

IN THE IOWA DISTRICT COURT FOR WOODBURY COUNTY

**PIERCE STREET SAME DAY SURGERY,  
L.C.,**

**Plaintiff,**

**vs.**

**ADAM SMITH; WILLIAM O. SAMUELSON;  
KEVIN LIUDAHL; JOSEPH A. MORRIS;  
LEE M. HILKA; TRI-STATE SPECIALISTS,  
LLP; RIVERVIEW ASC REALTY, LLC; AND  
RIVERVIEW SURGICAL CENTER, LLC,**

**Defendants.**

**CASE NO.: LACV178878**

**DEFENDANTS' PROPOSED JURY  
INSTRUCTIONS**

**KEVIN LIUDAHL; WILLIAM O.  
SAMUELSON; ADAM SMITH; JOSEPH A.  
MORRIS; TERRY MONK,**

**Counterclaimants,**

**vs.**

**PIERCE STREET SAME DAY SURGERY,  
L.C.,**

**Counterclaim Defendant.**

COME NOW, Defendants Adam Smith, William O. Samuelson, Kevin Liudahl, Joseph A. Morris, and Tri-State Specialists, LLP, (the "Defendants"), through their undersigned counsel, submitting the within Proposed Jury Instructions:

**A. Overview**

The Parties previously collaborated on jury instructions prior to the several continuances. This submission contains instructions where agreed upon by the parties and then Defendants' proposed instructions, without Plaintiffs' objections or suggested revisions (as best as possible).

## **INSTRUCTION NO. 1**

### **Statement of the Case**

This is a civil case brought by the Plaintiff, Pierce Street Same Day Surgery Center, L.C., who I will refer to as “Pierce Street.” Pierce Street is an ambulatory surgery center, often referred to as an ASC, here in Sioux City where doctors perform outpatient (“same day”) surgeries.

Pierce Street has brought various claims against multiple defendants. Four of the defendants are doctors: Kevin Liudahl, Joseph Morris, William Samuelson, and Adam Smith. Prior to this case, they were members or part owners of Pierce Street, along with others who are not parties to this lawsuit.

Drs. Liudahl, Morris, Samuelson, and Smith practice at Tri-State Specialists, another defendant in this lawsuit that I will refer to as “Tri-State.” Tri-State is a multispecialty medical clinic also located here in Sioux City. Drs. Liudahl, Morris, Samuelson, and Smith are physician partners at Tri-State, and Dr. Morris is an employed physician.

Defendant Lee Hilka is the CEO of Tri-State.

The remaining defendants are Riverview ASC Realty, LLC and Riverview Surgical Center, LLC. Riverview ASC Realty, LLC is a company that owns and is constructing the medical office building next to the Delta Hotel in South Sioux City, which building will include Riverview Surgical Center.

Certain Defendants have alleged counterclaims against Pierce Street.

In this case, Pierce Street alleges the following against Defendants and claims damages as a result:

- Each individual physician defendant breached his contractual obligations in Pierce Street’s Operating Agreement;
- Tri-State interfered with the individual physician defendants’ contractual obligations in Pierce Street’s Operating Agreement;

- Hilka interfered with the individual physician defendants' contractual obligations in Pierce Street's Operating Agreement;
- Smith and Hilka breached their duty of loyalty to Pierce Street;
- Smith, Samuelson, Liudahl, and Morris breached their duty of good faith and fair dealing to Pierce Street;
- Riverview ASC Realty and Riverview Surgical Center interfered with each individual physician defendants' contracts with Pierce Street; and
- All defendants conspired to commit the above wrongs against Pierce Street.

Defendants deny Pierce Street's claims.

Drs. Liudahl, Samuelson, Morris, Smith, and another physician who is not a defendant—Dr. Monk—alleged that Pierce Street breached its Operating Agreement in the way it terminated their membership interests in Pierce Street. They claim damages as a result. Pierce Street denies the Physician Defendants' claims.

