

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

ST. PAUL FIRE AND MARINE
INSURANCE COMPANY,

Plaintiff,

v.

No. 2:96-CV-52

JAMES L. GESNER, VON ROHR CORP.,
DISTINCTIVE INNS, INC., LEISURE
REAL ESTATE ENTERPRISES CORP.,
RECREATION MANAGEMENT OF VERMONT,
INC., CATAMOUNT MARINA SERVICES
CORP.,

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 St. Paul Fire and Marine Insurance Company, represented by David R. Strawbridge and Madeline Caprioli. There are one individual Defendant and five corporate Defendants: James L. Gesner; Von Rohr Corporation; Distinctive Inns, Incorporated; Leisure Real Estate Enterprises Corporation; Recreation Management of Vermont, Incorporated; and Catamount Marina Services Corporation., represented by Peter Langrock and Lisa B. Shelkrot. James Gesner is represented individually by Philip Linton.

The defendant Von Rohr Corporation owns all of the stock in the other four corporate defendants, which are known as corporate subsidiaries. The corporate subsidiaries operated the Marble Island Resort.

As I mentioned at the beginning of the trial, this case arises out of a fire that occurred at the main building of the Marble Island Resort on April 23, 1995. St. Paul alleges that James Gesner and the corporate defendants, acting through James Gesner, are responsible for the fire at the Marble Island Resort. St. Paul also alleges that James Gesner and the corporate defendants committed fraud and false swearing during the insurance company's investigation of the fire. The Defendants deny these claims.

There are two claims. Each claim is separate and distinct, requiring proof of different elements. Later I will instruct you on the elements of each claim in turn. First though, I will give you some general instructions.

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.

Corporations and Corporate Liability

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 natural persons as its agents or employees.

Evidence in the Case

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.

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.

Direct and Circumstantial Evidence

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.

The following anecdote is a simple example of circumstantial evidence. Assume that when you came into the courthouse this morning the sun was shining and it was a nice day. Assume that the courtroom blinds were drawn and you could not look outside. As you were sitting here, someone walked in with an umbrella which was dripping wet. Then a few minutes later another person also entered with a wet umbrella. Now, you cannot look outside of the courtroom and you cannot see whether or not it is raining. So you have no direct evidence of that fact. But on the combination of facts which I have asked you to assume, it would be reasonable and logical for you to conclude that it had been raining. That is all there is to circumstantial evidence.

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.

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 its importance or credibility in the same way you consider and evaluate all the other testimony in the case.

Expert Witnesses

You have heard testimony from so-called expert witnesses in this case. An expert is allowed to express his or her opinion on those matters about which he or she has special knowledge and training. Expert testimony is presented to you on the theory that someone who is experienced in a field can assist you in understanding the evidence or in reaching an independent decision on the facts.

In weighing the expert's testimony, you may consider the expert's qualifications, his or her opinions, his or her reasons for testifying, as well as all of the other considerations that apply when you are deciding whether or not to believe a witness's testimony. You may give the expert testimony whatever weight, if any, you find it deserves in light of all the evidence in this case. You should not, however, accept this witness's testimony merely because he or she is an expert. Nor should you substitute it for your own reason, judgment, and common sense. The determination of the facts in this case, as I have said, rests solely with you.

It sometimes happens that experts disagree. The way you resolve a conflict between experts is the same way that you

decide other fact questions, and the same way you decide whether to believe ordinary witnesses. In addition, you should consider the soundness of each expert's opinion, reasons for the opinion and motive, if any, for testifying.

I will now give you instructions on the legal theories that apply to this case. As an overall summary, St. Paul Fire and Marine Insurance Company, the plaintiff, seeks recovery of the amount it was obligated to pay to the Chittenden Bank, as mortgage holder of the Marble Island Resort, because: 1) James Gesner or someone acting at his direction set an incendiary fire; and/or 2) James Gesner made material misrepresentations and concealed material facts during the insurance investigation of the fire. St. Paul seeks to hold Von Rohr and the subsidiary corporations responsible for the acts of James Gesner.

