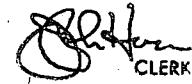


FILED

MAY 08 2017


Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

LINDA A. MILLER, M.D.,

Plaintiff,

vs.

HURON REGIONAL MEDICAL
CENTER, INC.,

Defendant.

CIV. 12-4138-KES

FINAL
INSTRUCTIONS
TO THE JURY

TABLE OF CONTENTS

FINAL INSTRUCTION

NO. 1 – INTRODUCTION AND DEFINITIONS	1
NO. 2 – BURDEN OF PROOF	2
NO. 3 – LEGAL CAUSE	3
NO. 4 – IMPEACHMENT	4
NO. 5 - EXPERT WITNESS TESTIMONY	5
NO. 6 – CORPORATION AS PARTY	6
NO. 7 – CORPORATE EMPLOYEES	7
NO. 8 – INSURANCE	8
NO. 9 – BREACH OF CONTRACT – ELEMENTS	9
NO. 10 – BREACH OF CONTRACT – COMPENSATORY DAMAGES	10
NO. 11 – DEFAMATION	11
NO. 12 – DEFAMATION – COMPENSATORY DAMAGES	13
NO. 13 - MITIGATION OF DAMAGES.....	15
NO. 14 – FUTURE DAMAGES	16
NO. 15 – PRESENT VALUE	17
NO. 16 – PUNITIVE DAMAGES.....	19
NO. 17 – DUTIES DURING DELIBERATIONS	22

VERDICT FORM

FINAL INSTRUCTION NO. 1 – INTRODUCTION AND DEFINITIONS

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, 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. 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 now as well as those I gave you earlier are in writing and will be available to you in the jury room. I emphasize, however, that this does not mean they are more important than my oral instructions. Again, 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 determining whether or not an issue has been proved by the greater convincing force of the evidence, 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 “more likely true than not true.” It applies in criminal cases, but not in this civil case; so put it out of your mind.

FINAL INSTRUCTION NO. 3 – LEGAL CAUSE

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 a result. A legal cause may act in combination with other causes to produce a result.

FINAL INSTRUCTION NO. 4 – 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 said or did something, or 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 you think it deserves.

FINAL INSTRUCTION NO. 5 – EXPERT WITNESS TESTIMONY

A witness may qualify as an expert and give an opinion on a matter at issue if the witness has special knowledge, skill, experience, training, or education concerning the matter on which the expert testifies. In deciding the weight to give to the opinion, you should consider the expert's qualifications, credibility, and reasons for the opinion. You are not bound by the opinion. If you decide that the reasons for the expert's opinion are unsound, or that other evidence outweighs the opinion, you may disregard the opinion entirely.

FINAL INSTRUCTION NO. 6 – CORPORATION AS PARTY

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

FINAL INSTRUCTION NO. 7 – CORPORATE EMPLOYEES

A corporation can act only through its officers, employees, and agents. Any act or omission of an officer, employee, or agent within the scope of his or her authority is the act or omission of the corporation for which he or she was then acting.

The Board of Directors, Medical Executive Committee, Chief Executive Officer, and administrative staff were the agents of Huron Regional Medical Center at the time of the events that gave rise to this lawsuit. Therefore, any acts or omissions of the Board of Directors, Medical Executive Committee, Chief Executive Officer, and administrative staff at that time are considered the acts or omissions of Huron Regional Medical Center.

FINAL INSTRUCTION NO. 8 – INSURANCE

Whether a party is insured has no bearing whatever on any issue that you must decide. You must refrain from any inference, speculation, or discussion about insurance.

FINAL INSTRUCTION NO. 9 – BREACH OF CONTRACT ELEMENTS

Dr. Miller alleges that Huron Regional Medical Center breached its contract by implementing corrective action against her without following the procedures required by Huron Regional Medical Center's bylaws. Huron Regional Medical Center denies that it implemented corrective action proceedings against Dr. Miller and asserts that she was not entitled to a hearing or any other of the corrective action procedures contained in the bylaws. To establish that Huron Regional Medical Center is liable on the breach of contract claim, Dr. Miller must prove each of the following three elements by the greater convincing force of the evidence:

One, Dr. Miller and Huron Regional Medical Center had an enforceable promise;

A hospital's bylaws constitute an enforceable promise between the hospital and the hospital's medical staff members.

Two, Huron Regional Medical Center breached that promise;

And three, Dr. Miller was damaged because of the breach.

If you find that Dr. Miller proved each of the three elements by the greater convincing force of the evidence, your verdict on the breach of contract claim must be for Dr. Miller. If, on the other hand, Dr. Miller failed to prove any of these elements by the greater convincing force of the evidence, then your verdict must be for Huron Regional Medical Center.

