

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

TODD NICKEL AS ADMINISTRATOR OF
THE ESTATE OF SHIRLEY MAE NICKEL,

Plaintiff,

vs.

EVANGELICAL LUTHERAN GOOD
SAMARITAN SOCIETY, d/b/a GOOD
SAMARITAN CENTER OTTUMWA,

Defendant.

4:17-cv-00126-HCA

FINAL JURY INSTRUCTIONS

Members of the jury, the instructions I gave at the beginning of the trial and during the trial are still in effect. Now I am going to give you some additional instructions.

You have to follow all of my instructions – the ones I gave you earlier, before and during the trial, as well as those I give you now. Do not single out some instructions and ignore others, because they are all important. This is true even though I am not going to repeat some of the instructions I gave you previously. I have repeated several instructions from the preliminary instructions in this final set. That does not make them more important than the other instructions I have given you.

You will have copies of all of the written instructions in the jury room. Remember, you have to follow all instructions, no matter when I give them, whether or not you have written copies.

FINAL INSTRUCTION NO. 1

Your duty is to decide what the facts are from the evidence. You are allowed to consider the evidence in the light of your own observations and experiences. After you have decided what the facts are, you will have to apply those facts to the law, which I give you in these and in my other instructions. That is how you will reach your verdict. Only you will decide what the facts are. However, you must follow my instructions, whether you agree with them or not. You have taken an oath to follow the law that I give you in my instructions.

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 says, or only part of it, or none of it. In deciding what testimony to believe, you may consider a witness's intelligence, the opportunity the witness had to see or hear the things they testify about, a witness's memory, knowledge, education and experience, any reasons a witness might have to testify a certain way, how a witness acted while testifying, whether a witness said something different at another time, whether a witness's testimony sounded reasonable, and whether and to what extent a witness's testimony is consistent with other evidence that you believe.

In deciding whether to believe a witness, remember that people sometimes hear or see things differently and sometimes forget things. You will have to decide whether a contradiction is an innocent misrecollection, or a lapse of memory, or an intentional falsehood; that may depend on whether it has to do with an important fact or only a small detail.

Do not let sympathy, or your own likes or dislikes, influence you. The law requires you to come to a just verdict based only on the evidence, your common sense, and the law that I give you in my instructions, and nothing else.

Nothing I said or did during this trial is meant to suggest what I think of the evidence or

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what I think your verdict should be.

FINAL INSTRUCTION NO. 2

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

Some things are not evidence. Now I will tell you what is not evidence:

1. Lawyers’ statements, arguments, questions, and comments are not evidence.
2. Documents or other things that might be in court or talked about, but that I do not receive as exhibits, are not evidence.
3. Objections are not evidence. Lawyers have a right – and sometimes a duty – to object when they believe something should not be a 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.
4. Testimony and exhibits that I strike from the record, or tell you to disregard, are not evidence, and you must not consider them.
5. Anything you see or hear about this case outside the courtroom is not evidence, and you must not consider it unless I specifically tell you otherwise.

Also, I might have told you that you can consider a piece of evidence for one purpose only, and not for any other purpose. If that happened, I told you what purpose you can consider the evidence for and what you are not allowed to consider it for. You need to pay close attention when I give an instruction about evidence that you can consider for only certain purposes, because you might not have that instruction in writing later in the jury room.

PAGE TWO OF FINAL INSTRUCTION NO. 2

Some of you may have heard the terms “direct evidence” and “circumstantial evidence.” You should not be concerned with those terms, since the law makes no distinction between the weight to be given to direct and circumstantial evidence.

FINAL INSTRUCTION NO. 3

You will have to decide whether certain facts have been proved by the greater weight of the evidence. A fact has been proved by the greater weight of the evidence, if you find that it is more likely true than not true. You decide that by considering all of the evidence and deciding what evidence is more believable.

FINAL INSTRUCTION NO. 4

The parties have stipulated -- that is, they have agreed -- that certain facts are as counsel stated into the record during trial. You must, therefore, treat those facts as having been proved.

FINAL INSTRUCTION NO. 5

You have heard evidence claiming witnesses made statements before this trial while under oath which were inconsistent with what the witness said in this trial. If you find these statements were made and were inconsistent, then you may consider them as part of the evidence, just as if they had been made at this trial.

