

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

BRUCE HOKEL,

Plaintiff,

vs.

DANIEL KENSINGER, M.D.,

Defendant.

4:20-CV-04119-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.

In this case Hokel has the burden of proving:

- (1) That Dr. Kensinger committed medical malpractice;
- (2) That Dr. Kensinger's medical malpractice, if any, caused Hokel's damages; and
- (3) The amount of Hokel's damages.

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.

You have probably heard the phrase "proof beyond a reasonable doubt." That is a stricter standard than "greater convincing force." It applies in criminal cases, but not in this civil case; so put it out of your mind.

FINAL INSTRUCTION NO. 4 – MEDICAL MALPRACTICE

Dr. Kensinger is liable for the damages legally caused by medical malpractice if each of the following is established by Hokel by the greater convincing force of the evidence:

One, that Dr. Kensinger violated the standard of care owed to Hokel in failing to properly diagnose and treat Hokel's post-surgical infection that resulted in the below-knee amputation of his left leg;

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 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 Hokel does not alone prove that Dr. Kensinger was negligent, but it may be considered, along with other evidence, in determining the issue of negligence.

You must decide whether Dr. Kensinger possessed and used the knowledge, skill, and care which the law demands of physicians who share the same specialty as Dr. Kensinger, based on the testimony and evidence of members of the profession who testified as expert witnesses.

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

The term "legal cause" means an immediate cause which, in the natural or probable sequence, produces the injury complained of. A legal cause does not need to be the only cause of the harmful result. A legal cause may act in combination with other causes to

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

For legal cause to exist, the harm suffered must be a natural and probable sequence 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. Kensinger's conduct must have such an effect in producing the harm as to lead reasonable people to regard it as a cause of Hokel'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 Hokel on his medical malpractice claim. You should then determine the amount of damages that Hokel 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. Kensinger.

FINAL INSTRUCTION NO. 5 – DAMAGES

If you decide for Hokel on the medical malpractice cause of action, you must then determine the amount of money that will reasonably and fairly compensate Hokel 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 Dr. Kensinger'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 disability and disfigurement suffered by Hokel;
2. The pain and suffering, mental anguish, and loss of capacity of enjoyment of life experienced in the past and reasonably certain to be experienced in the future as a result of the injuries sustained by Hokel;
3. The reasonable value of necessary medical care, treatment, and services received and the reasonable value of necessary expense of medical care, treatment and services reasonably certain to be received in the future.

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. 6 -FUTURE DAMAGES

The law allows damages for detriment or loss reasonably certain to result in the future. By their nature, all future happenings are somewhat uncertain. The fact and cause of the loss must be established with reasonable certainty. Once future 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, recovery is not barred by uncertainty as to the measure or extent of damages, or the fact that they cannot be measured by exactness. On the other hand, an award of future damages cannot be based on conjecture, speculation, or mere possibility.

FINAL INSTRUCTION NO. 7 – LIFE EXPECTANCY

According to the mortality table, the life expectancy of a 50.5 year-old male, is 74.9 years of age, or 24.4 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 only applies 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. 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.

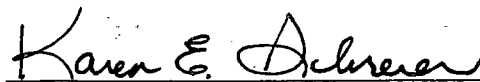
Nothing I have said or done is intended to suggest what your verdict should be—that is entirely for you to decide.

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 March 3, 2023.

BY THE COURT:



KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE