

UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF VERMONT

U.S. DISTRICT COURT  
DISTRICT OF VERMONT  
FILED

2013 NOV -6 AM 11:37

BY pij CLERK  
DEPUTY CLERK

KATHERINE E. GALLANT,

Plaintiff,

v.

NORMAN K. BICKNELL d/b/a THE  
MEADOWS,

Defendant.

Case No. 5:12-cv-71

**JURY CHARGE**

**I. General Instructions**

Now that you have heard the evidence and arguments, it is my duty to instruct you as to the applicable law.

It is your duty as jurors to follow the law, and to apply it to the facts as you find them from the evidence presented in the courtroom. 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 is or ought to be, it would be a violation of your sworn duty to base a verdict upon any view of the law other than that given in the instructions of the court, just as it would also be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything other than the evidence presented during the trial.

The lawyers may have referred to some of the rules of law in their arguments. If any difference appears between the law as stated by the lawyers and the law as stated by the court in these instructions, you must follow the court's instructions.

Our judicial system requires you to carefully and impartially consider all of the evidence, follow the law, and reach a just verdict, regardless of the consequences.

### **Jurors as Finders of Fact/Rulings of the Court**

You and you alone are the triers of the facts. Each of you, as jurors, must determine the facts for yourselves in reaching a verdict. By the rulings which I made during the course of the trial, I did not intend to indicate to you or to express my own views about this case.

### **Sympathy/Prejudice**

Neither sympathy nor prejudice, for or against the parties, or any other person involved with this case, should influence you in any manner in reaching your verdict. Your deliberations should be well-reasoned and impartial.

### **Important Case**

This is an important case to the parties and the court. You should give it serious and fair consideration.

### **Agency**

As the owner of a business, The Meadows, Mr. Bicknell is responsible for the acts and omissions of the agents and employees of the Meadows when those agents and employees are acting within the scope of their employment with The Meadows. For purposes of your deliberations, you should consider the acts, statements, and omissions of employees of The Meadows to be the acts, statements, and omissions of Mr. Bicknell doing business as The Meadows.

### **Arguments/Statements/Objections of the Attorneys**

The opening statements and closing arguments of the attorneys, their questions and objections, and all other statements that they made during the course of the trial are not evidence. The attorneys have a duty to object to evidence that they believe is not admissible. You may not hold it against either side if any attorney feels it is necessary to make an objection.

### **Evidence in the Case**

The evidence in this case consists of the sworn testimony of the witnesses, the exhibits admitted into evidence, and any stipulated facts, regardless of which party presented the evidence. When the attorneys on both sides stipulate or agree to the existence of a fact, you must, unless otherwise instructed, accept the stipulation and regard that fact as proved. You may give the stipulated fact, like any other evidence, the weight that you think it deserves.

Any evidence to which an objection was sustained or stricken by the court must be disregarded.

### **Evidence – Direct or Circumstantial**

There are two types of evidence from which you may find the facts of this case: direct and circumstantial evidence. Direct evidence is the testimony of someone who asserts actual knowledge of a fact, such as an eyewitness or the exhibits in the trial. Circumstantial evidence is proof of a chain of facts and circumstances tending to prove or disprove an issue in the case.

For example, if a witness were to testify that he or she had seen cows in a field, that would be an example of direct evidence that there were cows in a field. On the other hand, if a witness were to testify that he or she had seen fresh cow tracks in the field, that would be an example of circumstantial evidence that there had been cows in the field.

The law does not require a party to prove its claims or defenses by direct evidence alone, that is, by testimony of an eyewitness. One or more of the essential elements, or all of the essential elements, may be established by reasonable inference from other facts that are established by direct testimony. Circumstantial evidence may alone be sufficient to prove a claim or defense.

The law makes no distinction between the weight to be given to direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should consider all the evidence in the case and give it such weight as you think it deserves.

### **Credibility of Witnesses**

You are the sole judges of the credibility of the witnesses, and the weight to give their testimony is up to you. In considering the testimony of any witness, you may take into account his or her ability and opportunity to observe; his or her demeanor while testifying; any interest or bias he or she may have; and the reasonableness of his or her testimony, considered in light of all of the evidence in the case. 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 testimonies of different witnesses, may or may not cause you to discredit a witness's testimony. Two or more persons witnessing an incident or transaction may see or hear it differently. It is your duty to reconcile conflicting testimony if you can do so.

In weighing the effect of a discrepancy, consider whether it pertains to a matter of importance or to an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

You may give the testimony of each witness such weight, if any, you think it deserves. You may believe all of the testimony of any witness, you may believe it in part and disbelieve it in part, or you may reject it altogether. You do not have to accept the testimony of any witness, even if it is uncontradicted. It is for you to say what you will believe and what you will disbelieve.

