THE UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

LUCINDA PROHASKA and RONALD PROHASKA,	:	
Plaintiffs,	:	
v.	:	Case No. 2:05-cv-196
DAVID P. DOHERTY,	:	
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 Plaintiffs in this case are Lucinda and Ronald Prohaska, represented by James W. Spink and Jon T. Alexander. The Defendant is David P. Doherty, represented by Andrew C. Boxer.

This lawsuit arises from an incident on July 16, 2002, when the Plaintiff, Lucinda Prohaska, had an accident with her bicycle on the road by the Doherty summer vacation home.

I will first provide you with general instructions applicable to all claims. I will then address the law regarding each of the parties' 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 given in the instructions I am about to give you, just as it would be a violation of your sworn duty as judges of the facts to base a verdict upon anything but the evidence in the case.

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

You are to discharge your duty as jurors in an attitude of complete fairness and impartiality. You should evaluate the evidence deliberately and without the slightest trace of

sympathy, bias, or prejudice for or against any party. All parties expect that you will carefully consider all of the evidence, follow the law as it is now being given to you, and reach a just verdict, regardless of the consequences.

Evidence

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

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

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

While you should consider only the evidence in the case, you

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

Direct and Circumstantial Evidence

The law recognizes two types of evidence: direct and indirect or circumstantial. An example of direct evidence is when people testify to what they saw or heard themselves; that is, something which they have knowledge of by virtue of their senses. Indirect or 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 testimony from expert witnesses. The above instructions regarding a witness's credibility apply to an expert witness just as they do to any other witness. Expert witnesses are different only in that they can express opinions about matters within their particular field of expertise. Expert testimony is presented in the hope that someone experienced in

the field can assist you in understanding complex evidence and coming to an independent decision.

In weighing expert testimony, you should consider the expert's qualifications, opinion, and reasons for testifying, as well as the factors pertaining to credibility that were discussed. After considering those factors, you may give the expert testimony whatever weight, if any, you deem appropriate. You should not accept the expert witness's testimony at face value simply because he or she is an expert. Nor should you substitute the expert's opinion for your own reason, judgment, and common sense. In short, you can accept or reject as much of an expert's testimony you feel is appropriate based on your independent assessment of the evidence.

Burden of Proof

Because this is a civil case, the Plaintiffs have 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 proven 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 the Prohaskas failed to establish any essential element of their claims by a preponderance of the evidence, you should find for David Doherty as to that particular claim. If, after such consideration you find the evidence of both parties to be in balance or equally probable, then the Prohaskas have failed to sustain their burden and you must find for David Doherty.

I now turn to the law you must follow in evaluating each party's specific claims.

Count One: Negligence

The Prohaskas claim that David Doherty is liable for injuries caused by his negligence. Negligence is lack of ordinary care. It is a failure to exercise that degree of care that a reasonably prudent person would have exercised under the same circumstances. To prove their claim of negligence, the Prohaskas must prove by a preponderance of the evidence the following four elements:

1. that David Doherty owed Lucinda Prohaska a duty of care;
2. that David Doherty breached that duty;
3. that David Doherty's breach of duty was a proximate cause of Lucinda Prohaska's injuries; and
4. that the Prohaskas suffered actual damage as a result of David Doherty's actions or failure to act.

The first element is duty of care. 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. A person has a duty to act reasonably so as to avoid injuries to others. A person breaches that duty if he acts unreasonably under the circumstances. To determine whether a person's actions were reasonable or unreasonable, you should consider what a prudent dog owner similar to David Doherty would have done under the circumstances, acting on his judgment at the time of the performance of the duty.

In this case, David Doherty had a duty to exercise reasonable care to control his dog. Under Vermont law the owner of a dog may be found negligent if the owner of the dog had some reason to know that the dog was a probable source of danger. Prior complaints about the dog are not necessary, nor is it necessary that the owner have reason to believe that his dog is vicious or ferocious. If the owner has reason to believe that his dog has a disposition or exhibits behavior that makes it a probable source of danger, then the owner must exercise reasonable control over the dog to prevent such harm.

