

IN THE IOWA DISTRICT COURT IN AND FOR LYON COUNTY

CALICO SKIES WINERY AND
VINEYARD, INC. D/B/A CALICO SKIES
WINERY & VINEYARD, WILLIAM B.
KIMBERLEY, AND ASHLEE BAHNSON-
KIMBERLEY ,

Plaintiffs,

vs.

DENNIS J. SCHOLTEN AND JEFF
MATTOON ,

Defendants.

No. LACV501888

**PLAINTIFFS' STATEMENT OF THE
CASE, REQUESTED JURY
INSTRUCTIONS, AND PROPOSED
VERDICT FORM**

COME NOW the Plaintiffs, by and through the undersigned Attorney at Law, John C. Wagner, and hereby submit their Statement of the Case, Requested Jury Instructions and Proposed Verdict Form, provided pursuant to trial scheduling deadlines in this matter. Plaintiffs reserve the right to add to or alter these Requested Instructions depending on the state of the record and the evidence adduced at trial.

Respectfully submitted,

/s/ John C. Wagner

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INSTRUCTION NO. _____

I. STATEMENT OF THE CASE

MEMBERS OF THE JURY:

This case revolves around damage that Plaintiffs' vineyard plants sustained due to spray drift caused by Defendants. Calico Skies Vineyard and Winery (hereafter "The Vineyard") is owned by Plaintiffs, the Kimberleys, and is located in Inwood, Lyon County, Iowa. Defendant Dennis Scholten rents and farms land adjacent to the northeast portion of The Vineyard. The owner of the land rented by Scholten is Bud Gogelzang. Defendant Jeff Mattoon was hired by Scholten to apply chemical pesticides and herbicides to the land Scholten rented and farmed. Specifically, on June 9, 2015, Mattoon sprayed the rented land with a chemical herbicide which included a mixture of LO-VOL 6 2, 4-D Low Volatile Herbicide, which contains the active ingredient 2, 4-D acid-isooctyl ester. The spray migrated as herbicide drift onto The Vineyard grapevines, causing particulates of the spray chemicals to infiltrate The Vineyard and contact the grapevines within it. Prior to June 9, 2015, the grape vine plants of various varieties and ages were in foliage and in good health. The grapes grown in The Vineyard were/are also registered with the State of Iowa Sensitive Crops Directory, putting Defendants on notice of this fact. The Vineyard's perimeter is also clearly marked off with a seven-foot tall fence.

On roughly June 14, 2015, Plaintiffs noticed that The Vineyard and its grapes were showing stress symptoms, which Plaintiffs observed to spread and worsen over time. On June 17, 2015, Plaintiffs registered a formal complaint to the Iowa Department of Agriculture and Land Stewardship (hereafter "IDALS"). Pesticide investigator Brad

Hannah began reviewing the matter on June 19, 2015, and found that the 2, 4-D had not been applied to any other farms (except the land rented and farmed by Scholten) in the vicinity of The Vineyard for roughly 27 days prior to June 9, 2015, nor during the 8 days following that date. Plaintiffs observed the spray damage less than one week after June 9, 2015, and more than one week prior to application by other surrounding lands. Investigator Hannah collected vegetation samples from throughout The Vineyard and collected grape tissue tested positive for 2, 4-D herbicide, with the highest concentration found in vines in the northeast corner of The Vineyard. Much lower concentrations were found in the southeast corner.

Weather records for June 9, 2015, show that the temperature in Inwood exceeded 90 degrees Fahrenheit that day while wind speeds were as high as 14 miles per hour in variable directions. The warning label for LO-VOL 6 2, 4-D Low Volatile Herbicide lists grapes “in growing stage” as susceptible plants and also includes the following language on the label: “at temperatures above 90 [degrees Fahrenheit] vapors may damage susceptible crops growing nearby” and “2,4-D esters may volatilize during conditions of low humidity and high temperatures. Do not apply during conditions of low humidity and high temperatures.”

It is Plaintiffs’ position that the herbicide drift killed and damaged extensive plants in The Vineyard. This resulted in significant financial damage to Plaintiffs.

