

United States District Court
District of Vermont

NATIONWIDE MUTUAL FIRE
INSURANCE COMPANY

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v.

Civil No. 1:96-CV-177

PETER J. HATALA

CHARGE TO THE JURY

GENERAL INSTRUCTIONS

General Introduction -- Province of the Court and Jury

MEMBERS OF THE JURY:

This case involves a dispute between an insurance company, plaintiff Nationwide Mutual Fire Insurance Company (Nationwide), and one of its policyholders, defendant Peter Hatala. In May, 1994 Mr. Hatala obtained a homeowner's insurance policy with Nationwide as coverage for his residence in Waterville, Vermont. On May 9, 1995, a fire occurred at this residence. Mr. Hatala made a claim against his Nationwide policy in connection with the fire, and Nationwide denied the claim.

Nationwide seeks a ruling that its denial of Mr. Hatala's insurance claim was proper. As grounds for denying the claim, Nationwide argues (1) that Mr. Hatala intentionally made material misrepresentations while applying for insurance with Nationwide; (2) that Mr. Hatala intentionally made material misrepresentations during the course of Nationwide's investigation of the fire; (3) that Mr. Hatala submitted a false statement of property destroyed in the fire, with an intent to deceive Nationwide; and (4) that Mr. Hatala intentionally

started the fire, or caused it to be started, with the intention of damaging or destroying his property.

Mr. Hatala denies each of Nationwide's claims. Mr. Hatala also asserts a counterclaim, alleging that Nationwide breached its contract with him by wrongfully denying coverage under the policy, and that he is entitled to damages for the breach of contract.

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 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 must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by me.

Counsel have quite properly 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 counsel and the law stated by the Court in these instructions, you are to be governed by the Court's instructions.

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, but rather yours.

You must perform your duties as jurors without bias or prejudice as to any party. The law does not permit you 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.

All Persons Equal Before the Law

This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. All persons stand equal before the law, and are to be dealt with as equals in a court of justice.

Likewise, a corporation is entitled to the same fair trial at your hands as a private individual. All persons, including corporations, stand equal before the law, and are to be dealt with as equals in a court of justice.

Evidence in the Case

Statements and arguments of counsel are not evidence in the case. When, however, 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, regardless of who may have called them; and all exhibits received in evidence, regardless of who may have produced them; and all facts which may have been admitted or stipulated.

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

Questions Not Evidence

If a lawyer has asked a witness a question which contains an assertion of fact, you may not consider the lawyer's assertion as evidence of that fact. The lawyer's statements are not evidence.

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.

Inferences Defined

You are to consider only the evidence in the case. But in your consideration of the evidence you are not limited to the bald statements of the witnesses. In other words, you are not limited 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 seem justified in the light of your experience.

Inferences are deductions or conclusions which reason and common sense suggest are probably true, based on the facts which have been established by the evidence in the case.

Opinion Evidence -- Expert Witness

The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists as to those whom we call "expert witnesses." Witnesses who, by education and experience, have become expert in some art, science, profession, or calling, may state their opinions as to relevant and material matters in which they profess to be expert, and may also state their reasons for the opinion.

You should consider each expert opinion received in evidence in this case, and give it such weight as you may think it deserves. As with ordinary witnesses, you should determine each expert's credibility from his or her demeanor, candor, any bias, and possible interest in the outcome of the trial. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or if you feel that it is outweighed by other evidence, you may disregard the opinion entirely.

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 worthy of belief. 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 as to which the witness has testified, 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 give you cause to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and 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 will 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.

Credibility of Witnesses -- Inconsistent Statements

The testimony of a witness may be discredited, or as we sometimes say, "impeached," by showing that he or she previously made statements which are different than or inconsistent with his or her testimony here in court. The earlier inconsistent or contradictory statements are admissible only to discredit or impeach the credibility of the witness and not to establish the truth of these earlier statements made somewhere other than here during this trial, unless the witness has adopted, admitted or ratified the prior statement during the witness' testimony in this trial. It is the province of the jury to determine the credibility, if any, to be given the testimony of a witness who has made prior inconsistent or contradictory statements.

If a person is shown to have knowingly testified falsely concerning any important or material matter, you obviously have a right to distrust the testimony of such an individual concerning other matters. You may reject all of the testimony of that witness or give it such weight or credibility as you think it deserves.

An act or omission is "knowingly" done if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

Use of Deposition Testimony

During the trial of this case, certain testimony has been presented to you by way of deposition, consisting of sworn recorded answers to questions asked of the witness in advance of trial by one or more of the attorneys for the parties in the case. The testimony of a witness who, for some reason, cannot be present to testify from the witness stand may be presented in writing under oath. Such testimony is entitled to the same consideration, and is to be judged as to credibility and weighed, and otherwise considered by the jury, in so far as possible, in the same way as if the witness had been present, and had testified from the witness stand.

