

IN THE IOWA DISTRICT COURT IN AND FOR SCOTT COUNTY

BURRAGE ROOFING, CONSTRUCTION & RESTORATION, LLC, Plaintiff, vs. JONATHAN TODD DAWSON and MITTEN ROOFING AND RESTORATION, LLC, Defendants.	No. LACE137459 JURY INSTRUCTIONS
JONATHAN TODD DAWSON, Counterclaim-Plaintiff, vs. BURRAGE ROOFING, CONSTRUCTION & RESTORATION, LLC Counterclaim-Defendant.	

STATEMENT OF THE CASE

This case involves disputes between Burrage Roofing, Construction & Restoration, LLC ("Burrage") and its former employee, Jonathan Todd Dawson ("Dawson").

In this case, Burrage and Dawson are parties to a written contract, titled an "Employment Confidentiality/Non-compete Agreement," that Burrage required Dawson to sign during his employment. Burrage alleges that, after Dawson's employment ended

with Burrage, Dawson breached the contract and caused Burrage damage. Burrage further claims that Dawson and Mitten Roofing and Restoration, LLC ("Mitten") tortiously interfered with contracts and prospective business relationships between Burrage and its customers and caused Burrage damage. Dawson and Mitten deny all claims made by Burrage.

Dawson asserts that Burrage failed to pay him commission wages due under a written compensation agreement with Burrage and caused Dawson damage. Dawson seeks payment of the unpaid commissions that were earned during his employment with Burrage. Burrage denies all claims made by Dawson.

Do not consider this summary as proof of any claim. Decide the facts from the evidence and apply the law which I will now give you.

INSTRUCTION NO. 1

My duty is to tell you what the law is. Your duty is to accept and apply this law.

You must consider all of the instructions together because no one instruction includes all of the applicable law.

The order in which I give these instructions is not important.

Your duty is to decide all fact questions.

As you consider the evidence, do not be influenced by any personal sympathy, bias, prejudices or emotions. It is common to have hidden or implicit thoughts that help us form our opinions. You are making very important decisions in this case. You must evaluate the evidence carefully. You must avoid decisions based on things such as generalizations, gut feelings, prejudices, fears, sympathies, stereotypes, or inward or outward biases. The law demands that you return a just verdict, based solely on the evidence, your reason and common sense, and these instructions. As jurors, your sole duty is to find the truth and do justice.

INSTRUCTION NO. 2

Whenever a party must prove something they must do so by the preponderance of the evidence.

Preponderance of the evidence is evidence that is more convincing than opposing evidence. Preponderance of the evidence does not depend upon the number of witnesses testifying on one side or the other.

INSTRUCTION NO. 3

You shall base your verdict only upon the evidence and these instructions.

Evidence is:

1. Testimony in person, remote testimony or by deposition.
2. Exhibits received by the court.
3. Stipulations which are agreements between the attorneys.
4. Any other matter admitted (e.g. answers to interrogatories, matters which judicial notice was taken, etc.).

Evidence may be direct or circumstantial. The weight to be given any evidence is for you to decide.

Sometimes, during a trial, references are made to pre-trial statements and reports, witnesses' depositions, or other miscellaneous items. Only those things formally offered and received by the court are available to you during your deliberations. Documents or items read from or referred to which were not offered and received into evidence, are not available to you.

The following are not evidence:

1. Statements, arguments, questions and comments by the lawyers.
2. Objections and rulings on objections.
3. Any testimony I told you to disregard.
4. Anything you saw or heard about this case outside the courtroom.

INSTRUCTION NO. 4

Certain testimony has been read into evidence from a deposition. A deposition is testimony taken under oath before the trial and preserved in writing. Consider that testimony as if it had been given in court.

INSTRUCTION NO. 5

You will decide the facts from the evidence. Consider the evidence using your observations, common sense and experience. You must try to reconcile any conflicts in the evidence; but, if you cannot, you will accept the evidence you find more believable.

In determining the facts, you may have to decide what testimony you believe. You may believe all, part or none of any witnesses' testimony.

