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DES MOINES, IOWA
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CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

ALBAUGH, INC.,	*	
	*	CIVIL NO. 4-97-CV-90617
Plaintiff,	*	
	*	
v.	*	
	*	
AMERICAN CYANAMID CO.,	*	
	*	JURY INSTRUCTIONS
Defendant.	*	
	*	

TABLE OF CONTENTS

Preliminary Instructions
1. General
2. Statement of the Case
3. Burden of Proof
4. Definition of Evidence
5. Depositions
6. Interrogatories
7. Admissions
8. Corporations
9. Inconsistent Statements
10. Bench Conferences and Recesses
11. Note Taking
12. Outline of Trial
13. Conduct of the Jury

Final Instructions
1. Introduction
2. Duty of Jury
3. Evidence
4. Opinion Testimony
5. Statement of Case
6. Definition: Breach of Contract
7. Breach of Contract: Essentials for Recovery
8. Consideration
9. Interpretation of Contract Terms
10. Reasonable Time
11. Installment Contract
12. Performance by Plaintiff
13. Nonconforming Goods
14. Damages: In General
15. Specific Damages
16. Deliberations

MEMBERS OF THE JURY, THE COURT NOW GIVES YOU THE FOLLOWING INSTRUCTIONS:

173

Preliminary Instruction No. 1–General

Ladies and gentlemen: I will take a few moments now to give you some initial instructions about this case and about your duties as jurors. At the end of the trial I will give you further instructions. I may also give you instructions during the trial. Unless I specifically tell you otherwise, all such instructions - both those I give you now and those I give you later - are equally binding on you and must be followed.

Preliminary Instruction No. 2–Statement of the Case

This is a civil case brought by the plaintiff against the defendant. This case is brought by plaintiff Albaugh, Inc. against defendant American Cyanamid Company. In these instructions I will refer to the parties as "Albaugh" and "Cyanamid," respectively. Albaugh alleges that Cyanamid breached a 1996 contract between the parties under which Albaugh was to supply a substance called Trifluralin, to be used in the production of one of Cyanamid's herbicides. In these instructions I will refer to the contract as the "Agreement." Albaugh contends that Cyanamid breached the Agreement by refusing to accept delivery of Albaugh's trifluralin and terminating the Agreement. Cyanamid counters that it did not breach the Agreement, but rather legally terminated it because Albaugh did not supply Trifluralin that met the specifications required by the Agreement. Cyanamid further counters that Albaugh never had the capability to meet the obligations of the contract—namely Albaugh never had the capability to supply Cyanamid with the specified amounts of Trifluralin that met Cyanamid's specifications.

You will be asked to resolve these disputes between the parties. From the evidence you will decide what the facts are. You are entitled to consider that evidence in light of your own observations and experiences in the affairs of life. You will then apply those facts to the law which I give you in these and in my other instructions, and in that way reach your verdict. You are the sole judges of the facts; but you must follow the law as stated in my instructions, whether you agree with it or not.

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness says, or only part of it, or none of it at all.

In deciding what testimony to believe, consider the witnesses' intelligence, their opportunity to have seen or heard the things they testify about, their memories, any motives they may have for testifying a certain way, their manner while testifying, whether they said something different at an earlier time, the general reasonableness of their testimony, and the extent to which their testimony is consistent with other evidence that you believe.

Do not allow sympathy or prejudice to influence you. The law demands of you a just verdict, unaffected by anything except the evidence, your common sense, and the law as I give it to you. This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. In this case, the parties are corporations. The mere fact that a party is a corporation does not mean that it is entitled to any greater or lesser consideration by you. All persons, including individuals and corporations, stand equal before the law and are entitled to the same fair consideration by you.

You should not take anything I may say or do during the trial as indicating what I think of the evidence or what I think your verdict should be.

