

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
NORTHERN DIVISION

RONALD LOESEL, ARTHUR  
LOESEL, GAYLE LOESEL, ELAINE  
LOESEL, VALERIAN NOWAK,  
VALERIAN NOWAK AND ALICE  
B. NOWAK TRUST BY VALERIAN  
NOWAK,

Plaintiffs,

v.

Case Number 08-11131  
Honorable Thomas L. Ludington

CITY OF FRANKENMUTH,

Defendant.

\_\_\_\_\_ /

**FINAL JURY INSTRUCTIONS**

## **I. GENERAL INSTRUCTIONS**

- (1) Members of the jury, now it is time for me to instruct you about the law that you must follow in deciding this case.
- (2) I will start by explaining your duties and the general rules that apply in every civil case.
- (3) Then I will explain some rules that you must use in evaluating particular testimony and evidence.
- (4) Then I will explain the elements, or parts, of the claim that the Plaintiffs have made against the Defendant.
- (5) And last, I will explain the rules that you must follow during your deliberations in the jury room, and the possible verdicts that you may return.
- (6) Please listen very carefully to everything I say.
- (7) I have given each of you a copy of these instructions for your use while deliberating. They are available to each of you. If you have questions about the law or your duties as jurors, you should consult the copy of the instructions as given to you.

### **Duties of Judge and Jury**

- (1) You have two main duties as jurors. The first one is to decide what the facts are from the evidence that you saw and heard here in court. Deciding what the facts are is your job, not mine, and nothing that I have said or done during this trial was meant to influence your decision about the facts in any way.
- (2) Your second duty is to take the law that I give you, apply it to the facts, and decide if the Plaintiffs have proven their claims against the Defendant by a preponderance of the evidence. It is my job to instruct you about the law, and you are bound by the oath that you took at the beginning of the trial to follow the instructions that I give you, even if you personally disagree with them. This includes the instructions that I gave you before and during the trial, and these instructions. All the instructions are important, and you should consider them together as a whole.
- (3) The parties may talk about the law during their arguments. But if what they say is different from what I say, you must follow what I say. What I say about the law controls.
- (4) Perform these duties fairly and with an open mind. Do not let any bias, sympathy, or prejudice that you may feel toward one side or the other influence your decision in any way.

## **II. EVALUATION OF THE EVIDENCE**

### **Evidence**

- (1) You must make your decision based only on the evidence that you saw and heard here in court. Do not let rumors, suspicions, or anything else that you may have seen or heard outside of court influence your decision in any way.
- (2) The evidence in this case includes only what the witnesses said while they were testifying under oath; the exhibits that I allowed into evidence; and the stipulations that the parties agreed to.
- (3) Nothing else is evidence. The parties' statements and arguments are not evidence. Their questions and objections are not evidence. My legal rulings are not evidence. And my comments and questions are not evidence.
- (4) During the trial I did not let you hear the answers to some of the questions that the parties asked. And sometimes I ordered you to disregard things that you saw or heard, or I struck things from the record. You must completely ignore all of these things. Do not even think about them. Do not speculate about what a witness might have said. These things are not evidence, and you are bound by your oath not to let them influence your decision in any way.
- (5) Make your decision based only on the evidence, as I have defined it here, and nothing else.
- (6) You should use your common sense in weighing the evidence. Consider it in light of your everyday experience with people and events, and give it whatever weight you believe it deserves. If your experience tells you that certain evidence reasonably leads to a conclusion, you are free to reach that conclusion.

### **Inferences**

- (1) You are to consider only the evidence in the case. However, you are not limited to the statements of the witnesses. In other words, you are not limited to what you see and hear as the witnesses testify. You may draw from the facts that you find have been proved such reasonable inferences as seem justified in light of your experience.
- (2) "Inferences" are deductions or conclusions that reason and common sense lead you to draw from facts established by the evidence in this case.

### **Witnesses – Credibility**

- (1) Another part of your job as jurors is to decide how credible or believable each witness was. This is your job, not mine. It is up to you to decide if a witness' testimony was

believable, and how much weight you think it deserves. You are free to believe everything that a witness said, or only part of it, or none of it at all. But you should act reasonably and carefully in making these decisions.

