UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT WRIGHT,

Plaintiff,

v.

BEST RECOVERY SERVICES LLC,

Defendant.

_____/

Case No. 14-cv-12476

UNITED STATES DISTRICT COURT JUDGE
GERSHWIN A. DRAIN

UNITED STATES MAGISTRATE JUDGE
DAVID R. GRAND

JURY INSTRUCTIONS

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§ 103.02 Use of Notes

You may use the notes taken by you during the trial. However, the notes should not be substituted for your memory. Remember, notes are not evidence. If your memory should differ from your notes, then you should rely on your memory and not on your notes.

§ 103.12 All Persons Equal Before the Law—Organizations

You should consider and decide this case as a dispute between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. A company such as Defendant Best Recovery Services is entitled to the same fair trial as a private individual. All persons, including companies, and other organizations stand equal before the law, and are to be treated as equals.

§ 102.71 Objections and Rulings

Testimony and exhibits can be admitted into evidence during a trial only if it meets certain criteria or standards. It is the duty of the lawyer on each side of a case to object when the other side offers testimony or an exhibit that the lawyer believes is not properly admissible under the rules of law. Only by offering an objection can a lawyer request and obtain a ruling from me on the admissibility of the evidence being offered by the other side. You should not be influenced against any lawyer or the lawyer's client because the lawyer has made objections.

Do not attempt to interpret my rulings on objections as somehow indicating how I think you should decide this case. I am simply making a ruling on a legal question.

§ 101.41 Burden of Proof

When a party has the burden to prove any matter by a preponderance of the evidence, it means that you must be persuaded by the testimony and exhibits that the matter sought to be proved is more probably true than not true. You should base your decision on all of the evidence, regardless of which party presented it.

§ 104.01 Preponderance of the Evidence

Plaintiff Robert Wright has the burden in a civil action, such as this, to prove every essential element of his claim by a preponderance of the evidence. If he should fail to establish any essential element of his claim by a preponderance of the evidence, you should find for Defendant Best Recovery Services, LLC as to that claim.

The defendant has the burden of establishing the essential elements of certain affirmative defenses. I will explain this later.

"Establish by a preponderance of the evidence" means to prove that something is more likely so than not so. In other words, a preponderance of the evidence means such evidence as, when considered and compared with the evidence opposed to it, has more convincing force, and produces in your minds belief that what is sought to be proved is more likely true than not true. This standard does not require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.

In determining whether any fact in issue has been proved by a preponderance of the evidence you may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.

You may have heard of the term "proof beyond a reasonable doubt." That is a stricter standard that applies in criminal cases. It does not apply in civil cases such as this. You should, therefore, put it out of your minds.

§ 104.04 "If You Find" or "If You Decide"

When I instruct you that a party has the burden of proof on any proposition, or use the expression "if you find," or "if you decide," I mean that you must be persuaded, considering all the evidence in the case that the proposition is more probably true than not.

§ 101.47 Stipulations at Pretrial Conference

Before the trial of this case, the court held a conference with the lawyers for all the parties. At this conference, the parties entered into certain stipulations or agreements in which they agreed that facts could be taken as true without further proof.

The stipulated facts are as follows:

A. Plaintiff is a natural person residing in the State of Michigan. He is a "consumer" as defined by the FDCPA, 15 U.S.C. § 1692a(3).

B. Defendant Best Recovery Services LLC is a corporation domiciled in the State of Michigan and doing business in Oakland County, Michigan.

C. Best Recovery is the company that attempted to repossess Plaintiff's car. Best Recovery is responsible for the business actions of its authorized agents.

D. Defendant Best Recovery Services LLC is a "debt collector" as that term is defined by the FDCPA, 15 U.S.C. § 1692a(6).

E. James McClean was hired by the Defendant Best Recovery Services LLC on June 25, 2013.

F. At all times relevant, James McLean acted as the agent for Best Recovery Services LLC.

G. The Defendant Best Recovery Services LLC was hired by Plaintiff's finance company to repossess the vehicle on July 5, 2013.

H. The task of repossessing the vehicle was assigned to James McClean on July 6, 2013.

I. Defendant Best Recovery Services LLC attempted to repossess the vehicle on August 12, 2013.

J. Defendant's agent, James McClean approached the Plaintiff's vehicle in an attempt to repossess it.

Since the parties have stipulated to these facts and do not dispute them, you are to take these facts as true for purposes of this case.

