

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

MARY JANE BUCK; LOIS ERBSTEIN;
DONALD AND LORRAINE SHIRK; and
MAUREEN D. WILSON, Individually and as
Trustee of the MAUREEN D. WILSON
REVOCABLE TRUST,

Plaintiffs,

v.

THE RESERVE, A NONPROFIT
CORPORATION d/b/a THE RESERVE ON
WALNUT CREEK,

Defendant.

THE RESERVE, A NONPROFIT
CORPORATION d/b/a THE RESERVE ON
WALNUT CREEK,

Third-Party Plaintiff,

v.

S.X. CORPORATION d/b/a ESSEX
CORPORATION,

Third-Party Defendant.

CASE NO. CVCV052364

**PLAINTIFFS' PROPOSED
JURY INSTRUCTIONS**

Plaintiffs Mary Jane Buck, Lois Erbstein, Donald and Lorraine Shirk, and Maureen D. Wilson, individually and as trustee of the Maureen D. Wilson Revocable Trust, submit the following proposed jury instructions. Plaintiffs reserve the right to withdraw any of these proposed instructions, or submit additional instructions, depending on the evidence submitted at trial.

/s/ Jason M. Craig

Jason M. Craig (AT0001707)
Maria E. Brownell (AT0010240)
AHLERS & COONEY, P.C.
100 Court Avenue, Suite 600
Des Moines, Iowa 50309-2231
Telephone: 515/243-7611
Facsimile: 515/243-2149
E-mail: jcraig@ahlerslaw.com
mbrownell@ahlerslaw.com
ATTORNEYS FOR PLAINTIFFS

Electronically filed.

Electronically served on:

William J. Miller
Dorsey & Whitney, LLP
801 Grand Avenue, Suite 400
Des Moines, IA 50309
Email: miller.william@dorsey.com
ATTORNEY FOR DEFENDANT/
THIRD-PARTY PLAINTIFF

Mitchell R. Kunert
Nyemaster Goode, P.C.
700 Walnut Street, Suite 1600
Des Moines, IA 50309
Email: mrkunert@nyemaster.com
ATTORNEY FOR THIRD-PARTY
DEFENDANT

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings, on this date: May 29, 2018.

By ☐ U.S. Mail ☐ Fax
☐ Hand Delivery ☐ Private Carrier
☒ Electronically through EDMS
☐ Other: _____

Signature /s/ Jason M. Craig

STATEMENT OF THE CASE

Members of the Jury:

In this case, Plaintiffs are residents at a senior independent living facility called The Reserve on Walnut Creek. Plaintiffs claim that their agreements with The Reserve are so one-sided and unfair as to render the agreements unconscionable. Plaintiffs seek a declaration that the agreements are unenforceable and a refund of certain money paid to The Reserve. Plaintiffs also claim that The Reserve breached its fiduciary duties to Plaintiffs by putting its interests above those of Plaintiffs and taking actions detrimental to Plaintiffs' investment in The Reserve. The Reserve denies the Plaintiffs' claims in their entirety.

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.

JURY 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. Because you are making very important decisions in this case, you are to evaluate the evidence carefully and avoid decisions based on generalizations, gut feelings, prejudices, sympathies, stereotypes, or 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.

Authority

Iowa Civil Jury Instruction No. 100.2.

JURY 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.

Authority

Iowa Civil Jury Instruction No. 100.3

JURY INSTRUCTION NO. 3

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. 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.

Authority

Iowa Civil Jury Instruction No. 100.4

JURY INSTRUCTION NO. 4

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.

Authority

Iowa Civil Jury Instruction No. 100.9

JURY INSTRUCTION NO. 5

You have heard evidence claiming a witness who is a party to this case made statements before this trial while 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 witness had made it under oath during the trial.

