

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 JOINT 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.	

The parties hereby submit their Joint Proposed Jury Instructions.

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INSTRUCTION NO. 1

Statement of the Case.

Members of the Jury:

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.

At all times relevant to this lawsuit, Drs. Liudahl, Morris, Samuelson, and Smith practiced 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, Samuelson, and Smith are physician partners at Tri-State, and Dr. Morris is an employed physician.

Riverview ASC Realty, LLC and Riverview Surgical Center, LLC are also defendants. Riverview ASC Realty, LLC is a company that owns and constructed the medical office building next to the Delta Hotel in South Sioux City. The building includes Riverview Surgical Center as a tenant.

The final defendant is Mr. Lee Hilka. Mr. Hilka is the CEO of Tri-State, the manager of Riverview ASC Realty, and the interim manager of Riverview Surgical Center. Mr. Hilka was formerly the CEO of Pierce Street.

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

- Drs. Smith, Samuelson, Liudahl, and Morris breached their contractual obligations in Pierce Street’s Operating Agreement;
- Tri-State interfered with Drs. Smith, Samuelson, Liudahl, and Morris’s contractual obligations in Pierce Street’s Operating Agreement;
- Mr. Hilka interfered with Drs. Smith, Samuelson, Liudahl, and Morris’s contractual obligations in Pierce Street’s Operating Agreement;
- Mr. Hilka breached his own contractual obligation not to compete with Pierce Street following the end of his employment there;

- Drs. Smith, Samuelson, Liudahl, and Morris interfered with Mr. Hilka's contractual obligations not to compete with Pierce Street following the end of his employment there;
- Drs. Samuelson, Smith, and Hilka breached their duty of loyalty to Pierce Street;
- Drs. 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 Drs. Smith, Samuelson, Liudahl, and Morris's contractual obligations in Pierce Street's Operating Agreement with Pierce Street; and
- All defendants conspired with one another to commit these wrongs against Pierce Street.

Pierce Street claims damages as a result of these claims. Defendants deny Pierce Street's claims.

Certain defendants have brought counterclaims against Pierce Street. Drs. Liudahl, Samuelson, Morris, Smith, and another physician who is not a defendant—Dr. Terry Monk—allege that Pierce Street breached its Operating Agreement in the way it terminated their membership interests in Pierce Street. Defendants claim damages as a result of their claims. Pierce Street denies the counterclaims.

Do not consider this summary as proof of any claim. Decide the facts from the evidence and apply the law which I will now give you.

Authority

Iowa Civil Jury Instruction 100.1 (modified)

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

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. It is common to have hidden or implicit thoughts that help us form our opinions. You are making very important decisions in this case. You must evaluate the evidence carefully. You must avoid decisions based on things such as generalizations, gut feelings, prejudices, fears, sympathies, stereotypes, or inward or outward biases. The law demands that you return a just verdict, based solely on the evidence, your reason and common sense, and these instructions. As jurors, your sole duty is to find the truth and do justice.

Authority

Iowa Civil Jury Instruction 100.2 (Rev. 6/19)

[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 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 proposed instruction is agreed upon by the parties if necessary.]

INSTRUCTION NO. 11

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.

Authority

Iowa Civil Jury Instruction 100.14 (unmodified)

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

INSTRUCTION NO. 12

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.

Authority

Iowa Civil Jury Instruction 100.15 (unmodified)

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

INSTRUCTION NO. 13

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.

Authority

Iowa Civil Jury Instruction 100.16

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

INSTRUCTION NO. 14

Company Parties.

The fact that a plaintiff or defendant is a company should not affect your decision. All persons are equal before the law, and companies, 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 to reflect that parties are LLC and LC companies, not corporations).

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

INSTRUCTION NO. 15

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, Instagram, 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 (modified to update social media platforms)

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

INSTRUCTION NO. 16

Definitions

Own:

To have or hold as property: possess. In the case of limited liability companies, or “L.L.C.s”, members or 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

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. 17

Breach of Contract – Essentials for Recovery.

A plaintiff/counterclaim-plaintiff must prove all of the following propositions:

1. The existence of a contract. The parties stipulate this element has been established.
2. The terms of the contract.
3. The plaintiff/counterclaim-plaintiff has done what the contract requires.
4. The defendant/counterclaim-defendant has breached the contract.
5. The amount of any damage defendant/counterclaim-defendant has caused.

