

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

GERALD F. BUSHMAKER,
Plaintiff,

v.

09-cv-726-slc

RAPID AMERICAN CORPORATION,
Defendant.

II. POST-TRIAL INSTRUCTIONS: (February 19 draft)

Introduction

Ladies and Gentlemen of the Jury:

Now that you have heard the evidence and the arguments, I will give you the instructions that will govern your deliberations in the jury room. It is my job to decide what rules of law apply to the case and to explain those rules to you. It is your job to follow the rules, even if you disagree with them or don't understand the reasons for them. You must follow all of the rules; you may not follow some and ignore others.

The decision you reach in the jury room must be unanimous. In other words, you must all agree on the answer to each question. Your deliberations will be secret. You will never have to explain your verdict to anyone.

If you have formed any idea that I have an opinion about how this case should be decided, disregard that idea. It is your job, not mine, to decide the facts of this case.

The case will be submitted to you in the form of a special verdict consisting of ____ questions. In answering the questions, you should consider only the evidence that has been received at this trial. Do not concern yourselves with whether your answers will be favorable to one side or another, or with what the final result of this lawsuit may be.

Now I will read the entire verdict form to you. Note that you are to answer certain questions in the verdict only if you answer a preceding question a certain way. Read the italicized explanations between the verdict questions very carefully before you undertake to answer the next question. Do not answer questions needlessly. When you have answered all of the verdict questions that you need to answer, you will go to the End of the Verdict and the presiding juror will sign and date your verdict on behalf of the entire jury. Then you will return to this courtroom to present your verdict.

Selection of Presiding Juror; Communication with the Judge; Verdict

When you go to the jury room to begin considering the evidence in this case you should first select one of the members of the jury to act as your presiding juror. This person will help to guide your discussions in the jury room.

You are free to deliberate in any way you decide or select whomever you like as a presiding juror. However, I am going to provide some general suggestions on the process to help you get started. When thinking about who should be presiding juror, you may want to consider the role that the presiding juror usually plays. He or she serves as the chairperson during the deliberations and has the responsibility of insuring that all jurors who desire to speak have a chance to do so before any vote. The presiding juror should guide the discussion and encourage all jurors to participate.

Once you are in the jury room, if you need to communicate with me, the presiding juror will send a written message to me. However, don't tell me how you stand as to your verdict.

Suggestions for Conducting Deliberations

In order to help you determine the facts, you may want to consider discussing one claim at a time, and use my instructions to the jury as a guide to determine whether there is sufficient evidence to prove all the necessary legal elements for each claim or

defense. I also suggest that any public votes on a verdict be delayed until everyone has had a chance to say what they think without worrying what others on the panel might think of their opinion. I also suggest that you assign separate tasks, such as note taking, time keeping and recording votes to more than one person to help break up the workload during your deliberations. I encourage you at all times to keep an open mind if you ever disagree or come to conclusions that are different from those of your fellow jurors.

Listening carefully and thinking about the other juror's point of view may help you understand that juror's position better or give you a better way to explain why you think your position is correct.

Burden of Proof

Certain questions in the special verdict form ask that you answer the questions “Yes” or “No.” The party who wants you to answer a question “Yes” has the burden of proof as to each such question. This burden is to satisfy you by the greater weight of the credible evidence, to a reasonable certainty, that “Yes” should be your answer to a verdict question.

The “greater weight of the credible evidence” means that the evidence in favor of a “Yes” answer has more convincing power than the evidence opposed to it. Credible evidence means evidence you believe in light of reason and common sense.

“Reasonable certainty” means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof.

Plaintiff's Claims

Plaintiff asserts two different types of claims against defendant: a claim of negligence and a claim of strict liability.

Negligence

A corporation is negligent when it fails to exercise ordinary care. Ordinary care is the care that a reasonable person would use in similar circumstances. A corporation is not using ordinary care and is negligent, if the corporation, without intending to do harm, does something (or fails to do something) that a reasonable person would recognize as creating an unreasonable risk of injury or damage to a person or property.

