

IN THE IOWA DISTRICT COURT FOR DICKINSON COUNTY

Minger Construction, Inc.,

Plaintiff,

v.

Clark Farms, Ltd. and Kevin W. Clark,
a/k/a K. W. "Casey" Clark,

Defendants.

No. LACV025440

**JURY INSTRUCTIONS
AND VERDICT FORM**

Members of the Jury:

INSTRUCTION NO. 1

In this case, Plaintiff Minger Construction (hereinafter "Plaintiff") was hired by the City of Terril, Iowa, to upgrade its sewage systems. As part of the project, Plaintiff was required to remove the sludge in the existing ponds. Plaintiff entered into a contract with Defendants Clark Farms, Ltd., and Kevin W. Clark, a/k/a K. W. "Casey" Clark (hereinafter "Defendants") to move and remove the sludge from the existing ponds.

Plaintiff claims that Defendants breached the contract, and that Plaintiffs incurred damages as a result of the breach.

Defendants deny they breached the contract. They also claim that Plaintiff did not perform as it was required to do by the contract.

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. 2

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.

Do not be influenced by any personal likes or dislikes, sympathy, bias, prejudices or emotions.

INSTRUCTION NO. 3

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 on the number of witnesses testifying on one side or the other.

INSTRUCTION NO. 4

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

1. Testimony in person 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, and etc.).

Evidence may be direct or circumstantial. You should consider both kinds of evidence. The law makes no distinction between the weight given to either direct or circumstantial evidence. It is up to you to decide how much weight to give any kind of evidence.

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. 5

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. 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 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. The witnesses' appearance, conduct, age, intelligence, memory and knowledge of the facts; and,
3. The witnesses' interest in the trial, their motive, candor, bias and prejudice.

INSTRUCTION NO. 8

You have heard evidence claiming that Patrick Minger and Kevin Clark both made statements before this trial while under oath and while not under oath.

If you find such a statement was made, you may regard the statement as evidence in this case the same as if the statement had been made under oath during the trial.

If you find such a statement was made by either Patrick Minger or Kevin Clark, and their statement was inconsistent with their testimony during the trial you may also

use the statement as a basis for disregarding all or any part of their testimony during the trial but you are not required to do so. You should not disregard their testimony during the trial if other credible evidence supports it or if you believe it for any other reason.

INSTRUCTION NO. 9

A corporation is deemed a person under the law, but, since it is an artificial person, it can only act through its directors, officers, employees, or other agents. The law therefore holds a corporation responsible for all acts of its directors, officers, employees, or other agents, provided such acts are done within the scope of their authority.

The fact that a plaintiff or a defendant is a corporation should not affect your decision. All persons are equal before the law, and corporations, whether large or small, are entitled to the same fair and conscientious consideration by you as any other person.

INSTRUCTION NO. 10

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. 11

In arriving at an item of damage, you cannot arrive at a figure by taking down the estimate of each juror as to an item of damage, and agreeing in advance that the average of those estimates will be your item of damage.

INSTRUCTION NO. 12

Plaintiff claims that Defendants breached their contract with Plaintiff. In order to recover damages on its breach of contract claim, Plaintiff must prove all of the following propositions:

1. The existence of a contract. ✓
2. The terms of the contract. ✓
3. Plaintiff has done what the contract requires. ✓

4. Defendants breached the contract. ✓
5. The amount of any damage Defendants' breach caused Plaintiff. ✓

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

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 interpreting the terms of the contract, you may consider the following:

1. The terms of the written contract.
2. The intent of the parties along with a reasonable application of the surrounding circumstances.
3. The intent expressed in the language used prevails over any secret intention of either party.
4. The intent may be shown by the practical construction of a contract by the parties and by the surrounding circumstances.
5. You must attempt to give meaning to all of the language of the contract. Because a contract is to be interpreted as a whole, assume that all of the language is necessary. An interpretation that gives a reasonable, effective meaning to all terms is preferred to an interpretation that leaves a part of the contract unreasonable or meaningless.
6. 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.
7. Ambiguous language in a written contract is interpreted against the party who selected it.

8. Where general and specific terms in the contract refer to the same subject, the specific terms control

INSTRUCTION NO. 15

When a contract is fully integrated, Iowa law forbids the consideration of evidence solely to vary, add to, or subtract from the terms of the contract. A contract is fully integrated when the parties execute a writing or writings as the final and complete expression of their agreement.

The written contract between Plaintiff and Defendants involved in this case is fully integrated. Therefore, you shall not consider any evidence or testimony offered about proposals that were exchanged or terms that were discussed between Plaintiff and Defendants before the written contract was signed that were not included as terms in the written contract.

INSTRUCTION NO. 16

A breach of a contract occurs when a party fails to perform a term of the contract. It does not matter whether the breach was intentional or inadvertent.

INSTRUCTION NO. 17

The measure of damages for breach of a contract is an amount that would place Plaintiff in as good a position as it would have enjoyed if the contract had been performed by Defendants. 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.