There are many factors which you may consider in deciding what testimony to believe, for example:

1. Whether the testimony is reasonable and consistent with other evidence you believe;
2. Whether a witness has made inconsistent statements;
3. The witnesses' appearance, conduct, age, intelligence, memory and knowledge of the facts; and
4. The witnesses' interest in the trial, their motive, candor, bias and prejudice.

INSTRUCTION NO. 6

During this trial, you have heard the word "interrogatory." An interrogatory is a written question asked by one party of another, who must answer it under oath in writing. Consider interrogatories and the answers to them as if the questions had been asked and answered here in court.

INSTRUCTION NO. 7

You have heard testimony from persons described as experts. Persons who have become experts in a field because of their education and experience may give their opinion on matters in that field and the reasons for their opinion.

Consider expert testimony just like any other testimony. You may accept it or reject it. You may give it as much weight as you think it deserves, considering the witness' education and experience, the reasons given for the opinion, and all the other evidence in the case.

INSTRUCTION NO. 8

You have heard evidence claiming a witness made statements before this trial while not under oath which were inconsistent with what the witness said in this trial.

Because the witness did not make the earlier statements under oath, you may use them only to help you decide if you believe the witness.

Decide if the earlier statements were made and whether they were inconsistent with testimony given at trial. You may disregard all or any part of the testimony if you find the statements were made and they were inconsistent with the testimony given at trial, but you are not required to do so.

Do not disregard the testimony if other evidence you believe supports it or if you believe it for any other reason.

INSTRUCTION NO. 9

You have heard evidence claiming a witness made statements before this trial while under oath which were inconsistent with what the witness said in this trial. If you find these statements were made and were inconsistent, then you may consider them as part of the evidence, just as if they had been made at this trial.

You may also use these statements to help you decide if you believe the witness. You may disregard all or any part of the testimony if you find the statements were made and were inconsistent with the testimony given at trial, but you are not required to do so.

Do not disregard the trial testimony if other evidence you believe supports it, or if you believe it for any other reason.

INSTRUCTION NO. 10

The fact that any party is an LLC should not affect your decision. All persons are equal before the law, and LLC's, whether large or small, are entitled to the same fair and conscientious consideration by you as any other person.

INSTRUCTION NO. 11

Burrage claims that Dawson breached a written contract, titled an "Employment Confidentiality/Non-compete Agreement," between the parties. To recover on this claim, Burrage must prove each of the following propositions by a preponderance of the evidence:

1. The parties were capable of contracting.
2. The existence of a contract.
3. The terms of the contract.
4. Burrage has done what the contract requires.
5. Dawson has breached the contract.
6. The amount of any damage Dawson has caused.

If Burrage has failed to prove any one or more of these propositions, Burrage is not entitled to damages on its breach of contract claim. If Burrage has proved all of these propositions, then you will consider the defense of Prior Material Breach.

INSTRUCTION NO. 12

Dawson has asserted a breach-of-contract Counterclaim against Burrage for his compensation agreement. For his Counterclaim, Dawson must prove all of the following propositions:

1. The parties were capable of contracting.
2. The existence of a contract.
3. The terms of the contract.
4. Dawson has done what the contract requires.
5. Burrage has breached the contract.
6. The amount of any damage Burrage has caused.

If Dawson has failed to prove any of these propositions, Dawson is not entitled to damages. If Dawson has proved all of these propositions, Dawson is entitled to damages in some amount. If Dawson has proved all of these propositions, then you will consider the defense of conditions precedent and waiver.

INSTRUCTION NO. 13

The existence of a contract requires a meeting of the minds on the material terms. This means the parties must agree upon the same things in the same sense. You are to determine if a contract existed from the words and acts of the parties, together with all reasonable inferences you may draw from the surrounding circumstances.