### **Expert Witness**

You have heard evidence from a witness who is known as an expert witness. An expert witness is a person who has special knowledge, experience, training, or education in his or her profession or area of study. Because of this expertise, an expert witness may offer an opinion about one or more of the issues in the case. In evaluating the witness's testimony, you should evaluate her credibility and statements just as you would with any other witness. You should also evaluate whether the expert witness's opinion is supported by the facts that have been proved, and whether the opinion is supported by the witness's knowledge, experience, training, or education. You are not required to give the testimony of an expert witness any greater weight than you believe it deserves just because the witness has been referred to as an expert.

### **Number of Witnesses**

The fact that one side may have called more witnesses than the other side is of no significance. Your task is to evaluate the credibility of the witnesses, and to weigh all of the evidence.

### **Deposition Testimony**

During the trial, certain testimony was presented to you by way of a deposition. A deposition is a witness's testimony, given under oath, in response to questions asked in advance of trial by the attorneys for the parties in the case. You should give this testimony the same consideration as any other testimony and evaluate it in the same way as you would had the witness testified from the witness stand.

### **Prior Inconsistent Statements**

You may find that a witness has made statements outside of this trial that are inconsistent with the statements that the witness gave here. You may consider the out-of-court statements not made under oath only to determine the credibility of the witness and

not as evidence of any facts contained in the statements. As to out-of-court statements that were made under oath, such as statements made in prior testimony, you may consider them for all purposes, including for the truth of the facts contained therein.

### **Personal Knowledge and Experience of Jurors**

In deliberating upon your verdict, you are not expected to put aside your common sense or your own observations or experience of the general affairs of life. However, a juror having special knowledge of a subject may neither state this knowledge to fellow jurors nor act upon it himself or herself in arriving at a verdict. You must not tell your fellow jurors about matters which are based on special knowledge concerning an issue in the case which did not come from the evidence received in the courtroom.

### **Burden of Proof/Preponderance of the Evidence**

The burden is on the party making the claim to prove each essential element of the claim by a preponderance of the evidence. This burden applies to a plaintiff's claim against a defendant and to a defendant's affirmative defense.

To "establish by a preponderance of the evidence" means to prove that something is more likely than not. In other words, a preponderance of the evidence means such evidence that, when considered and compared with that opposed to it, has more persuasive force, and produces in your minds a belief that what is sought to be proved is more likely true than not true. A preponderance of the evidence means the greater weight of the evidence. In determining whether a fact, claim, or defense has been proven by a preponderance of the evidence, you may consider the testimony of witnesses, regardless of who may have called them, and the exhibits in evidence, regardless of who may have produced or introduced them. No proof of absolute certainty is required.

### **Verdict Form**

I will provide you with a verdict form that will guide you in making your determinations in this action. You must fill out the verdict form in accordance with these jury instructions. If there is any conflict between the verdict form and these instructions, you must follow these instructions.

## **II. Ms. Gallant's Claim – Negligence/Premises Liability**

Ms. Gallant alleges that the Defendant, Mr. Bicknell, was negligent in failing to inspect, make safe, and protect the area near the walkway area of The Meadows in which Ms. Gallant allegedly fell, specifically by failing to use reasonable care in maintaining the premises to keep the area free of dangerous conditions. Negligence is the lack of reasonable care in performing a legal duty owed by a defendant to Ms. Gallant.



Defendant Mr. Bicknell denies any negligence and, if any is found, asserts an affirmative defense of comparative negligence.

**A. Negligence/Premises Liability**

I will now provide you with instructions for Ms. Gallant's claim that Mr. Bicknell was negligent in the performance of his duties as the entity that owned or exercised control over the premises of The Meadows. Negligence is the breach of a legal duty owed by the defendant to the plaintiff that causes the plaintiff's injuries. In order to prove this claim, Ms. Gallant must prove by a preponderance of the evidence each of the following essential elements:

1. Mr. Bicknell knew, or had a reason to know of, a risk of harm that was not open and obvious to a reasonable person in Ms. Gallant's position;
2. Mr. Bicknell failed to exercise reasonable care to inspect the premises and make it safe so as to eliminate the risk of harm;
3. Ms. Gallant did not know or have reason to know of the risk of harm involved; and
4. The risk of harm at issue directly and proximately caused Ms. Gallant's injuries.

I will now explain each of these essential elements.

**i. Ownership/Control, Duty of Care and Breach**

Mr. Bicknell owned or exercised control over The Meadows, the premises in question. The law is specific as to the duty of care.

