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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

 *
 ANDREA G. BJORNESTAD * CIV 08-4105
 *
 Plaintiff, *
 *
 -vs- * JURY INSTRUCTIONS
 *
 PROGRESSIVE NORTHERN *
 INSURANCE COMPANY, *
 *
 Defendant. *
 *

LADIES AND GENTLEMEN OF THE JURY:

1

Now that you have heard all of the evidence, it becomes my duty to give you the instructions of the court concerning the law applicable to this case. After I have completed these instructions, counsel will have an opportunity to give closing arguments.

It is your duty as jurors to follow the law as I shall state it to you, and to apply that law to the facts as you find them from the evidence in the case.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

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JURORS TO BE FAIR AND IMPARTIAL

In deciding the facts of this case you must not be swayed by bias or prejudice or favor as to any party.

Our system of law does not permit jurors to be governed by prejudice or sympathy or public opinion.

Both the parties and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated by the court, and reach a just verdict regardless of the consequences.

This case should be considered and decided by you as an action between persons of equal standing in the community, and holding the same or similar stations in life.

The law is no respecter of persons, and all persons stand equal before the law and are to be dealt with as equals in a court of justice.

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DEFINITION OF EVIDENCE

As stated earlier, it is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in the case.

The term "evidence" includes the sworn testimony of the witnesses and the exhibits admitted in the record.

Remember that any statements, objections or arguments made by the lawyers are not evidence in the case.

The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing, to call your attention to certain facts or inferences that might otherwise escape your notice.

In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case.

So, while you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience.

In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case.

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CREDIBILITY OF WITNESSES

Now, I have said that you must consider all of the evidence.

This does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or "believability" of each witness and the weight to be given to this testimony.

In weighing the testimony of a witness you should consider the witness' relationship to the plaintiff or to the defendant; the witness' interest, if any, in the outcome of the case; the witness' manner of testifying; the witness' opportunity to observe or acquire knowledge concerning the facts about which the witness testified; the witness' candor, fairness and intelligence; and the extent to which the witness has been supported or contradicted by other credible evidence.

You may, in short, accept or reject the testimony of any witness in whole or in part.

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CIRCUMSTANTIAL EVIDENCE

There are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence -- such as the testimony of an eyewitness. The other is indirect or circumstantial evidence -- the proof of a chain of circumstances pointing to the existence or non-existence of certain facts.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that the jury find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

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EXPERT WITNESS

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 and 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 are not bound by the opinion; therefore, if you should conclude the reasons for the opinion are unsound, or that other evidence outweighs the opinions, you may disregard the opinion entirely.

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DEPOSITIONS

During the trial, certain evidence was presented to you by the playing of depositions. This is supported by the oath of the witness so testifying, exactly as if in open court, and should be carefully considered together with all other evidence received.

8

CORPORATION ACTS THROUGH EMPLOYEES

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 or her employment is the act or omission of the corporation for which he or she was then acting.

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FAIR TREATMENT OF PARTIES

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.

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CLAIMS OF THE PARTIES

The plaintiff, Andrea Bjornestad, in her complaint alleges that as a result of an automobile accident caused by the negligence of Nycole Marie Hansen on December 7, 2005, she suffered personal injuries causing her damages in excess of the \$100,000.00. She further alleges that she had an underinsured motorist policy with the defendant, Progressive Northern Insurance Company, and that defendant refused to pay the fair value of her claim under the policy. Plaintiff seeks to recover for breach of the insurance contract.

Plaintiff further alleges the defendant handled her claim for underinsured motorist benefits in bad faith.

The defendant denies that plaintiff is entitled to recover the policy limits of the underinsured motorist coverage, and further denies that it handled plaintiff's claim for such benefits in bad faith.

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CLAIMS NOT EVIDENCE

These claims by the parties form the issues of fact to be determined by you from the evidence received at the trial under the law applicable to the case as stated in these instructions.

In deciding this case, you should not consider testimony which was stricken out or statements of counsel not supported by the evidence or fair inference drawn therefrom. Further, the bringing of this action and the claims of the parties as to liability, non-liability and damages are not evidence and should be given no weight by you as evidence in deciding the case.

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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 this action, the plaintiff has the burden of proving the following issues:

1. That Nycole Marie Hansen negligently injured plaintiff in an automobile accident on December 7, 2005.
2. That plaintiff's damages from the automobile accident with Nycole Marie Hansen exceeded \$25,000 and thus, that Nycole Marie Hansen was an underinsured motorist;
3. If Nycole Marie Hansen was an underinsured motorist, the amount of damages plaintiff is entitled to recover pursuant to her underinsured

motorist benefits;

4. That the defendant acted in bad faith in handling plaintiff's claim for underinsured motorist benefits and the damages legally caused thereby;
5. That the conduct of defendant entitles plaintiff to recover punitive damages and the amount thereof.

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.

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UNDERINSURED MOTORIST CLAIM

The contract benefits of plaintiff's insurance policy with defendant include a total of \$100,000 in underinsured motorist benefits. Underinsured motorist benefits are available when a third party such as Nycole Marie Hansen causes a collision and the third party's insurance is insufficient to cover all the damages suffered by the injured party, in this case the plaintiff.

Plaintiff received \$25,000 under Nycole Marie Hansen's insurance policy and \$5,000 from defendant under the medical expense coverage of the policy. If you find plaintiff's damages, as defined in Instruction 18, are greater than \$30,000, then plaintiff is entitled to recover underinsured motorist benefits from defendant, and you should determine the total amount of such benefits in accordance with Instruction 18.