If you find such a statement was made and was inconsistent with this witness's testimony during the trial you may also use the statement as a basis for disregarding all or any part of the witness's testimony during the trial but you are not required to do so. You should not disregard the witness's testimony during the trial if other credible evidence supports it or if you believe it for any other reason.

Authority

Iowa Civil Jury Instruction No. 100.15

JURY INSTRUCTION NO. 6

Upon retiring you shall select a foreman or forewoman. 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.

Authority

Iowa Civil Jury Instruction No. 100.18

JURY INSTRUCTION NO. 7

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.

Authority

Iowa Civil Jury Instruction No. 100.21.

JURY INSTRUCTION NO. 8

You may not communicate about this case before reaching your verdict. This includes cell phones, and electronic media such as text messages, Facebook, MySpace, LinkedIn, YouTube, Twitter, email, etc.

Do not do any research or make any investigation about this case on your own. Do not visit or view any place discussed in this case, and do not use Internet maps or Google Earth or any other program or device to search for or to view any place discussed in the testimony. Also, do not research any information about this case, the law, or the people involved, including the parties, the witnesses, the lawyers, or the judge. This includes using the Internet to research events or people referenced in the trial.

This case will be tried on evidence presented in the courtroom. If you conduct independent research, you will be relying on matters not presented in court. The parties have a right to have this case decided on the evidence they know about and that has been introduced here in court. If you do some research or investigation or experiment that we do not know about, then your verdict may be influenced by inaccurate, incomplete or misleading information that has not been tested by the trial process, including the oath to tell the truth and by cross-examination. All of the parties are entitled to a fair trial, rendered by an impartial jury, and you must conduct yourself so as to maintain the integrity of the trial process. If you decide a case based on information not presented in court, you will have denied the parties a fair trial in accordance with the rules of this state and you will have done an injustice. It is very important that you abide by these rules.

It is important that we have your full and undivided attention during this trial.

Authority

Iowa Civil Jury Instruction No. 100.23.

JURY INSTRUCTION NO. 9

The Reserve's third-party claims against Essex Corporation are not at issue in this trial. Do not speculate as to why this claim is no longer involved in this case. You should not consider this during your deliberations.

Authority

California Civil Jury Instruction No. 5007

JURY INSTRUCTION NO. 10

Plaintiffs claim that their contracts with The Reserve are unconscionable.

A contract is unconscionable when the facts and circumstances show no person in his or her right senses would make it on the one hand, and no honest and fair person would accept it on the other hand.

An agreement may be unconscionable due to procedural abuses in the formation of the contract. An agreement may also be unconscionable due to substantive abuses related to the contract's terms.

Whether an agreement is unconscionable must be determined at the time it was entered into.

Authority

C & J Vantage Leasing Co. v. Wolfe, 795 N.W.2d 65, 80-81 (Iowa 2011).

JURY INSTRUCTION NO. 11

You should consider the following factors when determining whether the contracts are unconscionable:

- Assent;
- Unfair surprise;
- Notice;
- Disparity of bargaining power; and
- Substantive unfairness.

Authority

C & J Vantage Leasing Co. v. Wolfe, 795 N.W.2d 65, 80 (Iowa 2011).

JURY INSTRUCTION NO. 12

Procedural unconscionability arises from abuses in the formation of the contract. Factors to consider when evaluating whether a contract is procedurally unconscionable are as follows:

- An advantaged party's exploitation of a disadvantaged party's lack of understanding;
- Unequal bargaining power between the parties; and
- The use of fine print and convoluted language.

Authority

C & J Vantage Leasing Co. v. Wolfe, 795 N.W.2d 65, 81 (Iowa 2011)

JURY INSTRUCTION NO. 13

Substantive unconscionability refers to the terms of the agreement. A contract is substantively unconscionable when the substantive terms of the agreement are so harsh or oppressive that no person in his or her right senses would make it.

