

ORIGINAL



09-11739-L

CAUSE NO. DC-~~08-02854~~

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G. DISTRICT CLERK
DALLAS COUNTY TEXAS
Rose Christy

GERALD MEDOW, Plaintiff

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IN THE DISTRICT COURT

v.

193RD JUDICIAL DISTRICT

PLANO LINCOLN-MERCURY, INC. d/b/a
DAVID McDAVID LINCOLN MERCURY
OF PLANO, Defendant

DALLAS COUNTY, TEXAS

CHARGE OF THE COURT

Ladies and Gentlemen of the Jury:

This case is submitted to you by asking questions about the facts, which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law, you must be governed by the instructions in this charge. In discharging your responsibility on this jury, you will observe all the instructions which have previously been given you. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.

1. Do not let bias, prejudice or sympathy play any part in your deliberations.
2. In arriving at your answers, consider only the evidence introduced here under oath and such exhibits, if any, as have been introduced for your consideration under the rulings of the Court, that is, what you have seen and heard in this courtroom, together with the law as given you by the Court. In your deliberations, you will not consider or discuss anything that is not represented by evidence in this case.
3. Since every answer that is required by the charge is important, no juror should state or consider that any required answer is not important.
4. You must not decide who you think should win, and then try to answer the questions accordingly. Simply answer the questions, and do not discuss nor concern yourselves with the effect of your answers.
5. During trial it was permissible for you to take notes. You may carry those notes to the jury room for your personal use during deliberation on the court's charge. You may not share these notes with other jurors. Your personal recollection of the evidence takes precedence over any notes you have taken. A juror may not rely on the notes of another juror. If you disagree about the evidence, the presiding juror may apply to the court and have the court reporter's notes read to the jury.

6. You will not decide a question by lot or by drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by adding together each juror's figures and dividing by the number of jurors to get an average. Do not do any trading on your answers, that is, one juror should not agree to answer a certain question one way if others will agree to answer another question another way.
7. Unless otherwise instructed, you may answer a question upon the vote of ten or more jurors. If you answer more than one question upon the vote of ten or more jurors, the same group of at least ten of you must agree upon the answers to each of those questions.

These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys and the judge. If it should be found that you have disregarded any of these instructions, it will be jury misconduct and it may require another trial by another jury; then all of our time will have been wasted.

The presiding juror or any other person who observes a violation of the court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again.

When words are used in this charge in a sense which varies from the meaning commonly understood, you are given a proper legal definition, which you are bound to accept in place of any other definition or meaning.

Answer "Yes" or "No" to all questions unless otherwise instructed. A "Yes" answer must be based on a preponderance of the evidence, unless otherwise instructed. If you do not find that a preponderance of the evidence supports a "Yes" answer, then answer "No." The term "PREPONDERANCE OF THE EVIDENCE" means the greater weight of credible evidence admitted in this case. A "PREPONDERANCE OF THE EVIDENCE" is not measured by the number of witnesses or by the number of documents admitted in evidence. For a fact to be proved by a "PREPONDERANCE OF THE EVIDENCE," you must find that the fact is more likely true than not true. Whenever a question requires an answer other than "Yes" or "No," your answer must be based on a preponderance of the evidence unless you are instructed otherwise.

"NEGLIGENCE" means failure to use ordinary care, that is, failing to do that which a person of ordinary prudence would have done under the same or similar circumstances or doing that which a person of ordinary prudence would not have done under the same or similar circumstances.

"ORDINARY CARE" means that degree of care that would be used by a person of ordinary prudence under the same or similar circumstances.

"PROXIMATE CAUSE" means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

A fact may be established by direct evidence, by circumstantial evidence, or both. A fact is established by **DIRECT EVIDENCE** when proved by documentary evidence or by witnesses who saw the act done or heard the words spoken. A fact is established by **CIRCUMSTANTIAL EVIDENCE** when it may be fairly and reasonably inferred from other facts proved.

You are instructed that a corporation ("Inc.") is not a natural person, and therefore can act only through individual (i.e. natural) persons acting within the scope of their employment with the corporation. A person acts in the "course and scope of his employment" with an employer when that person is acting in the furtherance of the business of that person's employer.

In answering questions about damages, answer each question separately in accordance with the evidence. Do not increase or reduce the amount in one answer because of your answer to any other question about damages. Do not speculate about what the ultimate recovery may or may not be. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment.

For the purposes of this charge, David McDavid refers to Defendant Plano Lincoln-Mercury, Inc. d/b/a David McDavid Lincoln Mercury of Plano.

Question 1

Did David McDavid engage in any false, misleading, or deceptive act or practice that Gerald Medow relied on to its detriment and that was a producing cause of damages to Gerald Medow?

"Producing cause" means an efficient, exciting, or contributing cause that, in a natural sequence, produced the damages, if any. There may be more than one producing cause.

"False, misleading, or deceptive act or practice" means any of the following:

- (1) representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law; or
- (2) failing to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed.

Answer "Yes" or "No:"

yes

Question 2

Did David McDavid engage in any unconscionable action or course of action that was a producing cause of damages to Gerald David Medow?

