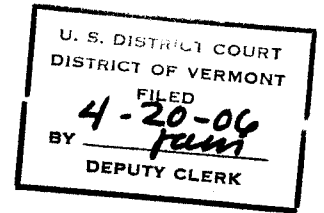


UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT



DOLORES CAMPBELL, :
Plaintiff, :
 :
v. : Docket No. 2:03-CV-317
 :
DAVENPORT ENTERPRISES, INC., :
D/B/A "WINGS" Grocery Store, :
Defendant. :

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 Plaintiff in this case is Dolores Campbell, represented by Ian Carleton. The Defendant is Davenport Enterprises, Inc., represented by Susan Flynn. Davenport Enterprises is owned by Mary and Don Davenport and does business as Wing's Market in Fairlee, Vermont.

As you are aware, this case involves an incident in which Plaintiff slipped and fell near the entryway of Defendant's store. Plaintiff alleges that she fell and was injured as a result of Defendant's negligent failure to maintain its premises safely. Defendant denies this allegation.

ROLE OF THE COURT AND THE JURY

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.

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 may be or 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 court or in these instructions is to be taken as an indication that I have any opinion about the facts of the case. 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.

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, 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. 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.

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. 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. It is for you to weigh the effect of any discrepancies in testimony, considering whether they pertain to matters of importance or to 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

You have heard the testimony of an expert witness 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 the expert's 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.

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 Plaintiff and Defendant 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 AND PREPONDERANCE OF THE EVIDENCE

Because this is a civil case, Plaintiff has the burden of proving every element of her claim "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 Plaintiff has failed to establish any essential element of her claim by a preponderance of the evidence, you should find for Defendant. If after such consideration you find the evidence of both parties to be in balance or equally probable, then Plaintiff has failed to sustain her burden and you must find for Defendant. If you find that Plaintiff has established all essential elements of her claim by a preponderance of the evidence, you should find for Plaintiff.

CORPORATION AS A PARTY

The Defendant, Davenport Enterprises, is a corporation. 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.

A corporation acts through its agents and employees. Defendant's agents and employees include its owners, Mary and Don Davenport; its other staff, such as Carol Thurston; and its contractor, David Cloud. You should consider any acts or

omissions that were made by these agents and employees while acting within the scope of their employment to be the acts or omissions of Defendant.

NEGLIGENCE

In her complaint, Plaintiff alleges that she suffered injury as a result of Defendant's negligence. Specifically, she alleges that Defendant allowed ice to build up near the front of its store, creating an unreasonably dangerous condition, and that it negligently failed to remedy that condition. To prevail on her claim of negligence, Plaintiff must prove by a preponderance of the evidence all three of the following elements:

1. That an unreasonably dangerous condition existed on Defendant's premises;
2. That Defendant breached its duty to Plaintiff by unreasonably allowing the condition to remain; and
3. That Defendant's breach of duty was a proximate cause of Plaintiff's injuries.

The first element is the existence of an unreasonably dangerous condition. Defendant's premises include its parking lot and the entryway to its store. This element will be satisfied if Plaintiff proves by a preponderance of the evidence that there was a condition on Defendant's premises that unnecessarily or unreasonably exposed her to danger. A condition is not unreasonably dangerous, however, if it was obvious to Plaintiff or if she should have observed it in the exercise of ordinary care.

The second element is breach of duty. Defendant, as a business, had a duty of active care to ensure that its premises were in a safe and suitable condition. If Defendant knew of an unreasonably dangerous condition, or if the condition existed for a sufficient length of time prior to Plaintiff's fall that Defendant should have discovered the condition in the exercise of ordinary care, then Defendant had a duty either to take reasonable steps to remedy the condition or to give fair warning of its existence. Keep in mind that the duty of due care increases proportionately with the foreseeable risks of the operations involved. Thus, as the risk of harm increases to Plaintiff, Defendant's duty of due care to prevent injury is correspondingly increased. This element will be satisfied if Plaintiff proves by a preponderance of the evidence that Defendant breached its duty.

The third element is proximate cause. This element will be satisfied if Plaintiff proves by a preponderance of the evidence that Defendant's breach of duty was a proximate cause of her injuries. An act or omission is the "proximate cause" of an injury if it directly and in a natural and continuous sequence produces, or contributes substantially to producing the injury, so it can reasonably be said that, except for the act or omission, the injury would not have occurred.

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 must prove by a preponderance of the evidence that Defendant's breach of duty was a proximate cause of her injuries, but she is not required to show that it was the only proximate cause.

COMPARATIVE NEGLIGENCE

As part of its defense to Plaintiff's suit, Defendant has raised the defense of comparative negligence. Defendant claims that Plaintiff was herself negligent and that her own negligence was the cause of her injuries.

