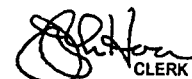


FILED

MAR 31 2016


CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

DEBBIE PLUCKER,
Plaintiff,

vs.

UNITED FIRE & CASUALTY
COMPANY,
Defendant.

CIV. 12-4075-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 civil actions, the party who has the burden of proving an issue must prove that issue by the 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 the greater convincing force of the evidence, you should consider all of the evidence bearing upon that issue, regardless of who produced it.

You have probably heard the phrase “proof beyond a reasonable doubt.” That is a stricter standard than “more likely true than not true.” It applies in criminal cases, but not in this civil case; so put it out of your mind.

FINAL INSTRUCTION NO. 3 – IMPEACHMENT

In Preliminary Instruction No. 3, I instructed you generally on the credibility of witnesses. I now give you this further instruction on how the credibility of a witness can 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 present 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 that 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. 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 – BREACH OF CONTRACT – ELEMENTS

To establish that United Fire is liable on the breach of contract claim, Plucker must prove each of the following three elements by the greater convincing force of the evidence:

One, Plucker and United Fire had an enforceable promise;

Every insurance contract shall be construed according to the terms and conditions set forth in the policy.

Two, United Fire breached that promise;

A breach may be one by non-performance, or by repudiation or both.

And three, Plucker was damaged because of the breach.

If you find that each of the three elements has been proved by the greater convincing force of the evidence, your verdict on the breach of contract claim must be for Plucker. 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 United Fire.

FINAL INSTRUCTION NO. 7 – BREACH OF CONTRACT – DAMAGES

The measure of damages for a breach of contract is the amount which will compensate the aggrieved party for all detriment legally caused by the breach, or which, in the ordinary course of things, would be likely to result from the breach.

Damages for breach of contract that are not clearly ascertainable in both their nature and origin are unrecoverable.

The court, in the verdict form, has reflected the offset to which United Fire is entitled for money it has already paid to Debbie Plucker for her medical expenses.

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, not upon speculation, guesswork, or conjecture.

FINAL INSTRUCTION NO. 8 – 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 duty of good faith and fair dealing begins when the insurance contract is entered into between the parties and continues as long as the contract is in place. The breach of that duty is called bad faith.

FINAL INSTRUCTION NO. 9 – BAD FAITH - ELEMENTS

If you find that United Fire breached its contract with Plucker for payment of medical expenses, you must then determine whether the breach was in bad faith. To establish that United Fire is liable for bad faith, Plucker must prove each of the following three elements by the greater convincing force of the evidence:

One, United Fire did not have a reasonable basis for denying, delaying, or failing to reasonably investigate Plucker's claim for medical payment benefits;

Two, United Fire 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 Plucker's claim for medical payment benefits; and

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

Three, United Fire's actions caused Plucker 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 United Fire's actions were in bad faith. Your determination of whether United Fire 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 Plucker's claim for medical payment 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 Plucker. 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 United Fire.

FINAL INSTRUCTION NO. 9A – MISCELLANEOUS

If a word or phrase in an insurance contract can be interpreted in one or more ways, you must interpret the insurance contract liberally in favor of the policyholder.

The scope of discovery in bad faith claims against a first party insurer is well established. The scope of discovery under Rule 26(b) is extremely broad.

FINAL INSTRUCTION NO. 10 – COMPENSATORY DAMAGES

If you decide for Plucker 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 her for any of the following elements of loss or harm proved by the evidence to have been legally caused by United Fire's conduct, whether such loss or harm could have been anticipated or not, namely:

- (1) Any out-of-pocket expenses Plucker incurred as a result of United Fire's denial, delay, or failure to reasonably investigate Plucker's claim for medical payment benefits, including reasonable attorney fees and costs; and
- (2) Any other harm Plucker experienced as a result of United Fire's denial, delay, or failure to reasonably investigate Plucker's claim for medical payment benefits, 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 Plucker, you may also, in your discretion, award punitive damages if you find that she suffered injury to person or property as a result of the oppression, fraud, malice, intentional misconduct, or willful and wanton misconduct of United Fire. Plucker 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 United Fire.

