

THE UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

U.S. DISTRICT COURT
DISTRICT OF VERMONT
FILED

2010 OCT -7 PM 4:00

CLERK

BY _____
DEPUTY CLERK

GARY TUORILA :
Plaintiff, : Civil No. 2:07-CV-00240
v. :
MATTHEW FARGO, :
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 Gary Tuorila, represented by Gary Franklin and Kevin Henry. The defendant is Matthew Fargo, represented by Kenneth DeMoura and John Kennelly.

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 in the Case

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

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

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

While you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and

reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case.

Direct and Circumstantial Evidence

The law recognizes two types of evidence: direct and circumstantial. Direct evidence is provided when, for example, people testify to what they saw or heard themselves; that is, something which they have knowledge of by virtue of their senses. Circumstantial evidence consists of proof of facts and circumstances from which in terms of common experience, one may reasonably infer the ultimate fact sought to be established.

Such evidence, if believed, is of no less value than direct evidence. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that you find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

Witness Credibility

You, as jurors, are the sole judges of the credibility of the witnesses and the importance of their testimony. It is your job to decide how believable each witness was in his or her testimony. You may be guided by the appearance and conduct of the witness, or by the manner in which the witness testifies, or by the character of the testimony given, or by evidence to the contrary of the testimony given.

You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which may help you decide the truth and the importance of each witness's testimony. Consider each witness's knowledge, motive and state of mind, and demeanor or manner while on the stand. Consider the witness's ability to observe the matters as to which he or she has testified, and whether he or she impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case; any interest he or she may have in the outcome of the case, or any bias for or against any party; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and people naturally tend to forget some things or remember other things inaccurately. Innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you should give the testimony of each witness such weight, if any, as you may think it deserves. You may, in short, accept or reject the testimony of any witness in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying to the existence or non-existence of any fact. You may find that the testimony of a small number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary. The test is not which side brings the greater number of witnesses, or presents the greater quantity of evidence; but which witness, and which evidence, appeals to your minds as being most accurate, and otherwise trustworthy.

Burden of Proof

Because this is a civil case, the Plaintiff has the burden of proving his claims by a "preponderance of the evidence." To prove something by a preponderance of the evidence means to prove that something is more likely true than not true. A preponderance of the evidence means the greater weight, or logic, or persuasive force of the evidence. It does not mean the greater number of witnesses or documents. It is a matter of quality, not quantity.

In determining whether any fact in issue has been proved by a preponderance of the evidence, you may consider the testimony of all the witnesses, regardless of who may have called them, and

all the exhibits received in evidence, regardless of who may have produced them. If, after considering all of the evidence, you conclude that Gary Tuorila failed to establish any essential element of his claims by a preponderance of the evidence, you should find for Mr. Fargo, 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 plaintiff has failed to sustain his burden and you must find for the other party.

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

Negligent Misrepresentation

The plaintiff has brought a negligent misrepresentation claim against the defendant. To prevail on this claim the plaintiff must prove four elements by a preponderance of the evidence. These four elements are:

- 1) That Mr. Fargo supplied Mr. Tuorila with false information or omitted material information, in the course of his business, profession or employment, or in any other transaction in which he had a pecuniary interest;
- 2) That Mr. Fargo failed to exercise reasonable care or competence in obtaining or communicating the information that was conveyed;

3) That Mr. Tuorila justifiably or reasonably relied on the information conveyed; and

4) That Mr. Tuorila's reliance on the false information or the omission of information caused him monetary loss.

The determination of whether Mr. Fargo exercised "reasonable care" should be made by applying an objective standard. That is, you should ask yourself how an ordinary, reasonable person in his position would have acted under the circumstances.

The determination of whether Mr. Tuorila justifiably or reasonably relied on the information provided by Mr. Fargo should also be made by applying an objective standard. That is, you should ask yourself whether, in light of all the facts and circumstances, an ordinary, reasonable person would have behaved as Mr. Tuorila did.

If you do find that Mr. Tuorila has proved each of the elements of negligent misrepresentation by a preponderance of the evidence, he is entitled to recover those damages necessary to compensate him for the monetary loss caused by the misrepresentation. If you find that Mr. Tuorila has not proven each or any of the elements of negligent misrepresentation by a preponderance of the evidence, then your verdict must be for the defendant.

