

IN THE IOWA DISTRICT COURT IN AND FOR ALLAMAKEE COUNTY

DONNA JEAN LUBAHN and ERNEST,
LUBAHN,

Plaintiffs,

vs.

VAL LYONS, M.D., and VAL O. LYONS,
M.D., P.C.,

Defendants.

LAW NO. LACV026101

DEFENDANTS' PROPOSED
JURY INSTRUCTIONS

COME NOW, Defendants Val Lyons, M.D., and Val O. Lyons, M.D., P.C., by and through their attorney of record and submit the following proposed Jury Instructions.

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-2-

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By /s/ Jennifer E. Rinden
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CERTIFICATE OF SERVICE

I, Wanda McFarland, certify that on the 23rd day of January, 2017, I electronically filed the foregoing with the Clerk of the Court using the ECF system which will send notification of such filing to the following attorneys of record:

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By: Wanda McFarland
Wanda McFarland

TABLE OF CONTENTS

Requested Preliminary Instruction.....	5
Proposed Jury Instruction No. 1 – CJI No. 100.1 – Statement of the Case.....	6
Proposed Jury Instruction No. 2 - CJI No. 100.2 - Duties of Judge and Jury, Instructions As a Whole.....	7
Proposed Jury Instruction No. 3 - CJI No. 100.3 - Burden of Proof, Preponderance of Evidence.....	8
Proposed Jury Instruction No. 4 - CJI No. 100.4 Evidence.....	9
Proposed Jury Instruction No. 5 - CJI No. 100.5 – Deposition Testimony.....	10
Proposed Jury Instruction No. 6 - CJI No. 100.6 – Interrogatories.....	11
Proposed Jury Instruction No. 7 – CJI No. 100.9 - Credibility of Witnesses	12
Proposed Jury Instruction No. 8 – CJI No. 100.12 – Opinion Evidence, Expert Witness.....	13
Proposed Jury Instruction No. 9 – CJI No. 100.11 - Hypothetical Question, Expert Testimony	14
Proposed Jury Instruction No. 10 – CJI No. 100.15 - Statements by a Party Opponent	15
Proposed Jury Instruction No. 11 – CJI No. 100.20 – Corporate Party.....	16
Proposed Jury Instruction No. 12 – CJI No. 700.1 (Modified), CJI No. 1600.10 (Modified)....	17
Proposed Jury Instruction No. 13 – CJI No. 1600.2 – Negligence – Duty of Physician – CJI No. 1600.3 – Negligence – Duty of Specialist.....	18
Proposed Jury Instruction No. 14 – Standard of Care, Expert Opinion Required – <i>See</i> Proposed Instruction.....	19
Proposed Jury Instruction No. 15 – CJI No. 700.8 – Accident Does Not Constitute or Raise a Presumption of Negligence (Modified).....	20

-4-

Proposed Jury Instruction No. 16 – Standard of Care – Not Retrospective	21
Proposed Jury Instruction No. 17 – Standard of Care – Choice Among Alternative Treatment.....	22
Proposed Jury Instruction No. 18 – CJI No. 700.3 – Cause Defined.....	23
Proposed Jury Instruction No. 19 – CJI No. 200.1 – Elements-Personal Injury and Vehicle Damage – CJI No. 200.12 – Physician and Mental Pain and Suffering-Past.....	24
Proposed Jury Instruction No. 20.....	25
Proposed Jury Instruction No. 21 – CJI No. 200.35B – Definition of Present Value-Actions Filed on or After July 1, 1997	26
Proposed Jury Instruction No. 22 – CJI No. 200.38 – Quotient Verdict	27
Proposed Jury Instruction No. 23 –CJI No. 100.21 – Cautionary Instruction – Juror’s Notes.....	28
Proposed Jury Instruction No. 24 – CJI No. 100.18 – General Instruction to Jury.....	29
Proposed Jury Instruction No. 25 – CJI No. 300.1 – Return of Verdict – Forms of Verdict.....	30

-5-

REQUESTED PRELIMINARY INSTRUCTION

You may not communicate about this case before reaching your verdict. This includes cell phones, and electronic media such as text messages, Facebook, MySpace, LinkedIn, YouTube, Twitter, email, etc.

