

UNITED STATES DISTRICT COURT  
DISTRICT OF VERMONT

RHONDA LENAIR, TRUSTEE OF THE :  
LISA TRUST :  
 : Civil No. 1:03CV299  
v. :  
 :  
WAYNE GAUTHIER AND :  
LOIS GAUTHIER :

CHARGE TO THE JURY

Now that you have heard the evidence and arguments, it becomes my duty to give you the instructions of the Court as to the law applicable to this case.

It is your duty as jurors to follow the law as I shall state it to you, and not question it, and to apply that law to the facts as you find them from the evidence in the case. You are not to single out one instruction alone as stating the law, but you must consider the instructions as a whole.

The lawyers may have referred to some of the governing rules of law in their arguments. If, however, any difference appears to you between the law as stated by the lawyers and the law stated by the Court in these instructions, you are to follow the Court's instructions.

Nothing I say in these instructions is an indication that I have any opinion about the facts of the case. It is not my function to determine the facts, but rather it is yours.

You must perform your duties as jurors without bias or

prejudice as to any party. You are not to be governed by sympathy, prejudice or public opinion.

All parties expect that you will carefully and impartially 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 in the Case

Statements and arguments of counsel are not evidence in the case. However, when the attorneys on both sides stipulate or agree as to the existence of a fact, the jury must, unless otherwise instructed, accept the stipulation and regard that fact as proved.

Unless you are otherwise instructed, the evidence in the case always consists of the sworn testimony of the witnesses, and all facts which may have been admitted or stipulated.

Any evidence to which an objection was sustained by the Court, and any evidence ordered stricken by the Court, must be disregarded.

Evidence--Direct, Indirect, or Circumstantial

There are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence--such as the testimony of an eyewitness. The other is indirect or circumstantial evidence --the proof of a chain of circumstances pointing to the existence or non-existence of certain facts.

As a general rule, the law makes no distinction between direct or circumstantial evidence, but simply requires that the jury find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

Credibility of Witnesses -- Discrepancies in Testimony

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You may be guided by the appearance and conduct of the witness, or by the manner in which the witness testifies, or by the character of the testimony given, or by evidence to the contrary of the testimony given.

You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is believable. Consider each witness' intelligence, motive and state of mind, and demeanor or manner while on the stand. Consider the witness' ability to observe the matters to which the witness testifies, and whether the witness impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case, any bias or prejudice, the manner in which each witness might be affected by the verdict, and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you to discredit their testimony. Two or more persons witnessing an incident or a transaction may see

or hear it differently, which is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such weight, if any, you think it deserves.

You may, in short, accept or reject the testimony of any witness in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying. You may find that the testimony of a small number of witnesses is more credible than the testimony of a larger number of witnesses to the contrary.

Verdict -- Unanimous -- Duty to Deliberate

The verdict must represent the considered judgment of each juror. To return a verdict, it is necessary that each juror agree. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without violence to 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 other jurors, or for the mere purpose of returning a verdict.

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

INSTRUCTIONS OF LAW

Now I will give you instructions concerning the law that applies to this case. You must follow the law as stated in these instructions. You must then apply these rules of law to the facts you find from the evidence.

You are to determine the facts in this case. By these instructions, I do not intend to indicate in any way how you should decide any question of fact.



Burden of Proof and Preponderance of the Evidence

Ordinarily, the burden is on the plaintiff in a civil action to prove every essential element of his or her claim by a preponderance of the evidence. In this case, it is the plaintiff's burden of proof to prove every essential element of her Negligent Non-Disclosure claim by a preponderance of the evidence.

To "establish by a preponderance of the evidence" means to prove that something is more likely so than not so. In other words, a preponderance of the evidence in the case means such evidence as, when considered and compared with that opposed to it, has more convincing force, and produces in your minds belief that what is sought to be proved is more likely true than not true. This rule does not, of course, require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.