INSTRUCTION NO. 14

In determining the terms of the contract, you may consider the following:

1. The intent of the parties along with a reasonable application of the surrounding circumstances.
2. The intent expressed in the language used prevails over any secret intention of either party.
3. The intent may be shown by the practical construction of a contract by the parties and by the surrounding circumstances.
4. You must attempt to give meaning to all language of a contract. Because an agreement is to be interpreted as a whole, assume that all of the language is necessary. An interpretation which gives a reasonable, effective meaning to all terms is preferred to an interpretation which leaves a part of the contract unreasonable or meaningless.
5. The meaning of a contract is the interpretation a reasonable person would give it if they were acquainted with the circumstances both before and at the time the contract was made.
6. Ambiguous language in a written contract is interpreted against the party who selected it.
7. Where general and specific terms in the contract refer to the same subject, the specific terms control.

8. An agreement will not be given an interpretation which places one party at the mercy of another unless the contract clearly requires that result.

INSTRUCTION NO. 15

A breach of the contract occurs when a party fails to perform a term of the contract.

INSTRUCTION NO. 16

When a person agrees to do something for a specified consideration to be received after full performance, they are not entitled to any part of the consideration until they have performed as agreed unless full performance has been excused, waived, prevented or delayed by the act of the other party.

However, a plaintiff who has not fully performed under the terms of the contract may still recover some amount if the failure to render performance due at an earlier time was not material. In determining whether a failure to render or to offer performance is material, the following circumstances are significant:

1. The extent to which defendant will be deprived of the benefit which defendant reasonably expected.
2. The extent to which defendant can be adequately compensated for the part of that benefit of which defendant will be deprived.
3. The extent to which plaintiff will suffer forfeiture.
4. The likelihood that plaintiff will cure the failure, taking account of all the circumstances including any reasonable assurances.
5. The extent to which the behavior of the plaintiff is in line with standards of good faith and fair dealing.

INSTRUCTION NO. 17

All contracts in Iowa include an implied duty of good faith and fair dealing. The implied duty is that neither party will do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. The duty of good faith generally operates upon an express condition of a contract, the occurrence of which is largely or exclusively within the control of one of the parties. The duty of good faith is meant to give the parties what they would have stipulated for at the time of contracting if they could have foreseen all future problems of performance.

INSTRUCTION NO. 18

Dawson claims Burrage breached the compensation agreement.

Burrage claims performance of that agreement was excused because conditions precedent were not met, or performance was waived.

If Burrage has proved any one of these defenses, then you shall find for Burrage. If Burrage has not proved any one of these defenses, then you shall decide whether Dawson is entitled to recover damages.

INSTRUCTION NO. 19

1. Conditions precedent are those facts and events occurring after the making of a valid contract that must exist or occur before there is a breach of contract duty and/or before judicial remedies are available.
2. Burrage claims that Defendant Dawson was not entitled to further commissions unless and until certain conditions precedent were met including remaining employed by Burrage and returning confidential information belonging to Burrage. If you find that these were conditions precedent, you must determine if the condition precedent was met. If you find the condition precedent was met, then the contract is enforceable. If you find the condition precedent was not met, then the contract is not enforceable.
3. A determination that a condition precedent exists depends not on the particular form of words used, but upon the intention of the parties gathered from the language of the entire instrument.

INSTRUCTION NO. 20

The right to insist on performance can be given up. This is known as a "waiver". A waiver may be shown by actions, or you may conclude from a party's conduct and the surrounding circumstances that a waiver was intended. The essential elements of a waiver are the existence of a right, knowledge of that right, and an intention to give it up.

INSTRUCTION NO. 21

The Court has made certain rulings regarding Section 3(a) of the Employment Confidentiality/Non-Compete Agreement. You are not to determine whether Dawson breached Section 3(a), the non-compete provisions of the Agreement. You may not award damages based upon any alleged violation of Section 3(a). The Court's ruling regarding Section 3(a) should not affect your consideration of any other provision of the Agreement.

INSTRUCTION NO. 22

The measure of damages for breach of contract is an amount that would place Burrage in as good a position as it would have enjoyed if the Employment Confidentiality/Non-compete Agreement had been performed.

The damages you award for breach of contract must be foreseeable or have been reasonably foreseen at the time the parties entered into the contract.

In your consideration of Burrage's damages, you may consider any lost profits incurred by Burrage.

