UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Matthew Sanders, Plaintiff	:	
v.	:	No. 2:00-CV-424
Nike, Inc; Bauer Nike Hockey Inc.; Bauer Nike Hockey U.S.A., Inc.; and Bauer U.S.A. Inc., Defendants.	:	

JURY CHARGE

The Plaintiff in this case is Matthew Sanders, represented by Thomas Sherrer. The Defendants are Nike, Inc., Bauer Nike Hockey, Inc., Bauer Nike Hockey U.S.A., Inc., Bauer Inc., Bauer U.S.A. Inc. (collectively "Bauer-Nike"), represented by Steven Straus and Gerard Benvenuto.

This lawsuit arises from a concussion that Plaintiff sustained during a college ice hockey game that occurred on November 14, 1997. At the time of his injury, Plaintiff was wearing a helmet provided by the Defendants. Plaintiff makes claims against the Defendants based on strict liability, negligence, breach of implied warranty of merchantability and consumer fraud. Defendants deny any wrongdoing.

ROLE OF THE COURT, THE JURY AND COUNSEL

You have listened carefully to the testimony presented to you. Now you must pass upon and decide the factual issues of this case. You are the sole and exclusive judges of the facts. You pass upon the weight of the evidence, you determine the

credibility of the witnesses, you resolve such conflicts as there may be in the evidence, and you draw such inferences as may be warranted by the facts as you find them. I shall shortly define the word "evidence" and instruct you on how to assess it, including how to judge the credibility of the witnesses.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. You are not to be concerned with the wisdom of any rule of law stated by the court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty as judges of the facts to base a verdict upon anything but the evidence in the case.

Nothing I say in these instructions is to be taken as an indication that I have any opinion about the facts of the case, or what that opinion is. It is not my function to determine the facts. That is your function.

You are to discharge your duty as jurors in an attitude of complete fairness and impartiality. You should appraise the evidence deliberatively and without the slightest trace of sympathy, bias or prejudice for or against any party. All parties expect that you will carefully consider all of the evidence, follow the law as it is now being given to you and reach a just verdict regardless of the consequences.

EVIDENCE

You have seen and heard the evidence produced in this trial and it is the sole province of the jury to determine the facts of this case. The evidence consists of the sworn testimony of the witnesses, any exhibits admitted into evidence, and all the facts admitted or stipulated. I would now like to call to your attention certain guidelines by which you are to evaluate the evidence.

There are two types of evidence which you may properly use in reaching your verdict. One type of evidence is direct evidence. Direct evidence is when a witness testifies about something she or he knows by virtue of his or her own senses -- something she or he has seen, felt, touched, or heard. Direct evidence may also be in the form of an exhibit where the fact to be proved is the exhibit's existence or condition.

Circumstantial evidence is evidence which tends to prove a disputed fact by proof of other facts. You infer on the basis of reason and experience and common sense from one established fact the existence or non-existence of some other fact. Circumstantial evidence is of no less value than direct evidence for it is a general rule that the law makes no distinction between direct evidence and circumstantial evidence but requires that your verdict must be based on all the evidence presented.

CREDIBILITY OF WITNESSES

You as jurors are the sole judges of the credibility of the witnesses and the weight of their testimony. It is your job to determine the credibility or believability of each witness. You do not have to give the same weight to the testimony of each witness since you may accept or reject the testimony of any witness in whole or in part. In weighing the testimony of the witnesses you have heard, you should consider their interest, if any, in the outcome of the case; their manner of testifying; their candor; their bias, if any; their resentment or anger, if any; the extent to which other evidence in the case supports or contradicts their testimony; and the reasonableness of their testimony.

The weight of the evidence is not determined by the number of witnesses testifying. You may find the testimony of a small number of witnesses or a single witness about a fact more credible than the different testimony of a larger number of witnesses. Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you to discredit such testimony. Two or more persons may well hear or see things differently, or may have a different point of view regarding various occurrences. Innocent misrecollection or failure of recollection is not an uncommon experience. You should attempt to resolve inconsistencies if you can, but you also are free to believe or disbelieve any part of the testimony of any witness as you see

fit.

EXPERT WITNESSES

In this case, I have permitted certain witnesses to express their opinions about matters that are in issue. A witness may be permitted to testify to an opinion on those matters about which he or she has special knowledge, skill, experience and training. Such testimony is presented to you on the theory that someone who is experienced and knowledgeable in the field can assist you in understanding the evidence or in reaching an independent decision on the facts.

