UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Leandro Umali, Plaintiff, v. Mount Snow Ltd. and USA Cycling Inc., Defendants.	:	Docket No. 2:01-CV-291

JURY CHARGE

Members of the Jury:

The Plaintiff in this case is Leandro Umali. The Plaintiff is represented by Edward Nass and Richard Hackman. The Defendants are Mount Snow Ltd. and USA Cycling. Mount Snow Ltd. is represented by John Zawistoski. USA Cycling is represented by Richard Hollstein.

This lawsuit arises from an injury Plaintiff sustained during a bicycle accident that occurred on August 19, 1999, while Plaintiff was participating in a bicycle race. Plaintiff alleges that his injury was caused by Defendants' negligent design or construction of the race course. Defendants deny any wrongdoing.

ROLE OF THE COURT, THE JURY, AND COUNSEL

You have listened carefully to the testimony presented to you. Now you must pass upon and decide the factual issues of

this case. You are the sole and exclusive judges of the facts. You pass upon the weight of the evidence, you determine the credibility of the witnesses, you resolve such conflicts as there may be in the evidence, and you draw such inferences as may be warranted by the facts as you find them. I shall shortly define the word "evidence" and instruct you on how to assess it, including how to judge the credibility of the witnesses.

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

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

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

reach a just verdict regardless of the consequences.

EVIDENCE

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

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

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

CREDIBILITY OF WITNESSES

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

The weight of the evidence is not determined by the number of witnesses testifying. You may find the testimony of a small number of witnesses or a single witness about a fact more credible than the different testimony of a larger number of witnesses. The fact that one party may have called more witnesses and introduced more evidence than the other does not mean that you should necessarily find the facts in favor of the side offering the most witnesses. Inconsistencies or

discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you to discredit such testimony. Two or more persons may well hear or see things differently, or may have a different point of view regarding various occurrences. Innocent misrecollection or failure of recollection is not an uncommon experience. It is for you to weigh the effect of any discrepancies in testimony, considering whether they pertain to matters of importance, or unimportant details, and whether a discrepancy results from innocent error or intentional falsehood. You should attempt to resolve inconsistencies if you can, but you also are free to believe or disbelieve any part of the testimony of any witness as you see fit.

EXPERT WITNESSES

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

In weighing this opinion testimony, you may consider the witness' qualifications, his or her opinions, the reasons for

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

TESTIMONY AND ARGUMENTS EXCLUDED

I caution you that you should entirely disregard any testimony that has been excluded or stricken from the record. Likewise, the arguments of the attorneys and the questions asked by the attorneys are not evidence in the case. The evidence that you will consider in reaching your verdict consists only of the sworn testimony of witnesses, the stipulations made by the parties and all exhibits admitted into evidence. When the attorneys for the plaintiff and the defendants stipulate or agree as to the existence of a fact, you must accept the stipulation as evidence and regard that fact as proved.

Anything you have seen or heard outside the courtroom is not evidence, and must be entirely disregarded. You are to consider only the evidence in the case. But in your

consideration of the evidence, you are not limited merely to the statements of the witnesses. In other words, you are not limited solely to what you see and hear as the witnesses testify. You are permitted to draw, from facts which you find have been proved, such reasonable inferences as you feel are justified in light of your experiences.

BURDEN OF PROOF

This is a civil case and as such the plaintiff has the burden of proving every element of his claim by a "preponderance of the evidence." The phrase "preponderance of the evidence" means the evidence of greater weight, logic, or persuasive force. It does not mean the greater number of witnesses or documents. It is a matter of quality, not quantity. Preponderance of the evidence is evidence that is more convincing and produces in your minds a belief that what is sought to be proved is more likely true than not. In other words, to establish a claim or a defense by a "preponderance of the evidence" means proof that the claim or defense is more likely so than not so. In determining whether any fact at issue has been proved by a preponderance of the evidence, you may consider the testimony of all the witnesses, regardless of who called them, and all the exhibits received in evidence, regardless of who may have produced them.