#### **Authority**

Iowa Civil Jury Instruction 100.1

[Defendants understand this statement was agreed upon by the Parties prior to the January trial being continued.]

## **INSTRUCTION NO. 2**

### **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.

### **Authority**

Iowa Civil Jury Instruction 100.2 (unmodified)

[This proposed instruction is agreed upon by the parties.]

### **INSTRUCTION NO. 3**

#### **Burden of Proof, Preponderance of the 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**

Iowa Civil Jury Instruction 100.3 (unmodified)

[This proposed instruction is agreed upon by the parties.]

## **INSTRUCTION NO. 4**

### **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**

Iowa Civil Jury Instruction 100.4 (unmodified)

[This proposed instruction is agreed upon by the parties.]

**INSTRUCTION NO. 5**

**Deposition Testimony**

A deposition is testimony taken under oath before trial and preserved in writing, and in some cases, also in a video recording. Certain testimony has been entered into evidence from a deposition by playing portions of the video recording, if the deposition was video recorded, or by reading portions of the written transcript. Consider that testimony as if it had been given in court.

**Authority**

Iowa Civil Jury Instruction 100.5 (modified by Defendants to reference video testimony)

[This proposed instruction is agreed upon by the parties.]

**INSTRUCTION NO. 6**

**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.

**Authority**

Iowa Civil Jury Instruction 100.6 (unmodified)

[This proposed instruction is agreed upon by the parties.]



## **INSTRUCTION NO. 7**

### **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**

Iowa Civil Jury Instruction 100.9 (unmodified)

[This proposed instruction is agreed upon by the parties.]

**INSTRUCTION NO. 8**

**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.

**Authority**

Iowa Civil Jury Instruction 100.11 (unmodified)

[This proposed instruction is agreed upon by the parties.]

**INSTRUCTION NO. 9**

**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's education and experience, the reasons given for the opinion, and all the other evidence in the case.

**Authority**

Iowa Civil Jury Instruction 100.12 (unmodified)

[This proposed instruction is agreed upon by the parties.]

**INSTRUCTION NO. 10**

**Contradictory Statement, Non-party, Witness Not Under Oath.**

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.

**Authority**

Iowa Civil Jury Instruction 100.13 (unmodified)

[This instruction is agreed upon by the parties.]

**INSTRUCTION NO. 11**

**Contradictory Statements, Non-Party, Witness Under Oath [To be read prior to trial]**

You may hear evidence claiming that a witness, who is not a plaintiff or defendant in this matter, made statements before this trial while under oath that 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 who made the inconsistent statements. You may disregard all or any part of the testimony if you find the prior 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 supports it, and you believe that evidence, or if you believe it for any other reason.

**Authority**

Iowa Civ. Jur. Instr. 100.14 (modified to make sense as an instruction given prior to trial commencing)

[This instruction is proposed by Defendants.]

**INSTRUCTION NO. 12**

**Statements by a Party Opponent [To be read prior to trial]**

You may hear evidence claiming that a plaintiff or a defendant in this matter made statements before this trial either while under oath or not under oath. If you find that such a statement was made, you may regard the statement as evidence in this case the same as if that party had said it while under oath during the trial.

If you find such a prior statement was made and was inconsistent with that party's testimony during this trial, you may also use that prior statement as a basis for disregarding all or any part of that party's testimony during this 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 their testimony or if you believe their testimony for any other reason.

**Authority**

Iowa Civ. Jur. Instr. 100.15 (modified to make sense as an instruction given prior to trial commencing)

[This instruction is proposed by Defendants.]

**INSTRUCTION NO. 13**

**Business Party**

The fact that a plaintiff or defendant is a business should not affect your decision. All persons are equal before the law, and businesses, whether large or small, are entitled to the same fair and conscientious consideration by you as any other person.

**Authority**

Iowa Civil Jury Instruction 100.20 (modified by Defs' 1/16/19)

## **INSTRUCTION NO. 14**

### **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~~Instagram, Pintrest, 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.