You also may use these statements to help you decide if you believe the witness. You may disregard all or any part of the testimony if you find the statements were made and were inconsistent with the testimony given at trial, but you are not required to do so. Do not disregard the trial testimony if other evidence you believe supports it, or if you believe it for any other reason.

FINAL INSTRUCTION NO. 6

You have heard evidence claiming witnesses made statements before this trial while not under oath which were inconsistent with what the witness said in this trial. Because the witness did not make the earlier statement under oath, you may use them only to help decide if you believe the witness.

Decide if the earlier statements were made and whether they were inconsistent with testimony given at trial. You may disregard all or any part of the testimony if you find the statements were made and were inconsistent with the testimony given at trial, but you are not required to do so. Do not disregard the trial testimony if other evidence you believe supports it, or if you believe it for any other reason.

FINAL INSTRUCTION NO. 7

Under the Rules of Evidence, the following persons have testified as expert witnesses in this trial: Deborah Karas, Brad Randall, and Gwen Suntken. Persons who have become experts in a field because of their education and experience may give their opinion on matters in that field and the reasons for their opinion.

Consider expert testimony just like any other testimony. You may accept it or reject it. You may give it as much weight as you think it deserves, considering the witness's education and experience, the reasons given for the opinion, and all the other evidence in the case.

An expert witness may have been asked to assume certain facts are true and to give an opinion based on that assumption. This is called a hypothetical question. If any fact assumed in the question has not been proved by the evidence, you should decide if that omission affects the value of the opinion.

FINAL INSTRUCTION NO. 8

The fact that Plaintiff is an estate or that Defendant is a corporation should not affect your decision. All persons are equal before the law, and estates and corporations, whether large or small, are entitled to the same fair and conscientious consideration by you as any other person.

FINAL INSTRUCTION NO. 9

A corporation is liable for the negligent acts of an officer, agent, or employee if the acts are done in the scope of employment.

FINAL INSTRUCTION NO. 10

For an act to be within the scope of an employee's employment, the act must be necessary to accomplish the purpose of the employment, and it must be intended to accomplish that purpose.

FINAL INSTRUCTION NO. 11

In these instructions I will be using the term “fault.” Fault means one or more acts or omissions towards the person of the actor or of another which constitutes negligence.

FINAL INSTRUCTION NO. 12

“Negligence” means failure to use ordinary care. Ordinary care is the care which a reasonably careful person would use under similar circumstances. “Negligence” is doing something a reasonably careful person would not do under similar circumstances, or failing to do something a reasonably careful person would do under similar circumstances.

FINAL INSTRUCTION NO. 13

A skilled nursing home must use the degree of ordinary care and attention that the known mental and physical condition of a patient requires.

A violation of this duty is negligence.

FINAL INSTRUCTION NO. 14

You must decide whether the claimed harm to Shirley Nickel is within the scope of the Defendant's liability. Shirley Nickel's claimed harm is within the scope of the Defendant's liability if that harm arises from the same general types of danger that Defendant should have taken reasonable steps to avoid.

Consider whether repetition of the Defendant's conduct makes it more likely harm of the type Plaintiff claims to have suffered would happen to another. If not, the harm is not within the scope of liability.

FINAL INSTRUCTION NO. 15

Plaintiff alleges that Defendant was specifically negligent. Plaintiff must prove all of the following three propositions to recover for specific negligence:

- (1) Defendant was specifically negligent in one or more of the following ways:
 - A. Failing to ensure Shirley Nickel was properly placed in the lift/sling,
or;
 - B. Failing to exercise ordinary care to ensure Shirley Nickel was safe and
secure in the lift/sling, or;
 - C. Failing to properly attend to Shirley Nickel while in the lift/sling;
 - D. Failing to properly document known unsafe conditions; and
- (2) The negligence was a cause of damage; and
- (3) The amount of damage.

If Plaintiff has failed to prove any of these numbered propositions, Plaintiff is not entitled to damages for specific negligence. If Plaintiff has proved all three numbered propositions, then you will consider the defense of comparative fault as explained in instruction Nos. 24-26.

