	8.1109	7.7217	7.3601	7.0236	6.7101
11	10.3676	9.7868	9.2526	8.7605	8.3064	7.8869	7.4987	7.1390
12	11.2551	10.5753	9.9540	9.3851	8.8633	8.3838	7.9427	7.5361
13	12.1337	11.3484	10.6350	9.9856	9.3936	8.8527	8.3577	7.9038
14	13.0037	12.1062	11.2961	10.5631	9.8986	9.2950	8.7455	8.2442
15	13.8651	12.8493	11.9379	11.1184	10.3797	9.7122	9.1079	8.5595
16	14.7179	13.5777	12.5611	11.6523	10.8378	10.1059	9.4466	8.8514
17	15.5623	14.2919	13.1661	12.1657	11.2741	10.4773	9.7632	9.1216
18	16.3983	14.9920	13.7535	12.6593	11.6896	10.8276	10.0591	9.3719
19	17.2260	15.6785	14.3238	13.1339	12.0853	11.1581	10.3356	9.6036
20	18.0456	16.3514	14.8775	13.5903	12.4622	11.4699	10.5940	9.8181
21	18.8570	17.0112	15.4150	14.0292	12.8212	11.7641	10.8355	10.0168
22	19.6604	17.6580	15.9369	14.4511	13.1630	12.0416	11.0612	10.2007
23	20.4558	18.2922	16.4436	14.8568	13.4886	12.3034	11.2722	10.3711
24	21.2434	18.9139	16.9355	15.2470	13.7986	12.5504	11.4693	10.5288
25	22.0232	19.5235	17.4131	15.6221	14.0939	12.7834	11.6536	10.6748
26	22.7952	20.1210	17.8768	15.9828	14.3752	13.0032	11.8258	10.8100
27	23.5596	20.7069	18.3270	16.3296	14.6430	13.2105	11.9867	10.9352
28	24.3164	21.2813	18.7641	16.6631	14.8981	13.4062	12.1371	11.0511
29	25.0658	21.8444	19.1885	16.9837	15.1411	13.5907	12.2777	11.1584
30	25.8077	22.3965	19.6004	17.2920	15.3725	13.7648	12.4090	11.2578
31	26.5423	22.9377	20.0004	17.5885	15.5928	13.9291	12.5318	11.3498
32	27.2696	23.4683	20.3888	17.8736	15.8027	14.0840	12.6466	11.4350
33	27.9897	23.9886	20.7658	18.1476	16.0025	14.2302	12.7538	11.5139
34	28.7027	24.4986	21.1318	18.4112	16.1929	14.3681	12.8540	11.5869
35	29.4086	24.9986	21.4872	18.6646	16.3742	14.4982	12.9477	11.6546
36	30.1075	25.4888	21.8323	18.9083	16.5469	14.6210	13.0352	11.7172
37	30.7995	25.9695	22.1672	19.1426	16.7113	14.7368	13.1170	11.7752
38	31.4847	26.4406	22.4925	19.3679	16.8679	14.8460	13.1935	11.8289

PRESENT VALUE TABLE CONT.

FINAL INSTRUCTION NO. 17 - LIFE EXPECTANCY

According to the mortality table, the life expectancy of a 61-year old female is an additional 22.3 years, or 83.3 years of age. 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.

FINAL INSTRUCTION NO. 18 - PREJUDGMENT INTEREST

Any person who is entitled to recover damages is entitled to recover interest from the day the loss or damage occurred except interest is not recoverable on damages which will occur in the future or on intangible damages such as pain and suffering, disability, disfigurement, or loss of capacity of the enjoyment of life.

You must decide:

- (1) the amount of damages (if any), and
- (2) the amount of damages which are subject to prejudgment interest (if any).

If you return a verdict for Ms. Romero, you must indicate on the verdict form whether you find Ms. Romero is entitled to prejudgment interest and if so, the amount of damages upon which interest is granted. Based upon your findings, the Court will calculate the amount of interest Ms. Romero is entitled to recover.

