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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

ANNA FAIR,)	CIV. 11-5005-JLV
)	
Plaintiff,)	
)	FINAL
vs.)	INSTRUCTIONS
)	TO THE JURY
NASH FINCH COMPANY and)	
SEDGWICK CMS,)	
)	
Defendants.)	

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VERDICT FORM

FINAL INSTRUCTION NO. 1 - INTRODUCTION

Members of the jury, I will take a few minutes to give you the instructions that are to guide and govern you in arriving at a verdict. These final instructions will be available to you in the jury room. The instructions explain the law that applies to this case. You must consider my instructions as a whole and not single out some instructions and ignore others. All instructions, whenever given and whether in writing or not, are equally binding on you and must be followed. The order in which the instructions are given has no significance as to their relative importance.

This case is presented to you because the parties dispute certain facts. You will decide the facts from the evidence presented in court. "Evidence" is defined in Final Instruction No. 3. You are entitled to consider that evidence in light of your own observations and experiences. You may use reason and common sense to draw conclusions from facts established by the evidence. You will then apply the law to the facts to reach your verdict. You are the sole judges of the facts, but you must follow the law as stated in my instructions, whether you agree with the law or not.

It is vital to the administration of justice that each of you faithfully perform your duties as jurors. You must carefully and honestly consider this case with due regard for the rights and interests of both parties. Do not allow sympathy or prejudice to influence you. The law demands of you a just verdict

based solely on the evidence, your common sense, and the law as I give it to you. Your verdict must not be based on speculation, guess, or conjecture.

Finally, do not take anything I said or did during the trial as an indication of what I think about the evidence or what I think your verdict should be. Do not conclude from any ruling or comment I made that I have any opinion on how you should decide the case.

FINAL INSTRUCTION NO. 2 - MATTERS TO BE DISREGARDED

It is your duty as jurors to determine the facts, and you must do this from the evidence produced here in open court. This consists of the testimony of the witnesses and the exhibits which have been received. This evidence is governed by various rules of law. Under these rules, it has been my duty as judge to rule on the admissibility of the evidence from time to time. You must not concern yourselves with the reasons for these rulings, and you must not consider any exhibit which was not received in evidence or any testimony which I ordered stricken. Such things you must put out of your mind. You must not consider anything you may have heard or read about this case other than the evidence produced here in open court.

FINAL INSTRUCTION NO. 3 - DEFINITION OF EVIDENCE

I mentioned the word “evidence.” “Evidence” includes the testimony of witnesses, documents and other things received as exhibits, and any facts that have been stipulated, that is, formally agreed to by the parties. Certain things are not evidence. I shall list those things for you now:

1. Statements, arguments, questions, and comments by lawyers representing the parties in the case are not evidence. Opening statements and closing arguments by lawyers are not evidence.
2. Exhibits that are identified by a party but not offered or received in evidence are not evidence.
3. Objections and rulings on objections are not evidence. Lawyers have a right to object when they believe something is improper. You should not be influenced by the objection. If I sustained an objection to a question, you must ignore the question and must not try to guess what the answer might have been.
4. Testimony I struck from the record or told you to disregard is not evidence and must not be considered.
5. Anything you see or hear about this case outside the courtroom is not evidence.

During the trial, certain evidence was presented to you by deposition. The witness testified under oath at the deposition, just as if the witness was in

court, and you should consider this testimony together with all other evidence received.

The fact that an exhibit was shown to you does not mean you must rely on it more than you rely on other evidence.

Some of you may have heard the terms “direct evidence” and “circumstantial evidence.” You should not be concerned with those terms. The law makes no distinction between direct and circumstantial evidence. You should give all evidence the weight and value you believe it is entitled to receive.

Finally, the weight of the evidence is not determined by the number of witnesses testifying as to the existence or non-existence of any fact. Also, the weight of the evidence should not be determined merely by the number or volume of documents or exhibits. The weight of the evidence depends on its quality, not quantity. The quality and weight of the evidence are for you to decide.