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 the 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

It is now my duty to give you instructions concerning the law that applies to this case. It is your duty as jurors to follow the law as stated in these instructions. You must then apply these rules of law to the facts you find from the evidence.

It is the sole province of the jury 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

The burden is on the plaintiff in a civil action, such as this, to prove every essential element of his or her claim by a preponderance of the evidence. If the proof should fail to establish any essential element of Nationwide's claim by a preponderance of the evidence, the jury should find for the defendant Peter Hatala as to that claim.

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 or claim 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.

Coverage under the Policy

To prevail in this matter, plaintiff Nationwide must show that it properly denied coverage under Mr. Hatala's homeowners' policy. The provisions of the policy are undisputed. The policy provided coverage for Mr. Hatala's residence in Waterville, VT, with coverage limits of \$117,000 for the residence and \$81,900 for personal property. The policy excludes coverage for "intentional acts meaning a loss resulting from an act committed by or at the direction of an insured if there is an intent to cause a loss." The policy further provides that Nationwide does "not provide coverage for an insured who has by design concealed or misrepresented a material fact or circumstances relating to this insurance."

Nationwide asserts four separate bases for denying coverage. The burden is on Nationwide to prove by the preponderance of the evidence that one or more of its bases for denying coverage was proper.

Misrepresentations During the Application Process

Nationwide first alleges that its denial of coverage was proper because Mr. Hatala intentionally misrepresented or concealed material facts while applying for insurance with Nationwide.

To prevail on this claim, Nationwide must first prove by the preponderance of the evidence that Mr. Hatala misrepresented or concealed facts while applying for insurance with Nationwide. Second, Nationwide must prove that either:

- (i) the misrepresentation or concealment, if any, was material;
- or
- (ii) the misrepresentation or concealment, if any, was "by design," that is, intentional.

A misrepresentation or concealment is material if Nationwide would not have issued the policy or contract had Nationwide known the true facts.

A misrepresentation or concealment is intentional if it was made purposefully, and not accidentally or inadvertently and in good faith.

If you find by a preponderance of the evidence either that Mr. Hatala concealed or misrepresented material facts while applying for insurance with Nationwide, or that he intentionally concealed or misrepresented any facts, whether or not material, while applying for insurance with Nationwide, then you should find in favor of Nationwide on this claim.

Misrepresentations During the Investigation

Second, Nationwide alleges that its denial of coverage was proper because Mr. Hatala intentionally misrepresented or concealed material facts during the course of Nationwide's investigation of the fire. To prevail on this claim, Nationwide must prove by the preponderance of the evidence that:

- (i) Mr. Hatala misrepresented or concealed facts during the course of Nationwide's investigation of the fire; and
- (ii) the misrepresentation or concealment, if any, was material; and
- (iii) the misrepresentation or concealment, if any, was "by design," that is, intentional.

A misrepresentation or concealment is material in this context if it concerned a subject relevant and germane to Nationwide's investigation as it was then proceeding. That is, a misrepresentation or concealment is material if it might have affected the attitude and action of Nationwide or was calculated either to discourage, mislead or deflect Nationwide's investigation in any area that might seem to Nationwide, at that time, a relevant or productive area to investigate.

A misrepresentation or concealment is intentional if it was made purposefully, and not accidentally or inadvertently and in good faith.

If you find by a preponderance of the evidence that Mr. Hatala intentionally misrepresented or concealed material

facts during the course of the investigation, then you should find in favor of Nationwide on this claim.

False Proof of Loss

Third, Nationwide alleges that its denial of coverage was proper because Mr. Hatala submitted a false statement of property destroyed during the fire. To prevail on this claim, Nationwide must prove, by the preponderance of the evidence:

- (1) Mr. Hatala submitted a statement of property destroyed during the fire which included property which was not lost; and
- (2) He did so fraudulently, that is, their inclusion must have been willful and with the intention of deceiving Nationwide.

If you find by a preponderance of the evidence that Mr. Hatala, willfully and with the intent to deceive Nationwide, submitted an inaccurate statement of property destroyed during the fire, then you should find in favor of Nationwide on this claim.