Do not do any research or make any investigation about this case on your own. Do not visit or view any place discussed in this case, and do not use Internet maps or Google Earth or any other program or device to search for or to view any place discussed in the testimony. Also, do not research any information about this case, the law, or the people involved, including the parties, the witnesses, the lawyers, or the judge. This includes using the Internet to research events or people referenced in trial.

This case will be tried on evidence presented in the courtroom. If you conduct independent research, you will be relying on matters not presented in court. The parties have a right to have this case decided on the evidence they know about and that has been introduced here in court. If you do some research or investigation or experiment that we do not know about, then your verdict may be influenced by inaccurate, incomplete or misleading information that has not been tested by the trial process, including the oath to tell the truth and by cross-examination. All of the parties are entitled to a fair trial, rendered by an impartial jury, and you must conduct yourself so as to maintain the integrity of the trial process. If you decide a case based on information not presented in court, you will have denied the parties a fair trial in accordance with the rules of this state and you will have done an injustice. It is very important that you abide by these rules. [Failure to following these instructions may result in the case having to be retired and could result in you being held in contempt and punished.]

It is important that we have your full and undivided attention during this trial.

CJI NO. 100.23 USE OF ELECTRONIC DEVICES.

-6-

PROPOSED JURY INSTRUCTION NO. 1
STATEMENT OF THE CASE

Members of the Jury:

This is a medical malpractice case. Plaintiff Donna Lubahn (Plaintiff) claims that Defendants Val Lyons, M.D., and Val O. Lyons, M.D., P.C., (Defendants) breached the standard of care in the treatment which they provided to Plaintiff on May 1, 2013. Plaintiff further claims that this breach of the standard of care caused Plaintiff's claimed damages.

Defendants deny that they breached the standard of care. Defendants further deny that their actions were the cause of any damage to Plaintiff.

For purposes of deciding these issues, Defendants Val Owen Lyons, M.D. and Val O. Lyons, M.D., P.C. shall be treated as the same single party.

Do not consider this summary as proof of any claim. Decide the facts from the evidence and apply the law which I will now give you.

CJI NO. 100.1 STATEMENT OF THE CASE.

-7-

PROPOSED JURY INSTRUCTION NO. 2

My duty is to tell you what the law is. Your duty is to accept and apply this law.

You must consider all of the instructions together because no one instruction includes all of the applicable law.

The order in which I give these instructions is not important.

Your duty is to decide all fact questions.

Do not be influenced by any personal likes or dislikes, sympathy, bias, prejudices or emotions.

CJI NO. 100.2 DUTIES OF JUDGE AND JURY, INSTRUCTIONS AS A WHOLE.

-8-

PROPOSED JURY INSTRUCTION NO. 3

Whenever a party must prove something they must do so by the preponderance of the evidence.

Preponderance of the evidence is evidence that is more convincing than opposing evidence. Preponderance of the evidence does not depend upon the number of witnesses testifying on one side or the other.

CJI NO. 100.3 BURDEN OF PROOF, PREPONDERANCE OF EVIDENCE.

-9-

PROPOSED JURY INSTRUCTION NO. 4

You shall base your verdict only upon the evidence and these instructions.

Evidence is:

1. Testimony in person or by deposition.
2. Exhibits received by the court.
3. Stipulations which are agreements between the attorneys.
4. Any other matter admitted (e.g. answers to interrogatories, matters which judicial notice was taken, etc.)

Evidence may be direct or circumstantial. The weight to be given any evidence is for you to decide.

The following are not evidence:

1. Statements, arguments, questions and comments by the lawyers.
2. Objections and rulings on objections.
3. Any testimony I told you to disregard.
4. Anything you saw or heard about this case outside the courtroom.