FINAL INSTRUCTION NO. 4 - USE OF NOTES

You must make your decision based on the evidence. We have an official court reporter making a record of the trial. However, we will not have a typewritten transcript of the trial available for your use in reaching a verdict. Notes you took during the trial are not necessarily more reliable than your memory or another juror's memory. Therefore, you should not be overly influenced by the notes.

At the end of the trial, you may take your notes out of the notebook and keep them or leave them, and we will destroy them. No one will read the notes.

FINAL INSTRUCTION NO. 5 - OBJECTIONS

The lawyers made objections during the trial that I ruled upon. If I sustained an objection to a question before it was answered, do not draw any inferences or conclusions from the question itself. The lawyers have a duty to object to testimony or other evidence they believe is not properly admissible. Do not hold it against a lawyer or the party the lawyer represents because the lawyer made objections.

FINAL INSTRUCTION NO. 6 - CREDIBILITY OF WITNESSES

You are the sole judges of all questions of fact and the credibility of witnesses. 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 says, only part of it, or none of it.

In deciding what testimony to believe, you may consider the witness's intelligence; the opportunity the witness had to see or hear the things testified about; the witness's memory; any motives the witness may have for testifying a certain way; the behavior of the witness while testifying; whether the witness said something different at an earlier time; the general reasonableness of the testimony; and the extent to which the testimony is consistent with any evidence that you believe.

In deciding whether or not to believe a witness, keep in mind people sometimes see or hear things differently and sometimes forget things. You need to consider whether a contradiction results from an innocent misrecollection or sincere lapse of memory or instead from an intentional falsehood or pretended lapse of memory.

FINAL INSTRUCTION NO. 7 - IMPEACHMENT

In the previous instruction, I instructed you generally on the credibility of witnesses. I now give you this further instruction on how the credibility of a witness may be “impeached” and how you may treat certain evidence.

A witness may be discredited or impeached by contradictory evidence; by a showing that the witness testified falsely concerning a material matter; or by evidence that at some other time the witness said or did something, or failed to say or do something, that is inconsistent with the witness’s trial testimony. If earlier statements of a witness were admitted into evidence, they were not admitted to prove that the contents of those statements were true. Instead, you may consider those earlier statements only to determine whether you think they are consistent or inconsistent with the trial testimony of the witness, and therefore whether they affect the credibility of that witness.

If you believe a witness has been discredited or impeached, it is your exclusive right to give that witness’s testimony whatever weight you think it deserves.

FINAL INSTRUCTION NO. 8 -

ATTORNEY LEACH'S LETTERS AND EMAIL

Mr. Leach's letters of August 25, 2009 and August 27, 2009, and his email of August 31, 2009, are not to be used by you to determine if the contents of the letters or email are true. Rather the exhibits are admissible only for the limited purpose of determining the nature of the notice, if any, received by the defendants or Dr. Preston's office.

You may not consider Mr. Leach's letters and email for any other purpose.

FINAL INSTRUCTION NO. 9 -

MRS. FAIR'S ANKLE PHOTOGRAPHS

Photographs of Mrs. Fair's ankle taken on September 2, 8, and 15, 2009, are not relevant to defendants' acting in good or bad faith, as that issue must be determined solely on the information available to defendants at the time the Wound Care treatment concern was presented to them.

Rather, the photographs are admissible only for the limited purpose of determining the nature and extent of Ms. Fair's damages, if any.

You may not consider the photographs for any other purpose.

FINAL INSTRUCTION NO. 10 - EXPERT WITNESSES

You heard testimony from a person described as an expert. Persons who, by knowledge, skill, training, education or experience, have become an expert in some field may state their opinions on matters in that field and may also state the reasons for their opinion.