CORPORATION ENTITLED TO TREATMENT AS A PERSON

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

NEGLIGENCE

In their complaint, Plaintiff alleges that Defendants' negligence caused his injury. Negligence is the failure to use ordinary care under the circumstances of the case. Ordinary care is that care which reasonably prudent persons use in conducting their own affairs, to avoid injury to themselves or their property, or the persons or property of others. When deciding whether ordinary care was exercised in a given case, the conduct in question must be viewed in the light of all the surrounding circumstances as shown by the evidence in the case. Because the amount of care exercised by a reasonably prudent person varies in proportion to the danger known to be involved in what is being done, it follows that the amount of caution required in the use of ordinary care will vary with the nature of what is being done, and all the surrounding circumstances as shown by the evidence in the case. To put it another way, any increase in foreseeable danger requires increased care. When the defendants are corporations, they can be negligent through the acts or omissions of their employees and agents acting in

the course of their duties.

In order to prove that Defendants were negligent, Plaintiff must prove by a preponderance of the evidence each of the following elements:

1. Defendants owed Plaintiff a duty to exercise ordinary care;
2. Defendants breached that duty;
3. Defendants' breach of duty was a proximate cause of Plaintiff's injury.

I will explain each of these elements to you in greater detail.

DUTY

The first element of negligence is duty. Duty, as it is understood in the law, means a legal obligation to do or not do some act, depending on the particular circumstances of the case.

You should be aware that the Vermont legislature has passed a law which states that a person who participates in a sport accepts as a matter of law all the dangers that are inherent in that sport, to the extent that such dangers, whether man-made or natural, are obvious and necessary to the sport.

Plaintiff must prove by a preponderance of the evidence that the risk involved was not an obvious and necessary risk associated with the sport, and that Defendants, therefore, owed him a duty.

If you find by a preponderance of the evidence that the risk which resulted in Plaintiff's injuries is not an obvious and

necessary part of the sport, then it is not an inherent risk of the sport, and Defendants had a duty to exercise ordinary care.

BREACH OF DUTY

The second element is breach of duty. In order to decide whether Defendants breached their duty to Plaintiff, you must determine from the evidence presented whether Defendants failed to use ordinary care, as I have defined that term.

PROXIMATE CAUSE

The last element is proximate cause. In order to find Defendants liable for Plaintiff's injury, you must conclude that Defendants' negligence was a proximate cause of the injury. A legal or proximate cause of an injury means that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury and without which the injury would not have occurred. An injury is proximately caused by an act or a failure to act when it appears from the evidence in the case that the act or omission played a substantial part in bringing about or actually causing the injury, and that the injury was either a direct result or a reasonably probable consequence of the act or omission.

The law recognizes that there may be more than one proximate cause of an injury. Multiple factors may operate at the same time, or independently, to cause the injury and each may be a proximate cause. Plaintiff is required to show that Defendants' negligence

was a proximate cause of his injury, but is not required to show that it was the only proximate cause.

PREMISES LIABILITY

In this case, Plaintiff alleges that he suffered injury as a result of a dangerous condition found on a piece of property. Plaintiff alleges that Mt. Snow is the owner of the property and that USA Cycling exercised some control over the property. He further alleges that he suffered injury as a result of Defendants' negligence.

If Plaintiff is to recover under this theory, he must prove to you, by a preponderance of the evidence, the following essential elements:

1. That an unreasonably dangerous or unsafe condition existed on land owned or controlled by Defendants;

2. That Defendants were negligent in creating the condition or allowing it to remain; and

3. That such unreasonably dangerous condition was a proximate cause of the injuries of Plaintiff.

As an initial matter, I instruct you that responsibility for a claimed dangerous condition of land can only be placed on a person or party who owns the land, or who exercises control over the land to such an extent that they may be said to be in the position of an owner. The liability of an owner or occupier of real estate in reference to injuries caused by a defective or

dangerous condition of the premises depends on that party having control of the property at the time and place in question. One who does not own or exercise control over lands or premises cannot be held responsible for any condition of the premises.