If you find Plaintiff is entitled to recover damages, you may consider the following:

1. The costs Plaintiff incurred to perform Defendants' duties under the contract.
2. The lost use of Plaintiff's equipment that was a direct result of Defendants' breach.
3. Loss of profits incurred by Plaintiff that are a direct result of Defendants' breach.
4. Liquidated damages that are a direct result of Defendants' breach.
5. The mobilization fee.

INSTRUCTION NO. 18

Under Iowa law, a shareholder can be personally liable for the obligations of his or her corporation in certain circumstances. Plaintiff claims that Defendant Kevin W. Clark must be held legally responsible for the acts of Defendant Clark Farms, Ltd.

To establish this claim, Plaintiff must prove all of the following propositions:

1. Defendant Kevin W. Clark is a shareholder of Clark Farms Ltd.
2. Defendant Clark Farms, Ltd., is liable to Plaintiff.
3. Defendant Kevin W. Clark has abused the corporate privilege.
4. The amount owed by Defendant Clark Farms, Ltd., to Plaintiff.

If Plaintiff has failed to prove any of these propositions, then Defendant Kevin W. Clark is not personally liable for breaching the contract with Plaintiff. If Plaintiff has proved all of these propositions, then Defendant Kevin W. Clark is personally liable for breaching the contract with Plaintiff.

INSTRUCTION NO. 19

Corporate privilege is the right of a shareholder of a corporation to avoid personal liability for the financial obligations of the corporation. A shareholder may be held personally liable for corporate financial obligations only in exceptional circumstances in which the shareholder abuses the privilege. An abuse may be found when the corporation is a mere shell, or serves no legitimate business purpose, or is used by the shareholder primarily as a means to commit fraud or promote injustice. Factors that may be considered to establish abuse of the corporate privilege include the following:

1. The corporation is undercapitalized,
2. The corporation does not maintain separate books,
3. The corporation's finances are not kept separate from individual finances or individual obligations are paid by the corporation,
4. The corporation is used to promote fraud or illegality,
5. The corporate formalities are not followed, or
6. The corporation is merely a sham.

A plaintiff seeking to hold a shareholder personally liable is not required to prove all six factors.

INSTRUCTION NO. 20

Upon retiring you shall select a foreperson. It will be his or her duty to see 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.

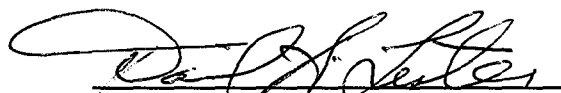
Remember you are not partisans or advocates, but are judges - judges of the facts. Your sole interest is to find the truth and do justice.

INSTRUCTION NO. 21

I am giving you one (1) verdict form. 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 must be signed by your foreman or forewoman.

After deliberating for six hours from 11:40 o'clock a.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 must be signed by all seven jurors who agree.

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



DAVID A. LESTER, Judge
Third Judicial District of Iowa

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VERDICT FORM

We, the jury, find the following verdict on the questions submitted to us:

QUESTION NO. 1 : Did Plaintiff do what the contract required? Answer "yes" or "no".

ANSWER: YES

[If your answer to question No. 1 is "no," do not answer any further questions, sign your verdict form, and notify the Court Attendant.]

[If your answer is "yes," go on to Question No. 2.]

QUESTION NO. 2: Did Defendant Clark Farms, Ltd., breach its contract with Plaintiff?

Answer "yes" or "no."

ANSWER: YES

[If your answer to question No. 2 is "no," do not answer any further questions, sign your verdict form, and notify the Court Attendant.]

[If your answer is "yes," go on to Question No. 3.]

QUESTION NO. 3: Is Defendant Kevin W. Clark personally liable for Defendant Clark Farms, Ltd.'s, breach of its contract with Plaintiff? Answer "yes" or "no."

ANSWER: YES

[Answer "yes" or "no", and go on to Question No. 4.]

QUESTION NO. 4: Did Defendants' breach of contract cause any damage to Plaintiff?

Answer "yes" or "no."

ANSWER:

YES

[If your answer to Question No. 4 is "no," do not answer any further questions, sign your verdict form, and notify the Court Attendant.]

[If your answer is "yes," go on to Question No.5.]

QUESTION NO. 5: State the amount of damages sustained by Plaintiff as a result of Defendants' breach of contract. If Plaintiff has failed to prove any damages, or has failed to prove that any damages were caused by Defendants' breach of contract, then enter a "0."

ANSWER:

Plaintiff's total damages are \$ 78,272.³⁶

Todd Backhaus
FOREPERSON

*To be signed only if verdict is unanimous.

Juror**

Juror**

Juror**

Juror**

Juror**

Juror**

Juror**

**To be signed by the jurors agreeing thereto after six hours or more of deliberation.

[Please sign the verdict form, and notify the Court Attendant.]