Expert testimony should be considered just like any other testimony. You may accept or reject it and give it as much weight as you think it deserves considering the witness's education and experience, the soundness of the reasons given for the opinion, the acceptability of the methods used, and all the other evidence in the case.

FINAL INSTRUCTION NO. 11 - EQUALS BEFORE THE LAW

In this case, the plaintiff Anna Fair is an individual and the defendants Nash Finch Company and Sedgwick CMS are corporations. A corporation is entitled to the same fair trial as an individual. No inference or presumption may be drawn against either party that would be improper in a case between individuals. You should consider and decide this case with the same fairness and consideration as though it were a case between individuals.

The parties in this case stand equal before the law and are entitled to a fair and impartial consideration of the entire case.

FINAL INSTRUCTION NO. 12 - AGENCY

A corporation can only act through its officers, employees, and agents. An officer, employee, or agent may bind the corporation by acts, statements, or omissions made while acting within the scope of the individual's duties for the corporation. All actions and omissions by all corporate officers, employees, and agents in this case were within the scope of their employment and were, as a matter of law, the acts and omissions of the corporation by which they were employed.

If you find Sedgwick CMS committed an act or acts of bad faith, both Sedgwick CMS and Nash Finch are liable. If you find Sedgwick CMS did not commit an act or acts of bad faith, neither Sedgwick CMS nor Nash Finch are liable.

FINAL INSTRUCTION NO. 13 - BURDEN OF PROOF

In civil actions, the party who has the burden of proving an issue must prove that issue by the greater convincing weight of the evidence. Greater convincing weight means that after weighing the evidence on both sides there is enough evidence to convince you something is more likely true than not true. In the event the evidence is evenly balanced so that you are unable to say the evidence on either side of an issue has the greater weight, then your finding upon the issue must be against the party who has the burden of proving it.

In determining whether or not an issue has been proved by the greater convincing weight of the evidence, you should consider all of the evidence bearing upon that issue, regardless of who produced it.

FINAL INSTRUCTION NO. 14 - DEFINITION OF LEGAL CAUSE

A legal cause is a cause that produces a result in a natural and probable sequence, and without which the result would not have occurred.

The term “legal cause” means an immediate cause which, in the natural or probable sequence, produces the alleged injury. For legal cause to exist, the harm suffered must be a foreseeable consequence of the act complained of. Liability cannot be based on speculation, or circumstances and conditions remotely connected to the events leading up to an injury. A defendant’s conduct must have such an effect in producing the harm as to lead a reasonable person to regard it as a cause of Mrs. Fair’s damages.

The legal cause need not be the only cause, nor the last or nearest cause. It is sufficient if it concurs with some other cause acting at the same time, which in combination with it causes the injury. For legal cause to exist, you must find the conduct complained of was a substantial factor in bringing about the harm. A legal cause need not be the only cause of a result. A legal cause may act in combination with other causes to produce a result.

FINAL INSTRUCTION NO. 15 - BAD FAITH CLAIM

Nash Finch and Sedgwick CMS each owed a duty of good faith and fair dealing to Mrs. Fair. To establish a bad faith claim against Nash Finch and Sedgwick CMS, Mrs. Fair must prove by the greater convincing weight of the evidence all of the following elements:

First, that Nash Finch and Sedgwick CMS did not have a reasonable basis for denying benefits to Mrs. Fair;

A defendant is liable to a claimant only when it has intentionally denied, failed to process, or failed to pay a claim without a reasonable basis, not merely for wrongful conduct.

Conduct is intentional when a person acts or fails to act for the purpose of causing injury or knowing that injury is substantially certain to occur.

Knowledge or intent may be inferred from the person's conduct and the surrounding circumstances.

Second, that Nash Finch and Sedgwick CMS knew they did not have a reasonable basis for denying benefits to Mrs. Fair, or acted with reckless disregard in determining whether they had a reasonable basis for denying benefits to Mrs. Fair; and

Third, that Mrs. Fair suffered compensatory damages.

