


 A handwritten signature in blue ink is written over a circular stamp. The stamp contains the text "POLK COUNTY, IA." and "CLERK DISTRICT COURT".

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.

Case No. CVCV052364

**STATEMENT OF THE CASE
AND JURY INSTRUCTIONS**

JUDGE JEANIE K. VAUDT

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.

FILED
POLK COUNTY, IA.
2018 JUN - 7 PM 3:24
CLERK DISTRICT COURT

STATEMENT OF THE CASE

Members of the Jury:

This case involves a lawsuit brought by Plaintiffs against Defendant. Plaintiffs individually entered into a contract with Defendant relating to their respective memberships in Defendant. Plaintiffs contend that Defendant breached fiduciary duties that Defendant owed them related to their memberships. Defendant denies all claims asserted by Plaintiffs.

You will decide whether Defendant breached a fiduciary duty to Plaintiffs. The law requires the court to decide the unconscionability claims asserted by Plaintiffs.

Do not consider this Statement of the Case and proof of any claim. Decide the facts from the evidence presented by the parties and apply the law which I will give you now.

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

The fact that a party is a non-profit corporation should not affect your decision. All parties 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 party.

Nothing I have said or done during this trial was intended to give any opinion as to the facts, proof, or what your verdict should be.

INSTRUCTION NO. 2

Whenever a party must prove something, it must do so by a 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 or by deposition.
2. Exhibits received by the court.
3. Stipulations, which are agreements between the attorneys.
4. Any other matter admitted (such as answers to interrogatories, matters for which judicial notice was taken, etc.).

In considering the evidence, make deductions and reach conclusions according to reason and common sense. Facts may be proved by direct evidence, circumstantial evidence, or both. Direct evidence is evidence from a witness who claims actual knowledge of a fact, such as an eyewitness. Circumstantial evidence is evidence about a chain of facts that shows the existence or nonexistence of a certain fact.

The law makes no distinction between direct and circumstantial evidence. Give all the evidence the weight you think it is entitled to receive.

Sometimes during a trial references are made to pretrial statements, witness 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 upon objections.

3. Any testimony I told you to disregard.
4. Anything you saw or heard about this case outside the courtroom.

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 the other evidence you believe;
2. The witness' appearance, conduct, age, intelligence, memory and knowledge of the facts; and
3. The witness' interest in the trial, their motive, candor, bias and prejudice.

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. 4

You have heard evidence claiming that a party or a representative of a party made statements before this trial while under oath and while not under oath.

If you find such statement was made, you may disregard the statement as evidence in this case the same as if the party had made it under oath during the trial.

If you find such statement was made and was inconsistent with testimony during the trial you may also use the statement as a basis for disregarding all or any part of the party's testimony during the trial but you are not required to so do.

You should not disregard the testimony during the trial if other credible evidence supports it or if you believe it for any other reason.

INSTRUCTION NO. 7

Each Plaintiff must prove the following propositions:

1. A fiduciary relationship existed between the Plaintiff and Defendant.
2. Defendant breached a fiduciary duty to that Plaintiff.
3. The breach of fiduciary duty was a cause of damage to that Plaintiff.
4. The amount of damage to that Plaintiff.

If any Plaintiff has failed to prove any of these propositions, then that Plaintiff cannot recover damages.

If any Plaintiff has proved all of these propositions, then that Plaintiff is entitled to recover damages in some amount.

INSTRUCTION NO. 8

Concerning proposition No. 1 of Instruction No. 7, 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.

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 each Plaintiff and Defendant.

INSTRUCTION NO. 9

Concerning proposition No. 3 of Instruction No. 7, the conduct of a party is the cause of damage when the damage would not have happened except for the conduct.

INSTRUCTION NO. 10

No fiduciary relationship can exist unless each Plaintiff reasonably relied upon Defendant in their dealings with each other.

INSTRUCTION NO. 11

If you conclude Defendant acted in good faith in making a business decision, that the decision was reasonably prudent, and that Defendant reasonably believed its actions were in the best interest of Defendant and its members, then there was no breach of a fiduciary duty.

INSTRUCTION NO. 12

You must use your sound judgment based upon an impartial consideration of the evidence to arrive at the amount of damages, if any, incurred by each Plaintiff that was caused by a breach of fiduciary duty that has been proven by that Plaintiff.

Your judgment must not be exercised arbitrarily, or out of sympathy or prejudice, for or against the parties. The amount you assess for any item of damage must not exceed the amount caused by a party as proved by the evidence.

A party cannot recover duplicate damages. Do not allow amounts awarded under one item of damage to be included in any amount awarded under another item of damage.

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 shall be your item of damage.

The damages you assess, if any, shall reflect your decision on the individual count involved without regard to the decision made by the court on the other count.

The court will use all the information you provide in your verdict to determine what amount of damage may be recovered.

INSTRUCTION NO. 13

Plaintiffs may recover only for a breach of fiduciary duty that occurred on or after
July 20, 2011.