**Authority**

Iowa Civil Jury Instruction 100.23 (~~unmodified~~modified by Defs' 9/9/19 - MySpace is now defunct, and more modern and popular social media sites were also added)

## **INSTRUCTION NO. 15**

### **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**

Iowa Civil Jury Instruction 100.18 (unmodified)

[This instruction is agreed upon by the parties.]

**INSTRUCTION NO. 16**

**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**

Iowa Civil Jury Instruction 100.21 (unmodified)

[This instruction is agreed upon by the parties.]

## INSTRUCTION NO. 17

### Definitions

#### *Elements*

“Elements” of a claim are the factual parts of a claim. The “elements” of the parties’ claims are set out in **bold** in the following instructions.

#### *Cause of Damages*

The conduct of a party is a “cause” of damage when the damage would not have happened except for the conduct.

#### *Own*

To have or hold as property: posses. In the case of limited liability companies, or “L.L.C.s”, owners also have a right to receive distributions of the company’s profits from time to time.

#### *Operate*

To cause to function or to put or keep in operation.

#### *Invest*

To commit money in order to earn a financial return.

#### *Manage*

To exercise executive, administrative, and supervisory powers.

#### *Consult*

To provide professional advice or services for remuneration or compensation.

#### *Employ*

To engage the labor or services of another for wages

#### *Compensation*

Payments or other benefits received for services rendered, like salary or wages.

### ***Ambulatory Surgical Center***

An ambulatory surgical center or “ASC” is a licensed facility where surgical services are provided to patients who do not require hospitalization and who are admitted and discharged from the facility within twenty-four hours.

### **Authority**

Jury Instructions in *Lucken v. Heritage Bancshares Group*, No. C 16-4005-MWB, Doc. 151 pp. 5 - 7 (format and definitions of “elements” and “cause of damages”)

*Thompson v. Kaczinski*, 774 N.W.2d 829, 837-38 (Iowa 2009) (adopting Restatement (Third) of Torts analysis of causation)

*Restatement (Third) of Torts* § 26 (Factual Cause): “Tortious conduct must be a factual cause of harm for liability to be imposed. Conduct is a factual cause of harm when the harm would not have occurred absent the conduct.

*Mitchell v. Cedar Rapids Comm. School Dist.*, 832 N.W.2d 689, 704 (Iowa 2013) (Cady, J. concurring) (“Now, causation is addressed under the rubric of factual cause and scope of liability. Factual cause follows the substantial-factor test, and scope of liability serves to limit the liability of a defendant to physical harm that resulted from risks that made the conduct negligent in the first place.”)

Definition of own: <https://www.merriam-webster.com/dictionary/own> (transitive verb definition 1(a)); *see also* Iowa Code §§ 489.404 - 489.406, 6 Del. C. §§ 18-601 et seq.

Definition of operate: <https://www.merriam-webster.com/dictionary/operate> (Definitions 2a and 2b of “operate” as a transitive verb.)

Definition of invest: <https://www.merriam-webster.com/dictionary/invest> (Definition 1).

Definition of manage: *Black’s Law Dictionary* (10th ed. 2014) (West 2018).

Definition of consult: <https://www.merriam-webster.com/dictionary/consult> (Definition 3 of “consult” as an intransitive verb), <https://www.merriam-webster.com/dictionary/consultant> (Definition 2). *See also* Defs’ Nov. 9, 2018 SMUF ¶ 101 and Defs’ Oct. 31, 2018 Br. in Support of Mot. for Summary Judgment pp. 26 - 27. Further, Section 6.6(b) is plainly concerned with preventing former members of Pierce Street taking on roles at a competing hospital or ASC that would pay them, while they waited out their one-year limitation on owning an interest in the competing hospital or ASC, which would entitle them to distributions.

Definition of employ: *Black’s Law Dictionary* (10th ed. 2014) (West 2018).

