

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

,

Plaintiff,

v.

Civil No. xx-xxxx WJ/xxx

,

Defendant.

COURT'S INSTRUCTIONS TO THE JURY

INSTRUCTION NO.

OPENING - PROVINCE OF THE COURT

MEMBERS OF THE JURY:

You have now heard all of the evidence in the case.

It becomes my duty, therefore, to instruct you on the rules of law that you must follow and apply in arriving at your decision in the case.

In any jury trial there are, in effect, two judges. I am one of the judges; the other is the jury. It is my duty to preside over the trial and to determine what evidence is relevant under the law for your consideration. It is also my duty at the end of the trial to instruct you on the law applicable to the case.

10th Cir. Pattern Criminal § 1.03 (modified for civil cases)

INSTRUCTION NO.

DUTY TO FOLLOW INSTRUCTIONS

You, as jurors, are the judges of the facts. But in determining what actually happened—that is, in reaching your decision as to the facts—it is your sworn duty to follow all of the rules of law as I explain them to you.

You have no right to disregard or give special attention to any one instruction, or to question the wisdom or correctness of any rule I may state to you. You must not substitute or follow your own notion or opinion as to what the law is or ought to be. It is your duty to apply the law as I explain it to you, regardless of the consequences. However, you should not read into these instructions, or anything else I may have said or done, any suggestion as to what your verdict should be. That is entirely up to you.

It is also your duty to base your verdict solely upon the evidence, without prejudice or sympathy. That was the promise you made and the oath you took.

From: 10th Cir. Pattern Criminal § 1.04 (appropriate for civil)

INSTRUCTION NO.

PREPONDERANCE OF THE EVIDENCE

The plaintiff must prove every essential part of its claim(s) by a preponderance of the evidence.

The defendant must prove every essential part of its affirmative defense(s) by a preponderance of the evidence.

A preponderance of the evidence simply means evidence that persuades you that a party's claim is more likely true than not true.

In deciding whether any fact has been proven by a preponderance of the evidence, you may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence regardless of who may have produced them.

If the proof fails to establish any essential part of plaintiff's claim(s) by a preponderance of the evidence, you should find for the defendant.

If the proof fails to establish any essential part of defendant's affirmative defense(s) by a preponderance of the evidence, plaintiff is not precluded from recovery.

From: NM U JI 13-304 (substituting "preponderance" for "greater weight") and Fifth Cir. Pattern Civ. Jury Instr. § 2.20 (portion taken and modified)

INSTRUCTION NO.

MULTIPLE PLAINTIFFS

Although there is more than one Plaintiff in this action, it does not follow from that fact alone that if one is entitled to recover, another is entitled to recover. The rights of the various Plaintiffs in this lawsuit are separate and distinct, and you should decide the issues as if each Plaintiff had brought a separate lawsuit.

[In this connection, you will note that some of the instructions apply to one Plaintiff, while other instructions apply to all Plaintiffs.]

From: NM UJI 13-115

INSTRUCTION NO.

MULTIPLE DEFENDANTS

Although there is more than one Defendant in this action, it does not follow from that fact alone that if one is liable, any other is liable. Each Defendant is entitled to fair consideration of his own defense.

You will decide each Defendant's case separately, as if each were a separate lawsuit.

From: NM UJI 13-116

INSTRUCTION NO.

CORPORATION AS A PARTY

A corporation can act only through its officers and employees. Any act or omission of an officer or an employee of a corporation, within the scope or course of that officer's or employee's employment, is the act or omission of the corporation.

From: NM UJI 13-409

INSTRUCTION NO.

CORPORATION IMPARTIALITY

The [name of Plaintiff, Defendant, or other party] in this case is a corporation. A corporation is entitled to the same fair and unprejudiced treatment as an individual and you should decide the case with the same impartiality as you would use in deciding a case between individuals.

From: NM UJI 13-114

INSTRUCTION NO.