§ 103.30 Evidence in the Case

Unless you are otherwise instructed, the evidence in the case consists of the sworn testimony of the witnesses regardless of who called the witness, all exhibits received in evidence regardless of who may have produced them, and all facts and events that may have been admitted or stipulated to and all facts and events that may have been judicially noticed.

Statements and arguments by the lawyers are not evidence. The lawyers are not witnesses. What they have said in their opening statement, closing arguments, and at other times is intended to help you interpret the evidence, but it is not evidence. However, when the lawyers on both sides stipulate or agree on the existence of a fact, you must, unless otherwise instructed, accept the stipulation and regard that fact as proved.

Any evidence to which I have sustained an objection and evidence that I have ordered stricken must be entirely disregarded.

§ 101.44 What Is Not Evidence

In deciding the facts of this case, you are not to consider the following as evidence: statements and arguments of the lawyers, questions and objections of the lawyers, testimony that I instruct you to disregard, and anything you may see or hear when the court is not in session even if what you see or hear is done or said by one of the parties or by one of the witnesses.

§ 103.34 Questions Not Evidence

If a lawyer asks a witness a question that contains an assertion of fact, you may not consider the assertion as evidence of that fact. The lawyer's questions and statements are not evidence.

§ 103.31 Consideration of the Evidence--Corporate Party's Agents and Employees

A corporation may act only through natural persons as its agents or employees. In general, any agents or employees of a corporation may bind the corporation by their acts and declarations made while acting within the scope of their authority delegated to them by the corporation or within the scope of their duties as employees of the corporation.

§ 104.05 "Direct" and "Circumstantial" Evidence—Defined

Generally speaking, there are two types of evidence that are generally presented during a trial—direct evidence and circumstantial evidence. "Direct evidence" is the testimony of a person who asserts or claims to have actual knowledge of a fact, such as an eyewitness. "Indirect or circumstantial" evidence is proof of a chain of facts and circumstances indicating the existence or nonexistence of a fact.

As a general rule, the law makes no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence. You are simply required to find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

§ 104.20 "Inferences" Defined

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.

"Inferences" are deductions or conclusions that reason and common sense lead you to draw from facts established by the evidence in the case.

§ 105.11 All Available Witnesses or Evidence Need Not Be Produced

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.

§ 104.54 Number of Witnesses

The weight of the evidence is not necessarily determined by the number of witnesses testifying to the existence or nonexistence of any fact. You may find that the testimony of a small number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

You are not bound to decide any issue of fact in accordance with the testimony of any number of witnesses that does not produce in your minds belief in the likelihood of truth, as against the testimony of a lesser number of witnesses or other evidence producing such belief in your minds.

The test is not which side brings the greater number of witnesses or takes the most time to present its evidence, but which witnesses and which evidence appeal to your minds as being most accurate and otherwise trustworthy.

§ 104.53 Oral Statements or Admissions

Evidence as to any oral statements or admissions, claimed to have been made outside of court by a party to any case, should always be considered with caution and weighed with great care. The person making the alleged statement or admission may not have expressed clearly the meaning intended, or the witness testifying to an alleged admission may have misunderstood or may have misquoted what was actually said.

However, when an oral statement or admission made outside of court is proved by reliable evidence, that statement or admission may be treated as trustworthy and should be considered along with all other evidence in the case.

§ 105.01 Discrepancies in Testimony

You are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You may be guided by the appearance and conduct of the witness, or by the manner in which the witness testifies, or by the character of the testimony given, or by evidence contrary to the testimony.

You should carefully examine all the testimony given, the circumstances under which each witness has testified, and every matter in evidence tending to show whether a witness is worthy of belief. Consider each witness' intelligence, motive and state of mind, and demeanor or manner while testifying.

Consider the witness' ability to observe the matters as to which the witness has testified, and whether the witness impresses you as having an accurate recollection of these matters. Also, consider any relation each witness may have with either side of the case, the manner in which each witness might be affected by the verdict, and the extent to which the testimony of each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses may or may not cause you to discredit such testimony. Two or more persons seeing an event may see or hear it differently.

In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such weight, if any, that you may think it deserves. In short, you may accept or reject the testimony of any witness, in whole or in part.

In addition, the weight of the evidence is not necessarily determined by the number of witnesses testifying to the existence or nonexistence of any fact. You may find that the testimony of a small number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

§ 105.04 Impeachment--Inconsistent Statement or Conduct (*Falsus In Uno Falsus In Omnibus*)

A witness may be discredited or impeached by contradictory evidence or by evidence that at some other time the witness has said or done something, or has failed to say or do something that is inconsistent with the witness' present testimony.

