

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
SOUTHERN DIVISION

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DANIEL D. KEYES,

Plaintiff,

vs.

MENARD, INC.,

Defendant.

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4:18-CV-04149-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 now give you some additional instructions. The instructions I am about to give you now are in writing and will be available to you in the jury room.

You must, of course, continue to follow the instructions I gave you earlier, as well as those I give you now. You must not single out some instructions and ignore others, because all are important.

All instructions, whenever given and whether in writing or not, must be followed.

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 the affairs of life. You may use reason and common sense to draw deductions or conclusions from facts which have been established by the evidence. 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 said or did 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 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 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 told you to disregard is not evidence and must not be considered.
4. Anything you saw or heard about this case outside the courtroom is not evidence. If you heard or saw any news reports about this case, you are instructed to disregard those entirely as they may well have been inaccurate and not discuss them with your fellow jurors.

If a particular item of evidence was received for a limited purpose, you must follow that instruction.

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. 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, 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

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. 6

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, and you should consider this testimony together with all other evidence received.

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

This lawsuit arises out of the fall of windows at a Menard's store on August 15, 2017. The Menard's store at issue is located at 110 North Highline Avenue in Sioux Falls, South Dakota.

Keyes claims to have been injured and sustained damages as a legal result of the negligence of Menard, Inc. Keyes seeks compensatory damages for the injuries and losses he sustained.

Menard, Inc. admits it was negligent and that its negligence was a legal cause of the windows falling on Keyes on August 15, 2017. However, Menard, Inc. disputes the nature and extent of the damages claimed by Keyes.

You will have to determine the nature and extent of the damages to which Keyes is entitled.

FINAL INSTRUCTION NO. 9

In civil actions, the party who has the burden of proving an issue must prove that issue by a preponderance of the evidence.

“Preponderance of the evidence” means the greater weight of the evidence or the greater convincing force of the evidence. Preponderance of the evidence 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.

As the plaintiff in this case, Keyes has the burden of proving by a preponderance of the evidence the extent of the injuries or damages he suffered or sustained.

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

You may have heard of the term “proof beyond a reasonable doubt.” That is a stricter standard that applies in criminal cases. It does not apply to civil cases such as this.

FINAL INSTRUCTION NO. 10

You must fix the amount of money which will reasonably and fairly compensate Keyes for any of the following elements of loss or harm suffered in person proved by the evidence to have been legally caused by Menard, Inc.'s conduct, taking into consideration the nature, extent, and duration of the injury, whether such loss or harm could have been anticipated or not, namely:

1. The aggravation of any preexisting ailment or condition.
2. The disability and disfigurement.
3. 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.
4. The reasonable value of necessary medical care, treatment, and services received. You should not concern yourself with any health insurance or Medicare coverage in making your decision.
5. The reasonable value of necessary household service, nursing, and attendance, or other services, including services furnished gratuitously by family members or others, which has been required as a result of the injury and the value of such services reasonably certain to be required in the future.
6. The earnings Keyes has lost, if any, from any source from the date of the injury until the date of the trial.

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. 11

Some of these jury instructions use the phrase “legally caused.” 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 the result. A legal cause may act in combination with other causes to produce the result. However, for a legal cause to exist, you must find that the conduct complained of was a substantial factor in bringing about the injury. Liability cannot be based on mere speculative possibilities or circumstances and conditions remotely connected to the events leading up to the injury. The defendant’s conduct must have such an effect in producing the injury to be regarded as a cause of the injury.

FINAL INSTRUCTION NO. 12

If you find that Keyes had a condition before the conduct of Menard, Inc. at issue in this case, you may not award damages for any previous or subsequent injuries or conditions unrelated to Menard, Inc.'s conduct.

However, if you find that Menard, Inc.'s conduct caused an aggravation of Keyes's preexisting condition, you may award damages for that aggravation. Before awarding these damages, Keyes must prove that the conduct of Menard, Inc. was a substantial factor in bringing about the harm alleged.

An aggravation of a preexisting condition makes that preexisting condition worse or more difficult to treat.

FINAL INSTRUCTION NO. 13

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.

FINAL INSTRUCTION NO. 14

If you find that Keyes is entitled to recover for an aggravation of a preexisting condition based on Final Instructions 12 and 13, you should try to apportion damages between the preexisting condition and the aggravation of that preexisting condition caused by the event. However, if you cannot logically, reasonably, or practically apportion Keyes's damages between the preexisting condition and the aggravation caused by Menard, Inc.'s conduct, then you may award damages for both the preexisting condition and the aggravation of that condition caused by Menard, Inc.

FINAL INSTRUCTION NO. 15

If you find that Keyes had a prior condition making him more susceptible to injury than a person in normal health, then you may award damages for the injuries caused by Menard, Inc.'s 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, Keyes must prove that the conduct of Menard, Inc. was a substantial factor in bringing about the harm alleged.



FINAL INSTRUCTION NO. 16

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. 17

Keyes is 71 years old. According to the mortality table, the life expectancy of a 70-year-old white male is 13.9 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 applies only 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. 18

In conducting your deliberations and returning your verdict, there are certain rules you must follow. I shall list those rules for you now.

*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.

*Third*, if you need to communicate with me during your deliberations, you may send a note to me through the 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*, during your deliberations, you must not communicate with or provide any information to anyone other than by note to me by any means about this case. You may not use any electronic device or media, such as a smart phone or computer; the internet, any internet service, or any text or instant messaging service; or any internet chat room, blog, or website such as Facebook, Snapchat, Instagram, YouTube, or Twitter, to communicate to anyone information about this case or to conduct any research about this case until I accept your verdict.

*Fifth*, your verdict must be based solely on the evidence and on the law which I have given to you in my instructions. 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 court security officer that you are ready to return to the courtroom.

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We, the jury, duly empaneled and sworn to try the issues in this case, find as follows:

1. Medical Expenses Finger & Head: \$ \_\_\_\_\_
2. Medical Expenses Right Hip: \$ \_\_\_\_\_
3. Medical Expenses Left Knee: \$ \_\_\_\_\_
4. Loss of Earnings: \$ \_\_\_\_\_
5. Other Damages: \$ \_\_\_\_\_

Dated May \_\_\_\_, 2021

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Foreperson