Contributory Negligence

Every person in all situations has a duty to exercise ordinary care for his or her own safety. This does not mean that a person is required at all hazards to avoid injury; a person must, however, exercise ordinary care to take precautions to avoid injury to himself or herself.

It is the duty of every person to exercise ordinary care to recognize and appreciate all dangers that are open and obvious to him or which should have been recognized and appreciated by a reasonably prudent person under the same or similar circumstances. That the warning of the existence of danger was not seen or was not heard does not free one from negligence. In addition, a person who looks and fails to see, or listens and fails to hear a warning of danger which under like or similar circumstances would have been seen or heard by a reasonably prudent person is as guilty of negligence as a person who did not look or listen at all.

Negligence: Duty of Manufacturer

It is the duty of a manufacturer to exercise ordinary care in the design, construction, and manufacture of its product so as to render the product safe for its intended use and also safe for unintended uses which are reasonably foreseeable.

It is the further duty of the manufacturer, in the exercise of ordinary care, to make

all reasonable and adequate tests and inspections of its product so as to guard against any defective condition that would render such product unsafe when used as it is intended to be used. A manufacturer is charged with the knowledge of its own methods of manufacturing its product and the defects in such methods, if any.

Failure of the manufacturer to perform any such duty constitutes negligence.

Negligence: Duty of Manufacturer to Warn

A manufacturer of a product has a duty to exercise ordinary care to warn of dangers which the manufacturer knows, or should know, are associated with the proper use of the product. This duty exists whether or not the product was properly designed.

“Proper use” means a use which is intended by the manufacturer. In addition, a manufacturer has the duty to warn of dangers inherent in a use not intended by the manufacturer if such unintended use is reasonably foreseeable by the manufacturer.

However, a manufacturer does not have a duty to warn about dangers that are known to the user, or are obvious to or readily discoverable by potential users, or are so commonly known that it can reasonably be assumed that users will be familiar with them. Additionally, the manufacturer does not have to warn about dangers associated with unforeseeable misuses of the product.

Negligence: Duty of Seller Installing Product *(probably not applicable here . . .)*

It is the duty of a person, who, while installing a product, has observed defects in the same, to exercise ordinary care to install such product so as to render such product safe for its intended use, or give the buyer or user thereof notice of the danger involved in the use thereof.

Negligence: Duty of Buyer or Consumer

The user of a product has a duty to use ordinary care for his or her own safety and protection and, to that end, to observe all obvious and patent defects and dangerous conditions, if any, which are open and obvious to him or her if he or she is using reasonable care and caution for his or her own safety and protection.

The danger, however, must not only be obvious but also must be understood by the user of a product. The failure to use a product in accordance with the instructions which are adequate, if you find they were adequate, or the use of such product in an abnormal manner is negligence.

A person is not bound absolutely by law to see every defect or dangerous condition or even to remember the existence of every defect or dangerous condition of which he or she had knowledge. He or she is only required to act as a reasonably prudent person under the same or similar circumstances would act.

A person is not required to anticipate negligent acts or omissions on the part of others and is not guilty of contributory negligence in failing to look out for danger when there is no reason to suspect any such danger.

Product Liability: Contributory Negligence

As stated earlier in these instructions, negligence is the failure to exercise ordinary care.

The user of a product has the duty to exercise ordinary care for his or her own safety and protection. If you find that plaintiff misused the product, used the product knowing it to be defective or unreasonably dangerous, used the product after altering or modifying the product, used the product knowing the product was worn out in such a manner as to render the product unsafe or failed to follow the instructions and warnings as to the use of the product, then you should find plaintiff negligent. If you are not so satisfied, you should find plaintiff not negligent.

Safe-place Statute: Duty of Employer

The immediate employer of a person has a duty under the Wisconsin's "safe-place" law to provide safe employment for its employees. Safe employment is broader in scope than a safe place of employment and may require something more than a safe place to work in the physical sense. It includes a safe place to work, but if the work situation is such, it may also require adequate training in the use of equipment, warnings, signals, or devices to advise employees of, and guard against, hazards of which they may not otherwise be apprised.