On the second element, Plaintiff must show that Defendants were negligent in their maintenance of the property. Under Vermont law, an owner of property must exercise ordinary care to inspect that property for defects, and to take reasonable steps to correct them when found. Ordinary care is not an absolute term, but a relative one. That is to say, in deciding whether ordinary care was exercised in a given case, the conduct in question must be viewed in light of all the surrounding circumstances, as shown by the evidence in the case. In making your determination, keep in mind that the owner or person in control of land is not a guarantor or insurer of the safety of the premises. By that I mean that the law does not charge an owner with knowledge of defects which reasonable inspection would not disclose.

If you conclude that Defendants did owe Plaintiff a duty and that Defendants breached that duty, then you must consider the issue of proximate cause. Plaintiff must show by a preponderance of the evidence that the alleged dangerous condition was a proximate cause of his injury. A legal or proximate cause of an injury means that cause which, in natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury and

without which the result would not have occurred. 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 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 or damage, and each may be a proximate or legal cause of some or all of an injury.

NO WAIVER OR RELEASE OF LIABILITY

You have heard evidence that Plaintiff signed a form prior to entering the event at Mt. Snow in August of 1999. That form contained language stating that Plaintiff acknowledged that cycling was a dangerous sport and that he understood the dangers of participating in a bicycle race and assumed the risks of participation in the race.

Plaintiff's acknowledgment of the dangers and risks of participating in this race is not to be construed by the members of this jury as a waiver by Plaintiff of any duty owed to him by Defendants, or as a release of liability for any negligent act or failure to act on the part of Defendants. The evidence may or may not be relevant to the risk inherent in the sport or other issues.

JOINT OR MULTIPLE TORTFEASORS

In this case, Plaintiff has alleged that his injuries were caused by the combined negligence of more than one Defendant. In reaching your verdict in this case, you must carefully consider the evidence presented against each Defendant, and enter a separate verdict for each.

In the event that you determine by a preponderance of the evidence that more than one of the Defendants is liable to Plaintiff for his injuries, then based on the evidence presented, you must assign a percentage of the responsibility to each Defendant you find liable.

COMPARATIVE NEGLIGENCE

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

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

1. Plaintiff owed himself a duty to exercise ordinary care;

2. Plaintiff breached that duty; and

3. Plaintiff's breach was a proximate cause of the injuries that he suffered.

Again, I remind you that the law recognizes that there may be more than one proximate cause of an injury. Multiple factors may operate at the same time, or independently, to cause the injury and each may be a proximate cause. Defendants are required to prove by a preponderance of the evidence that Plaintiff's negligence was a proximate cause of his injury, but are not required to show that it was the only proximate cause.

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

DAMAGES

The fact that I am about to instruct you as to the proper measure of damages does not reflect any view of mine as to which party is entitled to your verdict. Instructions as to the measure of damages are given for your guidance in the event you find in favor of the Plaintiff by a preponderance of the evidence in accordance with the other instructions.

In reaching your verdict, carefully consider the evidence presented against the Defendants. You may assess damages against the Defendants only if you find the Defendants are liable for the claims outlined above.

Please keep in mind the following general principles as you make your deliberations. In making any award of damages, it is not necessary that the Plaintiff prove the exact amount of his damages with absolute certainty. Nevertheless, any damages you award may not be based on sympathy, speculation, or guesswork because only actual damages are recoverable. Remember that the Plaintiff has the burden of proving damages by a preponderance of the evidence. In determining the amount of any damages that you decide to award, you should be guided by dispassionate common sense. You must use sound discretion in fixing an award of damages, drawing reasonable inferences from the facts in evidence.

AVOIDANCE OF DUPLICATION

You are being instructed on a number of items or elements of damages. You may award damages to Plaintiff for each item or elements of damages which Plaintiff has established, but you should be careful not to award damages for one item or element which duplicates an award for another item or element. Your award in all respects must be fair and reasonable in light of all the evidence that you find worthy of belief and the reasonable inferences to be drawn from that evidence.