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.

I.C.J.I. 100.1

II. REQUESTED UNIFORM JURY INSTRUCTIONS

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. 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.

I.C.J.I. 100.2

Authority

Roushar v. Dixon, [231 Iowa 993](#), [2 N.W.2d 660](#) (1942)

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.

I.C.J.I. 100.3

Authority

Mabrier v. A.M. Servicing Corporation of Raytown, [161 N.W.2d 180](#) (1968)

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.

I.C.J.I. 100.4

Authority

Iowa Rules of Evidence.

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.

I.C.J.I. 100.5

Authority

Iowa R. Civ. P. 1.704

Farley v. Seiser, [316 N.W.2d 857](#) (Iowa 1982)

INSTRUCTION NO. ____

Interrogatories. 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.

I.C.J.I. 100.6

Authority

Iowa R. Civ. P. 1.509

INSTRUCTION NO. _____

Stipulated Testimony. Counsel has stipulated that if were called as a witness [he] [she] would testify as stipulated. Consider stipulated testimony as if it had been given in court.

I.C.J.I. 100.8

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.

I.C.J.I. 100.9

Authority

Burger v. Omaha & C.B. St. Ry. Co., [139 Iowa 645](#), 117 N.W.35 (1908)

INSTRUCTION NO. ____

Hypothetical Question, Expert Testimony. 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.

I.C.J.I. 100.11

Authority

Cody v. Toller Drug Co., [232 Iowa 475](#), [5 N.W.2d 824](#) (1942)

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.

I.C.J.I. 100.12

Authority

Crouch v. National Livestock Remedy Co., [210 Iowa 849](#), [231 N.W. 323](#) (1930).

INSTRUCTION NO. ____

Contradictory Statement, Non-party, Witness Not Under Oath. You have heard evidence claiming [name of witness] made statements before this trial while not under oath which were inconsistent with what the witness said in this trial.

Because the witness did not make the earlier statements under oath, you may use them only to help you decide if you believe the witness.

Decide if the earlier statements were made and whether they were inconsistent with testimony given at trial. You may disregard all or any part of the testimony if you find the statements were made and they were inconsistent with the testimony given at trial, but you are not required to do so.

Do not disregard the testimony if other evidence you believe supports it or if you believe it for any other reason.

I.C.J.I. 100.13

Authority

Iowa R. Evid. 5.613; State v. Barry, [549 N.W.2d 316](#), 318 (Iowa App. 1996) (A prior inconsistent statement of a witness not under oath may be considered for impeachment purposes only).

Comment

This instruction should be given when a non-party witness has made a prior inconsistent statement while not under oath. If the non-party witness made a prior inconsistent statement under oath, then Instruction 100.14 should be given. If the non-party witness has made prior inconsistent statements both under oath and not under oath, then both Instruction 100.13 and Instruction 100.14 should be given to clarify and distinguish the two forms of statements for the jury.

INSTRUCTION NO. ____

Contradictory Statements, Non-Party, Witness Under Oath. You have heard evidence claiming [name of witness] made statements before this trial while under oath which were inconsistent with what [name of 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 [name of non-party 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.

I.C.J.I. 100.14

Authority

A prior inconsistent statement of a witness given under oath is substantive evidence which may be considered for any purpose. State v. Thompson, [397 N.W.2d 679](#), 683 n.2 (Iowa 1986); Iowa R. Evid., 5.801(d)(1)(A).

Comment

This Instruction should be given when a non-party witness has made a prior inconsistent statement while under oath. If the non-party witness made a prior inconsistent statement while not under oath, then Instruction 100.13 should be given. If the non-party witness has made prior inconsistent statements both under oath and not under oath, then both Instruction 100.14 and Instruction 100.13 should be given to clarify and distinguish the two forms of statements for the jury.

INSTRUCTION NO. ____

Statements By A Party Opponent. You have heard evidence claiming [name of party] 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 [name of party] had made it under oath during the trial.

