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CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

ANDREW J. ABERLE,

Plaintiff,

vs.

POLARIS INDUSTRIES, INC.,

Defendant.

CIV. 06-5057-KES

FINAL INSTRUCTIONS TO THE JURY

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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 these instructions you are told that your verdict depends on whether you find certain facts have been proved. The burden of proving a fact is upon the party whose claim or defense depends upon that fact. The party who has the burden of proving a fact must prove it by the greater weight of the evidence. 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 in the case, the evidence is equally balanced, you cannot find that issue has been proved.

The greater weight of the evidence is not necessarily determined by the greater number of witnesses or exhibits a party has presented.

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 – FAILURE TO INTRODUCE WITNESS

If a party has the power to produce a witness but fails to do so, you may infer that the testimony of that witness would not have been favorable to that party. This rule applies only if you find the following facts:

(1) The party, with exercise of reasonable diligence, could have produced the witness;

(2) A reasonable person in the same circumstances would have produced the witness if the party believed the testimony of the witness would be favorable;

(3) No reasonable excuse exists for the failure of the party to produce the witness; and

(4) The witness was not equally available to the adverse party.

FINAL INSTRUCTION NO. 5 – CORPORATION AS PARTY

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

FINAL INSTRUCTION NO. 6 – STRICT LIABILITY FOR DESIGN DEFECT

Aberle alleges that Polaris is liable because Polaris defectively designed the Polaris 2001 Magnum 500, 4x4 ATV in that it cannot safely operate with a spraying unit attached. To establish that Polaris is liable for design defect under strict liability, Aberle must prove the following four elements by the greater weight of the evidence:

***One*, that the Polaris 2001 Magnum 500, 4x4 ATV was in a defective condition which made it unreasonably dangerous to Aberle;**

> A product is in a defective condition and unreasonably dangerous to the user if it is not reasonably fit for the ordinary and reasonably foreseeable purposes for which it was sold or manufactured and expected to be used or if the product could have been designed to prevent a foreseeable harm without significantly hindering its function or increasing its price.

***Two*, that the defect existed at the time it left the control of Polaris;**

***Three*, that the Polaris 2001 Magnum 500, 4x4 ATV was expected to and did reach Aberle without a substantial unforeseeable change in the condition the product was in when it left the control of Polaris;**

> "Substantial unforeseeable change" is explained in Final Instruction No. 9.

***And four*, that the defective condition was a legal cause of the injuries.**

> 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 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.
>
> 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 may act in combination with other causes to produce a result.

If you find that each of the four elements has been proved by the greater weight of the evidence, you should consider whether there was a substantial unforeseeable change to the product as explained in Final Instruction No. 9 and/or whether Aberle misused the product as explained in Final Instruction No. 10. If, on the other hand, any of these elements has not been proved by the greater weight of the evidence, then your verdict must be for Polaris on this claim.

If Aberle proves the elements of this strict liability claim, then Polaris is liable even if it exercised reasonable care in the preparation and sale of the Polaris 2001 Magnum 500, 4x4 ATV.

FINAL INSTRUCTION NO. 7 – STRICT LIABILITY FOR FAILURE TO WARN

Aberle also alleges that Polaris is liable for failure to warn under strict liability. With regard to this claim, the issue is whether Polaris failed to provide an adequate warning of a danger associated with a foreseeable use of the product and whether that failure, if it exists, rendered the product defective and unreasonably dangerous. Polaris cannot defend this claim on the ground that it neither knew nor could have known of the danger, because the law imputes knowledge of the danger, if it exists, to Polaris.

To establish that Polaris is liable for failure to warn under strict liability, Aberle must prove the following six elements by the greater weight of the evidence:

***One*, that a danger existed associated with a foreseeable use of the product;**

***Two*, that an inadequate warning was given regarding the danger;**

***Three*, that as a result of the inadequate warning, the Polaris 2001 Magnum 500, 4x4 ATV was rendered defective and unreasonably dangerous;**

> A product is defective and unreasonably dangerous if it is not reasonably fit for the ordinary and reasonably foreseeable purposes for which it was sold or manufactured and expected to be used or if the product could have been designed to prevent a foreseeable harm without significantly hindering its function or increasing its price.