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

Authority

Iowa Civil Jury Instruction 2400.1 (unmodified)

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

INSTRUCTION NO. 18

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)

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

INSTRUCTION NO. 19

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)

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

INSTRUCTION NO.: 20

Cause - Defined.

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

Authority

Iowa Civil Jury Instruction 700.3

[Defendants propose this unmodified instruction and Plaintiff objects.]

INSTRUCTION NO. 21

Implied Covenant of Good Faith and Fair Dealing.

A contract imposes upon each party an implied covenant of good faith and fair dealing in its performance and enforcement.

Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.

The covenant of good faith and fair dealing does not give rise to new substantive terms that do not otherwise exist in the contract.

The implied covenant prevents one party from using technical compliance with the contract as a shield from liability when that party is acting for a purpose contrary to that for which the contract was made.

Authority

Mid-Am. Dist. Real Estate Co. v. Iowa Realty Co., 406 F.3d 969, 974 (8th Cir. 2005) (quoting *Kooyman v. Farm Bureau Mutual Ins. Co.*, 315 N.W.2d 30, 34 (Iowa 1982)).

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

INSTRUCTION NO. 22

Breach of Contract - Expectation Interest.

The measure of damages for breach of contract is an amount that would place the party in as good a position as it/he would have enjoyed if the contract had been performed.

Authority

Iowa Civil Jury Instruction 220.1 (unmodified)

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

INSTRUCTION NO. 23A

Intentional Interference With Contract - Essentials For Recovery.

Pierce Street must prove all of the following propositions:

1. Pierce Street had a contract with one or more of the following Defendants: Hilka, Smith, Samuelson, Liudahl, or Morris;
2. One or more Defendants knew of the contract(s);
3. One or more Defendants intentionally and improperly interfered with the contract by one or more of the following (set out the particulars supported by the evidence):

- Contributing additional capital to Tri-State for Tri-State to invest in Riverview ASC Realty, LLC;

- Acting as agents of Tri-State, an owner and participant in the Riverview project;

- Providing one or more of Smith, Samuelson, Liudahl, or Morris with resources and support that have allowed them to obtain ownership interests in or managerial control over Riverview in violation of their non-competition restrictions;

- Causing one or more of Smith, Samuelson, Liudahl, or Morris 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;

- Otherwise participating in the Riverview development, located less than four miles from PSSDS;

4. The interference caused Hilka, Smith, Samuelson, Liudahl, or Morris not to perform their contractual obligations to Pierce Street.
5. The nature and amount of damage.

If Pierce Street has failed to prove any one or more of these propositions, Pierce Street is not entitled to damages. If Pierce Street has proved all of these propositions, Pierce Street is entitled to damages in some amount.

Authority

Iowa Civil Jury Instruction 1200.1 (as modified)

[Plaintiff's version.]

INSTRUCTION NO. 23B

INSTRUCTION NO.: _____

Intentional Interference With Contract - Essentials For Recovery.

Pierce Street must prove all of the following propositions:

1. Pierce Street had a contract with one or more of the following defendants: Mr. Hilka, Dr. Smith, Dr. Samuelson, Dr. Liudahl, or Dr. Morris;
2. One or more of defendants Tri-State Specialists, Mr. Hilka, Dr. Smith, Dr. Samuelson, Dr. Liudahl, Dr. Morris, Riverview ASC Realty, or Riverview Surgical Center knew of the contract(s);
3. One or more defendants intentionally and improperly interfered with the contract by (set out the particulars supported by the evidence):

A) Causing one or more of Dr. Smith, Dr. Samuelson, Dr. Liudahl, or Dr. Morris to “directly or indirectly through an Affiliate or otherwise, own or operate, or own, invest in, or have any other ownership interest in any Entity or Person that owns or operates another ... ambulatory surgery center (“ASC”) within thirty (30) miles of [Pierce Street]” or to “directly or indirectly, through an Affiliate or otherwise, either alone or in conjunction with any other Entity or Person, manage, consult with, become employed or hired by, or otherwise have a compensation arrangement with, any Entity or Person that directly or indirectly owns or operates another ASC within 30 miles of [Pierce Street]; or”

B) Causing Mr. Hilka to directly or indirectly provide similar services, whether as an employee, employer, consultants, or otherwise, within thirty (30) miles of [Pierce Street] ... without the express written consent of [Pierce Street].

