

CAUSE NO. 2007-CI-15864

ALFONSO LOPEZ and
MARIA ELENA LOPEZ,

Plaintiffs,

vs.

CATERPILLAR INC. and HOLT TEXAS,
LTD. D/B/A HOLT CAT

Defendants.

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IN THE DISTRICT COURT

BEXAR COUNTY, TEXAS

57TH JUDICIAL DISTRICT

CHARGE OF THE COURT

LADIES AND GENTLEMEN OF THE JURY:

This case is submitted to you by asking questions about the facts, which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law, you must be governed by the instructions in this charge. In discharging your responsibility on this jury, you will observe all the instructions that have previously been given you. I shall now give you additional instructions, which you should carefully and strictly follow during your deliberations.

1. Do not let bias, prejudice or sympathy play any part in your deliberations.

2. In arriving at your answers, consider only the evidence introduced here under oath and such exhibits, if any, as have been introduced for your consideration under the rulings of the court, that is, what you have seen and heard in this courtroom, together with the law as given you by the court. In your deliberations, you will not consider or discuss anything that is not represented by the evidence in this case.

3. Since every answer that is required by the charge is important, no juror should state or consider that any required answer is not important.

4. You must not decide who you think should win, and then try to answer the questions accordingly. Simply answer the questions, and do not discuss nor concern yourselves with the effect of your answers.

5. You will not decide the answer to a question by lot or by drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by adding together each juror's figures and dividing by the number of jurors to get an average. Do not do any trading on your answers; that is, one juror should not agree to answer a certain question one way if others will agree to answer another question another way.

6. Unless otherwise instructed, you may answer a question upon the vote of ten or more jurors. If you answer more than one question upon the vote of ten or more jurors, the same group of at least ten of you must agree upon the answers to each of those questions.

These instructions are given to you because your conduct is subject to review the same as that of the witnesses, parties, attorneys and the judge. If it should be found that you have disregarded any of these instructions, then it will be jury misconduct and it may require another trial by another jury; if so, then all of our time will have been wasted.

The presiding juror or any other juror who observes a violation of the court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again.

When words are used in this Charge in a sense that varies from the meaning commonly understood, you will be given a proper legal definition, which you are bound to accept in place of any other meaning.

Answer "Yes" or "No" to all questions unless otherwise instructed. A "Yes" answer must be based on a preponderance of the evidence unless you are otherwise instructed. If you do not find that a preponderance of the evidence supports a "Yes" answer, then answer "No." The term "preponderance of the evidence" means the greater weight and degree of credible evidence admitted in this case. Whenever a question requires an answer other than "Yes" or "No," your answer must be based on a preponderance of the evidence unless you are otherwise instructed.

A fact may be established by direct evidence or by circumstantial evidence or both. A fact is established by direct evidence when proved by documentary evidence or by witnesses who saw the act done or heard the words spoken. A fact is established by circumstantial evidence when it may be fairly and reasonably inferred from other facts proved.

DEFINITIONS

"Producing Cause" means a cause that is a substantial factor in bringing about an injury and without which the injury would not have occurred. There may be more than one producing cause.

"Negligence" means failure to use ordinary care, that is, failing to do that which a person of ordinary prudence would have done under the same or similar circumstances or doing that which a person of ordinary prudence would not have done under the same or similar circumstances.

"Ordinary Care" means that degree of care that would be used by a person of ordinary prudence under the same or similar circumstances.

"Proximate Cause" means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using *ordinary care* would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

QUESTION 1.

Was there a design defect in the Caterpillar 623G Wheel Tractor Scraper at the time it left the possession of Caterpillar Inc. that was a producing cause of the injury in question?

A "design defect" is a condition of the product that renders it unreasonably dangerous as designed, taking into consideration the utility of the product and the risk involved in its use. For a design defect to exist there must have been a safer alternative design.

"Safer alternative design" means a product design other than the one actually used that in reasonable probability—

(1) would have prevented or significantly reduced the risk of the injury in question without substantially impairing the product's utility and

(2) was economically and technologically feasible at the time the product left the control of Caterpillar Inc. by the application of existing or reasonably achievable scientific knowledge.