Stated another way, to establish a fact by a preponderance of the evidence means to prove that the fact is more likely true than not true. A preponderance of the evidence means the greater weight of the evidence. It refers to the quality and persuasiveness of the evidence, not to the number of witnesses or documents. In determining whether a fact, claim or defense has been proven by a preponderance of the evidence, you may consider the relevant testimony of all

witnesses, regardless of who may have called them, and all the relevant exhibits received in evidence, regardless of who may have produced them.

Negligent Non-Disclosure

In her complaint, the plaintiff alleges she suffered damages as a result of the negligence of the defendants. To prove negligence, the plaintiff must prove by a preponderance of the evidence each of the following four elements:

1. That the defendants owed the plaintiff a duty;
2. That the defendants breached that duty;
3. That the plaintiff suffered injury; and
4. That the defendants' breach of their duty was a proximate cause of plaintiff's injury.

The first element of negligence is duty. "Duty" means a legal obligation to do or not to do some act, depending on the particular circumstances of the case. In this case, the plaintiff alleges the defendants had a duty to accurately disclose the ownership, nature and lawful location of the underground primary power line serving the house she bought from them. Your first task will be to determine whether the plaintiff has shown, by a preponderance of the evidence, that the defendants owed her this duty.

The second element is breach. In considering whether a breach of duty has occurred, you must look at the evidence and determine if the defendants, or their agents or employees, adhered to the duty as imposed by law.

The third element is injury. You must decide whether the

plaintiff has suffered injury in this case.

The fourth element is proximate cause. To find the defendants liable for the plaintiff's injury, you must conclude their negligent non-disclosure was a proximate cause of that injury. Damages are proximately caused by a failure to act whenever it appears from the evidence that the omission played a substantial part in actually causing the damage, and that the damage was either a direct or a reasonably probable consequence of the omission.

Compensatory Damages

Damages which the plaintiff may recover are those that will fairly and justly compensate her for injuries sustained as a direct result of the defendant's unlawful conduct. You may award compensatory damages only for those injuries which you find the plaintiff has proven by a preponderance of the evidence.

You may not simply award damages for any injury suffered by the plaintiff -- you must award damages only for those injuries that are a direct result of actions by the defendants and that are a direct result of conduct by the defendants which violated the plaintiff's rights.

The plaintiff is entitled to be compensated for damages proximately caused by the defendants' conduct. The plaintiff in this case seeks as damages the costs she will incur to replace the underground primary power line serving the house she bought from the defendants.

However, damages to compensate the plaintiff must not be based on speculation or sympathy. They must be based only on the evidence presented at trial.

Mitigation of Damages

The law imposes a general duty to mitigate, or minimize, damages. What this means is that a person who has been injured has a duty to take protective or preventative measures in an effort to reduce the harm or prevent it from increasing further.

In this case, the defendants claim the plaintiff failed to mitigate her damages. The burden is on the defendants to prove this defense by a preponderance of the evidence. If you find that the plaintiff could have avoided some of the damages claimed by taking reasonable action, you must reduce your award of damages, if any, by an amount equal to those damages that you find the plaintiff could have avoided.

Election of a Foreperson

I will select \_\_\_\_\_ to act as your foreperson. The foreperson will preside over your deliberations and will be your spokesperson here in court.

A verdict form has been prepared for your convenience. You will take this form to the jury room. I direct your attention to the verdict form.

The answer to each question must be the unanimous answer of the jury. Your foreperson will write the unanimous answer of the jury in the space provided for each question and, when completed, will date and sign it.

Conclusion

To return a verdict, all jurors must agree to the verdict. In other words, your verdict must be unanimous.

Upon retiring to the jury room your foreperson will preside over your deliberations and be your spokesperson here in court.

When you have reached a unanimous verdict, your foreperson should sign and date the verdict form.

If, during your deliberations, you should desire to communicate with the Court, please reduce your message or question to writing, signed by the foreperson, and pass the note to the court security officer. He will then bring the message to my attention. I will respond as promptly as possible, either in writing or by having you return to the courtroom so that I may address your question orally. I caution you, with regard to any message or question you might send, that you should never specify where you are in your deliberations or your numerical division, if any, at the time.