

U.S. DISTRICT COURT
DISTRICT OF VERMONT
FILED

2011 JAN 28 PM 1:35

THE UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

BY lw
DEPUTY CLERK

CLARENCE GONYEA and SANDY GONYEA, :
 :
Plaintiffs, :
 :
v. : Case No. 2:08-cv-242
 :
IRICK EXCAVATING, LLC, :
 :
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 Clarence and Sandy Gonyea, represented by William T. Counos. The Defendant is Irick Excavating, LLC, represented by Pietro J. Lynn.

This lawsuit arises from an event in which Plaintiff Clarence Gonyea alleges that he slipped and fell on ice at his place of employment. Clarence Gonyea alleges that Defendant Irick Excavating caused the event by failing to properly plow and sand the snow and ice on the parking lot surrounding his place of employment. Irick Excavating denies that it was negligent in performing its duty to plow and sand the parking lot. Irick Excavating also denies that it failed to properly perform its duties under the contract for services it had with Clarence

Gonyea's employer, Jolley Associates.

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 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. 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 Gonyeas failed to establish any essential element of their claims by a preponderance of the evidence, you should find for Irick Excavating 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 Gonyeas have failed to sustain their burden and you must find for Irick Excavating.

Company Defendant

The fact that the Defendant is a Limited Liability Company must not affect your decision in any way or the weight you give to the evidence. Companies such as Irick Excavating and all other persons are equal before the law and must be dealt with as equals in a court.

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

Count One: Negligence

The Gonyeas claim that Irick Excavating is liable for injuries caused by its 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 Gonyeas must prove by a preponderance of the evidence the following three elements:

1. that Irick Excavating owed Clarence Gonyea a duty of care;
2. that Irick Excavating breached that duty; and
3. that Irick Excavating's breach of duty was a proximate cause of Clarence Gonyea's injuries.
4. that the Gonyeas suffered actual damage as a result of Irick Excavating's conduct.

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 plowing and sanding provider similar to Irick Excavating would have done under the circumstances, acting on his judgment at the time of the performance of the duty.

In this case, the duty that Irick Excavating owed to Clarence Gonyea was defined by the terms of Irick Excavating's

contract to provide plowing and sanding services. It was obligated to perform that duty with reasonable care.

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 Irick Excavating, or its employees or agents, performed its duties. If you find by a preponderance of the evidence that Irick Excavating did not perform its duties under the contract reasonably, then you must find for the Gonyeas on this element.

The third element is proximate cause. In order to hold Irick Excavating legally responsible for Clarence Gonyea's injuries, the Gonyeas must prove by a preponderance of the evidence that Irick Excavating's breach of its 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 Irick Excavating's conduct and Clarence Gonyea'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 Gonyeas are required to prove by a preponderance of the evidence that Irick Excavating's breach of duty was a proximate cause of Clarence Gonyea'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 Irick Excavating's conduct and Clarence Gonyea's injuries, then you must find for Irick Excavating on this element.

Loss of Consortium

Sandy Gonyea has made a claim for loss of consortium. If you find by a preponderance of the evidence that Irick Excavating was negligent, then you may go on to consider whether Irick Excavating is liable to Sandy Gonyea for loss of consortium. But if you do not find by a preponderance of the evidence that Irick Excavating was negligent, then you may not award damages to Sandy Gonyea 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 Sandy Gonyea has lost such assistance, comfort, companionship and

services because of Irick Excavating's negligence, you may find Irick Excavating liable for loss of consortium.

Count Two: Breach of Contract

Clarence Gonyea claims that he suffered damages as the result of a breach of the contract between Jolley Associates and Irick Excavating. Specifically, Irick Excavating made a written agreement with Jolly Associates to provide snow plowing and sanding at the Alburg Mobil in Alburg, Vermont. The terms of this contract have been discussed during this trial, and you have been given the contract as an exhibit in this case.

In order to sue on the contract between Jolley Associates and Irick Excavating, the Gonyeas must establish that Clarence Gonyea was a third-party beneficiary to the contract rather than an incidental beneficiary. The determination of whether a party may be classified as a third-party beneficiary, as opposed to an incidental beneficiary, is based on the intentions of Jolley Associates and Irick Excavating when they entered into the contract. If you find that Jolley Associates and Irick Excavating intended by their contract to directly benefit Clarence Gonyea, then you may go on to consider whether Irick Excavating breached the contract.

Clarence Gonyea has the burden of proving the following essential elements of breach of contract by a preponderance of the evidence.

1. that a contract existed between Jolley Associates and Irick Excavating;
2. that the contract had definite terms;
3. that Irick Excavating breached the contract;
4. that Clarence Gonyea suffered damages as a result of the breach;
5. the amount of actual loss caused by the breach.

In this case, the parties have agreed that a contract existed between Jolley Associates and Irick Excavating, so the first element is proved. The parties have also agreed that the written contract contains the terms of the agreement.

Specifically, the parties agree that the Service Agreement provides for Irick Excavating to perform snow plowing when no more than three inches of snow has accumulated, to sand either at the discretion of Irick Excavating or the store manager, and to leave the premises in a safe and clean condition.

