UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

THE ESTATE OF ELROY A. WIETING, CHAD A. WIETING, Personal Represenative; CAROL A. WIETING, KRISTINE J. SMITH, TERESA M. EHRISMAN and CHAD A. WIETING,	*	CIV 07-3023
Plaintiffs,	*	JURY INSTRUCTIONS
-vs-	*	
ROGER PAUL BURNS and PAUL RYAN BURNS,	*	
Defendants.	*	

INSTRUCTION NO. 1

Ladies and gentlemen of the jury, it is my duty now to explain the rules of law you must apply to this case.

You as jurors are the sole judges of the facts. But it is your duty to follow the law stated in these instructions, and to apply that law to the facts as you find them from the evidence before you. It would be a violation of your sworn duty to base your verdict upon any rules of law other than the ones given you in these instructions, regardless of your personal feelings as to what the law ought to be.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

INSTRUCTION NO. 2

You have been chosen and sworn as jurors to try the issues of fact presented in this case. You are to perform this duty without bias or prejudice, because the law does not permit jurors to be governed by sympathy or public opinion. The parties and the public expect that you will carefully and impartially consider all of the evidence and will follow the law as stated by the Court, in order to reach a just verdict, regardless of the consequences to any party.

INSTRUCTION NO. 3

This is a civil action brought by the plaintiffs, the Estate of Elroy A. Wieting, deceased, and his family, against Roger Burns and Paul Burns, who are collectively considered the defendants. The plaintiffs claim that the defendants were negligent in causing the death of Elroy Wieting after an altercation between one or both defendants and others at the Country Bar and Grill in Alpena, South Dakota on October 21, 2006, which resulted in Elroy Wieting having a heart attack resulting in his death. The plaintiffs seek damages for the loss of Elroy Wieting's life.

The defendants deny that they caused Elroy Wieting's heart attack and subsequent death and further deny the extent of the claims of damages by plaintiffs.

These claims by the parties form the issues of fact to be determined by you from the evidence received at the trial under the law applicable to the case as stated in these instructions.

The bringing of this action and the claims of the parties as to damages are not evidence and should be given no weight by you as evidence in deciding the case.

There are two defendants in this lawsuit. The rights of these defendants are separate and distinct. You should decide the case of each defendant separately, as if it were a separate lawsuit.

INSTRUCTION NO. 4

I have mentioned the word "evidence." The evidence in this case consists of the testimony of witnesses, the documents and other things received as exhibits and the facts that have been stipulated -- that is, formally agreed to by the parties.

You may use reason and common sense to draw deductions or conclusions from facts which have been established by the evidence in the case.

Certain things are not evidence. I shall list those things again for you now:

1. Statements, arguments, questions and comments by lawyers representing the parties in the case are not evidence.

2. Objections are not evidence. Lawyers have a right and sometimes an obligation to object when they believe something is improper. You should not be influenced by the objection. If I sustained an objection to a question or an exhibit, you must ignore the question or the exhibit and must not try to guess what the answer or information may have been.

3. Testimony and questions that I struck from the record, or told you to disregard, are not evidence and must not be considered.

4. Anything you saw or heard about this case outside the courtroom is not evidence.

Finally, you were instructed that some evidence was received for a limited purpose only, and you must follow that instruction.

INSTRUCTION NO. 5

There are two types of evidence from which you may find the truth as to the facts of a case--direct and circumstantial evidence. Direct evidence is the testimony of one who asserts actual knowledge of a fact, such as an eyewitness; circumstantial evidence is proof of a chain of facts and circumstances indicating the liability or non-liability of a party. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all the evidence in the case.

INSTRUCTION NO. 6

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, consider the witness's intelligence, the opportunity the witness had to have seen or heard the things testified about, the witness's memory, any motives that witness may have for testifying a certain way, 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 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.

INSTRUCTION NO. 7

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.

INSTRUCTION NO. 8

The weight of the evidence is not necessarily determined by the number of witnesses testifying. You should consider all the facts and circumstances in evidence to determine which of the witnesses are worthy of a greater credence. You may find that the testimony of a smaller number of witnesses on one side is more credible than the testimony of a greater number of witnesses on the other side.