Your determination of whether a defendant acted in bad faith must be based upon the facts available to the defendant at the time it allegedly denied, failed to process, or failed to pay Mrs. Fair's claim.

If you find that each of these elements was proven by the greater convincing weight of the evidence, your verdict should be for Mrs. Fair. If any of these elements was not proven by the greater convincing weight of the evidence as to a defendant, then your verdict must be for that defendant on plaintiff's bad faith claim.

**FINAL INSTRUCTION NO. 16 -
ELEMENTS OF COMPENSATORY DAMAGES**

If you find in favor of Mrs. Fair on the question of liability, you must award Mrs. Fair such sum as you find will fairly and justly compensate her for any damages you find she suffered as a direct result of a defendant's conduct, including any out-of-pocket expenses for which Mrs. Fair was not compensated and any mental anguish and emotional distress experienced by Mrs. Fair in the past and reasonably certain to be experienced in the future as a result of a defendant's conduct.

Whether any of these elements of damage were proven by the evidence is for you to decide. Your verdict must be based on evidence and not upon speculation, guesswork, or conjecture and you must not award any damages based on sympathy.

FINAL INSTRUCTION NO. 17 - PUNITIVE DAMAGES

If you find in favor of Mrs. Fair and against Nash Finch and Sedgwick CMS, then you may, but are not required to, award her an additional amount as punitive damages if you find the damages to Mrs. Fair were the result of the oppression, fraud, malice, intentional misconduct, or wilful and wanton misconduct of one or both of the defendants. An award of punitive damages is for the purposes of punishing Nash Finch and Sedgwick CMS for engaging in such misconduct and deterring them and others from engaging in such misconduct in the future.

“Oppression” is conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person’s rights.

“Fraud” in relation to contracts consists of any of the following acts committed by a party to the contract with intent to deceive another party:

(1) the suggestion, as a fact, which is not true by one who does not believe it to be true, or (2) any other act designed to deceive.

“Malice” is not simply the doing of an unlawful or injurious act; it implies the act complained of was conceived in the spirit of mischief or of criminal indifference to civil obligations. Malice may be inferred from the surrounding facts and circumstances.

“Actual malice” is a positive state of mind, shown by a desire and intention to injure another, motivated by hatred or ill will toward

that person. “Presumed, or legal, malice” is malice which the law infers from or imputes to certain acts. Legal malice may be imputed to an act if the person acts willfully or wantonly to the injury of the other in reckless disregard of the other’s rights. Hatred or ill will is not always necessary.

Conduct is “intentional” when a person acts or fails to act for the purpose of causing injury or knowing that injury is substantially certain to occur. Knowledge or intent may be inferred from the person’s conduct and the surrounding circumstances.

“Willful and wanton misconduct” is more than negligent conduct, but less than intentional conduct. Conduct is willful and wanton when a person acts or fails to act when the person knows, or should have known, that injury is likely to occur.

If you decide to award punitive damages, you should consider the following in setting the amount of punitive damages:

1. The intent of a defendant. In considering a defendant’s intent, you should examine the degree of reprehensibility of the defendant’s misconduct, including, but not limited to, the following factors:
 - a. whether the harm caused was physical as opposed to economic;
 - b. whether the conduct reflected indifference to, or reckless disregard of, the health or safety of others;
 - c. whether the target of the conduct was vulnerable financially;

- d. whether the conduct involved repeated actions or was an isolated incident; and
 - e. whether the harm was the result of intentional malice, trickery or deceit, or mere negligence.
2. The amount awarded as compensatory damages. In considering this factor, you should consider:
- a. whether the plaintiff has been completely compensated for the harm caused by the defendant;

If you awarded damages under Final Instruction No. 16, you should presume Mrs. Fair was fully compensated .

- b. the relationship between the harm or potential harm suffered by the plaintiff and the punitive damages award;
- c. the magnitude of the potential harm, if any, that a defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded; and
- d. the possible harm to other victims that might result if similar future behavior is not deterred.