FINAL INSTRUCTION NO. 19 -

A CORPORATION ACTS THROUGH ITS EMPLOYEES

Regional Health Physicians, Inc., is a corporation and can act only through its employee, Dr. Hanisch. Any act or omission by Dr. Hanisch within the scope of her employment is the act or omission of Regional Health Physicians, Inc.

FINAL INSTRUCTION NO. 20 - ISSUES TO BE DECIDED BY THE JURY

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

First, was Dr. Hanisch negligent in her care and treatment of Ms. Romero?

If your answer to that question is “no,” you will return a verdict for Dr. Hanisch and Regional Health Physicians, Inc. If your answer is “yes,” you will have a second issue to determine, namely:

Was that negligence a legal cause of any injury to Ms. Romero?

If your answer to that question is “no,” Ms. Romero is not entitled to recover. If your answer is “yes,” you will then determine the amount of damages, if any, Ms. Romero is entitled to recover and return a verdict for Ms. Romero in that amount.

You should first determine the questions of liability before you consider the question of damages.

FINAL INSTRUCTION NO. 21 - DUTY AS JURORS

A verdict must represent the considered judgment of each juror. Your verdict must be unanimous. It is your duty to consult with one another and to deliberate with a view to reaching agreement if you can do so without violence to your individual judgment. Of course, you must not surrender your honest convictions as to the weight or effect of the evidence solely because of the opinions of other jurors or for the mere purpose of returning a verdict. Each of you must decide the case for yourself, but you should do so only after consideration of the evidence with your fellow jurors.

In the course of your deliberations, you should not hesitate to re-examine your own views and to change your opinion if you are convinced it is wrong. To bring twelve minds to an unanimous result, you must examine the questions submitted to you openly and frankly with proper regard for the opinions of others and with a willingness to re-examine your own views.

Remember you are not partisans. You are judges of the facts. Your sole interest is to seek the truth from the evidence. You are the judges of the credibility of the witnesses and the weight of the evidence.

You may conduct your deliberations as you choose. However, I suggest that you carefully consider all of the evidence bearing upon the questions before you. You may take all the time you feel is necessary.

FINAL INSTRUCTION NO. 22 - USE OF NOTES

You must make your decision based on what you recall of the evidence. When you deliberate, you will be able to take the exhibits with you into the jury room. You will not have typewritten transcripts of this record available for your use in reaching your verdict.

Notes you took during the trial are not necessarily more reliable than your memory or another juror's memory. Therefore, you should not be overly influenced by the notes. Your notes should be used only as memory aids. You should not give your notes precedence over your independent recollection of the evidence. If your notes or another juror's notes conflict with what you remember, you should rely on your own memory of the evidence. If you did not take notes, you should rely on your own independent recollection of the proceedings. Just because a juror took notes does not mean his or her memory of the evidence carries more weight than the memory of a juror who did not take notes. I emphasize that notes are not entitled to any greater weight than the recollection or impression of each juror as to what the testimony might have been.

At the end of the trial, you may take your notes out of the notebook and keep them or leave them, and we will destroy them.

FINAL INSTRUCTION NO. 23 - DUTY DURING DELIBERATIONS

There are certain rules you must follow while conducting your deliberations and returning your verdict:

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

Second, it is your duty 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.

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. After conferring with the attorneys, 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 in these 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 you reach in this case. You will take this form to the jury room. If your verdict is for Ms. Romero, use the verdict form entitled “Verdict for Plaintiff.” If your

verdict is for Dr. Hanisch and Regional Health Physicians, Inc., use the verdict form entitled "Verdict for Defendants." When each of you has agreed on a verdict, the foreperson will fill in the form, sign and date it, and advise the court security officer that you have reached a verdict. You will then return to the courtroom where your verdict will be received and announced.

Dated January 6, 2011.

BY THE COURT:

A handwritten signature in black ink, appearing to read "J. Viken", written over a horizontal line.

JEFFREY L. VIKEN
UNITED STATES DISTRICT JUDGE