The second element is breach. In considering whether a breach of a duty of care has occurred, you must look at the evidence and determine if David Doherty carried out his duty. If you find by a preponderance of the evidence that David Doherty

did not reasonably perform his duty, then you must find for the Prohaskas on this element.

Rebuttable Presumption of Negligence for Violation of Animal Control Ordinance

In determining whether David Doherty breached his duty of care, you may consider whether or not he complied with the Town of Danville's Animal Control Ordinance. At the time of Lucinda Prohaska's bicycle accident, the Town of Danville had enacted an Animal Control Ordinance.

The Ordinance at the time provided that a dog owner shall not permit his animal to harass pedestrians, bicyclists or other passersby, to obstruct traffic, or to otherwise be a nuisance or create a disturbance.

Under Vermont law, a defendant's violation of an ordinance creates a rebuttable presumption of negligence if that ordinance is concerned with the safety of persons in the position of Lucinda Prohaska and is meant to avoid the kind of harm she allegedly suffered. I instruct you that the Town of Danville Animal Control Ordinance was such an ordinance.

If you find that David Doherty was in violation of the Animal Control Ordinance, a presumption of negligence is established. If, however, David Doherty has shown by a preponderance of the evidence that the violation of the ordinance was justified, or that he exercised due care despite the violation of the ordinance, then the presumption disappears.

That is what is meant by a "rebuttable" presumption. If David Doherty fails to offer evidence to show that the violation was justified, or fails to offer evidence that he exercised due care despite the violation, then you must find that he breached his duty of care.

Proximate Cause

The third element is proximate cause. In order to hold David Doherty legally responsible for Lucinda Prohaska's injuries, the Prohaskas must prove by a preponderance of the evidence that David Doherty's breach of his duty of care was a proximate cause of those injuries.

A legal or proximate cause of an injury means that there is a causal connection between David Doherty's actions or failure to act and Lucinda Prohaska's injuries, unbroken by any other intervening causes, that produced the injuries, and without which the injuries would not have occurred. An injury is proximately caused by an act or a failure to act when it appears from the evidence that the act or omission played a substantial part in bringing about or causing the injury.

The law recognizes that there may be more than one proximate cause of an injury. Multiple factors may operate either independently or together to cause an injury. In such a case each may be a proximate cause. The Prohaskas are required to prove by a preponderance of the evidence that David Doherty's

breach of duty was a proximate cause of Lucinda Prohaska's injuries, but are not required to show that it was the only proximate cause.

If, however, a new or different event breaks the causal chain between David Doherty's conduct and Lucinda Prohaska's injuries, then you must find for David Doherty on this element.

Comparative Negligence

As part of his defense to this suit, David Doherty asserts that Lucinda Prohaska was also negligent in her actions, and that her own negligence was the cause of her injuries.

As any person, Lucinda Prohaska had a duty to exercise reasonable care for her own safety. Reasonable care is not the greatest possible care, such as might be employed by an unusually cautious person. Rather, it is ordinary care, given all the circumstances existing at the time and place of the accident. Here Lucinda Prohaska's conduct must be measured against that of a reasonable bicycle rider in her situation.

Just as the Prohaskas bear the burden of proving by a preponderance of the evidence that David Doherty was negligent, David Doherty bears the burden of proving by a preponderance of the evidence that Lucinda Prohaska failed to use due care for her own safety, and that this failure was a proximate cause of her injuries.

If you find that Lucinda Prohaska was negligent, then you

must go on to compare any negligence attributed to her with any negligence you may have attributed to David Doherty. To do so, you must assign a percentage to the causal negligence of Lucinda Prohaska on the one hand and David Doherty on the other. The percentages you assign must add up to 100 percent.

