

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

RANDOLPH B. CARFORD and
VIDALINA D. CARFORD,

Plaintiffs,

v. Docket No. 2:03-CV-342

ILENE L. GAMBLE,
Administrator of the ESTATE
OF DOUGLAS O. GAMBLE, and
LELAND S. SLOAN, SR.
d/b/a Sloan's Trucking,

Defendants.

JURY CHARGE

Members of the Jury:

Now that you have heard the evidence and the arguments, it is my duty to instruct you on the law. It is your duty to accept these instructions of law and apply them to the facts as you determine them.

The Plaintiffs in this case are Randolph B. Carford and Vidalina D. Carford, represented by Michael Hanley. The Defendants in this case are Ilene L. Gamble, in her capacity as the administrator of the estate of Douglas O. Gamble, and Leland S. Sloan, Sr., d/b/a Sloan's Trucking. Mrs. Gamble is represented by Robert McKearin, and Mr. Sloan is represented by Robert Bent.

As I told you earlier, this lawsuit arises from an accident that occurred on August 11, 2002, on Interstate 93 in Tilton, New Hampshire. The parties agree that Mr. and Mrs. Carford were traveling in their motor home when a tractor-trailer owned by Mr. Sloan and driven by Douglas Gamble crossed the median and struck their vehicle. Mr. Gamble died as a result of the accident, and Mr. and Mrs. Carford were injured. The parties agree that Mr. and Mrs. Carford were not at fault in the accident.

In their lawsuit, Mr. and Mrs. Carford allege that Mr. Gamble, while acting in the scope of his employment for Mr. Sloan, negligently failed to maintain control of the tractor-trailer. They allege that Mr. Sloan, as the employer of Mr. Gamble, was also legally at fault for the accident. Defendants deny that they were at fault.

ROLE OF THE COURT AND THE JURY

Now that you have listened carefully to the testimony that has been presented to you, you must consider and decide the fact issues of this case. You are the sole and exclusive judge of the facts. You weigh 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.

You are not to single out one instruction alone as stating the law, but you 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 to base a verdict upon any other view of the law than that given in the instructions I am about to give you, just as 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 should 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 evaluate the evidence deliberately 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 evidence, follow the law as it is now being given to you, and reach a just verdict, regardless of the consequences.

EVIDENCE

As I have said earlier, it is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in the case. Statements and arguments of counsel are not evidence. When, however, the attorneys on both sides stipulate or agree as to the existence of a fact, you must accept

the stipulation and regard that fact as proved.

The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing to call your attention to certain facts or inferences that might otherwise escape your notice. But it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.

The evidence includes any stipulated facts, the sworn testimony of the witnesses, and the exhibits admitted in the record. Any evidence as to which an objection was sustained and any evidence that I ordered stricken from the record must be entirely disregarded.

While you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case.

DIRECT AND CIRCUMSTANTIAL EVIDENCE

The law recognizes two types of evidence: direct and circumstantial. Direct evidence is provided when, for example, people testify to what they saw or heard themselves; that is,

something of which they have knowledge by virtue of their senses. Circumstantial evidence consists of proof of facts and circumstances from which in terms of common experience, one may reasonably infer the ultimate fact sought to be established.

Circumstantial evidence, if believed, is of no less value than direct evidence. As a general rule, the law makes no distinction between the two types of evidence, but simply requires that you find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

WITNESS CREDIBILITY

You, as jurors, are the sole judges of the credibility of the witnesses and the importance of their testimony. It is your job to decide how believable each witness was in his or her testimony. 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 may help you decide the truth and the importance of each witness's testimony. Consider each witness's knowledge, motive and state of mind, and demeanor or manner while on the stand. Consider the witness's ability to observe the

matters as to which he or she has testified, and whether he or she 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 interest he or she may have in the outcome of the case, or any bias for or against any party; 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 such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and people naturally tend to forget some things or remember other things inaccurately. Innocent misrecollection, like failure of recollection, 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 should give the testimony of each witness such weight, if any, as you may 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 to the existence

or non-existence of any fact. You may find that the testimony of a small number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary. The test is not which side brings the greater number of witnesses, or presents the greater quantity of evidence; but which witness, and which evidence, appeals to your minds as being most accurate, and otherwise trustworthy.

EXPERT WITNESSES

You have heard the testimony of expert witnesses in this case. An expert is allowed to express his or her opinion on those matters about which he or she has special knowledge and training. Expert testimony is presented to you on the theory that someone who is experienced in a field can assist you in understanding the evidence or in reaching an independent decision on the facts.