EVIDENCE - DEFINED

You must make your decision based only on the evidence that you saw and heard here in court. Do not let rumors, suspicions, or anything else that you may have seen or heard outside of court influence your decision in any way.

The evidence in this case includes only what the witnesses said while they were testifying under oath, the exhibits that I allowed into evidence, the stipulations that the lawyers agreed to, and the facts that I have judicially noticed.

Nothing else is evidence. The lawyers' statements and arguments are not evidence. Their questions and objections are not evidence. My legal rulings are not evidence. And my comments and questions are not evidence.

During the trial, I did not let you hear the answers to some of the questions that the lawyers asked. I also ruled that you could not see some of the exhibits that the lawyers wanted you to see. And sometimes I ordered you to disregard things that you saw or heard, or I struck things from the record. You must completely ignore all of these things. Do not even think about them. Do not speculate about what a witness might have said or what an exhibit might have shown. These things are not evidence, and you are bound by your oath not to let them influence your decision in any way.

From: 10th Cir. Pattern Criminal § 1.06 (appropriate for civil cases as well)

INSTRUCTION NO.

EVIDENCE—DIRECT AND CIRCUMSTANTIAL—INFERENCES

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

As a general rule, the law makes no distinction between direct and circumstantial evidence. The law simply requires that you find the facts in accord with all the evidence in the case, both direct and circumstantial.

While you must consider only the evidence in this case, you are permitted to draw reasonable inferences from the testimony and exhibits, inferences you feel are justified in the light of common experience. An inference is a conclusion that reason and common sense may lead you to draw from facts which have been proved.

By permitting such reasonable inferences, you may make deductions and reach conclusions that reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in this case.

From 10th Cir. Pattern Criminal § 1.07 (applicable to civil cases)

INSTRUCTION NO.

PROXIMATE CAUSE (without “Independent / Intervening”)

A proximate cause of an injury is that which in a natural and continuous sequence , unbroken by an independent and intervening cause, produces the injury, and without which the injury would not have occurred. It need not be the only cause, nor the last nor nearest cause. It is sufficient if it occurs with some other cause acting at the same time, which in combination with it, causes the injury.

From UJI 13-305 (Proximate Cause instruction (A) - without “independent and intervening cause)

INSTRUCTION NO.

PROXIMATE CAUSE - (with “Independent / Intervening)

A proximate cause of an injury is that which in a natural and continuous sequence , unbroken by an independent and intervening cause, produces the injury, and without which the injury would not have occurred. It need not be the only cause, nor the last nor nearest cause. It is sufficient if it occurs with some other cause acting at the same time, which in combination with it, causes the injury.

[An “independent intervening cause” interrupts and turns aside a course of events and produces that which was not foreseeable as a result of an earlier act or omission.]

[An “independent intervening cause” is that which interrupts the natural sequence of events which could reasonably be expected to result from the condition in which a product was sold or from a foreseeable manner of use.]

From NM UJI 13-305 and 306 (Proximate Cause Instruction (A) with “independent and intervening cause”).

INSTRUCTION NO.

SUMMARIES AND CHARTS (not received in evidence)

Certain charts and summaries have been shown to you to help explain the evidence in this case. Their only purpose is to help explain the evidence. These charts and summaries are not evidence or proof of any facts.

From: 10th Cir. Pattern Criminal § 1.41 (for demonstrative evidence not received in evidence, applicable for civil cases)

INSTRUCTION NO.

DEMONSTRATIVE EVIDENCE - SPECIFIC EXHIBITS

Exhibit [insert number] is an illustration. It is a party's [description or picture or model] to describe something involved in this trial. If your recollection of the evidence differs from the exhibit, rely on your recollection.

From: Fifth Cir. Pattern § 2.8 (specific exhibits)

INSTRUCTION NO.

LIMITED PURPOSE INSTRUCTION FOR TESTIMONY AND/OR EXHIBITS

Some evidence is admitted for a limited purpose only. When I instruct you that an item of evidence has been admitted for a limited purpose, you must consider it only for that limited purpose and for no other.

