Davis v. Old Dominion Freight Line et al Doc. 115 Att. 2

# INSTRUCTION NO. 1

Members of the Jury, the instructions I gave you at the beginning of the trial and during the trial remain in effect. I now give you some additional instructions on the law that applies to this case. You must, of course, continue to follow all the instructions I gave you earlier, as well those I give you now.

The instructions I am about to give you now are in writing and will be available to you in writing in the jury room. I emphasize, however, that this does not mean they are more important than my earlier instructions. Again, all my instructions, whether given in writing or spoken from this bench, must be followed.

It is your duty as jurors to follow the law as stated in the instructions, and to apply the given rules of law to the facts as you find them to be from the evidence in this case.

You are not to single out one instruction alone as stating the



Dockets.Justia.com

law, but must consider the instructions as a whole.

Neither are you to be concerned with the wisdom of any rule of law as stated by the Court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other 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 but the evidence in the case.

Nothing I say in the instructions is to be taken as an indication that I have any opinion about the facts of the case, or what that opinion is. It is not my function to determine the facts. You will determine the facts. During this trial I have occasionally asked questions of witnesses. Do not assume that because I asked questions I hold any opinion on the matters to which my questions related.

Justice through trial by jury must always depend on the willingness of each individual juror to seek the truth about the facts from the same evidence presented to all the jurors; and to arrive at a verdict by applying the same rules of law as given in the Court's instructions.

Statements and arguments of counsel are not evidence in the case. When the lawyers on both sides stipulate or agree on the existence of a fact, however, the Jury must accept the stipulation and regard that fact as proved. The evidence in the case always consists of the sworn testimony of the witnesses, regardless of who may have called them and any documents, photographs, or other items that are received by the Court, and all facts that may have been admitted or stipulated. Any evidence on which an objection was sustained by the Court—and any witness statement or tangible item that was stricken by the Court—must be entirely disregarded.

Anything you may have seen or heard outside this courtroom is not evidence, and it must be entirely disregarded.

## INSTRUCTION NO. 2

In conducting your deliberations and returning your verdict, there are certain rules you must follow.

*First*, when you go to the jury room, you must select one of your members as your foreperson. That person will preside over your discussions and speak for you all here in court.

*Second*, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach agreement if you can do so without violence to individual judgment, because a verdict must be unanimous.

Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinions if the discussion persuades you that you should. But do not come to a decision

simply because other jurors think it is right, or simply to reach a verdict. Remember at all times that you are not partisans. You are judges—judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

*Third*, if you need to communicate with me during your deliberations, you may send a note to me, through the court security officer, that is signed by one or more jurors. I will respond as soon as possible either in writing or orally in open court. Remember that you should never tell anyone —including me—how your votes stand numerically.

*Fourth*, your verdict must be based solely on the evidence and on the law that I have given to you in my instructions. The verdict must be unanimous. Again, nothing I have said or done is intended to suggest what your verdict should be—that is entirely for you to decide.

## INSTRUCTION NO. 3

This case should be considered and decided by you as a dispute between persons of equal worth. All persons, including corporations, stand equal before the law and are to be treated as equals.

**INSTRUCTION NO. 4**

You are the sole judges of the credibility of the witnesses and the weight and value to be given to their testimony. In deciding what the facts are, you will 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 deciding what testimony to believe, you should consider several things: the witness's intelligence; the opportunity the witness had to see or hear the things about which he or she testified; the witness's memory; any motives a witness may have for testifying a certain way; the manner and demeanor of the witness while testifying; whether the witness said something different at an earlier time; the general reasonableness or unreasonableness of the testimony; and the extent to which the testimony is consistent with any other evidence that you believe.

In deciding whether or not to believe a witness, keep in mind that people sometimes hear or see things differently and sometimes forget things. You need to consider therefore whether a contradiction is an innocent misrecollection, a lapse of memory, or a lie—and that may depend on whether it has to do with an important fact or only a small detail.

## INSTRUCTION NO. 5

An expert witness is a person who has special knowledge, skill, experience, training, or education on a subject to which his or her testimony relates.

An expert witness may give an opinion on questions in controversy. You may consider the expert' opinion in the light of his or her qualifications and credibility, the reasons given for the opinion, and the facts and other matters upon which the opinion is based.