- (2) Let me suggest some things for you to consider in evaluating each witness' testimony.
  - (a) Ask yourself if the witness was able to clearly see or hear the events. Sometimes even an honest witness may not have been able to see or hear what was happening, and may make a mistake.
  - (b) Ask yourself how good the witness' memory seemed to be. Did the witness seem able to accurately remember what happened?
  - (c) Ask yourself if there was anything else that may have interfered with the witness' ability to perceive or remember the events.
  - (d) Ask yourself how the witness acted while testifying. Did the witness appear honest? Or did the witness appear to be lying?
  - (e) Ask yourself if the witness had any relationship to the Plaintiff or the Defendant, or anything to gain or lose from the case, that might influence the witness's testimony. Ask yourself if the witness had any bias, or prejudice, or reason for testifying that might cause the witness to lie or to slant the testimony in favor of one side or the other.
  - (f) Ask yourself if the witness testified inconsistently while on the witness stand, or if the witness said or did something or failed to say or do something at any other time that is inconsistent with what the witness said while testifying. If you believe that the witness was inconsistent, ask yourself if this makes the witness's testimony less believable. Sometimes it may; other times it may not. Consider whether the inconsistency was about something important, or about some unimportant detail. Ask yourself if it seemed like an innocent mistake, or if it seemed deliberate.
  - (g) And ask yourself how believable the witness's testimony was in light of all the other evidence. Was the witness's testimony supported or contradicted by other evidence that you found believable? If you believe that a witness's testimony was contradicted by other evidence, remember that people sometimes forget things, and that even two honest people who witness the same event may not describe it exactly the same way.
- (3) These are only some of the things that you may consider in deciding how believable each witness was. You may also consider other things that you think shed some light on the witness's believability. Use your common sense and your everyday experience in dealing with other people. And then decide what testimony you believe, and how much weight you think it deserves.

### **Prior Inconsistent Statements**

- (1) If you decide that a witness said something earlier that is not consistent with what the witness said in court, you may consider the earlier statement in deciding whether to believe the witness, but you may not consider it as proof of the facts in this case.
- (2) However, there are exceptions. You may consider an earlier statement as proof of the facts in this case if:
  - (a) The statement was made by the Plaintiff, the Defendant, or an agent or employee of either party; or
  - (b) The statement was given under oath subject to the penalty of perjury at a trial, hearing, or in a deposition; or
  - (c) The witness testified during the trial that the earlier statement was true.

### **Deposition Testimony**

- (1) During the trial, certain evidence was presented to you by the reading of depositions. A deposition is a record of the sworn testimony of parties or witnesses taken before an authorized person. All parties and their attorneys had the right to be present and to examine and cross-examine the witnesses.
- (2) This evidence is entitled to the same consideration as you would give the same testimony had the witnesses testified in open court.

### **Weighing Conflicting Evidence – Number of Witnesses**

- (1) Another point about the witnesses. Sometimes jurors wonder if the number of witnesses who testified makes any difference.
- (2) Do not make any decisions based only on the number of witnesses who testified. What is more important is how believable the witnesses were, and how much weight you think their testimony deserves. Concentrate on that, not the numbers.

### **Presentation of Witnesses/Exhibits**

The law does not require any party to call as witnesses all persons who may have been present at any time or place involved in the case, or who may appear to have some knowledge of the matters in issue at this trial. Nor does the law require any party to produce as exhibits all papers and things mentioned in the evidence in the case.

### **Direct and Circumstantial Evidence**

- (1) Now, some of you may have heard the terms “direct evidence” and “circumstantial evidence.”
- (2) Direct evidence is simply evidence like the testimony of an eyewitness which, if you believe it, directly proves a fact. If a witness testified that he saw it raining outside, and you believed him, that would be direct evidence that it was raining.
- (3) Circumstantial evidence is simply a chain of circumstances that indirectly proves a fact. If someone walked into the courtroom wearing a raincoat covered with drops of water and carrying a wet umbrella, that would be circumstantial evidence from which you could conclude that it was raining.
- (4) It is your job to decide how much weight to give the direct and circumstantial evidence. The law makes no distinction between the weight that you should give to either one and does not say that one is any better evidence than the other. You should consider all the evidence, both direct and circumstantial, and give it whatever weight you believe it deserves.