FINAL INSTRUCTION NO. 16

In addition to alleging specific negligence in Instruction No. 15, Plaintiff alleges that Shirley Nickel's injuries were caused by the Defendant's general negligence. If you find Shirley Nickel's injuries were caused by negligence in one or more of the specific ways claimed by the Plaintiff as outlined in Instruction No. 15, then do not consider this general negligence claim. However, if you find the Plaintiff did not prove the injuries were caused by the Defendant's specific act or acts of negligence, then you will consider this general negligence claim.

Under the rule of general negligence, the occurrence of an injury allows you to conclude that the Defendant was negligent if the Plaintiff proves (1) the injury was caused by the lift/sling under the exclusive control of the Defendant, and (2) the injury would not have occurred if ordinary care had been used.

The Plaintiff must prove the Defendant had exclusive control of the lift/sling when she fell.

The Plaintiff must also prove the fall from the lift/sling would not have happened if ordinary care had been used. Proof of this requirement rests on common experience.

If you find the Plaintiff has proved both requirements of the rule, you may conclude the Defendant was negligent, but you are not required to do so. If the Plaintiff failed to prove either of the basic requirements, the Plaintiff cannot recover damages under the general negligence claim.

FINAL INSTRUCTION NO. 17

The conduct of a party is a cause of damage when the damage would not have happened except for the conduct.

FINAL INSTRUCTION NO. 18

If you find the Estate of Shirley Nickel is entitled to recover, it is your duty to determine the amount. In doing so, you shall consider the following items in determining an amount that will fully compensate the Estate of Shirley Nickel for the damages incurred:

1. Pre-death physical and mental pain and suffering.
2. Pre-death - loss of full mind and body.
3. Loss of parental consortium experienced by Todd Nickel.
4. Loss of parental consortium experienced by Mark Nickel.

The amount you assess for pre-death pain and suffering, loss of full mind and body, and loss of consortium cannot be measured by any exact or mathematical standard. You must use your sound judgment based upon an impartial consideration of the evidence. Your judgment must not be exercised arbitrarily, or out of sympathy or prejudice, for or against the parties. The amount you assess for any item of damage must not exceed the amount caused by the Defendant as proved by the evidence. A party cannot recover duplicate damages. Do not allow amounts awarded under one item of damage to be included in any amount awarded under another item of damage.

The amounts, if any, you find for each of the above items **will** be used to answer the special verdicts.

FINAL INSTRUCTION NO. 19

Pre-death physical and mental pain and suffering is physical and mental pain and suffering from the time of injury to the time of death.

Physical pain and suffering may include, but is not limited to, bodily suffering or discomfort.

Mental pain and suffering may include, but is not limited to, mental anguish or loss of enjoyment of life.

FINAL INSTRUCTION NO. 20

Pre-death - loss of full mind and body is the loss of function of the mind and/or body from the time of injury to the time of death.

FINAL INSTRUCTION NO. 21

Parental Consortium. The “present value” of the services which Shirley Nickel would have performed for Mark Nickel and Todd Nickel, but for her death, in the past and future. This is also known as loss of parental consortium. “Parental consortium” is the relationship between parent and child and the right of the child to the benefits of companionship, comfort, guidance, affection and aid of the parent in every parental relationship, general usefulness, industry and attention within the family. It does not include the loss of financial support from the injured parent, nor mental anguish caused by the parent’s death.

A child is not entitled to damages for loss of parental consortium unless the parent’s death has caused a significant disruption or diminution of the parent-child relationship.

Damages for loss of parental consortium are limited in time to the shorter of the child’s or Shirley Nickel’s normal life expectancy.

“Present value” is a sum of money paid now in advance which, together with interest earned at a reasonable rate of return, will compensate Plaintiff for future losses.

FINAL INSTRUCTION NO. 22

In determining the present value of the services Shirley Nickel would have provided as a parent, Instruction No. 21, you may consider:

1. The circumstances of her life.
2. Her age at the time of her death.
3. Her health, strength, character and life expectancy.
4. Her capacities, abilities and efficiencies in performing duties as a parent.
5. Her skills and abilities in providing instruction, guidance, advice and assistance to Mark Nickel and Todd Nickel.
6. The respective needs of Mark Nickel and Todd Nickel.
7. All other facts and circumstances bearing on the present value of services.