The amount of punitive damages must bear a reasonable relationship to the compensatory damages.

- 3. The nature and enormity of the wrong;
- 4. The defendant's financial condition;
- 5. All of the circumstances concerning the defendant's actions, including any mitigating circumstances which may operate to reduce, without wholly defeating, punitive damages.

You may not consider any one factor alone, but should consider all five factors in determining the amount, if any, of an award.

Evidence was received related to defendants' conduct occurring outside South Dakota. This evidence may be considered only in determining whether defendants' conduct occurring in South Dakota was reprehensible, and if so, the degree of reprehensibility. The evidence is relevant to that issue, if it bears a reasonable relationship to the South Dakota conduct which is directed at or acts upon Mrs. Fair, and demonstrates a deliberateness or culpability by the defendants in the conduct upon which you have based your finding of liability. Further, wherever occurring, acts or conduct that are not similar to the conduct upon which you found liability cannot be a basis for finding reprehensibility.

If you find that defendants had a practice of engaging in wrongful conduct similar to that which injured Mrs. Fair, that evidence may be considered in deciding the issues of reprehensibility, whether punitive damages should be assessed, and if so, the amount of punitive damages to be awarded. Do not include in your award of damages any sum that represents damages for injuries to any person other than Mrs. Fair.

Mrs. Fair has the burden of proving by the greater convincing weight of the evidence her entitlement to punitive damages. It is solely your decision whether to assess punitive damages against the defendants.

FINAL INSTRUCTION NO. 18 - DUTY AS JURORS

A verdict must represent the considered judgment of each juror. Your verdict must be unanimous. It is your duty to consult with one another and to deliberate with a view of reaching agreement if you can do so without violence to your individual judgment. Of course, you must not surrender your honest convictions as to the weight or effect of the evidence solely because of the opinions of other jurors or for the mere purpose of reaching a verdict. Each of you must decide the case for yourself, but you should do so only after consideration of the evidence with your fellow jurors.

In the course of your deliberations, you should not hesitate to re-examine your own views and change your opinion if you are convinced it is wrong. To bring the jury to a unanimous result, you must examine the questions submitted to you openly and frankly with proper regard for the opinions of others and with a willingness to re-examine your own views.

Remember that you are not partisans. You are judges of the facts. Your sole interest is to seek the truth from the evidence. You are the judges of the credibility of the witnesses and the weight of the evidence.

You may conduct your deliberations as you choose. However, I suggest you carefully consider all of the evidence bearing upon the questions before you. You may take all the time you feel is necessary.

There is no reason to think that another trial would be tried in a better way or that a more conscientious, impartial, or competent jury would be selected to hear it. Any future jury must be selected in the same manner and from the same source as you. If you should fail to agree on a verdict, the case is left open and must be resolved at some later time.

FINAL INSTRUCTION NO. 19 - DUTY DURING DELIBERATIONS

There are certain rules you must follow while conducting your deliberations and returning your verdict:

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


Second, if you need to communicate with me during your deliberations, you may send a note to me through the court security officer, signed by one or more jurors. After conferring with the lawyers, I will respond as soon as possible, either in writing or orally in open court. Remember that you should not tell anyone—including me—how your votes stand numerically.

Third, your verdict must be based solely on the evidence and on the law in these instructions. **The verdict must be unanimous.** Nothing I said or did was intended to suggest what your verdict should be—that is entirely for you to decide.

The verdict form is simply the written notice of the decision you reach in this case. You will take this form to the jury room. When you have unanimously agreed on the verdict, the foreperson will fill in the form, sign and date it, and advise the court security officer that you have reached a verdict. You will then return to the courtroom where your verdict will be received and announced.

Dated November 21, 2013.

BY THE COURT:



JEFFREY L. VIKEN
CHIEF JUDGE