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

I.C.J.I. 100.15

INSTRUCTION NO. ____

Impeachment, Character and Reputation. You have heard evidence claiming the witness has a [reputation] [character trait] for not telling the truth. You may use that evidence only to help you decide whether to believe the witness and how much weight to give [his] [her] testimony.

I.C.J.I. 100.16

Authority

Iowa R. Evid., rule 5.609

Iowa R. Evid., rule 5.405

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.

I.C.J.I. 100.18

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.

I.C.J.I. 100.19

Authority

Raim v. Stancel, [339 N.W.2d 621](#), 624 (Iowa Appeals 1983)
Sinclair v. Allender, [26 N.W.2d 320](#), 326 (Iowa 1947)

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.

I.C.J.I. 100.20

Comment

Note: If scope of employment is an issue, Iowa Civil Jury Instruction 730.1 and 730.2 may be useful.

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.

I.C.J.I. 100.21

Authority

Iowa R. Civ. P. 1.926 (1)

INSTRUCTION NO. ____

Use of Electronic Devices.

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. [Failure to follow these instructions may result in the case having to be retried and could result in you being held in contempt and punished.]

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

I.C.J.I. 100.23

INSTRUCTION NO. _____

Punitive Damages. Punitive damages may be awarded if the plaintiffs have proven by a preponderance of clear, convincing and satisfactory evidence the defendant's conduct constituted a willful and wanton disregard for the rights or safety of another and caused actual damage to the plaintiff.

Punitive damages are not intended to compensate for injury but are allowed to punish and discourage the defendant and others from like conduct in the future. You may award punitive damages only if the defendant's conduct warrants a penalty in addition to the amount you award to compensate for plaintiff's actual injuries.

There is no exact rule to determine the amount of punitive damages, if any, you should award. You may consider the following factors:

1. The nature of defendant's conduct that harmed the plaintiff.
2. The amount of punitive damages which will punish and discourage like conduct by the defendant. You may consider the defendant's financial condition or ability to pay. You may not, however, award punitive damages solely because of the defendant's wealth or ability to pay.
3. The plaintiff's actual damages. The amount awarded for punitive damages must be reasonably related to the amount of actual damages you award to the plaintiff.
4. The existence and frequency of prior similar conduct. *If applicable, add:* Although you may consider harm to others in determining the nature of defendant's conduct, you may not award punitive damages to punish the defendant for harm caused to others, or for out-of-state conduct that was lawful where it occurred, or for any conduct by the defendant that is not similar to the conduct which caused the harm to the plaintiff in this case.

I.C.J.I. 210.1

Authority

Iowa Code section 668A.1

Philip Morris USA v. Williams, 127 S.Ct. 1057 (2007)

State Farm Mutual Auto Ins. Co. v. Campbell, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003)

Larson v. Great West Cas. Co., 482 N.W.2d 170 (Iowa App. 1992)

Suss v. Schammel, 375 N.W.2d 252 (Iowa 1985)

Nelson v. Restaurants of Iowa, Inc., 338 N.W.2d 881 (Iowa 1983)

Comment

Note: See Iowa Civil Jury Instruction 100.19 for definition of clear, convincing and satisfactory evidence.

INSTRUCTION NO. _____

Special Interrogatories - Punitive Damages.

Question No. 1: Do you find by a preponderance of clear, convincing and satisfactory evidence the conduct of the defendant constituted willful and wanton disregard for the rights or safety of another?

Answer "Yes" or "No"

ANSWER:

[If your answer to Question No. 1 is "No" do not answer Question Nos. 2 and 3]

Question No. 2: What amount of punitive damages, if any, do you award?

ANSWER:

[If your answer to Question No. 2 is "None" do not answer Question No. 3]

Question No. 3: Was the conduct of the defendant directed specifically at (name)?

Answer "Yes" or "No"

ANSWER:

I.C.J.I. 210.2

Authority

Iowa Code section 668A.1

Comment

Note: Where punitive damage claims are submitted against multiple defendants, the special interrogatories (Question Nos. 1-3) must be submitted for each defendant.

