

IN THE IOWA DISTRICT COURT FOR WAPELLO COUNTY**JUDITH M. WARDLOW and DAVID L.
WARDLOW,****Plaintiffs,****vs.****DAVID L. WANNER and FOOT &
ANKLE CLINICS OF SOUTHERN
IOWA, P.C. d/b/a OTTUMWA FOOT &
ANKLE CLINIC, P.C.,****Defendants.****CASE NO.: LALA105903****JURY INSTRUCTIONS****Members of the Jury:**

In this case, Plaintiffs Judith Wardlow and David Wardlow claim that Defendant David L. Wanner, D.P.M., of Ottumwa Foot & Ankle Clinic, P.C., was negligent in his post-operative care of Ms. Wardlow by failing to timely recognize, diagnose, and treat osteomyelitis and/or a wound infection. Plaintiffs claim, as a result of such negligence, Judith Wardlow sustained injuries and damages.

The Defendants deny that they were negligent or caused any injuries or damages to the Plaintiffs. The Defendants further deny the nature and extent of damages alleged by the Plaintiffs. The Defendants further assert that Plaintiff Judith Wardlow was at fault and her fault was the cause of her damages. The Plaintiffs deny that Judith Wardlow was at fault or caused any injuries or damages to the Plaintiffs.

The parties stipulate and agree that David L. Wanner, D.P.M., and Ottumwa Foot & Ankle Clinic, P.C., should be treated as a single party. Thus, throughout the instructions when I refer to Dr. David Wanner, I am referring to both the individual physician and Ottumwa Foot & Ankle Clinic, P.C.

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. 1

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. Because you are making very important decisions in this case, you are to evaluate the evidence carefully and avoid decisions based on generalizations, gut feelings, prejudices, sympathies, stereotypes or biases. The law demands that you return a just verdict, based solely on the evidence, your reason and common sense, and these instructions. As jurors your sole duty is to find the truth and do justice.

INSTRUCTION NO. 2

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.

INSTRUCTION NO. 3

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.

INSTRUCTION NO. 4

Certain testimony has been read into evidence or shown by video 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.

INSTRUCTION NO. 5

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.

INSTRUCTION NO. 6

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.

INSTRUCTION NO. 7

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 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.

INSTRUCTION NO. 8

You have heard evidence claiming witnesses made statements before this trial while under oath which were inconsistent with what witnesses 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 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.

INSTRUCTION NO. 9

You have heard evidence claiming that Defendants made statements before this trial while under oath and not under oath.

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

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

INSTRUCTION NO. 10

You have heard evidence claiming Judith Wardlow made statements before this trial while under oath.

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

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

INSTRUCTION NO. 11

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.

INSTRUCTION NO. 12

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 that question has not been proved by the evidence, you should decide if that omission affects the value of the opinion.

INSTRUCTION NO. 13

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 the 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 follow these instructions may result in the case having to be retried 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.

INSTRUCTION NO. 14

The fact that a Defendant 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.

INSTRUCTION NO. 15

In this case the Defendant David L. Wanner, was an employee or agent of Foot & Ankle Clinics of Southern Iowa, P.C. d/b/a Ottumwa Foot & Ankle Clinic, P.C. You shall consider them as one person in connection with your considerations in this case.

INSTRUCTION NO. 16

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

INSTRUCTION NO. 17

Damages may be the fault of more than one person. In comparing fault, you should consider all of the surrounding circumstances shown by the evidence together with the conduct of the Defendants 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. Both are to be treated as a single party for the purpose of determining their percentage of fault.

INSTRUCTION NO. 18

After you have compared the conduct of all parties, if you find the Plaintiffs were at fault and the Plaintiffs’ fault was more than 50% of the total fault, the Plaintiffs cannot recover damages.

If you find the Plaintiffs’ fault was 50% or less of the total fault, then I will reduce the total damages by the percentage of Plaintiffs’ fault.

However, any fault of Judith M. Wardlow does not bar or reduce the damages for loss of consortium claimed by David L. Wardlow.

INSTRUCTION NO. 19

Plaintiffs claim that the Defendants were at fault because of negligence. This ground of fault has been explained to you in other instructions.

In order to recover against the Defendants, the Plaintiffs must prove all of the following ^{three} ~~three~~ propositions:

1. Defendants were at fault. In order to prove fault, the Plaintiffs must prove that the Defendants were negligent in one or more of the following ways:
 - a. In negligently providing post-operative care of bunionectomies for Plaintiff Judith M. Wardlow;
 - b. In negligently treating an open wound on Plaintiff's foot; or
 - c. In failing to properly rule out and/or treat osteomyelitis in Plaintiff Judith M. Wardlow on January 24, 2017; January 26, 2017; January 28, 2017; and March 16, 2017.
 - d. In placing hardware in Judith M. Wardlow's foot; ~~and/or~~
2. Defendants' fault was a cause of Plaintiffs' damages.
3. The amount of damage.