From: Fifth Circuit Pattern § 2.15 (modified)

INSTRUCTION NO.

DEPOSITION TESTIMONY

Deposition testimony is testimony that was taken under oath before trial and has been preserved in writing. This testimony is entitled to the same consideration that you give any other testimony at this trial.

From: NM UJI 12-203 (can substitute “by video” for “in writing” where necessary).

INSTRUCTION NO.

INTERROGATORIES

Interrogatories are written questions asked by one party to another before trial and answered under oath. The questions and answers may be read at trial as evidence. The answers read to you are testimony under oath and are entitled to the same consideration that you give any other testimony.

From: NM UJI 13-204

INSTRUCTION NO.

CREDIBILITY OF WITNESSES

I have said that you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate. You alone are the judges of the credibility of the witnesses and of the weight to be given to the testimony of each of them. In determining the credit to be given to the testimony of any witness, you may take into account the witness' ability and opportunity to observe, the witness' memory, the witness' manner while testifying, any interest, bias or prejudice that the witness may have and the reasonableness of the testimony, considered in light of all the evidence in the case.

Credibility of Witnesses

NM UJI 13-2003

INSTRUCTION NO.

IMPEACHMENT OF WITNESS

A witness may be discredited or impeached by contradictory evidence or inconsistent conduct.

[or by evidence that at other times the witness has made material statements, under oath or otherwise, which are inconsistent with the present testimony of the witness.]

[or by evidence that the witness has been convicted of a crime.]

[or by evidence that the general reputation of the witness for truth, honesty or integrity is bad.]

[or by specific acts of wrongdoing of the witness.]

If you believe that any witness has been impeached or discredited, it is your exclusive province to give the testimony of that witness only such credit as you may think it deserves.

From NM UJI 13-2004

INSTRUCTION NO.

EXPERT TESTIMONY

An expert witness is permitted to state an opinion based upon a question which, for the purposes of trial, assumes as true certain facts which may or may not be true. It will be for you in your deliberations, however, to determine from all of the evidence whether or not the facts assumed have been proved to be true. The rules of evidence provide that if scientific, technical, or other specialized knowledge might assist you in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify and state an expert opinion 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.

From NM UJI 13-213 and Fifth Circuit Civil § 2.13

INSTRUCTION NO.

DETERMINE LIABILITY BEFORE DAMAGES

You are not to engage in any discussion of damages unless you have first determined that there is liability, as elsewhere covered in these instructions.

The fact that you are given instructions on damages is not to be taken as an indication as to whether the court thinks damages should or should not be awarded.

From NM UJI 13-1801

INSTRUCTION NO.

NOMINAL DAMAGES

If you find that Plaintiff is entitled to a verdict in accordance with these instructions, but do not find that the Plaintiff has sustained substantial actual damages, then you may return a verdict for the Plaintiff in some nominal sum such as one dollar.

If you find in favor of the Plaintiff, but you find that the Plaintiff's damages have no monetary value, then you must return a verdict for the Plaintiff in the nominal amount of one dollar (\$1.00).

[The award of a nominal sum on account of actual damages would not prevent you from awarding punitive damages in such amount as you deem appropriate, if you find that the award of punitive damages is justified under these circumstances.]

From: *Long v. Shillinger*, 927 F.2d 525 (10th Cir. 1991); NM UJI 13-1832

INSTRUCTION NO.

COMPENSATORY DAMAGES MUST BE REASONABLE

If you find that the defendant is liable to the Plaintiff, then you must determine an amount that is fair compensation for all of the Plaintiff's damages. These damages are called compensatory damages. The purpose of compensatory damages is to make the Plaintiff whole-- that is, to compensate the Plaintiff for the damage that the Plaintiff has suffered.

You may award compensatory damages only for injuries that the Plaintiff proves were proximately caused by the defendant's allegedly wrongful conduct. The damages that you award must be fair compensation for all of the Plaintiff's damages, no more and no less. You should not award compensatory damages for speculative injuries, but only for those injuries which the Plaintiff has actually suffered or that the Plaintiff is reasonably likely to suffer in the future.

