

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

**SANDRA M. HASS, Personal
Representative of the ESTATE OF
KEITH E. HASS,**

Plaintiff,

vs.

**FAWAD S. ZAFAR, M.D., FAWAD S.
ZAFAR, M.D., P.C. and AUDUBON
COUNTY MEMORIAL HOSPITALS
AND CLINICS,**

Defendants.

LAW NO. LACL145009

***PLAINTIFF'S PROPOSED JURY
INSTRUCTIONS AND VERDICT
FORM***

COMES NOW, the Plaintiff and hereby submits the following proposed jury instructions:

/s/ Thomas P. Slater

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ATTORNEY FOR PLAINTIFF

STATEMENT OF THE CASE

On May 16, 2017 Decedent Keith Hass underwent a CT scan which was ordered by Defendant Fawad S. Zafar pursuant to kidney stone protocol. The scan was interpreted by a radiologist who identified a mass in the right lower lobe of Keith Hass' lung and recommended follow up studies. Keith Hass was not informed of the radiologist's interpretation of the May 16, 2017 CT scan or the radiologist's recommendation for follow-up. On April 19, 2018 Keith Hass underwent a CT scan of the chest which showed the presence of a much larger mass in the right

lower lobe. On May 14, 2018 Keith Hass was evaluated by an oncologist and diagnosed with having Stage IV non-small cell lung cancer. Keith Hass died on May 27, 2018.

Plaintiff alleges Defendants were negligent in their care of Keith Hass by failing to notify him or his primary care physician of the radiologist's interpretation of the May 16, 2017 CT scan and the need for follow up, and that Defendants' negligence was a cause of his death and therefore a cause of damages suffered by Plaintiff.

Defendants deny that they were negligent and deny that any claimed negligence was a cause of Plaintiff's injuries or damages.

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.

INSTRUCTION NO.

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.

100.2

INSTRUCTION NO.

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.

100.3

INSTRUCTION NO.

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, and etc.).

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

Sometimes, during a trial, references are made to pre-trial statements and reports, witnesses' depositions, or other miscellaneous items. Only those things formally offered and received by the court are available to you during your deliberations. Documents or items read from or referred to which were not offered and received into evidence, are not available to you.

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.

100.4

INSTRUCTION NO.

Certain testimony has been read into evidence from a deposition. A deposition is testimony taken under oath before the trial and preserved in writing. Consider that testimony as if it had been given in court.

100.5

INSTRUCTION NO.

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.

100.6

INSTRUCTION NO.

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 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.

100.9

INSTRUCTION NO.

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.

100.12

INSTRUCTION NO.

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.

100.11

INSTRUCTION NO.

You have heard evidence claiming [name of witness] 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 statements under oath, you may use them only to help you 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 they were inconsistent with the testimony given at trial, but you are not required to do so.

Do not disregard the testimony if other evidence you believe supports it or if you believe it for any other reason.

100.13

INSTRUCTION NO.

You have heard evidence claiming [name of witness] made statements before this trial while under oath which were inconsistent with what [name of 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 may also use these statements to help you decide if you believe [name of non-party 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.

100.14

INSTRUCTION NO.

You have heard evidence claiming [name of party] made statements before this trial [while under oath] [and] [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 [name of party] had made it under oath during the trial.

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

100.15

INSTRUCTION NO.

Defendant Audubon County Memorial Hospitals and Clinics operated a hospital in Audubon County, Iowa. Audubon County Memorial Hospitals and Clinics can only act through its agents and employees.

Gabelmann v. NFO, 571 N.W.2d 476, 480 (Iowa 1997).

INSTRUCTION NO.

An employer or corporation is liable for the negligent or wrongful acts of an employee if the acts are done in the scope of the employment.

730.1

INSTRUCTION NO.

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.

730.2

INSTRUCTION NO.

Defendant Audubon County Memorial Hospitals and Clinics admits its employees and agents were acting in the scope of their employment at all times material herein.

INSTRUCTION NO.

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

A violation of this duty is negligence.

1600.2

INSTRUCTION NO.

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.

1600.3

INSTRUCTION NO.

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

A violation of this duty is negligence.

