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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

GREGORY P. WARGER,)	CIV. 08-5092-JLV
)	
Plaintiff,)	FINAL INSTRUCTIONS
)	TO THE JURY
vs.)	
)	
RANDY D. SHAUERS,)	
)	
Defendant.)	

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FINAL INSTRUCTION NO. 1 - INTRODUCTION

Members of the jury, I shall take a few moments now 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. On August 4, 2006, in Pennington County, South Dakota, plaintiff Gregory P. Warger and defendant Randy D. Shauers were involved in a collision. Mr. Warger alleges he was injured in the collision and Mr. Shauers' negligence caused the collision. Mr. Warger seeks damages for his injuries. Mr. Shauers denies that he was negligent and that his negligence, if any, caused the collision. Mr. Shauers affirmatively alleges that the collision was caused by the contributory negligence of Mr. Warger.

From the evidence, you will decide the facts. 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 which have been established by the evidence. You will then apply those facts to the law which I give you in these and in my 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 it or not.

It is vital to the administration of justice that each of you as members of the jury faithfully perform your duties as jurors. You should 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 indicating what I think of 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 opinions on 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 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.

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—that is, formally agreed to by the parties—and any facts that have been judicially noticed—that is, 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 sustain an objection to a question, you must ignore the question and must not try to guess what the answer might have been.
3. Testimony that I strike from the record, or tell you to disregard, is not evidence and must not be considered.
4. Anything you see or hear about this case outside the courtroom is not evidence.

During the trial, certain evidence was presented to you by deposition. The witness testified under oath at the deposition, just as if the witness was in

court, and 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 are instructed that 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 that witness may have for testifying a certain way, including any apparent interest, bias, or prejudice, the manner of the witness while testifying, whether that 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 that 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, therefore, whether a contradiction results from an innocent misrecollection or sincere lapse of memory, or instead 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 the other facts and circumstances in evidence in deciding the weight to give to the testimony of that witness.

If you believe that any witness testifying 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 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 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, Mr. Warger has the burden of proving the following issues:

- (1) that Mr. Shauers was negligent;
- (2) that Mr. Shauers' negligence was a legal cause of Mr. Warger's injuries; and
- (3) the amount, if any, of Mr. Warger's damages that was legally caused by Mr. Shauers' negligence.

Mr. Shauers has the burden of proving the following issue:

- (1) that Mr. Warger was contributorily negligent.

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 - 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.

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 plaintiff’s injury.

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.

FINAL INSTRUCTION NO. 8 - DEFINITION OF NEGLIGENCE

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.

**FINAL INSTRUCTION NO. 9 -
DEFINITION OF CONTRIBUTORY NEGLIGENCE
AND COMPARATIVE NEGLIGENCE**

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 the bringing about the injury to 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. The term "slight" means small when compared with the negligence of the defendant.

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

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

In answering both parts to question #2, you must make a direct comparison between the conduct of Mr. Warger and Mr. Shauers.

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

If you find Mr. Warger's contributory negligence is slight, or less than slight, when compared with the negligence of Mr. Shauers, then Mr. Warger is entitled to recover damages. However, Mr. Warger's damages must be reduced in proportion with the amount of his contributory negligence.

FINAL INSTRUCTION NO. 10 -

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 and obey the law. Unless there is reasonable cause for thinking otherwise, people can assume that they are not exposed to danger from another person's violation of the law or duty of care.

FINAL INSTRUCTION NO. 11 -

PROPER LOOKOUT AND CONTROL OF VEHICLE

A person operating a vehicle on a public highway has a duty to exercise reasonable care under the circumstances to keep a lookout for other users of the highway and to maintain control of the vehicle so as to be able to stop the vehicle or otherwise avoid a collision within that person's range of vision.

FINAL INSTRUCTION NO. 12 - 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 a collision.

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. Any person driving on a public highway is required to anticipate the presence on the highway of other persons, vehicles, and objects.

FINAL INSTRUCTION NO. 13 - SPEED

A driver may be considered negligent in the operation of a motor vehicle even though the driver was driving within the speed limit if the speed was greater than was reasonable and prudent under the conditions.

FINAL INSTRUCTION NO. 14 - CHANGING LANES

A statute in this state provides:

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.

This statute sets the standard of care of a reasonable person. If you find Mr. Shauers violated the statute, such violation is negligence.

FINAL INSTRUCTION NO. 15 - PASSING IN A NO-PASSING ZONE

A statute in this state provides:

The driver of a vehicle may not overtake and pass any other vehicle proceeding in the same direction when traveling in a no-passing zone on highways when either marked by signs or lines on the roadways.

This statute sets the standard of care of a reasonable person. If you find Mr. Shauers violated the statute, such violation is negligence.

FINAL INSTRUCTION NO. 16 - PASSING AT AN INTERSECTION

A statute in this state provides:

No vehicle may be driven on the left side of the roadway when approaching within one hundred feet of or traversing any intersection.

This statute sets the standard of care of a reasonable person. If you find Mr. Shauers violated the statute, such violation is negligence.

FINAL INSTRUCTION NO. 17 -

U-TURN PROHIBITED IN A NO-PASSING ZONE OR WHERE UNSAFE

A statute in this state provides:

No vehicle, within a no-passing zone that is designated and marked, may be turned so as to proceed in the opposite direction, nor may any such turning movement be otherwise made unless it can be made in safety and without interfering with other traffic.

This statute sets the standard of care of a reasonable person. If you find

Mr. Warger violated the statute, such violation is contributory negligence.