Note: When the issue of punitive damages against a principal or employer is submitted to the jury, add the following special interrogatory:

Question No. 4: Is (principal or employer) liable for punitive damages?

Answer "Yes" or "No"

ANSWER:

[If your answer to Question No. 4 is "No" do not answer Question No. 5]

Question No. 5: What amount of punitive damages, if any, do you award against (name of principal or employer)?

ANSWER:

INSTRUCTION NO. ____

Punitive Damages Against A Principal Or Employer. (Principal or employer) is liable for the punitive damages by reason of the acts of (employee or agent) if one of the following occurred:

1. The [principal or employer] [managerial agent of (principal or employer)] authorized the act and the way it was done; or
2. The [agent] [employee] was unfit and the [principal] or employer] [managerial agent of (principal or employer)] was reckless in employing or retaining him; or
3. The [agent] [employee] was employed in a managerial capacity and was acting in the scope of employment; or
4. The [principal or employer] [managerial agent of (principal or employer)] ratified or approved the act.

I.C.J.I. 210.3

Authority

Bethards v. Shivvers, Incorporated, [355 N.W.2d 39](#) (Iowa 1984)
Briner v. Hyslop, [337 N.W.2d 858](#) (Iowa 1983)
Restatement (Second) of Torts, section 909 (1979)

Comment

Note: Use only the alternatives which are supported by the evidence.

INSTRUCTION NO. ____

Willful and Wanton - Defined. Conduct is willful and wanton when a person intentionally does an act of an unreasonable character in disregard of a known or obvious risk that is so great as to make it highly probable that harm will follow.

I.C.J.I. 210.4

Authority

Fell v. Kewanee Farm Equipment Co., [457 N.W.2d 911](#) (Iowa 1990)

Kosmacek v. Farm Service Coop of Persia, [485 N.W.2d 99](#) (Iowa App. 1992)

INSTRUCTION NO. ____

Liability Of Person Engaging Services Of Independent Contractor - Essentials For Recovery. In order to establish liability on the part of one who hires an independent contractor for acts or omissions of that independent contractor, the plaintiff must prove all of the following propositions:

1. The defendant was negligent in one or more of the following ways:
 - a. Defendant failed to keep the premises in a reasonably safe condition for an employee of an independent contractor.
 - b. The work was likely to create a peculiar risk in the absence of special precautions and defendant failed to take the precautions.
 - c. The danger was normal to the work and defendant failed to take pre-cautions against the danger.
 - d. Defendant kept control over a particular part of the work and failed to use ordinary care in controlling that work.
 - e. Defendant was under a legal or contractual duty to provide a specified safeguard against danger and failed to do so.
2. The negligence of the defendant was a cause of the plaintiff's damage.
3. The nature and extent of damage.

If the plaintiff has failed to prove any of these propositions, the plaintiff is not entitled to damages. If plaintiff has proved all of these propositions, the plaintiff is entitled to damages in some amount. [If an affirmative defense is submitted, delete the second sentence and insert the following: If the plaintiff has proved all of these propositions, you will consider the defense of _____ as explained in Instruction No. _____.]

I.C.J.I. 500.1

Authority

Downs v. A. & H. Constr., Ltd., [481 N.W.2d 520](#) (Iowa 1992)
Clausen v. R. W. Gilbert Const. Co., Inc., [309 N.W.2d 462](#) (Iowa 1981)
Lunde v. Winnebago Industries, Inc., [299 N.W.2d 473](#) (Iowa 1980)
Giarratano v. Weitz Company, [259 Iowa 1292](#), [147 N.W.2d 824](#) (1967)
Restatement (Second) of Torts, Sections 409-427B
Thompson v. Kaczinski, [774 N.W. 2d 829](#), 836-39 (Iowa 2009) (causation)

Comment

Submit only those acts that have evidentiary support. If special precautions are claimed, set forth in b. and c. the special precautions claimed.

Rev. 09/10

INSTRUCTION NO. ____

Liability Of Person Engaging Services Of Independent Contractor - Work Dangerous In Absence Of Special Precautions. Persons who hire an independent contractor to do work which they should recognize as likely to create a peculiar risk of harm to others while the work is being done have the duty to exercise ordinary care to take special precautions.

