

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION**

HOLLIE MERCER, Independent Administrator)	
of the Estate of Aaron Charles Mercer,)	
)	
Plaintiff,)	
)	
v.)	NO. 2:03-CV-276 PS
)	
SOUTH BEND SNOWMOBILER'S CLUB, INC.)	
)	
Defendant.)	

COURT'S FINAL JURY INSTRUCTIONS

Date: December 11, 2006

s/ Philip P. Simon
PHILIP P. SIMON, JUDGE
UNITED STATES DISTRICT COURT

Court's Final Instruction No. 1

Members of the jury, you have seen and heard all the evidence and arguments of the attorneys. Now I will instruct you on the law.

You have two duties as a jury. Your first duty is to decide the facts from the evidence in the case. This is your job, and yours alone.

Your second duty is to apply the law that I give you to the facts. You must follow these instructions, even if you disagree with them. Each of the instructions is important, and you must follow all of them.

Perform these duties fairly and impartially. Do not allow sympathy, prejudice, or public opinion to influence you.

Nothing I say now, and nothing I said or did during the trial, is meant to indicate any opinion on my part about what the facts are or about what your verdict should be.

Court's Final Instruction No. 2

During this trial, I have asked a witness a question myself. Do not assume that because I asked questions I hold any opinion on the matters I asked about, or on what the outcome of the case should be.

Court's Final Instruction No. 3

In this case, the defendant, South Bend Snowmobiler's Club, Inc., is a corporation. All parties are equal before the law. A corporation is entitled to the same fair consideration that you would give any individual person.

Court's Final Instruction No. 4

The evidence consists of the testimony of the witnesses and the exhibits admitted in evidence.

Court's Final Instruction No. 5

During the trial, certain testimony was presented to you by the reading of depositions. You should give this testimony the same consideration you would give it had the witnesses appeared and testified here in court.

Court's Final Instruction No. 6

Certain things are not to be considered as evidence. I will list them for you:

First, if I told you to disregard any testimony or exhibits or struck any testimony or exhibits from the record, such testimony or exhibits are not evidence and must not be considered.

Second, anything that you may have seen or heard outside the courtroom is not evidence and must be entirely disregarded. This includes any press, radio, or television reports you may have seen or heard. Such reports are not evidence and your verdict must not be influenced in any way by such publicity.

Third, questions and objections or comments by the lawyers are not evidence. Lawyers have a duty to object when they believe a question is improper. You should not be influenced by any objection, and you should not infer from my rulings that I have any view as to how you should decide the case.

Fourth, the lawyers' opening statements and closing arguments to you are not evidence. The purpose of these is to discuss the issues and the evidence. If the evidence as you remember it differs from what the lawyers said, your memory is what counts.

Court's Final Instruction No. 7

In determining whether any fact has been proved, you should consider all of the evidence bearing on the question regardless of who introduced it.

Court's Final Instruction No. 8

You may have heard the phrases “direct evidence” and “circumstantial evidence.” Direct evidence is proof that does not require an inference, such as the testimony of someone who claims to have personal knowledge of a fact. Circumstantial evidence is proof of a fact, or a series of facts, that tends to show that some other fact is true.

As an example, direct evidence that it is raining is testimony from a witness who says, “I was outside a minute ago and I saw it raining.” Circumstantial evidence that it is raining is the observation of someone entering a room carrying a wet umbrella.

The law makes no distinction between the weight to be given to either direct or circumstantial evidence. You should decide how much weight to give to any evidence. In reaching your verdict, you should consider all the evidence in the case, including the circumstantial evidence.

Court's Final Instruction No. 9

You should use common sense in weighing the evidence and consider the evidence in light of your own observations in life.

In our lives, we often look at one fact and conclude from it that another fact exists. In law we call this "inference." A jury is allowed to make reasonable inferences. Any inference you make must be reasonable and must be based on the evidence in the case.

Court's Final Instruction No. 10

You must decide whether the testimony of each of the witnesses is truthful and accurate, in part, in whole, or not at all. You also must decide what weight, if any, you give to the testimony of each witness.

In evaluating the testimony of any witness, you may consider, among other things:

- the ability and opportunity the witness had to see, hear, or know the things that the witness testified about;
- the witness's memory;
- any interest, bias, or prejudice the witness may have;
- the witness's intelligence;
- the manner of the witness while testifying; and
- the reasonableness of the witness's testimony in light of all the evidence in the case.

Court's Final Instruction No. 11

You may consider statements given by a party or a witness under oath before trial as evidence of the truth of what he said in the earlier statements, as well as in deciding what weight to give his testimony.

With respect to other witnesses, the law is different. If you decide that, before the trial, one of these witnesses made a statement not under oath that is inconsistent with his testimony here in court, you may consider the earlier statement only in deciding whether his testimony here in court was true and what weight to give to his testimony here in court.

