

IN THE IOWA DISTRICT COURT FOR WINNESHIEK COUNTY

KEVIN MOELLERS AND GAYLEEN MOELLERS, Plaintiffs,  v.  J.P. FITZGERALD INC. d/b/a, FITZGERALD INC. Defendant.	* * * * * * * * *	Case No. LACV026203  PLAINTIFFS PROPOSED JURY INSTRUCTIONS
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**COME NOW** the Plaintiffs, Kevin Moellers and Gayleen Moellers and submit the attached as the instructions proposed by the Plaintiffs in this matter.

Dated this the 28<sup>th</sup> day of November 2018.

**ANDERSON, WILMARTH,  
VAN DER MAATEN, BELAY,  
FRETHEIM, GIPP, LYNCH & ZAHASKY**

/s/ Andrew F. Van Der Maaten

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TO COUNTERCLAIM

MEMBERS OF THE JURY:

In this case, Plaintiff, Kevin Moellers and Gayleen Moellers, ("Moellers") claims it entered into a contract with Defendant, J.P. Fitzgerald, Inc. d/b/a Fitzgerald, Inc. ("Fitzgerald") for the purchase, installation, maintenance and repair of dairy equipment. Moellers claims Fitzgerald breached the contract by failing to install the proper equipment, maintain and repair the equipment it sold to Moellers. Moellers claims it has suffered damages as a result of the breach.

Defendant Fitzgerald denies that it breached the contract with Moellers. Fitzgerald further claims Moellers owes money to Fitzgerald for the work performed by Fitzgerald at Moellers' dairy.

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. \_\_\_\_

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. \_\_\_\_

I have not by these instructions or by any ruling made, or by any act done, or by anything said during the trial, intended or attempted to give any opinion as to what the facts are, what the proof is, nor what your verdict should be.

INSTRUCTION NO. \_\_\_\_

The fact that a Plaintiff or 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. \_\_\_\_

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. \_\_\_\_

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.

Evidence may be direct or circumstantial evidence. 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. \_\_\_\_

Facts may be proved by direct evidence, circumstantial evidence, or both. Direct evidence is the evidence of the witnesses to a fact or facts of which they have knowledge by means of their senses.

Circumstantial evidence refers to proof of a chain of circumstances pointing to the existence or non-existence of certain facts.

The law makes no distinction between direct and circumstantial evidence but simply requires the jury find the facts in accordance with a preponderance of all the evidence in the case.

INSTRUCTION NO. \_\_\_\_

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.\_\_\_\_

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, 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 witness's 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.
3. The witnesses' interest in the trial, their motive, candor, bias and prejudice.

INSTRUCTION NO.\_\_\_\_

You have heard evidence claiming a party made statements before this trial.

If you find such statements were made, you may regard the statement as evidence in this case the same as if the party had made them under oath during the trial.

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

INSTRUCTION NO.\_\_\_\_

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.\_\_\_\_

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. \_\_\_\_

An expert witness was asked to assume certain facts were true and to give an opinion based on that assumption. This is called a hypothetical question. If any fact assumed in the question has not been proved by the evidence, you should decide if that omission affects the value of the opinion.

INSTRUCTION NO. \_\_\_\_

Plaintiff claims that Defendant has intentionally destroyed evidence consisting of maintenance records related to repairs and other maintenance performed on the dairy equipment. You may, but are not required to, conclude that such evidence would be unfavorable to Defendant.

Before you can reach this conclusion, Plaintiff must prove all of the following:

1. The evidence exists or previously existed.
2. The evidence is or was within the possession or control of Defendant.
3. Defendant's interests would call for production of the evidence if favorable to that party.
4. Defendant has intentionally destroyed the evidence without satisfactory explanation.

For you to reach this conclusion, more than the mere destruction of the evidence must be shown. It is not sufficient to show that a third person destroyed the evidence without the authorization or consent of Defendant.

INSTRUCTION NO. \_\_\_\_

To recover against the Defendant for breach of contract, the Plaintiff must prove all of the following propositions:

1. The existence of a contract.
2. The terms of the contract, including a term that Defendant would provide proper equipment, maintain and repair the equipment it sold to Moellers.
3. The Plaintiff has done what the contract requires.
4. The Defendant has breached the contract, by failing to provide correct equipment and in failing to install, repair or maintain the equipment.
5. 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.

INSTRUCTION NO. \_\_\_\_

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. \_\_\_\_

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.

INSTRUCTION NO. \_\_\_\_

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

INSTRUCTION NO. \_\_\_\_

A breach of contract is a cause of damage when the damage would not have happened but for the breach.

INSTRUCTION NO. \_\_\_\_

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

If you find Plaintiff is entitled to recover damages, it is your duty to determine the amount. In doing so, you may consider the following items:

1. Profits lost due to reduced milk production.
2. Economic Loss due to excess cow death and culling.
3. Profits Lost due to loss of quality premiums.

The amount you assess for any item of damage must not exceed the amount caused by the Defendant as proved by the evidence.

A party cannot recover duplicate damages. Any amount awarded under one item of damage should not be included in any amount awarded under another item of damage.

Profits lost due to reduced milk production are calculated as:

(Normal Revenue minus Normal Cost) minus (Actual Revenue minus Actual Cost).

