UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

SARAH TAYLOR, Plaintiff, v. THE STRATTON CORPORATION, Defendant.	:	Case No. 2:09-cv-297

JURY CHARGE

Members of the Jury:

Plaintiff in this case is Sarah Taylor, who is represented by Todd D. Schlossberg. Defendant is the Stratton Corporation ("Stratton") represented by Andrew H. Maass. The claims before you arise from a skiing accident that occurred on January 6, 2009 on the Sunriser Supertrail, a trail at the Stratton Mountain Ski Resort in Vermont.

ROLE OF THE COURT, THE JURY AND COUNSEL

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. I shall shortly define

the word "evidence" and instruct you on how to assess it, including how to judge the credibility of the witnesses.

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 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 these instructions is to 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 with 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. 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

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 and 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 for 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. In weighing the testimony of the witnesses you have heard, you should consider their interest, if any, in the outcome of the case; their manner of testifying; their candor; their bias, if any; their resentment or anger, if any; the extent to which other evidence in the case supports or contradicts their testimony; and the reasonableness of their testimony. You may believe as much or as little of the testimony of each witness as you think proper.

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. The fact that one party called more witnesses and introduced more evidence than the other does not mean that you should necessarily find the facts in favor of the side offering the most 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. Innocent misrecollection or failure of recollection is not an

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

In this case, I have permitted certain witnesses to express their opinions about matters that are in issue. A witness may be permitted to testify to an opinion on those matters about which he or she has special knowledge, skill, experience and training. Such testimony is presented to you on the theory that someone who is experienced and knowledgeable in the field can assist you in understanding the evidence or in reaching an independent decision on the facts.

In weighing this opinion testimony, you may consider the witness's qualifications, her or her opinions, the reasons for testifying, as well as all of the other considerations that ordinarily apply when you are deciding whether or not to believe witness testimony. You may give the opinion testimony whatever weight, if any, you find it deserves in light of all the evidence in the case. You should not, however, accept opinion testimony merely because I allowed the witness to testify concerning her or

her opinion. Nor should you substitute it for your own reason, judgment and common sense. The determination of the facts in this case 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 the plaintiff and the defendants 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

This is a civil case and as such Plaintiff has the burden of proving every element of her claim by a "preponderance of the evidence." The phrase "preponderance of the evidence" means the evidence of greater weight, logic, or persuasive force. It does not mean the greater number of witnesses or documents. It is a matter of quality, not quantity. Preponderance of the evidence is evidence that is more convincing and produces in your minds a belief that what is sought to be proved is more likely true than not. In other words, to establish a claim or a defense by a "preponderance of the evidence" means proof that the claim or defense is more likely so than not so. In determining whether any fact at issue has been proved by a preponderance of the evidence, you may consider the testimony of all the witnesses, regardless of who called them, and all the exhibits received in evidence, regardless of who may have produced them.

CORPORATION ENTITLED TO TREATMENT AS A PERSON

Defendant in this case 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.

OBVIOUS AND NECESSARY DANGERS

As a threshold matter, you must determine whether the

accident at issue occurred as a result of an obvious and necessary danger inherent in the sport of skiing. Vermont law imposes a duty on the people who participate in sports. In recognition of the dangers that exist in virtually every sport, the Vermont legislature passed a law stating that every person who participates in a sport, including skiing, accepts as a matter of law all the dangers that are inherent in that sport, to the extent that such dangers are obvious and necessary to the sport. Since a skier accepts the obvious and necessary risks of skiing, a ski operator owes no duty of care to him or her with respect to those risks.

Plaintiff must prove by a preponderance of the evidence that the risk involved in her accident was not an obvious and necessary risk inherent to skiing. When making your determination of what constitutes an "obvious or necessary danger," you should consider whether, given contemporary practices and technology, the risk of injury at issue was reasonably avoidable. A risk of danger which is "inherent" in a sport is one which is a part of the essential character of that sport and intrinsic to it. An "obvious danger" does not necessarily refer to things that are easily observed. Rather, it is a risk or hazard which a reasonable participant in the sport would know of or appreciate. An obvious danger is one that is widely recognized and known by a reasonable skier under similar

circumstances.

A “necessary danger” is one that exists even when due care is exercised. It is a risk that is impossible or unreasonably difficult or expensive to eliminate. A person need only accept those risks that are inherent in the sport, not those increased risks that are caused by a ski area’s failure to use due care. Skiers should be deemed to assume only those skiing risks which the ski area cannot be reasonably required to prevent or warn against.

