

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

WAYNE T. SMITH,)	
)	
Plaintiff,)	
)	
v.)	Cause No. 3:01-CV-753 PS
)	
BIOMET, INC.,)	
)	
)	
Defendant.)	

COURT'S FINAL JURY INSTRUCTIONS

Date: April 2, 2004

s/ Philip P. Simon
Philip P. Simon, Judge
United States District Court

Court Instruction No. 1

Now that you have heard all of the evidence and the argument of counsel, it becomes my duty to give you instructions concerning the law applicable to this case.

It is your duty as jurors to follow the law as I shall state it to you, and to apply the 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 must consider the instructions as a whole. You are not to be concerned with the wisdom of any rule of law stated by me.

Neither by these instructions, nor by any ruling or remark I have made, do I mean to indicate any opinion as to the facts or as to what your verdict should be. You are the sole judges of the facts.

Court Instruction No. 2

Regardless of any opinion you may have as to what the law is or ought to be, it would be a violation of your sworn duty to base a verdict upon any view of the law other than that given in the instructions of the court, just as it would be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything other than the evidence in this case.

In deciding the facts of this case, you must not be swayed by bias or prejudice or favor as to any party. Our system of law does not permit jurors to be governed by prejudice or sympathy or public opinion. Both the parties and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated by the court, and reach a just verdict regardless of the consequences.

This case should be considered and decided by you as an action between persons of equal standing in the community, and holding the same or similar stations in life. Each party is entitled to the same fair trial at your hands, and a corporate entity such as defendant Biomet, Inc. is entitled to the same fair trial as an individual. The law respects all persons equally; all persons, including Biomet, stand equal before the law and are to be dealt with as equals in a court of justice.

Court Instruction No. 3

As stated earlier, it is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in the case. The term “evidence” includes sworn testimony of the witnesses, the exhibits admitted into evidence, evidence judicially noticed, and any stipulated facts. A stipulation is an agreed statement of facts between the parties, and you should regard such agreed statements as true. Any evidence to which I sustained an objection or that I ordered stricken must of course be disregarded. The only issues to be determined by you are those which I will set out in detail later in these instructions.

Remember that any statements, objections or arguments made by the lawyers are not evidence in the case. The function of the lawyers is to point out those things that are most significant or most helpful to their respective sides of the case, and in so doing to call your attention to certain facts or inferences that might otherwise escape your notice. In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding on you.

So 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 that reason and common sense lead you to draw from the facts that have been established by the testimony and evidence in the case.

In determining any fact in issue you may consider the testimony of all witnesses, regardless of who may have called them, and all the exhibits received in evidence, regardless of who may have produced them.

Court Instruction No. 4

There are two types of evidence: direct and circumstantial. Direct evidence is the direct proof of a fact, such as the testimony of an eyewitness. Circumstantial evidence is the proof of a chain of facts and circumstances that tend to show whether or not an asserted fact is true. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. Therefore, all of the evidence in the case, including the circumstantial evidence, should be considered by you in arriving at your verdict

Court Instruction No. 5

Now, 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 are the sole judges of the credibility or “believability” of each witness and the weight to be given to his or her testimony. In weighing the testimony of a witness you should consider: the witness’s relationship to any of the parties; the witness’s interest, if any, in the outcome of the case; the witness’s manner of testifying; the witness’s opportunity to observe or acquire knowledge concerning the facts about which he or she testified; the witness’s candor, fairness and intelligence; and the extent to which the witness’s testimony has been supported or contradicted by other credible evidence. You may, in short, accept or reject the testimony of any witness in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying as to the existence or non-existence of any fact. You may find that the testimony of a smaller number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary. The testimony of a single witness that produces in your minds a belief in the likelihood of its truth is sufficient for the 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 the evidence in the case, you hold greater belief in the accuracy and reliability of the one witness.

Similarly, the weight of the evidence is not necessarily determined by whether the evidence is in the form of a document or the oral testimony of a witness. It is for you to determine based upon the circumstances surrounding each document and each piece of testimony what weight to give to that evidence.