Definition of compensation: *Black’s Law Dictionary* (10th ed. 2014) (West 2018).

Definition of ambulatory surgical center: Neb. Rev. St. § 71-405 (West 2018).

[This instruction is proposed by Defendants and objected to by Plaintiff.]

## **INSTRUCTION NO. 18**

### **Breach of Contract**

Pierce Street's first claim is against Defendants, Doctors Liudahl, Morris, Samuelson, and Smith, alleging that they breached the contract they had with Pierce Street.

Pierce Street alleges that the doctors directly breached the contract, that is, they, themselves, did one or more of the things the contract prohibited them from doing.

Pierce Street also alleges that the doctors indirectly violated the contract, that is, the doctors caused one or more persons or entities under their control to do one or more of the things the contract prohibited them from doing.

To prevail on their claim that the doctors directly breached the contract, Pierce Street must prove the following **elements** for each doctor:

**One, a contract existed between that doctor and Pierce Street.**

**Two, the terms of the contract between that doctor and Pierce Street.**

**Three, that Pierce Street has done what the contract requires.**

**Four, that the doctor breached the contract was breached; that is, that each doctor did one more of the following: (i) owned, (ii) operated, (iii) invested in, (iv) managed, (v) consulted with, (vi) was employed by, or (vii) had a compensation arrangement with, an ambulatory surgical center, within thirty-miles of Pierce Street's location in Sioux City, Iowa.**

**Five, that Pierce Street was damaged as a consequence of each doctor's breach of their contract with Pierce Street.**

To prevail on their claim that the doctors indirectly violated the contract, Pierce Street must prove the following **elements** for each doctor:

**One, a contract existed between each of the four doctors and Pierce Street.**

**Two, the terms and conditions of the contract between each of the four doctors and Pierce Street.**

**Three, that Pierce Street performed all the terms and conditions required under the contract.**

**Four, that the contract was breached; that is, that each doctor caused one or more companies under their control to do one more of the following: (i) own, (ii) operate, (iii) invest in, (iv) manage, (v) consult with, (vi) become employed by, or (vii) have a compensation arrangement with, an ambulatory surgical center, within thirty-miles of Pierce Street's location in Sioux City, Iowa.**

**Five, that Pierce Street was damaged as a consequence of each doctor's breach of their contract with Pierce Street.**

If Pierce Street did not prove that one or more of Doctors Liudahl, Morris, Samuelson, and Smith directly or indirectly breached their contract with Pierce Street, then you must find in favor of each doctor against whom Pierce Street did not prove its claim.

If Pierce Street proved that one or more of Doctors Liudahl, Morris, Samuelson, and Smith directly or indirectly breached their contract with Pierce Street, then you must consider their defense that Pierce Street failed to mitigate their damages, as explained in the next instruction in evaluating and deciding Pierce Street's damages, if any.

#### **Authority**

Iowa Civ. Jur. Instr. 2400.1 (modified)

*Molo Oil Co. v. River City Ford Truck Sales, Inc.*, 578 N.W.2d 222, 224 (Iowa 1998)

Pierce Street Operating Agreement §6.6(a) and 6.6(b) (Am. Pet. Ex. A)



## **INSTRUCTION NO. 19**

### **Breach of Contract (Doctors Liudahl, Monk, Morris, Samuelson, and Smith)**

Doctors Liudahl, Morris, Samuelson, and Smith have a claim against Pierce Street alleging that Pierce Street breached the parties' contract by improperly discounting the value of their shares in Pierce Street by 25% when Pierce Street re-purchased their shares.

Doctors Liudahl, Morris, Samuelson, and Smith have a claim against Pierce Street alleging that Pierce Street improperly discounted the value of their shares in Pierce Street prior to re-purchasing their shares.

Doctors Liudahl, Monk, Morris, Samuelson, and Smith have a claim against Pierce Street alleging that Pierce Street improperly terminated their membership in Pierce Street to avoid paying them distributions of Pierce Street's profits that they earned and to which members are entitled.