1600.4

INSTRUCTION NO.

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 another which constitutes unreasonable failure to avoid an injury.

400.1

INSTRUCTION NO.

The conduct of a party is a cause of damage when the damage would not have happened except for the conduct. You must decide whether the claimed harm to Plaintiff is within the scope of Defendants' liability. The Plaintiff claimed harm is within the scope of a Defendants' liability if that harm arises from the same general types of danger that the Defendants should have taken reasonable steps to avoid.

700.3; 700.3A; 700.4

INSTRUCTION NO.

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, and the extent of the causal relation between their conduct and the damages claimed. You should then determine what percentage, if any, each Defendants' fault contributed to the damages.

400.2

INSTRUCTION NO

Plaintiff claims that Defendant Fawad Zafar, M.D. was negligent. In order to prevail on this claim Plaintiff must prove all of the following propositions:

1. Defendant Fawad Zafar, M.D. was negligent in failing to meet the standard of care in one or more of the following particulars:
 - a. In failing to timely notify Keith Hass of 5/16/2017 CT findings and refer him for timely diagnosis and treatment; or
 - b. In failing to timely notify Keith Hass' primary care physician of 5/16/2017 CT findings for timely diagnosis and treatment.
2. The negligence of Defendant Fawad Zafar was a cause of damages to Plaintiff.
3. The amount of damages.

If Plaintiff has proved all of these propositions, then Plaintiff is entitled to damages in some amount from Dr. Zafar. If the Plaintiff has proved proposition No. 1 but has not proved proposition No. 2 you shall consider Plaintiff's claim for lost chance of survival from Dr. Zafar.

INSTRUCTION NO.

Plaintiff claims that Defendant Audubon County Memorial Hospitals and Clinics by and through the acts or omissions of its agents or employees was negligent. In order to prevail on this claim Plaintiff must prove all of the following propositions:

1. Audubon County Memorial Hospitals and Clinics, by and through the acts or omissions of its agents or employees was negligent in failing to meet the standard of care in one or more of the following particulars:
 - a. In failing to have a policy for timely notification of Keith Hass' primary care physician of the 5/16/2017 CT report;

- b. In having a policy for timely notification of the primary care physician of Keith Hass but failing to follow it; or
 - c. In failing to timely notify Keith Hass' primary care physician of the 5/16/2017 CT report.
- 2. The negligence of Defendant Audubon County Memorial Hospitals and Clinics was a cause of damages to Plaintiff.
 - 3. The amount of damages.

If Plaintiff has proved all of these propositions, then Plaintiff is entitled to damages in some amount from Audubon County Memorial Hospitals and Clinics. If the Plaintiff has proved proposition No. 1 but has not proved proposition No. 2 you shall consider Plaintiff's claim for lost chance of survival from Audubon County Memorial Hospitals and Clinics.

INSTRUCTION NO.

If you find the Plaintiff 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 which will fully compensate the Plaintiff for the damages incurred:

- a. **Pre-death 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.
- b. **Pre-death loss of full mind and body.** Loss of function of the mind and body from the date of injury to the date of death;
- c. **Loss of spousal consortium experienced by Decedent's surviving spouse, Sandra Hass.**
- d. **Loss of consortium experienced by Decedent's surviving children.**
- e. **Loss Chance of Survival.**

The amount you assess for pre-death pain and suffering and loss of full mind and body of Keith Hass 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 Defendants 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

200.15

INSTRUCTION NO.

Services - Spousal Consortium. The present value of the services which Keith Hass would have performed for his spouse, Sandra Hass, but for his death. This is also known as loss of spousal consortium.

"Spousal consortium" is the fellowship of a husband and wife and the right of each 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 death.

Damages for spousal consortium are limited in time to the shorter of the spouse's or decedent's normal life expectancy.

200.19

INSTRUCTION NO.

Services - Parental Consortium. The present value of the services which Keith Hass would have performed for his children, but for his death. 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 decedent's normal life expectancy.

200.20

INSTRUCTION NO.

If you find Plaintiff has failed to prove the second proposition of her claim for negligence as set forth in Instruction No. _____, you must then consider Plaintiff's alternative claim for lost chance of survival. If you find that Plaintiff has proven her claim of negligence as set forth in Instruction No. _____, you should not consider Plaintiff's alternative claim for lost chance of survival.

