

U.S. DISTRICT COURT  
DISTRICT OF VERMONT  
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UNITED STATES DISTRICT COURT  
DISTRICT OF VERMONT

ROBERT L. STEPHENS,

Plaintiff,

v.

BROMLEY MOUNTAIN  
SKI RESORT, INC.,

Defendant.

File No. 1:07-CV-232

CHARGE TO THE JURY

Now that you have heard the evidence and arguments, it becomes my duty to give you the instructions of the Court as to the law applicable to this case.

It is your duty as jurors to follow the law as I shall state it to you, and not question it, and to apply that law to the facts as you find them from the evidence in the case. You are not to single out one instruction alone as stating the law, but you must consider the instructions as a whole.

The lawyers may have referred to some of the governing rules of law in their arguments. If, however, any difference appears to you between the law as stated by the lawyers and the law stated by me in these instructions, you are to follow my instructions.

Nothing I say in these instructions is an indication that I have any opinion about the facts of the case. It is not my function to determine the facts, but rather it is yours.

You must perform your duties as jurors without bias or prejudice as to any party. You are not to be governed by sympathy, prejudice, or public opinion.

All parties expect that you will carefully and impartially consider all of the evidence, follow the law as it is now being given to you, and reach a just verdict, regardless of the consequences.

### Corporations

The law makes no distinction between corporations and private individuals, nor does it distinguish between the size or type of business in which a corporation engages. All persons, including corporations, stand equal before the law and are to be dealt with as equals in this case. The corporate defendant in this case is entitled to the same fair and unprejudiced treatment as an individual would be under like circumstances, and you should decide the case with the same impartiality you would use in deciding a case between individuals.

### Evidence in the Case

Statements and arguments of counsel are not evidence in the case. However, when the attorneys on both sides stipulate or agree as to the existence of a fact, you must, unless otherwise instructed, accept the stipulation and regard that fact as proved.

Unless you are otherwise instructed, the evidence in the case always consists of the sworn testimony of the witnesses, and all facts which may have been admitted or stipulated.

Any evidence to which an objection was sustained by me, and any evidence ordered stricken by me, must be disregarded.

### Evidence -- Direct, Indirect, or Circumstantial

There are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence -- such as the testimony of an eyewitness. The other is indirect or circumstantial evidence -- the proof of a chain of circumstances pointing to the existence or non-existence of certain facts.

As a general rule, the law makes no distinction between direct or circumstantial evidence, but simply requires that you find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

### Credibility of Witnesses -- Discrepancies in Testimony

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You may be guided by the appearance and conduct of the witness, by the manner in which the witness testifies, by the character of the testimony given, or by evidence to the contrary of the testimony given.

You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is believable. Consider each witness' intelligence, motive and state of mind, and demeanor or manner while on the stand. Consider the witness' ability to observe the matters to which the witness testifies, and whether the witness impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case, any bias or prejudice, the manner in which each witness might be affected by the verdict, and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you to discredit their testimony. Two or more persons witnessing an incident or a transaction may see or hear

it differently, which is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such weight, if any, as you 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. You may find that the testimony of a small number of witnesses is more credible than the testimony of a larger number of witnesses to the contrary.

### Expert Witnesses

Some of the testimony you heard was given by an expert witness. This witness is a person who, by education, training or experience, has developed expertise beyond the level of the average person in some field. An expert is allowed to state opinions on matters within the area of his or her expertise and the reasons for those opinions.

You are not required to accept an expert's opinion. Rather, you should consider the expert opinion and give it the weight you think it deserves. As with the testimony of any witness, you must decide whether it is believable. For instance, you may disregard an expert's opinion entirely or in part if you conclude:

- (1) the opinion is not based on sufficient education, training and experience;
- (2) the reasons given by an expert in support of his or her opinion are not sound;
- (3) the expert's testimony is outweighed by other evidence;  
or
- (4) the expert is biased.