In weighing an expert's testimony, you may consider his or her qualifications, opinions, and reasons for testifying, as well as all of the other considerations that apply when you are deciding whether to believe a witness's testimony. You may give the expert's testimony whatever weight, if any, you find it deserves in light of all the evidence in this case. You should consider the soundness of his or her opinion, reasons for the opinion and motive, if any, for testifying. You should not, however, accept the expert's testimony merely because he or she is an expert. Nor should you substitute it for your own reason,

judgment, and common sense. The determination of the facts in this case, as I have said, rests solely with you.

BURDEN OF PROOF

Because this is a civil case, the Plaintiffs, Mr. and Mrs. Carford, have the burden of proving their case by a "preponderance of the evidence." To prove something by a preponderance of the evidence means to prove that something is more likely true than not true. A preponderance of the evidence means the greater weight, or logic, or persuasive force of the evidence. It does not mean the greater number of witnesses or documents. It is a matter of quality, not quantity.

In determining whether any fact in issue has been proved by a preponderance of the evidence, you may consider the testimony of all the witnesses, regardless of who may have called them, and all the exhibits received in evidence, regardless of who may have produced them. If, after considering all of the evidence, you conclude that Mr. and Mrs. Carford have failed to establish any essential element of a given claim by a preponderance of the evidence, you should find for the Defendants as to that claim. If, after such consideration you find the evidence of both parties to be in balance or equally probable, then Mr. and Mrs. Carford have failed to sustain their burden and you must find for the Defendants.

THE SUBSTANTIVE LAW OF THE CASE

In order to recover from the Defendants, Mr. and Mrs. Carford must prove that the Defendants were legally at fault for harm that they have suffered. You must analyze each Defendant's conduct separately in order to determine whether Mr. Gamble, Mr. Sloan, or both men were legally at fault. I will now explain the law that governs how you must make these determinations.

DEFENDANT GAMBLE'S LIABILITY FOR NEGLIGENCE

Mrs. Gamble is a Defendant in this lawsuit not in her personal capacity, but in her capacity as the administrator of the estate of her husband, Douglas Gamble. If you determine that Mr. Gamble was legally at fault for the harm suffered by Mr. and Mrs. Carford, the estate of Mr. Gamble will be liable to the Carfords.

In order to establish that Mr. Gamble was legally at fault, the Plaintiffs must prove by a preponderance of the evidence both of the following elements:

1. Mr. Gamble breached his duty to Mr. and Mrs. Carford by failing to use reasonable care; and
2. That breach of duty was a legal cause of the Carfords' injury.

I will explain these elements below.

First Element - Breach of Duty to Use Reasonable Care

As a driver, Mr. Gamble owed Mr. and Mrs. Carford a duty to use reasonable care. Reasonable care is the degree of care which

an ordinary, prudent person would use under the same or similar circumstances. The Plaintiffs must prove by a preponderance of the evidence that Mr. Gamble breached that duty.

In the context of driving a motor vehicle, the duty to use reasonable care includes the duty to remain alert, keep a proper lookout, pay attention to existing and potential hazards, and keep the vehicle under control at all times. The duty to keep a proper lookout includes the duty not only to look, but to look carefully so as to observe oncoming traffic.

The duty to use reasonable care arises from a risk to others which could be reasonably foreseen. Thus, a person may not be found negligent if he could not reasonably foresee that his conduct would result in an injury to another.

The failure to use reasonable care may take the form of action or inaction. That is, negligence may consist of either: doing something that an ordinary, prudent person would not do under the same or similar circumstances; or, failing to do something that an ordinary, prudent person would do under the same or similar circumstances.

Second Element - Legal Cause

Failure to exercise reasonable care amounts to legal fault if you find that such failure was a "legal cause" of the accident and injury. When is negligence a legal cause of harm? When the negligent conduct is a substantial factor in bringing about the

harm, and if the harm would not have occurred without that conduct.

On the other hand, if negligent conduct is not a substantial factor in bringing about the harm, it cannot be the basis for a finding of legal harm.

In determining whether Mr. Gamble's conduct was a legal cause of the Plaintiffs' injury, you need not find that his conduct was the sole cause of the injury. You need only find that it was a substantial factor in bringing about the injury, even though other factors may also have contributed to cause the injury.