Court Instruction No. 6

During the trial, the Court instructed you to consider certain evidence only for specific limited purposes. You must consider such evidence only for those limited purposes.

Court Instruction No. 7

The law does not require any party to call as witnesses all persons who may have been present at any time or place involved in the case, or who may appear to have some knowledge of the matters at issue in this trial. Nor does the law require any party to produce as exhibits all papers and things mentioned during this trial.

Court Instruction No. 8

A witness may be discredited or “impeached” by contradictory evidence, by a showing that he or she testified falsely concerning a material matter, or by evidence that at some other time the witness has said or done something, or has failed to say or do something, that is inconsistent with the witness’s present testimony.

If you believe that any witness has been so impeached, then it remains your exclusive province to give testimony of that witness such credibility or weight, if any, that you think it deserves.

Court Instruction No. 9

When any witness is questioned about an earlier statement that the witness may have made, or earlier testimony that the witness may have given, such questioning is permitted in order to aid you in evaluating the truth or accuracy of the witness's testimony at the trial. In addition, if that earlier statement was made under oath and is inconsistent with the witness's testimony at the trial, you may consider that earlier sworn statement as evidence of the truth or accuracy of such earlier statement.

Whether or not such prior statements of a witness are, in fact, consistent or inconsistent with the witness's trial testimony is entirely for you to determine.

Court Instruction No. 10

The purpose of the attorneys' opening statements is to acquaint you in advance with the facts the attorneys expect the evidence to show. The purpose of the attorneys' closing arguments is to discuss the evidence actually presented. Opening statements, closing arguments and other statements of counsel should be disregarded to the extent that they are not supported by the evidence.

During the course of a trial it often becomes the duty of counsel to make objections and for me to rule on them in accordance with the law. The fact that an attorney made objections should not influence you in any way. Nor should the nature or manner of my ruling on any objection influence you in any way.

Whenever I have sustained an objection to a question addressed to a witness you must disregard the question entirely, and draw no inference from the wording of it, or speculate as to what the witness would have said if he or she had been permitted to answer the question. You should also disregard any answer the witness may have given prior to my ruling on the objection.

Court Instruction No. 11

During the trial, certain testimony was presented to you by the reading of a deposition or the playing of a video deposition. This testimony is entitled to the same consideration you would give it had the witness personally appeared in court.

Court Instruction No. 12

You have heard testimony of an expert witness. This testimony is admissible where the subject matter involved requires knowledge, special study, training, or skill not within ordinary experience, and the witness is qualified to give an expert opinion.

However, the fact that an expert has given an opinion does not mean that it is binding on you or that you are obligated to accept the expert's opinion as to the facts. You should assess the weight to be given to the expert opinion in light of all the evidence in the case.

Court Instruction No. 13

The Plaintiff, Wayne Smith, has brought this lawsuit against the defendant, Biomet.

Mr. Smith raises three claims against Biomet. Mr. Smith's claims are: (1) tortious interference with business relations; (2) violation of the Texas Sales Representative Act; and (3) defamation. Mr. Smith seeks money damages from Biomet.

As to each of these claims, Mr. Smith has the burden of proving his claims by a preponderance of the evidence.

Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that the proposition on which the party has the burden of proof is more probably true than not true. When I say "if you find" or "if you decide" I mean if you find or if you decide by a preponderance of the evidence.

Mr. Smith also claims to be entitled to an award of punitive damages because Biomet made defamatory statements knowing they were false or with a reckless disregard of the truth, and because of the manner in which Biomet interfered with Mr. Smith's business. Mr. Smith has the burden to prove his claim for punitive damages by clear and convincing evidence.

Clear and convincing evidence is an intermediate standard of proof greater than a preponderance of the evidence and less than proof beyond a reasonable doubt and requires the existence of a fact be highly probable.

Biomet denies all of Mr. Smith's claims and that he is entitled to any relief. Biomet has no burden to disprove Mr. Smith's claims; as I already stated, it is Mr. Smith who has the burden to prove the claims.

