

FILED

JUN 18 2014

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CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

YVONNE NORGAUER,

Plaintiff,

vs.

DONALD GRAHAM, M.D.;
SANFORD CLINIC, f/k/a Sioux
Valley Clinic, f/k/a Sioux Valley
Physician Partners, a South Dakota
corporation; SANFORD MEDICAL
CENTER, f/k/a Sioux Valley Hospital,
a South Dakota corporation,

Defendants.

CIV. 11-4124-KES

**FINAL
INSTRUCTIONS
TO THE JURY**

TABLE OF CONTENTS

FINAL INSTRUCTION

NO. 1 – INTRODUCTION AND DEFINITIONS.....	1
NO. 2 – IMPEACHMENT.	2
NO. 3 – CORPORATIONS.....	3
NO. 4 – REDACTED RECORDS.	4
NO. 5 – BURDEN OF PROOF.	5
NO. 6 – MEDICAL MALPRACTICE.	6
NO. 7 – RES IPSA LOQUITUR.....	8
NO. 8 – PRINCIPAL AND AGENT SUED.....	9
NO. 9 – NEGLIGENCE.....	10
NO. 10 – RES IPSA LOQUITUR.....	12
NO. 11 – DAMAGES.....	13
NO. 12 – NO QUOTIENT VERDICT.	14
NO. 13 – SINGLE SUM.	15
NO. 14 – PREJUDGMENT INTEREST.....	16
NO. 15 – 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 – 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. 3 – CORPORATIONS

Defendants Sanford Clinic and Sanford Medical Center are corporations that can act only through their officers and employees. Any act or omission of an officer or employee within the scope of his or her employment is the act or omission of the corporation for which he or she was then acting. Therefore, any omission, failure, or negligent act of any officer or employee of a corporation within the scope of his or her employment is held at law to be the omission, failure, or negligence of the corporation.

The fact that two of the parties to this action are corporations is immaterial. Under the law of this state, the corporations are individual parties to the lawsuit, and all parties are entitled to the same impartial treatment.

FINAL INSTRUCTION NO. 4 – REDACTED RECORDS

Certain portions of the medical records provided to you have been redacted.
The deleted portions are not relevant to any of the issues before you.

FINAL INSTRUCTION NO. 5 – 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 than likely true than not true. In the event that the evidence is evenly balanced so that you are unable to say that the evidence on either side of an issue has the greater convincing force, then your finding upon the issue must be against the party who has the burden of proving it. In this case Norgauer has the burden of proving:

- (1) That one or all of the defendants were negligent;
- (2) That the defendants' negligence, if any, caused her damages; and
- (3) The amount of her damages.

In determining whether or not an issue has been proved by the 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. 6 – MEDICAL MALPRACTICE

Dr. Graham is liable for damages proximately caused by medical malpractice if each of the following is established by Norgauer by the greater weight of the evidence:

***One*, that Dr. Graham violated the standard of care owed to Norgauer in performing the gastric bypass and ventral hernia repair on her;**

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 medical malpractice.

The fact that an unfortunate or bad condition resulted to Norgauer does not alone prove that Dr. Graham committed medical malpractice, but it may be considered, along with other evidence, in determining the issue of medical malpractice.

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

You are also permitted to find a violation of the standard of care if the requirements of Final Instruction No. 7 are met.

And two, that such failure is the legal cause of any damage, injury, or loss suffered or experienced by Norgauer.

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. Graham's conduct must have such an effect in producing the harm as to lead reasonable people to regard it as a cause of Norgauer's injuries.

If you find that both of these elements have been proved by the greater convincing force of the evidence, your verdict must be for Norgauer on her medical malpractice claim. You should then determine the amount of damages that she is entitled to, if any. If, on the other hand, either of these elements has not been proved by the greater convincing force of the evidence, then your verdict must be for Dr. Graham on this issue.

FINAL INSTRUCTION NO. 7 – RES IPSA LOQUITUR

If you find from the evidence:

One, that the surgical sponge was under the full management and exclusive control of Dr. Graham at the time of Norgauer's injury;

Two, that according to common knowledge and experience the accident does not happen if Dr. Graham had not been negligent;

And three, that the surgical sponge was a legal cause of Norgauer's injury;

then you may find that Dr. Graham was negligent in the possession, control, and operation of the surgical sponge in the absence of a showing or explanation by Dr. Graham which satisfies you that Dr. Graham did use due care under the circumstances.

You should not find for Norgauer if it appears to you from the surrounding facts and circumstances that the accident may have resulted from a cause or causes other than a negligent act of Dr. Graham. In order to find Dr. Graham negligent, the evidence supporting an inference that Dr. Graham was negligent must have greater convincing force than all evidence to the contrary.

