

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

CINCINNATI INSURANCE COMPANIES, :
 :
 Plaintiff, :
 :
 v. : File No. 1:09-CV-96
 :
 HECTIC ELECTRIC, INC., :
 :
 Defendant. :
 _____ :

CHARGE TO THE JURY

Now that you have heard the evidence, it becomes my duty to give you the instructions of the Court as to the law applicable to this case. I will first give you some general instructions, after which the lawyers will present their closing arguments. I will then give you the law that applies to the plaintiff's claims.

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 refer 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.

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.

Credibility of Witnesses -- Inconsistent Statements

The testimony of a witness may be discredited, or as we sometimes say, "impeached," by showing the witness previously made statements which are different than or inconsistent with his or her testimony here in court. The earlier inconsistent or contradictory statements are admissible only to discredit or impeach the credibility of the witness and not to establish the truth of these earlier statements made somewhere other than here during this trial, unless the witness has adopted, admitted or ratified the prior statement during the witness' testimony in this trial. It is the province of the jury to determine credibility, if any, to be given to the testimony of a witness who has made prior inconsistent or contradictory statements.

Expert Witnesses

Some of the testimony you heard was given by expert witnesses. An expert 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:

- (1) the opinion is not based on sufficient education, training and experience;
- (2) the reasons given by an expert in support of his or her opinion are not sound;
- (3) the expert's testimony is outweighed by other evidence;
or
- (4) 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 deposition which has been received into evidence. A deposition is simply a procedure where the attorneys for one side 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.

Burden of Proof and Preponderance of the Evidence

Cincinnati Insurance Companies must prove every element of its claims by a preponderance of the evidence. To prove "by a 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

Plaintiff, Cincinnati Insurance Companies, claims defendant Hectic Electric was negligent and breached an implied warranty in the performance of certain electrical work at the Kouwenhoven home performed in 2000. Plaintiff claims Hectic Electric's negligence and/or breach of implied warranty caused the fire and damage to the home in 2006.

Defendant, Hectic Electric, denies plaintiff's allegations.

Now you will hear the parties' closing arguments.

Instructions of Law

Now I will give you instructions concerning the law that applies to the claims in 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.

Negligence

Plaintiff claims Hectic Electric, was negligent in the performance of electrical work at the Kouwenhoven home. To prevail on its negligence claim, plaintiff must prove both of the following by a preponderance of the evidence:

First, Hectic Electric was negligent.

Second, Hectic Electric's negligence was a proximate, or legal, cause of the damage to the Kouwenhoven home.

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.

If you find defendant Hectic Electric used reasonable care in performing the electrical work at the Kouwenhoven home, and therefore was not negligent, you must enter a verdict in its favor on this claim. If, however, you decide Hectic Electric was negligent, then you must also determine whether its negligence was a proximate, or legal, cause of the damage to the Kouwenhoven home.

Breach of Implied Warranty

In its complaint, plaintiff also alleges defendant Hectic Electric breached an implied warranty to perform the electrical work in a good and workmanlike manner. When an electrician wires a home, the electrician makes an implied promise that the electrical work was performed in a good and workmanlike manner. An electrician is not required to deliver perfect electrical work; it is required to deliver electrical work in a good and workmanlike manner. The implied warranty lasts for a reasonable period of time under the circumstances accounting for the age of the work, maintenance history, the nature of the defect and the extent to which it is discoverable through reasonable inspection.

In order to prevail on this claim, plaintiff must prove by a preponderance of the evidence both that Hectic Electric breached the implied warranty by not delivering the electrical work in a good and workmanlike manner, and that its breach of the implied warranty was a proximate, or legal, cause of the damage to the Kouwenhoven home.

Proximate Cause

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 the act or omission played a substantial part in bringing about or actually causing the injury or damage, and the injury or damage was either a direct result or a reasonably probable consequence of the act or omission.

Subrogation -- Equal Rights Under the Law

I will now explain to you the concept of subrogation and how it relates to this trial. Subrogation is a legal doctrine by which an insurer, having paid the losses of its insured, is placed in the position of its insured so that it may recover from a third party legally responsible for the loss. In other words, once an insurer has paid a claim to the insured, it may then stand in the shoes of the insured and assert the insured's rights against the responsible parties. The right to stand in the insured's shoes and to collect from the responsible party once it has paid the insured an amount representing the responsible party's debt is called the insurer's right to subrogation. The legal doctrine of subrogation thus places the subrogee -- the insurance company -- in the precise position of the one to whose rights and disabilities it is subrogated. Thus, Cincinnati Insurance Companies stands before you in the shoes of Gerrit and Ellen Kouwenhoven, and holds all of the rights of recovery that these parties have against Hectic Electric. Cincinnati paid the Kouwenhovens for their losses under an insurance policy issued by Cincinnati to the Kouwenhovens. Cincinnati is therefore entitled to all or part of the award rendered in this case.

Because all parties are equal in the eyes of the law, you are to treat Cincinnati in the same way you would treat any other plaintiff. Decide this case no differently than you would if the Kouwenhovens had no insurance. Thus, if Cincinnati proves its

case by a preponderance of the evidence, under the law that I have given to you, and the facts as presented, then you are to find for the plaintiff as you would find for any other party under the circumstances.

Damages

In this case, the parties have reached a stipulation on damages. If you find that Hectic Electric is liable to plaintiff on either claim, the parties have agreed the amount of damages payable is \$254,012.66.

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 sign and date the verdict.

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 plaintiff Cincinnati Insurance Companies has proven by a preponderance of the evidence that defendant Hectic Electric, Inc. was negligent in performing electrical work at the Kouwenhoven home?

_____ yes _____ no

If your answer to question 1 is "no," then your verdict is for Hectic Electric on this claim. Please proceed to question 3.

If your answer to question 1 is "yes," then proceed to question 2.

2. Do you find plaintiff Cincinnati Insurance has proven by a preponderance of the evidence that Hectic Electric's negligence was a proximate cause of the fire at the Kouwenhoven home?

_____ yes _____ no

If your answer to question 2 is "no," then your verdict is for Hectic Electric on this claim. Please proceed to question 3.

If your answer to question 2 is "yes," then your verdict is for Cincinnati Insurance on this claim. Please proceed to question 3.

3. Do you find plaintiff Cincinnati Insurance has proven by a preponderance of the evidence that Hectic Electric breached an implied warranty to perform the electrical work at the Kouwenhoven home in a good and workmanlike manner?

_____ yes _____ no

If your answer to question 3 is "no," then your verdict is for Hectic Electric on this claim, and your deliberations are completed.

If your answer to question 3 is "yes," then proceed to question 4.

4. Do you find plaintiff Cincinnati Insurance has proven by a preponderance of the evidence that Hectic Electric's breach of implied warranty was a proximate cause of the fire at the Kouwenhoven home?

_____ yes _____ no

If your answer to question 4 is "no," then your verdict is for Hectic Electric on this claim, and your deliberations are completed.

If your answer to question 4 is "yes," then your verdict is for Cincinnati Insurance on this claim, and your deliberations are completed.

The parties have stipulated the damages caused by the fire are:

\$254,012.66

Foreperson

Date

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Judge Murtha, we have reached a verdict.

Foreperson

Date