Plaintiff claims that Defendant Fawad Zafar, M.D. caused Keith Hass to lose a chance of survival. The Plaintiff must prove all of the following propositions:

1. The Defendant Fawad Zafar, M.D. was negligent in one or more of the following ways:

- a. In failing to timely notify Keith Hass of 5/16/2017 CT findings and refer him for timely diagnosis and treatment; or
 - b. In failing to timely notify Keith Hass' primary care physician of 5/16/2017 CT findings for timely diagnosis and treatment.
2. The negligence caused a loss of a chance of survival.
3. The amount of damage.

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

1600.16

INSTRUCTION NO.

If you find Plaintiff has failed to prove the second proposition of her claim for negligence as set forth in Instruction No. _____, you must then consider Plaintiff's alternative claim for lost chance of survival. If you find that Plaintiff has proven her claim of negligence as set forth in Instruction No. _____, you should not consider Plaintiff's alternative claim for lost chance of survival.

Plaintiff claims that Defendant Audubon County Memorial Hospitals and Clinics caused Keith Hass to lose a chance of survival. The Plaintiff must prove all of the following propositions:

1. The Defendant Audubon County Memorial Hospitals and Clinics was negligent in one or more of the following ways:
 - a. In failing to have a policy for timely notification of Keith Hass' primary care physician of the 5/16/2017 CT report;
 - b. In having a policy for timely notification of the primary care physician of Keith Hass but failing to follow it; or
 - c. In failing to timely notify Keith Hass' primary care physician of the 5/16/2017 CT report.
2. The negligence caused a loss of a chance of survival.
3. The amount of damage.

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

1600.16

INSTRUCTION NO.

Lost chance of survival means a reduction in the chance to survive the underlying disease because Keith Hass failed to receive earlier diagnosis or treatment.

With regard to the second proposition of Instruction No. ____, Plaintiff must prove that Defendants' negligence, if any, caused a loss of a chance of survival. To prove a loss of a chance of survival, Plaintiff must show, by a preponderance of the evidence, that there is a causal connection between the Defendants' negligence, if any, and the loss of a chance to survive the harm.

1600.17

INSTRUCTION NO.

You must determine the value of the harm suffered by Plaintiff and determine the percentage of lost chance to avoid that harm which Defendants caused. I will use your answers to the special interrogatories in the verdict form to calculate the appropriate amount of damages recoverable by Plaintiff.

You should determine the value of the harm suffered by Plaintiff in accordance with Instructions No. ____ through ____ (traditional damages instructions).

To determine the percentage of lost chance to avoid the harm, caused by the Defendants, you must determine the difference between Keith Hass' chance of avoiding the harm in the absence of any negligence on the part of the Defendants and Keith Hass' chance of avoiding the harm following any negligence on the part of the Defendant which you have found.

INSTRUCTION NO.

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 the Plaintiff for future losses.

200.35B

INSTRUCTION NO.

A Standard Mortality Table indicates the normal life expectancy of people who are the same age as Keith Hass at the time of his death was 9.05 years. A Standard Mortality Table indicates the normal life expectancy of people who are the same age as Sandra Hass is 9.92 years. The statistics from a Standard Mortality Table are not conclusive. You may use this information, together with all the other evidence, about Keith Hass and Sandra Hass' health, habits, occupation, and lifestyle, when deciding issues of future damages.

200.37

INSTRUCTION NO.

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

200.38

INSTRUCTION NO.

Upon retiring you shall select a foreman or forewoman. It will be his or her duty to see discussion is carried on in an orderly fashion, the issues are fully and freely discussed, and each juror is given an opportunity to express his or her 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 are judges - judges of the facts. Your sole interest is to find the truth and do justice.

100.18

INSTRUCTION NO.

During the 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.

100.21

INSTRUCTION NO.

I am giving you one verdict form. 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 must be signed by your foreperson.

After deliberating for six hours from ____ o'clock __.m., excluding meals or recesses outside your jury room, then it is necessary that only seven of you agree upon the answers to the questions. In that case, the verdict must be signed by all seven jurors.