If you believe any witness has been impeached and thus discredited, you may give the testimony of that witness such credibility, if any, you think it deserves.

If a witness is shown knowingly to have testified falsely about any material matter, you have a right to distrust such witness' other testimony and you may reject all the testimony of that witness or give it such credibility as you may think it deserves.

An act or omission is "knowingly" done, if voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

§ 105.09 Effect of Prior Inconsistent Statements or Conduct

Evidence that, at some other time while not under oath a witness who is not a party to this action has said or done something inconsistent with the witness' testimony at the trial, may be considered for the sole purpose of judging the credibility of the witness. However, such evidence may never be considered as evidence of proof of the truth of any such statement.

Where the witness is a party to the case, and by such statement or other conduct admits some fact or facts against the witness' interest, then such statement or other conduct, if knowingly made or done, may be considered as evidence of the truth of the fact or facts so admitted by such party, as well as for the purpose of judging the credibility of the party as a witness.

An act or omission is "knowingly" done, if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

§ 101.03 Claims and Defenses

The positions of the parties can be summarized as follows:

Plaintiff, Robert Wright claims that Best Recovery Services breached the peace when one of its agents attempted to repossess Mr. Wright's vehicle. Mr. Wright further claims that, as a result of the attempted repossession, he sustained personal injuries and economic (such as medical bills) and non-economic damages (such as pain, suffering, mental anguish, frustration, humiliation, embarrassment and annoyance). Defendant Best Recovery Services denies its agent breached the peace during the attempted repossession and that Mr. Wright did not sustain damages allocable to this incident.

Special Jury Instruction #1

The claims in this lawsuit arise from the attempted repossession of Mr. Wright's car and the injuries allegedly sustained during that repossession attempt. The law permits banks or finance companies to retake possession of cars if there has been a default in making payments. There are two different ways that a vehicle can be repossessed. The first way is that the bank can bring an action in court seeking an order requiring the borrower to turn over possession of the vehicle. The second way is that the bank can hire a repossession company like Best Recovery to use "self-help", or take the property without a court order. However, a repossession company like Best Recovery may repossess a vehicle without a court order only if it can proceed without a breach of peace. M.C.L § 440.9609(1)-(2); *Alexander v. Blackhawk Recovery & Investigation, L.L.C.*, 731 F. Supp. 2d 674, 679 (E.D. Mich. 2010).

Special Jury Instruction #2

In this case, Mr. Wright claims that Best Recovery breached the peace when attempting to repossess his vehicle. Best Recovery disputes this. It is up to you to decide whether there was a breach of peace.

Special Jury Instruction #3

Breaches of the peace typically involve open disturbance in public places. For those cases not concerning open disturbance in a public place, personal violence, either actually inflicted or immediately threatened, is required. In general terms the offense is a violation of public order, a disturbance of the public tranquility, by any act or conduct inciting to violence, or tending to provoke or excite others to break the peace. Each case where the offense is charged must depend upon the time, place, and circumstances of the act. A 'breach of the peace" has been defined in Michigan as any intentional violation of the natural right of all persons in a political society to the tranquility enjoyed by citizens of a community where good order reigns among its members. *See In re Gosnell,* 594 N.W.2d 90 (Mich. Ct. App. 1999).

Special Jury Instruction #4

The Plaintiff claims against Best Recovery under the Fair Debt Collection Practices Act, also known as the "FDCPA". The FDCPA is a federal law that was passed by Congress for the purpose of "eliminat[ing] abusive debt collection practices by debt collectors [and to] insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged . . ." 15 U.S.C. § 1692(e) (statement of Congressional findings and purpose).

Special Jury Instruction #5

The FDCPA prohibits repossession agents like Best Recovery from breaching the peace when repossessing motor vehicles. If you find that Best Recovery's employee breached the peace in its attempt to repossess the vehicle, then you should find that Best Recovery violated the FDCPA with respect to Wright. 15 U.S.C. § 1692f(6).

Special Jury Instruction #6

Whether or not the Plaintiff owes the debt alleged to be due is not a factor in this proceeding. Even if the Plaintiff owes a debt, the Defendant must comply with the FDCPA. Therefore, you may not consider whether or not the Plaintiff was indebted to the finance company when determining whether Best Recovery violated the FDCPA. *Baker v. G. C. Services Corp.*, 677 F.2d 775 (9th Cir. 1982).