What is left for you to determine is whether the Gonyeas have proven by a preponderance of the evidence that Irick Excavating breached the Service Agreement. A party breaches a contract when its conduct does not comply with the terms of the contract as agreed to by the parties.

If you find that Irick Excavating breached its contract with Jolley Associates, you must determine whether Clarence Gonyea has proven, by a preponderance of the evidence, that he incurred actual losses that flowed from the breach of contract, and the amount of those losses that can be determined with reasonable certainty.

Affirmative Defenses

As part of its defense to the Gonyeas' suit, Irick Excavating has raised several affirmative defenses. Irick Excavating bears the burden of proving an affirmative defense by a preponderance of the evidence.

Mitigation of Damages

A person who has been injured due to the negligence or breach of contract of another has a duty to use all reasonable means to reduce his injuries or prevent them from increasing or continuing into the future. If you find that Clarence Gonyea did not take reasonable steps to minimize his injuries or the effect of his injuries, you must reduce any award of damages to him by an amount equal to the damages that he could have avoided.

Comparative Negligence

Irick Excavating asserts that Clarence Gonyea was also negligent in his actions.

As any person, Clarence Gonyea had a duty to exercise reasonable care for his 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 Clarence Gonyea's conduct must be measured against that of a reasonable convenience store manager.

If you find that Clarence Gonyea was negligent, then you must go on to compare any negligence attributed to him with any negligence you have attributed to Irick Excavating. To do so, you must assign a percentage to the causal negligence of Clarence Gonyea on the one hand and Irick Excavating on the other. The percentages you assign must add up to 100 percent.

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

Aggravation

In some cases, a plaintiff has an existing physical condition or symptomatic disease that is aggravated by a defendant's conduct. In such a case, the plaintiff is entitled to recover damages only for the aggravation proximately caused by the defendant's conduct.

There is evidence in this case that Clarence Gonyea had a pre-existing condition or conditions which existed before he fell in November 2005. You may only find Irick Excavating liable for damages you find to be caused by its negligence in connection

with that event. If you find that Clarence Gonyea's pre-existing condition made him more susceptible to injury than a person in good health, Irick Excavating is responsible for all injuries that he suffered as a result of Irick Excavating's negligence, even if those injuries are greater than would have been suffered by a person in good health under the same circumstances. Irick Excavating may only be found liable for the additional injury caused by the negligence, however, and not for the pain and impairment that he would have suffered even if the accident had never occurred.

Intervening Cause

In order for an act to be considered an intervening cause of a plaintiff's harm, it must be a new and independent force or agency that breaks the chain of causal connection between the original wrong and the resultant harm. If you find that Irick Excavating was negligent, but that Clarence Gonyea's injuries were caused by another party or occurrence, and if you find that a person in Irick Excavating's position could not reasonably have anticipated the action or occurrence, then the chain of causal connection is broken, and you must find Irick Excavating not liable.

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 Gonyeas in accordance with the other instructions.

Compensatory Damages

The purpose of compensatory damages is to put a plaintiff in the same position he was in prior to the accident. Thus Clarence Gonyea is entitled to recover for all injuries and losses that were proximately caused by Irick Excavating's negligence or by its breach of contract. If you find that some of the Gonyeas' injuries were proximately caused by Irick Excavating's negligence or breach of contract, but others were not, you may only award damages for those injuries that the Gonyeas have demonstrated were proximately caused by Irick Excavating's negligence or breach of contract.

For Clarence Gonyea, these damages may include past and future medical expenses, past and future loss of wages, 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. Clarence Gonyea's damages may also include the loss of Sandy

Gonyea's income to the household. Where damages can be calculated precisely, as with medical expenses, the Gonyeas 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 Gonyeas.

In determining the amount of any award, you should consider Clarence Gonyea's age, his ability to lead a normal life and his health and physical condition. I instruct you that the normal life expectancy for a person in average health who is of Clarence Gonyea's age at the time of the accident is 18.6 years.

You are not to take into consideration any payments or benefits that you may think Clarence Gonyea received as a result of his 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 Gonyeas or to reimburse others.

If you should award any damages to the Gonyeas, you should know that they will be required to pay state or federal income tax on the portion of the award attributable to lost wages.

If you find that Clarence Gonyea is entitled to recover damages as a result of Irick Excavating's negligence, you may also consider whether Sandy Gonyea has proven by a preponderance

of the evidence that she suffered harm from loss of consortium. If you find that Sandy Gonyea has proven her claim of loss of consortium, you may award damages based on the impact of the injury to the aspects of her marital relationship, that I have previously described.

The Gonyeas must prove their damages to you by a preponderance of the evidence. For damages that the Gonyeas 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 Gonyeas any allowance for damages to be suffered in the future, those damages must be reduced to present worth. This includes any damages for future pain and suffering.

You may award damages to Clarence and Sandy Gonyea 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 Gonyeas may not recover twice for the same item or element of damages.

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.

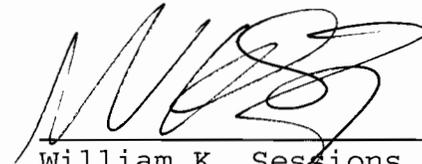
A copy of this charge will go with you into the jury room for your use.

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 28th day of January, 2011.



William K. Sessions III
District Judge