In sum, ski accidents are not always and inevitably the product of a party’s failure to use reasonable care. Some accidents may be the result of the obvious and necessary risks inherent in the sport, and accidents might occur despite the exercise of ordinary and reasonable care and without negligence by either party.

If you find the accident at issue was the result of an obvious and necessary risk of skiing, you must return a verdict in favor of the Defendant. On the other hand, if you find that the accident was the result of an obvious or necessary part of skiing, you must proceed to consider whether Defendant was negligent.

NEGLIGENCE

In their complaint, Plaintiff alleges that Defendant’s negligence caused her injury. Negligence is the failure to use

ordinary care under the circumstances of the case. Ordinary care is that care which reasonably careful persons or businesses use in conducting their own affairs, to avoid injury to themselves or their property, or the persons or property of others. When deciding whether ordinary care was exercised in a given case, the conduct in question must be viewed in the light of all the surrounding circumstances as shown by the evidence in the case. When the defendant is a corporation, they are liable for the negligent acts or omission of their employees and agents acting in the course of their duties.

In order to prove that Defendant was negligent, Plaintiff must prove by a preponderance of the evidence each of the following elements:

1. Defendant owed Plaintiff a duty;

2. Defendant breached that duty;

3. Defendant's breach of duty was a proximate cause of Ms. Taylor's injury.

The first element of negligence is duty. 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. In general, a "duty" in negligence cases may be defined as an obligation to conform to a particular standard of conduct towards another. Here, Defendant, acting through its agents and employees, had a duty to conform to a standard of conduct of a

reasonable entity of like experience and knowledge of the situation and its dangers. In light of this standard of conduct, Stratton had a duty to use reasonable care to keep its premises in a reasonably safe and suitable condition, and to warn of or correct dangers which in the exercise of reasonable prudence could be foreseen and corrected, so that a skier would not be unreasonably or unnecessarily exposed to an injury.

Keep in mind that under Vermont law the duty of care increases proportionately with the foreseeable risks of the operations involved. Thus, as the risk of harm increases, the duty of care to prevent injury is correspondingly increased.

The second element is breach of duty. In order to decide whether Defendant breached their duty to Plaintiff, you must determine from the evidence presented whether Defendant failed to use ordinary care, as I have defined that term, in their maintenance of the Sunriser Supertrail, either by failing to eliminate those hazards or to properly alert skiers to those hazards.

The last element is proximate cause. In order to find Defendant liable for Ms. Taylor's injury, you must conclude that Defendant's negligence was a proximate cause of her injuries. A legal or proximate cause of an injury means that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury. An injury is proximately

caused by an act or a failure to act when it appears from the evidence in the case that the act or omission played a substantial part in bringing about or actually causing the injury.

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 is required to show that Defendant's negligence was a proximate cause of Ms. Taylor's injury, but is not required to show that it was the only proximate cause.

COMPARATIVE NEGLIGENCE

As part of their defense to the suit brought by Plaintiff, the 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 proving by a preponderance of the evidence that Defendant is negligent, Defendant must prove by a preponderance of the evidence that Plaintiff was herself negligent. The elements of Defendant's negligence claim are the same as those I have already described in the section entitled NEGLIGENCE above. Thus, to prove that Plaintiff was negligent, Defendant must prove by a preponderance of the evidence that:

1. Plaintiff owed herself a duty to exercise ordinary care;
2. Plaintiff breached that duty; and
3. Plaintiff's breach was a proximate cause of the injuries that she suffered.

The first element of negligence is duty. 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. In general, a "duty" in negligence cases may be defined as an obligation not to engage in conduct which unreasonably and unnecessarily exposes one to injury. Keep in mind that under Vermont law the duty of care increases proportionately with the foreseeable risks of the operations involved. Thus, as the risk of harm increases, the duty of care to prevent injury is correspondingly increased.

The second element is breach of duty. In order to decide whether Plaintiff breached her duty to herself, you must determine from the evidence presented whether Plaintiff failed to use ordinary care, as I have defined that term.

The last element is proximate cause. In order to find Plaintiff liable, you must conclude that Plaintiff's negligence was a proximate cause of her injuries. A legal or proximate cause of an injury means that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause,

produces the injury. An injury is proximately caused by an act or a failure to act when it appears from the evidence in the case that the act or omission played a substantial part in bringing about or actually causing the injury.

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. Defendant is required to show that Plaintiff's negligence was a proximate cause of Ms. Taylor's injury, but is not required to show that it was the only proximate cause.

