

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

| | | |
|-----------------|---|--------------------------|
| VINCENT AQUINO, | : | |
| | : | |
| Plaintiff, | : | |
| | : | |
| v. | : | File No. 1:11-cv-212-jgm |
| | : | |
| SAMUEL WATTS, | : | |
| | : | |
| Defendant. | : | |
| _____ | : | |

CHARGE TO THE JURY

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

It is your duty as jurors to follow the law, and not question it, and to apply that law to the facts as you find them from the evidence in the case.

The lawyers may have referred to some of the rules of law in their arguments. If, however, any difference appears between the law as stated by the lawyers and the law stated by the Court in these instructions, you are to follow the Court's 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 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, and reach a just

verdict, regardless of the consequences.

During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, Blackberry or computer, the internet, any Internet service, any text or instant messaging service, any Internet chat room, blog, or website such as Facebook, MySpace, LinkedIn, YouTube or Twitter, to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict. In other words, you cannot talk to anyone on the phone, correspond with anyone, or electronically communicate with anyone about this case. You can only discuss the case in the jury room with your fellow jurors during deliberations. I expect you will inform me as soon as you become aware of another juror's violation of these instructions.

You may not use these electronic means to investigate or communicate about the case because it is important that you decide this case based solely on the evidence presented in this courtroom. Information on the internet or available through social media might be wrong, incomplete, or inaccurate. You are only permitted to discuss the case with your fellow jurors during deliberations because they have seen and heard the same evidence you have. In our judicial system, it is important that you are

not influenced by anything or anyone outside of this courtroom. Otherwise, your decision may be based on information known only by you and not your fellow jurors or the parties in the case. This would unfairly and adversely impact the judicial process.

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.

The evidence in the case consists of the sworn testimony of the witnesses, admitted exhibits, and any stipulated facts. You will hear witness testimony in this courtroom from witnesses under oath. Testimony has also been introduced from videotaped depositions and transcripts of depositions. A deposition is testimony taken under oath before trial and preserved in this case by videotape and transcript. You must consider that testimony as if it had been given here in court.

Any evidence to which an objection was sustained or stricken by the Court must be disregarded. Lawyers have the right to object to questions or answers which they believe are not admissible. You must not draw any inferences from the fact that a lawyer feels it is necessary to make objections.

Anything you have seen or heard outside the courtroom is not evidence, and must be entirely disregarded. You are to consider only the evidence in the case. But in your consideration of the evidence, you are not limited merely to the statements of the witnesses. In other words, you are not limited solely to what

you see and hear as the witnesses testify. You are permitted to draw, from the facts which you find have been proved, such reasonable inferences as you feel are justified in the light of your experiences.

Evidence -- Direct and 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 contrary evidence.

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's intelligence, motive and state of mind, and demeanor or manner. Consider the witness's 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 of any witness 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

You have heard expert witnesses express their opinions. A witness may be permitted to testify to an opinion on those matters about which he or she has special knowledge, skill, experience, and training. Such testimony is presented to you on the theory that someone who is experienced and knowledgeable in the field can assist you in understanding the evidence or in reaching an independent decision on the facts.

In weighing this opinion testimony, you may consider the witness's qualifications, his opinions, the reasons for testifying, as well as all of the other considerations that ordinarily apply when you are deciding whether or not to believe a witness's testimony. You may give the opinion testimony whatever weight, if any, you find it deserves in light of all the evidence. You should not, however, accept opinion testimony merely because the witness was allowed to testify concerning his judgment, nor should you substitute it for your own reason, judgment, and common sense. The determination of the facts rests solely with you.

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 as you find them from the evidence.

You determine the facts in this case. By these instructions, I am not indicating how you should decide any question of fact.

Overview of the Claims and Defenses in this Case

As you have heard, the claim before you arises out of a collision between Vincent Aquino and Samuel Watts at the bottom of the "Suntanner" trail at the Stratton Mountain Ski Resort on December 16, 2010.