A "peculiar risk" of harm exists only where some special danger results from the nature of the work done and which calls for special precautions. "Peculiar" does not mean that the risk must be one which is abnormal to the type of work done or that it must be an abnormally great risk. It refers to a special, exceptional, unusual, recognizable open danger arising out of the work itself which exists at all times.

This duty continues even though the contract provides for others to take adequate precautions, and the independent contractor agrees and assumes all liability for failing to do so. Such a contract does not relieve defendants from their duty to take such precautions where third persons are concerned.

A violation of this duty is negligence.

I.C.J.I. 500.3

Authority

Clausen v. R. W. Gilbert Const. Co., Inc., [309 N.W.2d 462](#) (Iowa 1981)

Lunde v. Winnebago Industries, Inc., [299 N.W.2d 473](#) (Iowa 1980)

[Restatement of Torts \(Second\), Section 416](#)

INSTRUCTION NO. ____

Liability Of Person Engaging Services Of Independent Contractor - Negligence In Exercising Control Retained By Such Person. Persons who hire an independent contractor, but who keep control of a particular part of the work, have the duty to use ordinary care in exercising such control.

"Keeping control" means keeping some degree of control over the way the work is done. This includes the right of supervision so that the independent contractor is not entirely free to control the way the work is done. It is not enough to have only a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations or changes.

A violation of this duty is negligence.

I.C.J.I. 500.5

Authority

Downs v. A. & H. Constr., Ltd., [481 N.W.2d 520](#) (Iowa 1992)
Giarratano v. Weitz Co., [259 Iowa 1292](#), [147 N.W.2d 824](#) (1967)
Restatement (Second) of Torts, Section 414

INSTRUCTION NO. ____

Liability Of Person Engaging Services Of Independent Contractor - Work Likely To Cause Nuisance Or Trespass - Essentials For Recovery. In order to establish liability of Scholten for acts of Mattoon resulting in the creation of a trespass upon the property of another, the plaintiffs must prove all of the following propositions:

1. Mattoon trespassed upon the land of plaintiffs in one or more of the following ways:

(a) by causing spray drift to escape onto the Vineyard;

2. The defendant knew or should have known a trespass would result if done in an ordinary manner unless special precautions were taken or received notice during the progress of the work that a trespass was occurring.

3. The trespass was a cause of damage to the plaintiffs.

4. The nature and extent of the plaintiff's damage.

If the plaintiffs have failed to prove any of these propositions, the plaintiffs are not entitled to damages. If the plaintiffs have proved all of these propositions, the plaintiffs are entitled to damages in some amount.

I.C.J.I. 500.7

Authority

Shannon v. Missouri Valley Limestone Company, [255 Iowa 528](#), [122 N.W.2d 278](#) (1963)

Restatement (Second) of Torts, Section 427B

Thompson v. Kaczinski, [774 N.W. 2d 829](#), 836-39 (Iowa 2009) (causation)

Comment

Note: This section must be amplified by instructing on nuisances. This same instruction can also be used for work likely to cause a trespass.

Rev. 09/10

INSTRUCTION NO. ____

Ordinary Care - Common Law Negligence - Defined. "Negligence" means failure to use ordinary care. Ordinary care is the care which a reasonably careful person would use under similar circumstances. "Negligence" is doing something a reasonably careful person would not do under similar circumstances, or failing to do something a reasonably careful person would do under similar circumstances.

I.C.J.I. 700.2

Authority

Bartlett v. Chebuhar, 479 N.W.2d 321 (Iowa 1992)
Schalk v. Smith, 224 Iowa 904, 277 N.W. 303 (1938)

INSTRUCTION NO. ____

Cause - Defined. The conduct of a party is a cause of damage when the damage would not have happened except for the conduct.

