

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

ANGELA VEURINK,

Plaintiff,

vs.

DR. JILL MURPHY

Defendant.

CIV 18-4021

FINAL JURY INSTRUCTIONS

INSTRUCTION NO. 1

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. Do not single out some instructions and ignore others, because they all are important. This is true even though some of those I gave you at the beginning of trial are not repeated here.

The instructions I am about to give you now 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 earlier instructions. Again, all instructions, whenever given and whether in writing or not, must be followed.

Eighth Circuit Manual of Model Jury Instructions Civil, 3.01 (2018) (modified); Defendant's Proposed Preliminary Instruction No. 1 (modified).

INSTRUCTION NO. 2

As explained in my prior instructions, this is a civil case, brought by the plaintiff, Angela Veurink, against the defendant, Dr. Jill Murphy.

Angela Veurink alleges that Dr. Murphy was negligent in that she failed to use the care and skill ordinarily exercised by plastic surgeons in performing a breast reduction surgery, an umbilical hernia repair, and abdominoplasty, and failed to be diligent in accomplishing the purposes for which she was employed. You are instructed you that this is the only claim for you to consider.

Angela Veurink seeks compensatory damages for the injuries and losses she sustained.

Dr. Murphy denies any negligence on her part which caused injury or damage to Angela Veurink. Dr. Murphy also denies the nature, scope, and extent of Angela Veurink's claimed damages and asks that Angela Veurink recover nothing in this matter.

It will be your duty to decide from the evidence whether Angela Veurink is entitled to a verdict against Dr. Murphy. From the evidence you will decide what the facts are. You are entitled to consider the evidence in the light of your own observations and experiences in the affairs of 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.

South Dakota Pattern Jury Instructions Civil, 1-10-20 (2018) (modified); *Eighth Circuit Manual of Model Jury Instructions Civil*, 1.03 (2018) (modified); Plaintiff's Proposed Preliminary Instruction 3; Defendant Proposed Preliminary Instruction No. 2 (modified).

INSTRUCTION NO. 3

When I use the word “evidence,” I mean the testimony of the witnesses, documents, and other things received as exhibits; facts that I tell you the parties have agreed are true; and any other facts that I tell you to accept as true.

Certain things are not evidence. I will list those things 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 a duty—to object when they believe something should not be part of the trial. Do not be influenced one way or the other by objections. If I sustain a lawyer’s objection to a question or an exhibit, that means the law does not allow you to consider that information. When that happens, you have to ignore the question or the exhibit, and you must not try to guess what the information might have been.

3. Testimony and exhibits that I strike from the record, or tell you to disregard, are not evidence and you must not consider them.

4. Anything you see or hear about this case outside the courtroom is not evidence, unless I specifically tell you otherwise.

Also, I might tell you that you can consider a piece of evidence for one purpose only and not for any other purpose. If that happens, I will tell you the purpose for which you can and cannot consider the evidence. A particular item of evidence is sometimes received for a limited purpose only. That is, it can be used by you for only one particular purpose, and not for any other purpose. I will tell you when that occurs, and instruct you on the purposes for which the item can and cannot be used.

INSTRUCTION NO. 3 (continued)

Finally, 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.

Eighth Circuit Manual of Model Jury Instructions Civil, 1.04 (2018) (modified); Plaintiff’s Proposed Preliminary Instruction 5 (modified); Defendant’s Proposed Preliminary Instruction No. 4 (modified).

INSTRUCTION NO. 4

As stated earlier, 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 intelligence of the witness; the opportunity the witness had to see or hear the things testified about; the memory, knowledge, education, and experience of the witness; any reasons the witness may have for testifying a certain way; how the witness acted while testifying; whether the witness said something different at another time; the general reasonableness of the testimony; and the extent to which the testimony is consistent with other evidence you believe.

Eighth Circuit Manual of Model Jury Instructions Civil, 3.03 (2018); Plaintiff's Proposed Instruction 3 (modified); Defendant's Proposed Instruction No. 4.

INSTRUCTION NO. 5

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 in a particular science, profession, or occupation. In deciding the weight to give to the opinion, you should consider the expert's qualifications, credibility, and reasons for the opinion. You should consider each expert opinion received in evidence in this case, and give it such weight as you think it deserves. You are not bound by the opinion; therefore, if you should decide that the opinion of an expert witness is not based on sufficient education and experience, or if you should conclude that the reasons for the opinion are unsound, or that other evidence outweighs the opinion, you may disregard the opinion entirely.