In weighing this opinion testimony, you may consider the witness' qualifications, his or her opinions, the reasons for testifying, as well as all of the other considerations that ordinarily apply when you are deciding whether or not to believe a witness' testimony. You may give the opinion testimony whatever weight, if any, you find it deserves in light of all the evidence in the case. You should not, however, accept opinion testimony merely because I allowed the witness to testify concerning his or her opinion. Nor should you substitute it for your own reason, judgment and common sense.

TESTIMONY AND ARGUMENTS EXCLUDED

I caution you that you should entirely disregard any testimony that has been excluded or stricken from the record. Likewise, the arguments of the attorneys and the questions

asked by the attorneys are not evidence in the case. The evidence that you will consider in reaching your verdict consists only of the sworn testimony of witnesses, the stipulations made by the parties and all exhibits admitted into evidence. When the attorneys for the plaintiff and the defendants stipulate or agree as to the existence of a fact, you must accept the stipulation as evidence and regard that fact as proved.

Anything you have seen or heard outside the courtroom is not evidence, and must be entirely disregarded. You are to consider only the evidence in the case. But in your consideration of the evidence, you are not limited merely to the statements of the witnesses. In other words, you are not limited solely to what you see and hear as the witnesses testify. You are permitted to draw, from facts which you find have been proved, such reasonable inferences as you feel are justified in light of your experiences.

BURDEN OF PROOF

This is a civil case and as such the plaintiff has the burden of proving every element of his claim by a "preponderance of the evidence." The phrase "preponderance of the evidence" means the evidence of greater weight, logic, or persuasive force. It is a matter of quality, not quantity. Preponderance of the evidence is evidence that is more convincing and produces in your minds a belief that what is

sought to be proved is more likely true than not. In other words, to establish a claim or a defense by a "preponderance of the evidence" means proof that the claim or defense is more likely so than not so. In determining whether any fact at issue has been proved by a preponderance of the evidence, you may consider the testimony of all the witnesses, regardless of who called them, and all the exhibits received in evidence, regardless of who may have produced them.

As to certain affirmative defenses, the burden of establishing the essential facts is on the Defendants. If the proof should fail to establish any essential element of a Defendant's affirmative defense by a preponderance of evidence in the case, the jury should find for the Plaintiff as to that claim.

CORPORATION ENTITLED TO TREATMENT AS A PERSON

Defendants in this case are corporations. The fact that a corporation is involved must not affect your decision in any way. A corporation and all other persons are equal before the law and must be dealt with as equals in a court. You should consider and decide this case as an action between persons.

A. STRICT PRODUCTS LIABILITY

The first theory I will discuss with you is called strict products liability. In order to prevail upon his claim of strict liability against Bauer-Nike, Mr. Sanders must prove by

a preponderance of the evidence each of the following elements:

1. that the Bauer 5000 helmet or some component of the helmet was in a defective condition when sold by Bauer-Nike;

2. that the defect, if any, made the helmet unreasonably dangerous to users such as Mr. Sanders;

3. that the helmet was in substantially the same condition at the time of the accident as it was when it left the hands of Bauer-Nike; and

4. that the defect, if any, in the helmet was the proximate cause of the injuries suffered by the Plaintiff.

DESIGN DEFECT

On the first element, Plaintiff must prove by a preponderance of the evidence that there was some defect in the helmet when it was sold by Bauer-Nike. Keep in mind that a product is not defective merely because it is possible for damage to occur from use of the product. Bauer-Nike is not required to guarantee that no one will be hurt using the helmet. All that Bauer-Nike is required to do is to manufacture and sell a product that is free from defective and unreasonably dangerous conditions.

Put another way, strict liability is not the same as absolute liability. Under Vermont's doctrine of strict liability, liability is imposed on a manufacturer or seller

only when the product is unreasonably dangerous.

Mr. Sanders claims that the helmet was defective in its design. A manufacturer has no duty to design an absolutely perfect product. The fact that there are alternative designs that, had they been adopted, would have prevented the accident is insufficient to establish liability; this is only one factor to be considered in determining if the product was unreasonably dangerous. It is not enough for Mr. Sanders to show that Bauer-Nike might have designed a safer product; if the helmet as designed was safe for ordinary use, then the helmet was not defectively designed.

A product is in a defective condition and unreasonably dangerous to the user if it has a propensity for causing physical harm beyond that which would be contemplated by the ordinary user or consumer, with ordinary knowledge common to the foreseeable class of users as to its characteristics.