Just as Plaintiff bears the burden of proof in showing that Defendant was negligent, Defendant bears the burden of showing that Plaintiff was negligent. To do so, Defendant must prove by a preponderance of the evidence both of the following elements:

1. That Plaintiff breached the duty of care to herself;
and
2. That her breach of duty was a proximate cause of her injuries.

The first element is breach of duty. Plaintiff owed herself a duty to take reasonable care to avoid injury or harm to herself. Reasonable care is the degree of care which an ordinary, prudent person would use under the same or similar circumstances. This element will be satisfied if Defendant proves by a preponderance of the evidence that Plaintiff failed

to exercise reasonable care.

The second element is proximate cause. In determining whether Defendant has proven by a preponderance of the evidence that Plaintiff's breach of duty was a proximate cause of her injuries, you should use the definition of proximate cause that I have already given you.

If you conclude that both Defendant and Plaintiff were negligent, and that the negligence of both contributed to Plaintiff's injuries, then it will be your job to ascribe a percentage of responsibility to each of the parties. That is, you must determine what percentage of the accident is a result of Defendant's negligence, and what percentage is the result of Plaintiff's. Those percentages must add up to 100%.

If you find that Plaintiff's responsibility for the accident was more than 50%, then your verdict will be for Defendant, and Plaintiff will not be entitled to damages. If Plaintiff's responsibility was 50% or less, then Plaintiff's damages will be reduced by the percentage, if any, for which she is responsible.

DAMAGES: IN GENERAL

If you determine that Defendant's share of responsibility for the accident is at least 50%, you must determine the amount of damages that Plaintiff sustained as a result of the accident. The fact that I am instructing you as to the proper measure of damages does not reflect any view on my part as to which party is

entitled to your verdict. These instructions are given only for your guidance, in the event that you should find Defendant liable for Plaintiff's injuries based on the instructions I have given you.

Please keep in mind the following general principles as you make your deliberations. Plaintiff has the burden of proving damages by a preponderance of the evidence. It is not necessary that Plaintiff prove the exact amount of the damages with absolute certainty. Nevertheless, any damages you award may not be based on sympathy, speculation, or guesswork, because only actual damages are recoverable. 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.

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.

COMPENSATORY DAMAGES

If you find that Defendant is liable to Plaintiff by a preponderance of the evidence, then you should award Plaintiff compensatory damages. The purpose of compensatory damages is not to punish Defendant, but rather to restore Plaintiff to the same

position she was in prior to the accident. Thus, Plaintiff is entitled to recover for all damages, past and future, that are a natural consequence of the accident, including such items as medical expenses, pain and suffering, and loss of enjoyment of life. Although Plaintiff may not recover for any ailment or disability that existed before the accident, she is entitled to damages for any intensification or aggravation of a pre-existing condition.

You must find each element of Plaintiff's damages by a preponderance of the evidence. I will discuss each of the elements in turn.

Plaintiff seeks damages for medical expenses. If you find that Defendant is liable to Plaintiff for such damages, then you should award the reasonable and necessary medical expenses incurred by Plaintiff that were proximately caused by the accident. You should not consider or speculate as to whether Plaintiff may have received insurance benefits or any other payments in connection with her injuries. The law does not permit you to make any deduction from Plaintiff's damages to reflect any such benefits, because Plaintiff may be required to repay such other sources from any award made in the case.

Plaintiff seeks damages for pain and suffering. If you find that Defendant is liable to Plaintiff for such damages, you should award an amount that would provide reasonable compensation

for any past or future pain, discomfort, fears, anxiety, and other mental or emotional distress that Plaintiff has suffered or will suffer which was proximately caused by the accident. No definite standard is prescribed by which to fix reasonable compensation for pain and suffering. Nonetheless, in making an award for pain and suffering you must exercise your authority with calm and reasonable judgment and the damages you fix must be just and reasonable in light of the evidence.

Plaintiff seeks damages for loss of enjoyment of life. If you find that Defendant is liable to Plaintiff for such damages, you should award an amount that will provide reasonable compensation for any past or future inability by Plaintiff to carry on and enjoy her life in the same manner as if the accident had not occurred.

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

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 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 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 form when it is completed.

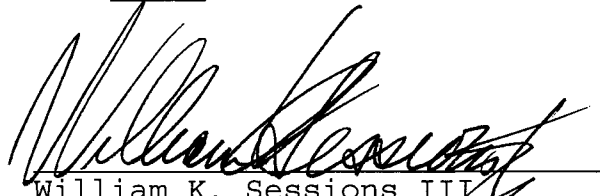
COMMUNICATIONS WITH THE COURT

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 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.

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 April, 2006



William K. Sessions III
United States District Court