You are not bound to accept an expert opinion as conclusive, but should give it whatever weight you think it should have. You may disregard any opinion testimony if you find it to be unreasonable.

## INSTRUCTION NO. 6

A witness may be discredited or impeached by contradictory evidence 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 any witness has been impeached and thus discredited, you may give the testimony of that witness whatever credibility, if any, you think it deserves.

If a witness is shown knowingly to have testified falsely about any material matter, you have a right to distrust that witness's other testimony and you may reject all the testimony of that witness or give it whatever credibility you think it deserves.

An act or omission is "knowingly" done, if the act is done voluntarily or intentionally, and not because of mistake or accident or other innocent reason.

## INSTRUCTION NO. 7

In considering the evidence in this case you are not required to set aside your common sense or common knowledge. You have the right to consider all the evidence in light of your own observations and experiences in the affairs of life.

## INSTRUCTION NO. 8

In these instructions you are told that one or the other party has the burden to prove certain facts. The burden of proving a fact is placed upon the party whose claim or defense depends upon that fact. The party who has the burden of proving a fact must prove it by a preponderance of the evidence. To prove something by the "preponderance of the evidence" is to prove that it is more likely true than not true. It is determined by considering all of the evidence and deciding which evidence is more believable.

If, on any issue of fact in the case, the evidence is equally balanced, you cannot find that fact has been proved. The preponderance of the evidence is not necessarily established by the greater number of witnesses or exhibits a party has presented.

You may have heard of the term "proof beyond a reasonable doubt." This is a stricter standard, which applies in criminal cases.

It does not apply in civil cases like this one. You should, therefore, put it out of your minds.

## INSTRUCTION NO. 9

A fact in dispute may be proved by circumstantial evidence, by direct evidence, or by both. A fact is established by direct evidence when, for example, it is proved by witnesses who testify to what they saw, heard, or experienced. A fact is established by circumstantial evidence when its existence can reasonably be inferred from other facts proved in the case.

## INSTRUCTION NO. 10

Carla Lewis claims damages from Old Dominion Freight Line, Inc. and Melvin "Keith" Howze and has the burden of proving each of three essential propositions:

First, that Ms. Lewis has sustained damages;

Second, that Mr. Howze was negligent;

And third, that Mr. Howze's negligence was a proximate cause of Ms. Lewis's damages.

## INSTRUCTION NO. 11

Old Dominion and Mr. Howze contend that there was negligence on the part of Ms. Lewis, which was a proximate cause of her injuries. Old Dominion and Mr. Howze have the burden of proving this contention.

## INSTRUCTION NO. 12

At the time of the wreck, Old Dominion employed Mr. Howze. Therefore, Old Dominion is legally responsible for any negligence on Mr. Howze's part.

## INSTRUCTION NO. 13

When I use the word "negligence" in these instructions I mean the failure to do something which a reasonably careful person would do, or the doing of something which a reasonably careful person would not do, under circumstances similar to those shown by the evidence in this case. To constitute negligence, an act must be one from which a reasonably careful person would foresee such an appreciable risk of harm to others as to cause him or her not to do the act, or to do it in a more careful manner.

**INSTRUCTION NO. 14**

A failure to exercise ordinary care is negligence. When I use the words "ordinary care," I mean the care a reasonably careful person would use under circumstances similar to those shown by the evidence in this case. It is for you to decide how a reasonably careful person would act under those circumstances.

## INSTRUCTION NO. 15

It was the duty of all persons involved in the wreck to use ordinary care for their own safety and the safety of others.

## INSTRUCTION NO. 16

The law frequently uses the expression "proximate cause," with which you may not be familiar. When I use the expression "proximate cause" in these instructions, I mean a cause which, in a natural and continuous sequence, produces damage and without which the damage would not have occurred.

This does not mean that the law recognizes only one proximate cause of damage. To the contrary, if two or more causes work together to produce damage, then you may find that each of them was a proximate cause.

## INSTRUCTION NO. 17

Every person using ordinary care has a right to assume, until the contrary is or reasonably should be apparent, that every other person will use ordinary care and obey the law. To act on that assumption is not negligence.

## INSTRUCTION NO. 18

The fact that the wreck occurred is not, of itself, evidence of negligence on the part of anyone.