Safe-place Statute: Injury to Frequenter: Negligence of Employer or Owner of a Place of Employment

Question (12) on the special verdict form asks whether Consolidated Papers failed to provide Gerald Bushmaker with employment as safe as the nature of his employment would reasonably permit. Wisconsin's "safe-place" law imposes a duty upon Consolidated Papers to maintain the premises upon which plaintiff was injured so as to make them safe. The law requires Consolidated Papers to furnish and use safety devices and safeguards and adopt and use methods and processes reasonably adequate to render the place of employment safe. Violation of this law is negligence.

The term "safe" or "safety," as used in this law, does not mean absolute safety. The term "safe" or "safety," as applied to the premises in this case, means such freedom from danger to the life, health, safety, or welfare of plaintiff as the nature of the premises will reasonably permit.

Consolidated Papers was not required to guarantee plaintiff's safety but rather was required to maintain the premises as safe as the nature of the place would reasonably permit.

In determining whether Consolidated Papers's premises were as free from danger as its nature would permit, you will consider the adequacy of the maintenance of the

premises, bearing in mind the nature of the business and the manner in which the business is customarily conducted.

Safe-place Statute: Definition of Frequenter

The term “frequenter” means and includes every person except a trespasser who may go in or be in a place of employment.

One who goes upon premises owned, occupied, or possessed by another without an invitation, express or implied, extended by the owner, occupant, or possessor, and solely for his or her pleasure, advantage, or purpose is a trespasser and not a frequenter.

The term “express invitation” means a specific invitation to come upon premises. An “implied invitation” is one which may be reasonably assumed from the circumstances which have caused a person to be on the premises of another.

Safe-place Statute: Negligence of Plaintiff Frequenter

Plaintiff had a duty to use ordinary care for his own safety and protection and to observe the immediate surroundings and all other conditions surrounding him, and the dangers, if any, which were open and obvious to him, and to use for his safety all such care and caution as the ordinarily prudent person ordinarily uses under like circumstances.

However, plaintiff is not bound absolutely by law to see every hazard or danger, if any exists, in his pathway, even should they be plainly observable, nor to remember the existence of every condition of which he had knowledge. Plaintiff is only required to act as a reasonably prudent person under the same circumstances would act.

Ordinary care demands that such vigilance be increased where special circumstances exist. The degree of diligence with respect to keeping a proper lookout

on the part of plaintiff varies with the time and place and the conditions which exist and the opportunity to observe things ahead of and about him, and all other circumstances then and there present.

Strict Liability: Duty of Manufacturer to Ultimate User

A manufacturer of a product who sells a defective product that is unreasonably dangerous to the ordinary user or consumer, and which product is expected to and does reach the consumer without substantial change in the condition in which the product is sold, is regarded by law as responsible for harm caused by the product even though the manufacturer has exercised all possible care in the preparation and sale of the product, provided the product was being used for the purpose for which it was designed and intended to be used.

A product is “defective” when it is in a condition not contemplated by the ordinary user or consumer which is unreasonably dangerous to the ordinary user or consumer, and the defect arose out of design, manufacture, or inspection while the article was in the control of the manufacturer.

A defective product is “unreasonably dangerous” to the ordinary user or consumer when it is dangerous to an extent beyond that which would be contemplated by the ordinary user (consumer) possessing the knowledge of the product's characteristics which were common to the community.

A product is not defective if it is safe for normal use.

A manufacturer is not under a duty to manufacture a product which is absolutely free from all possible harm to every individual. It is the duty of the manufacturer not to place upon the market a defective product which is unreasonably dangerous to the ordinary user.

Questions (5) and (10) on the special verdict form ask the same question about two different manufacturers: when the asbestos-containing products to which Gerald

Bushmaker was exposed left the possession of the Philip Carey Manufacturing Company and the A.W. Chesterton Company, were they in such a defective condition so as to be unreasonably dangerous?