It is undisputed that Chittenden Bank held a mortgage on the Marble Island Resort property. Leisure Real Estate, one of the subsidiaries, was the borrower under the Chittenden loan documents. James Gesner, individually, and the other corporate entities guaranteed this mortgage. It is also undisputed that St. Paul issued a fire insurance policy covering the Marble Island Resort property. The policy listed the four corporate subsidiaries as insureds.

The corporate subsidiaries submitted a claim to St. Paul for the damage that occurred to the main lodge building as a result

of the fire. St. Paul denied the insurance claim on the grounds of arson and fraud and false swearing. However, St. Paul was independently obligated under the insurance policy to pay Chittenden Bank for the balance of the mortgage. It is undisputed that Chittenden Bank made a claim on the insurance policy, and that St. Paul paid \$2,012,504.98 to the Chittenden Bank in satisfaction of that claim.

Claim One: Incendiary Fire

In Count One, St. Paul alleges that James Gesner, or someone acting at his direction, intentionally set the fire at Marble Island on April 23, 1995. St. Paul further alleges that James Gesner is liable to St. Paul for the mortgage payments which St. Paul was obligated to make to the Chittenden Bank.

In order to prevail on this claim, St. Paul must prove by a preponderance of the evidence:

- 1) the fire was of incendiary origin, that is, it was deliberately set;
- 2) the fire was set by or at the direction of James Gesner; and
- 3) James Gesner acted wilfully in setting the fire, or causing it to be set.

Burden of Proof on Count One

St. Paul has the burden of proving every element of this claim 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 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 after considering all of the testimony you are satisfied that St. Paul has carried its burden of proof on each element of the claim, then you must find for St. Paul. If, after such consideration you find the evidence of both parties to be in balance or equally probable, then St. Paul has failed to sustain its burden and you must find for the Defendants. In deciding whether St. Paul has met its burden on this issue, you may consider circumstantial as well as direct evidence, including James Gesner's motive and opportunity, if any, to start the fire or cause it to be started, and any suspicious circumstances relating to the fire.

Claim Two: Fraud and Misrepresentation

In Count Two, St. Paul alleges that James Gesner made intentional misrepresentations or concealed material facts with regard to statements about setting fires to St. Paul. To prevail

on this claim, St. Paul must prove by clear and convincing evidence:

- 1) that James Gesner misrepresented or concealed facts during St. Paul's investigation of the fire;
- 2) that the misrepresentation or concealment was intentional, that is, that James Gesner intended to mislead St. Paul's investigators;
- 3) that the misrepresentation or concealment was material. A misrepresentation is material if it is substantial or important to the investigation, in other words, if it could have affected the course of the investigation.

St. Paul has alleged that James Gesner made material misrepresentations with respect to conversations about starting fires. This claim must be proven by clear and convincing evidence. Proof by clear and convincing evidence is a higher degree of proof than by a preponderance of the evidence. Clear and convincing evidence is evidence that produces a firm conviction in your minds, although the proof need not be conclusive.

Verdict Based Upon Evidence

Your verdict in this case must be based solely upon the evidence presented at the trial of this case, whether testimonial

or documentary, and legitimate inferences to be drawn therefrom. Your verdict may not be based upon sympathy for a party, prejudice, passion, speculation or conjecture.

Unanimous Verdict

Your verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree. Your verdict must be unanimous as to each claim.

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 your individual judgment. You must each decide the case for yourself, but only after an impartial consideration of the evidence in the case with other jurors. In the course of your deliberations, do not hesitate to reexamine your own views, and change your opinion, if you become 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 -- the judges of the facts. Your sole interest is to seek the truth from the evidence in 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 special 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 special 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.

Communications with the Court

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 touching the merits of the case otherwise 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 touching the merits of the case.

Bear in mind also that you are never to reveal to any person -- not even to the Court -- how the jury stands, numerically or otherwise, on the questions before you, until after you have reached a unanimous verdict.

Dated at Burlington, in the District of Vermont, this 15th
day of June, 1998.



William K. Sessions III
District Judge