In this case, the plaintiff is Vincent Aquino. Mr. Aquino brings his claim under the legal theory of negligence. To prevail, Mr. Aquino must prove to you, by a preponderance of the evidence, each element of that theory. Defendant Samuel Watts denies he is at fault and asserts that Mr. Aquino is comparatively negligent. To prevail on this defense, Mr. Watts must prove to you, by a preponderance of the evidence, each element of the theory of comparative negligence.

Burden of Proof and Preponderance of the Evidence

The burden is on the plaintiff in a civil action to prove every essential element of a claim by a preponderance of the evidence. In this case, it is Vincent Aquino's burden to prove every essential element of his negligence claim by a preponderance of the evidence. 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.

To "establish by a preponderance of the evidence" means to prove that something is more likely so than not so. In other words, a preponderance of the evidence in the case means such evidence as, when considered and compared with that opposed to it, has more convincing force, and produced in your minds the belief that what is sought to be proved is more likely true than not true. This rule does not, of course, require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.

The phrase "preponderance of the evidence" means the greater weight of the evidence. It refers to the quality and persuasiveness of the evidence. In determining whether a fact or claim has been proven by a preponderance of the evidence, you may consider the relevant testimony of witnesses, regardless of who may have called them, and relevant exhibits in evidence, regardless of who may have produced them.

Obvious and Necessary Dangers

As a threshold matter, you must determine whether the collision at issue occurred as a result of an obvious and necessary danger inherent in the sport of skiing. In recognition of the dangers that exist in virtually every sport, the Vermont legislature passed a law stating that every person who participates in a sport, including skiing, accepts as a matter of law all the dangers that are inherent in that sport, to the extent that such dangers are obvious and necessary to the sport.

Mr. Aquino must prove by a preponderance of the evidence that the risk involved in the collision was not an obvious and necessary risk inherent to skiing. A risk of danger which is "inherent" in a sport is one which is a part of the essential character of that sport and intrinsic to it. An "obvious danger" does not necessarily refer to things that are easily observed. Rather, it is a risk or hazard which a reasonable participant in the sport would know of or appreciate. An obvious danger is one that is widely recognized and known by a reasonable skier under similar circumstances.

A "necessary danger" is one that exists even when due care is exercised. It is a risk that is impossible or unreasonably difficult or expensive to eliminate. A person need only accept those risks that are inherent in the sport, not those increased

risks that are caused by other skiers's failure to use reasonable care. Some collisions may be the result of the obvious and necessary risks inherent in the sport, and collisions might occur despite the exercise of ordinary and reasonable care and without negligence by either party.

If you find the collision at issue was the result of an obvious and necessary risk of skiing, you must return a verdict in favor of the defendant, Samuel Watts. On the other hand, if you find that the collision was not the result of an obvious or necessary part of skiing, you must proceed to consider whether Mr. Watts was negligent.

Negligence

Plaintiff Vincent Aquino is proceeding against defendant Samuel Watts on a theory of negligence. To prevail on his negligence claim, Mr. Aquino must prove both of the following by a preponderance of the evidence.

First, Mr. Watts was negligent.

Second, Mr. Watts's negligence was a proximate or legal cause of the damages sustained by Mr. Aquino.

The fact that a collision happened, standing alone, does not permit you the jury to draw an inference that the collision was caused by negligence. "Negligence" is the breach of a legal duty to exercise ordinary or due care which a prudent person would exercise under the same or similar circumstances. Ordinary care is that care which reasonably careful persons use in conducting their own affairs, to avoid injury to themselves or their property, or the persons or property of others. When deciding whether ordinary care was exercised in a given case, the conduct in question must be viewed in the light of all the surrounding circumstances as shown by the evidence in the case. Negligence may consist of omitting to do something a reasonably prudent person would do or doing something which a reasonably prudent person would not do under the same or similar circumstances.

In general, a duty in negligence cases may be defined as an obligation to conform to a particular standard of conduct toward

another. Here, Mr. Watts had a duty to conform to a standard of conduct of a reasonably careful skier of similar experience and knowledge of the situation and its dangers.

