

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

U.S. DISTRICT COURT
DISTRICT OF VERMONT
FILED

2009 AUG -4 PM 4: 10

AMEDEO DEL MONACO, and
PATRIOT MUTUAL INSURANCE CO.
Plaintiff,

v.

JAMES GREEN D/B/A JIM
GREEN & SONS CONTRACTING
and JEFFREY MISEROCCHI
Defendants.

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File No. 1:08-CV-63

BY CLERK
DEPUTY CLERK

CHARGE TO THE JURY

Now that you have heard the evidence and arguments, it becomes my duty to give you the instructions of the Court as to the law applicable to this case.

It is your duty as jurors to follow the law as I shall state it to you, and not question it, and to apply that law to the facts as you find them from the evidence in the case. You are not to single out one instruction alone as stating the law, but you must consider the instructions as a whole.

The lawyers may have referred to some of the governing rules of law in their arguments. If, however, any difference appears to you between the law as stated by the lawyers and the law stated by me in these instructions, you are to follow my instructions.

Nothing I say in these instructions is an indication that I have any opinion about the facts of the case. It is not my function to determine the facts, but rather it is yours.

You must perform your duties as jurors without bias or prejudice as to any party. You are not to be governed by sympathy, prejudice, or public opinion.

All parties expect that you will carefully and impartially 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.

Corporations

The law makes no distinction between corporations and private individuals, nor does it distinguish between the size or type of business in which a corporation engages. All persons, including corporations, stand equal before the law, and you should decide the case with the same impartiality you would use in deciding a case between individuals.

Evidence in the Case

Statements and arguments of counsel are not evidence in the case. However, when the attorneys on both sides stipulate or agree as to the existence of a fact, you must, unless otherwise instructed, accept the stipulation and regard that fact as proved.

Unless you are otherwise instructed, the evidence in the case always consists of the sworn testimony of the witnesses, and all facts which may have been admitted or stipulated.

Any evidence to which an objection was sustained by me, and any evidence ordered stricken by me, must be disregarded.

Evidence -- Direct, Indirect, or Circumstantial

There are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence -- such as the testimony of an eyewitness. The other is indirect or circumstantial evidence -- the proof of a chain of circumstances pointing to the existence or non-existence of certain facts.

There is no distinction between direct or circumstantial evidence. You may find the facts by a preponderance of all the evidence in the case, both direct and circumstantial.

Evidence - Charts and Summaries

Charts and/or summaries have been used to help explain the facts contained documents which are in evidence. Such charts or summaries are not evidence or proof of any facts. They are used only used as a matter of convenience. If you find the charts or summaries do not accurately reflect the facts or figures shown by the evidence in this case, you should disregard them entirely.

Credibility of Witnesses -- Discrepancies in Testimony

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You may be guided by the appearance and conduct of the witness, by the manner in which the witness testifies, 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 tends to show whether a witness is believable. Consider each witness' intelligence, motive and state of mind, and demeanor or manner while on the stand. Consider the witness' ability to observe the matters to which the witness testifies, and whether the witness 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 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 testimony of different witnesses, may or may not cause you to discredit their testimony. Two or more persons witnessing an incident or a transaction may see or hear

it differently, which 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.

You may give the testimony of each witness such weight, if any, as you think it deserves, and accept or reject the testimony in whole or in part.

The weight of the evidence is not necessarily determined by the number of witnesses testifying. You may find that the testimony of a small number of witnesses is more credible than the testimony of a larger number of witnesses to the contrary.

Expert Witnesses

Some of the testimony you heard was given by an expert witness. This witness is a person who, by education, training or experience, has developed expertise beyond the level of the average person in some field. An expert is allowed to state opinions on matters within the area of his or her expertise and the reasons for those opinions.

You are not required to accept an expert's opinion. Rather, you should consider the expert opinion and give it the weight you think it deserves. As with the testimony of any witness, you must decide whether it is believable. For instance, you may disregard an expert's opinion entirely or in part if: you conclude the opinion is not based on sufficient education, training and experience; the reasons given by an expert in support of his or her opinion are not sound; the expert's testimony is outweighed by other evidence; or the expert is biased.

The determination of the facts rests solely with you.

Deposition Testimony

Some of the testimony before you is in the form of a videotaped and transcribed deposition which has been received into evidence. A deposition is simply a procedure where the attorneys may question a witness or adversary party under oath before a court stenographer prior to trial. You may consider the testimony of a witness given at a deposition according to the same standards you would use to evaluate the testimony of a live witness at trial.

