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United States District Court

District of Vermont

FAITH CARTER
Plaintiff,

v.

KATHLEEN PROUD CARLTON
Defendant.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 9:95-CV-138

X **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

___ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Defendant's negligence was not a legal cause of the Plaintiff's injuries, and judgment is hereby entered for the Defendant Kathleen Proud Carlton.

Date: July 3, 1996

RICHARD PAUL WASKO
Clerk

William J. Egan
(By) Deputy Clerk

JUDGMENT ENTERED ON DOCKET
DATE: 7/3/96

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JURY INSTRUCTIONS

Now that you have heard the evidence and the arguments, it becomes 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.

Your final role here is to pass upon and decide the fact issues of this case. You are the sole and exclusive judge 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" for you and instruct you on how to assess it, including how to appraise the credibility or, to put it another way, the believability of witnesses.

You are not to consider any one instruction that I give you as alone stating the law, but you should take all of my 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.

You are to discharge your duty as jurors in an attitude of complete fairness and impartiality. You should appraise the evidence calmly and deliberatively and without the slightest trace of sympathy, bias or prejudice for or against any party.

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. The term "evidence" includes the sworn testimony of the witnesses, the exhibits admitted in the record, and the stipulations to which the parties agreed.

While we were hearing evidence you were told that the parties agreed, or stipulated, to certain facts. This means simply that they both accept the facts to which they stipulated. There is no disagreement over that, so there was no need for evidence by either side on that point. You may accept that as fact, even though nothing more was said about it one way or the other.

Remember that any statements, objections or arguments made by the lawyers are not evidence in the case. 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. In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.

Also, during the course of the trial I occasionally made comments to the lawyers, asked questions of a witness, or admonished a witness concerning the manner in which he or she responded to the questions of counsel. Do not assume from anything I have said that I have any opinion concerning any of the issues in this case. Except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own findings as to the facts.

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.

The law recognizes two types of evidence -- direct and circumstantial. Direct evidence is provided when, for example, people testify to what they saw or heard themselves; that is, something which they have knowledge of by virtue of their senses. Circumstantial evidence consists of proof of facts and

circumstances from which in terms of common experience, one may reasonably infer the ultimate fact sought to be established. Such evidence, if believed, is of no less value than direct evidence. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that you find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

The burden is on the plaintiff in a civil action such as this to prove every essential element of her claim by a "preponderance of the evidence." A preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your minds a belief that what is sought to be proved is more likely true than not true. In other words, to establish a claim by a "preponderance of the evidence" merely means to prove that the claim is more likely so than not so.

In determining whether any fact in issue has been proved by a preponderance of the evidence, you may consider the testimony of all the witnesses, regardless of who may have called them, and all the exhibits received in evidence, regardless of who may have produced them. If the proof should fail to establish any essential element of the Plaintiff's claim by a preponderance of the evidence, you should find for the Defendant as to that claim.

In this action the Plaintiff, Faith Carter, claims that the Defendant, Kathleen Proud (Carlton), was negligent in backing out of a parking space, and that the Plaintiff sustained injuries as a result of the Defendant's negligence.

Here the Defendant has conceded that her negligence was the sole cause of the accident, but argues that the Plaintiff's injuries were not legally caused by the accident, and if they were, that the injuries are not as serious as the Plaintiff claims.

Negligence is a "legal cause" of damage if it directly and in natural and continuous sequence produces, or contributes substantially to producing such damage, so it can reasonably be said that, except for the negligence, the loss, injury or damage would not have occurred. Negligence may be a legal cause of damage even though it operates in combination with the act of another, some natural cause, or some other cause.

If a preponderance of the evidence does not support the Plaintiff's claim, then your verdict should be for the Defendant. However, if you should find by a preponderance of the evidence that the Defendant's negligence was a legal cause of the Plaintiff's damages, then you must consider the issue of damages.