In addition, Biomet has raised certain defenses to Mr. Smith's claims. They are:

- (1) the statement upon which Mr. Smith bases his defamation claim was true;
- (2) Biomet's conduct was justified;
- (3) Mr. Smith failed to mitigate his damages.

As to these defenses, Biomet has the burden of proving these defenses by a preponderance of the evidence.

Court Instruction No. 14

A corporation must act through its officers, employees or agents. Any act or omission of an officer, employee, or agent acting within the scope of that person's authority is considered in law to be the act of the corporation.

Court Instruction No. 15

An independent contractor renders service to another, not as an employee, but as a wholly separate entity working according to a contract. The independent contractor may be guided by the other's instructions about the result to be accomplished, but the independent contractor is not controlled by the other in the manner or method of accomplishing that result.

Court Instruction No. 16

An agent is a person who, by agreement with another person called a principal, is expressly authorized to transact all of the principal's business of a particular kind or in a particular place.

Court Instruction No. 17

An agent acts within the scope of his express authority when the agent transacts business the principal has assigned.

Court Instruction No. 18

In addition to the express authority conferred by the principal, the agent has the implied authority to perform acts and to use such means as are usual and reasonably necessary to accomplish the principal's purpose.

Court Instruction No. 19

A principal gives an agent “apparent authority” when the principal places the agent in a position to perform acts or make representations for the principal that appear reasonable to a third person, and the third person relies on the apparent authority. If the third person reasonably believes under the circumstances that the principal authorized the agent to act, the principal is liable to the third person, even if the agent violated the principal’s orders or instructions or exceeded the agent’s actual authority. However, if the third person knows, or in the exercise of reasonable care should know, that the agent is exceeding the agent’s actual authority, the principal will not be liable.

Court Instruction No. 20

Mr. Smith claims that Biomet tortiously interfered with his business relationships. To establish this claim, Mr. Smith has the burden of proving the following elements by a preponderance of the evidence:

- (1) The existence of a valid business relationship between Mr. Smith and Ana Rose Arsenian, Dan Cavazos, and Eli Garcia or his customers as of July 10, 2001;
- (2) Biomet knew of the business relationship;
- (3) Biomet intentionally interfered with the relationship;
- (4) Biomet's conduct was not justified; and
- (5) Mr. Smith sustained damages as a proximate result of Biomet's interference with his business relationship.

If after considering all of the evidence you find that Mr. Smith has proved these elements, then your verdict should be for Mr. Smith and you should determine the amount of damages caused by Biomet's interference. However, if you find that Mr. Smith did not prove any one of these elements, your verdict should be for Biomet.

Court Instruction No. 20A

To prove that Biomet intentionally interfered with Mr. Smith's contracts or business relationships, Mr. Smith must prove by a preponderance of the evidence that Biomet acted illegally in achieving its end.

Court Instruction No. 21

To satisfy the “unjustified” element of his tortious interference claims, Mr. Smith must prove that Biomet’s interference was malicious and exclusively directed to the injury and damage of Mr. Smith. If Biomet had a legitimate reason for its actions, its conduct was justified.

Court Instruction No. 22

If you find that Biomet tortiously interfered with Mr. Smith's business relationships, Mr. Smith is entitled to compensatory damages. Compensatory damages include:

- (1) The monetary loss of benefits of the relationships; and
- (2) Consequential losses caused by the interference.

Court Instruction No. 23

If you find that Wayne Smith is entitled to recover for tortious interference with business relations, then in addition to compensatory damages, you may also award punitive damages.

Punitive damages may be awarded if you find by clear and convincing evidence that Biomet acted maliciously, fraudulently, willfully or wantonly with conscious disregard for probable injury, or with gross negligence or oppressiveness that was not the result of a mistake of fact or law, honest error of judgment, overzealousness, mere negligence, or other human failing. You may award punitive damages in any amount you believe will serve to punish Biomet and will deter Biomet and others from like conduct in the future.

If you award punitive damages, you must state the amount of those damages on the verdict form separately from the amount of any compensatory damage you may award.

Court Instruction No. 24

The terms used in these instructions have the following meanings:

“Malice” means a wrongful act intentionally done without legal justification or excuse and with an intent to inflict injury.