In evaluating the adequacy of the design in guarding against unreasonable risks, you should consider the gravity of the danger posed by the product's design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, and the adverse consequences to the product and to the consumer that would result from an alternative design. You may also consider standard industry practice at the time of the product's design and manufacture. However, such compliance is not conclusive. Evidence that all product

designers in the industry balance the competing factors in a particular way is relevant to the determination of the product's design. Another relevant factor in determining whether an alternative design was feasible at the time of manufacture is the manufacturer's ability to eliminate the allegedly unsafe character of the product without impairing its usefulness.

Only if you find that the Plaintiff has proven that Bauer-Nike's helmet had an unreasonably dangerous defect, and that the defect was the proximate cause of Plaintiffs' injuries, should you go on to determine the amount of his damages.

Proximate Cause

A legal or proximate cause of an injury means that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury. An injury is proximately caused by an act or a failure to act when it appears from the evidence in the case that the act or omission played a substantial part in bringing about or actually causing the injury.

The law recognizes that there may be more than one proximate cause of an injury. Multiple factors may operate at the same time, or independently, to cause the injury and each may be a proximate cause. Plaintiff is required to show that the defect was a proximate cause of Mr. Sanders' injury, but is not required to show that it was the only proximate cause.

Other Player's Head Injuries

You have heard testimony regarding the possibility that other UVM players may have sustained head injuries or concussions while wearing the helmet at issue. I am instructing you that this evidence was introduced not as proof that the helmets were defective or unreasonably dangerous, but that the Defendants were allegedly placed on notice that the helmets could be defective or unreasonably dangerous.

B. NEGLIGENCE

The Plaintiff claims that Bauer-Nike was negligent in the manner in which it designed the Bauer 5000 helmet, and that such negligence was the legal or proximate cause of his damages.

In order to prove that Bauer-Nike was negligent, the Plaintiff must prove each of the following elements by a preponderance of the evidence:

1. that Bauer-Nike owed Plaintiff a duty;
2. that Bauer-Nike breached that duty;
3. that the Plaintiff suffered damages; and
4. that Bauer-Nike's breach of its duty was a proximate cause of the Plaintiff's damages.

The first element of negligence is duty. Duty, as it is

understood in the law, means a legal obligation to do or not do some act, depending on the particular circumstances of the case. Your first task as a jury will be to determine whether Mr. Sanders has shown, by a preponderance of the evidence, that Bauer-Nike owed him a duty.

The second element is breach. In considering whether a breach has occurred, you must look at the evidence and determine if Bauer-Nike or its employees adhered to the duty as imposed by law.

The third element is injury. You must evaluate whether Plaintiff suffered an injury. You must then go on to consider whether Plaintiff suffered damages, and if so, whether those damages were proximately caused by Bauer-Nike's breach.

The last element, proximate cause, is often the most difficult to explain. In order to find Bauer-Nike liable for the injuries to Mr. Sanders, you must conclude that Bauer-Nike's negligence was a proximate cause of Mr. Sanders' injuries. Apply the definition of proximate cause described on page 10.

C. IMPLIED WARRANTY OF MERCHANTABILITY

Mr. Sanders claims that Bauer-Nike has breached the implied warranty of merchantability, and that as a result of that breach, the Plaintiff suffered economic losses. Under Vermont law, certain warranties are implied by law when goods,

or services incidental to them, are sold. One of these is the warranty of merchantability, which provides that unless the parties have agreed on some other standard, all goods shall be fit for the ordinary purposes for which they are intended. That is to say, the goods must be free of defects and reasonably safe for the normal use for which the goods are made and sold.

In order to prevail on this claim, Plaintiff must prove that there was a breach of implied warranty and that the injuries complained of were proximately caused by that breach. In order to prevail on this claim, the Plaintiff must prove each of the following elements by a preponderance of the evidence:

1. that the helmet sold by Bauer-Nike was not fit for the ordinary purposes for which it was intended;

2. that the helmet was unfit for its ordinary purposes when it left Bauer-Nike's manufacturing plant; and

3. that the defect was the proximate cause of Plaintiff's damages.

Proximate cause in the case of breach of an implied warranty means a cause which, unbroken by any intervening cause, produces the damage, and without which the damage would not have occurred. Apply the definition of proximate cause described on page 10.

Only if you find that the Plaintiff has proven that Bauer-Nike breached an implied warranty of merchantability and that

such breach was a proximate cause of Plaintiff's damage, should you go on to determine the amount of the damages for this claim.

