

TI's verdict \$75,000
insurance had faith
punitive damages

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

KEVIN BUOTE, :
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 Plaintiff, :
 :
 v. : Docket No. 2:00-CV-475
 :
 VERIZON NEW ENGLAND and BELL :
 ATLANTIC COMMUNICATIONS, INC., :
 :
 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.

There is one Plaintiff in this case, Kevin Buote, who is represented by William McCarty and Thomas Bixby. The Defendants are Verizon New England and Bell Atlantic Communications, Inc., to whom I will refer as Verizon. Verizon is represented by Potter Stewart and Kirsten Beske.

Kevin Buote seeks compensation, as well as punitive damages, from Verizon for injuries he claims to have suffered as a result of Verizon's bad faith handling of his workers' compensation claim. Verizon denies these allegations.

I will first provide you with general instructions

applicable to all claims. I will then address the law regarding these claims.

Role of the Court, the Jury, and Counsel

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. Shortly, I will define "evidence" for you and tell you how to weigh it, including how to evaluate the credibility or, to put it another way, the believability of the witnesses.

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 stated 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 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

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 which they have knowledge of 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.

Such evidence, if believed, is of no less value than direct evidence. As a general rule, the law makes no distinction between direct and circumstantial 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 a number 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, each side has the burden of proving their claims 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 Kevin Buote failed to establish any essential element of his claims by a preponderance of the evidence, you should find for Verizon as to the claim. If, after such consideration you find the evidence of both parties to be in balance or equally probable, then Kevin Buote has failed to sustain his burden and you must find for Verizon.

I now turn to the law you must follow in evaluating Kevin Buote's claims.

Workers' Compensation

As you know, this case involves the alleged bad faith handling of a claim for workers' compensation benefits made by Kevin Buote. The Vermont Workers' Compensation Act governs the benefits due an employee whose injury arises out of or occurs in the course of his or her employment. As a self-insured

employer, Verizon, as opposed to an outside insurer, was required to provide its employees workers' compensation benefits.

It is undisputed that Verizon has paid Kevin Buote all monies due from the workers' compensation proceedings undertaken in both the years 1997 and 2000. It is also undisputed that Verizon properly handled Kevin Buote's 1997 workers' compensation claim. This case deals only with the facts surrounding his claim of recurring symptoms in the year 2000 and the issue of whether Verizon handled that claim in bad faith, a legal concept I will explain more fully below.

Agency/Vicarious Liability

As a corporation, Verizon can act only through its employees. In this case, liability against Verizon may only arise, if at all, if you find that the alleged bad faith handling of Kevin Buote's workers' compensation claim was done by employees of Verizon. I instruct you that Susie Webscott, Steve Gottsche, and Jack Chapman are employees of Verizon.

Insurance Bad Faith

Kevin Buote alleges that Verizon handled his year 2000 workers' compensation claim in bad faith. To prove that his claim was handled in bad faith and that he was injured by this bad faith, he must demonstrate:

- (1) that Verizon had no reasonable basis to deny, delay,

or otherwise mishandle the claim for workers' compensation benefits; and

- (2) that Verizon acted in bad faith, that is, that it knew or recklessly disregarded the fact that no reasonable basis existed for denying, delaying, or otherwise mishandling the workers' compensation claim; and
- (3) that Verizon's bad faith handling has proximately caused injury to Kevin Buote.

In this case, the "benefits" involved include monetary payments, vocational rehabilitation, and re-employment in the next available suitable position at Verizon, all of which are provided for under the Workers' Compensation Act. In addition, the bad faith handling alleged involves Verizon's actions during two separate periods of time: (1) the period of time prior to July 2000 during which Verizon placed Kevin Buote on disability rather than workers' compensation, and (2) the period of time after July 2000 when Verizon agreed to process the claim as a workers' compensation claim.

The first element Kevin Buote must prove is that Verizon had "no reasonable basis" to deny, delay, or otherwise mishandle his workers' compensation claim. In this case, Verizon agreed in July 2000 that Kevin Buote's injury should be covered by workers' compensation. After that date, the parties agree that Verizon had no reasonable basis to deny, delay, or otherwise

mishandle the claim. Thus, although Kevin Buote must prove by a preponderance of the evidence both the first and second elements for the pre-July 2000 time period, he need only prove the second element for the post-July 2000 time period.