"Producing cause" means a cause that was a substantial factor in bringing about the damages, if any, and without which the damages would not have occurred. There may be more than one producing cause.

An unconscionable action or course of action is an act or practice that, to a consumer's detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree.

Answer "Yes" or "No:"

yes

Question 3

Answer Question 3 only if you answered "Yes" to either Question 1 or 2. Otherwise, do not answer Question 3. In answering this question, consider only the conduct that you have found was a producing cause of damages to Gerald David Medow.

- a. Did David McDavid engage in any such conduct knowingly?

"Knowingly" means actual awareness, at the time of the conduct, of the falsity, deception, or unfairness of the conduct in question or actual awareness of the conduct constituting a failure to comply with a warranty. Actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness.

Answer "Yes" or "No:"

yes

- b. Did David McDavid engage in any such conduct intentionally?

"Intentionally" means actual awareness of the falsity, deception, or unfairness of the conduct in question or actual awareness of the conduct constituting a failure to comply with a warranty, coupled with the specific intent that the consumer act in detrimental reliance on the falsity or deception. Specific intent may be inferred where objective manifestations indicate that a person acted intentionally or may be inferred from facts showing that the person acted with such flagrant disregard of prudent and fair business practices that the person should be treated as having acted intentionally.

Answer "Yes" or "No:"

yes

Question 4

Answer Question 4 only if you answered "Yes" to either Question 1 or 2. Otherwise, do not answer Question 4.

Furthermore, answer Parts 4a & b only if you answered "Yes" to Question 3. Otherwise, do not answer Parts 4a & b.

What sum of money, if paid now in cash, would fairly and reasonably compensate Gerald David Medow for the following categories of damages, if any, resulting from the Defendant's conduct supporting your "Yes" answer(s) to Questions 1 and/or 2? Answer in dollars and cents, if any.

"Mental anguish" means the emotional pain, torment, and suffering experienced by a person.

- a. Mental anguish sustained by Gerald Medow in the past:

\$ 5,000.00

- b. Mental anguish, that in all reasonable probability, will be sustained by Gerald Medow in the future:

\$ 0

c. Deficiency balance, that in all reasonable probability, Plaintiff will suffer:

\$ 32,221.00

d. Unpaid Tollway violations, which in all reasonable probability, Plaintiff will suffer:

\$ 614.90

e. Any money, if any, paid by Gerald Medow to Jack Martin:

\$ 500.00

Question 5

Did David McDavid commit fraud against Gerald Medow?

"Fraud" occurs when-

- a. a party makes a material misrepresentation,
- b. the misrepresentation is made with knowledge of its falsity or made recklessly without any knowledge of the truth and as a positive assertion,
- c. the misrepresentation is made with the intention that it should be acted on by the other party, and
- d. the other party relies on the misrepresentation and thereby suffers injury.

"Misrepresentation" means: (i) a false statement of fact; or (ii) a promise of future performance made with an intent, at the time the promise was made, not to perform as promised.

Answer "Yes" or "No":

Yes

Question 6

Did David McDavid commit fraud in the inducement against Gerald Medow?

"Fraud in the Inducement" occurs when-

- a. a party makes a material misrepresentation,
- b. the misrepresentation is made with knowledge of its falsity or made recklessly without any knowledge of the truth and as a positive assertion,

- c. the misrepresentation is made with the intention that it should be acted on by the other party, and
- d. the other party relies on the misrepresentation by entering an agreement and thereby suffers injury.

"Misrepresentation" means: (i) a false statement of fact; or (ii) a promise of future performance made with an intent, at the time the promise was made, not to perform as promised.

Answer "Yes" or "No":

yes

Question 7

Did David McDavid commit fraud by omission against Gerald Medow?

"Fraud by Omission" occurs when—

- a. a party fails to disclose a material fact within the knowledge of that party,
- b. the party knows that the other party is ignorant of the fact and does not have an equal opportunity to discover the truth,
- c. the party intends to induce the other party to take some action by failing to disclose the fact, and
- d. the other party suffers injury as a result of acting without knowledge of the undisclosed fact.

Answer "Yes" or "No":

yes

Question 8

Was the negligence of David McDavid in supervising Jack Martin a proximate cause of Gerald Medow's damages, if any, in question?

David McDavid was negligent in supervising Jack Martin if it knew, or in the exercise of ordinary care should have known, that Jack Martin was incompetent or unfit, thereby creating an unreasonable risk of harm to others.

Answer "Yes" or "No:"

yes

Question 9

Did David McDavid make a negligent misrepresentation on which the Gerald Medow justifiably relied?

Negligent misrepresentation occurs when-

- a. a party makes a representation in the course of his business or in a transaction in which he has a pecuniary interest,
- b. the representation supplies false information for the guidance of others in their business, and
- c. the party making the representation did not exercise reasonable care or competence in obtaining or communicating the information.

Answer "Yes" or "No:"

yes

Question 10

If you answered "Yes" to Question 1, 2, 5, 6, 7, 8, or 9, then answer Question 10. Otherwise, stop.

Was the negligence, if any, of Gerald Medow a proximate cause of Gerald Medow's damages, if any?

