

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
SOUTHERN DIVISION

**FILED**  
MAY 22 2009  
*[Signature]*  
CLERK

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MELISSA VOSS,

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CIV. 07-4143

Plaintiff,

JURY  
INSTRUCTIONS

vs.

STATE FARM FIRE AND CASUALTY  
COMPANY,

Defendant.

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INSTRUCTION NO. 1

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 trial are not repeated here.

The instructions I am about to give you now 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 earlier instructions. Again, all instructions, whenever given and whether in writing or not, must be followed.

INSTRUCTION NO. 2

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.

INSTRUCTION NO. 3

As I stated earlier, it is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in this case. "Evidence" includes the testimony of witnesses, documents and other things received as exhibits, any facts that are stipulated – that is, formally agreed to by the parties, and any facts that are judicially noticed – that is, facts which I say you may, but are not required to, accept as true, even without evidence.

Certain things are not evidence. I will list those things for you now:

1. Statements, arguments, questions and comments by lawyers representing the parties in the case are not evidence.
2. 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.
3. Testimony that I have stricken from the record, or have told you to disregard, is not evidence and must not be considered.
4. Anything you have seen or heard about this case outside the courtroom is not evidence, unless I specifically told you otherwise during the trial.

A particular item of evidence is sometimes received for a limited purpose only. That is, it can be used by you for only one particular purpose, and not for any other purpose. When this occurred during the trial, I instructed you on the purposes for which the item can and cannot be used.

INSTRUCTION NO. 3, continued

Finally, some of you may have heard the terms “direct evidence” and “circumstantial evidence.” You are instructed that 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.

INSTRUCTION NO. 4

If any reference by the Court or by counsel to matters of testimony or exhibits does not coincide with your own recollection of that evidence, it is your recollection which should control during your deliberations and not the statements of the Court or of counsel.

You are the sole judges of the evidence received in this case.

INSTRUCTION NO. 5

If you took notes during the trial, your notes should be used only as memory aids. You should not give your notes precedence over your independent recollection of the evidence. If you did not take notes, you should rely on your own independent recollection of the proceedings and you should not be influenced by the notes of other jurors. I emphasize that notes are not entitled to any greater weight than the recollection or impression of each juror as to what the testimony may have been.

INSTRUCTION NO. 6

During the trial I instructed you that certain evidence may only be considered for limited purposes. Although I will not repeat those instructions here, I will tell you that those limitations remain in effect unless I have instructed you otherwise. You may consider that evidence in your deliberations only for the purposes for which it was admitted. It may not be considered for any other purposes.



INSTRUCTION NO. 7

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.

INSTRUCTION NO. 8

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

INSTRUCTION NO. 9

The defendant is a corporation and can act only through its officers and employees. Any act or omission of an officer or employee within the scope of his employment is the act or omission of the corporation for which he was then acting.

INSTRUCTION NO. 10

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 to believe, you may 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 any 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 or lapse of memory or an intentional falsehood, and that may depend on whether it has to do with an important fact or only a small detail.

INSTRUCTION NO. 11

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 such 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 such witness's other testimony and you may reject all the testimony of that witness or give it such credibility as you may think it deserves.

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

INSTRUCTION NO. 12

The credibility of a witness may be attacked by introducing evidence that the witness has been convicted of a crime. You may consider evidence of this kind in connection with all the other evidence presented in deciding the weight to be given to the testimony of that witness.

INSTRUCTION NO. 13

A witness may qualify as an expert and give an opinion on a matter at issue if the witness has special knowledge, skill, experience, training, or education in a particular science, profession, or occupation. In deciding the weight to give to the opinion, you should consider the expert's qualifications and credibility and the reasons for the opinion. You should consider each expert opinion received in evidence in this case, and give it such weight as you think it deserves. You are not bound by the opinion; therefore, if you should decide that the opinion of an expert witness is not based on sufficient education and experience, or if you should conclude that the reasons for the opinion are unsound, or that other evidence outweighs the opinion, you may disregard the opinion entirely.

