

FILED
DISTRICT OF NEBRASKA
AT _____ M
DEC 19 2003
Gary D. McFarland, Clerk
By _____ Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

GWEN LONE WOLF,)	
)	
Plaintiff,)	7:01CV5006
)	
v.)	
)	
DUCKWALL ALCO STORES, INC.,)	COURT'S CHARGE TO
a Kansas Corporation,)	THE JURY
)	
Defendant.)	
_____)	

INSTRUCTION NO. 1

Now that you have heard the evidence and the arguments of counsel have been made, it is my duty to inform you of the legal principles and considerations you are to use in arriving at a proper verdict.

In accordance with the oath which each of you took when you were selected as jurors to try this case, it is your duty to determine the disputed issues of fact in this case from the evidence produced and seek thereby to reach a verdict which shall speak the truth of the case and thereby do justice between the parties hereto, uninfluenced by sympathy, favor, affection or prejudice for or against any party. It is your duty to receive and accept as correct the law as given you in this charge, and you are not privileged to entertain an opinion as to the law or what the law should be which conflicts in any respect with the law as stated in this charge. However, I have not attempted to embody all the law applicable to this case in any one of the

instructions contained in this charge, and therefore, you must consider the charge in its entirety, giving due weight to each instruction, and construing each instruction in the light of, and in harmony with, the other instructions, and so apply the principles set forth to all of the evidence received during the trial.

INSTRUCTION NO. 2

At the outset, I urge you to make every effort to reach an agreement in your deliberations. Inconclusive trials are not desirable. A common understanding among competent and intelligent people ought to be possible.

However, this observation must not be construed by any juror as a suggestion of the abandonment of an opinion held understandably and earnestly, just for the sake of agreement. The Court must never coerce agreements by jurors. It is appropriate to suggest that if you should find yourselves in apparent disagreement, each of you should carefully reexamine your opinions before assuming a position of dissent.

I should give you one preliminary word of caution. It is seldom wise or beneficial for a juror to make an emphatic expression of his or her opinion of the case, or to announce a determination to stand for a certain verdict, immediately upon entering the jury room at the beginning of deliberations. The reason for this is obvious. We are all human, and it is difficult to recede from a position once it has been firmly and definitely stated.

INSTRUCTION NO. 3

It is appropriate at this time to define a term which recurs from time to time in this charge.

By a "preponderance of the evidence" is meant the greater weight of credible evidence. Any party who has the burden of proving a claim must do so by the greater weight of the evidence. The greater weight of the evidence means evidence sufficient to make a claim more likely true than not true.

The greater weight of the evidence is not determined by the greater number of witnesses testifying in relation to the facts and circumstances, but that amount of evidence which on the whole, when fully, fairly and impartially considered, makes the stronger impression on your mind and is more convincing as to its truth when weighed against the evidence in opposition thereto. If the evidence is equally balanced, a preponderance is not established.

INSTRUCTION NO. 4

In determining whether a party to this action has sustained its burden of proof, you are not limited to the evidence introduced by that party. Any party to the case is entitled to the benefit of any evidence tending to establish its contention, even though such evidence comes from witnesses presented by the other party.

INSTRUCTION NO. 5

During the trial I have ruled on objections to certain evidence. You must not concern yourselves with the reason for such rulings since they are controlled by rules of law.

You must not speculate or form or act upon any opinion as to how a witness might have testified in answer to questions which I have rejected during the trial, or upon any subject matter to which I have forbidden inquiry.

In coming to any conclusion in this case, you must be governed by the evidence before you and by the evidence alone.

You have no right to indulge in speculation, conjecture or inference not supported by the evidence.

The evidence from which you are to find the facts consists of the following: (1) the testimony of the witnesses; (2) documents and other things received as exhibits; and (3) any facts that have been stipulated -- that is, formally agreed to by the parties.

The following things are not evidence: (1) statements, comments, questions and arguments by lawyers for the parties; (2) objections to questions; (3) any testimony I told you to disregard; and (4) anything you may have seen or heard about this case outside the courtroom.

INSTRUCTION NO. 6

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.

You have heard the terms "direct evidence" and "circumstantial evidence." You are instructed that you should not be concerned with those terms since the law makes no distinction between the weight to be given to direct and circumstantial evidence.