In considering a prior inconsistent statement, you should consider whether it was simply an innocent error or an intentional falsehood and whether it concerns an important fact or an unimportant detail.

Court's Final Instruction No. 12

It is proper for a lawyer to meet with any witness in preparation for trial.

Court's Final Instruction No. 13

You may find the testimony of one witness or a few witnesses more persuasive than the testimony of a larger number. You need not accept the testimony of the larger number of witnesses.

Court's Final Instruction No. 14

The law does not require any party to call as a witness every person who might have knowledge of the facts related to this trial. Similarly, the law does not require any party to present as exhibits all papers and things mentioned during this trial.

Court's Final Instruction No. 15

You have heard witnesses give opinions about matters requiring special knowledge or skill. You should judge this testimony in the same way that you judge the testimony of any other witness. The fact that such person has given an opinion does not mean that you are required to accept it. Give the testimony whatever weight you think it deserves, considering the reasons given for the opinion, the witness's qualifications, and all of the other evidence in the case.

Court's Final Instruction No. 16

Certain diagrams and sketches have been shown to you. Those diagrams and sketches are used for convenience and to help explain the facts of the case. They are not themselves evidence or proof of any facts.

Court's Final Instruction No. 17

When a party has the burden to prove an issue by a preponderance of the evidence, that means by a greater weight of the evidence. A greater number of witnesses testifying to a fact on one side or a greater quantity of evidence introduced on one side is not necessarily of the greater weight. For a fact to be proved by a preponderance of the evidence, you must find that the fact is more probably true than not true.

Court's Final Instruction No. 18

You must decide this case according to the Indiana law of comparative fault. The term "fault" refers to conduct that makes a person responsible, in some degree, for a death. The type of fault at issue is negligence.

Court's Final Instruction No. 19

In order to prove the essential elements of a plaintiff's claim, the burden is on the plaintiff, to establish, by a preponderance of the evidence in the case, the following facts:

First, that the defendant was negligent in one or more of the particulars alleged; and

Second, that the defendant's negligence was a proximate cause of some injury and consequent damages sustained by the plaintiff.

Court's Final Instruction No. 20

Negligence is the failure to use reasonable care.

A person may be negligent by acting or by failing to act. A person is negligent if he or she does something a reasonably careful person would not do in the same situation or fails to do something a reasonably careful person would do in the same situation.

Court's Final Jury Instruction No. 21

Reasonable or ordinary care is the care a reasonably careful and ordinarily prudent person would use under the same or similar circumstances.

Court's Final Instruction No. 22

An act or omission is a proximate cause of a death if the death is a natural and probable consequence of the act or omission.

Court's Final Instruction No. 23

The plaintiff incurs the risk of injury if he actually knew of a specific danger, understood the risk involved, and voluntarily exposed himself to that danger. Incurred risk requires much more than the general awareness of a potential for mishap. Determining whether the plaintiff has incurred the risk of injury requires a subjective analysis focusing upon:

- (1) The plaintiff's actual knowledge and appreciation of the specific risk; and
- (2) The plaintiff's voluntary acceptance of that risk.

Court's Final Instruction No. 24

A duty may be imposed upon one who by affirmative conduct or agreement assumes to act for another. The assumption of a duty requires one to exercise reasonable care. If that party breaches his duty, he may be held liable to a third party injured as a result of his failure to exercise reasonable care.

Court's Final Instruction No. 25

At the time of the occurrence being considered in this case, Indiana statute, IC 9-21-8-39 provided as follows:

IC 9-21-8-39 Railroad grade crossings

Whenever a person who drives a vehicle approaches a railroad grade crossing, the person shall stop within fifty (50) feet but not less than fifteen (15) feet from the nearest track of the railroad and may not proceed until the person can do so safely under the following circumstances:

- (1) When a railroad train approaching within one thousand five hundred (1,500) feet of a highway crossing emits an audible signal and because of speed or nearness to the crossing is an immediate hazard.
- (2) When an approaching train is plainly visible and is in hazardous proximity to the crossing.

If you find from a preponderance of the evidence that any party violated this statute on the occasion in question and the violation was without excuse or justification, such conduct would constitute fault to be assessed against that party.

Court's Final Instruction No. 26

At the time of the occurrence being considered in this case, Indiana statute, IC 14-16-1-23 governed the operation of off-road vehicles and snowmobiles on highways and roads. This statute provided as follows:

IC 14-16-1-23 Restrictions on operation

(a) An individual shall not operate a vehicle under any of the following conditions:

- (1) at a rate of speed greater than is reasonable and proper having due regard for existing conditions or in a manner that unnecessarily endangers the person or property of another.

If you find from a preponderance of the evidence that any party violated this statute on the occasion in question and the violation was without excuse or justification, such conduct would constitute fault to be assessed against that party.