To prevail on their claim that Pierce Street breached its contract with Doctors Liudahl, Monk, Morris, Samuelson, and Smith, each doctor must prove the following **elements**:

**One, a contract existed between that doctor and Pierce Street.**

**Two, the terms of the contract between that doctor and Pierce Street.**

**Three, that each doctor did what the contract requires.**

**Four, that Pierce Street breached the contract.**

**Five, that the doctor was damaged as a consequence of Pierce Street's respective breach of its contract with the doctor.**

## **INSTRUCTION NO. 20**

### **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**

Iowa Civil Jury Instruction 2400.5 (unmodified)

[The parties agree to this instruction.]

**INSTRUCTION NO. 21**

**Breach - Definition**

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

**Authority**

Iowa Civil Jury Instruction 2400.6 (unmodified)

[The parties agree to this instruction.]

## INSTRUCTION NO. 22

### **Breach of Implied Duty of Good Faith and Fair Dealing**

Pierce Street's third claim is that Doctors Liudahl, Morris, Samuelson, and Smith breached an implied duty of good faith and fair dealing that they owed to Pierce Street.

To prove their claim, Pierce Street must prove the following elements:

**One, that the following term(s) are implied in Pierce Street's contracts with each of Doctors Liudahl, Morris, Samuelson, and Smith:**

- Term 1
- Term 2, etc.<sup>1</sup>

You may determine that these terms are not "implied" in the contract and that, if considered part of the contract, the terms would be additions to or otherwise change the terms of the contract between Pierce Street and each of the doctors. If you determine that these terms are not "implied," but instead are additions or changes to the contract between Pierce Street and each of the doctors, then you must find for the doctors on this claim.

You may also determine that these terms are not "implied" in the contract and, instead, are duplicative of the existing terms of the contract. If you determine that these terms are not "implied" but instead are duplicative of terms in the contract between Pierce Street and each of the doctors, then you must find for the doctors on this claim.

**Two, that each of Doctors Liudahl, Morris, Samuelson, and Smith, in bad faith, breached the implied term(s) of the contract.**

#### Authority

*Alta Vista Properties, LLC v. Mauer Vision Center, PC*, 855 N.W.2d 722, 732-33 (Iowa 2014).

*American Tower, L.P. v. Local TV Iowa, L.L.C.*, 809 N.W.2d 546, 550-551.

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<sup>1</sup> Defendants should not have to write the terms for Pierce Street; however, they reserve the right to challenge the terms and/or suggest alternative wording.

*Kooyman v. Farm Bureau Mut. Ins. Co.*, 315 N.W.2d 30, 34 (Iowa 1982)

*Restatement (Second) Contracts* § 205 cmt. a.

*Mid-Am. Real Estate Co. v. Iowa Realty Co., Inc.*, 406 F.3d 969 (8th Cir. 2005) (instruction should not be given); *see also* Defs' Nov. 20, 2018 Resistance to Plf's Mot. for Summary Judgment, pp. 17 - 18.

**[Proposed by Defendants, who state that this instruction should not be given]**

## **INSTRUCTION NO. 23**

### **Tortious Interference with Contract**

Pierce Street's second claim is that Defendants Mr. Hilka, Tri-State Specialists, Riverview ASC Realty, and Riverview Surgical Center wrongly interfered with the performance of one or more of Doctors Liudahl's, Morris's, Samuelson's, and Smith's contractual obligations to Pierce Street.

You may only consider this claim if you found that one or more of Doctors Liudahl, Morris, Samuelson, or Smith breached their contract with Pierce Street. If you found that none of those doctors breached their contract with Pierce Street, then you may not consider this claim.

To prevail on this claim, Pierce Street must prove the following **elements** for each of Mr. Hilka, Tri-State Specialists, Riverview ASC Realty, and Riverview Surgical Center:

**One, Pierce Street had a contract with one or more of: Doctors Liudahl, Morris, Samuelson, and Smith.**

**Two, the defendant (Mr. Hilka, Tri-State Specialists, Riverview ASC Realty, or Riverview Surgical Center) knew of that contract.**

The defendant "knew" of the contract if it had actual knowledge of the contract or else had knowledge of facts which, if followed by reasonable inquiry, would have led to disclosure of the contracts between Pierce Street and Smith, Samuelson, Liudahl, and Morris.

**Three, the defendant intentionally and improperly interfered with the contract by causing one or more of Doctors Liudahl, Morris, Samuelson, or Smith to, directly or indirectly, own, operate, invest in, manage, become employed by, or have a compensation arrangement with another ambulatory surgical center within thirty (30) miles of Pierce Street.**

In determining if any defendant's interference was improper, you should determine whether the conduct was fair and reasonable under the circumstances. You may consider the following factors:

- A. The nature of the defendant's conduct.
- B. The defendant's motive.
- C. The interests of Pierce Street with which the defendant's conduct interferes.
- D. The interest sought to be advanced by the defendant.
- E. The social interests in protecting the freedom of action of the defendant and the contractual interests of the other party.
- F. The nearness or remoteness of the defendant's conduct to the interference. For Riverview ASC Realty and Riverview Surgical Center, you may not consider anything that occurred prior to their existence as a business entity as a basis to attribute liability to them.
- G. The relations between the parties.

**Four, the defendant's interference caused one or more of Doctors Liudahl, Morris, Samuelson, or Smith to breach their contract with Pierce Street.**

**Five, that Pierce Street was damaged as a consequence of the defendant's interference.**

If Pierce Street did not prove that one or more of Mr. Hilka, Tri-State Specialists, Riverview ASC Realty, or Riverview Surgical Center did not intentionally, and wrongly, interfere with Pierce Street's contract with one or more of Doctors Liudahl, Morris, Samuelson, or Smith, then you must find in favor of each defendant against whom Pierce Street did not prove its claim.

**Authority**

Iowa Civ. Jury Instr. 1200.1 (modified)

Iowa Civ. Jury Instr. 1200.5 (modified)

*Kern v. Palmer College of Chiropractic*, 757 N.W.2d 651, 662 (Iowa 2008).

*Hunter v. Bd. of Trs. of Broadlawns Med. Ctr.*, 481 N.W.2d 510, 518 (Iowa 1992).

January 8, 2019 Ruling on Defs' Mot. for Summary Judgment p. 28.

*Middle Branch Mut. Telephone Co. v. Jones*, 115 N.W. 3, 6 (Iowa 1908) (corporations not liable for pre-formation contracts by those purporting to act in the name of the corporation unless there is evidence of ratification of pre-formation contractual obligations).



**INSTRUCTION NO. 24**

**Interference with Contract - Definition of Contract**

A contract is an agreement between two or more persons to do or not to do something.

**Authority**

Iowa Civil Jury Instruction 1200.3 (unmodified)

[This instruction is agreed upon by the Parties.]

**INSTRUCTION NO. 25**

**Intentional Interference**

A defendant's interference with a contract is intentional if the defendant either interferes with the contract or prospective business relationship on purpose or knows the conduct is substantially certain to interfere with the contract.

**Authority**

Iowa Civil Jury Instruction 1200.6 (unmodified)

[This instruction is agreed upon by the Parties.]

## **INSTRUCTION NO. 26**

### **Breach of Duty of Loyalty**

Pierce Street's fourth claim is against that Dr. Smith breached his duty of loyalty to Pierce Street while he served on Pierce Street's Board of Managers. While Dr. Smith was on Pierce Street's Board of Directors, he owed Pierce Street a duty of loyalty.

Pierce Street also claims that Mr. Hilka breached his duty of loyalty to Pierce Street while he served as Pierce Street's Executive Director. While serving as Executive Director, Mr. Hilka owed Pierce Street a duty of loyalty.

To prove their claim, Pierce Street must prove the following **elements** for each defendant:

**One, while the defendant was a manager or director of Pierce Street, he took one or more actions that were, for each action, (a) in his personal interest, (b) adverse to the interests of Pierce Street.**

**Two, that for each action so proved, the action caused Pierce Street damages.**

If Pierce Street did not prove that either Dr. Smith or Mr. Hilka did not breach his duty of loyalty to Pierce Street, then you must find in favor of that defendant on this claim.

### **Authority**

*Schildberg Rock Products Co. v. Brooks*, 140 N.W.2d 132, 136 (Iowa 1966).

Iowa Civ. Jury Instr. 3200.1 (modified).

## **INSTRUCTION NO. 27**

### **Civil Conspiracy**

Pierce Street's claims that Doctors Liudahl, Morris, Samuelson, and Smith; Tri-State Specialists; and Riverview ASC Realty and Riverview Surgical Center for a civil conspiracy. A conspiracy is an agreement of two or more persons to commit a wrong against another. The agreement can be oral or written, informal or formal, and need not be detailed. The agreement need not be expressed in words and may be implied and understood to exist from the conduct itself. It may be proved by direct or circumstantial evidence. Merely because two or more persons associate with each other, or meet to discuss common interests or goals does not, by itself, establish a conspiracy.

To recover on their claim of civil conspiracy, Pierce Street must prove all of the following elements:

**One, for each defendant, that the defendant committed the wrong of breach of contract or tortious interference with contract, as defined in Instructions Nos. \_\_\_\_.**

**Two, for each defendant, that the defendant participated in a conspiracy with one or more of the defendants listed above to breach their contract with Pierce Street or tortiously interfere with Pierce Street's contracts with Doctors Liudahl, Morris, Samuelson, and Smith.**

Participation in a conspiracy is defined as when the person joins the agreement with the intention to accomplish the wrongful act. A participant need not know all the details of the agreement nor all of the other participants. One who innocently furthers wrongful conduct by another does not participate in a conspiracy.

**Three, the nature and extent of the damage.**

If Pierce Street has failed to prove any of these propositions for one or more of the defendants, they are not entitled to damages from each such defendant, and you must find for each such defendant. If the plaintiff has proved all of these propositions for one or more of the defendants, then plaintiff is entitled to damages in some amount from each such defendant.

**Authority**

Iowa Civ. Jury Instr. 3500.1 (modified)

Iowa Civ Jury Instr. 3500.2

Iowa Civ. Jury Instr. 3500.3

*Spears v. Com Link, Inc.*, 837 N.W.2d 680 (Table), 2013 WL 3457171 at \*4 (Iowa Ct. Appl. July 10, 2013) (instruction should not be given to include conspiracy for breach of contract, but only for torts).

## **INSTRUCTION NO. 28**

### **Damages**

The measure of damages for each of these claims: breach of contract, tortious interference with contract, breach of the implied duty of good faith and fair dealing, breach of duty of loyalty, and civil conspiracy is an amount that would place Pierce Street in as good a position as it would have been in had the respective breach of contract, tortious interference with contract, breach of the implied duty of good faith and fair dealing, breach of duty of loyalty, or civil conspiracy never occurred.

For the breach of contract and implied duty of good faith and fair dealing claims, the damages you award to Pierce Street, or Doctors Liudahl, Monk, Morris, Samuelson, or Smith, must be foreseeable or have been reasonably foreseen at the time each contract between Pierce Street and Doctors Liudahl, Monk, Morris, Samuelson and Smith were entered into.

For the tortious interference with contract, breach of duty of loyalty, and civil conspiracy claims, the damages you award to Pierce Street must be foreseeable or have been reasonably foreseen at the time the interference, or breach of the duty of loyalty, or conspiracy took place.

If you find that Pierce Street's value as a business is based on its income or revenues, then you may not award Pierce Street damages for lost business value but may only award Pierce Street damages for lost profits. In no event can the damages for lost profits exceed the value of Pierce Street as an ongoing, operational, business.

### **Authority**

Iowa Civ. Jury Instr. 220.1 (modified)

*Thompson v. Kaczinski*, 774 N.W.2d 829, 837-38 (Iowa 2009)

Defs' Dec. 31, 2018 Br. in Support of Second Mot. in Limine pp. 4 - 7 and the authorities collected therein, Defs' January 16, 2019 Reply Br. in Support of Second Mot. in Limine.

[This instruction is proposed by Defendants.]

## **INSTRUCTION NO. 29**

### **Mitigation of Damages**

All parties asserting claims for damages have a duty to mitigate their damages. That is, they have an obligation to exercise all reasonable diligence to lessen the damages they claim were caused by other parties to this litigation.

If one or more of the defendants to any claim prove by a preponderance of the evidence that the party bringing the claim did not take reasonable efforts to lessen its damages caused by the defendant's alleged wrongful actions, then the party bringing the claim is not entitled to damages, and you must find for each defendant who proves that the party bringing the claim against them failed to take reasonable efforts to lessen its damages.

Alternatively, if you find that a party bringing a claim took reasonable efforts to lessen its damages, you may determine if that claimant's reasonable efforts were successful. If you determine the claimant's reasonable efforts to lessen its damages were successful, you may consider if a defendant or defendants to the claimant's claim proved an amount by which the claimant lessened its damages. If you find that one or more of the defendants to a claim proved an amount by which that claimant was able to lessen its damages, then you must find that amount on the verdict form.

It is possible that the amount by which a claimant lessened its damages exceeds the damages you found that the claimant suffered. Do not concern yourself with the consequences of that. Just write down the amount of damages, if any, for each claimant, and the amount each claimant lessened its damages, if any, for each doctor on the verdict form, and the Court will determine the legal consequences of your finding these facts.

### **Authority**

*Kuehl v. Freeman Brothers Agency, Inc.*, 521 N.W.2d 714, 719 (Iowa 1994)



*Jerry's Hardware, L.L.C. v. Hillcrest Partners*, 870 N.W.2d 688 (Table), 2015 WL 448330 at \*6 (failure to mitigate damages requires awarding no damages).

[This instruction is proposed by Defendants.]

## **INSTRUCTION NO. 30**

### **Punitive Damages**

Punitive damages may be awarded if Pierce Street has proven by clear, convincing, and satisfactory evidence that a defendant's tortious interference with contract constituted a willful and wanton disregard for the rights or safety of another and caused actual damage to Pierce Street.

Evidence is clear, convincing and satisfactory if there is no serious or substantial uncertainty about the conclusion to be drawn from it.

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.

[Remainder of Iowa Civ. Jury Instr. 210.1 unmodified]

For defendants Tri-State Specialists, Riverview ASC Realty, and Riverview Surgical Center, they are liable for the punitive damages by reason of the acts of their agents if one of the following occurred.

1. The principal authorized the act and the way it was done; or
2. The agent was employed in a managerial capacity and was acting in the scope of employment.

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.

**Authority**

Iowa Civ. Jury Instrs. 210.1, 210.3, 210.4, 100.19

[This instruction is proposed by Defendants.]

## **INSTRUCTION NO. 31**

### **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.

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

### **Authority**

Iowa Civil Jury Instruction 300.1 (unmodified)

[This instruction is agreed upon by the parties.]

Dated: September 9, 2019

/s/ Jason R. Lawrence

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**PROOF OF SERVICE**

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on September 9, 2019, by:

<input type="checkbox"/> US Mail	<input type="checkbox"/> FAX
<input type="checkbox"/> Hand Delivered	<input checked="" type="checkbox"/> Email
<input type="checkbox"/> Federal Express	<input type="checkbox"/> Other: EDMS

Signature: /s/ Jason R. Lawrence

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