CJI No. 100.4 EVIDENCE.

-10-

PROPOSED JURY INSTRUCTION NO. 5

Certain testimony has been read into evidence from a deposition. Depositions are taken under oath before the trial and preserved in writing for presentation at the trial. Consider such testimony as if it had been given in court.

CJI NO. 100.5 DEPOSITION TESTIMONY.

-11-

PROPOSED JURY INSTRUCTION NO. 6

During this trial, you have heard the word "interrogatory." An interrogatory is a written question asked by one party of another, who must answer it under oath in writing. Consider interrogatories and the answers to them as if the questions had been asked and answered here in court.

CJI NO. 100.6 INTERROGATORIES.

-12-

PROPOSED JURY INSTRUCTION NO. 7

You will decide the facts from the evidence. Consider the evidence using your observations, common sense, and experience. You must try to reconcile any conflicts in the evidence; but, if you cannot, you will accept the evidence you find more believable.

In determining the facts, you may have to decide what testimony you believe. You may believe it all, part or none of any witnesses' testimony.

There are many factors which you may consider in deciding what testimony to believe, for example:

1. Whether the testimony is reasonable and consistent with other evidence you believe;
2. The witnesses' appearance, conduct, age, intelligence, memory and knowledge of the facts; and
3. The witnesses' interest in the trial, their motive, candor, bias and prejudice.

CJI NO.100.9 CREDIBILITY OF WITNESSES.

-13-

PROPOSED JURY INSTRUCTION NO. 8

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 of the other evidence in the case.

CJI NO. 100.12 OPINION EVIDENCE, EXPERT WITNESS

-14-

PROPOSED JURY INSTRUCTION NO. 9

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.

CJI NO. 100.11 HYPOTHETICAL QUESTION, EXPERT TESTIMONY

-15-

PROPOSED JURY INSTRUCTION NO. 10

You have heard evidence claiming that Plaintiff Donna Lubahn made statements before this trial while under oath and/or while not under oath.

If you find such a statement was made, you may regard the statement as evidence in this case, the same as if Plaintiff had made it under oath during trial.

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

CJI NO. 100.15 STATEMENTS BY A PARTY OPPONENT.

-16-

PROPOSED JURY INSTRUCTION NO. 11

The fact that Defendant Val O. Lyons, M.D., P.C. 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.

CJI No. 100.20 CORPORATE PARTY

-17-

PROPOSED JURY INSTRUCTION NO. 12

Plaintiff claims that Defendant Dr. Lyons was negligent.

Plaintiff must prove all of the following propositions:

1. The standard of care as explained in Instruction No. _____.
2. Dr. Lyons was negligent by failing to meet the standard of care in their treatment of Plaintiff in one or more of the following ways:
 - a. Specification to be determined.
3. Dr. Lyons' negligence, if any, was a cause of Plaintiff's damage.
4. The amount of damage caused to Plaintiff.

If the Plaintiff has failed to prove any of these propositions, Plaintiff is not entitled to damages. If Plaintiff has proved all these propositions, then the Plaintiff is entitled to damages in some amount.

CJI NO. 700.1 (Modified).

CJI NO. 1600.10 (Modified).

Hill v. McCartney, 590 N.W.2d 52, 56 (Iowa App. 1998).

-18-

PROPOSED JURY INSTRUCTION NO. 13

A physician must use the degree of skill, care and learning ordinarily possessed and exercised by other physicians in similar circumstances.

Physicians who hold themselves out as specialists must use the degree of skill, care, and learning ordinarily possessed and exercised by specialists in similar circumstances, not merely the average skill and care of a general practitioner.

A violation of this duty is negligence.

CJI NO. 1600.2 NEGLIGENCE-DUTY OF PHYSICIAN

CJI NO. 1600.3 NEGLIGENCE-DUTY OF SPECIALIST

-19-

PROPOSED JURY INSTRUCTION NO. 14

You are to determine the standard of care, i.e. the degree of skill, care and learning ordinarily possessed and exercised by other physicians in similar circumstances, only from the opinions of the physicians who have testified as to this standard.