Special Jury Instruction #7

If you find that Best Recovery's employee, James McLean breached the peace in attempting to repossess the Plaintiff's vehicle, you must find that Best Recovery violated the FDCPA.

§ 106.02 Effect of Instruction as to Damages

The fact that I have instructed you as to the proper measure of damages should not be considered as indicating any view of mine as to which party is entitled to your verdict in this case. Instructions as to the measure of damages are given for your guidance only in the event you should find in favor of the plaintiff from a preponderance of the evidence in the case in accordance with the other instructions.

§ 128.02 Damages Claimed for Injury, Pain, Disability, Disfigurement, Loss of Capacity for Enjoyment of Life

If you find for plaintiff Robert Wright you should compensate plaintiff for any bodily injury and any resulting pain and suffering, experienced in the past. No evidence of the value of such intangible things as pain, suffering mental anguish, frustration, humiliation, embarrassment and annoyance has been or need be introduced.

In that respect it is not value you are trying to determine, but an amount that will fairly compensate plaintiff Robert Wright for the damages he has suffered. There is no exact standard for fixing the compensation to be awarded on account of such elements of damage. Any such award should be fair and just in the light of the evidence.

§ 128.10 Damages Claimed for Medical Expenses for Care and Treatment of Plaintiff or Plaintiff's Spouse

If your verdict is for plaintiff Robert Wright, it should include the reasonable expense of medical care and treatment necessarily or reasonably obtained by him.

§ 128.20 Loss of Past and Future Earnings

If you should find that plaintiff Robert Wright is entitled to a verdict, in arriving at the amount of the award, you should include:

The reasonable value of the time, if any, shown by the evidence in the case to have been necessarily lost up to date by plaintiff Robert Wright since the injury, because of being unable to pursue plaintiff's occupation, as a proximate result of the injury. In determining this amount, you should consider any evidence of plaintiff's earning capacity, plaintiff's earnings, and the manner in which plaintiff ordinarily occupied plaintiff's time before the injury, and find what plaintiff was reasonably certain to have earned during the time so lost, had plaintiff not been disabled.

§ 128.60 Reasonable not Speculative

Damages must be reasonable. If you should find that plaintiff Robert Wright is entitled to a verdict, you may award plaintiff only such damages as will reasonably compensate plaintiff for such injury and damage as you find, from a preponderance of the evidence in the case, that plaintiff has sustained as a proximate result of the accident.

§ 128.70 Damages Must Have Been Proximately Caused

You are not to award any damages for any injury from which plaintiff Robert Wright may have suffered, or may now be suffering, unless it has been established by a preponderance of the evidence in the case that such injury or condition was proximately, or legally, caused by the accident in question.

§ 128.82 Nominal Damages

If you find that plaintiff Robert Wright is entitled to a verdict in accordance with these instructions, but do not find that plaintiff has sustained substantial actual damages, then you may return a verdict for plaintiff in a nominal sum such as one dollar on account of actual damages.

§ 128.100 Attorney Fees and Court Costs

If you find for the plaintiff Robert Wright, you must not take into account any consideration of attorney fees or court costs in deciding the amount of plaintiff's damages. I will decide the matter of attorney fees and court costs, if any, later.

§ 103.50 Election of Foreperson; Duty to Deliberate; Communications with Court; Cautionary; Unanimous Verdict; Verdict Form

You must follow the following rules while deliberating and returning your verdict:

> First, when you go to the jury room, you must select a foreperson. The foreperson 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 and try to reach agreement.

Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with the other jurors, and listened to the views of the other jurors.

Do not be afraid to change your opinions if the discussion persuades you that you should. But do not make a decision simply because other jurors think it is right, or simply to reach a verdict. Remember at all times that you are 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 bailiff, 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 that 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. [*The form reads: [quote]*]. You will take this form to the jury room, and when each of you has agreed on the verdict[*s*], your foreperson will fill in the form, sign and date it, and advise the marshal or bailiff that you are ready to return to the courtroom.

§ 106.07 Verdict Forms--Jury's Responsibility

Nothing said in these instructions and nothing in any form of verdict prepared for your convenience is meant to suggest or convey in any way or manner any suggestion or hint as to what verdict I think you should find. What the verdict shall be is your sole and exclusive duty and responsibility.