

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

ESTATE OF ZELDA M. BROKAW,

Plaintiff,

vs.

**JERRY D. SPEARS and CRAIG
BETCHER TRUCKING, INC.,**

Defendants.

No. C09-1011

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 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 Craig Betcher Trucking, Inc. is a corporation 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 negligent act or omission of an officer, employee, or other agent of a corporation, in the performance of that person's duties, is held in law to be the negligence of the corporation.

In this case, the parties agree that Jerry Spears was employed by Craig Betcher Trucking, Inc. and was acting within the scope of his employment at the time of the collision. Accordingly, the negligence of Jerry Spears, if any, is imputed to Craig Betcher Trucking, Inc.

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 claim or defense depends 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. 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.

An expert witness was asked to assume certain facts were 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. 6

In these instructions, I have used the terms “fault” and “negligence” interchangeably. The term “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.

Both drivers had a right to use the road, but each had to respect the rights of the other. Each driver could assume the other would obey the law until they knew, or in the exercise of ordinary care, should have known the other driver was not going to obey the law.

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

FINAL INSTRUCTION NO. 7

In order to recover on its claim, the Estate of Zelda Brokaw must prove all of the following three propositions by the greater weight or preponderance of the evidence:

1. Jerry Spears was negligent in one or more of the following ways:
 - a. failing to maintain a speed that was reasonable and proper, having due regard for the traffic, surface and width of the highway, and any other existing condition;
 - b. failing to maintain control of his vehicle;
 - c. failing to maintain an assured clear distance ahead;
 - d. failing to keep a proper lookout;
 - e. failing to sound his horn when reasonably necessary to ensure the safe operation of his vehicle; or
 - f. failing to drive on the right half of the road.
2. Jerry Spears' negligence was a cause of Zelda Brokaw's damages.
3. The amount of damage.

If the Estate of Zelda Brokaw has failed to prove any of these three propositions, then the Estate of Zelda Brokaw is not entitled to damages. If the Estate of Zelda Brokaw has proved all three of these propositions, then you will consider the defense of comparative negligence as explained in Instruction No. 8.

FINAL INSTRUCTION NO. 8

In order to prove their defense of comparative negligence, Jerry Spears and Craig Betcher Trucking, Inc. must prove both of the following propositions by the greater weight or preponderance of the evidence:

1. Zelda Brokaw was negligent in one or more of the following ways:
 - a. failing to maintain a speed that was reasonable and proper, having regard for the traffic, surface and width of the highway, and other existing condition;
 - b. failing to maintain control of her vehicle;
 - c. failing to maintain an assured clear distance ahead;
 - d. failing to maintain a proper lookout;
 - e. failing to sound her horn when reasonably necessary to ensure the safe operation of her vehicle;
 - f. failing to drive on the right half of the road; or
 - g. failing to have her headlights on.
2. Zelda Brokaw's negligence was a cause of Zelda Brokaw's damage.

If Jerry Spears and Craig Betcher Trucking, Inc. have failed to prove either of these propositions, then they have not proved their defense. If Jerry Spears and Craig Betcher Trucking, Inc. have proved both of these propositions, then you will assign a percentage of fault to Zelda Brokaw, and include Zelda Brokaw's fault in the total percentage of fault found by you answering the special verdicts.

FINAL INSTRUCTION NO. 9

Regarding element number 1(a) of Instruction Nos. 7 and 8 , any person driving a vehicle on a highway shall drive at a careful speed not greater than nor less than is reasonable and proper, having due regard for the traffic, surface and width of the highway, and of any other existing conditions.

A violation of this law is negligence.

Regarding element number 1(b) of Instruction Nos. 7 and 8 , a driver must have his or her vehicle under control. It is under control when the driver can guide and direct its movement, control its speed, and stop it reasonably fast.

A violation of this duty is negligence.

Regarding element number 1(c) of Instruction Nos. 7 and 8 , no person shall drive any vehicle on a highway at a speed greater than will permit them to stop within the assured clear distance ahead. The words “within the assured clear distance ahead” mean the distance from which noticeable objects, reasonably expected or anticipated to be upon the highway, may be seen.

A violation of this law is negligence.