***Four*, that the defective and unreasonably dangerous condition existed at the time the Polaris 2001 Magnum 500, 4x4 ATV left the control of Polaris;**

***Five*, that the Polaris 2001 Magnum 500, 4x4 ATV was expected to and did reach Aberle without a substantial unforeseeable change in the condition that it was in when it left Polaris' control;**

> "Substantial unforeseeable change" is explained in
> Final Instruction No. 9.

***And six*, that the defective condition was a legal cause of Aberle's injuries.**

> The term "legal cause" was defined in Final Instruction
> No. 6.

If you find that each of the six elements has been proved by the greater weight of the evidence, you should consider whether there was a substantial unforeseeable change to the product as explained in Final Instruction No. 9 and/or whether Aberle misused the product as explained in Final Instruction No. 10. If, on the other hand, any of these elements has not been proved by the greater weight of the evidence, then your verdict must be for Polaris.

If Aberle proves the elements of this strict liability claim, then Polaris is liable even if it exercised reasonable care in the preparation and sale of the Polaris 2001 Magnum 500, 4x4 ATV.

FINAL INSTRUCTION NO. 8 – MANUFACTURER'S COMPLIANCE WITH STATE OF THE ART

In determining whether Polaris' product was defective and unreasonably dangerous, you may consider whether Polaris complied with the generally recognized state of the art existing at the time its product was first sold to any person not engaged in the business of selling the product. However, compliance with such state of the art is not controlling and does not prevent you from finding in favor of Aberle.

FINAL INSTRUCTION NO. 9 – SUBSTANTIAL UNFORESEEABLE CHANGE TO PRODUCT

Polaris claims that it is not liable for design defect under strict liability, failure to warn under strict liability, or negligence because there was a substantial unforeseeable change in the Polaris 2001 Magnum 500, 4x4 ATV.

To establish this defense, Polaris must prove the following two elements by the greater weight of the evidence:

***One*, that there was a substantial unforeseeable change in the Polaris 2001 Magnum 500, 4x4 ATV;**

***And two*, that this change was the cause of the defect in the Polaris 2001 Magnum 500, 4x4 ATV.**

If you find that each of these elements has been proved by the greater weight of the evidence, then Polaris is not liable for design defect under strict liability, failure to warn under strict liability, or negligence, and your verdict must be for Polaris on these claims.

FINAL INSTRUCTION NO. 10 – MISUSE OF PRODUCT

Polaris claims that Aberle misused the Polaris 2001 Magnum 500, 4x4 ATV. If Polaris establishes that Aberle misused this product, then Polaris is not liable for design defect under strict liability, failure to warn under strict liability, or negligence.

To establish that Aberle misused the Polaris 2001 Magnum 500, 4x4 ATV, Polaris must prove the following three elements by the greater weight of the evidence:

***One*, that Aberle's conduct constituted a misuse;**

> "Misuse" means that the user used the product for an unintended purpose or for an intended purpose but in an improper manner.

***Two*, that this misuse was unforeseeable;**

***And three*, that this unforeseeable misuse was a legal cause of the accident.**

> The term "legal cause" was defined in Final Instruction No. 6.

If you find that each of the three elements has been proved by the greater weight of the evidence, then Polaris is not liable for design defect under strict liability, failure to warn under strict liability, or negligence, and your verdict must be for Polaris on these claims.

FINAL INSTRUCTION NO. 11 – CONTRIBUTORY NEGLIGENCE NOT A DEFENSE TO STRICT LIABILITY

The contributory negligence of Aberle, if any, is not a defense to Aberle's strict liability for design defect claim or his strict liability for failure to warn claim.