INSTRUCTION NO. 23

The measure of damages for breach of contract is an amount that would place Dawson in as good a position as he would have enjoyed if the compensation Agreement had been performed.

The damages you award for breach of contract must be foreseeable or have been reasonably foreseen at the time the parties entered into the contract.

In your consideration of Dawson's damages, you may consider commissions earned but not paid to Dawson during his employment with Burrage.

INSTRUCTION NO. 24

Damages that are speculative or not supported by the evidence may not be awarded.

INSTRUCTION NO. 25

Dawson claims that Burrage's failure to pay wages due under the compensation agreement also violated the Iowa Wage Payment Collection Law. Dawson must prove all of the following propositions to establish such a violation:

1. Dawson was employed by Burrage;
2. The amounts owed to Dawson under his compensation agreement constitute "wages";
3. Burrage failed to pay such wages to Dawson when due.

If Dawson has failed to prove any of these propositions, Dawson is not entitled to damages for violation of the Iowa Wage Payment Collection Law. If Dawson has proved all of these propositions, he is entitled to damages in some amount.

INSTRUCTION NO. 26

Wages means compensation owed by an employer for:

1. Labor or services rendered by an employee, whether determined on a time, task, piece, commission, or other basis of calculation;
2. Vacation, holiday, sick leave, and severance payments which are due to an employee under an agreement with the employer or under a policy of the employer; and
3. Any payments to the employee or to a fund for the benefit of the employee, including, but not limited to, payments for medical, health, hospital, welfare, pension, or profit-sharing, which are due to an employee under an agreement with the employer or under a policy of the employer.

INSTRUCTION NO. 27

If Dawson has proven that Burrage intentionally failed to pay Dawson's wages when due, whether as a result of a wage dispute or otherwise, Burrage shall be liable to Dawson for any wages or expenses that are so intentionally failed to be paid or reimbursed, plus liquidated damages. In other instances, Burrage shall be liable only for the unpaid wages due to Dawson.

INSTRUCTION NO. 28

If you find Burrage intentionally failed to pay wages due to Dawson, the Court shall award liquidated damages in an amount equal to the unpaid wages you found were intentionally withheld.

INSTRUCTION NO. 29

Burrage claims Dawson breached the Employment Confidentiality/Non-Compete Agreement.

Dawson claims performance was excused because of Burrage's prior material breach.

If Dawson has proved prior material breach, then you shall find for Dawson. If Dawson has failed to prove prior material breach, then you shall decide whether Burrage is entitled to recover damages for breach of contract.

INSTRUCTION NO. 30

Burrage must prove all of the following propositions:

1. Burrage had a contract with a third person;
2. Defendants knew of the contract;
3. Dawson intentionally and improperly interfered with the contract by using improperly obtained confidential information;
4. The interference caused the third person not to perform the contract.
5. The nature and amount of damage.

If Burrage has failed to prove any one or more of these propositions, Burrage is not entitled to damages. If Burrage has proved all of these propositions, Burrage is entitled to damages in some amount.

INSTRUCTION NO. 31

Burrage must prove all of the following propositions of intentional interference with a business relationship:

1. Burrage has a prospective contractual relationship or business relationship with a third person.
2. Dawson knew of the prospective relationship.
3. Dawson intentionally and improperly interfered with the relationship by using improperly obtained confidential information;
4.
 - a. The interference caused the third person not to continue the relationship; or
 - b. The interference prevented the plaintiff from continuing the relationship.
5. The nature and amount of damage.

If Burrage has failed to prove any of these propositions, Burrage is not entitled to damages. If Burrage has proved all of these propositions, Burrage is entitled to damages in some amount.

INSTRUCTION NO. 32

A contract is an agreement between two or more persons to do or not to do something.

INSTRUCTION NO. 33

Defendants "knew" of the contract if Defendants either had actual knowledge of the contract or else had knowledge of facts which, if followed by reasonable inquiry, would have led to disclosure of the contract between Burrage and the third party.