You are also to determine the failure to meet the standard of care, if any, only from the opinions of such physicians, who have testified as to such failure or the lack thereof.

Furthermore, you are to determine whether the alleged failure to meet the standard of care, if any, was the cause of Plaintiff's injuries only from the opinions of the physicians who have testified as experts in this case.

Iowa Code §147.139

Kennis v. Mercy Hospital Medical Center, 491 N.W.2d 161, 165 (Iowa 1992).

Hill v. McCartney, 590 N.W.2d 52, 56 (Iowa App. 1998).

Cox v. Jones, 470 N.W.2d 23, 25-26 (Iowa 1991).

Buckrod v. Bunten, 237 N.W.2d 808, 811-12 (Iowa 1976).

Bryant v. Rankin, 332 F.Supp. 319, 322 (S.D. Iowa 1971).

-20-

PROPOSED JURY INSTRUCTION NO. 15

The mere fact that full recovery does not result or that medical treatment is not entirely successful does not mean that Dr. Lyons was negligent or at fault.

CJI NO. 700.8 ACCIDENT DOES NOT CONSTITUTE OR RAISE A PRESUMPTION OF
NEGLIGENCE (MODIFIED).

Gebhardt v. McQuillen, 230 Iowa 181, 185, 297 N.W. 301, 303 (1941).

Grosjean v. Spencer, 140 N.W.2d 139, 143 (Iowa 1966).

Tripp v. Cedar Valley Medical Specialists, P.C., 723 N.W.2d 453 (Iowa App. 2006) (Table).

-21-

PROPOSED JURY INSTRUCTION NO. 16

STANDARD OF CARE – NOT RETROSPECTIVE

A physician's conduct must be viewed in light of the circumstances existing at the time of diagnosis and treatment and not retrospectively. If a physician exercised a reasonable degree of care and skill under the circumstances as they existed, though not as seen in hindsight or in light of facts later discovered, then the physician was not negligent.

Bryant v. Rankin, 332 F.Supp. 319, 322 (S.D. Iowa 1971), aff'd 465 F.2d 510 (8th Cir. 1972) (Iowa law) ("It is not enough for experts... to state in retrospect what might have been considered had the patient been under their care.").

Hagedorn v. Greenville Hosp. Sys., 514 S.E.2d 570, 574-75 (S.C. 1999) (affirming instruction "In considering whether a physician, a resident, or nurse has exercised reasonable judgment in a given case, you must consider such judgment in relation to the facts as they existed at the time the judgment was made, and not in light of what hindsight may reveal.").

Klisch v. Meritcare Med. Grp., Inc., 134 F.3d 1356, 1360 (8th Cir. 1998) (Minn. law) (affirming trial court's use of instruction that negligence is considered "in light of the information available at that time. Foresight, not hindsight, is the standard of negligence.").

East v. United States, 745 F.Supp. 1142, 1149 (D. Md. 1990) ("If a doctor exercised a reasonable degree of care and skill under the circumstances as they existed, though not as seen in perfect hindsight, then the doctor is not liable for malpractice.").

Boyce v. United States, 942 F.Supp. 1220, 1225-26 (E.D Mo. 1996) (determination of negligence "must be made in light of the conditions as they existed prior to the treatment, not in the 20/20 vision of hindsight").

Douzart v. Jones, 528 So.2d 602, 603 (La. Ct. App. 1998) (physician is not to be "evaluated with the benefit of hindsight").

-22-

PROPOSED JURY INSTRUCTION NO. 17

STANDARD OF CARE – CHOICE AMONG ALTERNATIVE TREATMENT

Physicians may disagree in good faith upon what would be the proper treatment or diagnosis of a medical condition in a given situation. It is for the physician to use his or her professional judgment to select which recognized method of treatment to use in a given situation. If you determine that there were two or more recognized alternative courses of action which have been recognized by the medical profession as being within the standard of care, and the defendants, in the exercise of their best judgment, elected one of those proper alternatives, then defendants were not negligent.

