

IOWA DISTRICT COURT IN AND FOR BLACK HAWK COUNTY

MARILYN A. FAIRCHILD,)	
)	Case No. LACV137917
Plaintiff,)	
)	
vs.)	DEFENDANT'S PROPOSED
)	JURY INSTRUCTIONS
DJBCK, INC., d/b/a DALTON)	
PLUMBING, HEATING AND)	
COOLING, INC.,)	
)	
Defendant.)	

COMES NOW Defendant, DJBCK, Inc., d/b/a Dalton Plumbing, Heating and Cooling, Inc., by and through counsel, and pursuant to Court Order and subject to all defenses raised by answer, motion or otherwise, and requests that the following jury instructions and verdict form be given to the jury upon the submission of this case:

1. ICJI 100.1 Statement of the Case.....
2. ICJI 100.2 Duties of Judge and Jury, Instructions as Whole.....
3. ICJI 100.3 Burden of Proof, Preponderance of Evidence.....
4. ICJI 100.4 Evidence.....
5. ICJI 100.5 Deposition Testimony.....
6. ICJI 100.9 Credibility of Witnesses.....
7. ICJI 100.12 Opinion Evidence, Expert Witness
8. ICJI 100.15 Statements by Party Opponent.....
9. ICJI 100.18 General Instruction to Jury.....
10. ICJI 100.19 Clear, Convincing and Satisfactory Evidence.....
11. ICJI 100.20 Corporate Party
12. ICJI 100.21 Cautionary Instruction - Juror's Notes.....

13. ICJI 1100.5 Implied Warranty of Fitness for Particular Purpose - Definition	
14. ICJI 1100.6 Essentials for Recovery - Implied Warranty of Fitness for Particular Purpose	
15. ICJI 1100.7 Fitness - Particular Purpose.....	
16. ICJI 1100.8 Reliance - Particular Purpose.....	
17. ICJI 1100.9 Implied Warranty of Fitness for Particular Purpose - Contract Services - Definition	
18. ICJI 2400.1 Essentials for Recovery - Contract.....	
19. ICJI 2400.2 Competency	
20. ICJI 2400.3 Existence of Contract	
21. ICJI 220.2 Breach of Contract / Fraud-Reliance Interest	
22. ICJI 2400.5 Terms - Interpretation	
23. ICJI 2400.6 Breach - Definition.....	
24. ICJI 2400.7 Performance by Plaintiff.....	
25. Essentials for Recovery - Consumer Fraud	
26. Material Fact - Definition	
27. Unintentional Violation	

Respectfully Submitted,

SWISHER & COHRT, P.L.C.

By: Henry J. Bevel III
Henry J. Bevel III AT0000782

528 West 4th Street

P. O. Box 1200

Waterloo, IA 50704-1200

Telephone: (319) 232-6555

Facsimile: (319) 232-4835

E-mail: bevel@s-c-law.com

Attorneys for Defendant

Original filed.

Copy to:

Erich D. Priebe

Dutton, Daniels, Hines, Kalkhoff,

Cook, & Swanson, P.L.C.

3151 Brockway Road

P.O. Box 810

Waterloo, IA 50704

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above case by service on each of the attorneys of record herein at their respective addresses disclosed on the pleadings by:

☐ U.S. Mail ☒ Other: EDMS

☐ Hand Delivered ☐ FAX

on 5-4, 2021

Kathy Fox

Defendant's Proposed Jury Instruction No. ____
Statement of the Case

Members of the Jury: In this case, the Plaintiff claims the Defendant breached a contract, breached the implied warranty for fitness for a particular purpose and engaged in consumer fraud. The Plaintiff seeks damages in this case.

The Defendant denies the Plaintiff's claims.

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.

Authority
ICJI 100.1

Defendant's Proposed Jury Instruction No. ____
Duties Of Judge And Jury, Instructions As Whole

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.

Authority
ICJI 100.2

Defendant's Proposed Jury Instruction No. ____
Burden Of Proof, Preponderance Of Evidence

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
ICJI 100.3

Defendant's Proposed Jury Instruction No. ____
Evidence

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
ICJI 100.4

Defendant's Proposed Jury Instruction No. ____
Deposition Testimony

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.

Authority
ICJI 100.5

Defendant's Proposed Jury Instruction No. ____
Credibility Of Witnesses

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
ICJI 100.9

Defendant's Proposed Jury Instruction No. ____
Opinion Evidence, Expert Witness

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.

Authority
ICJI 100.12

Defendant's Proposed Jury Instruction No. ____
Statements By A Party Opponent

You have heard evidence claiming Marilyn Fairchild and employees or agents of Dalton Plumbing, Heating & Cooling 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 Marilyn Fairchild or employees or agents of Dalton Plumbing, Heating & Cooling had made them under oath during the trial.

If you find such a statement was made and was inconsistent with Marilyn Fairchild, or the Dalton Plumbing, Heating & Cooling's employee / agent's testimony during the trial you may also use the statement as a basis for disregarding all or any part of Marilyn Fairchild or the Dalton Plumbing, Heating & Cooling employee / agent's testimony during the trial but you are not required to do so. You should not disregard Marilyn Fairchild or the Dalton Plumbing, Heating & Cooling employee / agent's testimony during the trial if other credible evidence supports it or if you believe it for any other reason.

Authority
ICJI 100.15

Defendant's Proposed Jury Instruction No. ____
General Instruction To Jury

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
ICJI 100.18

Defendant's Proposed Jury Instruction No. ____
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.

Authority
ICJI 100.19

Defendant's Proposed Jury Instruction No. ____
Corporate Party

The fact that a plaintiff or defendant is a corporation should not affect your decision. All person 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.