Preliminary Instruction No. 3–Burden of Proof

The burden is on the plaintiff in a civil action such as this to prove every essential element of his claim by a "preponderance of the evidence." A preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your minds a belief that what is sought to be proved is more likely true than not true. In other words, to establish a claim by a "preponderance of the evidence" means to prove that the claim is more likely so than not so.

In determining whether any fact in issue has been proved by a preponderance of the evidence, you may consider the testimony of all the witnesses, regardless of who may have called them, and all the exhibits received in evidence, regardless of who may have produced them. If the proof should fail to establish any essential element of plaintiff's claim by a preponderance of the evidence, you must find for defendant.

Preliminary Instruction No. 4–Definition of Evidence

I have mentioned the word "evidence." "Evidence" includes the testimony of witnesses; documents and other things received as exhibits; any facts that have been stipulated - that is, formally agreed to by the parties; and any facts that have been judicially noticed - that is facts which I say you must accept as true.

Certain things are not evidence. I will list those things for you now:

1. Statements, arguments, questions and comments by lawyers are not evidence.

2. Objections are not evidence. Lawyers have a right to object when they believe something is improper. You should not be influenced by the objection. If I sustain an objection to a question, you must ignore the question and must not try to guess what the answer might have been.

3. Testimony that I strike from the record, or tell you to disregard, is not evidence and must not be considered.

4. Anything you see or hear about this case outside the courtroom is not evidence, unless I specifically tell you otherwise during the trial.

Furthermore, a particular item of evidence is sometimes received for a limited purpose only. That is, it can be used by you only for one particular purpose, and not for any other purpose. I shall tell you when that occurs, and instruct you on the purposes for which the item can and cannot be used. You should also pay particularly close attention to such an instruction, because it may not be available to you in writing later in the jury room.

Finally, some of you may have heard the terms "direct evidence" and "circumstantial evidence." You are instructed that you should not be concerned with those terms, since the law makes no distinction between the weight to be given to direct and circumstantial evidence.

Preliminary Instruction No. 5–Depositions

Certain testimony from a deposition may be read or played into evidence. A deposition is testimony taken under oath before the trial, which is preserved in writing and/or on videotape. Consider that testimony as if it had been given in court.

Preliminary Instruction No. 6–Interrogatories

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.

Preliminary Instruction No. 7–Admissions

You may hear evidence claiming that a party made statements before this trial while not under oath. These statements are called admissions.

If you find an admission was made, you may consider it as if made during this trial. Decide whether to consider the admission for any purpose and what weight to give it.

Preliminary Instruction No. 8–Corporations

A corporation can only act through its employees or agents.

Accordingly, you are instructed that whatever actions, if any, you find were done for a particular corporate party are to be considered by you as if they had been done by the corporation itself.

Preliminary Instruction No. 9–Inconsistent Statements

You may hear evidence claiming witnesses made statements before this trial which were inconsistent with what the witness says 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 of the witnesses were made and whether they were inconsistent with the testimony given. 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, but you are not required to do so.

However, you should not disregard the testimony if other believable evidence supports it, or if for some other reason you believe it.

Preliminary Instruction No. 10–Bench Conferences and Recesses

During the trial it may be necessary for me to talk with the lawyers out of your hearing, either by having a bench conference here while you are present in the courtroom, or by calling a recess. Please understand that while you are waiting, we are working. The purpose of these conferences is to decide how certain evidence is to be treated under the rules of evidence, and to avoid confusion and error. We will, of course, do what we can to keep the number and length of these conferences to a minimum.

Preliminary Instruction No. 11–Note Taking

At the end of the trial you must make your decision based on what you recall of the evidence. You will not have a written transcript to consult, and it may not be practical for the court reporter to read back lengthy testimony. You must pay close attention to the testimony as it is given.

If you wish, however, you may take notes to help you remember what witnesses said. If you do take notes, please keep them to yourself until you and your fellow jurors go to the jury room to decide the case. And do not let note-taking distract you so that you do not hear other answers by the witness.