Answer "Yes" or "No:"

yes

If you answered "Yes" to 10, then answer Question 11. Otherwise, do not answer Question 11, and proceed to Question 12.

Question 11

What percentage of the culpable conduct that proximately caused the Plaintiff's damages do you find to be attributable to each of the parties found by you to have committed such culpable conduct?

The percentages you find must total 100 percent. The percentages must be expressed in whole numbers. The culpable conduct attributable to a person named below is not necessarily measured by the number of acts or omissions found. The percentage attributable to a person need not be the same percentage attributed to that person in answering another question.

| | | | |
|----|---------------|------------|---|
| a. | David McDavid | <u>80</u> | % |
| b. | Gerald Medow | <u>20</u> | % |
| | Total | <u>100</u> | % |

Question 12

Answer Question 12 only if:

1. You answered "Yes" to either Question 5, 6, 7, 8 or 9; and
 - a. You answered "No" to Question 10, or
 - b. You answered 50% or less for Gerald Medow to Question 11;

Otherwise, do not answer Question 12.

What sum of money, if paid now in cash, would fairly and reasonably compensate Gerald Medow for the following categories of damages, if any, proximately caused by the Defendant's culpable conduct supporting your "Yes" answer(s) to Question 5, 6, 7, 8 or 9. Answer in dollars and cents, if any.

"Mental anguish" means the emotional pain, torment, and suffering experienced by a person.

- a. Mental anguish sustained by Gerald Medow in the past:

\$ 12,000.00
- b. Mental anguish, that in all reasonable probability, will be sustained by Gerald Medow in the future:

\$ 0
- c. Deficiency balance, that in all reasonable probability, Plaintiff will suffer:

\$ 32,221.00
- d. Unpaid Tollway violations, which in all reasonable probability, Plaintiff will suffer:

\$ 1014.90

e. Any money, if any, paid by Gerald Medow to Jack Martin:

\$ 500.00

Question 13

Answer Question 13 only if you unanimously answered "Yes" in response to Question 5, 6, 7, 8 or 9 and only if you inserted an amount greater than zero in response to any part of Question 12. Otherwise, do not answer Question No. 13.

You are instructed that in order to answer "Yes" to Question 13, your answer must be unanimous. You may answer "No" in either blank in response to Question 13 only upon a vote of ten or more jurors. Otherwise, you must not answer either blank in response to Question 13.

"Clear and convincing evidence" means the measure or degree of proof that produces a firm belief or conviction of the truth of the allegations sought to be established.

"Gross negligence" means an act or omission by a Defendant,

1. which when viewed objectively from the standpoint of the Defendant at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and
2. of which the Defendant has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

Do you find by clear and convincing evidence that the harm to Gerald Medow resulted from gross negligence attributable to David McDavid ?

You are further instructed that David McDavid may be grossly negligent because of an act of a person acting in the course and scope of that person's employment with David McDavid if, and only if:

1. David McDavid authorized the doing and manner of the act; or
2. The person acting in the course and scope of that person's employment with David McDavid was unfit and David McDavid was reckless in employing that person; or

Answer "Yes" or "No:" _____

After you retire to the jury room, you will select your presiding juror. The first thing the presiding juror will do is to have this complete charge read aloud and then you will deliberate upon your answers to the questions asked. It is the duty of the presiding juror —

- (1) to preside during your deliberations;
- (2) to see that your deliberations are conducted in an orderly manner and in accordance with the instructions in this charge;
- (3) to write out and hand to the bailiff any communications concerning the case that you desire to have delivered to the Judge;
- (4) to vote on the questions;
- (5) to write your answers to the questions in the spaces provided; and
- (6) to certify to your verdict in the space provided for the presiding juror's signature or to obtain the signatures of all the jurors who agree with the verdict if your verdict is less than unanimous.

After you have retired to consider your verdict, no one has any authority to communicate with you except the bailiff of this Court. You should not discuss the case with anyone, not even with other members of the jury, unless all of you are present and assembled in the jury room. Should anyone attempt to talk to you about the case before the verdict is returned, whether at the courthouse, at your home, or elsewhere, please inform the Judge of this fact.

When you have answered all of the questions which you are required to answer under the instructions of the Court, and the presiding juror has placed your answers in the spaces provided and signed the verdict as presiding juror or obtained the signatures, the presiding juror shall advise the bailiff, at the door of the jury room, that you have reached a verdict and give the verdict to the bailiff to deliver to the Judge. You will then wait to be called back into the courtroom.

Signed on March 24, 2011



Carl Ginsberg, District Judge
193rd Judicial District Court

CERTIFICATE

We, the jury, have answered the above and foregoing questions as herein indicated, and herewith return same into court as our verdict.

I certify that the jury was unanimous in answering the following questions:

Answer "All" or list the individual questions: #1, 2, 3a, 3b, 4a, b, c, d, e, 6, 7, 8, 9
10, 11, 12b,
c, d, e

Presiding Juror (Signature)

Presiding Juror (Printed Name)

(If the answers to some questions were not unanimous, the jurors who agreed to those answers must certify as follows:)

List the individual questions: #5, #12a