FINAL INSTRUCTION NO. 23

If Shirley Nickel had medical conditions making her more susceptible to injury than a person in normal health, then Defendant is responsible for all injuries and damages which are experienced by Plaintiff that are caused by Defendant's actions, even though the injuries claimed produce a greater injury than those which might have been experienced by a normal person under the same circumstances.

FINAL INSTRUCTION NO. 24

Defendant claims that Shirley Nickel was at fault in the following particular: Shirley Nickel's own actions during the transfer caused her fall. These grounds of fault have been explained to you in other instructions. Defendant must prove both of the following propositions:

1. Shirley Nickel was at fault in the following way: Shirley Nickel made an intentional movement in the lift during the transfer.
2. Shirley Nickel's fault was a cause of the claimed damages.

If Defendant has failed to prove any of these propositions, the Defendant has not proved its defense. If Defendant has proved both of these propositions, then you assign a percentage of fault against Shirley Nickel and include Shirley Nickel's fault in the total percentage of fault found by you in answering the special verdicts.

FINAL INSTRUCTION NO. 25

Damages may be the fault of more than one person. In comparing fault, you should consider all of the surrounding circumstances as shown by the evidence, together with the conduct of Defendant, The Evangelical Lutheran Good Samaritan Society and Shirley Nickel, and the extent of the causal relation between their conduct and the damages claimed. You should then determine what percentage, if any, each person's fault contributed to the damages.

FINAL INSTRUCTION NO. 26

After you have compared the conduct of Shirley Nickel and the Defendant, if you find that Shirley Nickel was at fault and her fault was more than 50% of the total fault, the Estate of Shirley Nickel cannot recover damages.

However, if you find that Shirley Nickel's fault was 50% or less of the total fault, then I will reduce the total damages by the percentage of Shirley Nickel's fault.

FINAL INSTRUCTION NO. 27

In arriving at an item of damage or any percentage of fault, you cannot arrive at a figure by taking down the estimate of each juror as to an item of damage or a percentage of fault, and agreeing in advance that the average of those estimates shall be your item of damage or percentage of fault.

FINAL INSTRUCTION NO. 28

Standard Mortality Table indicates the normal life expectancy of people who are the same age as Shirley Nickel at the time of her death is 8.29 years. The statistics from a Standard Mortality Table are not conclusive. You may use this information, together with all the other evidence about Shirley Nickel's prior health, habits, occupation, and lifestyle, when deciding issues of future damages.

FINAL INSTRUCTION NO. 29

The exhibits received into evidence will be provided to you in the jury room during your deliberations. You may see that some of the exhibits have portions which are redacted or blacked out. Do not be concerned or speculate about the information which has been removed from these exhibits, as the Court has prior to trial ruled that the redacted information is not relevant to the case.

FINAL INSTRUCTION NO. 30

During the trial you have been allowed to take notes. You may take your notes with you to the jury room to use in your deliberations. Remember, these are notes and not evidence. Generally, they reflect the recollection or impression of the evidence as viewed by the person taking them, and may be inaccurate or incomplete.

Upon reaching a verdict, leave the notes in the jury room, and they will be destroyed.

FINAL INSTRUCTION NO. 31

There are rules you must follow when you go to the jury room to deliberate and return with your verdict.

First, you will select a 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 this without going against what you believe to be the truth, because all jurors have to agree on the verdict.

Each of you must come to your own decision, but only after you have considered all the evidence, discussed the evidence fully with your fellow jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your mind if the discussion persuades you that you should. But, do not come to a decision just because other jurors think it is right, or just 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, send me a note signed by one or more of you. Give the note to the court security officer and I will answer you as soon as I can, either in writing or here in court. While you are deliberating, do not tell anyone - including me - how many jurors are voting for any side.

Fourth, your verdict has to be based only on the evidence and on the law that I have given to you in my instructions. Nothing I have said or done was meant to suggest what I think your verdict should be. The verdict is entirely up to you.

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

Dated November 19, 2018.



Helen C. Adams
Chief U.S. Magistrate Judge