FINAL INSTRUCTION NO. 12 – NEGLIGENCE

Aberle also claims that Polaris is liable because Polaris acted negligently in designing, failing to test, failing to warn, or failing to instruct with respect to the Polaris 2001 Magnum 500, 4x4 ATV. To establish that Polaris is liable for negligence, Aberle must prove the following two elements by the greater weight of the evidence:

***One*, that Polaris was negligent;**

Negligence is the failure to use reasonable care. It is the doing of something which a reasonable person would not do, or the failure to do something which a reasonable person would do, under facts similar to those shown by the evidence. The law does not say how a reasonable person would act under the facts similar to those shown by the evidence. That is for you to decide.

Each manufacturer of a product has a duty to exercise reasonable care in the design, manufacture, testing, and inspection of its product so that the product may be safely used in a manner reasonably foreseeable to the manufacturer.

A manufacturer of a product has a duty to use ordinary care in the design of its product. This means the manufacturer must design the product so it fairly meets the uses which can reasonably be anticipated.

A manufacturer of a product has a duty to give adequate warning of such known or reasonably anticipated dangers of the product where injury to a user can be reasonably anticipated if an adequate warning is not given for a reasonably foreseeable use of the product. There is no duty to warn when the danger or potentiality of danger is obvious or is actually known to the injured person.

A manufacturer of a product has a duty to give adequate instructions as to the use of the product

where injury to the user can be reasonably anticipated if adequate instruction is not given for a reasonably foreseeable use of the product.

A failure to fulfill any of these duties is negligence.

The mere fact that an accident happened and a party sustained damages because of such accident, in and of itself, does not give rise to any inference that it was caused by negligence of anyone.

***And two*, that the negligence was a legal cause of Aberle's injuries.**

The term "legal cause" was defined in Final Instruction No. 6.

If you find that both of these elements have been proved by the greater weight of the evidence, you should consider whether Aberle was contributorily negligent as explained in Final Instruction No. 14, whether Aberle assumed the risk as explained in Final Instruction No. 15, whether there was a substantial unforeseeable change to the product as explained in Final Instruction No. 9, and/or whether Aberle misused the product as explained in Final Instruction No. 10. If, on the other hand, either of these elements has not been proved by the greater weight of the evidence, then your verdict must be for Polaris on this claim.

FINAL INSTRUCTION NO. 13 – MANUFACTURER'S COMPLIANCE WITH INDUSTRY STANDARDS

In determining whether Polaris was negligent, you may consider whether Polaris complied with the standards and customs of its own industry and with the generally recognized state of the art existing at the time its product was first sold to any person not engaged in the business of selling the product. However, compliance with such standards, customs, or state of the art is not controlling and does not prevent you from finding in favor of Aberle if you conclude that a reasonable manufacturer in Polaris' position would have taken additional precautions.

FINAL INSTRUCTION NO. 14 – CONTRIBUTORY NEGLIGENCE

Polaris claims that Aberle was contributorily negligent. Contributory negligence is negligence on the part of a plaintiff which, when combined with the negligence of a defendant, contributes as a legal cause in bringing about the injury of the plaintiff.

A plaintiff who is contributorily negligent may still recover damages if that contributory negligence is slight, or less than slight, when compared with the negligence of the defendant.

In determining this issue, you must determine the answer to two questions:

***One*, whether both Aberle and Polaris were negligent;**

***And two*, if both were negligent, whether Aberle's negligence was (a) slight or less than slight, or (b) more than slight in comparison with the combined negligence of Polaris and non-parties C&R Supply, Inc. (C&R Supply), Warne Chemical & Equipment Co. (Warne Chemical), and Den Hartog Industries Inc. d/b/a Ace Roto Mold Manufacturing, Inc. (Den Hartog Industries).**

> The term "slight" means small when compared with the combined negligence of the defendant and non-parties.
>
> In making this determination, you must make a direct comparison between the conduct of Aberle and of Polaris, C&R Supply, Warne Chemical, and Den Hartog Industries.