When you leave at night, your notes will be secured and not read by anyone.

Preliminary Instruction No. 12–Outline of Trial

The trial will proceed in the following manner:

First, the plaintiff's attorney may make an opening statement. Next, the defendant's attorney may make an opening statement. An opening statement is not evidence but is simply a summary of what the attorney expects the evidence to be.

The plaintiff will then present evidence and counsel for defendant may cross-examine. Following the plaintiff's case, the defendant may present evidence and plaintiff's counsel may cross-examine.

After presentation of evidence is completed, the attorneys will make their closing arguments to summarize and interpret the evidence for you. As with opening statements, closing arguments are not evidence. The court will instruct you further on the law. After that you will retire to deliberate on your verdict.

Preliminary Instruction No. 13–Conduct of the Jury

Finally, to insure fairness, you as jurors must obey the following rules:

First, do not talk among yourselves about this case, or about anyone involved with it, until the end of the case when you go to the jury room to decide on your verdict.

Second, do not talk with anyone else about this case, or about anyone involved with it, until the trial has ended and you have been discharged as jurors.

Third, when you are outside the courtroom, do not let anyone tell you anything about the case, or about anyone involved with it until the trial has ended and your verdict has been accepted by me. If someone should try to talk to you about the case during the trial, please report it to me.

Fourth, during the trial you should not talk with or speak to any of the parties, lawyers or witnesses involved in this case - you should not even pass the time of day with any of them. It is important not only that you do justice in this case, but that you also give the appearance of doing justice. If a person from one side of the lawsuit sees you talking to a person from the other side - even if it is simply to pass the time of day - an unwarranted and unnecessary suspicion about your fairness might be aroused. If any lawyer, party or witness does not speak to you when you pass in the hall, ride the elevator or the like, remember it is because they are not supposed to talk or visit with you either.

Fifth, do not read any news stories or articles about the case, or about anyone involved with it, or listen to any radio or television reports about the case or about anyone involved with it. In fact, until the trial is over I suggest that you avoid reading any newspapers or news journals at all, and avoid listening to any TV or radio newscasts at all. I do not know whether there might be any news reports of this case, but if there are you might inadvertently find yourself reading or

listening to something before you could do anything about it. If you want, you can have your spouse or a friend clip out any stories and set them aside to give you after the trial is over. I can assure you, however, that by the time you have heard the evidence in this case, you will know more about the matter than anyone will learn through the news media.

Sixth, do not do any research or make any investigation about the case on your own.

Seventh, do not make up your mind during the trial about what the verdict should be. Keep an open mind until after you have gone to the jury room to decide the case and you and your fellow jurors have discussed the evidence.

FINAL INSTRUCTION NO. 1

INTRODUCTION

Members of the jury, the instructions I gave you at the beginning of the trial and during the trial remain in effect. I now give you some additional instructions.

You must, of course, continue to follow the instructions I gave you earlier, as well as those I give you now. You must not single out some instructions and ignore others, because all are important. This is true even though some of those I gave you at the beginning of trial are not repeated here.

The instructions I am about to give you now, as well as the preliminary instructions given to you at the beginning of the trial, are in writing and will be available to you in the jury room. Again, *all* instructions, whenever given and whether in writing or not, must be followed.

In considering these instructions, the order in which they are given is not important. Neither in these instructions nor in any ruling, action, or remark that I have made during the course of this trial, have I intended to give any opinion or suggestion as to what your verdict should be.

FINAL INSTRUCTION NO. 2

DUTY OF JURY

It is your duty to find from the evidence what the facts are. You will then apply the law, as I give it to you, to those facts. You must follow my instructions on the law, even if you thought the law was different or should be different.

Do not allow sympathy or prejudice to influence you. The law demands of you a just verdict, unaffected by anything except the evidence, your common sense, and the law as I give it to you.