### Deposition Testimony

Some of the testimony before you is in the form of videotaped and transcribed depositions which have been received into evidence. A deposition is simply a procedure where the attorneys for one side may question a witness or adversary party under oath before a court stenographer prior to trial. You may consider the testimony of a witness given at a deposition according to the same standards you would use to evaluate the testimony of a live witness at trial.

Verdict -- Unanimous -- Duty to Deliberate

The verdict must represent the considered judgment of each juror. To return a verdict, it is necessary that each juror agree. Your verdict must be unanimous.

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

Remember at all times that you are not partisans. You are judges -- judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

### Instructions of Law

Now I will give you instructions concerning the law that applies to this case. You must follow the law as stated in these instructions. You must then apply these rules of law to the facts you find from the evidence.

You are to determine the facts in this case. By these instructions, I do not intend to indicate in any way how you should decide any question of fact.

### Burden of Proof and Preponderance of the Evidence

Ordinarily, the burden is on the plaintiff in a civil action to prove every essential element of his or her claim or defense by a preponderance of the evidence.

To "establish by a preponderance of the evidence" means to prove that something is more likely so than not so. In other words, a preponderance of the evidence in the case means such evidence as, when considered and compared with that opposed to it, has more convincing force, and produces in your minds the belief that what is sought to be proved is more likely true than not true.

Stated another way, a preponderance of the evidence means the greater weight of the evidence. It refers to the quality and persuasiveness of the evidence, not to the number of witnesses or documents. In determining whether a fact, claim or defense has been proven by a preponderance of the evidence, you may consider the relevant testimony of all witnesses, regardless of who may have called them, and all the relevant exhibits received in evidence, regardless of who may have produced them.

### Corporate Liability

Corporations and associations are not natural persons, and under the law of Vermont, a corporation may only act through its agents, including its officers and employees. A corporation or association is liable for the acts and the omissions of an employee or agent who is acting within the scope of his or her employment or agency. For the purposes of your deliberations, you should consider the act or omission of an employee or agent of Bromley Mountain Ski Resort, Inc., taken within the scope of his or her employment, to be the act or omission of Bromley Mountain Ski Resort, Inc. itself.

### Overview of the Claims in this Case

As you have heard, this case involves a dispute centered around Plaintiff Robert Stephens' claim that he was injured on August 9, 2006, while using the Alpine Slide chairlift at Bromley. He alleges that Bromley was negligent.

Defendant Bromley Mountain Ski Resort, Inc. denies Mr. Stephens' allegations. Further, Bromley claims Mr. Stephens' own negligence was a proximate cause of his injuries.

### Negligence

Mr. Stephens is proceeding against Bromley on a theory of negligence. To prevail on his negligence claim, Mr. Stephens must prove both of the following by a preponderance of the evidence:

First, Bromley was negligent.

Second, Bromley's negligence was a proximate or legal cause of the damage sustained by him.

The fact that an accident happened, standing alone, does not permit you the jury to draw an inference that the accident was caused by negligence. "Negligence" is the breach of a legal duty to exercise ordinary or due care which a prudent person would exercise under the same or similar circumstances. Negligence may consist of omitting to do something a reasonably prudent person would do or doing something which a reasonably prudent person would not do under the same or similar circumstances.

In general, a duty in negligence cases may be defined as an obligation to conform to a particular standard of conduct toward another. Here, I instruct you as a matter of law that Bromley had a duty in its operation of the chairlift to exercise the highest degree of care for Mr. Stephens' safety. In determining whether Bromley was negligent in operating the chairlift, its conduct is to be judged in light of the situation confronting it at the time. Measure the conduct by what a careful chairlift

operator in the same circumstances, exercising the highest degree of care for the safety of its passengers, would have done or omitted to do.

If you find Bromley did not breach its duty to Mr. Stephens and therefore was not negligent, that ends your deliberations and you must enter a verdict in its favor. If, however, you decide Bromley was negligent, then you must determine whether its negligence was a proximate, or legal, cause of Mr. Stephens' injury.