INSTRUCTION NO. 34

In determining whether Defendants' conduct in intentionally interfering with a contract is improper you should determine whether the conduct was fair and reasonable under the circumstances. In determining whether the conduct was improper you may consider:

1. The nature of the conduct.
2. Defendants' motive.
3. The interests of the party with which the conduct interferes.
4. The interest sought to be advanced by Defendants.
5. The social interests in protecting the freedom of action of Defendants' and the contractual interests of the other party.
6. The nearness or remoteness of the Defendants' conduct to the interference.
7. The relations between the parties.

INSTRUCTION NO. 35

Dawson's interference with a contract, prospective contractual relationship, prospective business relationship is intentional if Defendants either interfere with the contract, prospective contractual relationship, prospective business relationship on purpose or know the conduct is substantially certain to interfere with the contract, prospective contractual relationship, prospective business relationship.

INSTRUCTION NO. 36

"Prospective contractual relationship" means a reasonably likely contract of financial benefit to the Plaintiff. "Prospective business relationship" means a reasonably likely business relationship of financial benefit to the Plaintiff.

INSTRUCTION NO. 37

Defendant's interference with a prospective contractual relationship or prospective business relationship is improper if Defendants' interference is done with the purpose of financially harming or destroying Plaintiff's business.

INSTRUCTION NO. 38

If you find the Defendants committed tortious interference with Plaintiff's prospective business or contractual relationship, you may award Burrage an amount of damages compensating it for any lost profits for Burrage caused by Defendants' conduct.

INSTRUCTION NO. 39

The conduct of a party is a cause of damage when the damage would not have happened except for the conduct.

INSTRUCTION NO. 40

An LLC is liable for the wrongful acts of an officer, agent, or employee if the acts are done in the scope of the employment.

INSTRUCTION NO. 41

For an act to be within the scope of an employee's employment, the act must be necessary to accomplish the purpose of the employment, and it must be intended to accomplish that purpose.

INSTRUCTION NO. 42

Punitive damages may be awarded if the Plaintiff has proven by a preponderance of clear, convincing, and satisfactory evidence that the Defendants' conduct constituted a willful and wanton disregard for the rights or safety of another and caused actual damage to the Plaintiff.

Punitive damages are not intended to compensate for injury but are allowed to punish and discourage the Defendants and others from like conduct in the future. You may award punitive damages only if the Defendants' conduct warrants a penalty in addition to the amount you award to compensate for Plaintiff's actual injuries.

There is no exact rule to determine the amount of punitive damages, if any, you should award. You may consider the following factors:

1. The nature of Defendants' conduct that harmed the Plaintiff.
2. The amount of punitive damages which will punish and discourage like conduct by the Defendants. You may consider the Defendants' financial condition or ability to pay. You may not, however, award punitive damages solely because of the Defendants' wealth or ability to pay.
3. The Plaintiff's actual damages. The amount awarded for punitive damages must be reasonably related to the amount of actual damages you award to the Plaintiff.
4. The existence and frequency of prior similar conduct. ~~If applicable, add:~~
Although you may consider harm to others in determining the nature of Defendants'

conduct, you may not award punitive damages to punish the Defendants for harm caused to others, or for out-of-state conduct that was lawful where it occurred, or for any conduct by the Defendants that is not similar to the conduct which caused the harm to the Plaintiff in this case.

INSTRUCTION NO. 43

You will have to decide whether punitive damages have been proved by clear, convincing, and satisfactory evidence. Evidence is clear, convincing, and satisfactory if there is no serious or substantial uncertainty about the conclusion to be drawn from it.

INSTRUCTION NO. 44

An LLC is liable for the punitive damages by reason of the acts of an employee or agent if one of the following occurred:

1. The LLC authorized the act and the way it was done; or
2. The agent or employee was employed in a managerial capacity and was acting in the scope of employment; or
3. The LLC ratified or approved the act.

INSTRUCTION NO. 45

Conduct is willful and wanton when a person intentionally does an act of an unreasonable character in disregard of a known or obvious risk that is so great as to make it highly probable that harm will follow.