### **Objections**

- (1) There is one more general subject that I want to talk to you about before I begin explaining the elements of the claim that the Plaintiff asserts against the Defendant.
- (2) The attorneys objected to some of the things that were said or done during the trial. Do not hold that against either party. The attorneys have a duty to object whenever they think that something is not permitted by the rules of evidence. Those rules are designed to make sure that both sides receive a fair trial.
- (3) Do not interpret my rulings on their objections as any indication of how I think the case should be decided. My rulings were based on the rules of evidence, not on how I feel about the case. Remember that your decision must be based only on the evidence that you saw and heard here in court.

### **Conclusion to Evaluation of Evidence**

- (1) That concludes the part of my instructions explaining your duties and the general rules that apply in every civil case. In a moment, I will explain the elements of the claims that the Plaintiff asserts against the Defendant.

### **III. SUBSTANTIVE INSTRUCTIONS**

#### **Burden of Proof: Preponderance of the Evidence**

- (1) When I later say that a party has the “burden of proof,” or if I use the expression “if you find” or “if you decide,” I mean the evidence must satisfy you that the proposition on which that party has the burden of proof has been established by evidence which outweighs the evidence against it.
- (2) You must consider all the evidence regardless of which party produced it.
- (3) Similarly, to “establish by the preponderance of the evidence” means to prove that something is more likely true than it is not true. In other words, a preponderance of the evidence in the case means such evidence as, when considered and compared to that opposed to it, has more convincing force, and produces in your mind a belief that what is sought to be proved is more likely true than not true.

#### **Enactment of Zoning Ordinances Generally**

- (1) The Defendant, the City of Frankenmuth, is a Michigan municipal corporation. The City of Frankenmuth is governed by its elected city council and only acts officially when enacting an ordinance by vote of the council.
- (2) City councils may but are not required to explain the purpose or rationale for an ordinance they enact. However, in order to determine whether a particular rationale reasonably provides a basis for an ordinance, you may consider the information reviewed and considered by the City Council, including the City Planning Commission, planning consultants and citizens, and the statements of the council members themselves as they may inform you about the council’s collective decision to enact the ordinance.
- (3) Generally, it is presumed the City Council, in enacting an ordinance, intends to act in a manner consistent with the United States Constitution, but that presumption may be rebutted by a citizen based upon evidence. The presumption of constitutional validity may not be rebutted by mere speculation that is unsupported by evidence. Moreover, the fact that a zoning classification results in some inequality will not automatically make the ordinance unconstitutional.
- (4) A city, provided that it is otherwise acting lawfully, may amend zoning ordinances whenever it chooses to do so. Landowners do not have any vested property interest in the historical zoning classification of their land unless a landowner has a building permit and

has begun substantial construction. In this case, the plaintiffs do not make a claim that they have a vested interest in the historical zoning of the subject property.

- (5) Michigan city councils can consider a wide range of land use, economic, and environmental criteria when choosing to enact an ordinance. They may not, however, act without a rational basis for doing so.
- (6) Finally, municipal corporations are entitled to no different treatment than individual citizens. That is, no more favorably or unfavorably.

### **General Substantive Law**

- (1) The plaintiffs' claim arises under the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution, which prohibits the government from denying "equal protection of the laws." The plaintiffs' claim is brought pursuant to a federal civil rights statute known as "Section 1983," which allows plaintiffs to bring their equal protection claim against the defendant in this Court.
- (2) In this case, the plaintiffs claim that the defendant violated their equal protection rights because it treated their property differently from similarly situated properties by enacting an ordinance that limited the size of retail stores to 65,000 square feet on their land. Indeed, the plaintiffs claim that the defendant applied the ordinance to their land differently than it did to other, similarly situated locations.
- (3) The defendant denies that enactment of the ordinance violated the plaintiffs' constitutional rights and asserts that there is a rational explanation for the ordinance and the properties subject to the ordinance and excepted from the ordinance.