Authority

C & J Vantage Leasing Co. v. Wolfe, 795 N.W.2d 65, 81 (Iowa 2011)
In re Marriage of Shanks, 758 N.W.2d 506, 515-16 (Iowa 2008)

JURY INSTRUCTION NO. 14

If you find the Plaintiffs have met their burden of showing their contracts were unconscionable, then in order to prevent unjust enrichment of The Reserve, Plaintiffs are entitled to restitution.

Restitution means that the parties are returned to the status quo, with the Plaintiffs and The Reserve each returning to the other what each party has received. Under this rule, Plaintiffs are entitled to return of the money paid to The Reserve minus the reasonable value of Plaintiffs' use of The Reserve's property.

Authority

Hylar v. Garner, 548 N.W.2d 864, 874 (Iowa 1996)

Washington Pattern Jury Instruction No. 303.08 Contract—Damages—Restitution

JURY INSTRUCTION NO. 15

With regard to their claim for breach of fiduciary duty, the Plaintiffs must prove the following propositions:

1. A fiduciary relationship existed between the Plaintiffs and The Reserve
2. The Reserve breached the fiduciary duty.
3. The breach of the fiduciary duty has caused damage to the Plaintiffs.
4. The amount of damages.

If the Plaintiffs have proven all of these propositions, the Plaintiffs are entitled to recover damages in some amount.

Authority

Iowa Civil Jury Instruction No. 3200.1

JURY INSTRUCTION NO. 16

A fiduciary relationship is a relationship of trust and confidence on a subject between two persons. One of the persons is under a duty to act for or give advice to the other on that subject. Confidence is placed on one side, and domination and influence result on the other.

Such relationship exists when there is a reposing of faith, confidence and trust, and the placing of reliance by one upon the judgment and advice of the other. Circumstances that may indicate the existence of a fiduciary relationship include the acting of one person for another, the having and exercising of influence over one person by another, the placing of confidence by one person in another, the dominance of one person by another, the inequality of the parties, and the dependence of one person upon another. None of these circumstances is more important than another. It is for you to determine from the evidence whether a fiduciary relationship existed between the parties.

Authority

Iowa Civil Jury Instruction No. 3200.2

JURY INSTRUCTION NO. 17

A fiduciary has a duty to disclose all material facts in dealing with the other party to permit the other party to make an intelligent, knowing decision in such dealings. A fact is material if a reasonable person would consider it to be important in making a decision. A failure to perform the duty is a breach of fiduciary duty.

Authority

Iowa Civil Jury Instruction No. 3200.3

JURY INSTRUCTION NO. 18

The measure of damages for breach of fiduciary duty is an amount that would place the Plaintiffs in as good a position as they would have enjoyed if The Reserve had not breached its fiduciary duty. In your consideration of damages, you may consider the difference in value of Plaintiff's investment in The Reserve before and after the breach.

Authority

Iowa Civil Jury Instruction No. 220.1
Restatement (Second) of Torts § 903, comment a

JURY INSTRUCTION NO. 19

I am giving you four verdict forms (one for each Plaintiff) with three questions per 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 verdicts and answers to questions must be signed by your foreman or forewoman.

After deliberating for six hours from _____ o'clock ____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 verdicts and questions must be signed by all seven jurors who agree.

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

Authority

Iowa Civil Jury Instruction No. 300.1

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THE RESERVE, A NONPROFIT
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Third-Party Plaintiff,

v.

S.X. CORPORATION d/b/a ESSEX
CORPORATION,

Third-Party Defendant.

CASE NO. CVCV052364

**PLAINTIFFS' PROPOSED
VERDICT FORM NO. 1**

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

Question No. 1: Did Plaintiff Mary Jane Buck prove that her contract with Defendant The Reserve is unconscionable?

(Answer "yes" or "no")

Answer: _____

(Proceed to Question No. 2)

Question No. 2: Did Plaintiff Mary Jane Buck prove her breach of fiduciary duty claim against Defendant The Reserve?