Court's Final Instruction No. 27

At the time of the occurrence being considered in this case, Indiana statute, IC 14-16-1-20 governed the operation of off-road vehicles and snowmobiles on highways and roads. This statute provided as follows:

IC 14-16-1-20 Operation on highways and roads

(a) An individual may not operate a vehicle required to be registered under this chapter upon a public highway, street, or rights-of-way thereof or on a public or private parking lot not specifically designated for the use of vehicles, except under the following conditions:

The operator of a vehicle may cross a public highway at right angles for the purpose of getting from one (1) area to another when the operation can be done in safety. The operator shall bring the vehicle to a complete stop before proceeding across a public highway and shall yield the right-of-way to all traffic.

If you find from a preponderance of the evidence that any party violated this statute on the occasion in question and the violation was without excuse or justification, such conduct would constitute fault to be assessed against that party.

Court's Final Instruction No. 28

If you find from a preponderance of all the evidence that the defendant South Bend Snowmobiler's Club, Inc. is liable to the plaintiff and that plaintiff has suffered damages, you must then decide the total amount of money that will fairly compensate plaintiff for each proven element of damage. In deciding these compensatory damages, you may consider the following:

- The age, health and life expectancy of the deceased immediately before the injury causing death;
- The occupation and earning capacity of the deceased;
- The amount of money or other things of value furnished by the decedent to Hollie Mercer or the reasonable value of what Hollie Mercer could reasonably have expected to receive from the decedent during the decedent's lifetime had the decedent lived;
- The reasonable value of the loss of care, love and affection;
- The value of necessary and reasonable health care services furnished in connection with the last illness or injury of the decedent;
- The value of necessary and reasonable funeral and burial expenses for the decedent.

Your decision must be based on the evidence relating to damages and not on guess or speculation.

Court's Final Instruction No. 29

You are required to apportion the fault on a percentage basis between Aaron Mercer and the defendant, South Bend Snowmobiler's Club, Inc., to determine whether the plaintiff Hollie Mercer is entitled to recover damages, and if so, the amount of such recovery. You may not apportion fault to any other person or entity.

You will therefore determine the comparative fault issues in this case as follows:

First, you must determine the percentage of fault, if any, of Aaron Mercer, and the South Bend Snowmobiler's Club in proximately causing Aaron Mercer's injuries and damages. These percentages must total 100 percent. Enter these percentages in Verdict Form A.

Next, if you find that the Snowmobiler's Club is not at fault or if Aaron Mercer's fault is greater than 50 percent, then you must return your verdict for the Snowmobiler's Club and against the plaintiff, Hollie Mercer, in this case; and no further deliberation is required. Fill out Verdict Form B if this is your decision, and your job is done.

However, if you find that Aaron Mercer's fault is 50 percent or less, then you must determine the total amount of damages the plaintiff, Hollie Mercer, is entitled to recover, if any, without regard to fault.

Then, you must multiply the plaintiff's total damages by the defendant's percentage of fault and return your verdict for the plaintiff and against the defendant, Snowmobiler's Club, in the amount of the product of that multiplication. Use Verdict Form C if this is your decision.

The verdict forms provided to you by the court will help guide you through this process.

Court's Final Instruction No. 30

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

You will take the verdict forms with you to the jury room. When you reach unanimous agreement as to your verdict, the foreperson should fill in the verdict form, all of you should sign it, and then you should tell the court security officer to inform me that you have reached a verdict.

If, during deliberations, you should desire to communicate with the court, please reduce your message or question to writing and have the foreperson sign the note, or if he or she is unwilling to do so, by some other juror, and include the date and time. Then, pass the note to the courtroom security officer, who will bring it to my attention. I will respond as promptly as possible, either in writing or by having you return to the courtroom so that I can address you in person.

With respect to any message or question that you provide to the court during your deliberations, please be advised of the following rules. First, do not state or specify your numerical division at any time; that is, do not inform the court or even hint at how many among you were or are in favor or against reaching any particular verdict. Also, please be advised that the court cannot supply you with transcripts of any of the trial testimony.

Court's Final Instruction No. 31

The verdict must represent the considered judgment of each juror. Your verdict must be unanimous.

You should make every reasonable effort to reach a verdict. In doing so, you should consult with one another, express your own view, and listen to the opinions of your fellow jurors. Discuss your differences with an open mind. Do not hesitate to re-examine your own views and change your opinion if you believe it is wrong. But you should not surrender your honest beliefs about the weight or effect of the evidence solely because of the opinions of your fellow jurors or for the purpose of returning a unanimous verdict.

All of you should give fair and equal consideration to all the evidence and deliberate with the goal of reaching an agreement that is consistent with the individual judgment of each juror. You are impartial judges of the facts. Your sole interest is to seek the truth from the evidence on the case.