Answer "Yes" or "No."

Answer: Yes

QUESTION 2.

Was there a defect in the marketing of the Caterpillar 623G Wheel Tractor Scraper at the time it left the possession of Caterpillar Inc. that was a producing cause of the injury in question?

A "marketing defect" with respect to the product means the failure to give adequate warnings of the product's dangers that were known or by the application of reasonably developed human skill and foresight should have been known or failure to give adequate instructions to avoid such dangers, which failure rendered the product unreasonably dangerous as marketed.

"Adequate" warnings and instructions mean warnings and instructions given in a form that could reasonably be expected to catch the attention of a reasonably prudent person in the circumstances of the product's use; and the content of the warnings and instructions must be comprehensible to the average user and must convey a fair indication of the nature and extent of the danger and how to avoid it to the mind of a reasonably prudent person.

An "unreasonably dangerous" product is one that is dangerous to an extent beyond that which would be contemplated by the ordinary user of the product with the ordinary knowledge common to the community as to the product's characteristics.

Answer "Yes" or "No."

Answer: YES

QUESTION 3

Did the negligence, if any, of the corporation or individual named below proximately cause the injury in question?

Answer "Yes" or "No" for each of the following:

a. Holt Texas Ltd.

Yes

b. Alfonso Lopez

No

If you have answered "Yes" to Question[s] 1, 2 or 3 for more than one of those named below, then answer the following question. Otherwise, do not answer the following question.

Assign percentages of responsibility only to those you found caused or contributed to cause the injury. The percentages you find must total 100 percent. The percentages must be expressed in whole numbers. The percentage of responsibility attributable to a person or product is not necessarily measured by the number of acts, omissions, or product defects found.

QUESTION 4

For each person or product found by you to have caused the injury, find the percentage caused by—

- | | | |
|----|---|--------------|
| a. | The Caterpillar 623G Wheel Tractor
Scraper and Caterpillar, Inc. | <u>90</u> % |
| b. | Holt Texas Ltd | <u>10</u> % |
| c. | Alfonso Lopez | <u>0</u> % |
| | Total | <u>100</u> % |

Answer Question 5 if you answered "Yes" to Questions 1, 2, or 3 for any of the defendants and answered:

1. "No" for Alfonso Lopez to Question 3, or
2. 50 percent or less for Alfonso Lopez to Question 4.

Otherwise, do not answer Question 5.

QUESTION 5

What sum of money, if paid now in cash, would fairly and reasonably compensate Alfonso Lopez for his injuries, if any, that resulted from the occurrence in question?

Consider the elements of damages listed below and none other. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find.

You are instructed that any monetary recovery for the items of damages listed below is not subject to income taxes.

Answer separately, in dollars and cents, for damages, if any. Do not reduce the amounts, if any, in your answers because of the negligence, if any, of Alfonso Lopez.

- a. Physical pain and mental anguish sustained in the past.

Answer: \$ 400,000

- b. Physical pain and mental anguish that, in reasonable probability, Alfonso Lopez will sustain in the future.

Answer: \$ 1,900,000

- c. Loss of earning capacity sustained in the past.

Answer: \$ 110,908

- d. Loss of earning capacity that, in reasonable probability, Alfonso Lopez will sustain in the future.

Answer: \$ 779,884

e. Disfigurement sustained in the past.

Answer: \$ 500,000

f. Disfigurement that, in reasonable probability, Alfonso Lopez will sustain in the future.

Answer: \$ 1,500,000

g. Physical impairment sustained in the past.

Answer: \$ 500,000

h. Physical impairment that, in reasonable probability, Alfonso Lopez will sustain in the future.

Answer: \$ 1,500,000

i. Medical care expenses incurred in the past.

Answer: \$ 379,516

j. Medical care expenses that, in reasonable probability, Alfonso Lopez will incur in the future.

Answer: \$ 1,900,000

Answer Question 6 if you answered "Yes" to Questions 1, 2, or 3 for any of the defendants and answered:

- 3. "No" for Alfonso Lopez to Question 3, or
- 4. 50 percent or less for Alfonso Lopez to Question 4.

Otherwise, do not answer Question 6.