Vachon v. Broadlawns Med. Found. 490 N.W.2d 820, 823 (Iowa 1992) (approving use of nearly identical language)

-23-

PROPOSED JUY INSTRUCTION NO. 18

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

CJI NO. 700.3 CAUSE - DEFINED.

-24-

PROPOSED JURY INSTRUCTION NO. 19

If you find that Plaintiff Donna Lubahn is entitled to recover damages, you shall consider the following items:

1. Past physical and mental pain and suffering of Donna Lubahn.

The amount you assess for physical and mental pain and suffering in the past 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 a part a 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.

CJI NO. 200.1 ELEMENTS-PERSONAL INJURY AND VEHICLE DAMAGE
CJI NO. 200.12 PHYSICAL AND MENTAL PAIN AND SUFFERING-PAST

-25-

PROPOSED JURY INSTRUCTION NO. 20

Any damages which you award for actual economic losses incurred in the past or to be incurred in the future (including but not limited to, the cost of reasonable and necessary medical care), may not include any such losses which have been or will be replaced or indemnified by insurance, or by governmental, employment, or service benefit programs or from any other source except the assets of Plaintiff.

Iowa Code §147.136.

-26-

PROPOSED JURY INSTRUCTION NO. 21

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

CJI NO. 200.35B DEFINITION OF PRESENT VALUE -
ACTIONS FILED ON OR AFTER JULY 1, 1997.

Iowa Code Section 624.18(2), 668.3(b).

Schnebly v. Baker, 217 N.W.2d 708 (Iowa 1974).

In Re Millards Estate, 251 Iowa 1282, 105 N.W.2d 95 (1960).

-27-

PROPOSED JURY INSTRUCTIONS NO. 22

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

CJI NO. 200.38 QUOTIENT VERDICT.

Moose v. Rich, 253 N.W.2d 565 (Iowa 1977).

Sheker v. Jensen, 241 Iowa 583, 41 N.W.2d 679 (1950).

Manna v. McIntosh, 519 N.W.2d 815 (Iowa App. 1994).

-28-

PROPOSED JURY INSTRUCTION NO. 23

During trial, you have been allowed to take notes. You may take these with you to the jury room to use in your deliberations. Remember, these are notes and not evidence. Generally, they reflect the recollection or impressions 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.

CJI NO. 100.21 CAUTIONARY INSTRUCTION - JUROR'S NOTES.

-29-

PROPOSED JURY INSTRUCTION NO. 24

Upon retiring you shall select a foreman or forewoman. It will be his or her duty to see that discussion is carried on in an orderly fashion, the issues are fully and freely discussed, and all jurors are given an opportunity to express their views.

Your attitude at the beginning of your deliberations is important. It is not a good idea for you to take a position before thoroughly discussing the case with the other jurors. If you do this, individual pride may become involved and you may later hesitate to change an announced position even if shown it may be incorrect. Remember, you are not partisans-or advocates, but judges - judges of the facts. Your sole interest is to find the truth and do justice.

CJI NO. 100.18 GENERAL INSTRUCTION TO JURY.

-30-

PROPOSED JURY INSTRUCTION NO. 25

I am giving you verdict forms. During the first six hours of deliberations, excluding meals and recesses outside your jury room, your decision must be unanimous. If you all agree, the verdict forms must be signed by your presiding officer.

After deliberating for six (6) hours from _____ o'clock _____.m., excluding meals or recesses outside your jury room, a verdict can be returned if seven of you agree upon the answers to these questions. In that case, the verdict forms must be signed by all seven jurors who agree.

When you have agreed upon the verdicts and appropriately signed them, inform the Court Attendant.

CJI NO. 300.1 RETURN OF VERDICT - FORMS OF VERDICT.