Consumer Fraud Act

The second claim asserted by the plaintiff in this case is based on the Vermont Consumer Fraud Act. The Consumer Fraud Act makes unfair and deceptive acts or practices in consumer transactions unlawful in Vermont.

A "consumer" under the Act is:

Any person who purchases, leases, contracts for, or otherwise agrees to pay consideration for goods or services not for resale in the ordinary course of his or her trade or business but for his or her use or benefit or the use or benefit of a member of his or her household, or in connection with the operation of his or her household or a farm whether or not the farm is conducted as a trade or business, or a person who purchases, leases, contracts for, or otherwise agrees to pay consideration for goods or services not for resale in the ordinary course of his or her trade or business but for the use or benefit of his or her business or in connection with the operation of his or her business.

To prevail on this claim the plaintiff must prove three elements, by a preponderance of the evidence. These three elements are:

- 1) That Mr. Fargo made a representation or omission that was likely to mislead;
- 2) That Mr. Tuorila interpreted the message reasonably under the circumstances; and
- 3) That the misleading representation or omission was

material in that it affected Mr. Tuorila's decision regarding the equipment lease transaction.

The determination of whether any representation made by Mr. Fargo was likely to mislead should be made by applying an objective standard. That is, you should ask yourself whether the representation had the capacity to deceive an ordinary, reasonable person in light of all the facts and circumstances.

Similarly, in determining whether Mr. Tuorila reasonably interpreted any representation made by Mr. Fargo, you should ask yourself how an ordinary, reasonable person would have interpreted the representation in light of all the facts and circumstances.

To determine whether or not the defendant is liable under the Act, you must consider all of the facts and not merely the statement or omission that the plaintiff claims was misleading. The plaintiff must prove by a preponderance of the evidence that the statements made by the defendant were misleading in light of all of the information that he had.

Actual damages for a violation of the Consumer Fraud Act consist of the amount necessary to compensate the plaintiff for the actual harm he suffered as a result of the defendant's alleged violation.

General Instructions on 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.

To recover money damages in this case, Mr. Tuorila must prove by a preponderance of the evidence that he sustained damages and that his damages are a proximate result of Mr. Fargo's conduct. This means that Mr. Tuorila must show that his damages were either a direct result or a reasonably probable consequence of Mr. Fargo's conduct.

Actual Damages

Actual damages consist of the amount necessary to compensate the plaintiff for the actual harm he suffered as a result of the defendant's alleged violation.

Because Mr. Tuorila's alleged damages are economic, he must prove them to your satisfaction in dollars and cents. You may not award damages that are speculative in nature.

Notes

You have taken notes during the trial for use in your deliberations. These notes may be used to assist your

recollection of the evidence, but your memory, as jurors, controls. Your notes are not evidence, and should not take precedence over your independent recollections of the evidence. The notes that you took are strictly confidential. Do not disclose your notes to anyone other than your other jurors. Your notes should remain in the jury room and will be collected at the end of the case.

Closing Instructions

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

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

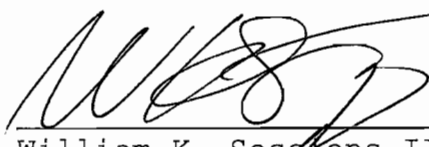
A verdict form has been prepared for your convenience. You will take this form to the jury room. Each of the interrogatories or questions on the verdict form requires the unanimous answer of the jury. Your foreperson will write the unanimous answer of the jury in the space provided opposite each question,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

If it becomes necessary during your deliberations to communicate with the Court, you may send a note through the Courtroom Security Officer signed by your foreperson. No member of the jury should ever attempt to communicate with the Court by

any means other than a signed writing, and the Court will never communicate with any member of the jury on any subject related to the merits of the case other than in writing, or orally here in open Court.

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

Dated: Burlington, Vermont, this 7th day of October, 2010.

A handwritten signature in black ink, appearing to read 'WKS III', written over a horizontal line.

William K. Sessions III
United States District Court