

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

---

TAMERA HAASE,

Plaintiff,

vs.

DINDOT-KLUSMANN FUNERAL HOME,  
JAY M. KLUSMANN,

Defendants.

---

4:24-CV-04047-RAL

FINAL JURY INSTRUCTIONS

FINAL INSTRUCTION NO. 1

Members of the jury, the instructions I gave you at the beginning of the trial and during the trial remain in effect. I will repeat some of those instructions and give you additional instructions now. These instructions are in writing and will be available to you in the jury room.

You must follow all instructions whenever given by the court and whether in writing or not. You must not single out some instructions and ignore others because all are important.

FINAL INSTRUCTION NO. 2

From the evidence you will decide what the facts are. You are entitled to consider that evidence in the light of your own observations and experiences in life. 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.

Do not allow sympathy or prejudice to influence you. 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 may say or do during the trial as indicating what I think of the evidence or what I think your verdict should be.

FINAL INSTRUCTION NO. 3

I have mentioned the word “evidence.” “Evidence” includes the testimony of witnesses, documents and other things received as exhibits. Certain things are not evidence. I shall list those things again for you now:

1. Statements, arguments, questions and comments by any lawyer representing the parties in the case are not evidence.
2. 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, unless I specifically told you otherwise during the trial.

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.

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

FINAL INSTRUCTION NO. 4

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 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.

You should judge the testimony of the parties in the lawsuit in the same manner as you judge the testimony of the other witnesses.

FINAL INSTRUCTION NO. 5

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. You should consider this testimony together with all other evidence received.

FINAL INSTRUCTION NO. 6

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 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. 7

The credibility of a witness may be attacked by introducing evidence that on some former occasion the witness made a statement or acted in a manner inconsistent with the witness's testimony in this case 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.

FINAL INSTRUCTION NO. 8

The fact that one of the parties to this action is a corporation is immaterial. Under the law of this state, the corporation is an individual party to the lawsuit and all parties are entitled to the same impartial treatment.

FINAL INSTRUCTION NO. 9

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 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.

FINAL INSTRUCTION NO. 10

Plaintiff claims that Defendants interfered with her right to handle her father's funeral and burial. Deleting sections that do not apply in any way here, South Dakota law specifies:

the right and the duty to control the disposition of a decedent's remains, including the location, manner, and conditions of dispositions, and arrangements for the provision of funeral goods and services, vests in the following, in the order named, provided the person is eighteen years or older and is of sound mind:

- (1) A person designated by the decedent . . . ;  
...
- (3) The decedent's spouse;
- (4) The child of the decedent or the majority of the decedent's children, provided that a lesser number must suffice if they have made reasonable efforts to notify the other children of their instructions and are not aware of any opposition on the part of the majority;  
...
- (8) The person named as personal representative in the decedent's last will and testament;
- (10) The person in the classes of the next degree of kinship, in descending order, under the laws of descent and distribution . . .  
...
- (12) Any other willing person, including the funeral director with custody of the body, provided the person attests that reasonable efforts have been made to contact other persons listed in this section.

A person entitled under the law to the right and duty of disposition forfeits that right and that duty, and the right and duty is passed on to the next qualifying person . . . [when] the person entitled to the right of disposition and the decedent were estranged at the time of death.

The word "child" in part (4) above includes biological and adopted children, but not stepchildren.

FINAL INSTRUCTION NO. 11

On the claim for interference with the right to control the funeral and internment, Plaintiff has the burden of proving by the greater convincing force the following issues:

- (1) That Defendants intentionally interfered with her legal right to control the funeral and internment of Plaintiff's father; and
- (2) That Defendants' conduct was the legal cause of harm to Plaintiff; and
- (3) Plaintiff suffered damages as a result.

To intentionally interfere with the legal right to control the funeral and internment, Defendants' acts must be willful or malicious, as distinguished from merely negligent. Willful and wanton misconduct is more than negligent conduct, but less than intentional conduct. Conduct is willful and wanton when a person acts or fails to act when the person knows, or should have known, that injury is likely to occur. Conduct is intentional when a person acts or fails to act knowing that injury is substantially certain to occur. Knowledge or intent may be inferred from the person's conduct and the surrounding circumstances. A malicious act is an intentional, wrongful act done willfully or intentionally against another without legal justification or excuse.

Defendants have the burden of proving that Plaintiff was estranged from her father at the time of his death. "Estranged" means a "physical and emotional separation from the decedent at the time of death that has existed for a period of time that clearly demonstrates an absence of due affection, trust and regard for the decedent." A person who is estranged from the decedent has no right to control the funeral or internment.