I.C.J.I. 700.3

Authority

Thompson v. Kaczinski, 774 N.W.2d 829, 836-39 (Iowa 2009)
Royal Indemnity Co. v. Factory Mut. Ins. Co., ____ N.W.2d ____, ____, No. 07-1324 slip.
op. at 19 (Iowa June 11, 2010)
Restatement (Third) of Torts: Liability for Physical and Emotional Harm, § 26

Comment

Note: In a case where the evidence may show more than one cause contributed to the injury or damages, the following sentence should be added: "There can be more than one cause of an injury or damage."

Note: A separate instruction must be given where the evidence may show "multiple sufficient causes." See Thompson, 774 N.W.2d at 837 n. 3

Note: Consider appropriateness of giving this instruction in addition to Iowa Civil Jury Instruction 220.34 Previous Infirm Condition where "Eggshell Plaintiff Rule" applies.

INSTRUCTION NO. ____

Scope of Liability – Defined. You must decide whether the claimed harm to plaintiff is within the scope of defendant's liability. The plaintiffs claimed harm is within the scope of a defendant's liability if that harm arises from the same general types of danger that the defendant should have taken reasonable steps [or other tort obligation] to avoid.

Consider whether repetition of defendant's conduct makes it more likely harm of the type plaintiff claims to have suffered would happen to another. If not, the harm is not within the scope of liability.

I.C.J.I. 700.3A

Authority

Thompson v. Kaczinski, 774 N.W.2d 829, 839 (Iowa 2009)
Royal Indemnity Co. v. Factory Mut. Ins. Co., ____ N.W.2d ____, ____, No. 07-1324 slip. op. at 18-20 (Iowa June 11, 2010)
Restatement (Third) of Torts: Liability for Physical and Emotional Harm, §§ 29, 30 & model instruction No. 2 (modified, at page 517).

Comment

In most cases, scope of liability will not be in dispute or will be adjudicated by the court on a dispositive motion. This instruction should be given only if under the facts of the particular case scope of liability is a question for the jury.

INSTRUCTION NO. ____

Concurrent Cause - Defined. There can be more than one cause of an injury or damage. When the fault of two or more separate parties is so related to an event that their combined fault, when viewed as a whole, is the cause of the event without which the event would not occur, then the fault of each party may be a cause.

I.C.J.I. 700.4

Authority

Thompson v. Kaczinski, [774 N.W.2d 829](#), 836-39 (Iowa 2009).

Foggia v. Des Moines Bowl-O-Mat [543 N.W.2d 889](#) (Iowa 1996) (multiple defendants).

Spaur v. Owens-Corning Fiberglas Corp., [510 N.W.2d 854](#), 858, 861 (Iowa 1994) (concept approved in a toxic tort case).

Rev. 09/10

INSTRUCTION NO. ____

Employer-Employee Relationship - Defined. An employee is a person bound by duty of service, subject to the employer's right to control or direct the manner in which the work shall be done.

I.C.J.I. 720.2

Authority

Dobson v. Jewell, [189 N.W.2d 547](#) (Iowa 1971)

INSTRUCTION NO. ____

Liability Of Employer. An employer is liable for the [negligent] [wrongful] acts of an [employee] [officer, agent or employee] if the acts are done in the scope of the employment.

I.C.J.I. 730.1

Authority

Bethards v. Shivvers, Inc., [355 N.W.2d 39](#) (Iowa 1984)
Graham v. Worthington, [259 Iowa 845](#), [146 N.W.2d 626](#) (1966)

INSTRUCTION NO. ____

Scope Of Employment. For an act to be within the scope of an employee's employment, the act must be necessary to accomplish the purpose of the employment, and it must be intended to accomplish that purpose.

I.C.J.I. 730.2

Authority

Merchants National Bank of Cedar Rapids v. Waters, [447 F.2d 234](#) (8th Cir. 1971)
Sandman v. Hagan, [261 Iowa 560](#), [154 N.W.2d 113](#) (1967)

INSTRUCTION NO. ____

Definition Of Independent Contractor. The right to control the manner and method of performing the work is the primary test for determining whether a person is an independent contractor or an employee. If the person doing the work answers to another only as to the result of the work but selects the manner and method of doing the work such person must be regarded as an independent contractor. In determining who has the right to control the manner and method of doing the work you should consider the following matters as shown by the evidence.

