

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION**

**MARTHA DUBAN AND
THOMAS DUBAN,**

Plaintiffs,

vs.

WAVERLY SALES CO.,

Defendant.

WAVERLY SALES CO.,

Third-Party Plaintiff,

vs.

**MERLE OXLEY and
OXLEY'S, INC.,**

Third-Party Defendant.

No. C11-2022

FINAL JURY INSTRUCTIONS

FINAL 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. 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 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

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FINAL INSTRUCTION NO. 1 (Cont'd)

important than my earlier 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

The fact that Waverly Sales Co. and Oxley's Inc. are corporations should not affect your decision. All persons are equal before the law, and corporations, whether large or small, are entitled to the same fair and conscientious consideration by you as any other person.

Since a corporation can act only through its officers, employees, or other agents, any act of an officer, employee, or other agent of Waverly Sales or Oxley's, in the performance of that person's duties, is held in law to be an act of Waverly Sales or Oxley's, respectively.

FINAL INSTRUCTION NO. 3

In these instructions you are told that your verdict depends on whether you find certain facts have been proved. The burden of proving a fact is upon the party whose claims rely upon that fact. The party who has the burden of proving a fact must prove it by the greater weight or preponderance of the evidence. To prove something by the greater weight or preponderance of the evidence is to prove that it is more likely true than not true. It is determined by considering all of the evidence and deciding which evidence is more believable. If, on any issue in the case, the evidence is equally balanced, you cannot find that issue has been proved.

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

You may have heard of the term "proof beyond a reasonable doubt." That is a stricter standard which applies in criminal cases. It does not apply in civil cases such as this. You should, therefore, put it out of your minds.

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, you may consider a witness' intelligence, the opportunity a witness had to see or hear the things testified about, a witness' memory, any motives a witness may have for testifying a certain way, the manner of a witness while testifying, whether a 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.

FINAL INSTRUCTION NO. 4A

You have heard evidence claiming Thomas Duban and Merle Oxley made statements before this trial while under oath.

If you find such statements were made, you may regard the statements as evidence in this case the same as if Thomas Duban and Merle Oxley had made them under oath during the trial.

If you find such statements were made and were inconsistent with Thomas Duban's or Merle Oxley's testimony during the trial you may also use the statements as a basis for disregarding all or any part of Thomas Duban's or Merle Oxley's testimony during the trial but you are not required to do so. You should not disregard Thomas Duban's or Merle Oxley's testimony during the trial if other credible evidence supports it or if you believe it for any other reason.

FINAL INSTRUCTION NO. 5

You have heard testimony from persons described as experts. 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' education and experience, the reasons given for the opinion, and all the other evidence in the case.

FINAL INSTRUCTION NO. 6

To recover on their claims, the Dubans must prove all of the following propositions:

- 1. Waverly Sales Co. was negligent in one or more of the following ways:**
 - a. In opening the overhead door before the horses had safely exited the arena;**
 - b. In failing to keep the exit alleyway clear of persons while it was being used by horses.**
- 2. Waverly Sales Co.'s negligence was a cause of the Dubans' damages.**
- 3. The amount of damage.**

If the Dubans have failed to prove any of these propositions, then they are not entitled to damages. If the Dubans have proved all of these propositions, then you will consider the defense of comparative fault, as explained in Instruction No. 7, and the claim that the Oxleys were at fault, as explained in Instruction No. 8.

FINAL INSTRUCTION NO. 7

To prove its defense that Martha Duban was at fault, Waverly Sales must prove both of the following propositions:

1. Martha Duban was negligent in one or more of the following ways:
 - a. In choosing to sit in an area which was only accessible by crossing an area where horses were being led.
 - b. In choosing to enter the northeast alley at a time when she knew or should have known that horses were being driven out.
2. Martha Duban's negligence was a cause of her damages.

If Waverly Sales has proved both of these propositions, then you will assign a percentage of fault to Martha Duban, and include Martha Duban's fault in the total percentage of fault found by you in answering the special verdicts. If Waverly Sales has failed to prove either of these propositions, then Waverly Sales has not proved this defense. You will then consider Waverly Sales' claim that the Oxleys were at fault, as explained in Instruction No. 8.

FINAL INSTRUCTION NO. 8

To prove its claim that Merle Oxley was at fault, Waverly Sales must prove both of the following propositions:

1. Merle Oxley was negligent in one or more of the following ways:
 - a. Failing to restrain his horses in a manner to avoid causing damage to others.
 - b. Failing to act as a reasonably prudent horse owner and driver.
2. Merle Oxley's negligence was a cause of the Dubans' damages.

If Waverly Sales has proved both of these propositions, then you will assign a percentage of fault to Merle Oxley, and include Merle Oxley's fault in the total percentage of fault found by you in answering the special verdicts. If Waverly Sales has failed to prove either of these propositions, then Waverly Sales has not proved this claim.

FINAL INSTRUCTION NO. 9

Regarding element number 1 of Instruction Nos. 6, 7, and 8, "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.

The mere fact an accident occurred or a party was injured does not mean a party was negligent or at fault.

Regarding element number 2 of Instruction Nos. 6, 7, and 8, the conduct of a party is a cause of damage when the damage would not have happened except for the conduct.