### **Plaintiffs' Equal Protection Claim:**

- (1) To prevail on the equal protection claim, the plaintiffs must prove, by a preponderance of the evidence, that the defendant deprived them of the equal protection of the laws.

The plaintiffs must prove the following two elements:

- (A) that the size limitation ordinance enacted by the defendant treated the plaintiffs' property differently than other similarly situated property within its jurisdiction; and
- (B) that the defendant had no rational explanation for applying the size limitation ordinance to the properties it did, including the plaintiffs' property, but not to other similarly situated properties and geographic areas of the defendant.

The plaintiffs can prove this element by disproving all rational explanations for the difference that might justify the government action, regardless of whether the explanation was articulated at the time the size limitation ordinance was enacted



- (2) If you find that the plaintiffs have proved the two elements in (A) and (B) above, your verdict will be for the plaintiffs on their claim. If you find that the plaintiffs have not proved one or the other of the elements, your verdict will be for the defendant on the plaintiffs' claim.

### **Award of Compensatory Damages**

- (1) If you find in favor of the plaintiffs under the prior instructions, then you must award them such a sum as you find by the preponderance of the evidence will fairly and justly compensate them for actual losses you find they have suffered as a direct result of the defendant's conduct.
- (2) If you find that the plaintiffs have not proved their claim, then you will not consider the question of damages.
- (3) To recover compensatory damages, the plaintiffs must prove that the injury would not have occurred without the defendant's act. The plaintiffs must also prove that the defendant's act played a substantial part in bringing about the injury, and that the injury was a direct result of the defendant's act.
- (4) If you find in favor of the plaintiffs, then they are entitled to damages that will "fairly and justly compensate them," as described above. Such an amount is the value WalMart would have paid the plaintiffs but-for the ordinance, minus the value of the property without the zoning ordinance.

### **IV. CLOSING STATEMENTS**

- (1) Shortly, we will hear the closing arguments of the attorneys. Please pay attention to the arguments, but remember that the closing arguments are not evidence but are only intended to assist you in understanding the evidence and the theory of each party. You must base your decision only on the evidence.
- (2) Let me finish up by repeating something that I said to you earlier. Nothing that I have said or done during this trial was meant to influence your decision in any way. You decide for yourselves if the plaintiffs have proved the claim against the defendant by a preponderance of the evidence.

### **V. DELIBERATIONS AND CONCLUDING INSTRUCTIONS**

#### **Deliberations and Verdict**

- (1) Now let me explain some things about your deliberations in the jury room, and your possible verdicts.

- (2) The first thing that you should do in the jury room is choose someone to be your foreperson. This person will help to guide your discussions and will speak for you here in court.

### **Communications with Other Jurors Only**

- (1) Once you start deliberating, do not talk to the jury officer, or to me, or to anyone else except each other about the case. If you have any questions or messages, you must write them down on a piece of paper, sign and date them, and then give them to the jury officer. The officer will give them to me, and I will respond as soon as I can. I may have to talk to the lawyers about what you have asked, so it may take me some time to get back to you. Any questions or messages normally should be sent to me through your foreperson.
- (2) During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, Blackberry or computer; the internet, any internet service, or any text or instant messaging service; or any internet chat room, blog, or website such as Facebook, My Space, LinkedIn, YouTube, or Twitter, to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict.

### **Communications About Deliberations**

Do not ever write down or tell anyone how you stand on your votes. For example, do not write down or tell anyone that you are split 3-3 or 4-2, or whatever your vote happens to be. That should stay secret until you are finished.

### **Exhibits**

I will send the exhibits into the jury room with you.

### **Decision Based Only on Evidence**

- (1) Remember that you must make your decision based only on the evidence that you saw and heard here in court. Do not try to gather any information about the case on your own while you are deliberating.
- (2) For example, do not conduct any experiments inside or outside the jury room; do not bring any books, like a dictionary, or anything else with you to help you with your deliberations; do not conduct any independent research, reading or investigation about the case; and do not visit any of the places that were mentioned during the trial.
- (3) Make your decision based only on the evidence that you saw and heard here in court.