FINAL INSTRUCTION NO. 10 – BREACH OF CONTRACT – COMPENSATORY DAMAGES

If you determine that Huron Regional Medical Center breached its contract with Dr. Miller, you must then fix the amount of money that will reasonably and fairly compensate Dr. Miller for all detriment legally caused by the breach, or which, in the ordinary course of things, would be likely to result from the breach.

Damages for breach of contract that are not clearly ascertainable in both their nature and origin are unrecoverable.

FINAL INSTRUCTION NO. 11 – DEFAMATION – ELEMENTS

Dr. Miller also alleges that Huron Regional Medical Center defamed her, by utilizing libel, when it filed the Adverse Action Report with the National Practitioner Data Bank.

To find Huron Regional Medical Center liable on the defamation claim, Dr. Miller must prove each of the following three elements by the greater convincing force of the evidence:

One, that Huron Regional Medical Center included false information in the Adverse Action Report that it submitted to the National Practitioner Data Bank;

The Health Care Quality Improvement Act requires health care entities to file certain reports with the National Practitioner Data Bank. Health care entities are required to file a report on a physician when the health care entity accepts the surrender of a physician's clinical privileges while the physician is under an investigation by the entity relating to possible incompetence or improper professional conduct, or in return for not conducting such an investigation or proceeding.

In determining whether Dr. Miller was under an investigation at the time she surrendered her privileges, you should consider the guidelines of the National Practitioner Data Bank Guidebook, which was published in 2001 by the Secretary of the Department of Health and Human Services. You may also consider the testimony of witnesses and the exhibits admitted in evidence.

Two, that Huron Regional Medical Center, by and through its officers, employees, or agents, knew that the information contained in the Adverse Action Report was false;

Huron Regional Medical Center relies upon the advice of counsel defense to establish it did not know the report or reports filed with Data Bank contained false information. The burden of proof is on Huron Regional Medical Center to prove that: (1) the advice of counsel was sought in good faith, from honest motives, and for good purposes; (2) the advice of counsel was obtained after a full and fair disclosure of all the facts within the Huron Regional Medical Center's knowledge and information; and (3) the attorney's advice was followed in good faith.

And Three, that the false information caused Dr. Miller to be subject to hatred, contempt, ridicule, or public disgrace, or caused her to be shunned, avoided, or injured in her occupation.

If you find that Dr. Miller proved each of these three elements by the greater convincing force of the evidence, your verdict on the defamation claim must be for Dr. Miller. If, on the other hand, Dr. Miller failed to prove any of these elements by the greater convincing force of the evidence, then your verdict must be for Huron Regional Medical Center.

FINAL INSTRUCTION NO. 12 – DEFAMATION – COMPENSATORY DAMAGES

If you decide for Dr. Miller on the question of liability on her claim for defamation, you must then fix the amount of money that will reasonably and fairly compensate her for any of the following elements of loss or harm proved by the evidence to have been legally caused by Huron Regional Medical Center's conduct, whether such loss or harm could have been anticipated or not, namely:

- (1) The earnings Dr. Miller has lost, if any, from any source from the date of the defamation until the date of trial;
- (2) Such sum as will reasonably compensate Dr. Miller for whatever loss of earning capacity you find Dr. Miller has suffered as a result of the defamation;

The factors to be considered in determining the measure of damages for loss of earning capacity include what Dr. Miller earned before the injury; what she is capable of earning after the injury; her prior ability; the extent to which the injuries affect her power to earn; age; life expectancy; physical condition; occupation; skill; and habits of industry.

- (3) The mental anguish, if any, experienced by Dr. Miller in the past and reasonably certain to be experienced in the future as a result of the defamation.

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. 13 -MITIGATION OF DAMAGES

In determining the amount of money that will reasonably and fairly compensate Dr. Miller for her lost wages and loss of earning capacity, you are instructed that Dr. Miller has a duty under the law to exercise reasonable care to minimize existing damage and to prevent further damage. Huron Regional Medical Center has the burden of demonstrating that Dr. Miller did not minimize her damages. Therefore, if you find by the greater weight of the evidence that Dr. Miller failed to take reasonable care, diligence, and effort to minimize her damages, you must reduce her damages by the amount she reasonably could have avoided if she had taken such measures.

FINAL INSTRUCTION NO. 14 – FUTURE DAMAGES

The law allows damages for detriment reasonably certain to result in the future. By their nature, all future happenings are somewhat uncertain. The law simply requires that facts exist which establish a basis for measuring any claimed future damages with reasonable certainty. The requirement of reasonable certainty applies only to whether future damages exist; once such 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, uncertainty as to the measure or extent of damages or the fact that they cannot be measured with exactness does not bar their recovery. On the other hand, conjecture, speculation, or the mere possibility of future damages does not warrant such an award.