1. The existence of a contract or the performance of a certain piece of work or kind of work at a fixed price.
2. Whether the business of the person doing the work is independent from that of the person who hires the work done.
3. Whether the person doing the work has the right to employ assistants and has the right to supervise their activities.
4. Whether the person doing the work must furnish necessary tools, supplies and material.
5. Whether the work in that locality is usually done under the supervision or by a specialist without supervision.
6. The skill required in doing the work.
7. The time limit for performing the services.
8. The method of payment.
9. Whether the work is part of the regular work of the person who hires the work done.
10. Whether the parties believe they are creating a relationship of employer-employee or independent contractor.
11. Whether there is any withholding from payment to the person providing the service for federal income tax or social security.
12. Any other matters shown by the evidence bearing on this question.

I.C.J.I. 730.3

Authority

D & C. Express, Inc. v. Sperry, [450 N.W. 2d 842](#) (Iowa 1990)

Peterson v. Pittman, [391 N.W. 2d 235](#) (Iowa 1986)
Burr v. Apex Concrete Company, [242 N.W.2d 272](#) (Iowa 1976)
Greenwell v. Meredith Corporation, [189 N.W.2d 901](#) (Iowa 1971)

Comment

Note: Instruct only on the factors supported by the evidence.

VERDICT AND VERDICT FORM

INSTRUCTION NO. ____

Return Of Verdict - Forms Of Verdict. I am giving you _____ verdict forms [and questions]. 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 [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) (six)* of you agree upon the answers to the questions. In that case, the verdict [and questions] must be signed by all (seven) (six)* jurors who agree.

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

I.C.J.I. 300.1

Comment

Note: *Use if a juror has been excused during the trial.

MODIFIED JURY INSTRUCTIONS

INSTRUCTION NO. ____

Essentials For Recovery. The plaintiff must prove all of the following propositions:

1. The defendant was negligent in one or more of the following ways:
 - a. By spraying of herbicide at times when the wind was blowing at such velocity and direction as to permit the application to drift into the vineyard;
 - b. By spraying of herbicide under such other weather and other conditions, such as temperature conditions, as to permit the application to drift into the vineyard;
 - c. By spraying of herbicide near the vineyard which was registered with the Iowa Sensitive Crops Directory and not taking reasonable care to prevent the herbicide from affecting the vineyard; and/or
 - d. By otherwise failing to apply herbicide in such a manner as to prevent the drift of herbicide into the vineyard.
2. The negligence was a cause of damage to the plaintiffs.
3. 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.

I.C.J.I. 700.1

Authority

Coker v. Abell-Howe Co., [491 N.W.2d 143](#) (Iowa 1992)
Rinkleff v. Knox, [375 N.W.2d 262](#) (Iowa 1985)
Bauman v. City of Waverly, [164 N.W.2d 840](#) (Iowa 1969)
Thompson v. Kaczinski, [774 N.W.2d 829](#), 836-39 (Iowa 2009) (causation)

Rev. 09/10

Pastour v. Kolb Hardware, Inc., [173 N.W.2d 116](#) (Iowa 1969)
Shared Control - Wiles v. Myerly, [210 N.W.2d 619](#) (Iowa 1973)

Comment

Caveat: If exclusive control issue relates to multiple defendants, additional instructions as to shared control may be required.

INSTRUCTION NO. ____

General Negligence (Res Ipsa Loquitur). It is alleged the plaintiff's injuries were caused by the defendant's specific acts of negligence and also by the defendant's general negligence. If you find plaintiff's injuries were caused by negligence in one or more of the specific ways claimed by the plaintiff, then do not consider the general negligence claim. However, if you find the plaintiff did not prove the injuries were caused by the defendant's specific act or acts of negligence, then you will consider the plaintiff's general negligence claim.

Under the rule of general negligence, the occurrence of an injury allows you to conclude that the defendant was negligent if the plaintiff proves (1) the injury was caused by the herbicide spray under the exclusive control of the defendant, and (2) the injury would not have occurred if ordinary care had been used.