Injuries or damages are "proximately caused" by an act, or failure to act, of another when it appears by a preponderance of the evidence that the act or omission played a substantial part in bringing about or actually causing the injury or damage, and that the injury or damage was either a direct result or a reasonably probable consequence of the act or omission.



### Comparative Negligence

As part of its defense to this suit, Bromley Mountain Ski Resort, Inc. has raised the defense of comparative negligence. Bromley claims Mr. Stephens was himself negligent and that his own negligence was the cause of his injuries.

Just as Mr. Stephens bore the burden of proof in showing that Bromley was negligent, so here, Bromley bears the burden of proving by a preponderance of the evidence that Mr. Stephens was also negligent. The elements of Bromley's claim are the same as for Mr. Stephens' claim of negligence. Therefore, before you may conclude that Mr. Stephens was also negligent, you must be persuaded by a preponderance of the evidence that Mr. Stephens owed himself a duty to act reasonably, that he breached that duty, that he suffered injury, and that his negligence, if any, was a proximate cause of the injuries he suffered.

In making your determination on the issue of comparative negligence, you should refer to the definitions of "negligence" and "proximate cause" which I have already given you. However, with respect to the element of "duty," you must decide if Mr. Stephens had a duty to conform to a standard of conduct of a reasonable chairlift passenger. If so, in determining whether Mr. Stephens was negligent in causing his own injuries, you may consider what a reasonable chairlift passenger of like age,

intelligence, experience, as well as like knowledge of the situation and its dangers would have done or omitted to do.

Should you conclude that both Bromley and Mr. Stephens were negligent, and that the negligence of both contributed to Mr. Stephens' 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 negligence is attributable to Mr. Stephens and what percentage is attributable to Bromley. The percentages must add up to 100%.

### Effect of Instructions as to Damages

The fact that I will instruct you as to the proper measure of damages should not be considered as intimating any view of mine as to which party is entitled to your verdict in this case. Instructions as to the measure of damages are given only for your guidance in the event you should find in favor of Mr. Stephens in accordance with the other instructions. If you find Mr. Stephens has not proven liability, or Plaintiff himself was more than 50% responsible, you should not consider damages at all.

### Compensatory Damages

If you do determine by a preponderance of the evidence that Bromley is liable to Mr. Stephens, then you must consider the issue of damages. The amount of damages Mr. Stephens shall recover, if any, is solely a matter for you to decide.

In a case such as this one, damages are awarded on a theory of compensation. An award of compensatory damages is intended to place the injured person in the position he or she was in immediately before the injury occurred, as nearly as can be done with an award of money damages.

As with the other elements of his claim, the burden is on Mr. Stephens to prove by a preponderance of the evidence the amount of damages to which he is entitled. You may not award damages that are speculative or based on sympathy. Damages must be based only on the evidence presented at trial.

In this case, Mr. Stephens seeks to recover past and future compensatory damages for his injury including past medical expenses and lost wages. The parties have agreed the amount of Mr. Stephens' past medical expenses is \$21,904.49 and his lost wages is \$4,829.95. You should not consider the agreement as an admission of liability, negligence, fault or wrongdoing on the part of Defendant. Mr. Stephens is not seeking damages for future medical expenses.

Mr. Stephens also seeks past and future damages for pain and suffering, loss of enjoyment of life, disability, disfigurement, physical impairment, and emotional distress. 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 should exercise your authority with calm and reasonable judgment and the damages you fix should be just and reasonable in light of the evidence.

Although the arguments of the attorneys are not evidence, you may determine Mr. Stephens' damages in terms of daily pain and suffering, and then determine what amount of damages would be appropriate compensation for each day of pain and suffering. A per diem, or daily, calculation argument is a tool of persuasion of counsel to suggest a method of how to quantify damages based on the evidence of pain and suffering presented.