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LEGAL CAUSE DEFINITION

The term "legal cause" means an immediate cause which, in the natural or probable sequence, produces the injury complained of. For legal cause to exist, the harm suffered must be a foreseeable consequence of the act complained of. In other words, liability cannot be based on mere speculative possibilities or circumstances and conditions, remotely connected to the events leading up to an injury. The defendant's conduct must have such an effect in producing the harm as to lead reasonable people to regard it as a cause of the plaintiff's injury.

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DUTY TO DEAL IN GOOD FAITH

You are instructed that every insurance contract in South Dakota 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.

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BAD FAITH - ELEMENTS

If you find that defendant breached its contract with plaintiff for underinsured motorist benefits, you must then determine whether the breach was in bad faith. 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, delaying, or failing to reasonably investigate plaintiff's claim for underinsured motorist benefits;

Defendant had a duty to conduct a reasonable investigation of plaintiff's claim for underinsured motorist benefits. A failure to reasonably investigate a claim does not constitute a reasonable basis for denying or delaying a claim. You must determine whether defendant satisfied its obligation to reasonably investigate plaintiff's claim for underinsured motorist 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, delaying, or failing to reasonably investigate plaintiff's claim for underinsured motorist benefits; and

Defendant may challenge claims which are fairly debatable and can be held liable only where it had knowledge or recklessly denied, delayed, or failed to investigate the plaintiff's claim without a reasonable basis.

Three, defendant's actions caused plaintiff 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. Your determination of whether defendant acted in bad faith must be based upon the facts and law available to it at the time it made the decision to deny, delay, or failed to reasonably investigate plaintiff's claim for underinsured motorist 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.

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CONDITIONING OFFER - BAD FAITH

Under South Dakota law, it is evidence of bad faith for an insurance company to withhold the payment of benefits to its insured for which its liability is reasonably clear on the condition that its insured either waive other claims under the policy or other claims the insured may have against his insurer.

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DAMAGES - UNDERINSURED MOTORIST BENEFITS

If you decide for the plaintiff on the question of liability on plaintiff's claim for underinsured motorist benefits you must then fix the amount of money which will reasonably and fairly compensate the plaintiff for any of the following elements of loss or harm suffered in person or property proved by the evidence to have been legally caused by the negligence of Nycole Marie Hansen, whether such loss or harm could have been anticipated or not, namely:

1. The nature, extent, and duration of plaintiff's injury;
2. Disability;
3. Pain and suffering experienced in the past and reasonably certain to be experienced in the future as a result of the injury;
4. The reasonable value of necessary medical care, treatment, and services received to date less the amount of \$5,000 previously paid by the defendant, and services reasonably certain to be received in the future;
5. The earnings the plaintiff has lost, if any, from any source from the date of the injury until the date of trial; and

6. Such sum as will reasonably compensate plaintiff for whatever loss of earning capacity you find that the plaintiff has suffered as a result of the injury. In determining the plaintiff's loss of earning capacity, you may consider such factors as the nature and extent of the injury, the plaintiff's age, life expectancy, talents, skill, experience, training, education, and industry.

Whether any of these elements or 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.

Plaintiff has received compensation for the above damages in the amount of \$25,000 under Nycole Marie Hansen's insurance policy and \$5,000 from defendant. If you find plaintiff's damages under this instruction exceed \$30,000, you must fix the amount of additional damages, not to exceed \$75,000, which plaintiff is entitled to recover from defendant for underinsured motorist benefits.

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DAMAGES - BAD FAITH

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

1. Any economic damages suffered by plaintiff as a result of defendant's bad faith conduct, excluding any damages plaintiff is entitled to recover under Instruction 18; and
2. Mental anguish or suffering experienced by plaintiff as a result of defendant's bad faith conduct.

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.

PUNITIVE DAMAGES

In addition to any actual damages that you may award to the plaintiff, you may also, in your discretion, award punitive damages if you find that the plaintiff suffered injury to person or property through the oppression, fraud, malice, intentional misconduct, or willful and wanton misconduct of the defendant. The 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 defendant's intent, you should examine the degree of reprehensibility of its 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 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) Defendant's financial condition.
- (5) All of the circumstances concerning 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.

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PREJUDGMENT INTEREST

Any person who 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 person liable for the damages was prevented by law, or an act of the person entitled to recover the damages from paying the damages, or
- (2) Interest is not recoverable on damages which will occur in the future, punitive damages, or intangible damages such as pain and suffering, emotional distress, loss of consortium, injury to credit, reputation or financial standing, loss of enjoyment of life, or loss of society and companionship.

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 the plaintiff is entitled to recover.

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JURORS DUTY

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to individual judgment.

Each of you must decide the case for yourself, but only after an impartial consideration of all the evidence in the case with your fellow jurors.

In the course of your deliberations, do not hesitate to re-examine your own views, and change your opinion, if convinced it is erroneous.

But do not surrender your honest conviction as to the weight or effect of the evidence, solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

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UNANIMOUS VERDICT

When you have retired to your jury room, you will select one of your number as foreperson.

You will take the verdict form to the jury room and when you have reached unanimous agreement as to your verdict, you will have your foreperson fill it in, date and sign the verdict form, and then return to the courtroom.

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COMMUNICATION WITH COURT

If, during your deliberations, you should desire to communicate with the court, please reduce your message or question to writing signed by the foreperson, and pass the note to the marshal who will bring it to my attention.

I caution you, however, with regard to any message or question you might send, that you should never state or specify your numerical division at the time.

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FINAL CAUTION

Of course, the fact that I have given you instructions concerning the issue of damages should not be interpreted in any way as an indication that I believe this is a case where an award of damages is appropriate.

The damage instructions have been given so that you may have complete instructions of law.

It is proper to add a final caution.

Nothing that I have said in these instructions -- and nothing that I have said or done during the trial -- has been said or done to suggest to you what I think your verdict should be.

What the verdict shall be is your exclusive duty and responsibility.