In considering the issue of the Plaintiff's damages you are instructed that you should assess the amount you find to be

justified by a preponderance of the evidence as full, just and reasonable compensation for all of the Plaintiff's damages, no more and no less. Damages are not allowed as a punishment and cannot be imposed or increased to penalize the Defendant. Neither can damages cannot be based on speculation because it is only actual damages -- what the law calls compensatory damages - -that are recoverable. However, compensatory damages are not restricted to actual loss of time or money; they include both the mental and physical aspects of injury, tangible and intangible. They are an attempt to restore the Plaintiff by making her whole or as she was immediately prior to her injuries.

You may consider awarding damages for the following elements, to the extent you find them proved by a preponderance of the evidence:

(1) The reasonable value of any past, present, and future medical expenses which the Plaintiff has reasonably incurred or will incur as a result of injuries caused by the Defendant's negligence; and

(2) Any loss of income the Plaintiff has sustained to date or will sustain in the future as a result of injuries caused by the Defendant's negligence; and

(3) Any bodily injury sustained by the Plaintiff and any resulting physical or mental

pain and suffering the Plaintiff has experienced in the past or will experience in the future as a result of injuries caused by the Defendant's negligence.

With respect to the third and final category, I instruct you that no evidence of the value of intangible things, such as mental or physical pain and suffering, has been or need be introduced. You are not trying to determine value, but an amount that will fairly compensate the Plaintiff for the damages she has suffered. There is no exact standard for fixing the compensation to be awarded for these elements of damage. Any award that you make should be fair in light of the evidence.

In calculating any future damages which you find have been proven by a preponderance of the evidence, and which you find are permanent, you may consider her life expectancy. Females of the Plaintiff's age have a life expectancy of 51.2 years. The mortality tables received in evidence may be considered in determining how long the claimant may be expected to live. Bear in mind, however, that life expectancy as shown by mortality tables is merely an estimate of the average remaining life of all persons in the United States of a given age and sex having average health and exposure to danger of persons in that class. So, such tables are not binding on you but may be considered together with the other evidence in the case bearing on the Plaintiff's health, age,

occupation and physical condition, before and after the injury, in determining the probable length of her life.

When considering life expectancy in determining future damages, you should bear in mind, of course, the distinction between entire life expectancy and work life expectancy, and those elements of damage related to future income should be measured only by the Plaintiff's remaining work life expectancy.

If you find that the Plaintiff is reasonably certain to lose earnings in the future, or to incur medical expenses in the future, then you must determine the present value in dollars of such future damages, since the award of future damages necessarily requires that payment be made now in one lump sum and the Plaintiff will have the use of the money now for a loss that will not occur until some future date. You must decide what those future losses will be and then make a reasonable adjustment for the present value.

You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages - that is, to take advantage of any reasonable opportunity she may have had under the circumstances to reduce or minimize the loss or damage.

So, if you should find from a preponderance of the evidence that the Plaintiff, within the limitations of any disability she may have sustained, failed to seek out or take advantage of a business or employment opportunity that was reasonably available to her under all of the circumstances shown by the evidence, then you should reduce the amount of any award for loss of earnings by the amount she could have reasonably realized if she had taken advantage of such opportunity.

The Plaintiff also has a duty to minimize her damages by following the expert recommendations of her physicians. In other words, a person who has suffered injury by reason of a defendant's negligence is bound to use reasonable and proper effort to make the damages as small as practicable, and to act in good faith to adopt reasonable methods and follow reasonable programs of medical care or treatment to restore herself.

Failure of the Plaintiff to make a reasonable effort to minimize damages does not prevent all recovery, but does prevent recovery of such damages as might have been avoided by making such efforts. If you find that some portion of the Plaintiff's injuries are due to her failure to minimize damages, then subtract this amount from the total when you complete Question Two of your Form of Verdict.

Of course, the fact that I have given you instructions concerning the issue of the Plaintiff's damages should not be interpreted in any way as an indication that I believe the Plaintiff should, or should not, prevail in this case.

Now, I have said that you must consider all the evidence. That does not mean, however, that you must accept all the evidence as true or accurate. I instructed you that one of your principal functions during the trial would be to observe the witnesses and to determine their credibility.