“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 United Fire.

In considering United Fire'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 Plucker has been completely compensated for the economic harm caused by United Fire;
- (b) the relationship between the harm or potential harm suffered by Plucker and the punitive damages award;
- (c) the magnitude of the potential harm, if any, that United Fire'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) United Fire's financial condition.

(5) All of the circumstances concerning United Fire'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.

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 March 31, 2016.


KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE

Instruction No. 5

Acts of concealment by a defendant are competent evidence to establish culpability. Such acts, however, are not conclusive or create a legal presumption of culpability. They are merely circumstances to be considered and weighed in connection with the other the evidence in the case.

Source: *Hickory v. United States*, 160 U.S. 408, 416-17, 16 S. Ct. 327, 40 L. Ed. 474 (1896);
Leisinger v. Jacob, 2002 SD 108, ¶ 15, 651 N.W.2d 693;
State v. Martin, 2015 SD 2, ¶ 19, 859 N.W.2d 600

Refused
3/31/16
K. Anderson

Instruction No. 6

If a party fails or refuses to produce evidence under its control, you may infer that the evidence would not have been favorable to such party. This rule applies only if you find all of the following facts:

- (1) The party, with exercise of reasonable diligence, could have produced such evidence; and
- (2) A reasonably prudent person in the same circumstances would have produced such evidence if the party believed that such evidence would be favorable; and
- (3) No reasonable excuse exists for the failure of such party to produce such evidence; and
- (4) The evidence was not equally available to the adverse party or parties.

Source: S.D. Pattern Jury Instruction 1-30-110;
Torres v. Travelers, Civ. No. 01-5056 (Final Instruction No. 18)

Refused.
3/31/16
K. Schreier

Instruction No. 10

An insurance policy which is fairly susceptible of different interpretations must be interpreted in the manner most favorable to the insured.

Source: *Chord v. Reynolds*, 1999 SD 1, ¶ 14, 587 N.W.2d 729

3/31/16
Refused
K. Ahrens

Instruction No. 15

An insurance company must keep detailed documentation in each claim file in order to permit reconstruction of its activities relative to the claim.

Source: SDCL § 58-3-7.4 (“Detailed documentation shall be contained in each claim file in order to permit reconstruction of the insurer’s activities with relative to each claim;....”)

3/31/16
Refused
K. Schreier

DEFENDANT'S REQUESTED
INSTRUCTION NO. 4 – BREACH OF CONTRACT – CONDITION PRECEDENT

A condition precedent is a contract term and acts as a limitation on the contractual obligations of the parties. A condition precedent is a fact or event which the parties intend must exist or take place before there is a right to performance. Generally, a contract will be unenforceable when it contains a condition precedent that fails to occur.

3/31/16
Refused
K. Schuman

Jennings v. Rapid City Reg'l Hosp., Inc., 2011 S.D. 50, 802 N.W.2d 918; *Weitzel v. Sioux Valley Heart Partners*, 2006 S.D. 45, 714 N.W.2d 884

DEFENDANT'S REQUESTED
INSTRUCTION NO. 6 - BAD FAITH – CONDUCT FRIVOLOUS OR UNFOUNDED

The failure to pay a specified amount of insurance benefits when requested by an insured only qualifies as bad faith when the insurance company's refusal to pay the specified amount is frivolous or unfounded.

3/31/16
Refused
K. Schreier

DEFENDANT'S REQUESTED
INSTRUCTION NO. 7 - BAD FAITH - RIGHT TO INVESTIGATE



An insurance company has a right to investigate an insured's claim, and, in doing so, may request an insured's medical records prior to paying a claim under the insurance policy.

3/31/16
K. Schreier
Refused

Bertelsen v. Allstate Ins. Co., 2011 S.D. 13, 796 N.W.2d 685