INSTRUCTION NO. 9

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

INSTRUCTION NO. 10

You have heard testimony from persons described as experts. A person who, by knowledge, skill, training, education or experience, has become an expert in some field may state opinions on matters in that field and may also state the reasons for those opinions.

Expert testimony should be considered just like any other testimony. You may accept or reject it, and give it as much weight as you think it deserves, considering the witness's education and experience, the soundness of the reasons given for the opinion, the acceptability of the methods used, and all the other evidence in the case.

INSTRUCTION NO. 11

In these instructions you are told that your verdict depends on whether you find certain facts have been proved. The burden of proving a fact is upon the party whose claim depends upon that fact. The party who has the burden of proving a fact must prove it by the preponderance of the evidence. To prove something by the preponderance of the evidence is to prove that it is more likely true than not true. It is determined by considering all of the evidence and deciding which evidence is more believable.

The preponderance of the evidence is not necessarily determined by the greater number of witnesses or exhibits a party has presented. You should consider all the facts and circumstances in evidence to determine which of the witnesses are worthy of a greater credence. You may find that the testimony of a smaller number of witnesses on one side is more credible than the testimony of a greater number of witnesses on the other side.

You have heard in criminal cases the term "proof beyond a reasonable doubt." That is a stricter standard which applies in criminal cases. It does not apply in civil cases such as this. You should, therefore, put it out of your minds.

INSTRUCTION NO. 12

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

First, did the plaintiffs prove by a preponderance of the evidence that one or more of the defendants' wrongful actions were a legal cause (as defined in Instruction Nos. 13 and 14) of the death of Elroy Wieting?

If your answer to that question is "no," you will record that answer on the verdict form, and you will have your foreperson date and sign the verdict form.

If your answer to that question is "yes," you will go on to determine a second issue:

Which defendant or defendants are liable?

Third, if you have found more than one defendant liable, what is the percentage of fault to be assessed to each defendant?

Fourth, what is the amount of damages, if any, plaintiffs are entitled to recover?

When you have recorded the answer to that question on the verdict form, you will have your foreperson date and sign the verdict form.

You should first decide the question of causation before you determine the questions of damages and percentage of fault.

INSTRUCTION NO. 13

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.

INSTRUCTION NO. 14

The legal cause need not be the only cause, nor the last 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.

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 conduct of one or both of the defendants 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 or defendants are not responsible; and
4. lapse of time

INSTRUCTION NO. 16

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 the evidence. That is for you to decide.

INSTRUCTION NO. 17

The law allows damages for detriment reasonably certain to result in the future. By their nature, all future happenings are somewhat uncertain. The law simply requires that facts exist which establish a basis for measuring any claimed future damages with reasonable certainty. The requirement of reasonable certainty applies only to whether future damages exist; once such 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, uncertainty as to the measure or extent of damages or the fact that they cannot be measured with exactness does not bar their recovery. On the other hand, conjecture, speculation, or the mere possibility of future damages does not warrant such an award.

INSTRUCTION NO. 18

If you find that the plaintiffs are entitled to recover, you must then fix the amount of money which will reasonably and fairly compensate the surviving spouse and children of the decedent for their pecuniary loss as a result of the death of the decedent.

In determining pecuniary loss, you may consider what benefits of pecuniary value, including money, goods and services, the surviving spouse and children might reasonably have expected to receive from the decedent had the decedent lived, bearing in mind, the following:

1. The decedent's contributions in the past;
2. The decedent's life expectancy at the time of death;
3. The decedent's health, age, habits, talents, and success;
4. The decedent's occupation;
5. The decedent's past earnings;
6. The decedent's likely future earnings; and prospects of bettering himself had the decedent lived;
7. The decedent's personal living expenses, that is those amounts decedent customarily spent on himself;
8. The decedent's legal obligations to support the surviving spouse and children and the likelihood of fulfilling that obligation;
9. The instruction, moral training and superintendence of education decedent might reasonably have given the decedent's children had the decedent lived;
10. The counsel, guidance and aid decedent would reasonably have given the surviving spouse had the decedent lived;
11. The life expectancy, health and physical condition of the surviving spouse and children;
12. The loss of advice, assistance, companionship, society and protection the decedent would reasonably have given the surviving spouse had the decedent lived.