A business owner of property acting as a landlord, such as Mr. Bicknell, has a duty to exercise reasonable care and keep in safe condition common walkways for the use of tenants and their guests. This duty of reasonable care includes a duty to inspect areas open to the public and to ensure that they are in a reasonably safe condition for their intended and foreseeable uses. Therefore, an owner is responsible for injuries that are caused by conditions on common walkways that the owner actually knew existed, unless the dangers were obvious. An owner is also responsible for injuries caused by a condition that existed long enough so that the owner should have known about it and should have known that it could be unreasonably dangerous. Once an owner discovers a dangerous condition in a common walkway, the owner must either take reasonable steps to make it safe or must sufficiently warn about it until it can be fixed. An owner must not increase the risk of a danger known to him. A person has the right to expect the premises

to be in a reasonably safe condition.

On the other hand, a business owner is not liable for injuries that a person sustained from something dangerous on the common walkway that the person either knows about or that would have been obvious to a reasonable person. In other words, Mr. Bicknell has an obligation to adequately warn of hazards that he knew or should have known existed, but that were not reasonably foreseeable to Ms. Gallant.

Reasonable care means the care that reasonably prudent persons use in conducting their own affairs to avoid injury to themselves, their property, or the persons or property of others. Reasonable care is not the greatest possible care, such as might be employed by an unusually cautious person. Rather, a person must exercise the same amount of care a reasonable person would have exercised in the same or similar circumstances. Because the amount of care exercised by a reasonably prudent person varies in proportion to the danger known to be involved, the amount of caution will vary with the nature of what is being done and the surrounding circumstances. You must therefore determine whether Mr. Bicknell created an unreasonable risk of harm to others, including Ms. Gallant, by a failure to exercise that degree of care that a reasonably prudent person would have exercised under like circumstances.

In determining whether Mr. Bicknell exercised reasonable care, you should consider whether Mr. Bicknell knew or should have known of a particular risk of harm. You may consider any evidence presented concerning the actual knowledge of Mr. Bicknell, including the knowledge of his employees or agents.

In determining whether Mr. Bicknell was negligent, you may also consider the evidence, if any, of HUD's standards for subsidized housing. A violation of these standards may be evidence of negligence, but does not require a finding of negligence.

Before imposing liability on Mr. Bicknell, you must find that Mr. Bicknell failed to exercise reasonable care under all of the circumstances. You must consider all of the evidence in making this determination.

If you find that Mr. Bicknell did not breach the duty of care he owed Ms. Gallant, then you must enter a verdict for Mr. Bicknell. If, however, you find that Ms. Gallant has proven the first three essential elements of her negligence/premises liability claim by a preponderance of the evidence, you must next consider whether Ms. Gallant has proven that Mr. Bicknell's breach of the duty of care caused the injuries she suffered.

**ii. Causation**

You must decide if Ms. Gallant's injuries were directly and proximately caused by Mr. Bicknell.

An act or failure to act is the “direct cause” of an injury if the injury would not have happened but for the act or failure to act, even though the act or failure to act combined with other causes. Mr. Bicknell may be liable even if there were other causes for Ms. Gallant’s injuries, but Mr. Bicknell is only liable if the incident would not have occurred but for his own fault. In other words, Ms. Gallant must prove that but for Mr. Bicknell’s breach of the duty of care, her injuries would not have occurred.

The act or failure to act must also be a “proximate cause” of the injury. An injury or damage is proximately caused by an act or a failure to act whenever it appears from the evidence that the act or failure to act 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 of or a reasonably probable consequence of the act or failure to act. Proximate cause is therefore a cause that results in an injury in a natural and continuous sequence, unbroken by any other intervening cause, and it is a cause without which the result would not have occurred. This does not mean that the act or failure to act must be the only cause. On the contrary, many facts or things, or the conduct of two or more persons, may operate at the same time, either independently or together, to cause injury or damage, and in such a case each may be a proximate cause.

If Ms. Gallant’s injuries were not caused by Mr. Bicknell, or if the injuries would have occurred regardless of whether Mr. Bicknell breached a duty of care, Ms. Gallant has failed to prove causation. If you find that Ms. Gallant has not established causation by a preponderance of the evidence, you must enter a verdict for Mr. Bicknell, and you should not consider Mr. Bicknell’s affirmative defenses or the issue of damages. If you find that Ms. Gallant has established causation, and all of the other essential elements of her negligence claim, then you must consider the affirmative defenses raised by Mr. Bicknell, before you consider the issues of damages.