D. CONSUMER FRAUD

Plaintiff claims that Defendants violated Vermont's Consumer Fraud Act. The Consumer Fraud Act makes it illegal for a seller to commit any unfair or deceptive acts or practices in its business. A seller is a person regularly and principally engaged in a business of selling goods or services to consumers.

The first question for you to consider is whether Defendants committed any unfair or deceptive acts or practices in this case. To establish a "deceptive act or practice" under the Vermont Consumer Fraud Act, the Plaintiff must prove three elements by a preponderance of the evidence.

1. there must be a representation, omission, or practice likely to mislead consumers;
2. consumer must be interpreting the message reasonably under the circumstances; and
3. misleading effects must be material, that is, likely to affect the consumer's conduct or decision regarding the product.

In evaluating deceptive conduct, you must look at whether the representation or omission had the capacity or tendency to

deceive a reasonable consumer. Actual injury need not be shown. A consumer's understanding need not be the only one possible. Materiality is measured by what a reasonable person would regard as important in making a decision. However, it may include a subjective test where the seller knows that the consumer is particularly susceptible to an omission or misrepresentation.

Plaintiff must also prove by the preponderance of evidence that he sustained injury that was proximately caused by an unfair or deceptive act, as defined by Vermont Consumer Fraud law.

ASSUMPTION OF RISK

In recognition of the dangers that exist in virtually every sport, the legislature of this state has passed a law which states that a person who participates in a sport accepts as a matter of law all the dangers that are inherent in that sport, to the extent that such dangers are obvious and necessary to the sport.

In this case, Defendants claim that the risk of suffering the injuries incurred by Plaintiff is an obvious and necessary risk of sport and that therefore, Defendants owed Plaintiff no duty of care. The claim that Plaintiff assumed the risk which caused his injuries is an affirmative defense. By that I mean that defendant bears the burden of proving to you, by a preponderance of the evidence, that the risk which caused Plaintiff's accident is one which he assumed as an inherent part of the sport.

In order to persuade you of that fact, Defendants must prove by a preponderance of the evidence that the risk involved is both obviously and necessarily part of the sport. A risk or danger which is "inherent" in a sport is one which is a part of the essential characteristics of that sport.

"Obvious" has a particular definition when used here. "Obvious" does not mean something easily observed. Rather, an obvious risk is one that is inherent in the very nature of the sport itself. The Defendant must prove that the particular danger posed by use of the Bauer 5000 helmet was obvious. If

you find that the danger was not obvious, then the Defendants cannot succeed with this defense.

A "necessary risk" is one where the danger exists because the effort required to remove the danger would place an unreasonable burden upon the Defendants. In other words, the Defendants claim there simply was no obligation toward the Plaintiff because it would place an unreasonable burden on the Defendant to discover or learn of the danger; to warn the Plaintiff about the danger; or to prevent or extinguish the danger. If you find, based on a preponderance of the evidence, that it would have taken unreasonable effort on the part of the Defendants to discover or learn of the danger of using the Bauer 5000 helmet, to warn about the danger, or to prevent or extinguish the danger, then the danger was a necessary risk of the sport in which the Plaintiff was engaged.

If the specific risk which resulted in Plaintiff's injuries is not an obvious and necessary part of the sport, then it is not an inherent risk of the sport, and Defendants had a duty to exercise reasonable care to eliminate or adequately warn Plaintiff of the danger.

COMPARATIVE NEGLIGENCE

As part of its defense to the suit brought by Plaintiff, the Defendants have raised the defense of comparative negligence. Defendants claim that Plaintiff was himself negligent and that his own negligence, if any, was the cause of his injuries.

Just as Plaintiff bears the burden of proving by a preponderance of the evidence that Defendants are negligent, Defendants must prove by a preponderance of the evidence that Plaintiff was also negligent. The elements of Defendants' negligence claim are the same as those I have already described in the section entitled NEGLIGENCE above. Thus, to prove that Plaintiff was negligent, Defendants must prove by a preponderance of the evidence that:

1. Plaintiff owed himself a duty to exercise ordinary care;
2. Plaintiff breached that duty; and
3. Plaintiff's breach was a proximate cause of the injuries that he suffered.

Again, I remind you that the law recognizes that there may be more than one proximate cause of an injury. Multiple factors may operate at the same time, or independently, to cause the injury and each may be a proximate cause. Defendants are required to prove by a preponderance of the evidence that Plaintiff's negligence was a proximate cause of Mr. Sanders'

injury, but are not required to show that it was the only proximate cause.