FINAL INSTRUCTION NO. 3

EVIDENCE

I have mentioned the word "evidence." The "evidence" in this case consists of:

1) the testimony of witnesses,

2) the documents and other things received as exhibits,

3) the facts that have been stipulated -- this is, formally agreed to by the parties,

4) the facts that have been judicially noticed -- this is, facts which I say you may, but are not required to, accept as true, even without evidence.

You may use reason and common sense to draw deductions or conclusions from facts which have been established by the evidence in the case.

Certain things are not evidence. I shall list those things again for you now:

1) Statements, arguments, questions and comments by lawyers representing the parties in the case are not evidence.

2) Objections are not evidence. Lawyers have a right to object when they believe something is improper. You should not be influenced by the objection. If I sustained an objection to a question, you must ignore the question and must not try to guess what the answer might have been.

3) Testimony that I struck from the record, or told you to disregard, is not evidence and must not be considered.

4) Anything you saw or heard about this case outside the courtroom is not evidence.

Finally, if you were instructed that some evidence was received for a limited purpose only, you must follow that instruction.

FINAL INSTRUCTION NO. 4

OPINION TESTIMONY

The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists as to those whom we call "expert witnesses." Witnesses who, by education and experience, have become experts in some art, science, profession, or calling, may state their opinions as to relevant and material matter, in which they profess to be an expert, and may also state their reasons for the opinion.

You should consider each expert opinion received in evidence in this case, and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion or are not sound or if you feel that it is outweighed by other evidence, you may disregard the opinion entirely.

FINAL INSTRUCTION NO. 5

STATEMENT OF THE CASE

Members of the jury: As I previously told you, in this case, Plaintiff Albaugh alleges that Cyanamid breached the parties' contract by refusing to buy Albaugh's trifluralin and terminating the Settlement Agreement. Cyanamid counters that it legally terminated the contract because Albaugh failed to supply trifluralin that met the specifications required in the contract.

FINAL INSTRUCTION NO. 6

DEFINITION: BREACH OF CONTRACT

A breach of contract occurs when, without legal excuse, a party fails to perform a term of the contract.

FINAL INSTRUCTION NO. 7

BREACH OF CONTRACT: ESSENTIALS FOR RECOVERY

In order to recover damages in this case, Plaintiff Albaugh must prove all of the following propositions:

1) The parties were capable of contracting;

2) The existence of a contract;

3) The consideration;

4) The terms of the contract;

5) Albaugh has done what the contract requires;

6) Cyanamid has breached the contract;

7) The amount of any damage Cyanamid has caused.

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

INSTRUCTION NO. 8

CONSIDERATION

"Consideration" is either a benefit given or to be given to the person who makes the promise or a detriment experienced or to be experienced by the person to whom the promise is made. Where the contract provides for mutual promises, each promise is consideration for the other promise.

FINAL INSTRUCTION NO. 9

INTERPRETATION OF CONTRACT TERMS

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.

FINAL INSTRUCTION NO. 10

REASONABLE TIME

The time for shipment or delivery or any other action under a contract, if not agreed upon by the parties, shall be a reasonable time.

FINAL INSTRUCTION NO. 11

INSTALLMENT CONTRACTS

You are instructed that the contract between Albaugh and Cyanamid was an "installment contract," that is, one which requires or authorizes that a delivery of goods in separate lots to be separately accepted.

A nonconformity with respect to one or more installments cannot be a breach of the whole contract unless the nonconformity impairs the value of the whole contract.

FINAL INSTRUCTION NO. 12

PERFORMANCE BY PLAINTIFF

When a person 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, unless full performance has been excused, waived, prevented, or delayed by the act of the other party.

However, a plaintiff 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 defendant will be deprived of the benefit which defendant reasonably expected;

2) The extent to which defendant can be adequately compensated for the part of that benefit of which defendant will be deprived;

3) The extent to which plaintiff will suffer forfeiture;

4) The likelihood that plaintiff will cure the failure, taking account of all the circumstances including any reasonable assurances;

5) The extent to which the behavior of the plaintiff is in line with standards of good faith and fair dealing.