INSTRUCTION NO. 7

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves.

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it, or none of it.

In determining the weight to be given to the testimony of the witnesses, you should take into consideration their interest in the result of the suit, if any appears, their conduct and demeanor while testifying, their apparent fairness or bias, their relationship to the parties, if any appears, their opportunities for seeing or knowing and remembering the things about which they testified, the reasonableness or unreasonableness of the testimony given by them, any previous statement or conduct of the witness that is consistent or inconsistent with the testimony of the witness at this trial, and all of the evidence, facts, and circumstances proved which tend to corroborate or contradict such evidence, if any appear. You are not bound to take the testimony of any witness as true, and should not do so if you are satisfied from all the facts and circumstances proved at the trial that such witness is mistaken in the matter testified to, or that for any other reason appearing in the evidence, the testimony is untrue or unreliable.

The fact that one side may have used a greater number of witnesses or presented a greater quantity of evidence should not affect your decision. Rather, you should determine which witness or witnesses, and which evidence appears accurate and trustworthy. It is the weight of the evidence that counts -- not the number of witnesses.

The testimony of a single witness which produces in your minds belief in the likelihood of truth is sufficient for proof of any fact, and would justify a verdict in accordance with such testimony, even though a number of witnesses may have testified to the contrary if, after consideration of all of the evidence in the case, you hold greater belief in the accuracy and reliability of the one witness.

INSTRUCTION NO. 8

A witness who has special knowledge, skill, experience, training, or education in a particular area may testify as an expert in that area. You determine what weight, if any, to give to an expert's testimony just as you do with the testimony of any other witness. You should consider the expert's credibility as a witness, the expert's qualifications as an expert, the sources of the expert's information, and the reasons given for any opinions expressed by the expert.

INSTRUCTION NO. 9

During the trial, testimony was presented to you by a video-taped deposition and by written deposition. Such testimony is under oath and is entitled to the same fair and impartial consideration you give other testimony.

INSTRUCTION NO. 10

The plaintiff in this action is Gwen Lone Wolf. She brings this action against Duckwall Alco Stores, Inc., which operates a chain of discount department stores and has its headquarters in Abilene, Kansas. The fact that a corporation is involved as a party must not affect your decision in any way. A corporation and all other persons stand equal before the law and must be dealt with as equals in a court of justice. When a corporation is involved, of course, it may act only through people as its employees, and, in general, a corporation is responsible under the law for any of the acts and statements of its employees that are made within the scope of their duties as employees of the company.

INSTRUCTION NO. 11

The parties have stipulated to the following facts, which you must accept as true:

1) On or about July 31, 1998, Lone Wolf was shopping at the Alco Discount Store, owned and maintained by Duckwall Alco Stores, Inc., in Valentine, Cherry County, Nebraska.

2) While shopping, Lone Wolf fell in the Alco Discount Store.

3) That the amounts charged by plaintiff's medical providers are fair and reasonable.

I. Plaintiff's Claims:

A. ISSUES

On July 31, 1998, the plaintiff, Gwen Lone Wolf, (hereinafter referred to as "Lone Wolf"), was shopping at the Alco Discount Store in Valentine, Nebraska. While shopping, Lone Wolf claims that she slipped and fell and sustained personal injuries, as a result of a bag of fertilizer that had opened and leaked a white, granular substance on the tile floor. Lone Wolf seeks a judgment against the defendant, Duckwall Alco Stores, Inc. (hereinafter referred to as "Alco"), for damages. Lone Wolf claims that Alco was negligent in one or more of the following ways:

- 1) Failure to inspect its premises;
- 2) Failure to maintain its premises;
- 3) Failure to inspect for and remove debris when it appeared on the premises;
- 4) Failure to warn pedestrians of the existence of the debris; and
- 5) Failure to restrict access to the area of the debris so as to prevent customers from falling there.

B. PLAINTIFF'S BURDEN OF PROOF

Before Lone Wolf can recover against Alco, Lone Wolf must prove, by a preponderance of the evidence, each and all of the following:

- 1) That Alco either created a condition, knew of a condition, or, by the exercise of reasonable care, would have discovered a condition;
- 2) That Alco should have realized that such condition involved an unreasonable risk of harm to its customers, including Lone Wolf;
- 3) That Alco should have expected that customers such as Lone Wolf either (a) would not discover or realize the danger; or (b) would fail to protect themselves against the danger;
- 4) That Alco failed to use reasonable care to protect its customers, including Lone Wolf, against the danger;
- 5) That such condition was a proximate cause of some damage to Lone Wolf; and
- 6) The nature and extent of that damage.