If you find Mr. Watts did not breach his duty to Mr. Aquino and therefore was not negligent, that ends your deliberations and you must enter a verdict in Mr. Watts's favor. If, however, you decide Mr. Watts was negligent, then you must determine whether his negligence was a proximate, or legal, cause of Mr. Aquino's injury.

Injuries or damages are "proximately caused" by an act, or a failure to act, 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.

Comparative Negligence

As part of his defense to the suit brought by Mr. Aquino, Mr. Watts has raised the defense of comparative negligence. Mr. Watts claims that Mr. Aquino was himself negligent and that Mr. Aquino's own negligence was a cause of his injuries.

Just as Mr. Aquino bears the burden of proving by a preponderance of the evidence that Mr. Watts is negligent, so here, Mr. Watts must prove by a preponderance of the evidence that Mr. Aquino was negligent. The elements of Mr. Watts's negligence claim are the same as for Mr. Aquino's claim of negligence. Therefore, before you may conclude that Mr. Aquino was negligent, you must be persuaded by a preponderance of the evidence that Mr. Aquino owed himself a duty to act reasonably, that he breached that duty, that he suffered injury, and that his negligence, if any, was a proximate cause of the injuries he suffered.

In making your determination on the issue of comparative negligence, you should refer to the section on Negligence above. Should you conclude that both Mr. Watts and Mr. Aquino were negligent, and that the negligence of both contributed to Mr. Aquino's injuries, then it will be your job to ascribe a percentage of responsibility to each of the parties; that is, you must determine what percentage of the negligence is attributable to Mr. Aquino and what percentage is attributable to Mr. Watts.

The percentages must add up to 100 percent. If you find that Mr. Aquino's comparative negligence is greater than 50 percent, then Mr. Aquino cannot recover anything, and you must enter a verdict for Mr. Watts. However, if Mr. Aquino's negligence is 50 percent or less, then Mr. Aquino is entitled to recover from Mr. Watts.

Effect of Instruction on Damages

The fact that I will instruct you as to the proper measure of damages does not reflect any view of mine as to which party is entitled to your verdict. Instructions as to the measure of damages are given only for your guidance in the event you find in favor of Mr. Aquino in accordance with the other instructions. If you find Mr. Aquino has not proven liability, or Mr. Aquino himself was more than 50 percent responsible, you should not consider damages at all.

Compensatory Damages

If you do determine by a preponderance of the evidence that Mr. Watts is liable to Mr. Aquino, then you must consider the issue of damages. The amount of damages Mr. Aquino shall recover, if any, is solely a matter for you 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 injured person in the position he was in immediately before the injury occurred, as nearly as can be done with an award of money damages. Thus, Mr. Aquino is entitled to recover for all damages that are a natural consequence of Mr. Watts's conduct, including items such as past and future pain and suffering, lost enjoyment, and past and future medical expenses.

As with the other elements of his claim, the burden is on Mr. Aquino to prove by a preponderance of the evidence the amount of damages to which he is entitled. You may not award damages that are speculative or based on sympathy. Damages must be based only on the evidence presented at trial.

In this case, Mr. Aquino seeks to recover past and future compensatory damages for his injury, including past medical expenses. The parties have agreed that Mr. Aquino's past medical expenses are \$167,658.74. You should not consider the agreement an admission of liability, negligence, fault, or wrongdoing on Mr. Watts's part.

Mr. Aquino also seeks past and future damages for pain and suffering, loss of enjoyment of life, disability, physical impairment, and emotional distress. No definite standard is prescribed by law by which to fix reasonable compensation for pain and suffering. Nonetheless, in making an award for pain and suffering, you should exercise your authority with calm and reasonable judgment and the damages you fix should be just and reasonable in light of the evidence.

Although the arguments of the attorneys are not evidence, you may determine Mr. Aquino's damages in terms of daily pain and suffering, and then determine what amount of damages would be appropriate compensation for each day of pain and suffering. A per diem, or daily, calculation argument is a tool of persuasion of counsel to suggest a method of how to quantify damages based on the evidence of pain and suffering presented.