Devitt, Blackmar, Wolff & O'Malley, *Federal Jury Practice and Instructions*, § 72.08 (modified); Plaintiff's Proposed Instruction 8 (modified); Defendant's Proposed Instruction 7 (modified).

INSTRUCTION NO. 6

A witness may be discredited or impeached by contradictory evidence or by evidence that at some other time the witness has said or done something, or has failed to say or do something that is inconsistent with the witness's present testimony.

If you believe any witness has been impeached and thus discredited, you may give the testimony of that witness such credibility, if any, you think it deserves.

If a witness is shown knowingly to have testified falsely about any material matter, you have a right to distrust such witness's other testimony and you may reject all the testimony of that witness or give it such credibility as you may think it deserves.

An act or omission is "knowingly" done, if voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

INSTRUCTION NO. 7

If any reference by the Court or by the lawyers to matters of testimony or exhibits does not coincide with your own recollection of that evidence, it is your recollection which should control during your deliberations and not the statements of the Court or of the lawyers.

You are the sole judges of the evidence received in this case.

In weighing the evidence in this case, you have a right to consider the common knowledge possessed by all of you, together with the ordinary experiences and observations in your daily affairs of life.

O'Malley, Grenig, and Lee, *Federal Jury Practice and Instructions*, § 12.07 (6th ed. 2011); *South Dakota Pattern Jury Instructions Civil*, 1-30-20 (2018) (modified); Plaintiff's Proposed Instruction 4 (modified); Defendant's Proposed Instruction No. 3 (modified).

INSTRUCTION NO. 8

If you took notes during the trial, your notes should be used only as memory aids. You should not give your notes precedence over your independent recollection of the evidence. If you did not take notes, you should rely on your own independent recollection of the proceedings and you should not be influenced by the notes of other jurors. I emphasize that notes are not entitled to any greater weight than the recollection or impression of each juror as to what the testimony may have been.

United States v. Rhodes, 631 F.2d 43, 46 n.3 (5th Cir. 1980); Defendant's Proposed Instruction No. 6.

INSTRUCTION NO. 9

The issues to be determined by you in this case regarding Angela Veurink's claims for medical negligence are these:

First, was Dr. Murphy negligent?

If your answer to that question is "no," you must return a verdict for Dr. Murphy on that claim. If your answer is "yes," you will have a second issue to determine, namely:

Was that negligence a legal cause of any injury to Angela Veurink?

If your answer to that question is "no," Angela Veurink is not entitled to recover damages; but if your answer is "yes," you then will have a third issue to determine, namely: the amount of damages, if any, Angela Veurink is entitled to recover and return a plaintiff's verdict for the amount thereof.

You must first determine the questions of liability before you consider the question of damages.

South Dakota Pattern Jury Instructions Civil, 1-50-10 (2018); Plaintiff's Proposed Instruction 11 (modified).

INSTRUCTION NO. 10

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. Dr. Murphy’s conduct must have such an effect in producing the harm as to lead reasonable people to regard it as a cause of Angela Veurink’s harm.

South Dakota Pattern Jury Instructions Civil, 20-10-20 (2018); *Kostel v. Schwartz*, 756 N.W.2d 363, 384 (S.D. 2008) (modified); Plaintiff’s Proposed Instruction 17; Defendant’s Proposed Instruction No. 9.

INSTRUCTION NO. 11

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.

South Dakota Pattern Jury Instructions Civil, 20-70-50 (2018); *Mousseau v. Schwartz*, 756 N.W.2d 345, 351 (S.D. 2008); *Hansen v. Isaak*, 19 N.W.2d 521, 522 (S.D. 1945); Plaintiff's Proposed Instruction 16; Defendant's Proposed Instruction No. 10.

INSTRUCTION NO. 12

You must decide whether Dr. Murphy possessed and used the knowledge, skill, and care which the law demands of a plastic surgeon based on the testimony and evidence of members of the profession who testified as expert witnesses.

South Dakota Pattern Jury Instructions Civil, 20-70-20 (2018); Kostel v. Schwartz, 756 N.W.2d 363, 383 (S.D. 2008); Plaintiff's Proposed Instruction 9; Defendant's Proposed Instruction No. 11 (modified).

INSTRUCTION NO. 13

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.

South Dakota Pattern Jury Instruction Civil, 20-70-70 (2018); *Kostel v. Schwartz*, 756 N.W.2d 363, 382 (S.D. 2008); Plaintiff's Proposed Instruction 15; Defendant's Proposed Instruction No. 12.