(Answer “yes” or “no”)

Answer: _____

(If your answer to Question No. 1 or Question No. 2 was “yes,” proceed to Question No. 3. If your answer to both questions was “no,” do not answer Question No. 3 and instead sign this verdict form and move on to the next verdict form).

Question No. 3: State the total amount of money Plaintiff Mary Jane Buck is entitled to recover:

Answer: \$ _____

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.

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

MARY JANE BUCK; LOIS ERBSTEIN;
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Defendant.

THE RESERVE, A NONPROFIT
CORPORATION d/b/a THE RESERVE ON
WALNUT CREEK,

Third-Party Plaintiff,

v.

S.X. CORPORATION d/b/a ESSEX
CORPORATION,

Third-Party Defendant.

CASE NO. CVCV052364

**PLAINTIFFS' PROPOSED
VERDICT FORM NO. 2**

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

Question No. 1: Did Plaintiff Lois Erbstein prove that her contract with Defendant The Reserve is unconscionable?

(Answer "yes" or "no")

Answer: _____

(Proceed to Question No. 2)

Question No. 2: Did Plaintiff Lois Erbstein prove her breach of fiduciary duty claim against Defendant The Reserve?

(Answer “yes” or “no”)

Answer: _____

(If your answer to Question No. 1 or Question No. 2 was “yes,” proceed to Question No. 3. If your answer to both questions was “no,” do not answer Question No. 3 and instead sign this verdict form and move on to the next verdict form).

Question No. 3: State the total amount of money Plaintiff Lois Erbstein is entitled to recover:

Answer: \$ _____

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.

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

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THE RESERVE, A NONPROFIT
CORPORATION d/b/a THE RESERVE ON
WALNUT CREEK,

Defendant.

THE RESERVE, A NONPROFIT
CORPORATION d/b/a THE RESERVE ON
WALNUT CREEK,

Third-Party Plaintiff,

v.

S.X. CORPORATION d/b/a ESSEX
CORPORATION,

Third-Party Defendant.

CASE NO. CVCV052364

**PLAINTIFFS' PROPOSED
VERDICT FORM NO. 3**

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

Question No. 1: Did Plaintiff Lorraine Shirk prove that her contract with Defendant The Reserve is unconscionable?

(Answer "yes" or "no")

Answer: _____

(Proceed to Question No. 2)

Question No. 2: Did Plaintiff Lorraine Shirk prove her breach of fiduciary duty claim against Defendant The Reserve?
(Answer “yes” or “no”)

Answer: _____

(If your answer to Question No. 1 or Question No. 2 was “yes,” proceed to Question No. 3. If your answer to both questions was “no,” do not answer Question No. 3 and instead sign this verdict form and move on to the next verdict form).

Question No. 3: State the total amount of money Plaintiff Lorraine Shirk is entitled to recover:

Answer: \$_____

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.

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Defendant.

THE RESERVE, A NONPROFIT
CORPORATION d/b/a THE RESERVE ON
WALNUT CREEK,

Third-Party Plaintiff,

v.

S.X. CORPORATION d/b/a ESSEX
CORPORATION,

Third-Party Defendant.

CASE NO. CVCV052364

**PLAINTIFFS' PROPOSED
VERDICT FORM NO. 4**

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

Question No. 1: Did Plaintiff Maureen Wilson prove that her contract with Defendant The Reserve is unconscionable?

(Answer "yes" or "no")

Answer: _____

(Proceed to Question No. 2)

Question No. 2: Did Plaintiff Maureen Wilson prove her breach of fiduciary duty claim against Defendant The Reserve?

(Answer “yes” or “no”)

Answer: _____

(If your answer to Question No. 1 or Question No. 2 was “yes,” proceed to Question No. 3. If your answer to both questions was “no,” do not answer Question No. 3 and instead sign this verdict form and move on to the next verdict form).

Question No. 3: State the total amount of money Plaintiff Maureen Wilson is entitled to recover:

Answer: \$_____

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.