

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

RICHARD B. KENDERDINE, Special
Administrator of the Estate of Vivian C.
Kenderdine, Deceased,

Plaintiff,

vs.

MARCIA R. SCHMIDT,

Defendant.

1:20-CV-01030-CBK

JURY INSTRUCTIONS

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 verdicts 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. Plaintiff seeks to recover monetary damages against defendant.

Plaintiff claims that defendant Marcia R. Schmidt, hereinafter “Ms. Schmidt,” was negligent and such negligence was a proximate cause of a collision which resulted in the death of Vivian C. Kenderdine, hereinafter “Ms. Kenderdine,” and financial loss to the estate. Defendant denies the Ms. Schmidt was negligent and denies that any negligence on her part caused the death of Ms. Kenderdine or damages to plaintiff.

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

INSTRUCTION NO. 4

Plaintiff included as a defendant the employer of Ms. Schmidt, the Roslyn Elevator. In some states, the owner of a vehicle is responsible for the negligence of a driver permitted to drive the owner's vehicle. That is not the law in South Dakota unless Ms. Schmidt was on company business or was found to be such a careless driver that it was negligent for the owner to entrust the vehicle to the driver. The evidence is clear that Ms. Schmidt was not on company business and there is no evidence of anything that would make Roslyn Elevator liable. Therefore, the Court has found as a matter of law that no claim against Roslyn Elevator may be pursued. This leaves Ms. Schmidt as the sole defendant. Do not speculate as to anything further as to this action by the Court.

INSTRUCTION NO. 5

I have mentioned the word “evidence.” The evidence in this case consists of the testimony of witnesses and the documents and other things received as exhibits.

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 to object when they believe something is improper. You should not be influenced by the objection. If I sustained any 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.

INSTRUCTION NO. 6

There are two types of evidence from which you may find the truth as to the facts of a case--direct evidence 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 evidence 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. 7

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. 8

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

INSTRUCTION NO. 9

In these instructions you are told that your verdict depends on whether you find certain facts have been proved. In civil actions, the party who has the burden of proving an issue, must prove that issue by the greater convincing weight of the evidence. "Greater convincing weight" 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 the evidence is evenly balanced so that you are unable to say the evidence on either side of an issue has the greater weight, then your finding upon the issue must be against the party who has the burden of proving it.

In this action, plaintiff has the burden of proving the following issues:

1. Ms. Schmidt was negligent in causing the collision.
2. Ms. Schmidt's negligence was a legal cause of damages to the plaintiff.
3. The amount, if any, of plaintiff's damages that were legally caused by Ms. Schmidt's negligence.

The defendant has the burden of proving the following issues:

1. Ms. Kenderdine was contributorily negligent.
2. Ms. Kenderdine's contributory negligence was more than slight in comparison with the negligence of Ms. Schmidt.

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

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. 10

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

First, was Ms. Schmidt negligent?

If you find that Ms. Schmidt was not negligent, you must return a verdict for the defendant. If you find that Ms. Schmidt was negligent, you have a second issue to determine, namely:

Was that negligence a legal cause of the death of Ms. Kenderdine?

If you find that Ms. Schmidt's negligence was not a legal cause of the death of Ms. Kenderdine, plaintiff is not entitled to recover damages and you must return a verdict for the defendant. If you find that Ms. Schmidt's negligence was a legal cause of the death of Ms. Kenderdine, you must determine a third issue, namely:

Was Ms. Kenderdine also negligent?

If you find that Ms. Kenderdine was not negligent, you then must determine the amount of plaintiff's damages and return a verdict for the plaintiff.

If you find that Ms. Kenderdine was also negligent, you then must determine a fourth issue, namely:

Was Ms. Kenderdine's own negligence also a legal cause of her death?

If you find that the Ms. Kenderdine's own negligence was not a legal cause of her death, you then must determine the amount of plaintiff's damages and return a verdict for the plaintiff.