If you find that either Lucinda Prohaska or David Doherty was negligent, and that any negligence attributed to Lucinda Prohaska is 50 percent or less, then you should go on to consider damages, but any damage award will be reduced by the percentage of negligence you have attributed to Lucinda Prohaska. If you should find, however that Lucinda Prohaska was more than 50 percent negligent, then you should return a verdict for David Doherty, and you should not go on to consider damages.

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 if you find in favor of the Prohaskas in accordance with the other instructions.

Compensatory Damages

The purpose of compensatory damages is to put a plaintiff in the same position she was in prior to the accident. Thus Lucinda Prohaska is entitled to recover for all injuries and losses that were proximately caused by David Doherty's negligence. If you

find that some of Lucinda Prohaska's injuries were proximately caused by David Doherty's negligence, but others were not, you may only award damages for those injuries that the Prohaskas have demonstrated were proximately caused by David Doherty's negligence.

For Lucinda Prohaska, these damages may include past and future medical expenses, loss of future earnings, as well as damages for physical injuries, pain and suffering, disability or physical impairment, mental anguish, inconvenience, loss of ability to engage in recreational activities as well as those of daily living, and loss of capacity for the enjoyment of life. Where damages can be calculated precisely, as with medical expenses, the Prohaskas must prove their losses in dollars and cents.

There is no mathematical formula for computing damages for physical pain and suffering. The amount of the award, if any, is left to your reasonable discretion based on the evidence provided by the Prohaskas.

In determining the amount of any award, you should consider Lucinda Prohaska's age, her ability to lead a normal life and her health and physical condition. I instruct you that the normal life expectancy for a person of Lucinda Prohaska's age who is in average health is 30.6 years.

You are not to take into consideration any payments or

benefits that you may think Lucinda Prohaska received as a result of her injuries. It is not of any consequence to the case before you whether medical bills have been paid or by whom. You may not consider whether any damages you may award will go to the Prohaskas or to reimburse others.

Loss of Consortium

Ronald Prohaska has made a claim for loss of consortium. If you find by a preponderance of the evidence that David Doherty was negligent, then you may go on to consider whether David Doherty is liable to Ronald Prohaska for loss of consortium. But if you do not find by a preponderance of the evidence that David Doherty was negligent, then you may not award damages to Ronald Prohaska for loss of consortium.

A loss of spousal consortium claim is designed to compensate a spouse for loss of love and affection, loss of society and companionship, loss of performance of material services, loss of support, loss or impairment of sexual relations, loss of aid and assistance, and loss of comfort.

If you find by a preponderance of the evidence that Ronald Prohaska has lost such assistance, comfort, companionship and services because of David Doherty's negligence, you may find David Doherty liable for loss of consortium.

The Prohaskas must prove their damages to you by a

preponderance of the evidence. For damages that the Prohaskas claim will accrue in the future, they must demonstrate by a preponderance of the evidence that there is a reasonable probability that the expected future consequences will follow from the original injury. Under no circumstance may you award damages that are contingent, speculative or merely possible. In other words, if awarding a particular element of damage requires you to guess about future events, it is improper.

If you award the Prohaskas any allowance for damages to be suffered in the future, those damages must be reduced to present worth, so that the portion of the award for future damages, when prudently invested and saved, will match their compensation needs as they arise in the future. This includes any damages for future pain and suffering.

You may award damages to the Prohaskas for each item or element of damages you find they have proven by a preponderance of the evidence. You should be careful, however, not to award damages for one item or element which duplicates an award for another item or element. In other words, the Prohaskas may not recover twice for the same item or element of damages.

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. Likewise, any

interest that the Prohaskas may be entitled to receive on past damages is not for your consideration. Any effect that an award of interest would have on the amount of the judgment is a matter for the court to decide.

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 wrong. 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 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 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 for 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 24th day of June, 2011.

/s/ William K. Sessions III
William K. Sessions III
District Judge