In considering whether there was or was not a reasonable basis for the pre-July 2000 denial, delay, and mishandling, you must keep in mind that if Kevin Buote's workers' compensation claim was "fairly debatable," Verizon could lawfully challenge it. That is, if there was a realistic question about the relationship between the year 2000 symptoms and Kevin Buote's original 1997 injury, then Verizon was permitted to withhold benefits and conduct additional investigation of the symptoms and their cause. In determining whether a reasonable basis existed, you should consider all the medical evidence available to Verizon prior to July 2000, although it is up to you to determine how much weight, if any, to give to that evidence.

If you find that Kevin Buote has proven by a preponderance of the evidence that Verizon had no reasonable basis to deny, delay, or otherwise mishandle his claim prior to July 2000, then you should consider the second element: whether Verizon's actions were done in bad faith. If instead you find that Kevin Buote has not proven this first element by a preponderance of the evidence, then you must find for Verizon with regard to the pre-July 2000 time period. Regardless of what you determine as

to the first element for that time period, you should also consider whether Verizon acted in bad faith after July 2000 in handling the workers' compensation claim.

The second element Kevin Buote must prove is that Verizon knew or recklessly disregarded the fact that it had no reasonable basis for denying, delaying, or otherwise mishandling his workers' compensation claim. To prove this element, Kevin Buote does not need to show that Verizon acted with specific intent to harm him. However, he must show at least that Verizon acted with reckless disregard. Reckless disregard is utter disregard for the probable consequences of one's actions or the rights of others, to an extent that is equivalent to a wilful or intentional wrong. It is thus not sufficient for Kevin Buote to demonstrate that Verizon was merely grossly negligent, i.e., that Verizon may have failed to use even a slight degree of care in handling the claim. If you find that Kevin Buote has proven this second element by a preponderance of the evidence, either with regard to the pre-July 2000 or post-July 2000 handling of the claim, you should consider the third element outlined above: whether Verizon's bad faith handling was the proximate cause of any injury to Kevin Buote.

Kevin Buote claims that he has incurred certain injuries, which I will discuss in more detail below, as a result of Verizon's bad faith handling of his workers' compensation claim.

He has the burden of proving by a preponderance of the evidence that this alleged bad faith handling was the proximate cause of his injuries. The proximate cause of an injury means the 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 whenever 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, and that the injury was either a direct result or a reasonably probable consequence of the act or omission. You should keep in mind that the law does not necessarily recognize just one proximate cause of an injury, consisting of only one factor or the conduct of only one person. On the contrary, many factors or things may operate independently to cause injury, and each may be a proximate cause of some or all of the injury.

Damages - General Instruction

I will now instruct you on some general matters regarding any award of damages that you find is required under the law as I have described it to you. My instructing you on damages issues should not be viewed by you as any indication of the Court's view as to the merits of Kevin Buote's claims. Rather, these instructions are for your use only in the event you find that Kevin Buote is entitled to an award of damages.

Compensatory Damages

It is your responsibility to determine the amount of damages, if any, that Kevin Buote has sustained as a result of Verizon's alleged bad faith handling of his workers' compensation claim. Here, the word "damages" is a legal term referring to the amount of monetary payment to which Kevin Buote is entitled as compensation for any losses he may have suffered. These are called "compensatory damages." Compensatory damages seek to make Kevin Buote whole. Thus, Kevin Buote is entitled to recover for all damages that are a natural consequence of the alleged bad faith handling, including lost wages, pain and suffering, emotional and mental distress, and lost enjoyment of life. As with the other elements of his claim, the burden is on Kevin Buote to prove by a preponderance of the evidence the amount of damages which he has suffered.

Kevin Buote seeks compensation for his past and future lost wages. Such compensation is limited to those wages you find reasonably likely to be lost as a result of the bad faith handling of his workers' compensation claim. You may take into account Kevin Buote's age, his employment history, his past earnings record, his experience and skills, and all the contingencies to which his occupation would be liable. Keep in mind that future prospects that are speculative or merely possible are not to be considered in awarding damages. Kevin Buote must prove lost wages by a preponderance of the credible

evidence and your award must be complete, fair, and reasonable in light of all the circumstances. In addition, because the amount of lost wages is capable of being calculated in dollars and cents, Kevin Buote must demonstrate the amount of his loss in dollars and cents.

Kevin Buote also seeks to be compensated for past pain and suffering, emotional and mental distress, and lost enjoyment of life. No evidence of monetary value of these intangible damages has been, nor need be, introduced into evidence. There is no exact standard for fixing the compensation to be awarded for these types of damages. Therefore, any award you make for such intangible damages should be fair in light of the evidence presented at trial.

