

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA

**FILED**  
SEP 03 2010  
*[Signature]*  
CLERK

SOUTHERN DIVISION

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ROBIN BAIR and FRANCIS ZEPHIER,

Plaintiffs,

-vs-

ROBERT A. CALLAHAN, M.D.,

Defendant.

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CIV. 4:09-cv-04009-RAL

FINAL  
JURY INSTRUCTIONS

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## FINAL INSTRUCTION NO. 1

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.

FINAL INSTRUCTION NO. 2

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. 3

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 said, or only part of it, or none of it.

In deciding what testimony to believe, you may consider a witness' intelligence, the opportunity a witness had to see or hear the things testified about, a witness' memory, any motives a witness may have for testifying a certain way, the manner of a witness while testifying, whether a 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 that people sometimes hear or see things differently and sometimes forget things. You need to consider therefore whether a contradiction is an innocent misrecollection or lapse of memory or an intentional falsehood, and that may depend on whether it has to do with an important fact or only a small detail.

#### FINAL INSTRUCTION NO. 4

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 to the opinion, you should consider the expert's qualifications, credibility, and reasons for the opinion. You are not bound by the 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. 5

During the trial, certain evidence was presented to you by videotape deposition. This is supported by the oath of the witness so testifying, exactly as if in open court, and should be carefully considered together with all other evidence received.

FINAL INSTRUCTION NO. 6

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

First, was the defendant negligent?

If your answer to that question is “no,” you will return a verdict for the defendant. If your answer is “yes,” you will have a second issue to determine, namely:

Was that negligence a legal cause of any injury to the plaintiff?

If your answer to that question is “no,” plaintiff is not entitled to recover; but if your answer is “yes,” you then will determine the amount of damages, if any, plaintiff is entitled to recover and return a plaintiff’s verdict for the amount thereof.

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

## FINAL INSTRUCTION NO. 7

In performing professional services for a patient, a specialist in a particular field of medicine has the duty to possess that degree of knowledge and skill ordinarily possessed by physicians of good standing engaged in the same field of specialization in the United States.

A specialist also has the duty to use that care and skill ordinarily exercised under similar circumstances by physicians in good standing engaged in the same field of specialization in the United States and to be diligent in an effort to accomplish the purpose for which the physician is employed.

A failure to perform any such duty is negligence.

## FINAL INSTRUCTION NO. 8

You must decide whether the defendant possessed and used the knowledge, skill, and care which the law demands based on the testimony and evidence of members of the profession who testified as 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. 9

If there is more than one method of treatment for a particular medical condition that is accepted by the medical profession, then there is a matter of professional opinion or judgment which is best, and the doctor's choice of either is, ordinarily, not negligence.

## FINAL INSTRUCTION NO. 10

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.

FINAL INSTRUCTION NO. 11

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

## FINAL INSTRUCTION NO. 12

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 that the evidence is evenly balanced so that you are unable to say that the evidence on either side of an issue has the greater convincing force, then your finding upon the issue must be against the party who has the burden of proving it. In this action, the plaintiffs have the burden of proving the following issues:

- (1) That Dr. Callahan was negligent;
- (2) That Dr. Callahan's negligence was the legal cause of the injuries, losses, and damages claimed by Plaintiffs; and
- (3) The nature and extent of Plaintiffs' claimed injuries, losses, and damages.

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. 13

If you decide for the plaintiffs on the question of liability you must then fix the amount of money which will reasonably and fairly compensate the plaintiffs for any of the following elements of loss or harm suffered in person or property proved by the evidence to have been legally caused by the defendant'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, 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 aggravation of any pre-existing ailment or condition;
- (5) The reasonable value of home care provided in the past and the reasonable value of home care reasonably certain to be provided in the future together with the expenses incurred in rendering said care.

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

If you find that plaintiff had an injury or condition prior to the conduct of the defendant at issue in this case, you may not award damages for any previous or subsequent injuries or conditions unrelated to the defendant's conduct.

However, if you find that the defendant's conduct caused an aggravation of the plaintiff's pre-existing injury or condition, you may award damages for that aggravation. Before awarding these damages, plaintiff must prove that the conduct of the defendant was a substantial factor in bringing about the harm alleged.

An aggravation of a pre-existing injury is a worsening of that pre-existing injury, and an aggravation of a pre-existing condition makes that pre-existing condition more difficult to treat.

## FINAL INSTRUCTION NO. 15

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

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

## FINAL INSTRUCTION NO. 16

If you find that the plaintiff is entitled to recover for an aggravation of a pre-existing injury or condition, but you cannot logically, reasonably or practically apportion the plaintiff's present and future injuries between the injury caused by the pre-existing injury or condition and the aggravation caused by the defendant's conduct, then you may award damages for all present and future injuries caused by both the pre-existing injury or condition and the defendant's conduct.

## FINAL INSTRUCTION NO. 17

If you find that the defendant is liable to plaintiff Robin Bair, you must then determine the amount of money which will reasonably compensate plaintiff Francis Zephier for any of the following elements of damages which you find were suffered by plaintiff Francis Zephier and legally caused by the defendant's negligence:

The reasonable value of the services, aid, comfort, society, companionship, and conjugal affections of the spouse which the plaintiff has been deprived of in the past and the present cash value of the services, aid, comfort, society, companionship, and conjugal affections of the spouse which the plaintiff is reasonably certain to be deprived of in the future.