Regarding element number 1(d) of Instruction Nos. 7 and 8 , “proper lookout” is the lookout a reasonable person would keep in the same or similar situation. It means more than looking and seeing. It includes being aware of the operation of the driver’s vehicle in relation to what the driver saw or should have seen.

A violation of this duty is negligence.

Regarding element number 1(e) of Instruction Nos. 7 and 8 , a driver shall sound his or her horn when reasonably necessary to ensure the safe operation of the vehicle.

A violation of this duty is negligence.

Regarding element number 1(f) of Instruction Nos. 7 and 8 , a vehicle shall be driven on the right half of the road on all roads of sufficient width except when

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FINAL INSTRUCTION NO. 9 (Cont'd)

an obstruction makes it necessary to drive to the left of the center of the road. Any person doing so shall yield the right-of-way to all vehicles traveling in the opposite direction upon the open portion of the road within a distance which is an immediate danger.

A violation of this law is negligence.

Regarding element number 1(g) of Instruction No. 8, every motor vehicle on the highway, at any time from sunset to sunrise, and at all times when conditions such as fog, haze, or rain provide insufficient lighting to render clearly noticeable persons and vehicles on the highway five hundred feet ahead, shall display lighted headlights bright enough to reveal persons and vehicles at a safe distance ahead.

A violation of this law is negligence.

FINAL INSTRUCTION NO. 10

Regarding element number 2 of Instruction Nos. 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. 11

Regarding element number 3 of Instruction No. 7, if you find the Estate of Zelda Brokaw is entitled to recover, 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 the Estate of Zelda Brokaw for the damages Zelda Brokaw incurred.

1. **Medical Expenses.** The reasonable cost of necessary hospital charges, doctor charges, nursing home charges, prescription expenses and other necessary medical charges from the date of injury to the date of death.
2. **Physical and Mental Pain and Suffering.** Physical and mental pain and suffering from the date of injury to the date 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.
3. **Loss of Full Mind and Body.** Loss of function of the mind and body from the date of injury to the date of death.

The amount you assess for physical and mental pain and suffering, or loss of function of the mind and body, 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 Jerry Spears as provided 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. 12

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 Zelda Brokaw and Jerry Spears 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. Defendants Jerry Spears and Craig Betcher Trucking Incorporated 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 Zelda Brokaw was at fault, and her fault was more than 50% of the total fault, then the Estate of Zelda Brokaw cannot recover damages. However, if you find Zelda Brokaw's fault was 50% or less of the total fault, then I will reduce the total damages by the percentage of Zelda Brokaw's fault.

FINAL INSTRUCTION NO. 13

In assessing percentages of fault, or 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 shall be your percentage of fault or item of damage.

FINAL INSTRUCTION NO. 14

Jerry Spears claims that if you find that he violated the law in the operation of his vehicle, he had a legal excuse for doing so because of Zelda Brokaw's actions and, therefore, is not negligent. "Legal excuse" means that someone seeks to avoid the consequences of his conduct by justifying acts which would otherwise be considered negligent. The burden is upon Jerry Spears and Craig Betcher Trucking, Inc. to establish as a legal excuse:

1. Anything that would make complying with the law impossible;
2. Anything over which the driver has no control which places his vehicle in a position contrary to the law;
3. Failure to obey the law when the driver is confronted with sudden emergency not of his own making; or
4. An excuse or exception provided by the law.

If you find that Jerry Spears has violated the law as submitted to you in other instructions, and that he has established a legal excuse for doing so under any one of the four definitions set forth above, then you should find that he was not negligent for violating the particular law involved.

Regarding the third definition set forth above, a sudden emergency is an unforeseen combination of circumstances that calls for immediate action or a sudden or expected occasion for action. A driver of a vehicle who, through no fault of his own, is placed in a sudden emergency, is not chargeable with negligence if the driver exercises that degree of care which a reasonably careful person would have exercised under the same or similar circumstances. However, when the driver's own fault is the cause of the emergency, the fact that he then acted in a reasonable manner will not preclude his liability for his negligence which produced the emergency.

FINAL INSTRUCTION NO. 15

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. 15 (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 _____ day of July, 2010.

JON STUART SCOLES
UNITED STATES MAGISTRATE JUDGE
NORTHERN DISTRICT OF IOWA