DEFENDANT SLOAN'S LIABILITY FOR NEGLIGENCE

There are two alternative ways in which Plaintiffs can establish that Mr. Sloan was legally at fault for their injury. Under the first alternative, they must prove that Mr. Sloan violated federal safety regulations and that his violation was a legal cause of Mr. and Mrs. Carford's injury. Under the second alternative, they must prove that Mr. Gamble was legally at fault and that he caused the accident while acting in the scope of his employment for Mr. Sloan. Mr. and Mrs. Carford do not need to prove both alternatives, but in order for Mr. Sloan to be liable, you must unanimously agree on at least one alternative.

FIRST ALTERNATIVE - VIOLATION OF FEDERAL REGULATIONS

Under the first alternative, the Plaintiffs seek to prove

Mr. Sloan's legal fault based on his alleged violation of federal safety regulations. Under this alternative, Mr. and Mrs. Carford must prove by a preponderance of the evidence both of the following two elements:

1. Mr. Sloan violated a federal safety regulation; and
2. That violation was a legal cause of Plaintiffs' injuries.

First Element - Violation of Federal Safety Regulation

At the time of the accident, Mr. Sloan was required to ensure that his drivers complied with various federal safety regulations. In particular, the regulations required Mr. Sloan to ensure that Mr. Gamble did not do any of the following:

1. Operate a commercial motor vehicle while his ability or alertness was so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him to begin or continue to operate the commercial motor vehicle.
2. Drive for more than 10 consecutive hours.
3. Drive after being on duty for 15 consecutive hours.
4. Drive within 8 hours of having gone off duty.
5. In any consecutive 8-day period, drive after being on duty for more than 70 hours.

A driver is considered to go "on duty" at the time that he begins to work or is required to be in readiness to work. He goes "off duty" when he is relieved from work and all responsibility for performing work. To "drive" means to be at the driving controls of a motor vehicle that is in operation.

If you find that Plaintiffs have established by a

preponderance of the evidence that Mr. Sloan permitted or required Mr. Gamble to engage in any of the five prohibited activities listed above, then the first element has been satisfied.

Second Element - Legal Cause

If you find that the first element is satisfied, you must determine whether Mr. Sloan's violation or violations of federal regulations were a legal cause of Mr. and Mrs. Carford's injury. As I have already explained, conduct is a legal cause if it is a substantial factor in bringing about the harm, and if the harm would not have occurred without that conduct. You need not find that the violation or violations were the sole cause of the injury. You need only find that it was a substantial factor in bringing about the injury, even though other factors may also have contributed to cause the injury.

SECOND ALTERNATIVE - LIABILITY AS EMPLOYER

Under the second alternative, Plaintiffs seek to establish that Mr. Sloan was legally at fault for their injury based on his status as Mr. Gamble's employer.

Ordinarily, a person cannot be held legally responsible for another person's conduct. Employers may be held responsible for the actions of their employees, however, if the employee is acting on behalf of the employer, and for the employer's benefit and purpose, that is, while he is acting within the scope of his

employment. For this reason, in order to establish that Mr. Sloan was legally at fault, the Plaintiffs must prove by a preponderance of the evidence all three of the following elements:

1. Mr. Gamble was legally at fault for the accident;
2. Mr. Gamble was employed by Mr. Sloan; and
3. At the time of the accident, Mr. Gamble was acting in the scope of his employment for Mr. Sloan.

The first element will be satisfied if you find that the Plaintiffs have proven both elements of negligence with respect to Mr. Gamble, as described above.

As to the second element, the parties have stipulated to the fact that Mr. Gamble was employed by Mr. Sloan, so I instruct you that this element has been satisfied.

As to the third element, an act is within the scope of employment if it is incidental to the employer's business and is done to further the employer's interest.

DAMAGES

If you determine that either or both of the Defendants is liable to Mr. and Mrs. Carford, you must determine the amount of damages that the Carfords sustained as a result of the Defendants' fault. Here, the word "damages" is a legal term referring to the amount of monetary payment to which Mr. and Mrs. Carford are entitled to compensate them for their losses, if any, which resulted from the accident. These are called "compensatory

damages." Compensatory damages seek to make the plaintiffs whole--that is, to compensate them for any harm that they may have suffered.

For each item of loss or harm that Mr. and Mrs. Carford claim, they have the burden of proving by a preponderance of the evidence that (1) they have or will have such a loss or harm, and (2) the loss or harm was caused by the legal fault of the Defendants. If you decide that Mr. and Mrs. Carford have proved these two matters to be more probable than not, you must then decide how much money will fully, fairly, and adequately compensate them for each of those items of loss or harm.