Should you find by a preponderance of the evidence that one or more of the Defendants and Plaintiff were negligent, and that the negligence of each of them proximately caused the injury suffered by Plaintiff, then it will be your job to assign a percentage of responsibility to Defendants and the Plaintiff. Those percentages must add up to 100 percent.

INSTRUCTION ON DAMAGES

As explained above, the Plaintiff has made claims against the Defendants for strict liability, negligence, implied warranty of merchantability, and consumer fraud. If you decide for the Defendants on the question of liability, you will have no occasion to consider the question of damages.

The fact that I am instructing you about the proper measure of damages is no indication of my view of the case. Rather, I give you these instructions for guidance if you find in favor of the Plaintiff from a preponderance of the evidence presented in the case and according to the other instructions I have given you.

In reaching your verdict in this case, you must carefully consider the evidence presented against the Defendants. You may assess damages against the Defendants only if you find the Defendants liable under at least one of the theories I have outlined above.

If you find the Plaintiff is entitled to recover on any of Plaintiff's liability theories, then the law provides that he is to be fully and fairly compensated for all the injuries and losses he has suffered. This means you may award the amount of money you determine to be full, fair and reasonable compensation for all his injuries and losses.

COMPENSATORY DAMAGES

In an ordinary case such as the one before you, damages are awarded on a theory of compensation. An award of compensatory damages is intended to put the Plaintiff in the same position he was in prior to the incident in question. Thus, Mr. Sanders is entitled to recover for all damages that are a natural consequence of such negligence that you find, including such items as past and future pain and suffering, lost enjoyment and past and future loss of earnings.

As with the other elements of his claim, the burden is on Mr. Sanders to prove by a preponderance of the evidence the amount of damages which he has suffered. Where the amount of Plaintiff's damages are capable of being calculated in dollars and cents, such as lost earnings, Mr. Sanders must demonstrate the amount of his losses in dollars and cents. However, where Plaintiff's claimed damages may not be reduced to dollars and cents, such as with assertions of lost enjoyment and pain and suffering, Mr. Sanders need not demonstrate the exact dollar and cent value of his injury. Nonetheless, Plaintiff is still

required to submit to the jury evidence of such a quality that the jury is capable of reasonably estimating the extent of Plaintiff's loss. Under no circumstances may you award damages that are speculative or conjectural. You are further instructed that any natural feelings of sympathy for Mr. Sanders must be set aside during your deliberations. Such feelings are not properly a factor for your consideration in this matter.

In determining the damages suffered by Plaintiff, if any, as a result of Plaintiff's injuries, you should consider the following items:

1. Lost earnings and benefits and lost earning capacity:

Assuming you find liability, Mr. Sanders would be entitled to be compensated for all past and future lost earnings that you find were caused by the injuries resulting from Bauer-Nike's conduct. As with the other elements of his case, Mr. Sanders must prove such lost wages by a preponderance of the evidence. Such damages are limited to what you find to be reasonably probable from Plaintiff's injuries. You may take into account Mr. Sander's age, employment history, past earnings record, business and professional experience, skill or ability in his work or profession, and all the contingencies to which his occupation would be liable.

Keep in mind that future prospects are speculative or merely possible are not to be considered in awarding damages.

Plaintiff must prove lost earning capacity by a preponderance of the credible evidence and your award must be complete, fair, and reasonable in light of all the circumstances. You should have in mind that a certain injury to one person may have entirely different consequences to another. The evidence in each individual case must justify the award.

2. Lost Enjoyment and Pain and Suffering:

Plaintiff in this case alleges that he suffered lost enjoyment and mental distress as a result of Defendants' conduct. If Mr. Sanders has proved such injury by a preponderance of the evidence, then I instruct you that you may make an award of damages to compensate Plaintiff for this element.

The measure of damages awarded to Mr. Sanders for lost enjoyment and emotional distress should be equivalent to reasonable compensation for any pain, discomfort, fears, anxiety, humiliation and other mental and emotional distress suffered by him which was proximately caused by Bauer-Nike. No definite standard is prescribed by law by which to fix reasonable compensation for lost enjoyment and emotional distress. Nonetheless, in making an award for lost enjoyment and emotional distress you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in light of the evidence.

You may award Plaintiff a sum you deem appropriate to

compensate him for the pain and suffering he has endured as a result of his injuries, including any (i) disability, (ii) disfigurement, (iii) physical impairment, and (iv) emotional distress. You may also include an amount to compensate Plaintiff for any future pain and suffering which you find he is reasonably likely to experience.