This action is Mr. Aquino's only opportunity to recover damages for his injuries, and therefore whatever he is entitled to recover for damages in the future on the account of his injuries must be included in the amount he recovers now. You may consider Mr. Aquino's life expectancy of 21 years when considering an award of future damages.

Life expectancy is merely an estimate of the probable average remaining length of life of persons in the United States of a given age and sex. The inference which may reasonably be

drawn from life expectancy applies only to one who has the average health and exposure to danger of people of that age and sex. In determining the reasonably certain life expectancy of Mr. Aquino, you should also consider all other facts and circumstances in evidence in the case bearing upon the life expectancy of Mr. Aquino, including his occupation, habits, past health record, and present state of health.

Taxation

If you find in favor of Mr. Aquino 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 Mr. Aquino and award damages, you must not calculate interest as part of the damages award.

Verdict -- Unanimous -- Duty to Deliberate

The verdict must represent the considered judgment of each juror. All of you must agree with the verdict. 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, without violence to your own individual judgment. 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 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 the judges -- judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

Note Taking

You were permitted to take notes during the course of the trial. If you took any notes, those notes should be used only as memory aids. You should not give your notes precedence over your independent recollection of the evidence. If you did not take notes, you should rely on your own independent recollection of the proceedings and should not be influenced by the notes of other jurors. I emphasize that notes are not entitled to any greater weight than the recollection or impression of each juror as to what the testimony may have been.

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 it.

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.

You will have with you in the jury room all of the exhibits, a copy of these instructions, and the verdict form. If, during your deliberations, you should desire to communicate with the Court, please do so by a written note, signed by your foreperson and delivered to the court security officer outside the jury room door. He 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.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

| | | |
|-----------------|---|--------------------------|
| VINCENT AQUINO, | : | |
| | : | |
| Plaintiff, | : | |
| | : | |
| v. | : | Case No. 1:11-cv-212-jgm |
| | : | |
| SAMUEL WATTS, | : | |
| | : | |
| Defendant. | : | |
| _____ | : | |

NOTIFICATION OF DECISION

Judge Murtha, we have reached a verdict.

Foreperson

Date

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

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| | : | |
| Plaintiff, | : | |
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| Defendant. | : | |
| _____ | : | |

VERDICT FORM

1. Were the injuries to Plaintiff Vincent Aquino the result of an obvious and necessary risk inherent in the sport of skiing?

_____ yes _____ no

If your answer to Question 1 is "yes," then your verdict is for Defendant Samuel Watts, and your deliberations are complete.

2. Do you find Plaintiff Vincent Aquino has proven by a preponderance of the evidence that Defendant Samuel Watts was negligent in causing his injuries?

_____ yes _____ no

If your answer to question 1 is "no," then your verdict is for Defendant Samuel Watts, and your deliberations are complete.

If your answer to question 1 is "yes," then proceed to question 3.

3. Do you find Defendant Samuel Watts has proven by a preponderance of the evidence that Plaintiff Vincent Aquino was negligent in causing his own injuries?

_____ yes _____ no

If your answer to question 3 is "no," then proceed to question 5. If your answer to question 2 is "yes," then proceed to question 4.

4. We, the jury, ascribe to each of the parties the following proportion of negligence. (These percentages must equal 100%.)

| | |
|--------------------------|--------------|
| Plaintiff Vincent Aquino | _____ % |
| Defendant Samuel Watts | _____ % |
| Total | <u>100</u> % |

If you have found Plaintiff Vincent Aquino more than 50% negligent, then your verdict is for Defendant Samuel Watts, and your deliberations are complete.

If you have found Mr. Watts is at least 50% negligent, then proceed to question 5.

5. State the total damages to which you find Plaintiff Vincent Aquino has proven. Do not reduce your damages award if you have found Plaintiff Vincent Aquino negligent in question 3. The Court will do the calculations.

| | |
|--|----------------------|
| Past medical expenses | \$ <u>167,658.74</u> |
| Past and future pain and suffering, emotional damages, disability, physical impairment, and loss of enjoyment of life | \$ _____ |
| TOTAL DAMAGES | \$ _____ |

Foreperson

Date