

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

FILED

JUN 11 2009


SHARON McELGUNN, as personal
representative of the estate of Teri
Powell,

Plaintiff,

vs.

CUNA MUTUAL INSURANCE
SOCIETY,

Defendant.

CIV. 06-5061-KES  CLERK

**FINAL
INSTRUCTIONS
TO THE JURY**

TABLE OF CONTENTS

FINAL INSTRUCTION

NO. 1 – INTRODUCTION AND DEFINITIONS	1
NO. 2 – BURDEN OF PROOF	2
NO. 3 – IMPEACHMENT	3
NO. 4 – CORPORATION AS PARTY	4
NO. 5 – CORPORATE EMPLOYEES	5
NO. 6 – AGENCY	6
NO. 7 – BAD FAITH - DUTY OF PARTIES	7
NO. 8 – BAD FAITH - ELEMENTS	8
NO. 9 – INSURANCE POLICY	10
NO. 10 – COMPENSATORY DAMAGES	12
NO. 11 – PUNITIVE DAMAGES	13
NO. 12 – DUTIES DURING DELIBERATIONS	16

VERDICT FORM

FINAL INSTRUCTION NO. 1 – INTRODUCTION AND DEFINITIONS

Members of the jury, the instructions I gave at the beginning of the trial and during the trial remain in effect. I now give you some additional instructions.

You must, of course, continue to follow the instructions I gave you earlier, as well as those I give you now. You must not single out some instructions and ignore others, because all are important. This is true even though some of those I gave you at the beginning of and during the trial are not repeated here.

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

Neither in these instructions nor in any ruling, action or remark that I have made during the course of this trial have I intended to give any opinion or suggestion as to what your verdict should be.

FINAL INSTRUCTION NO. 2 – BURDEN OF PROOF

In civil actions, the party who has the burden of proving an issue must prove that issue by greater convincing force of the evidence.

Greater convincing force means that after weighing the evidence on both sides there is enough evidence to convince you that something is more likely true than not true. In the event that the evidence is evenly balanced so that you are unable to say that the evidence on either side of an issue has the greater convincing force, 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 greater convincing force of the evidence, you should consider all of the evidence bearing upon that issue, regardless of who produced it.

FINAL INSTRUCTION NO. 3 – IMPEACHMENT

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 said, or only part of it, or none of it.

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

The credibility of a witness may be attacked by introducing evidence that on some former occasion the witness made a statement on a matter of fact or acted in a manner inconsistent with his or her testimony in this case or on a matter material to the issues. Evidence of this kind may be considered by you in connection with all the other facts and circumstances in evidence in deciding the weight to be given to the testimony of that witness.

If you believe that any witness testifying in this case has knowingly sworn falsely to any material matter in this case, then you may reject all of the testimony of the witness.

FINAL INSTRUCTION NO. 4 – CORPORATION AS PARTY

The fact that one of the parties to this action is a corporation is immaterial. In the eyes of the law, the corporation is an individual party to the lawsuit, and all parties are entitled to the same impartial treatment.

FINAL INSTRUCTION NO. 5 – CORPORATE EMPLOYEES

A corporation can act only through its officers, employees, and agents. Any act or omission of an officer, employee, or agent within the scope of his or her employment is the act or omission of the corporation for which he or she was then acting.

FINAL INSTRUCTION NO. 6 – AGENCY

Defendant's lawyers were agents of defendant at all relevant times. Therefore, any act or omission of defendant's lawyers is the act or omission of defendant.

Powell's lawyers were the agents of Powell at all relevant times. Therefore, any act or omission of Powell's lawyers is the act or omission of Powell.

FINAL INSTRUCTION NO. 7 - BAD FAITH - DUTY OF PARTIES

Every insurance contract includes the duty of good faith and fair dealing. This duty means that neither party will do anything to injure the rights of the other in receiving the benefits of the agreement. The breach of that duty is called bad faith.