If you find that Ms. Kenderdine's own negligence contributed as a legal cause of her death, you have a fifth issue to determine. The plaintiff may still recover if you find that such contributory negligence of Ms. Kenderdine was slight or less than slight, when compared to the negligence of Ms. Schmidt; but the damages the plaintiff may recover must be reduced in proportion to the amount of Ms. Kenderdine's contributory negligence. If you find that the contributory negligence of Ms. Kenderdine is more than slight in

comparison with the negligence of Ms. Schmidt, the plaintiff cannot recover and you must return a verdict for the defendant.

You must first determine the questions of liability before you undertake to determine damages.

INSTRUCTION NO. 11

A legal cause is a cause that produces some harmful result in a natural and probable sequence, and without which the harmful result would not have occurred.

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. It is sufficient if it concurs with some other cause acting at the same time, which in combination with it causes 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 harmful result.

Liability cannot be based on mere speculative possibilities or circumstances and conditions remotely connected to the events leading up to the harmful result. A party's conduct must have had such an effect in producing the harmful result as to lead reasonable people to regard it as a cause of the harmful result.

INSTRUCTION NO. 12

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 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 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. 13

The estate of a person who is contributorily negligent may still recover damages if that contributory negligence is slight, or less than slight, when compared with the negligence of a defendant. The term “slight” means small when compared with the negligence of the defendant.

In determining this issue you must determine the answer to two questions:

1. Whether both Ms. Kenderdine and Ms. Schmidt were negligent; and
2. If both were negligent, whether Ms. Kenderdine’s negligence was
 - (a) “slight” or less than “slight,” or
 - (b) more than “slight” in comparison with Ms. Schmidt’s negligence.

In answering the second question you must make a direct comparison between the conduct of Ms. Kenderdine and Ms. Schmidt.

If you find Ms. Kenderdine’s contributory negligence is more than slight when compared with the negligence of Ms. Schmidt, then the plaintiff is not entitled to recover any damages.

If you find Ms. Kenderdine’s contributory negligence is slight, or less than slight, when compared with the negligence of Ms. Schmidt, then the plaintiff is entitled to recover damages. However, the plaintiff’s damages must be reduced in proportion to the amount of Ms. Kenderdine’s contributory negligence.

INSTRUCTION NO. 14

The following are some of South Dakota's safety laws:

1. 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.
2. 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 which 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.
3. 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.
4. No person may drive a motor vehicle at such a slow speed as to impede the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation or in compliance with law.
5. The driver of an overtaking vehicle shall pass at a safe distance to the side of an overtaken vehicle and may not cut in front of the latter until safely clear of the overtaken vehicle.
6. No person may drive a vehicle onto or from any controlled-access roadway except at such entrances and exits as are established by public authority.

If you find that either Ms. Kenderdine or Ms. Schmidt violated one or more of the foregoing safety laws, you may find that the person in question was negligent but only if the negligent conduct was a proximate cause of the death of Ms. Kenderdine.

In order to find either Ms. Kenderdine or Ms. Schmidt negligent for violating one or more of the foregoing safety laws, you must unanimously agree which rule or rules the person in question violated.

INSTRUCTION NO. 15

If you decide for the plaintiff on the question of liability, then you must then fix the amount of money which will reasonably and fairly compensate Richard Kenderdine, the surviving spouse, for any pecuniary loss proven by the evidence as a result of the injuries and death of Ms. Kenderdine.

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

1. Ms. Kenderdine's contributions in the past;
2. Ms. Kenderdine's life expectancy at the time of death;
3. Ms. Kenderdine's health, age, habits, talents, and success;
4. Ms. Kenderdine's contributions to services in the home;
5. The counsel, guidance and aid decedent would reasonably have given the surviving spouse had Ms. Kenderdine lived;
6. The life expectancy, health and physical condition of the surviving spouse;
7. The loss of advice, assistance, companionship, society, and protection Ms. Kenderdine would reasonably have given the surviving spouse had she lived.

Whether any of the 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.