If Plaintiffs have proved the foregoing propositions against the Defendants, then they are entitled to recover in some amount against the Defendants as hereafter directed. If Plaintiffs have failed to prove any of the foregoing propositions as to the Defendants, the Plaintiffs are not entitled to recover any damages against the Defendants. If the Plaintiffs failed to prove any of these propositions, the Plaintiff is not entitled to damages. If the Plaintiffs have proven all of these propositions, you shall consider the defense of comparative fault as set forth in Instruction Nos. 17 and 18.

INSTRUCTION NO. 20

“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.

INSTRUCTION NO. 21

A physician must use the degree of skill, care, and learning ordinarily possessed and exercised by other podiatrists in similar circumstances. A podiatrist is a physician. A violation of this duty is negligence.

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.

INSTRUCTION NO. 22

The conduct of a party is a cause of damage when the damage would not have happened except for the conduct. There can be more than one cause of an injury or damage.

INSTRUCTION NO. 23

There can be more than one cause of an injury or damage. When the fault of two or more separate parties or conditions is so related to an event that their combined fault, when viewed as a whole, is the cause of the event without which the event would not occur, then the fault of each party may be a cause.

INSTRUCTION NO. 24

A physician's conduct must be viewed in light of the circumstances existing at the time of diagnosis and treatment and not retrospectively. If Dr. Wanner exercised a reasonable degree of care and skill under the circumstances as they existed, though not as seen in perfect hindsight, then he is not negligent.

INSTRUCTION NO. 25

While the result of the treatment administered to the Plaintiff Judith M. Wardlow by the defendants is not in itself evidence of negligence, it is a circumstance which may be considered by you in determining whether the result was caused by Defendants' negligence.

INSTRUCTION NO. 26

If you find Judith M. Wardlow had a condition before this incident and this condition was aggravated by this incident causing further suffering and disability then she is entitled to recover damages caused by the aggravation. She is not entitled to recover for any physical ailment or disability which existed before this incident or for any injuries or damages which she now has which were not caused by the Defendants' actions.

INSTRUCTION NO. 27

If Judith M. Wardlow had a condition making her more susceptible to injury than a person in normal health, then the Defendants are responsible for all injuries and damages which are experienced by Judith M. Wardlow factually caused by the Defendants' 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.

INSTRUCTION NO. 28

If you find Judith Wardlow was injured by another act after this incident, she cannot recover for any later injury or aggravation of injury not caused by this incident.

INSTRUCTION NO. 29

Defendants claim Ms. Wardlow failed to mitigate her damages by not completing physical therapy and by maintaining an inappropriate activity level. Ms. Wardlow has a duty to exercise ordinary care to reduce, minimize or limit her damages. To prove Defendant's claim of failure to mitigate, Defendant must prove all of the following:

1. There was something Ms. Wardlow could do to mitigate her damages;
2. Requiring Ms. Wardlow to do so was reasonable under the circumstances;
3. Ms. Wardlow acted unreasonably in failing to undertake the mitigating activity; and
4. Ms. Wardlow's failure to undertake the mitigating activity caused an identifiable portion of her damages.

If Defendant has proved all of these numbered propositions, then Defendant has proved this defense. If Defendant has failed to prove one or more of these numbered propositions, then Defendant has not proved Ms. Wardlow failed to mitigate her damages.

INSTRUCTION NO. 30

If you find Plaintiff, Judith Wardlow is entitled to recover damages, you shall consider the following items:

1. Past Loss of Function of the Body - Loss of function of the body from the date of injury to the present time. Loss of body is the inability of a particular part of the body to function in a normal manner.
2. Future Lost Function of the Body - The present value of future loss of function of the body.
3. 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.
4. Future Physical and Mental Pain and Suffering - The present value of future physical and mental pain and suffering.
5. Past Lost Earning Capacity – The parties have stipulated Plaintiff is receiving \$2,041 in monthly Social Security Disability, and Plaintiff has stipulated that she is not seeking recovery for the monies that she is receiving from Social Security. You are not to consider this amount when awarding damages if you determine there are any such damages.
6. Loss Future Earning Capacity;
7. Past Medical Expenses – Stipulation of \$3,900;
8. Future Medical Expenses.

All 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.

The amount you assess for physical and mental pain and suffering in the past and future, loss of future earning capacity, and loss of function of the 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 assess for any item of damage must not exceed the amount caused by a party 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. Similarly, damages awarded to one party shall not be included in any amount awarded to another party.

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.

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

INSTRUCTION NO. 31

“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 Plaintiff David L. Wardlow 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 Plaintiff David L. Wardlow would otherwise have received from the date of injury until the present time.
2. The present value of loss of spousal consortium which Plaintiff David L. Wardlow would otherwise have received in the future.