When you have agreed upon a verdict and appropriately signed it, tell the Court Attendant.

300.1

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

**SANDRA M. HASS, Personal
Representative of the ESTATE OF
KEITH E. HASS,**

Plaintiff,

LAW NO. LACL145009

***PLAINTIFF'S PROPOSED VERDICT
FORM***

vs.

**FAWAD S. ZAFAR, M.D., FAWAD S.
ZAFAR, M.D., P.C., and AUDUBON
COUNTY MEMORIAL HOSPITALS
AND CLINICS**

Defendants.

300.6 Verdict -

Question No. 1: Was Defendant Fawad S. Zafar, M.D. negligent?

Answer "yes" or "no."

ANSWER:

[If your answer is "yes," answer Question No. 2. If your answer is "no," proceed to Question No. 3].

Question No. 2: Was the negligence of the Defendant Fawad S. Zafar, M.D. a cause of any item of damage to Plaintiff?

Answer "yes" or "no."

ANSWER:

[Proceed to Question No. 3]

Question No. 3: Was Defendant Audubon County Memorial Hospitals and Clinics negligent?

Answer "yes" or "no."

ANSWER:

[If your answer is “yes,” answer Question No. 4. If your answer is “no,” proceed to Question No. 5].

Question No. 4: Was the negligence of the Defendant Audubon County Memorial Hospitals and Clinics a cause of any item of damage to Plaintiff?

Answer "yes" or "no."

ANSWER:

[If you answered “yes” to Question Nos. 1 and 2 or Question Nos. 3 and 4 proceed to Question No 9. If you answered “yes” to Question 1 and “no” to Question No. 2 or you answered “yes” to Question 3 and “no” to question No. 4 you shall consider Plaintiff’s claim of loss chance of survival and proceed to Question no. 5. If you answered “no” to both Question Nos. 1 and 3 you shall not answer any further questions]

Question No. 5: Was the negligence of Defendant Fawad S. Zafar, M.D. the cause of a loss of a chance of survival?

Answer “Yes” or “No”

ANSWER: _____

[If you answered “yes” proceed to Question No. 6. If you answered “no” proceed to Question No. 7.]

Question No. 6: What percentage of lost chance of survival, caused by Defendant Fawad S. Zafar, M.D., do you find?

ANSWER: _____

[Proceed to Question No. 7]

Question No. 7: Was the negligence of Defendant Audubon County Memorial Hospitals and Clinics the cause of a loss of a chance of survival?

Answer “Yes” or “No”

ANSWER: _____

[If you answered “yes” proceed to Question No. 8. If you answered “no” to Question No. 7 and “yes” to Question No. 5 proceed to Question No. 9.]

Question No. 8: What percentage of lost chance of survival caused by Defendant Audubon County Memorial Hospitals and Clinics, do you find?

ANSWER: _____

Question No. 9: What percentage of negligence do you attribute to each Defendant? The percentages must total 100%

[if you previously found that a party was not negligent, or did not cause damage to Plaintiff, then enter "0" after [his][her][its] name.]

ANSWER: Defendant Fawad S. Zafar, M.D. _____%

Defendant Audubon County Memorial Hospital _____%

TOTAL 100%

Question No. 10: State the amount of damages sustained by Plaintiff caused by Defendants' negligence as to each of the following items of damage. If Plaintiff has failed to prove any item of damage, or has failed to prove that any item of damage was caused by Defendants' fault, enter 0 for that item.

1. Pre-Death pain and suffering \$ _____
2. Pre-Death Loss of Full Mind and Body \$ _____
3. Loss of Spousal Consortium-Sandra Hass \$ _____
4. Loss of Parental Consortium-Teresa Kasperbauer \$ _____
5. Loss of Parental Consortium-Lisa Hodne \$ _____
6. Loss of Parental Consortium-Anissa Irlmeier \$ _____
7. Lost Chance of Survival \$ _____

TOTAL (add the separate items of damage) \$ _____

Authority

Iowa Code section 668.3(8)

Johnson v. Knoxville Comm. Sch. Dist., 570 NW2d 633, 644 (Iowa 1997)