“Normal” refers to revenue and expenses the dairy could reasonably expect but for any breach of contract; and, “Actual” refers to the revenue and expenses the dairy experienced during the period of time in issue. In calculating revenue, you may consider milk production lost, market prices of milk during relevant periods and herd size.

The amounts, if any, you find for each of the above items will be used to answer the verdict form.

INSTRUCTION NO. \_\_\_\_

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.

INSTRUCTION NO. \_\_\_\_

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. \_\_\_\_

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.

INSTRUCTION NO. \_\_\_\_

Occasionally, after a jury retires to the Jury Room, questions may arise as to the instructions. The instructions have been prepared for you under the Iowa laws, as I understand them to be. A written copy of the instructions will be given to you for your consideration. I have tried to use language which is generally understandable. Normally, a question about the instructions can be answered by just carefully re-reading them. However, if you do feel it necessary to ask a question, you must do so in writing and it must be signed by your foreperson. I cannot answer any question

without first discussing it with the attorneys and the parties. This naturally takes time and deliberation before I can reply.

The Court Attendant who is working with you is in a similar position. He or she has taken an oath not to communicate with you except to ask if you have agreed upon a verdict. Please do not put him or her on the spot by asking any other questions.

INSTRUCTION NO. \_\_\_\_

A typed record of witnesses' testimony taken during the trial is not available. You must rely on your own recollection of the witnesses' testimony.

After your verdict has been received by the Court, either party has a right to poll the jury. This means that the Clerk would call your name individually and ask the question, "Is this your verdict?" and it would be necessary for you to answer yes or no in open court. This is not done in every case, but the parties do have the right to this procedure.

Finally, if you need to notify anyone about the time you will be deliberating, for example a spouse, baby-sitter, or employer, please notify the Court Attendant before you begin your deliberations or at any time thereafter and a telephone will be made available to you for that purpose.

INSTRUCTION NO. \_\_\_\_

I am giving you \_\_\_\_ verdict form(s). If you all agree to the answers to the questions, the verdict will be signed by the person you selected to serve as foreman or forewoman.

After deliberating for six (6) hours, excluding meals or recesses outside your jury room, then it is necessary that only seven of you agree upon the verdict. In that case the verdict must be signed by all seven jurors who are in agreement.

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

Dated the \_\_\_\_ day of December 2018.

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Judge, First Judicial District



IN THE IOWA DISTRICT COURT FOR WINNESHIEK COUNTY

KEVIN MOELLERS AND GAYLEEN MOELLERS, Plaintiffs,  v.  J.P. FITZGERALD INC. d/b/a, FITZGERALD INC. Defendant.	* * * * * * * * * *	Case No. LACV026203  SPECIAL VERDICT FORM #1
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We, the jury, find in favor of the plaintiffs, Kevin Moellers and Gayleen Moellers, and fix the amount of their recovery against the defendant for the following items of damage:

Profits lost due to reduced milk production.	\$ _____
Economic Loss due to excess cow death and culling	\$ _____
Profits Lost due to loss of quality premiums	\$ _____
Total:	\$ _____

\_\_\_\_\_  
FOREPERSON\*

\*To be signed only if verdict is unanimous.

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Juror\*\*  
  
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Juror\*\*  
  
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Juror\*\*  
  
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Juror\*\*  
  
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Juror\*\*

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

IN THE IOWA DISTRICT COURT FOR WINNESHIEK COUNTY

KEVIN MOELLERS AND GAYLEEN MOELLERS, Plaintiffs,  v.  J.P. FITZGERALD INC. d/b/a, FITZGERALD INC. Defendant.	* * * * * * * * *	Case No. LACV026203  SPECIAL VERDICT FORM #2
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We, the jury, find in favor of the defendant on plaintiff claims.

\_\_\_\_\_  
FOREPERSON\*

\*To be signed only if verdict is unanimous.

\_\_\_\_\_  
Juror\*\*

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Juror\*\*

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Juror\*\*

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Juror\*\*

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Juror\*\*

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

IN THE IOWA DISTRICT COURT FOR WINNESHIEK COUNTY

<p>KEVIN MOELLERS AND GAYLEEN MOELLERS, Plaintiffs,</p> <p>v.</p> <p>J.P. FITZGERALD INC. d/b/a, FITZGERALD INC.</p> <p>Defendant.</p>	<p>*</p> <p>*</p> <p>*</p> <p>*</p> <p>*</p> <p>*</p> <p>*</p> <p>*</p> <p>*</p> <p>*</p>	<p>Case No. LACV026203</p> <p>ORDER</p>
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The jury has been deliberating since \_\_\_\_\_, \_\_\_\_\_m. on this date.

If the jury has not informed the court attendant that it has reached a verdict by \_\_\_\_\_ p.m., the court attendant is directed to deliver this Order to the Foreperson of the jury, and the Foreperson shall read this Order to the jury, and sign the certificate below.

IT IS ORDERED

1. The members of the jury are permitted to leave at this time.
2. The members of the jury shall return to the jury room at \_\_\_\_\_m. on December \_\_\_\_\_, 2018.
3. While separated, the members of the jury are admonished:
  - a. Not to discuss the case among themselves or with any other person.
  - b. Not to disclose the state of their deliberations.
  - c. Not to do any independent research or investigation.
4. When all of the jurors have returned to the jury room, they shall continue their deliberations.

Dated the \_\_\_\_ day of December 2018.

\_\_\_\_\_  
Judge, First Judicial District