### **III. Mr. Bicknell’s Affirmative Defense/Comparative Negligence**

Mr. Bicknell has asserted an affirmative defense called “comparative negligence.” An affirmative defense is a claim that, if true, will defeat all or part of a plaintiff’s claim. Mr. Bicknell has the burden of proving his affirmative defense by a preponderance of the evidence. You must consider the affirmative defense only if you find in Ms. Gallant’s favor on her negligence/premises liability claim. If you find in favor of Mr. Bicknell on Ms. Gallant’s negligence/premises liability claim, the issue of an affirmative defense should not be addressed.

In this case, Mr. Bicknell asserts comparative negligence as an affirmative defense, which means that Mr. Bicknell claims that Ms. Gallant was herself negligent in her actions on the day of the incident. In order to establish comparative negligence, Mr. Bicknell must prove by a preponderance of the evidence each of the following essential



elements of his comparative negligence defense:

1. Ms. Gallant herself was negligent by failing to act with reasonable care for her own safety and well-being at the time and place in question; and
2. Ms. Gallant's negligence was a direct and proximate cause of her injuries.

The same principles I outlined previously for Ms. Gallant's claim likewise apply to Mr. Bicknell's comparative negligence claim. I will briefly review the elements again.

First, Ms. Gallant had a duty to act with reasonable care for her own safety and well-being. Reasonable care means the care that reasonably prudent persons use in conducting their own affairs to avoid injury to themselves, their property, or the persons or property of others. Reasonable care is not the greatest possible care, such as might be employed by an unusually cautious person. Rather, a person must exercise the same care a reasonable person would have exercised in the same or similar circumstances. Here, Ms. Gallant's conduct must be measured against that of a reasonable person walking under the conditions as they existed on the day of the incident.

Second, Mr. Bicknell must prove that but for Ms. Gallant's failure to act with reasonable care for her own safety and well-being, her injuries would not have occurred. Mr. Bicknell must also prove that Ms. Gallant's negligence was a "proximate cause" of her injury. An injury or damage is proximately caused by an act or a failure to act whenever it appears from the evidence that the act or failure to act 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 of or a reasonably probable consequence of the act or failure to act. Proximate cause is a cause that results in an injury in a natural and continuous sequence, unbroken by any other intervening cause. It is a cause without which the result would not have occurred. This does not mean that the act or failure to act must be the only cause. On the contrary, many facts or things, or the conduct of two or more persons may operate at the same time, either independently or together, to cause injury or damage, and in such a case each may be a proximate cause.

If you find that Mr. Bicknell has proven that Ms. Gallant was negligent herself, then you must attribute to each party their relative negligence. This means that you must compare any negligence attributed to Ms. Gallant with any negligence you have attributed to Mr. Bicknell. To do so, you must assign a percentage of negligence to Ms. Gallant on one hand, and to Mr. Bicknell on the other. The percentages you assign must add up to 100 percent. Let me suggest two hypothetical examples:

	Example 1	Example 2
Ms. Gallant	15%	60%
Mr. Bicknell	85%	40%
Total Negligence	100%	100%

Of course, these examples are for illustrative purposes only. They do not indicate in any way how you should decide the case.

If you determine that Ms. Gallant's share of the negligence is greater than 50%, then you should return a verdict for Mr. Bicknell, and you should not consider damages. If Ms. Gallant's share of the negligence is 50% or less when compared to the negligence of Mr. Bicknell, then you must consider damages, and the total damages award, if any, must be reduced by the percentage of Ms. Gallant's negligence. I will provide you with a verdict form that will help you work through these questions during your deliberations.

#### **IV. Damages**

##### **General Instructions on Awarding Damages**

The fact that I have instructed you on the issue of damages should not be considered as the court's opinion that any party has established any of its claims or defenses. That is solely for you to decide.

Ms. Gallant must prove by a preponderance of the evidence she actually sustained damages, and that the damages were proximately caused by Mr. Bicknell's conduct. This means that the damages were a direct or a reasonably probable consequence of Mr. Bicknell's conduct.

You must be guided by the amount of loss which was or will actually be incurred by Ms. Gallant, and not by any feelings of sympathy, passion, prejudice, or a desire to help her. It is never the purpose of compensatory damages to punish a defendant or to reward a plaintiff.

Ms. Gallant is entitled to recover compensation for any bodily injury and any pain and suffering, disability, disfigurement, mental anguish, and loss of enjoyment of life she has experienced in the past as a result of this incident and that she is reasonably certain to suffer in the future. There is no particular formula to calculate this compensation. Any such award should fairly compensate Ms. Gallant for the damages she has suffered and may suffer in the future for any harm you find caused by Mr. Bicknell, and any such award should be fair and just in light of the evidence.