INSTRUCTION NO. 16

You must consider not only the value of any past loss, but also any future loss. Once future damage 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 of extent of damages, or the fact that they cannot be measured with exactness. Still, the monetary amount for future damages cannot be based on conjecture, speculation, or mere possibility and must be reasonable.

INSTRUCTION NO. 17

Vivian Kenderdine was 67 years old at the time of her death. According to the mortality table, the life expectancy of a 67-year-old female is an additional 19.1 years.

Richard Kenderdine is currently 64 years old. According to the mortality table, the life expectancy of a 64-year-old male is an additional 18.8 years.

The court takes judicial notice of these facts, which are now evidence for you to consider.

Life expectancies shown by the mortality table are an estimate of the probable average length of life of all persons of a given age in the United States. 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.

INSTRUCTION NO. 18

The plaintiff, Richard Kenderdine, brings this action in a purely representative capacity, as the special administrator of the estate of Vivian C. Kenderdine, deceased, and this action is for the exclusive benefit of Ms. Kenderdine's surviving spouse. He is the real party in interest whose damages you are to determine if you decide for the plaintiff.

INSTRUCTION NO. 19

If you award damages, you must use a process of discussion, deliberation, reasoning, and collective judgment in which each juror has an opportunity for individual participation. You must not use a method in which the jurors agree in advance to be bound by the average of what each individual juror considers to be the award of damages, or use other methods in which you agree in advance to be bound by a certain calculation.

INSTRUCTION NO. 20

You have been instructed on the subject of the measure of damages in this case because it is my duty to instruct you as to all of the law that may become pertinent to your deliberations. The fact that you have been instructed on the subject of damages must not be considered as intimating any view of my own on the issue of liability or as to which party is entitled to your verdict.

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 return with your verdict form to the courtroom.

Do not give the verdict form to the Marshal. The foreperson should retain the form until the Clerk gives it to me in open court.

You will be required to provide written answers to certain questions on the verdict form. The questions are to be answered with a "Yes" or a "No" or other brief answer. When all the jurors have agreed to all of the answers to the questions (other than the ones that are immaterial), that will be the verdicts of the jury. The foreperson will write the answers of the jury in the space provided under 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 any question on the verdict form until after you have reached unanimous verdicts.

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 verdicts should be.

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

UNITED STATES DISTRICT COURT
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VERDICT FORM

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

QUESTION NO. 1: Was defendant Marcia R. Schmidt negligent?

_____ No _____ Yes

If you answered "No" in Question 1, you should proceed no further. The foreperson should sign and date this verdict form.

If, and only if, you answered "Yes" in Question 1, proceed to Question 2.

QUESTION NO. 2: Was the negligence of defendant Marcia R. Schmidt a legal cause of the death of Vivian C. Kenderdine?

_____ No _____ Yes

If you answered "No" in Question 2, you should proceed no further. The foreperson should sign and date this verdict form.

If, and only if, you answered "Yes" in Question 2, proceed to Question 3.

QUESTION NO. 3: Was Vivian C. Kenderdine also negligent?

_____ No _____ Yes

If you answered "No" in Question 3, you should skip Questions 4 and 5 and proceed to answer Question 6.

If, and only if, you answered "Yes" in Question 3, proceed to Question 4.

QUESTION NO. 4: Was Vivian C. Kenderdine's negligence also a legal cause of her death?

_____ No _____ Yes

If you answered "No" in Question 4, you should skip Question 5 and proceed to answer Question 6.

If, and only if, you answered "Yes" in Question 4, proceed to Question 5.

QUESTION NO. 5: Was Vivian C. Kenderdine's negligence more than slight in comparison to the negligence of Ms. Schmidt?

_____ No _____ Yes

If you answered "Yes" to Question 5, you should proceed no further. The foreperson should sign and date this verdict form.

If, and only if, you answered "No" to Question 5, proceed to Question 6.

QUESTION NO. 6: What are the damages, if any, that you find that plaintiff is entitled to recover?

\$ _____ For past losses.

\$ _____ For future losses.

Dated this _____ day of October, 2022.

Foreperson