The plaintiff must prove the defendant had exclusive control when the negligence occurred. If you find the negligence occurred before the injury, then the plaintiff must prove there was no change in the condition of the (describe the instrument) after it left the defendant's exclusive control which could reasonably have caused the injury.

The plaintiff must also prove the occurrence would not have happened if ordinary care had been used. Proof of this requirement rests on common experience.

If you find the plaintiff has proved both requirements of the rule, you may conclude the defendant was negligent, but you are not required to do so. If the plaintiff fails to prove either of the basic requirements, the plaintiff cannot recover damages under the general negligence claim.

I.C.J.I. 700.7

Authority

Brewster v. U.S., [542 N.W.2d 524](#) (Iowa 1996)

Reilly v. Straub, [282 N.W.2d 688](#) (Iowa 1979)

INSTRUCTION NO. ____

Trespass.

To prove trespass, Plaintiffs must show that Defendant made an actual interference with Plaintiffs' exclusive possession of their land including some observable or physical invasion."

Freeman v. Grain Processing Corp., 848 N.W.2d 58, 67 (Iowa 2014).

INSTRUCTION NO. ____

IN THE IOWA DISTRICT COURT IN AND FOR LYON COUNTY

CALICO SKIES WINERY AND
VINEYARD, INC. D/B/A CALICO SKIES
WINERY & VINEYARD, WILLIAM B.
KIMBERLEY, AND ASHLEE BAHNSON-
KIMBERLEY ,

Plaintiffs,

vs.

DENNIS J. SCHOLTEN AND JEFF
MATTOON ,

Defendants.

No. LACV501888

VERDICT FORM

VERDICT NO. _____

Verdict - Single Plaintiff - Defendant(s), Third Party Defendant(s), Person(s) Who Have Been Released - Cases Governed By Chapter 668.

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

Dennis J. Scholten

Question No. 1: Was Dennis J. Scholten at fault?

Answer "yes" or "no."

ANSWER:

[If your answer is "no," do not answer Question No. 2.]

Question No. 2: Was the fault of Dennis J. Scholten a cause of any item of damage to the plaintiffs?

Answer "yes" or "no."

ANSWER:

[If your answer to either Question No. 1 or No. 2 is "no," then you shall not assign any fault to Dennis J. Scholten.]

Jeff Mattoon

Question No. 3: Was Jeff Mattoon at fault?

Answer "yes" or "no."

ANSWER:

[If your answer is "no," do not answer Question No. 4.]

Question No. 4: Was the fault of Jeff Mattoon a cause of any item of damage to the plaintiffs?

Answer "yes" or "no."

ANSWER:

[If your answer to either Question No. 3 or No. 4 is "no," then you shall not assign any fault to Jeff Mattoon.]

Question No. 5: What percentage of the total fault do you attribute to each defendant? The percentages must total 100%.

[If you previously found that a party was not at fault, or did not cause damage to plaintiffs, then enter "0" after [his] [her] [its] name.]

ANSWER:

Dennis Scholten	_____ %
Jeff Mattoon	_____ %
TOTAL	100 %

Question No. 6: State the amount of damages sustained by the plaintiffs caused by a defendant's fault as to each of the following items of damage. If the plaintiffs have failed to prove any item of damage, or have failed to prove that any item of damage was proximately caused by a defendant's fault, enter 0 for that item.

Damages:_____

Punitive Damages:_____

We, the Jury, find in favor of the plaintiffs and fix the amount of recovery against the defendants.

FOREMAN OR FOREWOMAN*

*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.

I.C.J.I. 300.6 (modified)

Authority

Iowa Code section [668.3\(8\)](#)

Johnson v. Knoxville Comm. Sch. Dist., [570 N.W.2d 633](#), 644 (Iowa 1997)

Thompson v. Kaczinski, [774 N.W.2d 829](#), 836-39 (Iowa 2009)

Comment

Note: *The above is merely an example of format. The list of items should be consistent with the damage marshaling instruction.