##### **Proving Specific Amounts for Damages**

Ms. Gallant does not have to prove the exact dollar amount of her noneconomic damages, which include pain and suffering. You may not, however, award damages that are speculative or merely possible in nature.

### **Duplication of Damages Must Be Avoided**

You should be careful not to award damages for one item that duplicates an award for another item. In other words, a party is only entitled to one recovery for his or her damages.

Your award in all respects must be fair and reasonable in light of all the evidence that you find worthy of belief and all the reasonable inferences to be drawn from such evidence.

### **Mitigation of Damages**

Under the law, a party seeking an award of damages must make reasonable attempts to minimize or eliminate those damages. In other words, a party is not entitled to recover damages to the extent he or she could have avoided or otherwise reduced those damages. Mr. Bicknell must prove by a preponderance of the evidence that Ms. Gallant failed to mitigate her damages. If you find that Ms. Gallant has failed to mitigate her damages, your award must not compensate Ms. Gallant for her failure to mitigate her damages, and you must subtract the monetary amount of any such failure from your award.

### **Income Taxes and Interest**

If you find for Ms. Gallant and award damages, you must not consider any effect of federal or state income tax in deciding the amount of the damages award. If you find for Ms. Gallant and award damages, you must not calculate interest as part of the damages award.

### **Court Costs and Attorney's Fees**

If you find Ms. Gallant is entitled to any damages, you must not include in your award any sum for costs or attorney's fees. These are matters for the court.

## **V. Concluding Instructions**

### **Jury Deliberations/Unanimous Verdict**

The verdict must represent the considered judgment of each juror. In order to return a verdict, you must all agree. Your verdict must be unanimous.

You must consult with one another. You must try to reach an agreement if you can do so without sacrificing your individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with

your fellow jurors. Do not hesitate to re-examine your views and change your opinions if you are convinced they are wrong. But do not surrender your honest opinion as to the weight or effect of evidence solely because of the opinions of your fellow jurors, or for the mere purpose of returning a verdict.

If you need to communicate with me, you should send a note through the Court Officer, signed by your foreperson. You must not discuss with the court or with any other person what is said in deliberations, and any note you send to the court must not include this information. In other words, you may ask the court questions but, in doing so, you must not reveal what the jurors are thinking or saying. You must not tell anyone how the jury stands numerically or otherwise until after you have reached a unanimous verdict and you have been discharged. Even then you need not speak to anyone about this case unless you want to.

When you have reached a verdict, tell the Court Officer that you have reached a verdict, but do not tell the Officer what the verdict is. You will then be brought into the courtroom where I shall ask you if you have reached a verdict, and, if you have, what it is.

### **Juror Note Taking**

During the trial, you have been provided with pencil and paper, and some of you have taken notes. As I explained at the beginning of the trial, all jurors should be given equal attention during the deliberations regardless of whether or not they have taken notes. Any notes you have taken may only be used to refresh your memory during deliberations. You may not use your notes as authority to persuade your fellow jurors as to what a witness did or did not say. In your deliberations you must rely upon your collective memory of the evidence in deciding the facts of the case. If there is any difference between your memory of the evidence and your notes, you may ask that the record of the proceedings be read back. If a difference still exists, the record must prevail over your notes. I will now describe the process for a read back.

### **Read Back of Evidence**

If, during your deliberations, you are unable to recall with any degree of accuracy, a particular part of the testimony, or part of these instructions, you may do the following:

1. Write out your question, and have the foreperson sign it;
2. Knock on the door of the jury room; and
3. Deliver your note to the Court Officer, to give to me.

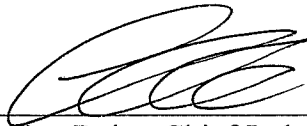
After the attorneys have been consulted, and the record has been reviewed, I shall decide what action to take. I will tell you my ruling.

**Selection and Duties of a Foreperson**

I select \_\_\_\_\_ to act as your foreperson. The foreperson acts as a chairperson or moderator. It is your duty to see that discussions are carried out in a sensible and orderly manner and to see that the issues submitted for the jury's decision are fully and fairly discussed, and that every juror has a chance to say what he or she thinks upon every question. When ballots should be taken, you will see that it is done. You will act as the jury's spokesperson in the courtroom. In all other respects, the foreperson is the same as every other juror. His or her vote or opinions do not count more or less than those of his or her fellow jurors.

Ladies and gentlemen of the jury, you may now take the case and retire to begin your deliberations.

Dated at Rutland, in the District of Vermont, this 6<sup>th</sup> day of November, 2013.

  
\_\_\_\_\_  
Christina Reiss, Chief Judge  
United States District Court