FINAL INSTRUCTION NO. 9A

A sudden emergency is an unforeseen combination of circumstances that calls for immediate action, or a sudden or unexpected occasion for action. A person who, through no fault of his own, is placed in a sudden emergency, is not chargeable with negligence if he exercises that degree of care which a reasonably careful person would have exercised under the same or similar circumstances.

The burden of proving a sudden emergency falls on the person asserting the excuse.

FINAL INSTRUCTION NO. 10

Regarding element number 3 of Instruction No. 6, if you find Martha Duban is entitled to recover damages, then it is your duty to determine the amount. In doing so, you shall consider the following items in determining an amount which will fully compensate Martha Duban for the damages she incurred.

- 1. Past Medical Expenses.** The reasonable cost of necessary hospital charges, doctor charges, prescription expenses, and other necessary medical services from the date of injury to the present time. In determining the reasonable cost of these items, you may consider the amount charged, the amount actually paid, or any other evidence of what is reasonable and proper for such medical expense.
- 2. Past Loss of Function.** Loss of function of the mind and body from the date of injury to the present time. Loss of function is the inability of a particular part of the mind or body to function in a normal manner.
- 3. Future Loss of Function.** The present value of future loss of function of the mind and body.
- 4. Past Physical and Mental Pain and Suffering.** Physical and mental pain and suffering from the date of injury to the present time. 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.
- 5. Future Physical and Mental Pain and Suffering.** The present value of future physical and mental pain and suffering.

The amount you assess for physical and mental pain and suffering in the past and future, or loss of function of the mind and body in the past and future, 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

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FINAL INSTRUCTION NO. 10 (Cont'd)

assess for any item of damage must not exceed the amount caused by a party as provided by the evidence.

Future damages must be reduced to present value. "Present Value" is a sum of money paid now in advance which, together with interest earned at a reasonable rate of return, will compensate Martha Duban for future losses.

FINAL INSTRUCTION NO. 11

Thomas Duban claims damages for loss of spousal consortium. "Spousal consortium" is the fellowship of a husband and wife, and the right of each other to the benefits of company, cooperation, affection, the aid of the other in every marital relationship, general usefulness, industry, and attention within the home and family. It does not include loss of financial support from the injured spouse, nor mental anguish caused by the spouse's injury.

If you find Thomas Duban is entitled to recover damages, it is your duty to determine the amount. In doing so, you shall consider the following items:

1. The reasonable value of loss of spousal consortium which Thomas Duban would otherwise have received from the date of injury until the present time.
2. The present value of loss of spousal consortium which Thomas Duban would otherwise have received in the future.

Damages for loss of spousal consortium are limited in time to the shorter of Martha Duban's or Thomas Duban's normal life expectancy.

In determining the value for loss of spousal consortium you may consider:

1. The circumstances of Martha Duban's life.
2. Martha Duban's and Thomas Duban's ages at the time of Martha Duban's injury.
3. Martha Duban's health, strength, character and life expectancy.
4. Martha Duban's capabilities and efficiencies in performing the duties of a spouse.
5. Martha Duban's skills and abilities in providing instructions, guidance, advice and assistance.
6. Thomas Duban's needs.
7. All other facts and circumstances bearing on this issue.

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FINAL INSTRUCTION NO. 11 (Cont'd)

The amount you assess for loss of spousal consortium for the past and future 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 Waverly Sales and Merle Oxley, as proved by the evidence.

FINAL INSTRUCTION NO. 12

A Standard Mortality Table indicates the normal life expectancy of individuals who are the same age as Martha Duban is 5.74 years. A Standard Mortality Table indicates the normal life expectancy of individuals who are the same age as Thomas Duban is 7.01 years. The statistics from a Standard Mortality Table are not conclusive. You may use this information, together with all the other evidence about Martha Duban's and Thomas Duban's health, habits, occupation, and lifestyle, when deciding the issue of future damages.

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. In arriving at an item of damage, you cannot arrive at a figure by taking down the estimate of each juror and agreeing in advance that the average of those estimates will be the amount 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. 13

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 Martha Duban, Waverly Sales, and Merle Oxley, and the extent of the causal relation between their conduct and the damages claimed. You should then determine what percentage, if any, each party's fault contributed to the damages. Merle Oxley and Oxley's Inc. are to be treated as a single party for the purpose of determining their percentage of fault.

After you have compared the conduct of all parties, if you find Martha Duban was at fault, and her fault was more than 50% of the total fault, then the Dubans cannot recover damages. However, if you find Martha Duban's fault was 50% or less of the total fault, then I will reduce the total damages by the percentage of Martha Duban's fault. If you assign to a party less than 50% of the total fault, that party will only be liable to the extent of the percentage of fault assigned by you.

In assessing percentages of fault, you cannot arrive at a figure by taking down the estimate of each juror and agreeing in advance that the average of those estimates shall be your percentage of fault.

FINAL INSTRUCTION NO. 14

In conducting your 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 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 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

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FINAL INSTRUCTION NO. 14 (Cont'd)

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.

DATED this 28th day of March, 2013.



JON STUART SCOLES
CHIEF MAGISTRATE JUDGE
NORTHERN DISTRICT OF IOWA