C. EFFECT OF FINDINGS:

If Lone Wolf has failed to meet her burden of proof on any one or more of the above elements, then your verdict must be for Alco, and you must complete Verdict Form No. 1.

If Lone Wolf has met her burden of proof on all of the above elements, then you must consider Alco's affirmative defense of contributory negligence.

II. Defendant's Claims:

A. ISSUES

Alco denies that it was negligent in any respect, and further alleges that Lone Wolf herself was negligent in one or more of the following ways:

- 1) Failure to maintain a proper lookout;
- 2) Failure to see what was in plain sight;
- 3) Running, walking, or moving too fast for the conditions then and there existing and considering the type of footwear she was wearing; and
- 4) Failure to avoid toy sand boxes and tripping over them.

Lone Wolf denies that she was negligent in any respect.

B. DEFENDANT'S BURDEN OF PROOF

In connection with the claim that Lone Wolf was contributorily negligent, the burden is on Alco to prove by a preponderance of the evidence, each and all of the following:

- 1) That Lone Wolf was negligent in one or more of the ways claimed by Alco; and
- 2) That this negligence was a proximate cause of Lone Wolf's own damages.

C. EFFECT OF FINDINGS

If Lone Wolf has met her burden of proof and Alco has not met its burden of proof, then your verdict must be for Lone Wolf, and using Instruction No. 18, you must determine the amount of damage suffered by Lone Wolf and complete Verdict Form No. 2.

If Lone Wolf and Alco have both met their burdens of proof, then you must compare their negligence and complete Verdict Form No. 3.

INSTRUCTION NO. B

If you find that Lone Wolf was damaged and that her damages were proximately caused by both the negligence of Lone Wolf and the negligence of Alco, then you must determine to what extent the negligent conduct of each contributed to the damages of Lone Wolf, expressed as a percentage of 100 percent.

If you find that both Lone Wolf and Alco were negligent and that the negligence of Lone Wolf was equal to or greater than the negligence of Alco, then Lone Wolf will not be allowed to recover.

If you find that both Lone Wolf and Alco were negligent and that the negligence of Alco was greater than the negligence of Lone Wolf, then Lone Wolf will be allowed to recover.

If Lone Wolf is allowed to recover, you will determine Lone Wolf's total damages without regard to her percentage or degree of negligence.

If Lone Wolf is allowed to recover, the Court will then reduce her total damages by the percentage of her own negligence.

INSTRUCTION NO. 14

Negligence is doing something that a reasonably careful person would not do under similar circumstances, or failing to do something that a reasonably careful person would do under similar circumstances.

Owners and occupiers have a duty to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors. Reasonable care means that care that a reasonable person would exercise under similar circumstances. Among the factors you may consider in evaluating whether Alco exercised reasonable care for the protection of Gwen Lone Wolf, a lawful visitor, are:

- 1) The foreseeability or possibility of harm;
- 2) The purpose for which Lone Wolf entered the premises;
- 3) The time, manner, and circumstances under which Lone Wolf entered the premises;
- 4) The use to which the premises are put or are expected to be put;
- 5) The reasonableness of the inspection, repair, correction, or warning;
- 6) The opportunity and ease of repair or correction, or giving of a warning; and
- 7) The burden on Alco in terms of inconvenience or cost in providing adequate protection.

8) Any other evidence that affects
the reasonableness of what Alco
did or did not do.

INSTRUCTION NO. 15

The words "should have known," "should have realized," or "should have expected" mean that the party in question was required to be reasonably attentive and, where adequate information could not be obtained by being reasonably attentive, to make reasonable inspections or investigations. Any such party was also required to draw reasonably correct conclusions.

A party has "reason to know" or "reason to expect" something if such party had information from which a reasonable person either would have inferred that the fact in question existed or would have proceeded under the assumption that such fact existed.

INSTRUCTION NO. 16

The term "unreasonable risk of harm" means a risk that a reasonable person, under all the circumstances of the case, would not allow to continue.