I remind you that you may award compensatory damages only for injuries that Kevin Buote has proven, by a preponderance of the evidence, were proximately caused by Verizon's bad faith handling of the workers' compensation claim. 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 Kevin Buote has actually suffered or which he is reasonably likely to suffer in the future. 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 Kevin Buote to prove

the amount of his losses with mathematical precision, but only with as much definiteness and accuracy as the circumstances permit.

You are further instructed that any natural feelings of sympathy for Kevin Buote must be set aside during deliberations. Such feelings are not properly a factor for your consideration in this matter. Any compensatory damages you may decide to award should be guided by dispassionate common sense.

Mitigation of Damages

The law imposes a general duty to mitigate, or minimize, damages. This means that a person who has been injured has a duty to take reasonable protective or preventative measures to limit his or her losses and protect himself or herself from further injury.

In this case, Verizon argues that any award made to Kevin Buote should be reduced by his failure to mitigate his damages. The burden is on Verizon to prove this claim by a preponderance of the evidence. If you find that Kevin Buote could reasonably have avoided some of the damages claimed by taking reasonable actions to prevent or limit any portion of damages he has proved, you must reduce your award of damages, if any, by an amount equal to those damages that he could have avoided.

Present Worth of Future Losses

I instruct you that you may award Kevin Buote damages for

any future lost wages he has proved he is reasonably certain to sustain. In making an award for future damages, I instruct you that you must reduce such an award to its present worth. The present worth of an award is defined as that amount of money which, if put in an interest-bearing account, would amount to the sum of money you find Kevin Buote will be entitled to in the future. In making this award, you may consider the general and probable trend of the economy as to inflation or deflation.

Punitive Damages

Kevin Buote is also seeking punitive damages from Verizon. 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 Kevin Buote for any injuries he may have suffered, but instead to punish Verizon for malicious or wanton conduct and to deter Verizon and others from acting in the same way. You may not consider punitive damages unless you first find that Kevin Buote is entitled to compensatory damages. Awarding punitive damages is within your discretion - you are not required to award such damages.

In this case, the defendant, Verizon, is a corporation. Before you award punitive damages against Verizon, you must find that the allegedly malicious and wanton acts supporting punitive damages were committed by an officer or director of Verizon, or by someone acting under their direction. Alternatively, you may award punitive damages against Verizon if you find that these acts were committed by an employee of the corporation and Kevin Buote 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 Verizon.

You may only award punitive damages on a proper showing that the acts of Verizon were more than simply wrongful or unlawful. In order to recover an award for punitive damages, Kevin Buote must persuade you by a preponderance of the evidence that Verizon's conduct resulted from actual malice, that is, Verizon's conduct was motivated by personal ill will toward him, or was carried out under circumstances evidencing insult or oppression, or demonstrated a reckless or wanton disregard of his rights. An act is reckless or wanton if it is done in such a manner, and under such circumstances, as to reflect utter disregard for the potential consequences of the act or the rights of others, to an extent that is equivalent to a wilful or intentional wrong. In

making this determination, your focus should not be on the particular acts that Verizon committed, but instead on the nature of its alleged conduct in committing them.

Taxation of Judgment

If you should conclude that Kevin Buote is entitled to an award of damages in this case, I instruct you that such an award 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 taxation effects.

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 other 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 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.

Notes

You 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 other 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.

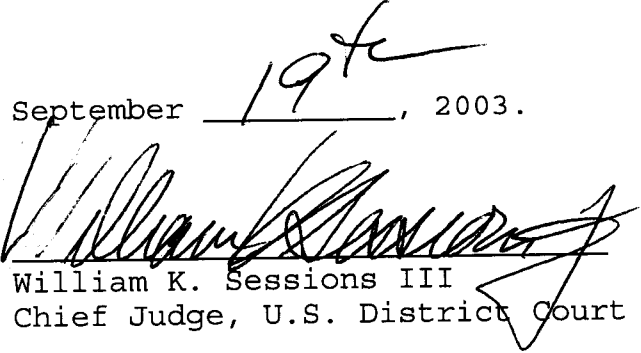
A verdict form has been prepared for your convenience. You will take this form to the jury room. Each of the interrogatories or questions on the verdict form requires the unanimous answer of the jury. Your foreperson will write the unanimous answer of the jury in the space provided opposite each question, 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: Burlington, Vermont, September 19th, 2003.


William K. Sessions III
Chief Judge, U.S. District Court