Authority
ICJI 100.20

Defendant's Proposed Jury Instruction No. ____
Cautionary Instruction - Juror's Notes

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
ICJI 100.21

Defendant's Proposed Jury Instruction No. ____
Implied Warranty Of Fitness For Particular Purpose - Definition

Where at the time of contracting, the seller has reason to know the particular purpose for which the Bosch Geothermal Unit is required and the buyer is relying on the seller's skill or judgment to select or furnish a suitable pool heating unit, there is an implied warranty the goods shall be fit for the particular purpose.

Authority
ICJI 1100.5

Defendant's Proposed Jury Instruction No. ____
Essentials For Recovery - Implied Warranty Of Fitness For Particular Purpose

Plaintiff must prove all of the following propositions:

1. At the time of the sale the defendant had reason to know the particular purpose of the Bosch Geothermal Unit.
2. The defendant had reason to know the plaintiff was relying on the defendant's skill or judgment to furnish the pool heating system.
3. The plaintiff relied upon the defendant's skill or judgment.
4. The Bosch Geothermal system was not fit for the particular purpose.
5. The failure of the Bosch Geothermal system to fit the particular purpose was a cause of the plaintiff's damage.
6. The amount of damage.

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

Authority
ICJI 1100.6

Defendant's Proposed Jury Instruction No. ____
Fitness - Particular Purpose

When the ordinary purpose of a product is the same as the buyer's particular purpose, the buyer must still prove the seller knew the buyer's particular purpose and the buyer was relying on the seller's skill and judgment to furnish a suitable product or service.

No specific conversation between the parties is necessary with respect to the particular purpose. The particular purpose may arise from the facts and circumstances surrounding the transaction or past transactions between the parties.

Authority
ICJI 1100.7

Defendant's Proposed Jury Instruction No. ____
Reliance - Particular Purpose

It is not enough that the buyer relied upon the general reputation or integrity of the seller. It must appear the seller had special skill or judgment regarding the product and its intended use, and the buyer relied upon the seller's special skills or judgment.

The buyer's reliance on the seller's skill or judgment need not be a total reliance. The buyer may rely partly on their own judgment and partly on the seller's skill and judgment.

Authority
ICJI 1100.8

Defendant's Proposed Jury Instruction No. ____
Implied Warranty Of Fitness For Particular Purpose - Contract For Services - Definition

When a contractor agrees to build, install or perform work, there is an implied agreement that the building, installation or work performed will be sufficient for the particular purpose desired or to accomplish a certain result.

Authority
ICJI 1100.9

Defendant's Proposed Jury Instruction No. ____
Essentials for Recovery - Contract

Plaintiff 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. The plaintiff has done what the contract requires.
5. The defendant has breached the contract.
6. The amount of any damage defendant has caused.

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

Authority
ICJI 2400.1

Defendant's Proposed Jury Instruction No. ____
Competency

A person is capable of making a contract unless the person lacked sufficient mental capacity to understand it.

Authority
ICJI 2400.2

Defendant's Proposed Jury Instruction No. ____
Existence Of A Contract

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.

Authority
ICJI 2400.3

Defendant's Proposed Jury Instruction No. ____
Breach Of Contract/Fraud-Reliance Interest

The measure of damages for [breach of a contract] [fraud] is an amount that will reimburse (plaintiff) for the loss caused by [his] [her] reliance on the [contract] [defendant's misrepresentation or omission] and will place [him] [her] in as good a position as if the [breach [representation] had not been made.

The damages you award for [breach of contract] [fraud] must be foreseeable or have been reasonably foreseen at the time the [parties entered into the contract] [representation was made].

In your consideration of the damages, you may consider the following:

(List the items of damage claimed and allowable according to the facts of the case.)

Authority
ICJI 220.2

Defendant's Proposed Jury Instruction No. ____
Terms - Interpretation

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.

Authority
ICJI 2400.5

Defendant's Proposed Jury Instruction No. ____
Breach - Definition

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

Authority
ICJI 2400.6

Defendant's Proposed Jury Instruction No. ____
Performance By Plaintiff

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) (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 (subject to defendant's claim for partial breach). 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.

Authority
ICJI 2400.7

Defendant's Proposed Jury Instruction No. ____
Essentials for Recovery - Consumer Fraud

Plaintiff must prove all of the following propositions to recover for Plaintiff's claim of consumer fraud:

1. An employee of Dalton Plumbing, Heating & Cooling, Inc., engaged in misrepresentation, concealment, suppression or omission of facts.
2. The misrepresentation, concealment, suppression or omission was of a material fact.
3. The misrepresentation, concealment, suppression or omission of a material fact was made with the intent that the Plaintiff rely upon the misrepresentation, concealment, suppression or omission.
4. The Plaintiff sustained damages as a result of the misrepresentation, concealment, suppression or omission of material facts.
5. The amount of damage.

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

Authority
Iowa Code §714H.3.

Defendant's Proposed Jury Instruction No. ____
Material Fact - Definition

A fact is material when it influences a person to enter into a contract, when it deceives him and induces him to act, or when without it, the transaction would not have occurred. As a general rule, to constitute fraud by concealment or suppression, there must be something more than mere silence or a mere failure to disclose known facts.

Authority

Wilden Clinic, Inc. v. City of Des Moines, 229 N.W.2d 286, 293 (Iowa 1975).

Defendant's Proposed Jury Instruction No. ____
Unintentional Violation

If the Defendant has shown by a preponderance of the evidence that a violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid the error, the Defendant cannot be found liable for consumer fraud.

Authority
Iowa Code §714H.5(7).