If Defendants fail to prove by the greater convincing force that Plaintiff was estranged from Bill Shumaker at the time of his death and if Plaintiff proves by the greater convincing force each of the three elements of this claim, then your verdict must be for Plaintiff. Otherwise, your verdict must be for Defendants.

FINAL INSTRUCTION NO. 12

On a claim of negligent misrepresentation about the will specifying that the stepchildren control the funeral and burial, Plaintiff must prove by the greater convincing force, each of the following:

- (1) Defendants made a representation as a statement of fact, by saying that the Will gave Bill's stepchildren the right to control the funeral and burial;
- (2) That representation was untrue;
- (3) Defendants did so without reasonable grounds for believing the representation to be true;
- (4) Defendants did so with the intent to induce a particular action by Plaintiff;
- (5) Plaintiff changed position with actual and justifiable reliance on the representation;  
and
- (6) Plaintiff suffered damage as a result.

If Plaintiff proved each of these six elements by the greater convincing force, then your verdict on this claim must be for Plaintiff. Otherwise, your verdict must be for Defendants.

You cannot award any emotional distress damages on a negligent misrepresentation claim.

FINAL INSTRUCTION NO. 13

On Plaintiff's claim of fraudulent misrepresentation about what the Will said, Plaintiff must prove by the greater convincing force, each of the following:

- (1) Defendants made a representation as a statement of fact, that the Will gave Bill's stepchildren the right to control the funeral and burial;
- (2) That representation was untrue;
- (3) Defendants knew the representation was untrue or they made the representation recklessly;
- (4) Defendants made the representation with intent to deceive Plaintiff and for the purpose of inducing Plaintiff to act upon it;
- (5) Plaintiff justifiably relied on the representation; and
- (6) Plaintiff suffered damage as a result.

If Plaintiff proved each of these six elements by the greater convincing force, then your verdict on this claim must be for Plaintiff. Otherwise, your verdict must be for Defendants.

You cannot award any emotional distress damages on a fraudulent misrepresentation claim.

FINAL INSTRUCTION NO. 14

Defendants are liable for damages caused by the negligent infliction of emotional distress if Plaintiff proves each of the following elements by the greater convincing force of the evidence:

- (1) Defendants engaged in negligent conduct;
- (2) Plaintiff suffered emotional distress;
- (3) Defendants' conduct was a legal cause of Plaintiff's emotional distress; *and*
- (4) Plaintiff suffered a physical manifestation of the distress.

To recover for negligent infliction of emotional distress, it is necessary for Plaintiff to prove that she experienced some physical manifestation of distress by the greater convincing force of the evidence. Mere shame, humiliation, and distress are not physical manifestations but loss of weight, for instance, may suffice.

FINAL INSTRUCTION NO. 15

The term “legal cause” means an immediate cause which, in the natural or probable sequence, produced the harm complained of.

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 harm. However, for legal cause to exist, you must find that the conduct complained of was a substantial factor in bringing about the harm.

Liability cannot be based on mere speculative possibilities or circumstances and conditions remotely connected to the events leading up to the harm. Defendants’ conduct must have such an effect in producing the harm as to lead reasonable people to regard it as a cause of Plaintiff’s harm

FINAL INSTRUCTION NO. 16

If you decide for Plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate Plaintiff 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 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:

- The mental anguish experienced in the past and reasonably certain to be experienced in the future as a result of the injury.
- The aggravation of any pre-existing ailment or condition.

You may award emotional distress damages only on the claims of a violation of the right to handle the funeral and burial and of negligent infliction of emotional distress.

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. 17

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

However, if you find that Defendants' 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 Defendants was a substantial factor in bringing about the harm alleged.

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

FINAL INSTRUCTION NO. 18

If you find that Plaintiff had a prior injury or condition making her more susceptible to injury than a person in normal health, then you may award damages for the injuries caused by Defendants' conduct, even though those injuries may be greater than what might have been experienced by a person in normal health under the same circumstances. Before awarding such damages, however, Plaintiff must prove that the conduct of Defendants was a substantial factor in bringing about the harm alleged.

FINAL INSTRUCTION NO. 19

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 Defendants' 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 Defendant is not responsible; *and*
- (4) Lapse of time.

FINAL INSTRUCTION NO. 20

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

FINAL INSTRUCTION NO. 21

The fact that I have instructed you as to the proper measure of damages should not be considered as suggesting any view of mine as to which party is entitled to your verdict in this case. Instructions as to the measure of damages are given for your guidance, in the event you should find in favor of Plaintiff from the greater convincing force of the evidence in accordance with the other instructions.

FINAL INSTRUCTION NO. 22

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 court services 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. 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.