4. The interference caused Dr. Smith, Dr. Samuelson, Dr. Liudahl, or Dr. Morris not to perform their contractual obligations to Pierce Street before December 20, 2018. The interference caused Mr. Hilka not to perform his contractual obligations to Pierce Street before January 16, 2016.
5. The nature and amount of damage.

If Pierce Street has failed to prove any one or more of these propositions, Pierce Street is not entitled to damages. If Pierce Street has proved all of these propositions, Pierce Street is entitled to damages in some amount.

Authority

Iowa Civil Jury Instruction 1200.1 (as modified)

[Defendants' version modifying Plaintiff's version to quote exactly how Operating Agreement could be breached by doctors in § 6.6, how Hilka could breach his Employment Agreement, and to stop causation at the date Defendants non-compete obligations to Plaintiff ended.]

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 proposed instruction is agreed upon by the parties.]

INSTRUCTION NO. 25

Interference With Contract - Knowledge.

A defendant “knew” of the contract if the defendant either 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 Mr. Hilka, Dr. Smith, Dr. Samuelson, Dr. Liudahl, or Dr. Morris.

Authority

Iowa Civil Jury Instruction 1200.4 (modified to include party names)

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

INSTRUCTION NO. 26

Interference with Contract - Improper.

In determining whether a defendant's conduct in intentionally interfering with a contract is improper, you should determine whether the conduct was fair and reasonable under the circumstances. In determining whether the conduct was improper you may consider:

1. The nature of the conduct.
2. The defendant's motive.
3. The interests of the party with which the conduct interferes.
4. The interest sought to be advanced by the defendant.
5. The social interests in protecting the freedom of action of the defendant and the contractual interests of the other party.
6. The nearness or remoteness of the defendant's conduct to the interference.
7. The relations between the parties.

Authority

Iowa Civil Jury Instruction 1200.5 (unmodified)

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

INSTRUCTION NO. 27

Intentional Interference.

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

Authority

Iowa Civil Jury Instruction 1200.6 (unmodified)

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

INSTRUCTION NO. 28A

Officer/Manager Duty of Loyalty.

An officer/manager of a company owes the company complete loyalty, honesty, and good faith.

That duty is owed the company and its members/owners whenever the actions of the officer/manager concern “matters affecting the general well being of the corporation.”

An officer/manager’s first duty was to act in all things of trust wholly for the benefit of the company.

Officers/managers owe a duty to disclose information to those who have a right to know the facts.

Authority

Midwest Mgmt. Corp. v. Stephens, 353 N.W.2d 76, 80 (Iowa 1984).

Mitchellville Co-op. v. Indian Creek Corp., 469 N.W.2d 258, 263 (Iowa App. 1991)

[Plaintiff’s version..]

INSTRUCTION NO. 28B

Officer/Manager/Member Duty of Loyalty.

In a manager-managed limited company (“LC”) like Pierce Street, an officer and a manager owe a duty of loyalty to Pierce Street.

A member of an LC like Pierce Street does not owe a duty of loyalty to Pierce Street or any other member solely by reason of being a member.

Officers, members, and managers in an LC like Pierce Street shall discharge their duties consistent with their contractual obligation of good faith and fair dealing.

Pierce Street’s contract with its physicians prevents its managers from being liable for breach of the duty of loyalty except where the manager intentionally inflicts harm on the company or its members.

Authority

Iowa Code § 489.409(1), (4), and (8) - Standards of conduct for members and managers for LLCs; Pierce Street Operating Agreement § 5.4 - Exculpation.

[Defendants’ version.]

INSTRUCTION NO. 29

Intentional Infliction - Explained.

Plaintiff claims defendants Dr. Samuelson, Dr. Smith, and Mr. Hilka intentionally inflicted harm on plaintiff. To prove defendants acted intentionally, plaintiff must demonstrate that the defendants intended to produce the harm that plaintiff alleges occurred. It is not enough for the plaintiff to demonstrate that the defendants intended to act. Instead, the plaintiff must show that the defendants wanted the plaintiff to be harmed through their conduct or knew or believed that such harm was certain or substantially certain to occur.