If you find Aberle's contributory negligence is more than slight when compared with the combined negligence of Polaris, C&R Supply, Warne Chemical, and Den Hartog Industries, then Aberle is not entitled to recover any damages on his negligence claim.

If you find Aberle's contributory negligence is slight, or less than slight, when compared with the combined negligence of Polaris, C&R Supply, Warne Chemical, and Den Hartog Industries, then Aberle is entitled to recover damages.

FINAL INSTRUCTION NO. 15 – ASSUMPTION OF RISK

Polaris claims that it is not liable for negligence because Aberle assumed the risk. If a person assumes the risk of injury or damage, the person is not entitled to any recovery. To support an assumption of the risk defense, Polaris must prove the following three elements by the greater weight of the evidence:

***One*, that Aberle had actual or constructive knowledge of the existence of the specific risk involved;**

> A person has constructive knowledge of a risk if the risk is so plainly observable that anyone of competent faculties could be charged with knowledge of it.

***Two*, that Aberle appreciated the risk's character**;

> A person can be deemed to appreciate a risk if it is a risk that no adult person of average intelligence could deny.

***And* three, that Aberle voluntarily accepted the risk, having had the time, knowledge, and experience to make an intelligent choice.**

If you find that each of the three elements has been proved by the greater weight of the evidence, then Polaris is not liable for negligence, and your verdict must be for Polaris on this claim.

FINAL INSTRUCTION NO. 16 – ASSUMPTION OF RISK AND CONTRIBUTORY NEGLIGENCE COMPARED

While the same conduct on the part of Aberle may amount to both assumption of risk and contributory negligence, the two defenses are distinct. Assumption of the risk involves a voluntary or deliberate decision to encounter a known danger whereas contributory negligence frequently involves the inadvertent failure to notice danger. In addition, contributory negligence must be a legal cause of the injury in order to be a defense, while assumption of the risk need not cause the injury in order to bar recovery.

FINAL INSTRUCTION NO. 17 – DAMAGES

If you decide for Aberle on the question of liability for design defect under strict liability, failure to warn under strict liability, or negligence, you must then fix the amount of money which will reasonably and fairly compensate Aberle for any of the following elements of loss or harm suffered in person and proved by the evidence to have been legally caused by Polaris' conduct, taking into consideration the nature, extent, and duration of the injury, whether such loss or harm could have been anticipated or not, namely:

1. The disability and disfigurement;
2. The pain and suffering, mental anguish, and loss of capacity of the enjoyment of life experienced in the past and reasonably certain to be experienced in the future as a result of the injury; and
3. The reasonable value of necessary medical care, treatment, and services received.

Whether any of these elements of damages has 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. 18 – APPORTIONMENT OF FAULT

If you find that Aberle is entitled to a verdict and damages against Polaris, you must allocate the fault of Polaris and the non-parties C&R Supply, Warne Chemical, and Den Hartog Industries. To do this, you must determine the respective percentages of fault of Polaris, C&R Supply, Warne Chemical, and Den Hartog Industries. The total of these percentages must add up to 100 percent. In making this determination, you shall consider both the nature of the conduct of each person at fault and the extent of the causal relation between the conduct and the damages suffered.

While you must allocate the fault of Polaris, C&R Supply, Warne Chemical, and Den Hartog, you may not allocate the amount of damages among these entities. You must return a verdict in one single sum against Polaris.

FINAL INSTRUCTION NO. 19 – 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.

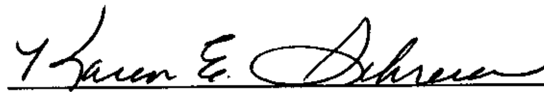
Do not be afraid to change your opinions if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right, or simply to reach a verdict. Remember at all times that you are not partisans. You are judges—judges of the facts. Your sole interest 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 May 5, 2009.



KAREN E. SCHREIER
CHIEF JUDGE