FINAL INSTRUCTION NO. 15 – PRESENT VALUE DAMAGES

If you should find that Dr. Miller is entitled to a verdict, and further find that the evidence in the case establishes a reasonable likelihood of loss of future earnings then you must ascertain the present value in dollars of such future damage, since the award of future damages necessarily requires that payment be made now for a loss that will not be sustained until some future date

Under these circumstances, the result is that Dr. Miller will in effect be reimbursed in advance of the loss, and so will have the use of money which she would not have received until some future date, but for the verdict.

In order to make a reasonable adjustment for the present use of money representing a lump-sum payment of anticipated future loss, the law requires that you discount, or reduce to its present value, the amount of the anticipated future loss, by taking (1) the interest rate or return which Dr. Miller could reasonably be expected to receive on an investment of the lump-sum payment together with (2) the period of time over which the future loss is reasonably certain to be sustained; and then reduce, or in effect deduct from, the total amount of future loss whatever that amount would be reasonably certain to earn or return, if invested at such rate of interest over such period of time; and include in the verdict an award for only the present worth—the reduced amount of anticipated future loss.

Bear in mind that your duty to discount to present value applies only to loss of future earnings. Damages for future pain and suffering, and future mental anguish are not subject to any reduction for the present use of such money.

Finally, in determining the present value of future damages, you may also take into consideration the effect of inflation or deflation on the future damages.

FINAL INSTRUCTION NO. 16 – PUNITIVE DAMAGES

In addition to any actual damages that you may award to Dr. Miller on her defamation claim, you may also, in your discretion, award punitive damages if you find that she suffered injury to person or property as a result of the oppression, malice, intentional misconduct, or willful and wanton misconduct of Huron Regional Medical Center. Dr. Miller has the burden of proof on the issue of punitive damages. The purpose of awarding punitive damages is to set an example and to punish Huron Regional Medical Center.

“Oppression” is conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person’s rights.

“Malice” is not simply the doing of an unlawful or injurious act; it implies that the act complained of was conceived in the spirit of mischief or of criminal indifference to civil obligations. Malice may be inferred from the surrounding facts and circumstances.

Actual malice is a positive state of mind, evidenced by the positive desire and intention to injure another, actuated by hatred or ill will toward that person. Presumed, or legal, malice is malice which the law infers from or imputes to certain acts. Legal malice may be imputed to an act if the person acts willfully or wantonly to the injury of the other in reckless disregard of the other’s rights. Hatred or ill will is not always necessary.

Conduct is “intentional” when a person acts or fails to act, for the purpose of causing injury or knowing that injury is substantially certain to occur.

Knowledge or intent may be inferred from the person’s conduct and the surrounding circumstances.

“Willful and wanton misconduct” is more than negligent conduct, but less than intentional conduct. Conduct is willful and wanton when a person acts or fails to act when the person knows, or should have known, that injury is likely to occur.

If you find that punitive damages should be awarded, then in determining the amount, you should consider the following five factors:

(1) The intent of Huron Regional Medical Center.

In considering Huron Regional Medical Center's intent, you should examine the degree of reprehensibility of its misconduct, including, but not limited to, the following factors:

- (a) whether the harm caused was physical as opposed to economic;
- (b) whether the tortious conduct evinced an indifference to, or reckless disregard of, the health or safety of others;
- (c) whether the target of the conduct was vulnerable financially;
- (d) whether the conduct involved repeated actions or was an isolated incident; and
- (e) whether the harm was the result of intentional malice, trickery or deceit, or mere accident.

(2) The amount awarded in actual damages.

In considering this factor, you should consider:

- (a) whether Dr. Miller has been completely compensated for the economic harm caused by Huron Regional Medical Center;
- (b) the relationship between the harm or potential harm suffered by Dr. Miller and the punitive damages award;
- (c) the magnitude of the potential harm, if any, that Huron Regional Medical Center's conduct would have caused to its intended victim if the wrongful plan had succeeded; and
- (d) the possible harm to other victims that might have resulted if similar future behavior were not deterred.

The amount of punitive damages must bear a reasonable relationship to the actual damages.

(3) The nature and enormity of the wrong.

(4) Huron Regional Medical Center's financial condition.

(5) All of the circumstances concerning Huron Regional Medical Center's actions, including any mitigating circumstances which

may operate to reduce, without wholly defeating, punitive damages.

You may not consider any one factor alone, but should consider all five factors in determining the amount, if any, of an award.

FINAL INSTRUCTION NO. 17 – 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.

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 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.

Dated May 8, 2017.



KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE