

**IN THE IOWA DISTRICT COURT FOR STORY COUNTY**

**WILTCHER INDUSTRIES, INC.,**

**Plaintiff,**

**vs.**

**ASI CONTRACTING, INC.,**

**Defendants.**

**CASE NO. LACV051321**

**JURY INSTRUCTIONS**

2021 APR 16 PM 1:46  
CLERK OF DISTRICT COURT  
STORY COUNTY, NEVADA, IA

**FILED**

**INSTRUCTION NO. 1**

Members of the Jury: In this case Plaintiff Wiltcher Industries, Inc. claims that Defendant ASI Contracting, Inc. has failed to pay for the manufacturing and delivery of shower kits, pans and wall systems to ASI for a construction project at Iowa State University. ASI Contracting, Inc. denies that any money is due and owing to Wiltcher Industries, Inc. ASI Contracting, Inc. has also filed a counterclaim against Wiltcher Industries, Inc. alleging that the shower kits, pans and wall systems were not properly manufactured and were untimely delivered causing ASI Contracting, Inc. damages. Wiltcher Industries, Inc. has denied that any money is due to ASI Contracting, Inc.

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. 2**

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.

### **INSTRUCTION NO. 3**

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. 4**

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. deposition testimony, matters which judicial notice was taken, 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.

#### **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. 6**

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.

**INSTRUCTION NO. 7**

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

### **INSTRUCTION NO. 8**

You have heard evidence claiming a 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.



### **INSTRUCTION NO. 9**

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. 10**

You have heard evidence claiming a 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 the party had made it under oath during the trial.

If you find such a statement was made and was inconsistent with the 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. 11**

The fact that the parties to this litigation are corporations 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. 12**

A party must prove all of the following propositions for their claim of breach of contract:

1. The parties were capable of contracting.
2. The existence of a contract.
3. The terms of the contract.
4. The party asserting a breach of contract has done what the contract requires.
5. The other party has breached the contract.
6. The amount of any damage the party has caused.

If a party has failed to prove any of these propositions, that party cannot recover damages.

If a party has proved all of these propositions on their claim of breach of contract, then that party is entitled to damages in some amount based upon a consideration of those items of damages set forth in Jury Instruction No. 20.

**INSTRUCTION NO. 13**

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

#### **INSTRUCTION NO. 14**

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. 15**

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. 16**

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



### **INSTRUCTION NO. 17**

When a party 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.

However, a party 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. In determining whether a failure to render or to offer performance is material, the following circumstances are significant:

1. The extent to which the other party will be deprived of the benefit which the other party reasonably expected.
2. The extent to which the other party can be adequately compensated for the part of that benefit of which the other party will be deprived.
3. The extent to which the party will suffer forfeiture.
4. The likelihood that the party will cure the failure, taking account of all the circumstances including any reasonable assurances.
5. The extent to which the behavior of the party is in line with standards of good faith and fair dealing.

### **INSTRUCTION NO. 18**

As to Plaintiff's promissory estoppel claim against the Defendant, Plaintiff must prove all of the following propositions:

1. That Defendant made a clear and definite promise to the Plaintiff.
2. That the promise was made with Defendant's clear understanding that the Plaintiff was seeking assurance upon which Plaintiff could rely and without which it would not act.
3. That Plaintiff acted to its substantial detriment in reasonable reliance on the promise.
4. That an injustice can only be avoided by enforcement of the promise.

If the Plaintiff has failed to prove any of these propositions, the Plaintiff is not entitled to damages on its promissory estoppel claim.

If the Plaintiff has proved all of these propositions, the Plaintiff is entitled to damages in some amount based upon a consideration of those items of damages set forth in Jury Instruction No. 20.

### **INSTRUCTION NO. 19**

As to Plaintiff's unjust enrichment claim against Defendant, you may only consider this claim if you first decide that the subject matter of the unjust enrichment claim is not the same subject matter as an express written contract between the parties. If the subject matter is the same, do not consider the claim of unjust enrichment.

If you determine that Plaintiff has a claim for matters not covered or agreed upon in the written contract, then Plaintiff must prove all of the following propositions:

1. That Defendant was enriched by the receipt of a benefit from Plaintiff.
2. That the enrichment was at the expense of the Plaintiff.
3. That it is unjust to allow the Defendant to retain the benefit under the circumstances.

If the Plaintiff has failed to prove any of these propositions, the Plaintiff is not entitled to damages on its unjust enrichment claim.

If the Plaintiff has proved all of these propositions, the Plaintiff is entitled to damages in some amount based upon a consideration of those items of damages set forth in Jury Instruction No.20.

## INSTRUCTION NO. 20

The measure of damages for breach of a contract, promissory estoppel, or unjust enrichment is an amount that would place a party in as good a position as they would have enjoyed if the contract had been performed or the promise had been true.

The damages you award for breach of contract, promissory estoppel, or unjust enrichment must be foreseeable or have been reasonably foreseen at the time the parties entered into the contract or at the time the promises or representations were made.

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

1. The amount of money due and owing pursuant to the parties' contract.
2. Any and all extra delivery charges for expedited or partial deliveries requested by a party.
3. Any and all extra manufacturing and delivery charges for replacement products requested by a party.
4. A party has a right to damages based on the expectation of completing the contract as follows:
  - a. The loss in the value to the party caused by the failure to perform, plus
  - b. Any other loss, including incidental or consequential loss, caused by the breach, less
  - c. Any cost or other loss that was avoided by not having to perform.
5. If the loss in value of the provided goods or construction is not proved with sufficient certainty, a party may recover damages based upon:
  - a. The reasonable cost of completing performance or of remedying the defects if that cost is not clearly disproportionate to the probable loss in value.

### **INSTRUCTION NO. 21**

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. 22**

You may not communicate about this case before reaching your verdict. This includes cell phones, and electronic media such as text messages, Facebook, SnapChat, 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.

### **INSTRUCTION NO. 23**

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. 24**

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. 25**

Occasionally, jurors want to ask a question after they begin deliberating. I have prepared the Instructions after carefully conferring with the parties and their counsel. I have tried to use language which is generally understandable. Usually, questions about the Instructions can be answered by carefully re-reading them. If, however, you deem it necessary to ask the court a question, please consider the following:

1. Words not defined in these instructions should be given their ordinary meaning.
2. There will be no additional evidence and likely no additional instruction of law. These instructions contain all the law you need to decide this case.
3. If you ask me a question during your deliberations, your foreperson must reduce the question to writing, on a clean sheet of paper, and give it to the court attendant, who will deliver it to me. I must then contact the lawyers and conduct a hearing with them but not in your presence. After that, I will give you a written answer consistent with subparagraphs (1) and (2) above.

If you submit a written question, you are not to inform anyone, including the Court, how many jurors are voting for or against either party on any issue until you return your verdict.

If, after considering these matters, you still wish to ask me a question, follow the procedure outlined here, then save your written question and any written answer I send you and return them with your verdict form when you have completed your deliberations and returned a verdict. Please do not ask the court attendant any questions about the Instructions.

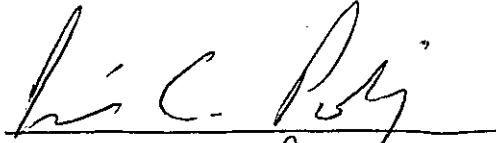
### INSTRUCTION NO. 26

I am giving one verdict form containing six questions. Answer the questions on the verdict form as instructed on the verdict form.

During the first six hours of deliberations, excluding meals and recesses outside your jury room, your decision must be unanimous. If you all agree, the verdict form must be signed by your foreman or forewoman.

After deliberating for six hours excluding meals or recesses outside your jury room, then it is necessary that only seven of you agree upon the answers to the questions. In that case, the verdicts must be signed by all seven jurors who agree.

When you have agreed upon the verdicts and appropriately signed them, tell the Court Attendant.

  
Christopher C. Polking  
District Court Judge  
2nd Judicial District