Damages for loss of spousal consortium are limited in time to the shorter of the spouse’s injured Plaintiff’s normal life expectancy.

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

1. The circumstances of Plaintiff Judith M. Wardlow’s life.
2. Plaintiff Judith M. Wardlow and Plaintiff David L. Wardlow’s ages at the time of Plaintiff Judith M. Wardlow’s injury.
3. Plaintiff Judith M. Wardlow’s health, strength, character and life expectancy.

4. Plaintiff Judith M. Wardlow's capabilities and efficiencies in performing the duties of a spouse.
5. Plaintiff Judith M. Wardlow's skills and abilities in providing instructions, guidance, advice and assistance.
6. Plaintiff David L. Wardlow's needs.
7. All other facts and circumstances bearing on this issue.

The amount you assess for loss of spousal 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(s) 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. Similarly, damages awarded to one party shall not be included in any amount awarded to another party.

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

INSTRUCTION NO. 32

A Standard Mortality Table indicates the normal life expectancy of people who are the same age as Judith Wardlow (62 years) is 22.47 years, and David Wardlow (78 years) is 8.5 years. The statistics from a Standard Mortality Table are not conclusive. You may use this information, together with all the other evidence, about Judith and David Wardlow's health, habits, occupation, and lifestyle, when deciding issues of future damages.

INSTRUCTION NO. 33

You have heard testimony that attorneys paid the expert witnesses in connection with this case, and their testimony.

Attorneys often advance the cost for purposes of expert witness testimony. Normally there is a fee agreement in effect which requires the parties to repay their attorneys for the money that has been advanced.

This information as to payment of the expert witness fees has no relevance or probative value in connection with this case and should not be used or considered by you in any deliberations of the facts of this case.

INSTRUCTION NO. 34

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.

INSTRUCTION NO. 35

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.

INSTRUCTION NO. 36

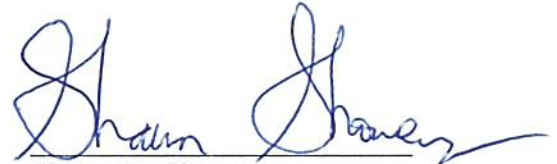
During the trial, you have been allowed to take notes. You may take these with you to the jury room to use in your deliberations. Remember, these are notes and not evidence. Generally, they reflect the recollection or impressions of the evidence as viewed by the person taking them, and may be inaccurate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

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

INSTRUCTION NO. 37

I am giving you one verdict form. If you all agree to the answers to the questions, the verdict will be signed by the person you selected to serve as foreman or forewoman.

When you have agreed upon a verdict and appropriately signed it, inform the court attendant.

A handwritten signature in blue ink, appearing to read "Shawn Showers", is written over a horizontal line.

Shawn R. Showers
District Court Judge
Eighth Judicial District

[If your answer to Question No. 2 is "no," STOP HERE, do not answer any further questions, and sign the Verdict Form, if your Answer is "YES" please go to Question No. 3.]

Question 3: Was Plaintiff Judith Wardlow at fault?

ANSWER:

_____ YES _____ NO

[If your answer is "NO" do not answer Questions No. 4 and 5].

Question No. 4. Was Judith Wardlow's fault a cause of any damage to the Plaintiffs?

ANSWER:

_____ YES _____ NO

[If your answer is "NO" do not answer Question no. 5].

Question No. 5. Using 100% as the total combined fault of plaintiff Judith Wardlow and Defendant Dr. David Wanner which was a cause of plaintiff's damage, what percentage of such combined fault do you assign to the plaintiff Judith Wardlow and what percentage of such combined fault do you assign to the defendant Dr. David Wanner D.P.M.?

ANSWER: Judith Wardlow	_____ %
Dr. David Wanner	_____ %
TOTAL	100%

[If you find Plaintiff Judith Wardlow to be more than 50% at fault, do not answer any further questions and sign the Verdict Form].

Question No. 6: Do you find that Plaintiff Judith Wardlow has proven she has a substantial and permanent loss of impairment of bodily function, or substantial disfigurement caused by the negligence of Dr. David Wanner?

Yes

No

Question No. 7: State the amount of damages sustained by the plaintiffs by Dr. David Wanner's fault as to each of the following items of damage. If the plaintiffs have failed to prove any item of damage, or has failed to prove that any item of damage was caused by Dr. David Wanner's fault, enter 0 for that item:

Past Pain and Suffering: _____

Future Pain and Suffering: _____

Past Loss of Function _____

Future Loss of Function _____

Loss of consortium for David Wardlow _____

Past Lost Earning Capacity _____

Loss Future Earning Capacity _____

Past Medical Expenses _____

Future Medical Expenses _____

Total: _____



FOREMAN OR FOREWOMAN*