You must use sound discretion in fixing an award of damages. Your verdict must be based upon proof and not upon speculation, guess or conjecture. Further, sympathy or prejudice for or against a party should not affect your verdict and is not a proper basis for determining damages.

From: NM UJI 13-1802 (modified) and Fifth Circuit Pattern § 15.2

INSTRUCTION NO.

DOUBLE RECOVERY

You must not award compensatory damages more than once for the same injury. For example, if the Plaintiff prevails on all claims and establishes a dollar amount for the injuries, you must not award the Plaintiff any additional compensatory damages on each claim. The Plaintiff is only entitled to be made whole once, and may not recover more than what was lost. Of course, if different injuries are attributed to the separate claims, then you must compensate the Plaintiff fully for all injuries.

[With respect to punitive damages, you may make separate awards on each claim that Plaintiffs have proven.]

From: Fifth Circuit pattern § 15.14 (modified); *See Hale v. Basin Motor Co.*, 110 NM 314 (1990).

INSTRUCTION NO.

FUTURE DAMAGES

If you have found that Plaintiff is entitled to damages arising in the future, you must determine the amount of such damages you believe would fairly compensate Plaintiff for such future damages.

If these damages are of a continuing nature, you may consider how long they will continue.

[As to loss of future earning ability, you may consider that some persons work all their lives and others do not and a person's earnings may remain the same or may increase or decrease in the future.]

From: NM UJI 13-1821 (bracketed) and Fifth Circuit Pattern § 15.3 (modified).

INSTRUCTION NO.

FUTURE DAMAGES – DISCOUNT TO PRESENT VALUE

In fixing the amount you may award for damages arising in the future, you must reduce the total of such damages by making allowance for the fact that any award you might make would, if properly invested, earn interest. You should, therefore, allow a reasonable discount for the earning power of such money and arrive at the present cash value of the total future damages, if any.

Damages for any future pain and suffering are not to be so reduced.

From: NM UJI 13-1822

INSTRUCTION NO.

MITIGATION

In fixing the amount of money which will reasonably and fairly compensate the plaintiff, you are to consider that one who is damaged must exercise ordinary care to minimize existing damages and to prevent further damages. A plaintiff may not recover for losses which could have been prevented by reasonable efforts on its part.

From: NM UJI 13-1811

INSTRUCTION NO.

PUNITIVE DAMAGES

You may consider punitive damages only if you find that Plaintiff should recover compensatory or nominal damages. You may award punitive damages if the Plaintiff has proved that the defendant[s] acted with malice or willfulness, or with reckless indifference to the safety or rights of others. Malicious conduct is the intentional doing of an act with knowledge that the act was wrongful. Willful conduct is the intentional doing of an act with knowledge that harm may result. Reckless conduct is the intentional doing of an act with utter indifference to the consequences.

Punitive damages are awarded for the limited purpose of punishment and to deter others from the commission of like offenses. The law does not require you to award punitive damages, however, if you decide to award punitive damages, you must use sound reason in setting the amount of the damages. The amount of punitive damages must be based on reason and justice taking into account all the circumstances, including the nature of the wrong and such aggravating and mitigating circumstances as may be shown. The amount of an award of punitive damages must not reflect bias, prejudice, or sympathy toward any party. The amount awarded, if any, must be reasonable and not disproportionate to the circumstances.

From NM UJI j13-1827 (modified) and Fifth Circuit Pattern § 15.13 (modified)

INSTRUCTION NO.

PUNITIVE DAMAGES AND VICARIOUS LIABILITY

The employer [principal] is liable for punitive or exemplary damages only when the employer [principal] has in some way authorized, participated in or ratified the acts of the employee [agent].