INSTRUCTION NO. 17

"Proximate cause" -- An injury or damage is proximately caused by an act, or a failure to act, whenever it appears from the evidence in the case, that the act or omission played a substantial part in bringing about the injury or damage; and that the injury or damage was either a direct result or a natural or probable consequence of the act or omission.

This does not mean that the law recognizes only one proximate cause of an injury or damage, consisting of only one factor or thing, or of the conduct of only one person. On the contrary, many factors, or the conduct of two or more persons, may operate at the same time, either independently or together, to cause injury or damage; and in such a case, each may be a proximate cause.

INSTRUCTION NO. 18

If you return a verdict in favor of Lone Wolf, then you must decide how much money will fairly compensate Lone Wolf for her injuries.

I am about to give you a list of the things you may consider in making this decision. From this list, you must only consider those things you decide were proximately caused by Alco's negligence:

- 1) The nature and extent of Lone Wolf's injuries, including whether the injuries are temporary or permanent, and whether any resulting disability is partial or total;
- 2) The reasonable value of the medical, nursing, physical therapy, and other care and supplies reasonably needed by and actually provided to Lone Wolf for her injuries and reasonably certain to be needed and provided in the future; and
- 3) The physical pain and mental suffering that Lone Wolf has experienced and is reasonably certain to experience in the future.

Remember, throughout your deliberations, you must not engage in any speculation, guess, or conjecture, and you must not award any damages by way of punishment or through sympathy.

INSTRUCTION NO. 19

There is evidence before you from a life expectancy table, called the "Standard Ordinary Mortality Table." According to this table, a 47-year-old female such as Gwen Lone Wolf has a remaining life expectancy fo 31.69 years. This evidence may assist you in determining probable life expectancy. However, this is only an estimate based on average experience. It is not conclusive. You should consider it along with any other evidence bearing on probable life expectancy, such as evidence of health, occupation, habits, and the like.

INSTRUCTION NO. 20

If you find that Lone Wolf is entitled to recover damages for any future losses, then you must reduce those damages to their present cash value. You must decide how much money must be given to Lone Wolf today to compensate her fairly for her future losses.

INSTRUCTION NO. 21

In the trial of this case and in this charge, I have in no way attempted to express my opinion as to who should prevail upon the issues submitted to you. You must not construe any statement, action, or ruling on my part in the trial of this case as an indication of any opinion on my part respecting the proper course of your verdict. During the course of a trial, I occasionally ask questions of a witness in order to bring out facts not fully covered in the testimony. Do not assume that I hold any opinion on the matters to which the questions related.

So regardless of what I may have chosen to say, I must admonish you that you are the sole judges of the facts, and your verdict must respond to your own conclusions from the evidence.

INSTRUCTION NO. 22

Upon your retirement to the jury room, first select one of your number to be foreperson to preside over your deliberations and who will sign the form of verdict. You will then begin your study and deliberations of the case.

In arriving at your verdict, I admonish you that it must be unanimous. Short of unanimity, you cannot consider that you have reached any verdict.

If it becomes necessary during your deliberations to communicate with the Court, the telephone will ring in my office and your note will be picked up and delivered to me. Bear in mind you are not to reveal to me or to anyone else how the jury stands, numerically or otherwise, until you have reached a unanimous verdict.

Upon arriving at your verdict and completion of the appropriate form of verdict by the foreperson, you will have concluded your task and you will notify me as instructed above.

As the Judge presiding over the trial, I shall be available throughout the remainder of the day and until your verdict is returned, and I shall receive it promptly upon its return.

If you do not arrive at your verdict during the present court day, you will continue deliberations until you do, with allowance of time for meals and with an intermission between 5 p.m. today and 8:30 a.m. ~~tomorrow~~ ^{Monday} morning. During the time

allotted for meals and night's rest, you will be permitted to separate, but you should return promptly at the time set for continuation of your deliberations. During the periods of your separation, you should keep in mind the admonitions of the Court concerning your conduct while separated.

Verdict forms have been prepared and will be taken with you when you retire for your deliberations. These forms will be adequate for the expression of any verdict you may properly agree upon. Your foreperson only will date and sign the verdict.

Only one verdict form must be completed. Remember, at all times your verdict must be unanimous.