INSTRUCTION NO. 14

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

INSTRUCTION NO. 15

Defendant claims that each Plaintiff failed to mitigate her damages.

A Plaintiff has a duty to exercise ordinary care to reduce, minimize or limit her damages. However, a Plaintiff has no duty to do something that is unreasonable under the circumstances.

To prove Defendant's claim of failure to mitigate, Defendant must prove all of the following:

1. There was something each Plaintiff could do to mitigate her damages;
2. Requiring each Plaintiff to do so was reasonable under the circumstances;
3. Each Plaintiff acted unreasonably in failing to undertake the mitigating activity; and
4. Each Plaintiff's failure to undertake the mitigating activity caused an identifiable portion of her damages.

If Defendant has proved all of these numbered propositions, then Defendant has proved this defense, and you shall reduce any damages awarded by the dollar amount by which Plaintiff failed to mitigate her damages.

If Defendant has failed to prove one or more of these numbered propositions, then Defendant has not proved the Plaintiff failed to mitigate her damages.

INSTRUCTION NO. 16

Defendant is a senior adult congregate living facility as defined by Iowa law. A senior congregate living facility means a facility which provides housing and one or more supportive services furnished to a resident, with or without other periodic charges, in consideration of an entrance fee.

In considering each Plaintiff's claim for breach of fiduciary duty, you should not speculate or reach any judgment about the amounts of the entrance fees, supplemental amounts, or monthly charges set by Defendant.

INSTRUCTION NO. 17

You have heard evidence presented by Plaintiffs, objections by the attorneys, and rulings by the court regarding a claim of unconscionability asserted by Plaintiffs. You will only be deciding whether Defendant has breached a fiduciary duty to each Plaintiff. Accordingly, in reaching your decision on breach of fiduciary duty, you must disregard the claim of unconscionability and any evidence presented by Plaintiffs solely regarding a claim of unconscionability.

INSTRUCTION NO. 18

Defendant's third-party claims against Essex Corporation are not at issue in this trial. Do not speculate about, and do not consider, these claims during your deliberations.

INSTRUCTION NO. 19

Upon retiring to deliberate you shall select a foreperson. It will be his or her duty to see 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 that it may be incorrect.

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

INSTRUCTION NO. 20

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. 21

Occasionally after a jury retires to the jury room, the members have questions. I have prepared the instructions that have been given to you after carefully considering this case with the parties and the lawyers. I have tried to use language which is generally understandable. Usually questions about instructions can be answered by carefully re-reading the instructions.

If, however, any of you feel it is necessary to ask a question, you must do so in writing and deliver the question to the court attendant. I cannot communicate with you without first discussing your question and potential answer with the parties and the lawyers. This process naturally takes time and deliberations before I can reply. The foreperson shall read my response to the jury.

Please keep the written question and response and return it to the court with the verdict.

The court attendant will take an oath not to communicate with you about this case except to ask if you have agreed upon a verdict. Please do not put her on the spot by asking her any questions. You should direct your questions to the court and not to the court attendant.

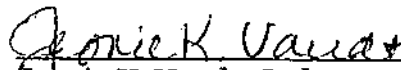
INSTRUCTION NO. 22

I am giving you a verdict form with several questions. If you return a unanimous verdict, that is, a verdict upon which you all agree, only your foreperson will sign the verdict form.

After deliberating for six hours (excluding meals and recesses outside of your jury room), all but one of you may agree upon and return a verdict. In that case, those of you who agree on that verdict must sign the verdict form. Your deliberations are deemed to begin at 1:00 a.m./p.m. on June 7, 2018.

When you have arrived at your verdict, the verdict form should be signed as instructed and the foreperson should place it in an envelope that the court attendant will provide to you. You shall then give the sealed verdict to the court attendant.

Dated this 7th day of June, 2018.


Jeanie K. Vaudt, Judge
Fifth Judicial District of Iowa

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

VERDICT FORM

We, the jury, duly empaneled and sworn to try the issues herein, answer this Verdict Form as to Plaintiffs' claims of breach of fiduciary duty by Defendant as follows:

I. MARY JANE BUCK

1. **Did Mary Jane Buck prove by a preponderance of the evidence that Defendant was in a fiduciary relationship with her?**

 X Yes

 No

If you answered Question No. 1 "Yes," then proceed to Question No. 2.

If you answered Question No. 1 "No," then skip Question Nos. 2 and 3 and proceed to Question No. 4.

- 2. Did Mary Jane Buck prove by a preponderance of the evidence that Defendant breached a fiduciary duty owed to her?**

 X Yes No

If you answered Question No. 2 "Yes," then proceed to Question No. 3.

If you answered Question No. 2 "No," then skip Question No. 3 and proceed to Question No. 4.