FINAL INSTRUCTION NO. 8 – BAD FAITH - ELEMENTS

To establish that defendant is liable for bad faith, plaintiff must prove each of the following three elements by the greater convincing force of the evidence:

One, defendant did not have a reasonable basis for denying or delaying Powell's policy benefits;

Two, defendant either knew it did not have a reasonable basis or acted recklessly in determining whether it had a reasonable basis for denying or delaying Powell's policy benefits; and

If you find by a greater convincing force of evidence that defendant recklessly denied or delayed Powell's policy benefits then you may find that defendant knew that it had no reasonable basis to deny or delay Powell's policy benefits.

However, defendant may challenge claims which are fairly debatable and can be held liable only where it had knowledge or recklessly denied or delayed Powell's policy benefits without a reasonable basis.

Three, defendant's actions caused Powell to suffer loss or harm.

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.

A legal cause does not need to be the only cause of a result. A legal cause can act in combination with other causes to produce a result.

It is your job to determine whether defendant's actions were in bad faith. An action for bad faith arises from the claims practices of insurance companies, their adjustors, and their legal department, and does not involve the independent conduct of privately retained attorneys who represent an insurance company regarding the attorneys' handling of the litigation. Your

determination of whether defendant acted in bad faith must be based upon the facts and law available to defendant at the time defendant denied or delayed Powell's policy benefits.

If you find that each of the three elements has been proved by the greater convincing force of the evidence, your verdict must be for plaintiff. If, on the other hand, any of these elements has not been proved by the greater convincing force of the evidence, then your verdict must be for defendant.

FINAL INSTRUCTION NO. 9 – INSURANCE POLICY

To determine whether defendant had a reasonable basis to deny or delay payment of Powell's credit disability benefits, you need to know how the court has construed certain provisions of the insurance policy and the law available to defendant when Powell's claim was processed.

Total Disability

Under South Dakota law, the term "total disability" under the "any occupation" provision of the insurance policy does not mean absolute helplessness or entire physical disability rendering the insured unable to perform any work, but rather means the insured is unable to perform the substantial and material acts of any occupation, which the insured is reasonably qualified by education, training, or experience, in the usual and customary way. Further, the ability of the insured to perform some of the duties of any occupation is not sufficient to preclude payments of benefits under the policy.

Furthermore, under South Dakota law, an insured's income is a factor that is to be considered in determining whether he or she was totally disabled under the insurance policy.

Notice Requirements

The court has construed this policy provision to be unambiguous and to require an insured to file his or her claim for disability benefits no later than 90 days after his or her total disability stopped. An insured has until one year from the time the claim should have been filed, which is 90 days after the insured's total disability stopped, to file a claim.

Defendant claims there was controversy as to whether it was clear. Under South Dakota law, where a provision of an insurance policy is fairly susceptible to different interpretations, the interpretation most favorable to the insured should be adopted. You must read the insurance policy as a whole

and not read words or sentences out of context. If the insurance policy contains a specific definition, you must give that term its defined meaning in light of the court's other instructions.

Under South Dakota law, the notice requirements in the insurance policy should not be strictly enforced unless the delay in notification has prejudiced the insurer's ability to defend a claim.

FINAL INSTRUCTION NO. 10 – COMPENSATORY DAMAGES

If you decide for plaintiff on the question of liability on her claim for bad faith, you must then fix the amount of money which will reasonably and fairly compensate Powell's estate for any of the following elements of loss or harm proved by the evidence to have been legally caused by defendant's conduct, whether such loss or harm could have been anticipated or not, namely:

- (1) Any out-of-pocket expenses she incurred, including reasonable attorney fees and costs; and
- (2) Any other harm she experienced as a result of defendant's conduct, including mental and emotional harm.

Whether any of these elements of damages have been proved by the evidence is for you to determine. Your verdict must be based on evidence and not upon speculation, guesswork, or conjecture.