[ALTERNATIVES for Vicarious Liability]

Additionally, if you find that the conduct of _____ (name of agent or employee of party on whose conduct vicarious claim for punitive damages is based) was [malicious], [willful], [reckless], [wanton], [fraudulent] [or] [in bad faith], you may award punitive damages against _____ (name of party against whom vicarious liability for punitive damages is asserted) if:

(A) _____ (name of agent or employee) was acting in the scope of [his] [her] employment by _____ (name of party) and had sufficient discretionary or policy-making authority to speak and act for [him] [her] [it] with regard to the conduct at issue, independently of higher authority; [or if]

(B) _____ (name of party) in some [other] way [authorized,] [participated in] [or] [ratified] the conduct of _____ (name of agent or employee).

From NM UJI 13-1827; *Albuq. Concrete Coring Co, Inc., 118 NM 140 (1994)*

INSTRUCTION NO.

DAMAGES - MULTIPLE DEFENDANTS (Where fault is not apportioned)

If you find that only one defendant is responsible for a particular injury, then you must award damages for that injury only against that defendant. If you find that the Plaintiff is entitled to recover damages against more than one Defendant, you must return a verdict for compensatory damages in one single sum jointly against the Defendants whom you find to be liable.

[If you find that punitive damages are recoverable, they are to be assessed individually against any Defendant or Defendants you find liable therefor.]

From NM UJI 13-1824; Fifth Circuit Pattern

NM UJI 13-1824; Fifth Circuit Pattern Instructions § 15.14 (modified); *Gallegos v. Citizens Ins. Agency, et al.*, 108 N.M. 722, 727 (1989).

INSTRUCTION NO.

DUTY TO DELIBERATE

It is your sworn duty as jurors to discuss the case with one another in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after full consideration of the evidence with the other members of the jury. While you are discussing the case, do not hesitate to re-examine your own opinion and change your mind if you become convinced that you are wrong. However, do not give up your honest beliefs solely because the others think differently, or merely to finish the case.

Remember that in a very real way you are the judges--judges of the facts. Your only interest is to seek the truth from the evidence in the case.

INSTRUCTION NO.

FAITHFUL PERFORMANCE

Faithful performance by you of your duties is vital to the administration of justice.

From: NM UJI 13-2001

INSTRUCTION NO.

JURY ACTS AS A BODY

The jury acts as a body. Therefore, on every question which you must answer, it is necessary that all of you participate regardless of the vote on another question. Before a question can be answered, all of you must agree upon the answer.

From: NM UJI 13-2006

INSTRUCTION NO.
FOREPERSON INSTRUCTION

Upon retiring to the jury room, you will select one of your number to act as foreperson. The foreperson will preside over your deliberations and will be your spokesperson here in court.

A special verdict form has been prepared for you. You will be given the Court's instructions and a special verdict form. In this case it will be necessary for you to answer the preliminary questions presented to you on the verdict form. You will begin deliberating only when I have instructed you to do so. If you recess during your deliberations, follow all of the instructions that the Court has given you about your conduct during the trial.

After you have reached your unanimous verdict, your foreperson is to fill in on the form your answers to the questions. Do not reveal your answers until such time as you are discharged, unless otherwise directed by me. You must never disclose to anyone, not even to me, your numerical division on any question.

If it becomes necessary during your deliberations to communicate with me, you may send a note by the marshal. Never attempt to communicate with me except by a written note signed by your foreperson. I will then respond as promptly as possible either in writing or by having you brought into the courtroom so that I can address you orally. I will always first disclose to the attorneys your question and my response before I answer your question. If I reply to you in writing, please leave *both* the message and the reply in the jury room. They should not be thrown away, even at the conclusion of your deliberations.

Bear in mind always you are not to reveal to me or to any person how you stand, numerically or otherwise, until you have reached a unanimous verdict.

From NM UJI 13-2009; and Fifth Circuit Pattern Instruction § 3.1 (General Instructions for Charge); *Bledsoe v. Garcia*, 742 F.2d 1237, 1244 (10th Cir. 1984) (unanimous jury verdict has been used in federal courts for over 200 years).

DATED _____, 2010

William P. Johnson
UNITED STATES DISTRICT JUDGE