FINAL INSTRUCTION NO. 8 – PRINCIPAL AND AGENT SUED

Defendants Sanford Clinic and Dr. Donald Graham are sued as principal and agent. Sanford Clinic is the principal and Dr. Graham is its agent. If you find Dr. Graham is liable, then you must find Sanford Clinic is also liable. But if you find Dr. Graham is not liable, then you must find that Sanford Clinic is not liable.

FINAL INSTRUCTION NO. 9 – NEGLIGENCE

Sanford Medical Center is liable for damages proximately caused by its operating room staff's negligence if each of the following is established by Norgauer by the greater weight of the evidence:

***One*, Sanford Medical Center's operating room staff violated the standard of care owed to Norgauer in performing the gastric bypass and ventral hernia repair on her;**

The standard of care with which a hospital must comply is to provide that care which is available at hospitals within the same or similar communities.

An operating room staff professional has the duty to possess that degree of knowledge and skill ordinarily possessed by an operating room staff professional of good standing engaged in the same line of practice in the same or similar locality.

An operating room staff professional also has the duty to use that care and skill ordinarily exercised under similar circumstances by members in good standing of the profession engaged in the same profession in the same or similar locality and to be diligent in an effort to accomplish the purpose for which employed.

A failure to fulfill any such duty is negligence.

The operating room staff were agents of Sanford Medical Center at the time of Norgauer's gastric bypass surgery and ventral hernia repair. Therefore, any act or omission of a member of the operating room staff at that time is considered the act or omission of Sanford Medical Center.

You are also permitted to find a violation of the standard of care if the requirements of Final Instruction No. 10 are met.

And two, that such failure is the legal cause of any damage, injury, or loss suffered or experienced by Norgauer.

“Legal cause” is defined for you in Final Instruction No. 6.

If you find that each of the two elements has been proved by the greater convincing force of the evidence, your verdict must be for Norgauer on the issue of negligence. You should then determine the amount of damages that she is entitled to, if any. If, on the other hand, either of these elements has not been proved by the greater convincing force of the evidence, then your verdict must be for Sanford Medical Center on this issue.

FINAL INSTRUCTION NO. 10 – RES IPSA LOQUITUR

If you find from the evidence:

One, that the surgical sponge was under the full management and exclusive control of Sanford Medical Center's operating room staff at the time of Norgauer's injury;

Two, that according to common knowledge and experience the accident does not happen if Sanford Medical Center's operating room staff had not been negligent;

And three, that the surgical sponge was a legal cause of Norgauer's injury;

then you may find that Sanford Medical Center's operating room staff were negligent in the possession, control, and operation of the surgical sponge in the absence of a showing or explanation by Sanford Medical Center which satisfies you that its operating room staff did use due care under the circumstances.

You should not find for Norgauer if it appears to you from the surrounding facts and circumstances that the accident may have resulted from a cause or causes other than a negligent act of Sanford Medical Center's operating room staff. In order to find Sanford Medical Center's operating room staff negligent, the evidence supporting an inference that Sanford Medical Center's operating room staff were negligent must have greater convincing force than all evidence to the contrary.

FINAL INSTRUCTION NO. 11 – DAMAGES

If you decide for Norgauer on the question of liability on either the medical malpractice or the negligence causes of action, you must then fix the amount of money which will reasonably and fairly compensate her 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 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 reasonable value of necessary medical care, treatment, and services received;
- (2) The disability suffered by Norgauer;
- (3) The pain and suffering, mental anguish, and loss of enjoyment of life experienced in the past as a result of the injuries sustained by Norgauer; and
- (4) The earnings Norgauer has lost, if any, from any source from the date of the injury through 2011.

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

FINAL INSTRUCTION NO. 12 – NO QUOTIENT VERDICT

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

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

FINAL INSTRUCTION NO. 13 – SINGLE SUM

If you find that Norgauer is entitled to recover against more than one defendant, you may not allocate the damages among them, but you must return a verdict in one single sum against all defendants whom you find to be liable.

FINAL INSTRUCTION NO. 14 – PREJUDGMENT INTEREST

Any person who is entitled to recover damages for medical bills is entitled to recover interest thereon from the date of the medical bills.

If you return a verdict for Norgauer, you must indicate on the verdict form whether you find that she is entitled to prejudgment interest, and if so, the amount of medical bills upon which interest is granted and the date of such medical bills. Based upon your findings, the court will calculate the amount of interest Norgauer is entitled to recover.

FINAL INSTRUCTION NO. 15 – 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.

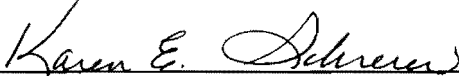
Do not be afraid to change your opinions if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right, or simply to reach a verdict. Remember at all times that you are not partisans. You are judges—judges of the facts. Your sole interest 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 June 18, 2014.



KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE