

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

JEFFERY D. GURKE, Plaintiff, vs. ROBERT H. GRESHAM, Defendant.	5:19-CV-5037-KES FINAL INSTRUCTIONS TO THE JURY
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VERDICT FORM

FINAL INSTRUCTION NO. 1 – INTRODUCTION

Members of the jury, the written instructions I gave you at the beginning of the trial and the oral instructions I gave you during the trial remain in effect. I now give you some additional instructions.

The instructions I am about to give you, as well as the preliminary instructions given to you at the beginning of the trial, are in writing and will be available to you in the jury room. *All* instructions, whenever given and whether in writing or not, must be followed. This is true even though some of the instructions I gave you at the beginning of the trial are not repeated here.

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 has said or done something, or has 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, if any, 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 – 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 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.

The plaintiff has the burden of proving these issues:

1. *That Gresham was negligent;*
2. *That Gresham's negligence was the legal cause of injury to Gurke; and*
3. *The amount, if any, of Gurke's damages that were legally caused by Gresham's conduct.*

The defendant has the burden of proving these issues:

1. *That Gurke was contributorily negligent more than slight.*

In determining whether or not an issue has been proved by the greater convincing force, you should consider all of the evidence bearing upon that issue, regardless of who produced it.

FINAL INSTRUCTION NO. 4 – NEGLIGENCE

Plaintiff, Jeffery D. Gurke, alleges that defendant, Robert H. Gresham, is liable because Gresham was negligent in the operation of his motorcycle, causing injuries to Gurke. To show negligence, Gurke must prove by the greater convincing force of the evidence the following two elements:

First, Gresham was negligent;

Negligence is the failure to use reasonable care. It is the doing of something that a reasonable person would not do, or the failure to do something that 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.

The term “reasonable person” refers to a person exercising those qualities of attention, knowledge, intelligence, and judgment that society requires of its members for the protection of their own interests and the interests of others.

The driver of a 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 an accident.

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 that 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.

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 an accident within that person’s range of vision.

A statute in South Dakota provides that no vehicle may be turned so as to proceed in the opposite direction unless such turning movement 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 that Gresham violated this statute, such violation is negligence.

The mere fact that an accident happened and a party sustained damages because of the accident does not give rise to any inference that it was caused by the negligence of anyone.

And second, Gresham's negligence was a legal cause of injury to Gurke.

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 injury as to lead reasonable people to regard it as a cause of the plaintiff's injury.

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, nor the last or nearest cause. A legal cause may act in combination with other causes to produce a result.

If you find that Gurke has not proved both of the above elements by the greater convincing force of evidence, enter your verdict for Gresham on the verdict form. If you find that Gurke has proved both of the above elements by the greater convincing force of the evidence, proceed to Final Jury Instruction Number 5.

FINAL INSTRUCTION NO. 5 – CONTRIBUTORY NEGLIGENCE

Contributory negligence is negligence on the part of the plaintiff which, when combined with the negligence of the defendant, contributes as a legal cause in bringing about the injury to the plaintiff. Gresham asserts that even if he was negligent, he is not liable for any injury suffered by Gurke because Gurke was contributorily negligent. 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. To prove a contributory negligence defense, Gresham must show by the greater convincing force of the evidence the following three elements:

First, Gurke was negligent;

Negligence is the failure to use reasonable care. It is the doing of something that a reasonable person would not do, or the failure to do something that 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.

The term “reasonable person” refers to a person exercising those qualities of attention, knowledge, intelligence, and judgment that society requires of its members for the protection of their own interests and the interests of others.

A statute in South Dakota provides that the driver of a motor vehicle may not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and condition of the highway. If you find that Gurke violated this statute, such violation is negligence unless you find from all the evidence that Gurke has proved by the greater weight of the evidence that the violation was legally excused. Legal excuse was defined for you in Final Instruction No. 4.