INSTRUCTION NO. 14

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. In this action, Angela Veurink has the burden of proving the following issues:

1. ~~As to the medical negligence claim,~~ that Dr. Murphy was negligent, or violated the standard of care, as specified in instruction no. 11, owed to Angela Veurink;
2. That such negligence was the legal cause of any damage, injury, or loss suffered or experienced by Angela Veurink; *and*
3. The nature and extent of the damages, injuries, and losses suffered by Angela Veurink, as a legal result of the negligence of Dr. Murphy;

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. The greater convincing force of the evidence is not necessarily determined by the greater number of witnesses or exhibits a party has presented.

INSTRUCTION NO. 15

If you decide for Angela Veurink on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate Angela Veurink 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. Murphy'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:

- The disfigurement suffered by Angela Veurink;
- The pain and suffering, mental anguish, and loss of capacity of enjoyment of life experienced in the past and reasonably certain to be experienced in the future as a result of the injuries sustained by Angela Veurink; and
- The reasonable value of necessary medical care, treatment, and services received.

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.

South Dakota Pattern Jury Instructions Civil, 50-00-10, 50-10-60, 50-10-70, 50-10-80 (2018); Plaintiff's Proposed Instruction 19 (modified).

Plaintiff's Proposed Instruction _____

Avera Health Plans initially determined that the breast portion of the surgery was covered. Avera Health Plans subsequently determined that the breast portion of the surgery was not covered. Whether or not Avera Health Plans covered the operation is irrelevant to the medical malpractice claim at issue in this case.

If you get
to the issue of
damages, you
should

~~the~~ ISA
Whether or not the Plaintiff
received health insurance
benefits is irrelevant
to this case.

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 cannot be based on conjecture, speculation, or mere possibility.

South Dakota Pattern Jury Instructions Civil, 50-120-10 (2018); Plaintiff's Proposed Instruction 21.

INSTRUCTION NO. 17

Any person who is entitled to recover damages is entitled to recover thereon from the day that the loss or damage occurred except:

- (1) During a period of time, the person liable for the damages was prevented by law, or by an act of the person entitled to recover the damages from paying the damages; or
- (2) Interest is not recoverable on damages which will occur in the future or intangible damages such as pain and suffering, mental anguish, or loss of enjoyment of life.

You must decide:

- (1) the amount of damages (if any), and
- (2) the amount of damages which are subject to prejudgment interest (if any), and
- (3) the date or dates on which the loss or damage occurred.

If you return a verdict for Angela Veurink, you must indicate on the verdict form whether you find Angela Veurink is entitled to prejudgment interest, and if so, the amount of damages upon which interest is granted and the beginning date or dates of such interest. Based upon your findings, the Court will calculate the amount of interest Angela Veurink is entitled to recover.

South Dakota Pattern Jury Instructions Civil, 50-130-10 (2018); Plaintiff's Proposed Instruction 23.

INSTRUCTION NO. 18

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.

South Dakota Pattern Jury Instructions Civil, 60-10-20 (2018) (modified); Plaintiff's Proposed Instruction 27 (modified); *Ardnt v. Bubenik*, No. 02-4259 (D.S.D. Apr. 30, 2004).

INSTRUCTION NO. 19

The fact that I have instructed you as to the proper measure of damages should not be considered as intimating 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.

O'Malley, Grenig, & Lee, *Federal Jury Practice & Instructions Civil*, § 106.02 (6th ed. 2011)

(modified); Defendant's Proposed Instruction No. 15 (modified).

INSTRUCTION NO. 20

In conducting your deliberations and returning your verdict, there are certain rules you must follow. I will 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 going against what you believe to be the true, because all jurors have to agree on the verdict.

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 you are not for or against any party. You are judges—judges of the facts. Your only job is to study the evidence and decide what is true.

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 vote stands numerically.

Fourth, your verdicts 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 verdicts should be—that is entirely for you to decide.

INSTRUCTION NO. 20 (continued)

Finally, the verdict form is your written decision in this case. You will take these forms to the jury room, and when you have all agreed on the verdicts, your foreperson will fill in the forms, sign and date them, and tell the court security officer that you are ready to return to the courtroom.

Eighth Circuit Manual of Model Jury Instructions Civil, 3.06 (2018) (modified); Plaintiff's Proposed Instruction 26 (modified); Defendant's Proposed instruction No. 17.

2. Prejudgment interest relating to Angela Veurink's past medical expenses beginning _____ (fill in date) on the amount of \$ _____ (stating amount, or if none, write the word "none").
3. Pain and suffering, mental anguish, loss of enjoyment of life, and disfigurement in the sum of \$ _____ (stating amount, or if none, write the word "none").

Dated this _____ day of July, 2019.

Foreperson