Whether any of the elements of damages have been proved by the evidence is for you to determine.

## FINAL INSTRUCTION NO. 18

If you should find that the Plaintiffs are entitled to a verdict, and further find that the evidence in the case establishes a reasonable likelihood of future medical expense, then it becomes your duty to ascertain the present value in dollars of such future damages, since the award of future damages necessarily requires that payment be made now for a loss that will not actually be sustained until some future date.

Under these circumstances, the result is that the plaintiff will in effect be reimbursed in advance of the loss, and so will have the use of money which the plaintiff 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 such plaintiff 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 that amount which would be reasonably certain to earn or return, if invested at such rate of interest over such period of time; and include in the verdict an award for only the present worth - the reduced amount - on anticipated future loss.

This computation is made by using the so-called "present-value" table which is attached to this 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, future mental anguish, disability, and disfigurement are not subject to any reduction for the present use of such money.

## FINAL INSTRUCTION NO. 19

The attached tables 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 tables.

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

The following example illustrates the use of the present value tables.

Assuming annual expenses of \$100 per year for a period of seven years at a net discount rate of 2 percent, the present value of those future expenses is \$100 times 6.4720, or \$647.20.

**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.

## PRESENT VALUE TABLE CONT.

n	1%	2%	3%	4%	5%	6%	7%	8%
39	32.1630	26.9026	22.8082	19.5845	17.0170	14.9491	13.2649	11.8786
40	32.8347	27.3555	23.1148	19.7928	17.1591	15.0463	13.3317	11.9246
41	33.4997	27.7995	23.4124	19.9931	17.2944	15.1380	13.3941	11.9672
42	34.1581	28.2348	23.7014	20.1856	17.4232	15.2245	13.4524	12.0067
43	34.8100	28.6616	23.9819	20.3708	17.5459	15.3062	13.5070	12.0432
44	35.4555	29.0800	24.2543	20.5488	17.6628	15.3832	13.5579	12.0771
45	36.0945	29.4902	24.5187	20.7200	17.7741	15.4558	13.6055	12.1084
46	36.7272	29.8923	24.7754	20.8847	17.8801	15.5244	13.6500	12.1374
47	37.3537	30.2866	25.0247	21.0429	17.9810	15.5890	13.6916	12.1643
48	37.9740	30.6731	25.2667	21.1951	18.0772	15.6500	13.7305	12.1891
49	38.5881	31.0521	25.5017	21.3415	18.1687	15.7076	13.7668	12.2122
50	39.1961	31.4236	25.7298	21.4822	18.2559	15.7619	13.8007	12.2335

## FINAL INSTRUCTION NO. 20

According to the mortality table, Robin Bair's life expectancy, as a 44-year old male, is 78 years of age, or 34 more 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. 21

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.

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.

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

\*\*\*\*\*

ROBIN BAIR and FRANCIS ZEPHIER,

CIV. 4:09-cv-04009-RAL

Plaintiffs,

VERDICT FORM

-vs-

ROBERT A. CALLAHAN, M.D.,

Defendant.

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We, the jury, duly impaneled in the above-entitled action and sworn to try the issues herein, do hereby answer the Verdict Form as follows:

- 1. Do you find that the Defendant, Robert A. Callahan, M.D., was negligent in his treatment of Plaintiff Robin Bair?

Yes \_\_\_\_ No \_\_\_\_

If your answer to question 1 is "no," do not proceed to answer any further questions. Sign the Verdict Form and notify the bailiff. If your answer to question number 1 is "yes," proceed to question number 2.

- 2. Was the negligence of Robert A. Callahan, M.D. a legal cause of any injury to Plaintiff Robin Bair?

Yes \_\_\_\_ No \_\_\_\_

If your answer to question 2 is "no," do not proceed to answer any further questions. Sign the Verdict Form and notify the bailiff. If your answer to questions 1 and 2 are both "yes," then you must assess the amount of damages by answering question 3.

3. We award Plaintiff Robin Bair damages as follows:

For past medical expenses:	\$ _____.
For future medical expenses:	\$ _____.
For past home services:	\$ _____.
For future home services:	\$ _____.
For all other elements of damages:	\$ _____.
Total:	\$ _____.

If you awarded damages to Plaintiff Robin Bair, then you must answer the following questions with regard to Plaintiff Francis Zephier:

4. Do you find that the negligence of Defendant Robert A. Callahan, M.D. was a legal cause of damage to Plaintiff Francis Zephier?

Yes \_\_\_\_ No \_\_\_\_

If your answer to question 4 is "no," do not proceed to answer any further questions. Sign the Verdict Form and notify the bailiff. If your answer to question 4 is "yes," then you must assess the amount of damages to Plaintiff Francis Zephier by answering question 5.

5. We award Plaintiff Francis Zephier damages in the sum of:

\$ \_\_\_\_\_.

Dated this \_\_\_\_ of September, 2010.

\_\_\_\_\_  
Foreperson