Authority

Restatement of Torts (Second), Section 870, comment b
Restatement of Torts (Second), Section 766, comment j

(Defendants propose this instruction to explain the previous instruction; Plaintiff objects.)

INSTRUCTION NO. 30

Breach of Duty of Loyalty- Essentials For Recovery.

To recover for a breach of duty of loyalty claim, Pierce Street must prove all of the following propositions:

1. While an officer or manager of Pierce Street, the following defendants owed a duty of loyalty to Pierce Street: Dr. Samuelson, Dr. Smith, and Mr. Hilka. The parties stipulate this element has been established.
2. Dr. Samuelson, Dr. Smith, or Mr. Hilka breached a duty of loyalty.
3. The breach of the duty of loyalty was a cause of damage to Pierce Street.
4. The amount of damage.

If Pierce Street has failed to prove any of these propositions, Pierce Street cannot recover damages. If Pierce Street has proved all of these propositions, Pierce Street is entitled to recover damages in some amount.

Authority

Iowa Civil Jury Instruction 3200.1 (as modified to refer to duty of loyalty and to include party names)

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

INSTRUCTION NO. 31

Essentials for Recovery - Conspiracy.

In order to recover for the claim of conspiracy, Pierce Street must prove all of the following propositions:

1. A defendant committed one or more the following wrongs: intentional interference with contract or breach of duty of loyalty, as defined in Instructions Nos._____.
2. The defendant participated in a conspiracy with one or more other defendants to commit the wrongs.
3. The nature and extent of damage.

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

Authority

Iowa Civil Jury Instruction 3500.1 (modified)

*(See Instruction 24, *3T Services, Inc. v. Superior Industrial Mechanical, Inc.; Joseph G. Rohan, Brian Solomon, Steve Bruening, Angel Adame, and Adan Nava*, EQCV179595, (Woodbury County, filed June 13, 2019, Judge Tott)

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

INSTRUCTION NO. 32

Conspiracy - Definition.

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.

Authority

Iowa Civil Jury Instruction 3500.2 (unmodified)

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

INSTRUCTION NO. 33

Participation - Definition.

A person participates in a conspiracy 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.

Authority

Iowa Civil Jury Instruction 3500.3 (unmodified)

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

INSTRUCTION NO. 34

Mitigation of Damages

All parties asserting claims for damages have a duty to mitigate their damages. That is, they have a duty to exercise ordinary care to reduce, minimize, or limit their damages. However, they have no duty to do something that is unreasonable under the circumstances.

To establish that a party failed to mitigate its/his damages, the defendant(s) to the claim must prove all of the following:

1. There was something the claiming party could do to mitigate its/his damages.
2. Requiring the party to do so was reasonable under the circumstances.
3. The claiming party acted unreasonably in failing to undertake the mitigating activity.
4. The claiming party's failure to undertake the mitigating activity caused an identifiable portion of its/his damages.

If the defendant(s) prove each of these elements, then you must reduce any item of damages by the amount the claiming party reasonably could have avoided if it/he had undertaken the mitigating activity. If the defendant(s) failed to prove one or more of these elements, then it has not proven that the claiming party failed to mitigate its/his damages.

Authority

Iowa Civil Jury Instruction 400.7 (modified); given in Haskenhoff v. Homeland Energy Solutions, LLC, Case No. LACV003218, Chickasaw County (Judge KellyAnn Lekar) August 14, 2019.

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

INSTRUCTION NO. 35

Punitive Damages.

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

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 intentional interference with contract or breach of duty of loyalty warrants a penalty in addition to the amount you award to compensate for Pierce Street'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 the defendant's conduct that harmed Pierce Street.
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. Pierce Street's actual damages. The amount awarded for punitive damages must be reasonably related to the amount of actual damages you award to Pierce Street.
4. The existence and frequency of prior similar conduct.

Authority

Iowa Civil Jury Instruction 210.1 (modified)

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

INSTRUCTION NO. 36

Punitive Damages Against A Principal Or Employer.

Tri-State Specialists, Riverview ASC Realty, or Riverview Surgical Center is liable for the punitive damages by reason of the acts of its 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 employed in a managerial capacity and was acting in the scope of employment; or
3. The [principal or employer] [managerial agent of (principal or employer)] ratified or approved the act.