This action is Mr. Stephens' only opportunity to recover damages for his injury, therefore whatever he is entitled to recover for damages in the future on account of his injury must be included in the amount he recovers now. You may consider Mr. Stephens' life expectancy of 17.5 years when considering an award of future damages.

### Damages Not Punitive

If you should find Bromley is liable to Mr. Stephens on the claim in this case, in fixing the amount of your award, you may not include in, or add to an otherwise just award, any sum for the purpose of punishing Bromley, or to serve as an example or warning for others. Nor may you include in your award any sum for court costs or attorney's fees.

### Reduction of Future Damages to Present Value

An award for future damages, including future pain and suffering or future mental anguish, necessarily requires that payment be made now for a loss Mr. Stephens will not actually suffer until some future date. Therefore, any such award must be for the present cash value of those damages.

### Election of a Foreperson

I will select \_\_\_\_\_ to act as your foreperson. The foreperson will preside over your deliberations and will be your spokesperson here in Court.

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

The answer to each question must be the unanimous answer of the jury. Your foreperson will write the unanimous answer of the jury in the space provided for each question and, when completed, will date and sign the verdict.



### Conclusion

To return a verdict, all jurors must agree to the verdict. In other words, your verdict must be unanimous.

Upon retiring to the jury room your foreperson will preside over your deliberations and be your spokesperson here in Court.

When you have reached a unanimous verdict, your foreperson should sign and date the verdict form.

If, during your deliberations, you should desire to communicate with me, please reduce your message or question to writing, signed by the foreperson, and pass the note to the court security officer. The officer will then bring the message to my attention. I will respond as promptly as possible, either in writing or by having you return to the courtroom so that I may address your question orally. I caution you, with regard to any message or question you might send, that you should never specify where you are in your deliberations or your numerical division, if any, at the time.

UNITED STATES DISTRICT COURT  
DISTRICT OF VERMONT

ROBERT L. STEPHENS,

Plaintiff,

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BROMLEY MOUNTAIN  
SKI RESORT, INC.,

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VERDICT FORM

1. Do you find Plaintiff Robert Stephens has proven by a preponderance of the evidence that Defendant Bromley Mountain Ski Resort, Inc. was negligent in causing his injuries?

\_\_\_\_\_ yes          \_\_\_\_\_ no

If your answer to question 1 is "no," then your verdict is for Defendant Bromley Mountain Ski Resort, Inc., and your deliberations are completed.

If your answer to question 1 is "yes," then proceed to question 2.

2. Do you find Defendant Bromley Mountain Ski Resort, Inc. has proven by a preponderance of the evidence that Plaintiff Robert Stephens was negligent in causing his own injuries?

\_\_\_\_\_ yes          \_\_\_\_\_ no

If your answer to question 2 is "no," then proceed to question 4. If your answer to question 2 is "yes," then proceed to question 3.

3. We, the jury, ascribe to each of the parties the following proportion of negligence. (These percentages must equal 100%.)

Plaintiff Robert Stephens	_____%
Defendant Bromley Mountain Ski Resort, Inc.	_____%
Total	<u>100%</u>

If you have found Plaintiff Robert Stephens more than 50% negligent, then your verdict is for Defendant Bromley Mountain Ski Resort, Inc., and your deliberations are completed.

If you have found Defendant Bromley Mountain Ski Resort, Inc. is at least 50% negligent, then proceed to question 4.

4. State the total damages to which you find Plaintiff Robert Stephens is entitled.

Past medical expenses	<u>\$21,904.49</u>
Past lost wages	<u>\$ 4,829.95</u>
Past and future pain and suffering, emotional damages, disability, physical impairment, and loss of enjoyment of life	\$ _____
TOTAL DAMAGES	\$ _____

Do not reduce your damages award if you have found Plaintiff Robert Stephens negligent in question 2. The Court will do the calculations.

\_\_\_\_\_  
Foreperson

\_\_\_\_\_  
Date

UNITED STATES DISTRICT COURT  
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Judge Murtha, we have reached a verdict.

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Foreperson

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Date