FINAL INSTRUCTION NO. 18 - ACTION REQUIRED AT A STOP SIGN

A statute in this state provides:

Every driver of a vehicle approaching a stop intersection indicated by a stop sign shall come to a full stop at a clearly marked stop line, or if none, then at the point nearest the intersecting roadway where the driver has a view of approaching traffic on the intersecting roadway before entering the intersection. After having stopped, the driver shall yield the right-of-way to any vehicle which has entered or is approaching the intersection from another highway and may not proceed into the intersection until certain that such intersecting roadway is free from oncoming traffic which may affect safe passage.

This statute sets the standard of care of a reasonable person. If you find Mr. Warger violated the statute, such violation is contributory negligence.

FINAL INSTRUCTION NO. 19 - WHEN SIGNALS ARE REQUIRED

A statute in this state provides:

The 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 plainly visible to the driver of such other vehicle of the intention to make such movement.

This statute sets the standard of care of a reasonable person. If you find Mr. Warger violated the statute, such violation is contributory negligence.

FINAL INSTRUCTION NO. 20 - LEGAL EXCUSE

Under the law, there are four circumstances in which the violation of a safety statute may be excused:

- (1) anything that would make compliance with the statute or ordinance impossible;
- (2) anything over which the driver has no control which places the car in a position violative of the statute;
- (3) an emergency not of the driver's own making by reason of which the driver fails to observe the statute; and
- (4) an excuse specifically provided by statute.

A legal excuse must be something that would make it impossible to comply with the statute. Noncompliance must be caused by circumstances beyond the driver's control and not produced by his own misconduct. Evidence of due care does not furnish an excuse or justification. If the legal excuse is an emergency, then the party must prove (1) that an emergency existed; (2) that he was not engaged in prior conduct which caused or contributed to the emergency; and (3) that he was unable to comply with the statute because of the emergency. You must determine whether the emergency was foreseeable.

Mr. Shauers has the burden of proving that his statutory violations, if any, are legally excused. Mr. Warger has the burden of proving that his statutory violations, if any, are legally excused. The burden of proof is by the greater convincing force of the evidence.

FINAL INSTRUCTION NO. 21 - DAMAGES

If you decide for Mr. Warger on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate Mr. Warger for any of the following elements of loss or harm suffered and proved by the evidence to have been legally caused by Mr. Shauers' 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 mental anguish experienced in the past and reasonably certain to be experienced in the future as a result of the injury.
- (3) The 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.
- (5) The lost wages.
- (6) The value of Mr. Warger's motorcycle.

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. 22 - LIFE EXPECTANCY

According to the mortality table, Mr. Warger's life expectancy is 27.4 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.

FINAL INSTRUCTION NO. 23 - PREJUDGMENT INTEREST

Any person who is entitled to recover damages is entitled to recover interest 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,
- (2) Interest is not recoverable on damages that will occur in the future or intangible damages such as pain and suffering, emotional distress, or loss of 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), and
- (3) the date or dates on which the damages occurred.

If you return a verdict for Mr. Warger, you must indicate on the verdict form whether you find that Mr. Warger 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 Mr. Warger is entitled to recover.

FINAL INSTRUCTION NO 24 - ISSUES TO BE DECIDED

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

First, was Mr. Shauers negligent?

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

Was that negligence a legal cause of any injury to Mr. Warger?

If you find Mr. Shauers' negligence was not a legal cause of Mr. Warger's injury, Mr. Warger is not entitled to recover and you will return a verdict for Mr. Shauers.

If you find Mr. Shauers' negligence was a legal cause of Mr. Warger's injury, you then must determine a third issue:

Was Mr. Warger also negligent?

If you find Mr. Warger was not negligent, you then must fix the amount of Mr. Warger's damages and return a verdict for Mr. Warger.

If you find Mr. Warger was also negligent, you then must determine a fourth issue, namely:

Was that negligence a legal cause of Mr. Warger's injury?

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

If you find that Mr. Warger's negligence did contribute as a legal cause of his injury, Mr. Warger may still recover if the jury should find that such contributory negligence of Mr. Warger was slight in comparison with the negligence of Mr. Shauers. If you find that Mr. Warger is contributorily negligent, but that Mr. Warger's negligence is under the circumstances slight in comparison with Mr. Shauers' negligence, Mr. Warger is still entitled to recover, but the damages to be awarded Mr. Warger must be reduced in proportion to the amount of Mr. Warger's contributory negligence. If you find that the contributory negligence of Mr. Warger is more than slight in comparison with the negligence of Mr. Shauers, Mr. Warger 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 damage found to have been suffered.

FINAL INSTRUCTION NO. 25 - USE OF NOTES

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. 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.

You will notice that we have an official court reporter making a record of the trial. However, we will not have typewritten transcripts of this record available for your use in reaching your verdict.

FINAL INSTRUCTION NO. 26 - 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 that you are not partisans; you are judges—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 that you feel is necessary.

FINAL INSTRUCTION NO. 27 - 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 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.

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 that you reach in this case. You will take this form to the jury room. If your verdict is for Mr. Warger, use the verdict form entitled “Verdict for Plaintiff.” If your

verdict is for Mr. Shauers, use the verdict form entitled "Verdict for Defendant."
When each of you has agreed on a verdict, your 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 September 28, 2010.

BY THE COURT:



JEFFREY L. VIKEN
UNITED STATES DISTRICT JUDGE