INSTRUCTION NO. 14

In this case it is not disputed that Plaintiff Melissa Voss was issued a valid renter's insurance policy from Defendant State Farm Fire and Casualty Company. It is also not disputed that this policy or insurance contract was in effect on August 28, 2006, the date in which a fire took place at the residence where Plaintiff was residing as a renter and that loss from fire was covered under the insurance contract. Defendant State Farm contends that Plaintiff's claimed loss is not covered by the renter's insurance policy because of the Concealment or Fraud exclusion of the insurance contract. This exclusion states: "This policy is void as to you and any other insured, if you or any other insured under this policy has intentionally concealed or misrepresented any material fact or circumstance relating to this insurance, whether before or after a loss." Plaintiff denies that she the intentionally concealed or misrepresented any material fact or circumstance so as to bar her claim under the Concealment or Fraud exclusion. Defendant State Farm Fire, as the insurer, has the burden of proof with regard to whether the Concealment or Fraud exclusion bars Plaintiff's claim based on the evidence presented. If you should find that State Farm has not met its burden of proving its defense under the Concealment or Fraud Exclusion of the insurance policy, Plaintiff then has the burden of proving the amount and value of the property burned and covered under the policy. Even if it is found that the Concealment or Fraud exclusion does not apply to Plaintiff's claim, Defendant State Farm denies the amount and value of the losses Plaintiff is claiming.



INSTRUCTION NO. 15

To prevail on its defense under the Concealment or Fraud Exclusion of the insurance contract, State Farm has the burden to show by clear and convincing evidence that Plaintiff, in filing her claim or proof of loss, willfully misrepresented a material fact or circumstance relating to her loss and that she did so with the intent to deceive State Farm.

INSTRUCTION NO. 16

Clear and convincing evidence is more than the greater weight of the evidence but need not be beyond a reasonable doubt. It is that measure or degree of proof which will produce in your mind a firm belief or conviction as to the allegation sought to be established. It is evidence that is so clear, direct, weighty, and convincing that it allows you to reach a clear conviction of the precise facts at issue, without hesitancy as to their truth. Evidence need not be voluminous or undisputed to accomplish this.

INSTRUCTION NO. 17

If you should find that State Farm has not met its burden of proving by clear and convincing evidence its defense under the Concealment or Fraud Exclusion of the insurance policy, then Plaintiff has the burden of establishing by the greater weight of evidence the prior existence and value of the claimed property, and if proven, then Plaintiff is entitled to payment under the terms of the renter's insurance policy. Under that policy, coverage for personal property loss is the cost to replace the property, less depreciation, unless the personal property is of a nature that coverage for it is market value. Personal property with coverage as market value includes antiques, fine arts, paintings, statuary and similar articles which by their nature cannot be replaced with new articles, and articles whose age or history contribute substantially to their value including, but not limited to memorabilia, souvenirs and collectors items. No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and their origin.

If you find that Plaintiff has prevailed on her claim of breach of the insurance contract, Plaintiff then has the burden of proving by the greater weight of the evidence the existence and value of the property covered under the insurance policy. To prove something by the greater weight 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 that Plaintiff has the burden to prove, the evidence is equally balanced, you cannot find that issue has been proved.

INSTRUCTION NO. 18

Any party that is entitled to recover damages is entitled to recover interest thereon from the day that the loss or damage occurred except: 1. During a period of time, the party liable for the damages was prevented by law, or an act of the party entitled to recover the damages from paying the damages, or 2. Interest is not recoverable on damages which will occur in the future. You must decide: 1. the amount of damages (if any), and 2. the amount of damages which are subject to prejudgment interest (if any), and 3. the date or dates on which the damages occurred. If you return a verdict for the plaintiff, you must indicate on the verdict form whether you find plaintiff is entitled to prejudgment interest, and if so, the amount of damages upon which interest is granted and the beginning date of such interest. Based upon your findings, the Court will calculate the amount of interest, if any, the plaintiff is entitled to recover.

INSTRUCTION NO. 19

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 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 marshal or bailiff, 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

INSTRUCTION NO. 19, continued.

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 bailiff that you are ready to return to the courtroom.