“Oppression” means an act of domination by which one subjects another to a cruel and unjust hardship.

“Willful or wanton misconduct” means a conscious act or course of action by the defendant that under the circumstances shows either: (1) an extreme indifference to the safety of others; or (2) an awareness of a risk of injury to others and the disregard of that risk.

“Gross negligence” means the intentional failure to perform a duty in reckless disregard of the consequences to the life or property of others.

Court Instruction No. 25

The plaintiff must use reasonable care to minimize his damages. This is called mitigation of damages.

If you find that Biomet is liable and that Mr. Smith has suffered damages, Mr. Smith may not recover for any item of damage which he could have avoided through the use of reasonable care.

Biomet has the burden of proving by a preponderance of the evidence that Mr. Smith failed to use reasonable care to minimize his damages.

Court Instruction No. 26

In Texas, there is a statute called the Texas Sales Representative Act. This Act applies to Mr. Smith because he resides in Texas.

The Texas Sales Representative Act required Biomet to pay Mr. Smith all commissions due upon termination of Biomet's relationship with Mr. Smith.

Court Instruction No. 27

If, after considering all of the evidence, you determine that Biomet paid all commissions due Mr. Smith upon termination of the parties' relationship, then your verdict must be for Biomet. If, after considering all of the evidence, you determine that Biomet did not pay all commissions due Mr. Smith upon termination of the parties' relationship, then your verdict must be for Mr. Smith and you should determine the amount of commissions due.

Biomet has asserted an affirmative defense to this claim. Biomet claims that Mr. Smith owed Biomet money and Biomet was justified in deducting the money owed from the commissions due Mr. Smith. Biomet has the burden of proving this affirmative defense by a preponderance of the evidence.

Court Instruction No. 28

Mr. Smith claims that Biomet defamed him and that he is entitled to damages.

Court Instruction No. 29

Defamation is words, statements or other forms of expression that injure a person's good reputation.

Court Instruction No. 30

To recover on his claim of defamation, Mr. Smith must prove the following elements by a preponderance of the evidence:

- (1) That Biomet made the following statement: that Wayne Smith had said that he was going to go to Biomet's annual shareholders' meeting in Warsaw and settle matters with a gun;
- (2) That the statement was made about Mr. Smith;
- (3) That the statement was heard by someone other than Mr. Smith or an agent of Biomet;
and
- (4) That Biomet knew the statement was false at the time it was made or, believing it to be true, acted negligently in failing to determine the truth of the statement.

If after considering all of the evidence you find that Mr. Smith has proved these elements, then your verdict should be for Mr. Smith. However, if you find that Mr. Smith did not prove all of these elements, your verdict should be for Biomet.

Court Instruction No. 31

You are instructed that the statement that Wayne Smith threatened to go to Biomet's annual shareholders' meeting and settle matters with a gun is defamatory. In considering Mr. Smith's defamation claim, you should accept that fact as conclusively proved.

Court Instruction No. 32

Truth is a complete defense to a claim for defamation. If you find that the statement which Biomet made concerning Mr. Smith was true, then you must find for Biomet on Mr. Smith's defamation claim.

Court Instruction No. 33

If you find that Mr. Smith was defamed, you must determine the damages he has suffered. There are two classes of compensatory damages that may be awarded.

The first class consists of general damages that include injury to Mr. Smith's reputation and standing in the community, personal humiliation, mental anguish, and suffering. The law presumes that such damages result from defamation.

The second class consists of special monetary damages that are not assumed to result from defamation. Mr. Smith has the burden of proving that he has actually incurred special monetary damages as a result of the defamation.

If you find for Mr. Smith, you must determine the amount of money that would compensate Mr. Smith for his damages. You should then record that amount on your verdict form.

Court Instruction No. 34

If Biomet made defamatory statements knowing that they were false, or with a reckless disregard of the truth, you may consider whether punitive damages should be assessed.

If you find that punitive damages should be assessed, you must assess them separately from the amount of compensatory damages on the verdict form.

Court Instruction No. 35

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 form 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 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 Instruction No. 36

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.