INSTRUCTION NO. 46

During the trial you have been allowed to take notes. You may take these with you to the jury room to use in your deliberations. Remember, these are notes and not evidence. Generally, they reflect the recollection or impressions of the evidence as viewed by the person taking them, and may be inaccurate or incomplete.

Upon reaching a verdict, leave the notes in the jury room, and they will be destroyed.

INSTRUCTION NO. 47

I am now going to explain the rules you must follow as jurors while this case is going on. Until this case is over and your jury service ends, please follow these rules:

- **Do not talk about this case with anyone.** This includes other jurors, friends, family members, coworkers, or anyone else.
- **Do not let anyone talk to you about the case.** If someone tries, stop the conversation and tell me or the jury manager.
- **Do not discuss the case online or on social media.**
- **Do not look up information about this case.** Do not search the internet, read news stories, or watch or listen to reports about the case.
- **Do not research anything related to the case,** including the law, the parties, the witnesses, the lawyers, or me.
- **Keep an open mind.** Do not form an opinion until you have heard all the evidence.

I will remind you of these rules each time we take a break.

These rules are important because information outside the courtroom may be wrong, incomplete, or unfair. You must decide this case only from the evidence you see and hear in this courtroom and from the law I give you.

One more thing: the attorneys are not allowed to speak with you outside the courtroom. If they do not greet you or speak to you, they are simply following the rules, not being rude.

INSTRUCTION NO. 48

Occasionally, jurors will have questions after they begin deliberating. If that should occur, please consider the following:

1. Words not defined in these instructions should be given their ordinary meaning.
2. There will be no additional evidence and I cannot comment to you about evidence.
3. If possible, I will meet with you after you reach a verdict and answer your questions about the trial process.
4. If you ask me a question during your deliberations, your foreperson must put it in writing and give it to the court attendant, who will deliver it to me. Never attempt to communicate with me by any means other than a signed writing. You are not permitted to tell me or anyone else how you stand numerically or otherwise until you have reached a unanimous verdict.

After receiving your question, I will contact the lawyers and conduct a hearing with them out of your presence. Only then will you receive a written answer. Considerable time may go by between question and answer. Experience shows that most jury questions can be answered by carefully re-reading these instructions. Doing so may save considerable time for all involved.

If, after considering these matters, you still wish to ask a question, follow the procedure just described. Save your questions and the answer and return them with these instructions when you return your verdict.

INSTRUCTION NO. 49

Upon retiring you shall select a foreperson. He or she shall ensure that discussion is carried on in an orderly fashion, the issues are fully and freely discussed, and each juror is given an opportunity to express his or her views.

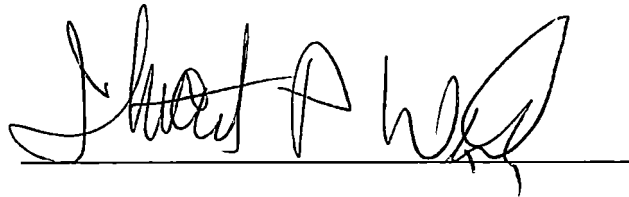
Your attitude at the beginning of your deliberations is important. It is not a good idea for you to take a position before thoroughly discussing the case with the other jurors. If you do this, individual pride may become involved and you may later hesitate to change an announced position even if shown it may be incorrect. Remember you are not partisans or advocates, but are judges -- judges of the facts. Your sole interest is to find the truth and do justice.

INSTRUCTION NO. 50

I am giving you one verdict form and questions. During the first six hours of deliberations, excluding meals and recesses outside your jury room, your decision must be unanimous. If you all agree, the verdict and answers to questions must be signed by your foreman or forewoman.

After deliberating for six hours from 1:30 o'clock P.m. excluding meals or recesses outside your jury room, then it is necessary that only seven of you agree upon the answers to the questions. In that case, the verdict and questions must be signed by all seven jurors who agree.

When you have agreed upon the verdict and answers to questions and appropriately signed it, tell the Court Attendant.

A handwritten signature in black ink, appearing to read "Stuart P. Werling", is written over a horizontal line.

Stuart P. Werling, Judge

7th Judicial District