Intentional Acts

Fourth, Nationwide alleges that its denial of coverage was proper because Mr. Hatala intentionally started the fire at his home, or caused it to be started, and did so with the intent to damage or destroy his property. That is, Nationwide alleges that Mr. Hatala committed arson. To prevail on this claim, Nationwide must prove by the preponderance of the evidence:

- (1) The fire at Mr. Hatala's residence was an incendiary fire; and
- (2) The fire was set by or on behalf of Mr. Hatala; and
- (3) Mr. Hatala acted with the intent to damage or destroy his property.

Circumstantial evidence may be used to establish arson. As arson can be a covert and clandestine act, there is seldom direct evidence of the actual perpetration. Thus, a well-connected train of circumstances may be as satisfactory as direct evidence to prove arson by a preponderance of the evidence.

In deciding whether Nationwide has met its burden of proof, it is appropriate for you to consider Mr. Hatala's motive and opportunity for starting the fire, if any, as well as any suspicious acts by Mr. Hatala connected to the fire. Note, however, that none of these standing alone necessarily prove that Mr. Hatala set the fire or caused the fire to be set. Instead, you must evaluate all the circumstances when making your determination.

If you should find by a preponderance of the evidence that Mr. Hatala intentionally started the May 9, 1995 fire, or caused it to be started, and did so with the intention of damaging or destroying his property, then you should find in favor of Nationwide on this claim.

Breach of Contract Counterclaim

Mr. Hatala has brought a counterclaim against Nationwide alleging that Nationwide breached its contract with him by failing to provide coverage under the policy. If you find in favor of Nationwide on any of Nationwide's four claims I have discussed, then your verdict is for Nationwide and you should not consider Mr. Hatala's counterclaim. If, however, you find against Nationwide on those four claims, then Nationwide breached its contract with Mr. Hatala by failing to provide coverage under the policy. In that case, you must enter a verdict in favor of Mr. Hatala on his breach of contract counterclaim. You must also consider the extent of Mr. Hatala's damages.

Effect of Instruction as to Damages

The fact that I will instruct you as to the proper measure of damages should not be considered as intimating any view of mine as to which party is entitled to your verdict in this case. Instructions as to the measure of damages are given for your guidance, in the event you should find in favor of Mr. Hatala in accordance with the other instructions.

Damages

If you should find in favor of Mr. Hatala, then you must consider the issue of damages. Mr. Hatala must prove, by a preponderance of the evidence, the amount of damages to which he is entitled.

The amount of damages the plaintiff shall recover, if any, is solely a matter for you to decide. The purpose of damages is to compensate Mr. Hatala fully and adequately for Nationwide's breach of its obligation under the policy, by placing him in the same position he would have been in had Nationwide not breached. Accordingly, if you find in favor of Mr. Hatala you should award him as damages the benefits or payments that he would have been entitled to under the policy. These include the physical damages to Mr. Hatala's residence, the cost of lost or damaged personal property, and the lost use of the property.

You may include only the damages the plaintiff has proven by a preponderance of the evidence. You may not award speculative damages or damages based on sympathy.

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

[Form of special verdict read.]

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 opposite each question, and will date and sign the special verdict, when completed.

Verdict Forms - Jury's Responsibility

It is proper to add the caution that nothing said in these instructions and nothing in any form of verdict prepared for your convenience is meant to suggest or convey in any way or manner any intimation as to what verdict I think you should find. What the verdict shall be is your sole and exclusive duty and responsibility.

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 then 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.

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VERDICT FORM

1. Did Mr. Hatala conceal or misrepresent material facts while applying for insurance with Nationwide?

_____ yes _____ no

2. Did Mr. Hatala intentionally conceal or misrepresent any facts, whether or not material, while applying for insurance with Nationwide?

_____ yes _____ no

3. Did Mr. Hatala intentionally conceal or misrepresent material facts during the course of Nationwide's investigation of the fire?

_____ yes _____ no

4. Did Mr. Hatala submit an inaccurate statement of property destroyed in the fire, willfully and with the intent to deceive Nationwide?

_____ yes _____ X no

5. Did Mr. Hatala intentionally start the May 9, 1995 fire at his home, or cause it to be started, with the intention of damaging or destroying his property?

_____ yes _____ X no

If your answer to one or more of Questions 1-5 is "yes", then your verdict is for the plaintiff, Nationwide Mutual Fire Insurance Company, and your deliberations are completed. Have the foreperson sign and date the verdict form.

If you answered "no" to Questions 1-5, then you have found a breach of contract, and your verdict is for the defendant, Peter Hatala. You must assess damages in Question 6.

6. What is the total amount of damages sustained by the defendant, Peter Hatala, as a result of plaintiff Nationwide's breach of its obligation under the insurance policy?

_____&

Foreperson

Date

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Judge Murtha, we have reached a verdict.

Foreperson

Date