QUESTION 6

What sum of money, if paid now in cash, would fairly and reasonably compensate Maria Lopez for injuries, if any, to her husband, Alfonso Lopez, that resulted from the occurrence in question?

Consider the elements of damages listed below and none other. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find.

Answer separately, in dollars and cents, for damages, if any. Do not reduce the amounts, if any, in your answers because of the negligence, if any, of Alfonso Lopez.

- a. Loss of household services sustained in the past.

"Household services" means the performance of household and domestic duties by a spouse to the marriage.

Answer: \$ 110,000

- b. Loss of household services that, in reasonable probability, Maria Lopez will sustain in the future.

Answer: \$ 780,000

- c. Loss of consortium sustained in the past.

"Consortium" means the mutual right of the husband and wife to that affection, solace, comfort, companionship, society, assistance, sexual relations, emotional support, love, and felicity necessary to a successful marriage.

Answer: \$ 1,500,000

- d. Loss of consortium that, in reasonable probability, Maria Lopez will sustain in the future.

Answer: \$ 4,000,000

Answer the following question regarding Caterpillar Inc. only if you unanimously answered "Yes" to Question 1 or 2 regarding Caterpillar Inc. Otherwise, do not answer the following question regarding Caterpillar Inc.

To answer "Yes" to any part of the following question, your answer must be unanimous. You may answer "No" to any part of the following question only upon a vote of ten or more jurors. Otherwise, you must not answer that part of the following question.

QUESTION 7

Do you find by clear and convincing evidence that the harm to Alfonso Lopez resulted from gross negligence attributable to Caterpillar Inc.?

"Clear and convincing evidence" means the measure or degree of proof that produces a firm belief or conviction of the truth of the allegations sought to be established.

"Gross negligence" means an act or omission by Caterpillar Inc.,

(a) which when viewed objectively from the standpoint of Caterpillar Inc. at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and

(b) of which Caterpillar Inc. has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

You are further instructed that Caterpillar Inc. may be grossly negligent because of an act of its employee if, but only if—

- a. Caterpillar Inc. authorized the doing and the manner of the act, or
- b. the employee was unfit and Caterpillar Inc. was reckless in employing that employee, or
- c. the employee was employed in a managerial capacity and was acting in the scope of employment, or
- d. Caterpillar Inc. or a manager of Caterpillar Inc. ratified or approved the act.

The term "manager" means:

- (a) A corporate officer, or
- (b) A person who has authority to employ, direct, and discharge an employee of Caterpillar Inc., or
- (c) A person engaged in the performance of nondelegable or absolute duties of Caterpillar Inc., or
- (d) A person to whom Caterpillar Inc. has confided the management of the whole or a department or division of the business of Caterpillar Inc.

Answer "Yes" or "No."

Answer: Yes

Answer the following question regarding Holt Texas Ltd only if you unanimously answered "Yes" to Question 3 regarding Holt Texas Ltd. Otherwise, do not answer the following question regarding Holt Texas Ltd.

To answer "Yes" to any part of the following question, your answer must be unanimous. You may answer "No" to any part of the following question only upon a vote of ten or more jurors. Otherwise, you must not answer that part of the following question.

QUESTION 8

Do you find by clear and convincing evidence that the harm to Alfonso Lopez resulted from gross negligence attributable to Holt Texas Ltd?

"Clear and convincing evidence" means the measure or degree of proof that produces a firm belief or conviction of the truth of the allegations sought to be established.

"Gross negligence" means an act or omission by Holt Texas Ltd,

(a) which when viewed objectively from the standpoint of Holt Texas Ltd at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and

(b) of which Holt Texas Ltd has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

You are further instructed that Holt Texas Ltd may be grossly negligent because of an act of its employee if, but only if—

- a. Holt Texas Ltd authorized the doing and the manner of the act, or
- b. the employee was unfit and Holt Texas Ltd was reckless in employing that employee, or
- c. the employee was employed in a managerial capacity and was acting in the scope of employment, or
- d. Holt Texas Ltd or a manager of Holt Texas Ltd ratified or approved the act.