FINAL INSTRUCTION NO. 11 – PUNITIVE DAMAGES

In addition to any actual damages that you may award to plaintiff, you may also, in your discretion, award punitive damages if you find that Powell suffered injury to person or property as a result of the oppression, fraud, malice, intentional misconduct, or willful and wanton misconduct of defendant. Plaintiff has the burden of proof on the issue of punitive damages. The purpose of awarding punitive damages is to set an example and to punish the defendant.

“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 thereto:

- (1) The suggestion as a fact of that 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 that 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, evidenced by the positive desire and intention to injure another, actuated 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 find that punitive damages should be awarded, then in determining the amount, you should consider the following five factors:

(1) The intent of the defendant.

In considering the 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 tortious conduct evinced an 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 accident.

(2) The amount awarded in actual damages.

In considering this factor, you should consider:

- (a) whether the plaintiff has been completely compensated for the economic harm caused by the defendant;
- (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 the 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 have resulted if similar future behavior were not deterred.

The amount of punitive damages must bear a reasonable

relationship to the actual 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 has been received of defendant's conduct occurring outside of South Dakota. This evidence may be considered only in determining whether defendant's 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 plaintiff, and demonstrates a deliberateness or culpability by the defendant in the conduct upon which you have based your finding of liability. Further, acts or conduct wherever occurring, that are not similar to the conduct upon which you found liability cannot be a basis for finding reprehensibility. You must not use evidence of out-of-state conduct to punish the defendant for action that was lawful in the jurisdiction where it occurred.

If you find that defendant had a practice of engaging in wrongful conduct similar to that which injured Powell, 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 Powell.

FINAL INSTRUCTION NO. 12 – DUTIES DURING DELIBERATIONS

In conducting 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 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 an 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 marshal or court security officer, 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 not tell anyone—including me—how your votes stand numerically.**

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

Finally, the verdict form is simply the written notice of the decision that

you reach in this case. You will take this form to the jury room, and when each of you has agreed on the verdict, your foreperson will fill in the form, sign and date it, and advise the marshal or court security officer that you are ready to return to the courtroom.

Dated June 11, 2009.



KAREN E. SCHREIER
CHIEF JUDGE

UNITED STATES DISTRICT COURT
 DISTRICT OF SOUTH DAKOTA
 WESTERN DIVISION

SHARON McELGUNN, as personal)
 representative of the estate of Teri)
 Powell,)

Civil No. 06-5061-KES

Plaintiff,)

VERDICT FORM

vs.)

CUNA MUTUAL INSURANCE)
 SOCIETY,)

Defendant.)

Complete this form by placing a "X" or "√" on the appropriate line and fill in the blanks, if applicable.

(1) BAD FAITH	
1.	On the issue of bad faith against CUNA Mutual Insurance Society, we find in favor of _____ Sharon McElgunn, as personal representative of the estate of Teri Powell _____ CUNA Mutual Insurance Society
	If you answered CUNA Mutual Insurance Society, please sign and date the verdict form.
	If you answered Sharon McElgunn, as personal representative of the estate of Teri Powell, please proceed to question 2.

(2) COMPENSATORY DAMAGES		
2.	<p>If you found in favor of Sharon McElgunn, as personal representative of the estate of Teri Powell on the issue of bad faith, determine the amount of compensatory damages to which she is entitled.</p>	<p>\$ _____ amount of damages</p>
	<p>If you did not award Sharon McElgunn, as personal representative of the estate of Teri Powell any compensatory damages, please sign and date the verdict form.</p>	
	<p>If you awarded Sharon McElgunn, as personal representative of the estate of Teri Powell compensatory damages, please proceed to question 3.</p>	

(3) PUNITIVE DAMAGES		
3.	<p>If you found in favor of Sharon McElgunn, as personal representative of the estate of Teri Powell on the issue of punitive damages, determine the amount of punitive damages against CUNA Mutual Insurance Society.</p>	<p>\$ _____ amount of damages</p>

Please sign and date the verdict form.

Dated this ____ day of June, 2009.

Foreperson