DAMAGES IN LIEU OF INTEREST

In considering Plaintiff's damages, if any, you are instructed that Plaintiff is entitled to interest on past expenses at the rate of 12% to be calculated from the date the expense was incurred, but only on those past damages that you find to be liquidated and reasonably ascertainable. You may not award interest on any other damages such as pain and suffering, emotional upset, disability or any other items of damages except for past medical bills.

PRESENT WORTH OF FUTURE LOSSES

During the course of this trial, Plaintiff has suggested that he anticipates incurring damages in the future which are a consequence of the accident at issue here. If you find such evidence credible and capable of reasonable calculation, then I instruct you that you may award Plaintiff damages for any future damages which he has proven that he is reasonably certain to sustain in the future. This includes any allowance you might make for future pain and suffering.

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 Plaintiff will be entitled to in the future for pain and suffering as a result of the injury. In making this award, you may consider the general and probable trend of the economy as to

inflation or deflation.

TAXATION

If the jury awards the Plaintiff damages, such damages, including lost wages, will not be subject to Federal or State income taxation and the Plaintiff will have the full use of whatever amount the jury awards. Consequently, there should be no addition of any sum to a verdict as compensation for income taxes.

MEDICAL EXPENSES, PAST AND FUTURE

In this case, Plaintiff has made a claim that he has incurred and will continue to incur expenses for medical care. If you find by a preponderance of evidence that Defendants are liable to Plaintiff for such damages, then you should award Plaintiff the reasonable and necessary medical expenses incurred by him, including any reasonable and necessary medical expenses which he is reasonably certain to incur in the future. These include all doctor's bills, hospital bills, expenses for medical appliances, pharmacy bills, and other bills of a medical nature which are a proximate result of the accident.

The fact that some medical services, such as transportation to and from the hospital, or care at home, may have been provided to Plaintiff for free by friends or relatives, does not prevent Plaintiff from recovering the reasonable worth of such services.

LOST EARNINGS, PAST AND FUTURE

Plaintiff is entitled to be compensated for all lost earnings

or wages to date caused by the injuries resulting from Defendants' negligence. As with the other elements of his case, Plaintiff must prove such lost wages by a preponderance of the evidence. Such damages are limited to what you find to be reasonably probable from Plaintiff's injuries. You may take into account Plaintiff's age, his employment history, his past earnings record, his business and professional experience, his skill or ability in his work or profession, and all the contingencies to which his occupation would be liable.

Keep in mind that future prospects that are speculative or merely possible are not to be considered in awarding damages. Plaintiff must prove lost earning capacity by a preponderance of the credible evidence and your award must be complete, fair, and reasonable in light of all the circumstances. You should have in mind that a certain injury to one person may have entirely different consequences to another. The evidence in each individual case must justify the award.

PAIN, SUFFERING, AND MENTAL ANGUISH

Plaintiff in this case alleges that he suffered pain and suffering and mental anguish as a result of Defendants' conduct. If Plaintiff has proved such injury by a preponderance of the evidence, then I instruct you that you may make an award of damages to compensate Plaintiff for these elements.

The measure of damages awarded to Plaintiff for pain and

suffering as a result of the injury suffered should be equivalent to reasonable compensation for any pain, discomfort, fears, anxiety, and other mental and emotional distress suffered by Plaintiff which was proximately caused by Defendants. No definite standard is prescribed by law by which to fix reasonable compensation for pain and suffering. Nonetheless, in making an award for pain and suffering, you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in light of the evidence.

UNANIMOUS VERDICT

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

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

Remember at all times that you are not partisans. You are

judges -- the judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

NOTES

You may have taken notes during the trial for use in your deliberations. These notes may be used to assist your recollection of the evidence, but your memory, as jurors, controls. Your notes are not evidence, and should not take precedence over your independent recollections of the evidence. The notes that you took are strictly confidential. Do not disclose your notes to anyone other than your fellow jurors. Your notes should remain in the jury room and will be collected at the end of the case.

CLOSING INSTRUCTIONS

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

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

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

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

You will note that all other persons are also forbidden to communicate in any way or manner with any member of the jury on any subject related to the merits of the case.

Dated at Burlington, Vermont this _____ day of July, 2004.

William K. Sessions III
United States District Court