In determining the amount of damages to allow Mr. and Mrs. Carford, you may draw such inferences as are justified by your common experiences and observations of humankind, from the evidence of the nature of the injuries and the results thereof. You may also consider whether it is more probable than not that their damages will continue into the future as a direct, natural and probable consequence of the Defendants' legal fault and, if so, award them full, fair and adequate compensation for those future damages.

The damages you award must be fair and reasonable, neither inadequate nor excessive. You should not award damages for speculative injuries, but only for those injuries that Mr. and Mrs. Carford have actually suffered or which they are reasonably

likely to suffer in the future. The reason behind awarding a verdict to the Plaintiffs is not to punish the Defendants for any wrongdoing but to compensate the Plaintiffs for the injuries incurred as a result of the Defendants' legal fault.

In awarding compensatory damages, should you decide to award them, you must be guided by dispassionate common sense.

Computing damages may be difficult, but you must not let that difficulty lead you to engage in arbitrary guesswork. On the other hand, the law does not require Mr. and Mrs. Carford to prove the amount of their losses with mathematical precision, but only with as much definiteness and accuracy as the circumstances permit.

ITEMS TO BE CONSIDERED IN CALCULATING DAMAGES

You may consider the following items in order to determine the amount of damages, if any, that is attributable to the Defendants' legal fault:

1. The reasonable value of medical (hospital, nursing) care, services, and supplies reasonably required and actually given in the treatment of Mr. and Mrs. Carford, and the reasonable present value of similar items that will probably be required and given in the future.
2. The present value of lost wages to date, that is, wages that Mr. and Mrs. Carford probably would have earned to date if they had not been injured.
3. The present value of Mr. Carford's loss of earning capacity, that is, any wages that Mr. Carford probably will lose in the future as a result of his injuries. This includes the value of household services, including physical assistance in the operation and maintenance of the home.

4. Reasonable compensation for Mr. and Mrs. Carford's property lost or destroyed in the accident. This amount is the fair market value of such property at the time of its loss or destruction.

5. Reasonable compensation for Mr. and Mrs. Carford's pain and suffering experienced to date and which will probably be experienced in the future. This includes compensation for physical pain, discomfort, fears, anxiety, and mental and emotional distress.

6. If you find that either Mr. or Mrs. Carford has established permanent injuries, such compensation as would fairly and fully compensate them for any loss of enjoyment of life which they have sustained as a result of the Defendants' legal fault--that is, the inability, if any, to carry on and enjoy a life in the same manner as if the accident had not occurred.

7. Reasonable compensation for Mr. and Mrs. Carford's loss of consortium. A spouse has a right of consortium; i.e., a right to the society and sex of his or her spouse. The right to society includes love, companionship, comfort, affection, solace, or moral support. The right to sex includes the enjoyment of sexual relations.

No definite standard or method of mathematical calculation is prescribed by law by which to fix reasonable compensation for items 5, 6, and 7 (pain and suffering, loss of enjoyment of life, or loss of consortium). Nor is the opinion of any witness required as to the amount of such reasonable compensation. In making an award for these factors, you should exercise your reasonable judgment. The damages you determine must be full, fair, and adequate in light of the evidence.

CONSIDERATION OF PLAINTIFFS' LIFE EXPECTANCIES

If you find from the evidence that Mr. or Mrs. Carford are likely to continue to suffer damages in the future, you may

consider their life expectancies, that is, the number of years remaining in which they may continue to suffer damages.

Mr. Carford is 44 years old, and Mrs. Carford is 41 years old. According to standard mortality tables, a man of Mr. Carford's age can be expected to live to the age of 77, and a woman of Mrs. Carford's age can be expected to live to the age of 80. This means that from today, Mr. Carford can be expected to live an additional 33 years and five months, while Mrs. Carford can be expected to live an additional 39 years and 5 months.

These figures are not binding upon you. They are estimates based on the experiences of persons who have reached the ages in questions. However, these figure may be considered by you in connection with other evidence relating to the probable life expectancy of Mr. and Mrs. Carford, including evidence of their occupations, health, habits and other activities and circumstances, bearing in mind that many persons live longer and many die sooner than the average.

ENHANCED DAMAGES

If you find that Mr. and Mrs. Carford suffered actual damages that were caused or substantially caused by the conduct of the Defendants, there are certain circumstances under which the law permits you, but does not require you, to consider an award of damages to reflect aggravating circumstances. Such an award would be in addition to any regular compensatory damages to

which you decide Mr. and Mrs. Carford are entitled. These additional damages are called "enhanced damages" or "liberal compensatory damages."

