

UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF VERMONT

GEICO GENERAL INSURANCE COMPANY,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Case No. 2:12-cv-40
	:	
TIMOTHY DOWD and MERRY KINDRED	:	
as Administratrix of the Estate of	:	
KATHRYN BORNEMAN,	:	
	:	
Defendants.	:	
	:	

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 GEICO General Insurance Company, represented by Antonin Robbason of the firm of Miller Faignant & Robbason. The Defendants are Timothy Dowd and Merry Kindred as the administratrix of the estate of her sister Kathryn or Kaye Borneman. Ms. Kindred is represented by Christopher and John Maley of the firm of Sylvester & Maley.

As I mentioned at the beginning of the trial, this lawsuit arises from an automobile accident on December 26, 2010, when Defendant Timothy Dowd, driving a vehicle which he did not own, caused an accident in which Kathryn Borneman died.

I will first give you general instructions applicable to a

case of this type. I will then address the law that specifically applies to this case.

Role of the Court, the Jury, and Counsel

Now that you have listened carefully to the testimony that has been presented to you, you must consider and decide the fact issues of this case. You are the sole and exclusive judge of the facts. You weigh the evidence, you determine the credibility of the witnesses, you resolve such conflicts as there may be in the evidence, and you draw such inferences as may be warranted by the facts as you find them. Shortly, I will define "evidence" for you and tell you how to weigh it, including how to evaluate the credibility or, to put it another way, the believability of the witnesses.

You are not to single out one instruction alone as stating the law, but you must consider the instructions as a whole. You are not to be concerned with the wisdom of any rule of law stated by the court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions I am about to give you, just as it would be a violation of your sworn duty as judges of the facts to base a verdict upon anything but the evidence in the case.

Nothing I say in these instructions should be taken as an indication that I have any opinion about the facts of the case,

or what that opinion is. It is not my function to determine the facts. That is your function.

You are to discharge your duty as jurors in an attitude of complete fairness and impartiality. You should evaluate the evidence deliberately and without the slightest trace of sympathy, bias, or prejudice for or against any party. All parties expect that you will carefully consider all of the evidence, follow the law as it is now being given to you, and reach a just verdict, regardless of the consequences.

#### Evidence

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

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

The evidence includes any stipulated facts, the sworn

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

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

#### Direct and Circumstantial Evidence

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

Such evidence, if believed, is of no less value than direct evidence. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires

that you find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

**Witness Credibility**

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

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

Inconsistencies or discrepancies in the testimony of a

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

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

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

### Corporations

A corporation is entitled to the same fair trial as a private individual. All persons, including corporations and other organizations, stand equal before the law, and are to be dealt with as equals in a court of justice. Of course, when a corporation is involved in a case, it may act only through human beings as its agents or employees.

### Burden of Proof

Because this is a civil case, the parties bear the burden of proving certain facts 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.

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

**GEICO's Count One: Declaration of No Coverage**

GEICO brought this suit, requesting a determination that there is no insurance coverage under Timothy Dowd's GEICO policy.

**The Estate's Counterclaim: Declaration of Coverage**

The Estate of Kathryn Borneman has counterclaimed against GEICO, requesting a determination that there is coverage under the Policy.

**The Coverage Dispute**

This dispute involves the clause in Timothy Dowd's GEICO Policy concerning insurance coverage for non-owned automobiles. Exhibit 1 is the insurance Policy. You are not being asked to interpret the entire Policy. You are not being asked to, nor should you, interpret any other portions of the Policy.

There is no question that the Jeep met the definition of a non-owned automobile under the Policy. There is also no question that Sarah Yandow met the definition of an owner under the Policy.

The factual issues for you, the jury, to decide are 1) whether Timothy Dowd had permission, or reasonably believed that he had permission to use the jeep, and 2) whether his use of the vehicle was within the scope of that permission.

I have already instructed you about the necessary level of proof in this case, that is, proof by a preponderance of the evidence. The Defendants, Timothy Dowd and the Estate of Kathryn

Borneman, bear the burden of proving by a preponderance of the evidence that Mr. Dowd either had permission, or reasonably believed that he had permission, from Sarah Yandow to use the Jeep.

**Express or Implied Permission**

Permission may be express or implied. Express permission means permission that is stated directly. Implied permission is determined from all of the facts and circumstances of the situation. It may arise from the relationship between the driver and the owner. It may arise from a course of conduct over a period of time, or there may be implied consent in the first instance if the factual circumstances justify the inference. It may be shown by acquiescence in or lack of objection to use of the vehicle. The driver does not have implied permission to use the vehicle merely by obtaining possession of the vehicle and using it. However, the manner or way in which the driver drove the vehicle is not relevant.

**Reasonable Belief**

In this case, the first question you must answer is whether Timothy Dowd reasonably believed that he had either express or implied permission to use the Jeep. In order to make that determination, you must decide whether the Defendants have proven to you by a preponderance of the evidence that Mr. Dowd had an actual belief, grounded in reason, that he had express or implied

permission from Sarah Yandow to use the Jeep. That is, you must make a decision about Timothy Dowd's state of mind: did he in fact believe, with reason, that he had permission to use the Jeep, taking into account all of the circumstances of the situation?

**Scope of Permission**

If the Defendants meet their burden to show that Timothy Dowd had permission or reasonably believed that he had permission to use the Jeep, then they have the benefit of a presumption that the particular use of the Jeep was within the scope of that permission.

The burden of proof then shifts to GEICO to prove by a preponderance of the evidence that Mr. Dowd's use of the Jeep was outside the scope of that permission. Specifically, GEICO has the burden to establish by a preponderance of the evidence that permission to use the Jeep had been expressly withdrawn, or that the use of the Jeep was so far from the purpose of the permitted use as to amount to a major deviation from that use. If the use was a major deviation, then the use was outside the scope of permission. In making this determination, again, the manner or way that Timothy Dowd drove is irrelevant.

**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. Bear in mind also that you are not to reveal to any person – not even to the Court – how the jury stands, numerically or otherwise, on the questions before you, during your deliberations.

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 21<sup>st</sup> day of August,  
2013.

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