Verdict -- Unanimous -- Duty to Deliberate

The verdict must represent the considered judgment of each juror. To return a verdict, all jurors must agree. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without violence to 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 other jurors, or for the mere purpose of returning a verdict.

Remember at all times that you are not partisans. You are judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

Instructions of Law

Now I will give you instructions concerning the law that applies to this case. You must follow the law as stated in these instructions. You must then apply these rules of law to the facts you find from the evidence.

You are to determine the facts in this case. By these instructions, I do not intend to indicate in any way how you should decide any question of fact.

Burden of Proof and Preponderance of the Evidence

A party must prove every element of a claim by a preponderance of the evidence. To prove "by preponderance of the evidence" means to prove that something is more likely so than not so.

Stated another way, a preponderance of the evidence means the greater weight of the evidence. It refers to the quality and persuasiveness of the evidence, not to the number of witnesses or documents. In determining whether a fact, claim or defense has been proven by a preponderance of the evidence, you may consider the relevant testimony of all witnesses, regardless of who may have called them, and all the relevant exhibits received in evidence, regardless of who may have produced them.

Overview of the Claims in this Case

Plaintiffs Amedeo Del Monaco and Patriot Mutual Insurance claim defendants James Green and Jeffrey Miserocchi were negligent in designing, constructing and installing a fire pit for his deck, and that defendant Green was negligent in hiring Miserocchi. The plaintiffs claim Green's and Miserocchi's negligence caused the fire and damage to Del Monaco's home.

Defendants Green and Miserocchi deny plaintiffs' allegations. They claim Del Monaco's own negligence caused the fire and damage to his home.

Negligence

Plaintiffs claim defendant James Green was negligent (1) in designing, constructing and installing the deck and/or fire pit; and (2) for hiring Miserocchi, in that Green did not determine whether Miserocchi was competent to perform the work for which he was hired. Plaintiffs claim Miserocchi was negligent in designing, constructing and installing the fire pit.

To prevail on a negligence claim, plaintiffs must prove both of the following by a preponderance of the evidence:

First, Green and/or Miserocchi were negligent.

Second, Green and/or Miserocchi were a proximate or legal cause of the damage sustained by Del Monaco.

Negligence is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use under the circumstances. Negligence may consist of doing something that a reasonably careful person would not do under like circumstances or in failing to do something a reasonably careful person would do under like circumstances.

Injuries or damages are "proximately" or "legally" caused by an act, or failure to act, of another when it appears by a preponderance of the evidence that the act or omission 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 or a reasonably probable consequence of the act or omission.

If you find defendants Green and/or Miserocchi used reasonable care, and therefore were not negligent, that ends your deliberations and you must enter a verdict in their favor. If, however, you decide Green and/or Miserocchi were negligent, then you must determine whether their negligence was a proximate, or legal, cause of the plaintiffs' damages.

If you find Green and/or Miserocchi were negligent and a proximate cause of plaintiffs' damages, you must consider defendants' defense to plaintiffs' claims.

Defense - Comparative Negligence

Defendants Green and Miserocchi claim Del Monaco was negligent in his use of the fire pit and/or deck and that Del Monaco's own negligence caused the damage.

Because Patriot Mutual Insurance Company "stands in the shoes" of Del Monaco with respect to its claims for the insurance benefits it paid to Del Monaco in connection with the fire, any defenses defendants have to Del Monaco's claims are equally applicable to Patriot Mutual. For example, if you find the fire was the result of Del Monaco's negligence, this defense is applicable to claims by Patriot Mutual Insurance Company.

Just as Del Monaco bore the burden of proof to show defendants were negligent, defendants bear the burden of proving by a preponderance of the evidence that Del Monaco was also negligent. The elements of defendants' negligence claim are the same as for Del Monaco's negligence claim. That is, defendants must show by a preponderance of the evidence that Del Monaco was negligent and that his negligence was a proximate cause of the damages.

Should you conclude that Green and/or Miserocchi and Del Monaco were negligent, and that their negligence proximately caused the damages, then it will be your job to determine the percentage of responsibility of each party. That is, you must determine what percentage of the accident is a result of Green's

and/or Miserocchi's negligence, and what percentage is the result of Del Monaco's negligence. Those percentages must add up to 100 percent. Let me suggest two hypothetical examples:

Plaintiff	Del Monaco	15%	60%
Defendant	Green	55%	15%
Defendant	Miserocchi	30%	25%
Total Negligence		100%	100%

These are only examples.