## INSTRUCTION NO. 19

When two vehicles are traveling in the same direction, the vehicle in front has the superior right to use the highway for the purpose of traveling, and the driver behind must use ordinary care to operate his vehicle in recognition of this superior right. This does not relieve the driver of the forward vehicle of the duty to use ordinary care and to obey the rules of the road.

## INSTRUCTION NO. 20

In determining whether Mr. Howze or Ms. Lewis was negligent, you may consider the following three rules of the road:

(a) It is the duty of the driver of a motor vehicle to keep a lookout for other vehicles or persons on the highway. The lookout requried is that which a reasonably careful driver would keep under circumstances similar to those shown by the evidence in this case.

(b) It is the duty of the driver of a motor vehicle to keep his or her vehicle under control. The control required is that which a reasonably careful driver would maintain under circumstances similar to those shown by the evidence in this case.

When danger would be reasonably apparent to the driver who is keeping a proper lookout, then he or she is required to use ordinary care to have his or her vehicle under such control as to be

able to check its speed or stop it, if necessary, to avoid damage to others.

(c) It is the duty of the driver of a motor vehicle to drive at a speed no greater than reasonable and prudent under the circumstances, having due regard for any actual or potential hazards.

A failure to meet the standard of conduct required by any of these three rules is negligence.

## INSTRUCTION NO. 21

There were in force in the State of Arkansas at the time of the occurrence three applicable statutes. They provided:

> *First,* it shall be unlawful for any person to drive or operate any vehicle in such a careless manner as to evidence a failure to keep a proper lookout for other traffic, vehicular or otherwise, or in such a manner as to evidence a failure to maintain proper control on the public thoroughfares or private property in the State of Arkansas.
>
> It shall be unlawful for any person to operate or drive any vehicle on the public thoroughfares or private property in the State of Arkansas in violation of the following prohibited acts:
>
> (i) To operate any vehicle in such a manner which would cause a failure to maintain control; or

(ii) To operate a vehicle in any manner when the driver is inattentive and such inattention is not reasonable and prudent in maintaining vehicular control.

*Second*, no person shall drive a motor vehicle at such a slow speed as to impede the normal and reasonable movement of traffic except when reduced speed is necessary for safe operations or in compliance with the law.

*Third*, the driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of vehicles and the traffic upon and the condition of the highway.

The driver of any motor truck or any motor vehicle drawing another vehicle when traveling upon a roadway outside of a business or residence district shall not follow within two hundred feet of another motor vehicle.

A violation of any of these statutes, although not necessarily negligence, is evidence of negligence to be considered by you along with all other facts and circumstances in this case.

**INSTRUCTION NO. 22**

If you should find that the wreck was proximately caused by negligence on the part of Mr. Howze, and not by negligence on the part of Ms. Lewis, then Ms. Lewis is entitled to recover the full amount of any damages you may find she has sustained as a result of the wreck.

If you should find that the wreck was proximately caused by negligence of Ms. Lewis and Mr. Howze, then you must compare the percentages of their negligence.

If the negligence of Ms. Lewis is of less degree than the negligence of Mr. Howze, then Ms. Lewis is entitled to recover any damages which you may find she has sustained as a result of the occurrence reduced in proportion to the degree of her own negligence. The Court will make this reduction based on your apportionment of negligence.

On the other hand, if Mr. Howze was not negligent, or if the negligence of Ms. Lewis is equal to or greater in degree than the negligence of Mr. Howze, then Ms. Lewis is not entitled to recover any damages.

Again, because Old Dominion employed Mr. Howze, any negligence on his part is imputed to his employer.

## INSTRUCTION NO. 23

If you decide for Ms. Lewis on the question of liability, then you must then fix the amount of money which will reasonably and fairly compensate her for any of the following six elements of damage sustained, which you find were proximately caused by the negligence of Mr. Howze:

*First:* The nature, extent, and duration and permanency of any injury.

*Second:* The reasonable expense of any necessary medical care, treatment and services received, including transportation and board and lodging expenses necessarily incurred in securing such care, treatment, or services and the present value of such expense reasonably certain to be required in the future.

*Third:* Any pain and suffering and mental anguish experienced in the past and reasonably certain to be experienced in the future.

*Fourth:* The value of any earnings lost and the present value of any earnings reasonably certain to be lost in the future.