Before you can answer either question “yes,” you must be satisfied that: (1) the product was in a defective condition; (2) the defective condition made the product unreasonably dangerous to people; (3) the defective condition of the product existed when the product was under the control of the manufacturer; and (4) the product reached the user without substantial change in the condition in which it was sold.

Strict Liability: Duty of Manufacturer to Warn

A manufacturer of a product must provide warnings concerning any dangerous condition of the product or any danger connected with its proper use of which he or she knows or should know. “Proper use” means a use which is intended by the manufacturer. In addition, a manufacturer has the duty to warn of dangers inherent in a use not intended by the manufacturer, if such unintended use was reasonably foreseeable by the manufacturer.

A manufacturer has a duty to warn only of dangers of which it has actual knowledge or dangers which in the exercise of ordinary care it should have knowledge. A manufacturer or seller has no duty to warn of any danger in the use of its products unless and until the state of medical and scientific knowledge was such that a reasonably prudent manufacturer would have been aware of danger and necessity of giving warning.

A manufacturer does not have a duty to warn about dangers that are known to the user, or are obvious to or readily discoverable by potential users, or are so commonly known that it can reasonably be assumed that users will be familiar with them. Additionally, the manufacturer does not have to warn about dangers associated with unforeseeable misuses of the product.

The failure to give a warning, when required by this instruction, means that the product is “defective” and unreasonably dangerous, even though it is faultlessly made and therefore within the strict liability rule.

Strict Liability: Definition of Business

The term “business” means some particular occupation or employment habitually engaged in for livelihood or gain.

It is not necessary that the manufacturer be engaged solely in the business of selling the product involved herein, provided it is more than an occasional or isolated sale. The term “business” does not apply to an isolate or an occasional sale of a product by one who is not engaged in that activity as a part of his or her business.

Causation

If you find that some party was negligent, or that a product was defective and unreasonably dangerous, then several questions in the special verdict form ask you to decide whether that negligence or defective product was a “cause” of plaintiff Gerald Bushmaker’s cancer. Notice that these questions do not ask about “*the* cause” but rather ask about “*a* cause” of Mr. Bushmaker’s cancer. The reason for this is that there may be more than one cause of an injury. The negligence of one person may cause it, or the combined negligence of two or more people may cause it.

Before you can find that any person’s negligence or a defective product was a cause of the plaintiff’s injury, you must find that that negligence or that defective product was a “substantial factor” in producing the injury. In this context “substantial factor” means that the negligence had a “substantial influence,” that there was a real, actual connection between the negligence and the injury, and that the negligence in question was an operating factor that had a substantial effect in producing the injury. The mere fact that you find that a party was negligent or that a product was defective

does not establish that the negligence or the defect was a cause of the Gerald Bushmaker's cancer. Mr. Bushmaker also must show that the negligence or defect produced or helped produce his cancer.

Causation in Asbestos Cases

In order for an asbestos-containing product to be a cause of a person's injury, the plaintiff must prove that he had significant exposure to or contact with that particular product on a regular basis over a period of time. That is, plaintiff Gerald Bushmaker must prove that he had more than a casual, minimum or incidental contact with an asbestos-containing product.

Mr. Bushmaker may meet his burden by showing that he worked with a particular asbestos-containing product himself, or worked in the limited area or immediate vicinity where other workers were using that product. Simply showing that a particular asbestos-containing product was ordered by an employer where Mr. Bushmaker worked or was used at a particular job site or by a particular supplier is not sufficient to establish that Mr. Bushmaker was exposed to that product, or that this product was a substantial cause of Mr. Bushmaker's cancer. Rather, Gerald Bushmaker must show that the particular asbestos-containing products were in fact used by him or in his immediate presence on a regular basis over a period of time.

[Please Note: if the parties agree that this instruction is an accurate statement of the law in Wisconsin, then the court will give it.]