Whatever the Plaintiff is entitled to recover in the future on account of Plaintiff's injuries must be included in the amount he recovers now. Even if you did find Plaintiff was partially at fault, you must still determine the total amount of the Plaintiff's damages and place this amount on the Special Verdict form. Do not reduce the damages by any percentage of fault you assign to Plaintiff. I will do that reduction calculation, if necessary.

Collateral Source Rule

You are not to concern yourself with any benefit or payments which you think the Plaintiff has received as a result of his injuries. It is not of any consequence or relevance to the case before you whether his medical bills have been paid or by whom, or whether he has recovered from any other source. Furthermore, you may not consider whether any damages you may award will go to the Plaintiff to reimburse others.

PUNITIVE DAMAGES

Mr. Sanders is also seeking punitive damages from Bauer-Nike. Again, the fact that I instruct you regarding the standards for an award of punitive damages should not be viewed by you as any indication of the Court's assessment of the merits of this claim. These instructions are given only for your guidance in determining whether you feel that an award of punitive damages is appropriate.

Punitive damages differ from compensatory damages in that punitive damages are awarded not to compensate Mr. Sanders for any injuries he may have suffered, but instead to punish Bauer-Nike for malicious or wanton conduct and to deter Bauer-Nike and others from acting in the same way. As a general rule, punitive damages may be recovered in any action based on a defendant's tortious conduct. However, such damages are not recoverable as a matter of legal right. Punitive damages may be awarded only when liability of the defendant for actual damages has been established. Awarding punitive damages is within your discretion - you are not required to award such damages.

In this case, the Defendant, Bauer-Nike, is a corporation. Before you award punitive damages against Bauer-Nike, you must find that the allegedly malicious and wanton acts supporting punitive damages were committed by an officer or director of Bauer-Nike, or by someone acting under their direction.

Alternatively, you may award punitive damages against Bauer-Nike if you find that these acts were committed by an employee of the corporation and Mr. Sanders has shown by a preponderance of the evidence that an officer or director either directed the acts, participated in them, or subsequently ratified them. In determining the amount of punitive damages to award, if any, you may consider evidence of the financial condition or net-worth of Bauer-Nike.

In order to recover an award for punitive damages, Mr. Sanders must persuade you by a preponderance of the evidence that Bauer-Nike's conduct resulted from actual malice, that is, Bauer-Nike's conduct was motivated by personal ill will toward him, or that defendant's conduct showed a reckless or wanton disregard of Plaintiff's rights. In making this determination, your focus should not be on the particular acts that Bauer-Nike committed, but instead on the nature of its alleged conduct in committing them.

In the event that you concluded that an award of punitive damages is appropriate, you may award them on a proper showing that the act or acts of the Defendants are more than wrongful or unlawful. Malice may be shown by conduct manifesting personal ill will or carried out under circumstances evidencing insult or oppression or by conduct showing reckless or wanton disregard of one's rights.

UNANIMOUS VERDICT

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree.

It is your duty as jurors to consult with one another, and to deliberate with a view toward reaching an agreement, if you can do so without violence to your individual judgment. You must each decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

Remember at all times that you are not partisans. You are judges -- the judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

NOTES

You may have taken notes during the trial for use in your deliberations. These notes may be used to assist your recollection of the evidence, but your memory, as jurors, controls. Your notes are not evidence, and should not take precedence over your independent recollections of the evidence. The notes that you took are strictly confidential.

Do not disclose your notes to anyone other than your fellow jurors. Your notes should remain in the jury room and will be collected at the end of the case.

CLOSING INSTRUCTIONS

I have selected _____ to act as your foreperson. The foreperson will preside over your deliberations, and will be your spokesperson here in Court.

A copy of this charge will go with you into the jury room for your use.

A verdict form has been prepared for your convenience. You will take this form to the jury room. Each of the interrogatories or questions on the verdict form requires the unanimous answer of the jury. Your foreperson will write the unanimous answer of the jury in the space provided opposite each question, and will date and sign the special verdict, when completed.

If it becomes necessary during your deliberations to communicate with the Court, you may send a note through the Courtroom Security Officer signed by your foreperson. No member of the jury should ever attempt to communicate with the Court by any means other than a signed writing, and the Court will never communicate with any member of the jury on any subject related to the merits of the case other than in writing, or orally here in open Court.

You will note that all other persons are also forbidden

to communicate in any way or manner with any member of the jury on any subject related to the merits of the case.

Dated at Burlington, Vermont this 25 day of October, 2004.

William K. Sessions III

United States District Court