*Fifth:* Any scars and disfigurement and visible results of her injury.

*Sixth:* The reasonable expense of any necessary help in her home, which has been required as a result of her injury and the present value of such expense reasonably certain to be required in the future.

Whether any of these six elements of damage has been proved by the evidence is for you to decide.

## INSTRUCTION NO. 24

I have used the expression "present value" in these instructions with respect to certain elements of damage which you may find that Ms. Lewis will sustain in the future. This simply means that if you find that Ms. Lewis is entitled to recover any elements of damage which require you to determine their present value, you must take into consideration the fact that money recovered will earn interest, if invested, until the time in the future when these losses will actually occur. Therefore, you must reduce any award for future damages to compensate for the reasonable earning power of money.

## INSTRUCTION NO. 25

This case is submitted to you on questions. Your answers to these questions will be your verdict in this case.

## QUESTION NO. 1

**Question No. 1:** Do you find by a preponderance of the evidence that there was negligence on the part of Melvin "Keith" Howze that was a proximate cause of any damages Carla Lewis may have sustained?

Yes_____ No_____

**Instruction: If you answered Question No. 1 "Yes," then go to Question No. 2. If you answered Question No. 1 "No," then your deliberations are done. Go to the last page, where the foreperson must sign and date the form. Then advise the Court, through the court security officer, that you've reached a verdict.**

## QUESTION NO. 2

**Question No. 2:** Do you find, by a preponderance of the evidence, that there was negligence on the part of Carla Lewis that was a proximate cause of any damages she may have sustained?

Yes_____ No_____

**Instruction: If you answered Question No. 2 "Yes," then go to Question No. 3. If you answered Question No. 2 "No," then skip Question No. 3, and go to Question No. 4.**

## QUESTION NO. 3

**Question No. 3:** Using 100% to represent the total negligence for the wreck, apportion the negligence between the two parties to this case:

Melvin "Keith" Howze (and Old Dominion) _____%

Carla Lewis _____%

## QUESTION NO. 4

**Instruction: Answer this Question only if you answered Question No. 1 "Yes." Don't reduce the damages awarded (if any) by the percentage of negligence (if any) put on Carla Lewis. The Court will make that reduction, based on your apportionment of negligence. If Ms. Lewis's percentage of negligence is equal to or greater than Melvin "Keith" Howze/Old Dominion's negligence, Ms. Lewis will not recover any damages.**

**Question No. 4:** State the total amount of damages that you find, based on a preponderance of the evidence, Carla Lewis sustained in the wreck: $____________________.

Sign this form and advise the Court that you have finished your deliberations.

| ______________________ | ________________ | ___________ |
|---|---|---|
| Foreperson | Date | Time |

## INSTRUCTION NO. 26

You will take these Questions to the jury room, and when each of you has agreed on the answers, your foreperson will fill in the forms for each Interrogatory that you are called upon to answer to reflect your unanimous decision, sign and date them, and then advise the court security officer that you are ready to return to the courtroom.

I add the caution that nothing said in the instructions—and nothing in the form of the Questions prepared for your convenience—is or was intended to suggest or convey in any way or manner any intimation as to what answers I think you should find. How you choose to answer the Questions shall be the sole and exclusive responsibility of you, the Jury.

If it becomes necessary during your deliberations to communicate with the Court, you may send a note by the court security officer, signed by your foreperson, or by one or more

members of the Jury. No member of the Jury should ever attempt to communicate with the Court by any means other than a signed writing; and the Court will never communicate with any member of the Jury on any subject touching the merits of the case, other than in writing, or orally here in open Court.

You will note from the oath about to be taken by the court security officer to act as bailiff that he, and all other persons, are forbidden to communicate in any way or manner with any member of the Jury on any subject touching the merits of the case. Bear in mind also that you must never reveal to any person, not even to the Court, how the Jury stands, numerically or otherwise, on the issue presented to you unless or until you reach a unanimous verdict.

Court security officer, do you solemnly swear to keep this Jury together in the jury room, and not to permit any person to speak to or communicate with them, concerning this case, nor to do so yourself unless by order of the Court or to ask whether they have

agreed on a verdict, and to return them into the Courtroom when they have so agreed, or when otherwise ordered by the Court, so help you God?