Should you find by a preponderance of the evidence that Defendant and Plaintiff were negligent, and that the negligence of each of them proximately caused the injury suffered by Plaintiff, then it will be your job to assign a percentage of responsibility to Defendant and the Plaintiff. Those percentages must add up to 100 percent. If you find that Plaintiff's comparative negligence is greater than 50%, then Plaintiff cannot recover anything, and you must enter a verdict for Defendant. However, if Plaintiff's negligence is 50% or less, then Plaintiff is entitled to recover from Defendant.

INSTRUCTION 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 against Defendant. You may assess damages against Defendant only if you find they are liable for claims outlined above.

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

COMPENSATORY DAMAGES

In an ordinary case such as the one before you, damages are awarded on a theory of compensation. An award of compensatory damages is intended to put Plaintiff in the same position she was in prior to the accident at issue here. Thus, Ms. Taylor is

entitled to recover for all damages that are a natural consequence of Defendant's conduct, including items such as past and future pain and suffering and lost enjoyment, lost wages, and past and future medical expenses.

As with the other elements of her claim, Ms. Taylor has the burden of proving by a preponderance of the evidence the amount of damages that she has suffered. Where the amount of her damages are capable of being calculated in dollars and cents, such as lost wages, Ms. Taylor must demonstrate the amount of her losses in dollars and cents. However, where her claimed damages may not be reduced to dollars and cents, such as with assertions of lost enjoyment and pain and suffering, Ms. Taylor need not demonstrate the exact dollar and cent value of her injuries. Nevertheless, she is still required to submit to the jury evidence of such a quality that the jury is capable of reasonably estimating the extent of her loss. Under no circumstances may you award damages that are speculative or conjectural. You are further instructed that any natural feelings of sympathy for Plaintiff must be set aside during your deliberations. Such feelings are not properly a factor for consideration in this matter.

In determining the damages, if any, that Ms. Taylor has suffered as a result of her injuries, you should consider the following items:

Lost Enjoyment, Mental Anguish, and Pain and Suffering

In this case, Ms. Taylor alleges that she suffered lost enjoyment, mental anguish and pain and suffering as a result of Defendant's conduct. If Ms. Taylor has proved such injury by a preponderance of the evidence, then you may make an award of damages to compensate Ms. Taylor for this element.

The measure of damages to be awarded Ms. Taylor should be equivalent to reasonably compensate her for any pain, discomfort, fears, anxiety, humiliation, lost enjoyment of life's activities, and any other mental and emotional distress suffered by her which was proximately caused by Defendant. No definite standard is prescribed by law to fix reasonable compensation for lost enjoyment and emotional distress. In making an award for lost enjoyment and emotional distress you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in light of the evidence.

If you find Ms. Taylor has proven any such damages by a preponderance of the evidence, you must award her a sum you deem appropriate to compensate her for any of these damages she has endured as a result of her injuries, including any: (1) disability, (2) disfigurement, (3) and physical impairment. You may also include an amount to compensate Ms. Taylor for any such damages in the future which you find she is reasonably likely to experience.

Whatever Ms. Taylor is entitled to recover in the future due to her injuries must be included in the amount she recovers now. You must determine the total amount of Ms. Taylor's damages and place this amount on the Special Verdict Form.

Lost Wages

Plaintiff is entitled to be compensated for all lost earnings to date that you find were caused by the injuries resulting from Defendant's negligence. As with the other elements of her case, Ms. Taylor must prove such lost wages by a preponderance of the evidence. Such damages are limited to what you find to be reasonably probable from Plaintiff's injuries.

Past and Future Medical Expenses

Plaintiff claims that she has incurred and will continue to incur expenses for medical care. If you find by a preponderance of the evidence that Defendant is liable to Ms. Taylor for such damages, then you should award her the reasonable and necessary medical expenses she has incurred, including any reasonable and necessary medical expenses which she is reasonably certain to incur in the future. These include all doctor's bills, hospital bills, and other bills of a medical nature which are a proximate result of the accident.

LIFE EXPECTANCY

According to the *Census Bureau Vital Statistics of the United States,* a person 33 years of age has a remaining life

expectancy of 49 years. This is merely an estimate of the probable average remaining length of life of all persons of this age. You may consider this estimate in determining the amount of damages for any future losses that you award Ms. Taylor.

TAXATION

If you award Ms. Taylor damages, these damages will not be subject to federal or state income taxation. Ms. Taylor will have the full use of whatever amount the jury awards. Consequently, you should not add any sum to your award of damages to compensate for income taxes.

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 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 at Burlington, Vermont this 13th day of January, 2012.

/s/ William K. Sessions III
William K. Sessions III
United States District Court