INSTRUCTION NO. 19

The plaintiff, Chad Wieting, brings this action in a purely representative capacity, as the Personal Representative of the estate of Elroy Wieting, and this action is for the exclusive benefit of the wife and children of the decedent. They are the parties in interest whose damages you are to determine if you decide for the plaintiff. If you return a verdict for the plaintiffs, it should be a single sum representing the pecuniary loss of all the decedent's heirs. It is the duty of the court to divide that sum among them.

INSTRUCTION NO. 20

The law does not permit you to, and you must not, award plaintiffs any sum for the sorrow, mental distress and grief that the heirs may have suffered by reason of the death of the decedent.

INSTRUCTION NO. 21

Upon retiring to the jury room, you will select one of your number to act as your foreperson. The foreperson will preside over your deliberations, and will be your spokesperson here in court.

A special verdict form has been prepared for your convenience.

You will take this form to the jury room and, when you have reached unanimous agreement as to your verdict, you will have your foreperson fill in, date and sign the form to state the verdict upon which you unanimously agree, and then notify the marshal that you have a verdict.

You will be required to provide written answers to certain questions in this special verdict. When all the jurors have agreed to all of the answers to the questions, that will be the verdict of the jury. The foreperson will write the answers of the jury in the space provided opposite the question. You will refrain from answering any question that has become no longer relevant because of your answer to a previous question.

INSTRUCTION NO. 22

The verdict must represent the considered judgment of each juror. In order to return any verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for himself or herself, but do so only after an impartial consideration of the evidence in the case with the other jurors. In the course of your deliberations, do not hesitate to re-examine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence, solely because of the opinion of the other jurors, or for the mere purpose of returning a verdict.

Remember at all times, 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.

INSTRUCTION NO. 23

If you have questions, you may send a note by a marshal, signed by your foreperson, or by one or more members of the jury.

You will note from the oath about to be taken by the marshal that he, as well as all other persons, are forbidden to communicate in any way or manner with any member of the jury on any subject touching the merits of the case.

Bear in mind also that you are never to reveal to any person--not even to the Court--how the jury stands, numerically or otherwise, on the question of liability or non-liability of the defendants, until after you have reached a unanimous verdict.

INSTRUCTION NO. 24

It is proper to add a final caution.

Nothing that I have said in these instructions -- and nothing that I have said or done during the trial -- has been said or done to suggest to you what I think your verdict should be.

What the verdict shall be is your exclusive duty and responsibility.

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Plaintiffs,	*	VERDICT
-vs-	*	
ROGER PAUL BURNS and PAUL RYAN BURNS,	*	
Defendants.	*	

Please return a verdict by placing an "X" in the space provided.

We, the jury, duly impaneled in the above-entitled action, and sworn to try the issues therein, make the following findings:

1. Were Roger Burns' wrongful actions a legal cause of Elroy Wieting's death on October 21, 2006?

YES _____ NO _____

2. Were Paul Burns' wrongful actions a legal cause of Elroy Wieting's death on October 21, 2006?

YES _____ NO _____

If your answers to these questions are "NO," you will not answer any further questions, and your foreperson will sign and date the verdict form.

3. If your answers to questions 1 and 2 were both "YES," you must determine the relative degrees of fault of Roger Burns and Paul Burns. What were the relative degrees of fault of Roger Burns and Paul Burns?

Roger Burns:	_____%
Paul Burns:	_____%
Total	100 %

4. If your answer to question 1 or 2 was "YES," what is the amount of damages, if any, legally caused by a defendant or defendants?

$ _____

Dated this _____ day of September, 2008

_____

Foreperson