When a person is confronted with a sudden emergency, that person has a duty to exercise the care that an ordinarily prudent person would exercise in the same or similar situation. If you find that a sudden emergency arose, Gurke would not be contributorily negligent if you find:

- (1) That Gurke was confronted with a sudden and unexpected danger;
- (2) That Gurke's own negligence did not bring about the dangerous situation;
- (3) That Gurke had at least two courses of action available after perceiving the dangerous situation; and
- (4) That Gurke's choice of action after confronting the danger was a choice which a reasonably prudent person would have taken under similar circumstances, even though it may later develop that some other choice would have been better.

Second, Gurke's negligence was a legal cause of his injury;

The term "legal cause" was explained in Final Jury Instruction Number 4.

And third, Gurke's negligence was more than "slight."

The term "slight" means small when compared with the negligence of the defendant.

In determining whether Gurke's negligence was more than "slight," you must make a direct comparison between the conduct of Gurke and Gresham.

If you find that Gurke was contributorily negligent, that Gurke's contributory negligence was slight, or less than slight, when compared with the negligence of Gresham, then you must reduce Gurke's damages in proportion with the amount of his contributory negligence.

If you find that all three of the above elements have been proven by the greater convincing force of the evidence, then enter your verdict for Gresham on the verdict form. If you find that Gresham has not proved all three of the above elements by the greater convincing force of the evidence, enter a verdict in favor of Gurke on the verdict form. If you enter a verdict in favor of Gurke,

you must determine the amount of damages to which he is entitled as instructed in Final Jury Instruction Number 6.

FINAL INSTRUCTION NO. 6 – DAMAGES

If you decide for Gurke on the question of liability you must then determine the amount of money that will reasonably and fairly compensate Gurke for any of the following elements of loss or harm suffered in person or property proven by the evidence to have been legally caused by Gresham's conduct, taking into consideration the nature, extent, and duration of the injury, whether that loss or harm could have been anticipated or not, namely:

1. The nature, extent, and duration of the injury;
2. The aggravation of any pre-existing ailment or condition;
3. Gurke's permanent impairment, disability, and disfigurement;
4. Gurke's past pain and suffering;
5. Gurke's pain and suffering reasonably certain to occur in the future;
6. Gurke's past mental anguish;
7. Gurke's mental anguish reasonably certain to occur in the future;
8. Gurke's past emotional distress and loss of capacity of the enjoyment of life;
9. Gurke's emotional distress and loss of capacity of the enjoyment of life reasonably certain to be experienced in the future;
10. The reasonable expense of necessary medical care, treatment, and services received; and

11. The wages Gurke has lost, if any, from employment since the injury because of Gurke not being able to pursue his occupation.

Whether any of these elements of damages has been proven by the evidence is for you to determine. Your verdict must be based on evidence and not on speculation, guesswork, or conjecture. Damages are considered speculative only when the existence of damage is uncertain, not when the amount is uncertain. Once the existence of damages has been established, uncertainty as to the measure or extent of the damages does not bar recovery.

If you find that Gurke was contributorily negligent as discussed in Final Jury Instruction Number 5, and that Gurke's contributory negligence was slight, or less than slight, when compared with the negligence of Gresham, then you must reduce Gurke's damages in proportion with the amount of his contributory negligence.

The fact that I have given you instructions on damages should not be taken by you as any intimation by the court or an admission by the defendant of the defendant's liability for the alleged injuries to the plaintiff.

FINAL INSTRUCTION NO. 7 – AGGRAVATION OF PRE-EXISTING INJURY OR
CONDITION

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

However, if you find that Gresham's conduct caused an aggravation of Gurke's pre-existing injury or condition, you may award damages for that aggravation. An aggravation of a pre-existing injury or condition is a worsening of that pre-existing injury or that makes that pre-existing condition more difficult to treat.

Before awarding these damages, Gurke must prove that Gresham's conduct was a substantial factor in bringing about the harm alleged. 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.

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

FINAL INSTRUCTION NO. 8 – 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.

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 advocates. 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.

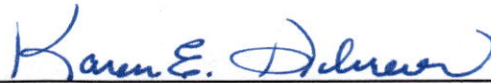
Nothing I have said or done is intended to suggest what your verdict should be—that is entirely for you to decide.

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.

Good luck with your deliberations.

Dated June 30, 2023.

BY THE COURT:



KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE