

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
SOUTHERN DIVISION

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<p>RONDA HORSLEY,  Plaintiff,  vs.  PAUL E. MEYER, M.D.,  Defendant.</p>	<p>4:19-CV-04092-RAL  FINAL JURY INSTRUCTIONS</p>
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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

This is a civil case, brought by the plaintiff, Ronda Horsley, against the defendant, Paul E. Meyer, M.D.

Ms. Horsley alleges that Dr. Meyer was negligent in his care and treatment of her in performing a wedge excision biopsy of a nodule in her right lung. Ms. Horsley further alleges that Dr. Meyer failed to obtain her informed consent to perform the particular procedure at issue. Ms. Horsley seeks compensatory damages for the injuries and losses she sustained. Dr. Meyer denies any negligence on his part and maintains that Ms. Horsley gave informed consent for the procedure. Dr. Meyer also denies the nature, scope, and extent of Ms. Horsley's claimed damages and asks that Ronda Horsley recover nothing in this matter.

It will be your duty to decide from the evidence whether Ms. Horsley is entitled to a verdict against Dr. Meyer.

FINAL INSTRUCTION NO. 3

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. 4

I have mentioned the word "evidence." "Evidence" includes the testimony of witnesses and 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 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, you must ignore the question or the exhibit and must not try to guess what the answer or information might have been.
3. Testimony that I struck from the record, or told you to disregard, is not evidence and must not be considered.

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.

FINAL INSTRUCTION NO. 5

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. 6

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 of the other facts and circumstances in evidence in deciding the weight to give the testimony of that witness.

FINAL INSTRUCTION NO. 7

You have heard testimony from persons described as being 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.

FINAL INSTRUCTION NO. 8

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.

Plaintiff Ronda Horsley has the burden of proving the following issues on her medical malpractice claim:

1. That Paul E. Meyer, M.D. was negligent by violating the standard of care owed to Plaintiff Ronda Horsley;
2. That such negligence was the legal cause of any damage, injury, or loss suffered or experienced by Ms. Horsley;
3. The nature and extent of the damages, injuries, and losses suffered by Ms. Horsley as a legal result of the negligence of Dr. Meyer; and

Plaintiff Ronda Horsley has the burden of proving the following issues on her lack of informed consent claim:

1. That Defendant Paul E. Meyer, M.D. performed a procedure on Ms. Horsley without obtaining her informed consent;
2. That an undisclosed material risk occurred;
3. That if the undisclosed material risk had been disclosed, a reasonable person in Ms. Horsley's position would not have agreed to the proposed treatment;
4. That Ms. Horsley sustained damage, injury or loss as a legal result of the undisclosed material risk.

In determining whether or not an issue has been proved by 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. 9

You must decide whether the defendant possessed and used the knowledge, skill, and care which the law demands of a cardio thoracic surgeon based on the testimony and evidence of members of that specialty who testified as expert witnesses.

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 negligence.

FINAL INSTRUCTION NO. 10

A physician in some instances may be presented with multiple methods of acceptable treatment for a particular condition. A physician's choice of treatment from multiple acceptable treatments available is not necessarily negligence. However, a physician may be responsible for medical negligence if the physician's choice of treatment violates the standard of care.

FINAL INSTRUCTION NO. 11

The fact that an unfortunate or bad condition resulted to the patient does not alone prove that the Defendant was negligent, but it may be considered, along with other evidence, in determining the issue of negligence.

FINAL INSTRUCTION NO. 12

A physician has the duty to obtain a patient's informed consent to medical treatment before providing that treatment. The patient's informed consent may be express or implied from the circumstances.

A physician is liable for damages legally caused by the failure to obtain the informed consent of the patient if each of the following is established by the greater weight of the evidence:

- (1) the physician treated the patient without obtaining the patient's informed consent;
- (2) an undisclosed material risk occurred which caused injury to the patient;  
and
- (3) if the undisclosed risk had been disclosed, a reasonable person in the Plaintiff's position would not have agreed to the proposed treatment.

FINAL INSTRUCTION NO. 13

To obtain a patient's informed consent, the physician must disclose to the patient all material information necessary for the patient to make an informed decision regarding the proposed treatment.

Information is generally regarded as material if a reasonable patient in what the physician knows or should know to be the patient's position would attach significance to the information when deciding whether to submit to the proposed medical treatment or procedure.

The physician has the duty to disclose to the patient all known material or significant risks associated with the treatment or procedure, as well as any available alternative reasonable treatment or procedure.

The physician must also disclose any material risks associated with abstaining from the treatment or procedure.

FINAL INSTRUCTION NO. 14

A risk is generally regarded as material when a reasonable patient in what the physician knows or should know to be the patient's position would attach significance to the risk when deciding whether to submit to the proposed medical treatment or procedure.

A physician is not required to discuss extremely remote risks, risks already known to the patient or those of which persons of average sophistication are aware. In exceptional circumstances, the physician is allowed to exercise discretion and withhold information from the patient, when full disclosure of that information would be detrimental to the patient's well-being.

FINAL INSTRUCTION NO. 15

This Court has received into evidence the Avera Heart Hospital Consent for Treatment Policy. This policy reflects standards adopted by Avera Heart Hospital to obtain informed consent. This Court has instructed you on what South Dakota law requires to recover on a cause of action for lack of informed consent. There is no cause of action under South Dakota law for breach of a written policy to obtain informed consent. To the extent that the Avera Heart Hospital policy requires more or less than South Dakota law does, you are instructed to apply as the legal standard what is contained in these instructions.

FINAL INSTRUCTION NO. 16

A physician who discusses with a patient the complications of a medical procedure may still be liable if the physician's negligence by breaching the standard of care caused those complications.



FINAL INSTRUCTION NO. 17

The term "legal cause" means an immediate cause which, in the natural or probable sequence, produces 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. The defendant's conduct must have such an effect in producing the harm as to lead reasonable people to regard it as a cause of the plaintiff's harm.

FINAL INSTRUCTION NO. 18

If you decide for Plaintiff Ronda Horsley and against Paul E. Meyer, M.D. on the claim of medical negligence or on the claim of lack of informed consent, you must then fix the amount of money which will reasonably and fairly compensate Ms. Horsley 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 Dr. Meyer's negligent conduct or failure to obtain informed consent, taking into consideration the nature, extent, and duration of the injury, whether such loss or harm could have been anticipated or not, namely:

- (1) Disability and disfigurement as a consequence of Dr. Meyer's negligence or failure to obtain informed consent;
- (2) The pain and suffering, mental anguish, and loss of capacity of the enjoyment of life experienced in the past and reasonably certain to be experienced in the future as a result of the injury as a consequence of Dr. Meyer's negligence or failure to obtain informed consent;
- (3) The reasonable value of necessary medical care, treatment, and services received as a consequence of Dr. Meyer's negligence or failure to obtain informed consent.

Whether any of these elements of damages have been proved by the evidence is for you to determine. If you award damages for medical negligence or for lack of informed consent, you must not award any amounts for the medical expenses, disfigurement, pain and suffering that necessarily would stem from whatever biopsy of the lung mass to which Ms. Horsley consented and which was to be performed. Your verdict must be based on evidence and not upon speculation, guesswork, or conjecture.

FINAL INSTRUCTION NO. 19

The law allows damages for detriment 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 with exactness. On the other hand, an award of future damages must be shown with reasonable certainty and cannot be based on conjecture, speculation, or mere possibility.

FINAL INSTRUCTION NO. 20

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 the plaintiff from the greater convincing force of the evidence in accordance with the other instructions.

FINAL INSTRUCTION NO. 21

If you determine that a party 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 you unanimously 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. 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. 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.

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
SOUTHERN DIVISION

<p>RONDA HORSLEY,  Plaintiff,  vs.  PAUL E. MEYER, M.D.,  Defendant.</p>	<p>4:19-CV-04092-RAL  SPECIAL VERDICT FORM</p>
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We, the jury, duly impaneled in the above-entitled action and sworn to try the issues herein, find as follows.

**Medical Malpractice**

1. Do you find that the Defendant, Paul E. Meyer, M.D., was negligent in his treatment of Plaintiff Ronda Horsley?

Yes \_\_\_\_\_ No \_\_\_\_\_

If your answer to question 1 is "no," please go to question No. 3. If your answer to question No. 1 is "yes," please go to question No. 2 below.

2. Was the negligence of Paul E. Meyer, M.D. a legal cause of damage to Plaintiff Ronda Horsley?

Yes \_\_\_\_\_ No \_\_\_\_\_

Please proceed to question No. 3.

**Informed Consent**

3. Do you find that Defendant Paul E. Meyer, M.D. performed a procedure on Plaintiff Ronda Horsley without obtaining her informed consent?

Yes \_\_\_\_\_ No \_\_\_\_\_



If your answer to question No. 3 is "yes," please go to question No. 4. If your answer to question No. 3 is "no," please go to the section marked "Damages" below and follow the instructions.

4. Do you find that an undisclosed material risk occurred which caused injury to Plaintiff Ronda Horsley?

Yes \_\_\_\_\_ No \_\_\_\_\_

If your answer to question No. 4 is "yes," please go to question No. 5. If your answer to question No. 4 is "no," please go to the section entitled "Damages" below and follow the instructions.

5. If the undisclosed risk had been disclosed, do you find that a reasonable person in Plaintiff Ronda Horsley's position would not have agreed to the proposed treatment?

Yes \_\_\_\_\_ No \_\_\_\_\_

Please go to the section marked "Damages" below and follow the instructions.

### **Damages**

If you answered "yes" to question Nos. 1 and 2, and/or if you answered "yes" to question Nos. 3, 4, and 5, please answer question No. 6 to assess the amount of damages.

If you did not answer "yes" to question Nos. 1 and 2, and you also did not answer yes to question Nos. 3, 4 and 5, then the case is concluded. Please have the Foreperson sign and date the Verdict Form and notify the Bailiff.

6. We award Plaintiff Ronda Horsley damages as follows:

For medical expenses: \$ \_\_\_\_\_.

For all other elements of damages: \$ \_\_\_\_\_.

Total: \$ \_\_\_\_\_.

Dated this \_\_\_\_ of October, 2021.

\_\_\_\_\_  
Foreperson