Comparative Fault:

Question (16) on the special verdict form asks you to assume the total conduct causing Gerald Bushmaker's lung disease to be 100 percent and to identify what percentage, if any, you attribute to the Phillip Carey Manufacturing Company, A.W. Chesterton, Consolidated Papers and Gerald Bushmaker.

If your answers to previous questions on the verdict form require you to answer Question (16), then you will determine how much and to what extent each party, including Gerald Bushmaker, is to blame for causing his injury. You will decide the percentage (a portion of 100%) attributable to each party in causing the injury.

If you are required to answer Question (16), then you must determine the relative fault of Gerald Bushmaker and each company that gave Mr. Bushmaker significant occupational asbestos exposure and caused Mr. Bushmaker to develop lung cancer. In answering this Question(16) you will assign such percentage, that is, some part of 100%, that you find is attributable to each party appearing in the question.

The burden of proof as to what the percentage of each subdivision should be is on the party who is asserting that percentage of causal negligence attributable to the other, and this party must satisfy you by the greater weight of the credible evidence, to a reasonable certainty, what the percentage should be.

III. DAMAGES

General

On the damages question, the party asking for damages, namely Gerald Bushmaker, has the burden of convincing you, by the greater weight of the credible evidence, both that he has been injured or damaged and the amount of the damages.

Mr. Bushmaker need not produce evidence that is as exact as the evidence needed to support findings on other questions in the verdict. Determining damages involves the consideration of many different factors that cannot be measured precisely. In determining the damages, you must base your answer on evidence that reasonably supports your determination of damages under all of the circumstances of the case.

Do not measure damages by what the lawyers ask for in their arguments. Their opinions as to what damages should be awarded should not influence you unless their opinions are supported by the evidence. It is your job to determine the amount of the

damages sustained from the evidence you have seen and heard. Examine that evidence carefully and impartially. Do not add to the damage award or subtract anything from it because of sympathy to one side or because of hostility to one side. Do not make any deductions because of a doubt in your minds about the liability of any of the parties.

Income Taxes

In determining the amount of damages for personal injuries, you must not include in the award, or add to it, any sum to compensate Mr. Bushmaker for state or federal income taxes, since damages received as an award for personal injuries are not subject to income taxes. You will not, of course, subtract from, or exclude from, your award of damages any amount because the plaintiff is not required to pay income taxes.

Past Pain, Suffering and Disability

Subdivision (a) of Question (17) on the special verdict form asks what sum of money will fairly and reasonably compensate Gerald Bushmaker for past pain, suffering, and disability.

Your answer to Question (17)(a) should be the amount of money that will fairly and reasonably compensate Mr. Bushmaker for the pain, suffering, and disability he has suffered from the date of the accident up to this time as a result of the accident.

Pain, suffering and disability includes any physical pain, humiliation, embarrassment, worry and distress which Mr. Bushmaker has suffered in the past. You should consider to what extent his injuries impaired his ability to enjoy the normal activities, pleasures, and benefits of life.

Past Health Care Expenses

Subdivision (b) of Question (17) on the special verdict form asks what sum of money will fairly and reasonably compensate plaintiff for past health care expenses.

You will insert as your answer to Question (17)(b) the sum of the money you find has reasonably and necessarily been incurred from the date of the accident up to this time for the care of the injuries sustained by Mr. Bushmaker as a result of his cancer.

Billing statements (which may include invoices) for health care services that Mr. Bushmaker has received for his treatment have been admitted as evidence.

We will use the following paragraph if no evidence has been received disputing the value, reasonableness, or necessity of health care services provided to plaintiff:

These billing statements establish the value, reasonableness, and necessity of health care services provided to Mr. Bushmaker. You must still determine whether the health care services were provided for injuries sustained by Mr. Bushmaker as a result of his cancer.

We will use the following paragraph if evidence has been received disputing the value, reasonableness, or necessity of health care services provided to plaintiff:

The party challenging the value, reasonableness or necessity of Mr. Bushmaker's past health care services has the burden to prove they were not reasonable in amount or reasonably and necessarily provided to care for Mr. Bushmaker.