FINAL INSTRUCTION NO. 13

NON-CONFORMING GOODS

Under law, a party to a contract for the sale of goods may reject shipment of those goods if the goods are nonconforming goods, that is, if the goods fail to meet the specifications agreed upon by the parties to the contract.

FINAL INSTRUCTION NO. 14

DAMAGES: IN GENERAL

If you find in favor of Albaugh on its breach of contract claim, you must award Albaugh such sum as you find will fairly and justly compensate Albaugh for any damages you find it sustained as a direct result of Cyanamid's wrongful conduct. However, I must explain to you now some matters applicable to all of your determination of damages.

In arriving at the amount of damages on a claim, you cannot establish a figure by taking down the estimate of each juror as to damages and agreeing in advance that the average of those estimates shall be your award of damages for that claim.

Remember, throughout your deliberations, you must not engage in any speculation, guess, or conjecture. Although the precise amount of plaintiff's damages may be difficult to determine, that should not affect the plaintiff's recovery. On the other hand, the plaintiff is not to be awarded purely speculative damages. Damages may be awarded only where there is some reasonable basis in the evidence in the case for determining that the plaintiff has in fact suffered a loss, even though the amount of such loss is difficult to determine.

You must not award damages under any of these Instructions by way of punishment or through sympathy. Your judgment must not be exercised arbitrarily, or out of sympathy or prejudice, for or against any of the parties. The amount you assess for any item of damages must not exceed the amount caused by the wrongful conduct of the defendant as proved by the evidence.

The fact that I am instructing you on the proper measure of damages should not be considered as an indication that I have any view as to which party is entitled to your verdict in this case. Instructions as to the measure of damages are given only for your guidance, in the event that you should find that a party is entitled to damages in accord with the other instructions.

FINAL INSTRUCTION NO. 15

SPECIFIC DAMAGES

The measure of damages for breach of contract is an amount that would place the plaintiff in as good a position as the plaintiff would have occupied if the contract had been performed.

The damages you award must be foreseeable or have been reasonably foreseeable at the time the parties entered into the contract.

In your consideration of the damages, you may consider Albaugh's lost profits.

FINAL INSTRUCTION NO. 16

DELIBERATIONS

In conducting your deliberations and returning your verdict, there are certain rules you must follow.

First, when you go to the jury room, you must select one of your members as your foreperson. That person will preside over your discussions and speak for you here in court.

Second, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach agreement if you can do so without violence to individual judgment, because a verdict must be unanimous.

Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors, and listened to the views of your fellow jurors.

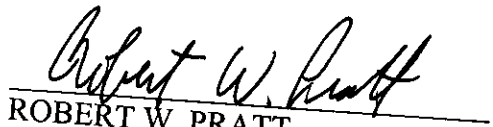
Do not be afraid to change your opinions if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right, or simply to reach a verdict. Remember at all times that you are not partisans. You are judges - judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

Third, if you need to communicate with me during your deliberations, you may send a note to me through the marshal or bailiff, signed by one or more jurors. I will respond as soon as possible either in writing or orally in open court. Remember that you should not tell anyone - including me - how your votes stand numerically.

Fourth, your verdict must be based solely on the evidence and on the law which I have given to you in my instructions. The verdict must be unanimous. Nothing I have said or done is intended to suggest what your verdict should be - that is entirely for you to decide.

Finally, the verdict form is simply the written notice of the decision that you reach in this case. You will take this form to the jury room, and when each of you has agreed on the verdict, your foreperson will fill in the form, sign and date it, and advise the marshal or bailiff that you are ready to return to the courtroom.

Dated this 19th day of October, 2000.



ROBERT W. PRATT,
U.S. DISTRICT JUDGE