You are the sole judges of the credibility or believability of witnesses and the weight to be given to their testimony. In weighing the testimony of witnesses, you should consider their relation to the Plaintiff or to the Defendant, their interest, if any, in the outcome of the case, their candor and manner of testifying, their opportunity to gather or acquire knowledge concerning their testimony, their fairness and intelligence and the extent to which they have been supported or contradicted by other credible evidence. You may accept or reject the testimony of any witness in whole or in part.

The weight of the evidence is not determined by the number of witnesses testifying as to the existence or nonexistence of any fact. You may find that the testimony of a smaller number

of witnesses to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

Now, one factor to be considered in assessing credibility is any interest a witness may have in the outcome of a trial. In appraising a witness's credibility, you may take into consideration the fact of the witness's interest. It by no means follows, however, that because a person has a substantial interest in the outcome that the person is not capable of telling a straightforward or truthful story. It is for you to decide to what extent, if at all, an interest in the outcome of a case has affected a witness's testimony.

You may also consider any demonstrated bias, prejudice or hostility of a witness toward a party in determining the weight to be accorded to that witness's testimony.

A witness may be discredited or "impeached" by contradictory evidence, by a showing that the witness testified falsely concerning a material matter, or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness's present testimony.

You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not

telling the truth as he or she remembers it, because people naturally tend to forget some things or remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether that misstatement was simply an innocent lapse of memory or an intentional falsehood; and that may depend on whether it has to do with an important fact or with only an unimportant detail.

If you believe that any witness has been so impeached, then it is your exclusive province to give the testimony of that witness such credibility or weight, if any, as you may think it deserves.

The rules of evidence provide that if scientific, technical, or other specialized knowledge might assist the jury in understanding the evidence or in determining a fact in issue, witnesses qualified as experts by knowledge, skill, experience, training, or education may testify and state their opinions concerning such matters.

You should consider each expert opinion received in evidence in this case and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other

evidence, then you may disregard the opinion entirely.

Ordinarily, under the rules of procedure governing the preparation of a case for trial, the parties are permitted to take and record the testimony of witnesses, under oath, in the same manner as you have seen witnesses sworn and questioned here before you; and, under certain conditions, that testimony, which is called a "deposition," may then be offered as evidence before the jury at the trial.

You should consider such deposition testimony, and evaluate the weight or credibility to which it is entitled, in the same way you consider and evaluate all the other testimony in the case.

When you retire to the jury room, how you go about your business is entirely up to you. I suggest to you, however, that you select a foreperson whose duty it will be to preside over your deliberations and who will be your spokesperson here in court. You can go about selecting your foreperson by vote or whichever way you want.

The foreperson has no greater voice or vote than any other juror, but sees that some order is established in the manner in which you proceed and is your spokesperson here in court.

If during your deliberations you should desire to communicate with the Court, please reduce your message or question to writing signed by your foreperson and pass the note to the marshal who will bring it to my attention. I will then respond as promptly as possible, either in writing or by having you returned to the courtroom so that I can address you orally. I caution you, however, that with regard to any message or question you might send, that you should never state or specify your numerical division at the time.

A form of verdict has been prepared for your convenience. You will take the verdict form into the jury room and when you have reached unanimous agreement you will have the foreperson fill in the verdict form, date and sign it. You will then return to the courtroom where the verdict will be read, and each of you will be asked individually if that is your verdict.

Any verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree to it. In other words, your verdict must be unanimous.

It is your duty as jurors to consult with one another and to deliberate in an effort to reach agreement if you can do so without violence to individual judgment. Each of you must 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 the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

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

FORM OF VERDICT
Faith Carter v. Kathleen Proud (Carlton)

Question One:

Do you find from a preponderance of the evidence that the Defendant's negligence was a legal cause of the Plaintiff's injuries?

Answer Yes or No _____

If your answer to Question One is "Yes," then go on to Question Two. If your answer to Question One is "No," then skip Question Two and have the foreperson sign and date the form of verdict.

Question Two:

If you answered "Yes" to Question One, what sum of money do you find from a preponderance of the evidence to be the total amount of the Plaintiff's damages?

Answer in Dollars $_____

SO SAY WE ALL.

_____
FOREPERSON

_____
DATE