Unless you are satisfied by the greater weight of the credible evidence, to a reasonable certainty, that the billing statements were not reasonable in amount or do not reflect health care services reasonably and necessarily provided to care for Mr. Bushmaker, you must find the billing statements reflect the reasonable value of the health care services and that those services were reasonably and necessarily provided to care for Mr. Bushmaker. You must still determine whether the health care services were provided for the injuries sustained by Mr. Bushmaker as a result of exposure to asbestos.

Future Pain, Suffering and Disability

Subdivision (c) of Question (17) on the special verdict form asks what sum of money will fairly and reasonably compensate Gerald Bushmaker for future pain, suffering, and disability.

If you are satisfied that Mr. Bushmaker will endure pain, suffering, and disability in the future as a result of exposure to asbestos, then you will insert as your answer to Question (17)(c) the sum of money you find will fairly and reasonably compensate Mr. Bushmaker for this future pain, suffering, and disability.

Pain, suffering, and disability includes:

- physical pain
- worry
- distress
- embarrassment
- humiliation

In answering this damage question, you should consider the following factors:

- the extent plaintiff's injuries have impaired and will impair his ability to enjoy the normal activities, pleasures, and benefits of life.
- the nature of plaintiff's injuries.
- the effect the injuries are reasonably certain to produce in the future bearing in mind plaintiff's age, prior mental and physical condition, and the probable duration of his life.

Future Health Care Expenses

Subdivision (d) of Question (17) on the special verdict form asks what sum of money will fairly and reasonably compensate Gerald Bushmaker for future health care expenses.

If you are satisfied that Mr. Bushmaker will require health care services in the future for injuries sustained as a result of being exposed to asbestos, you will insert as your answer to Question (17)(d) the sum of money you find will reasonably and necessarily be incurred in the future to care for Mr. Bushmaker.

Severe Emotional Distress

Gerald Bushmaker claims that he suffered severe emotional distress in addition to the physical injuries he sustained as a result of his exposure to asbestos. Subdivision (e) of Question No. (17) on the special verdict form asks what sum of money will fairly and reasonably compensate plaintiff for the severe emotional distress that he suffered.

If you are satisfied that plaintiff suffered severe emotional distress and that his exposure to asbestos was a substantial factor in producing it, you will insert as your answer to Question No. 17(e) the sum of money you find will reasonably and necessarily compensate plaintiff for severe emotional distress. If you are not satisfied, make no allowance for the severe emotional distress and confine your award to fair and reasonable compensation only for any other damages resulting from personal injuries to plaintiff which were caused by his exposure to asbestos.

Life Expectancy and Mortality Tables

In determining future damages as a result of plaintiff's injuries, you may consider the fact that at this time Gerald Bushmaker is ____ years old and has a life expectancy of ____ years.

A mortality table which gives the expectancy of life of a person of Mr. Bushmaker's age was received in evidence as an aid in determining such expectancy. It is not, however, conclusive or binding upon you as to plaintiff's actual or probable expectancy of life. Mortality tables are based upon averages, and there is no certainty that any person will live the average duration of life rather than a longer or shorter

period. To determine the probably length of life of Mr. Bushmaker, you will consider all the facts and circumstances established by the credible evidence bearing upon that subject.

Present Value of Future Loss

In determining the amount of damages for any loss which will be incurred by plaintiff in the future, you must determine the present worth in dollars of the future damages.

A lump sum of money received today may be worth more than the same sum paid in installments over a period of months or years. This is because a sum received today can be invested and earn money at current interest rates. By making a reduction for the earning power of money, your answer will reflect the present value in dollars of an award of future damages.

This instruction which asks you to reduce future damages to present value does not apply to that portion of future damages which represents future pain and suffering.

Effects of Inflation

In computing the amount of future economic damages, you may take into account economic conditions, present and future, and the effects of inflation.