

**FILED**

JUN 17 2016

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CLERK

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
SOUTHERN DIVISION

<p>NATHAN P. KOBASIC,  Plaintiff,  vs.  YANKTON MEDICAL CLINIC, P.C.,  Defendant.</p>	<p>CIV. 14-04118  FINAL INSTRUCTIONS TO THE JURY</p>
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VERDICT FORM

FINAL INSTRUCTION NO. 1 – INTRODUCTION

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

You must 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. This is true even though some of those I gave you at the beginning of and during the trial are not repeated here.

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. This does not mean they are more important than my oral instructions. All instructions, whenever given and whether in writing or not, must be followed.

Neither in these instructions nor in any ruling, action, or remark that I have made during the course of this trial have I intended to give any opinion or suggestion as to what your verdict should be.

## FINAL INSTRUCTION NO. 2 – 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, Nathan Kobasic has the burden of proof on the following elements:

1. Yankton Medical Clinic was negligent;
2. Yankton Medical Clinic's negligence, if any, legally caused damages;
3. The amount of 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.

FINAL INSTRUCTION NO. 3 – IMPEACHMENT

In Preliminary Instruction No. 3, I instructed you generally on the testimony of witnesses. I now give you this further instruction on how the testimony of a witness can be “impeached” and how you may treat certain evidence.

A witness may be discredited or impeached by:

1. Conviction of a felony;
2. A showing that the witness testified falsely concerning a material matter;
3. Evidence that at some other time the witness said or did something, or failed to say or do something, that is inconsistent with the witness’s present testimony:
  - a. If earlier statements of a witness were admitted into evidence, they were not admitted to prove that the contents of those statements were true.
  - b. 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 you think it deserves.

FINAL INSTRUCTION NO. 4 – CORPORATION AS A PARTY

Defendant, Yankton Medical Clinic, P.C., is a corporation that can act only through its officers and employees. Any act or omission of an officer or employee within the scope of his or her employment is the act or omission of the corporation for which he or she was then acting. Therefore, any omission, failure, or negligent act of any officer or employee of a corporation within the scope of his or her employment is held at law to be the omission, failure, or negligence of the corporation.

The fact that one of the parties to this action is a corporation is immaterial. Under the law of this state, a corporation is an individual party to the lawsuit, and all parties are entitled to the same impartial treatment.

FINAL INSTRUCTION NO. 5 – REDACTED RECORDS

Certain portions of the medical records provided to you have been redacted. The deleted portions are not relevant to any of the issues before you.

FINAL INSTRUCTION NO. 6 – NEGLIGENCE

Yankton Medical Clinic, P.C., is liable for damages legally caused by its negligence if each of the following elements is established by Nathan Kobasic by the greater convincing force of the evidence:

**One, that Yankton Medical Clinic violated the standard of care owed to Nathan Kobasic;**

The standard of care with which a non-specialist employee of a clinic must comply is to provide the care which is available at clinics within the same or similar communities.

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 specialist also has the duty to recommend to the Bureau of Prisons that a patient be referred to another specialist or recommend the assistance of another specialist if, under the circumstances, a reasonably careful and skillful specialist would do so.

If the specialist fails to perform that duty and undertakes to or continues to perform professional services without the aid of another specialist, it is a further duty to exercise the care and skill ordinarily used by specialists in good standing in the same field of specialization in the United States and under similar circumstances.

A failure to perform any such duty is negligence.

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

***And two, that such failure is the legal cause of any damage, injury, or loss suffered or experienced by Nathan Kobasic.***

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. Liability cannot be based on mere speculative possibilities or circumstances and conditions remotely connected to the events leading up to an injury. Yankton Medical Clinic’s conduct must have such an effect in producing the harm as to lead reasonable people to regard it as a cause of Nathan Kobasic’s injury.

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

In considering whether conduct is a substantial factor in producing harm to another, the following considerations are important:

- a. The number of other factors that contributed to producing the harm;
- b. The extent to which any other factors produced the harm;
- c. 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 that became harmful only after the operation of other forces for which the defendant is not responsible;
- d. Lapse of time.

If you find that both of these elements have been proved by the greater convincing force of the evidence, your verdict must be for Nathan Kobasic. You should then determine the amount of damages that he 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 Yankton Medical Clinic.



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

If you find that Nathan Kobasic had a condition prior to the conduct of Yankton Medical Clinic at issue in this case, and damages can be apportioned, you may not award damages for any previous or subsequent injuries or conditions unrelated to Yankton Medical Clinic's conduct.

However, if you find that Yankton Medical Clinic's conduct caused an aggravation of Nathan Kobasic's pre-existing condition, and damages can be apportioned, you may award damages for that aggravation. Before awarding these damages, Nathan Kobasic must prove that the conduct of Yankton Medical Clinic was a substantial factor in bringing about the harm alleged.

On the other hand, if you find that Nathan Kobasic is entitled to recover for an aggravation of a pre-existing condition, but you cannot logically, reasonably or practically apportion Nathan Kobasic's present and future injuries between the injury caused by the pre-existing condition and the aggravation caused by Yankton Medical Clinic's conduct, then you may award damages for all present and future injuries caused by both the pre-existing condition and Yankton Medical Clinic's conduct.

In considering whether conduct is a substantial factor in producing harm to another, the following considerations are important:

1. The number of other factors that contributed to producing the harm;
2. The extent to which any other factors produced the harm;
3. Whether Yankton Medical Clinic'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 that became harmful only after the operation of other forces for which the defendant is not responsible;
4. Lapse of time.

FINAL INSTRUCTION NO. 8 – DAMAGES

If you decide for Nathan Kobasic on the question of liability, then you must fix the amount of money, in accordance with Final Instruction No. 7, that will reasonably and fairly compensate him for any of the following elements of loss or harm suffered by his injury proved by the evidence to have been legally caused by Yankton Medical Clinic, 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 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 by Nathan Kobasic as a result of the injury.
2. The disability and disfigurement suffered by Nathan Kobasic as a result of the injury.
3. Such sum as will reasonably compensate Nathan Kobasic for whatever loss of earning capacity you find that he has suffered as a result of the injury. The factors to be considered in determining the measure of damages for loss of earning capacity are:
  - a. what Nathan Kobasic earned before the injury;
  - b. what Nathan Kobasic is capable of earning after the injury;
  - c. the prior ability of Nathan Kobasic;
  - d. the extent to which the injuries affect Nathan Kobasic's power to earn;
  - e. age;
  - f. life expectancy;
  - g. physical condition;
  - h. occupation;
  - i. skill; and
  - j. habits of industry.

Whether any of these elements of 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. 9 – DUTY DURING DELIBERATIONS

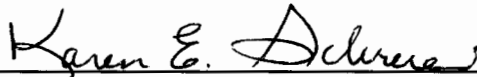
You must follow certain rules while conducting your deliberations and returning your verdict:

- Select a foreperson to preside over your discussions and to speak for you here in court.
- 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.
- 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.
- 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.
- 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 court security officer that you are ready to return to the courtroom.

Dated June 17, 2016.

  
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KAREN E. SCHREIER  
UNITED STATES DISTRICT JUDGE