Authority

Iowa Civil Jury Instruction 210.3

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

INSTRUCTION NO. 37

Scope of Employment.

A company is liable for the wrongful acts of an employee/agent if the acts are done in the scope of employment/agency.

Authority

Iowa Civil Jury Instruction 730.1 (modified)

Bethards v. Shivvers, Inc., 355 N.W.2d 39 (Iowa 1984)

Graham v. Worthington, 259 Iowa 845, 146 N.W.2d 626 (1966)

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

INSTRUCTION NO. 38

Liability Of Employer.

For an act to be within the scope of an employee/agent's employment/agency, the act must be necessary to accomplish the purpose of the employment/agency, and it must be intended to accomplish that purpose.

Authority

Iowa Civil Jury Instruction 730.2 (modified)

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)

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

INSTRUCTION NO. 39

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.

Authority

Iowa Civil Jury Instruction 210.4 (unmodified)

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

INSTRUCTION NO. 40

Clear, Convincing, and Satisfactory Evidence.

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

Authority

Iowa Civil Jury Instruction 100.19 (unmodified)

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

INSTRUCTION NO. 41

Spoliation of Evidence

Pierce Street claims that (name of party) has intentionally [destroyed] [failed to produce] evidence consisting of (describe evidence). You may, but are not required to, conclude that such evidence would be unfavorable to (name of party).

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

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

For you to reach this conclusion, more than the mere [destruction] [non-production] of the evidence must be shown. It is not sufficient to show that a third person [destroyed] [is withholding] the evidence without the authorization or consent of (name of party).

Authority

Iowa Civil Jury Instruction 100.22 (unmodified)

[Proposed by Plaintiff and objected to by Defendants.]

If given, Defendants request that the following language be added to the instruction:

Absent exceptional circumstances, you may not impose sanctions on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

[Iowa Rule of Civil Procedure 1.517(6).]

INSTRUCTION NO. 42

Inference from Assertion of Privilege Against Self-Incrimination

You have heard one or more of the Defendants decline to answer certain questions on grounds of the Fifth Amendment privilege against self-incrimination.

The Fifth Amendment of the United States Constitution affords every person the right to decline to answer any questions if he or she believes that the answers may tend to incriminate them. In civil cases such as this, however, you are permitted – but not required – to draw the inference that the withheld information would have been unfavorable to any Defendant who invokes the Fifth Amendment.

Any inference you may draw should be based upon all the facts and circumstances in this case as you may find them.

Authority

Modern Federal Jury Instructions, Civil, Instr. 75-5.
Baxter v. Palmigiano, 425 U.S. 308, 318 (1976)
LiButti v. United States, 107 F.3d 110, 120-125 (2d Cir. 1997)
RAD Servs., Inc. v. Aetna Gas. & Sur. Co., 808 F.2d 271, 274-277 (3d Cir. 1986)
ePlus Tech., Inc. v. Aboud, 313 F.3d 166, 179 (4th Cir. 2002)
Curtis v. M & S Petroleum, 174 F.3d 661, 673-674 (5th Cir. 1999)
Evans v. City of Chicago, 513 F.3d 735, 740-741 (7th Cir. 2008)
SEC v. Jasper, 678 F.3d 1116, 112:r1125 (9th Cir. 2012)
Coquina Investments v. Rothstein, 2012 U.S. Dist. LEXIS 139947, at *31-*34 & n.9 (S.D. Fla. Sept. 28, 2012)

[Proposed by Plaintiff if necessary; Defendants object.]

INSTRUCTION NO. 43

Duplicate Damages

A party cannot recover duplicate damages. Do not allow amounts awarded under one item of damage to be included in any amount awarded under another item of damage. [Similarly, damages awarded to one party shall not be included in any amount awarded to another party.]

Authority

Iowa Civil Jury Instruction 200.1 (modified to included only the stock section on duplicate damages)

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

INSTRUCTION NO. 44

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 proposed instruction is agreed upon by the parties.]

INSTRUCTION NO. 45

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 proposed instruction is agreed upon by the parties.]

INSTRUCTION NO. 46

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 proposed instruction is agreed upon by the parties.]