If you find the negligence attributed to Del Monaco is 50% or less, you should consider the appropriate money award for the plaintiffs' damages.

If you find, however, that Del Monaco was more than 50% negligent, then you should return a verdict for defendants on the issue of negligence, and you should not consider a money award for the damages.

Effect of Instructions as to Damages

I will instruct you as to the proper measure of damages, but you should not consider this instruction as an indication of whether you should award damages. The instructions are given only for your guidance.

Compensatory Damages

If you find by a preponderance of the evidence that defendants Green and/or Miserocchi were negligent and a proximate cause of the fire, then you must consider the issue of damages. The amount of damages plaintiffs may recover, if any, is a matter for you as the jury to decide.

In a case such as this one, damages are awarded on a theory of compensation. An award of compensatory damages is intended to place the damaged person in the position he or she was in immediately before the damage occurred, as nearly as can be done with an award of money damages.

In determining the compensation to plaintiffs for their damages in this case, you may consider the cost of restoring and replacing the plaintiffs' damage and loss so that plaintiffs are returned to the position they were in before the fire.

As with the other claims, the burden is on the plaintiffs to prove by a preponderance of the evidence the amount of damages to which they are entitled. Damages must be based only on the evidence presented at trial.

Where the plaintiffs' damages are capable of being calculated in dollars and cents, the plaintiffs must demonstrate their loss in dollars and cents. You may not award damages that are speculative.

The parties disagree about the extent of damages plaintiff suffered as a result of the fire and have presented evidence in support of their claims. It is up to you, as jurors, to determine the damages plaintiffs are entitled to recover, if any.

If you find by a preponderance of the evidence that defendants Green and/or Miserocchi were negligent and a proximate cause of the fire, plaintiffs may recover for the value of the fire damage to Del Monaco's personal and real property.

Del Monaco has been indemnified or paid for some of his personal property loss by his insurance company, Patriot Mutual Insurance Company. As a result, Patriot Mutual Insurance Company has acquired Del Monaco's right to recover those damages - up to the amount Patriot indemnified or paid Del Monaco for his loss.

You may also consider how much Del Monaco is entitled to recover. Del Monaco offered his opinion as to the value of the damaged personal property, and you may consider his opinion as the owner of the property.

Conclusion

To return a verdict, all jurors must agree to the verdict. In other words, your verdict must be unanimous.

Upon retiring to the jury room your foreperson will preside over your deliberations and be your spokesperson here in Court.

When you have reached a unanimous verdict, your foreperson should sign and date the verdict form.

If, during your deliberations, you should desire to communicate with me, please reduce your message or question to writing, signed by the foreperson, and pass the note to the court security officer. The officer will then bring the message to my attention. I will respond as promptly as possible, either in writing or by having you return to the courtroom so that I may address your question orally. I caution you, with regard to any message or question you might send, that you should never specify where you are in your deliberations or your numerical division, if any, at the time.

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VERDICT FORM

1. Do you find Plaintiffs have proven by a preponderance of the evidence that Defendant James Green was negligent and a proximate cause of Plaintiffs' damages?

_____ yes _____ no

If your answer to question 1 is "no," then your verdict is for Defendant Green, and your deliberations are completed with respect to Green.

Proceed to question 2.

2. Do you find Plaintiffs have proven by a preponderance of the evidence that Defendant Jeffrey Miserocchi was negligent and a proximate cause of Plaintiffs' damages?

_____ yes _____ no

If your answer to question 2 is "no," then your verdict is for Defendant Miserocchi, and your deliberations are completed with respect to Miserocchi.

If your answer to questions 1 and/or 2 is "yes," proceed to question 3.

If your answer to both questions 1 and 2 is "no," your deliberations are complete, and the foreperson should sign and date the verdict form.

- _____ yes _____ no

4. We, the jury, ascribe to each of the parties the following proportion of negligence. If you found Green or Miserocchi were not negligent in questions 1 or 2, you may indicate that defendant's percentage as zero. The percentages must equal 100%.

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Foreperson

Date

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Election of a Foreperson

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

A verdict form has been prepared for your convenience. You will take this form to the jury room. I direct your attention to the verdict form.

The answer to each question must be the unanimous answer of the jury. Your foreperson will write the unanimous answer of the jury in the space provided for each question and, when completed, will date and sign the verdict.