The term "manager" means:

- (a) A corporate officer, or
- (b) A person who has authority to employ, direct, and discharge an employee of Holt Texas Ltd., or
- (c) A person engaged in the performance of nondelegable or absolute duties of Holt Texas Ltd., or
- (d) A person to whom Holt Texas Ltd. has confided the management of the whole or a department or division of the business of Holt Texas Ltd.

Answer "Yes" or "No."

Answer: Yes

Answer the following question regarding Caterpillar Inc. only if you unanimously answered "Yes" to Question 7 regarding Caterpillar Inc. Otherwise, do not answer the following question regarding Caterpillar Inc.

QUESTION 9

You are instructed that you must unanimously agree on the amount of any award of exemplary damages.

What sum of money, if any, should be assessed against Caterpillar Inc. and awarded to Alfonso and Maria Lopez as exemplary damages for the conduct found in response to Question 7?

"Exemplary damages" means any damages awarded as a penalty or by way of punishment but not for compensatory purposes. Exemplary damages include punitive damages.

Factors to consider in awarding exemplary damages, if any, are—

- a. The nature of the wrong.
- b. The character of the conduct involved.
- c. The degree of culpability of the wrongdoer.
- d. The situation and sensibilities of the parties concerned.
- e. The extent to which such conduct offends a public sense of justice and propriety.
- f. The net worth of Caterpillar Inc.

Answer in dollars and cents, if any.

Answer: \$ 40,000,000

Answer the following question regarding Holt Texas Ltd only if you unanimously answered "Yes" to Question 8 regarding Holt Texas Ltd. Otherwise, do not answer the following question regarding Holt Texas Ltd.

QUESTION 10

You are instructed that you must unanimously agree on the amount of any award of exemplary damages.

What sum of money, if any, should be assessed against Holt Texas Ltd and awarded to Alfonso and Maria Lopez as exemplary damages for the conduct found in response to Question 8?

"Exemplary damages" means any damages awarded as a penalty or by way of punishment but not for compensatory purposes. Exemplary damages include punitive damages.

Factors to consider in awarding exemplary damages, if any, are—

- a. The nature of the wrong.
- b. The character of the conduct involved.
- c. The degree of culpability of the wrongdoer.
- d. The situation and sensibilities of the parties concerned.
- e. The extent to which such conduct offends a public sense of justice and propriety.
- f. The net worth of Holt Texas Ltd.

Answer in dollars and cents, if any.

Answer: \$ 500,000

After you retire to the jury room, you will select your own presiding juror. The first thing the presiding juror will do is to have this complete charge read aloud and then you will deliberate upon your answers to the questions asked.

It is the duty of the presiding juror—

1. to preside during your deliberations;
2. to see that your deliberations are conducted in an orderly manner and in accordance with the instructions in this charge;
3. to write out and hand to the bailiff any communications concerning the case that you desire to have delivered to the judge;
4. to vote on the questions;
5. to write your answers to the questions in the spaces provided; and
6. to certify to your verdict in the space provided for the presiding juror's signature or to obtain the signatures of all the jurors who agree with the verdict if your verdict is less than unanimous.

You should not discuss the case with anyone, not even with other members of the jury, unless all of you are present and assembled in the jury room. Should anyone attempt to talk to you about the case before the verdict is returned, whether at the courthouse, at your home, or elsewhere, please inform the judge of this fact.

When you have answered all the questions you are required to answer under the instructions of the judge and your presiding juror has placed your answers in the spaces provided and signed the verdict as presiding juror or obtained the signatures, you will inform the bailiff at the door of the jury room that you have reached a verdict, and then you will return into court with your verdict.



THE HONORABLE ANTONIA ARTEAGA

CERTIFICATE

We, the jury, have answered the above and foregoing questions as herein indicated, and herein return same into court as our verdict.

I certify that the jury was unanimous in answering the following questions:

Answer "All" or List Questions: ALL

CHRIS JORDAN
PRESIDING JUROR

CHRIS JORDAN
Printed Name of Presiding Juror

(If the answers to some questions were not unanimous, the jurors who agree to those answers must certify as follows:)

We agree to the answers to the following questions:

List questions: _____

Jurors' Signatures

Jurors' Printed Names