- 3. Did Mary Jane Buck prove by a preponderance of the evidence that Defendant was the cause of any damages to her?**

 X Yes No

If you answered Question No. 3 "Yes," then enter the amount of damages (if any) that were proven by a preponderance of the evidence submitted by Mary Jane Buck in the space below and then proceed to Question No. 4. If you find that Mary Jane Buck failed to mitigate any damages she has proven, you must reduce the amount of damages awarded in the space below by the amount of damages that Mary Jane Buck could have prevented.

If no amount of damages was proved by a preponderance of the evidence, enter \$0.00 in the space below and proceed to Question No. 4.

\$ 175,858

If you answered Question No. 3 "No," then proceed to Question No. 4.

II. LOIS ERBSTEIN

- 4. Did Lois Erbstein prove by a preponderance of the evidence that Defendant was in a fiduciary relationship with her?**

 X Yes No

If you answered Question No. 4 "Yes," then proceed to Question No. 5.

If you answered Question No. 4 "No," then skip Question Nos. 5 and 6 and proceed to Question No. 7.

5. **Did Lois Erbstein prove by a preponderance of the evidence that Defendant breached a fiduciary duty owed to her?**

 X Yes No

If you answered Question No. 5 "Yes," then proceed to Question No. 6.

If you answered Question No. 5 "No," then skip Question No. 6 and proceed to Question No. 7.

6. **Did Lois Erbstein prove by a preponderance of the evidence that Defendant was the cause of any damages to her?**

 X Yes No

If you answered Question No. 6 "Yes," then enter the amount of damages (if any) that were proven by a preponderance of the evidence submitted by Lois Erbstein in the space below and proceed to Question No. 7. If you find that Lois Erbstein failed to mitigate any damages she has proven, you must reduce the amount of damages awarded in the space below by the amount of damages that Lois Erbstein could have prevented. If no amount of damages was proven, enter \$0.00 in the space provided below and proceed to Question No. 7.

\$ 173,170

If you answered Question No. 6 "No," then proceed to Question No. 7.

III. LORRAINE SHIRK

7. **Did Lorraine Shirk prove by a preponderance of the evidence that Defendant was in a fiduciary relationship with her?**

 X Yes No

If you answered Question No. 7 "Yes," then proceed to Question No. 8.

If you answered Question No. 7 "No," then skip Question Nos. 8 and 9 and proceed to Question No. 10.

8. **Did Lorraine Shirk prove by a preponderance of the evidence that Defendant breached a fiduciary duty owed to her?**

 X Yes No

If you answered Question No. 8 "Yes," then proceed to Question No. 9.

If you answered Question No. 8 "No," then skip Question No. 9 and proceed to Question No. 10.

- 9. Did Lorraine Shirk prove by a preponderance of the evidence that Defendant was the cause of any damages to her?**

 X Yes No

If you answered Question No. 9 "Yes," then enter the amount of damages (if any) that were proven by a preponderance of the evidence submitted by Lorraine Shirk in the space below and proceed to Question No. 10. If you find that Lorraine Shirk failed to mitigate any damages she has proven, you must reduce the amount of damages awarded in the space below by the amount of damages that Lorraine Shirk could have prevented. If no amount of damages was proven, enter \$0.00 in the space provided below and proceed to Question No. 10.

\$ 166,068

If you answered Question No. 9 "No," then proceed to Question No. 10.

IV. MAUREEN WILSON

- 10. Did Maureen Wilson prove by a preponderance of the evidence that Defendant was in a fiduciary relationship with her?**

 X Yes No

If you answered Question No. 10 "Yes," then proceed to Question No. 11.

If you answered Question No. 10 "No," then please sign below and alert the court attendant that you have completed this form.

- 11. Did Maureen Wilson prove by a preponderance of the evidence that Defendant breached a fiduciary duty owed to her?**

 X Yes No

If you answered Question No. 11 "Yes," then proceed to Question No. 12.

If you answered Question No. 11 "No," then please sign below and alert the court attendant that you have completed this form.

- 12. Did Maureen Wilson prove by a preponderance of the evidence that Defendant was the cause of any damages to her?**

 X Yes No

If you answered Question No. 12 "Yes," then enter the amount of damages (if any) that were proven by a preponderance of the evidence submitted by Maureen Wilson in the space below and then please sign below and alert the court attendant that you have completed this form. If you find that Maureen Wilson failed to mitigate any damages she has proven, then you must reduce the amount of damages awarded in the space below by the amount of damages that Maureen Wilson could have prevented. If no amount of damages was proven, enter \$0.00 in the space provided below and then please sign below and alert the court attendant that you have completed this form.

\$ 179,966

If you answered Question No. 12 "No," then please sign below and alert the court attendant that you have completed this form.

You may now sign and date this form in accordance with the previous instructions because you have completed your deliberation.

*FOREPERSON: 

* To be signed by the foreperson ONLY if the verdict is unanimous.

DATE: 6/7/18

OR

Juror**

Juror**

Juror**

Juror**

Juror**

Juror**

Juror**

Juror**

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