## **Notes of Trial**

Some of you have taken notes during the trial. Whether or not you took notes, you should not be influenced by the notes of another juror, but you should rely on your own memory of what was said. Notes are only an aid to recollection and are not entitled to any greater weight than actual recollection or the impression of each juror as to what the evidence actually is.

## **Reaching Your Decision**

- (1) Now that all the evidence is in and the arguments are completed, you are free to talk about the case in the jury room. In fact, it is your duty to talk with each other about the evidence, and to make every reasonable effort you can to reach unanimous agreement. Talk with each other, listen carefully and respectfully to each other's views, and keep an open mind as you listen to what your fellow jurors have to say. Try your best to work out your differences. Do not hesitate to change your mind if you are convinced that other jurors are right and that your original position was wrong.
- (2) But do not ever change your mind just because other jurors see things differently, or just to get the case over with. In the end, your vote must be exactly that – your own vote. It is important for you to reach unanimous agreement, but only if you can do so honestly and in good conscience.
- (3) No one will be allowed to hear your discussions in the jury room, and no record will be made of what you say. So you should all feel free to speak your minds.
- (4) Listen carefully to what the other jurors have to say, and then decide for yourself if the plaintiffs have proven the defendant liable by a preponderance of the evidence.

## **Verdict**

- (1) I have prepared an original verdict form that you should use to record your verdict. It will be provided to you in a brown folder. Each of you has been furnished with a copy of the verdict form to aid you in your deliberations. However, when you reach your decision, your foreperson should complete only the official verdict form.
- (2) Follow the instructions on the form and fill in the answers to the questions by having your foreperson mark the appropriate place on the forms.
- (3) When you have completed the form according to the instructions, your foreperson should then sign the form, put the date on it, and return it to me.
- (4) Your verdict for each question on the verdict form must be unanimous.

- (5) To reach a unanimous verdict of yes on any question, every one of you must agree that the party with burden of proof on that question has met their burden of proof by a preponderance of the evidence.
- (6) To return a unanimous verdict of no, every one of you must agree that the party with the burden of proof on that question has not met their burden of proof by a preponderance of the evidence.
- (7) Either way, your verdict must be unanimous.

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CITY OF FRANKENMUTH,

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**Verdict Form**

Please answer the following questions. Your answers must be unanimous.

**(1) Liability**

As to whether the plaintiffs' proved their equal protection claim by a preponderance of the evidence, we, the jury, do unanimously find (mark either (A)(1) or (A)(2)):

- (A) (1) \_\_\_\_\_ that the size limitation ordinance enacted by the defendant treated the plaintiffs' property differently than other similarly situated property within its jurisdiction; or
- (2) \_\_\_\_\_ that the size limitation ordinance enacted by the defendant did not treat the plaintiffs' property differently than other similarly situated property within its jurisdiction.

**If you find that the size limitation did treat the plaintiffs' property differently than similarly situated property, (A)(1), move on to section B. Otherwise, stop here.**

We, the jury, also unanimously find (mark either (B)(1) or (B)(2)):

- (B) (1) \_\_\_\_\_ that the defendant had no rational explanation for applying the size limitation ordinance to the plaintiffs' property but not to other similarly situated properties within its jurisdiction; or
- (2) \_\_\_\_\_ that the defendant had a rational explanation for applying the size limitation ordinance to the plaintiffs' property but not to other similarly situated properties within its jurisdiction.

**Only proceed to damages if you found that the Defendant had no rational explanation for applying the zoning ordinance in the manner that it did, and thereby violated the plaintiffs' equal protection rights ((B)(1)).**

**(2) Damages**

If you found that the zoning ordinance violated the plaintiffs' rights, they are entitled to what they would have received from WalMart—had the ordinance never been enacted—minus the property's value without the zoning ordinance.

Indicate what the plaintiffs would have received from WalMart had the ordinance never been enacted:

\_\_\_\_\_

Indicate your assessment of the value of the property without the zoning ordinance:

\_\_\_\_\_

Subtract the value of the property from what the plaintiffs would have received from WalMart for their total recovery; this value will be the plaintiffs' recovery for the violation of their equal protection rights:

\_\_\_\_\_

\_\_\_\_\_ (print name)

Foreperson

Dated: March \_\_\_\_, 2014