In this case, Mr. and Mrs. Carford seek enhanced damages based on the conduct of Mr. Sloan. You may award such damages only if you find that it is more probable than not that Mr. Sloan's conduct was wanton, malicious, or oppressive. Conduct is "wanton" if it is done with reckless indifference or reckless disregard of consequences. Conduct is "malicious" if it is done with ill will, hatred, hostility, or bad motive. Conduct is "oppressive" if it involves abuse of power.

As I have already explained to you, the purpose of an award of damages is to compensate the Plaintiffs for their loss, not to punish the Defendants. You are not permitted to award money damages for the purpose of punishing the Defendants or of making an example of them for the public good or preventing them and others from similar conduct in the future. However, if you find that Mr. and Mrs. Carford suffered additional vexation and distress as a result of the fact that Mr. Sloan's conduct was wanton, malicious, or oppressive, you may take the additional vexation and distress into account in determining whether, and in what amount, Mr. Sloan is liable for enhanced damages.

FACTORS NOT TO BE CONSIDERED IN DETERMINING DAMAGES

In determining the amount of damages to award to Mr. and

Mrs. Carford, you must consider only the evidence in the case. You must not consider, discuss, or speculate upon any events, factors, possibilities or other matters not admitted in evidence. The only proper consideration is what amount of money will fully, fairly, and adequately compensate Mr. and Mrs. Carford for the injuries they have sustained as you find from the evidence.

You may not consider or speculate on whether Mr. and Mrs. Carford have received benefits from other sources in connection with their injuries. This includes worker's compensation benefits, health insurance coverage, and any other insurance benefits. The law does not permit you to make any deduction from the Plaintiffs' damages to reflect benefits which may have been received from other sources. This is so because the Plaintiffs may be required to repay such other sources from any award made in the case.

I instruct you that any award you may make in this case would not be subject to federal or state income taxation. Consequently, you should not add any sum to such an award to compensate for presumed income tax effects.

MITIGATION OF DAMAGES

A person who has suffered harm by the wrongful act of another is obligated to exercise reasonable care and effort to avoid loss and to minimize, or "mitigate," the damages. He or she may not recover for losses which could have been prevented by

him or her making reasonable efforts without undue risk or expense on his or her part.

You should not include in the verdict such damages, if any, that Mr. and Mrs. Carford could have avoided, by reasonable effort, without undue risk or expense. Similarly, in calculating damages arising from expected future losses, you should not include any damages, such as lost wages, that Mr. and Mrs. Carford could avoid by making reasonable future efforts, without undue risk or expense.

Once the Plaintiffs have proved that they suffered damages, it is the Defendants' burden to prove that any of those damages reasonably could have been avoided. In deciding whether to reduce the Plaintiffs' damages due to some failure to mitigate on their part, therefore, you must weigh all the evidence in light of the particular circumstances of the case, using sound discretion in deciding whether the Defendants have satisfied their burden of proving that Mr. and Mrs. Carford could have avoided the damages in question.

VERDICT BASED UPON EVIDENCE

Your verdict in this case must be based solely upon the evidence presented at the trial of this case, whether testimonial or documentary, and legitimate inferences to be drawn therefrom. Your verdict may not be based upon sympathy for a party, prejudice, passion, speculation or conjecture.

UNANIMOUS VERDICT

Your verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree. That is, 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 your individual judgment. You must each decide the case for yourself, but only after an impartial consideration of the evidence in the case with other jurors. In the course of your deliberations, do not hesitate to reexamine your own views, and to change your opinion if you become 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--the judges of the facts. Your sole interest is to seek the truth from the evidence in 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.

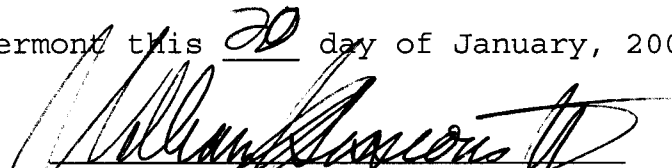
COMMUNICATIONS WITH THE COURT

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 touching the merits of the case otherwise 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 touching the merits of the case.

Bear in mind also that you are never to reveal to any person--not even to the Court--how the jury stands, numerically or otherwise, on the questions before you, until after you have reached a unanimous verdict.

Dated at Burlington, Vermont this 20 day of January, 2006.


William K. Sessions, III
United States District Court