

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

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U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF IA

GRACE LABEL, INC.,	)	
	)	
Plaintiff,	)	NO. 4:02-cv-30538-RAW
	)	
vs.	)	
	)	
STEVE KLIFF, individually and	)	
d/b/a STEVE KLIFF &	)	
ASSOCIATES,	)	
	)	
Defendant.	)	
-----	)	
STEVE KLIFF, individually and	)	
d/b/a STEVE KLIFF &	)	
ASSOCIATES,	)	
	)	
Counterclaim	)	
Plaintiff,	)	INSTRUCTIONS TO THE JURY
	)	
vs.	)	
	)	
GRACE LABEL, INC.,	)	
	)	
Counterclaim	)	
Defendant.	)	

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

This is a civil case brought by plaintiff Grace Label, Inc., a corporation located in Des Moines, Iowa, against Steve Kliff, a Ohio resident who does business as Steve Kliff & Associates. Grace Label is in the business of manufacturing pressure-sensitive labels and flexible packaging. Kliff brokers printing projects. The lawsuit involves a contract between Grace Label and Kliff under which Grace Label was to produce and ship

**PAGE TWO OF STATEMENT OF THE CASE**

certain trading cards bearing the likeness of pop music star Britney Spears. The cards were intended for Kliff's customer, Barcel S.A. de C.V., a Mexican snack food company, which was going to put the cards in bags of snack foods. In these instructions I will refer to this as the "trading card contract." Grace Label contends Kliff breached the trading card contract by failing to pay for the goods produced and sues for the amount it claims is owed under the contract. Kliff denies he breached the trading card contract. He contends Grace Label breached the trading card contract and he rightfully rejected the cards because the cards had a bad odor and were not suitable for direct contact with food. Kliff also claims Grace Label breached an express warranty and an implied warranty of fitness for a particular purpose in connection with the production and sale of the trading cards. Kliff has brought a counterclaim against Grace Label for damages. Grace Label denies Mr. Kliff's counterclaim.

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

**INSTRUCTION NO. 1**

Members of the jury, the instructions I gave at the beginning of 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 the trial are not repeated here.

The instructions I am about to give you now are in writing and will be available to you in the jury room. I emphasize, however, that this does not mean they are more important than my earlier instructions. Again, all instructions, whenever given and whether in writing or not, must be followed. In considering the instructions, you will attach no importance or significance whatever to the order in which they are given.

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.

**PAGE TWO OF INSTRUCTION NO. 1**

You must follow the instructions now given you regardless of your opinion of what the law ought to be. You need not be concerned with the wisdom of any rule of law.

Finally, as judges of the facts your duty is to decide all fact questions. In doing so, do not be influenced by any personal likes or dislikes, sympathy, bias, prejudice or emotions.

**INSTRUCTION NO. 2**

You shall base your verdict only upon the evidence and these instructions.

Evidence is:

1. Testimony of witnesses.
2. Exhibits received by the Court.
3. Stipulations, which are agreements between the parties. If the parties stipulate to a fact, you should treat that fact as having been conclusively proved.

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 exhibits formally offered and received by the court are available to you during your deliberations, and you will be provided with these. Documents or items read from or referred to, which were not offered and received into evidence, are not available to you. You may examine the exhibits very closely, but you may not alter them.

**PAGE TWO OF INSTRUCTION NO. 2**

The following are not evidence.

1. Statements, arguments, questions and comments by the lawyers.
2. Objections and rulings on objections.
3. Testimony I told you to disregard.
4. Anything you saw or heard about this case outside the courtroom.

**INSTRUCTION NO. 3**

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 witness' testimony.

There are many factors 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 witness' appearance, conduct, age, intelligence, memory, and knowledge of the facts;
3. The witness' interest in the trial, their motive, candor, bias, and prejudice; and
4. Whether the witness said something different at an earlier time.

**INSTRUCTION NO. 4**

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

**INSTRUCTION NO. 5**

A corporation can act only through its officers, employees or other agents. Any acts or omissions of any officer, employee, or agent of a corporation are held in the law to be the acts or omissions of the corporation; and these acts or omissions are chargeable to and imputed to the corporation. A corporation is charged with the knowledge of its employees.

In addition, an independent contractor hired to perform a specific task for a person is the agent of that person with respect to the work entrusted to him on that task. Any acts or omissions of the agent in connection with the work in question are considered the acts or omissions of the person employing the agent.

**INSTRUCTION NO. 6**

You have testimony from persons described as experts. Persons who have become experts in a field because of their education and experience may give their opinion on matters in that field and the reasons for their opinion.

Consider expert testimony just like any other testimony. You may accept it or reject it. You may give it as much weight as you think it deserves, considering the witness' education and experience, the reasons given for the opinion, and all the other evidence in the case.

**INSTRUCTION NO. 7**

In these instructions you are told that your verdict depends on whether you find certain facts have been proved. The burden of proving a fact is upon the party whose claim depends upon that fact. The party who has the burden of proving a fact must prove it by the preponderance of the evidence. To prove something by the preponderance of the evidence is to prove that it is more likely true than not true. It is determined by considering all of the evidence and deciding which evidence is more believable.

The greater weight of the evidence is not necessarily determined by the greater number of witnesses or exhibits a party has presented.

You may have heard of the term "proof beyond a reasonable doubt." That is a stricter standard which applies in criminal cases. It does not apply in civil cases such as this. You should, therefore, put it out of your minds.

**INSTRUCTION NO. 8**

The parties have made claims against each other. Grace Label claims that Kliff breached the trading card contract. Kliff, in turn, brings three claims against Grace Label: (1) for breach of the trading card contract, (2) for breach of express warranty and (3) for breach of an implied warranty of fitness for a particular purpose. These claims are explained to you later. The parties cannot both recover damages. Therefore, if you find Grace Label should recover damages on its claim for breach of contract, Kliff cannot recover damages on any of his claims and, conversely, if you find that Kliff should recover damages on any of his claims, Grace Label cannot recover damages on its claim against Kliff.

**INSTRUCTION NO. 9**

Grace Label contends that Kliff breached the trading card contract. To recover on this claim Grace Label must prove all of the following propositions:

1. A contract existed between Grace Label and Kliff under which Grace Label was to produce and ship to Kliff's customer Barcel trading cards bearing the likeness of Britney Spears for a price to be paid by Kliff. It is undisputed that such a contract existed.

2. The terms of the contract.

3. Grace Label produced and shipped trading cards in accordance with its obligations under the contract, or has been excused from doing what the contract requires.

4. Kliff has breached the contract.

5. The amount of any damage caused by Kliff's breach.

If Grace Label has failed to prove any of these propositions, Grace Label is not entitled to recover any damages and you will answer the special verdict form accordingly. If Grace Label has proved all of these propositions, then Grace Label is entitled to recover damages in some amount from Kliff and you will answer the special verdict form accordingly.

**INSTRUCTION NO. 10**

In determining the terms of the contract you may consider the following:

1. The intent of the parties. The intent may be shown by the practical construction of a contract by the parties and by the surrounding circumstances.
2. The intent expressed in the language used prevails over any secret intention of either party.
3. 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.
4. 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.
5. Ambiguous language in a written contract is interpreted against the party who selected it.
6. Where general and specific terms in the contract refer to the same subject, the specific terms control.
7. The terms of a contract may be explained or supplemented by a course of dealing between the parties.

**INSTRUCTION NO. 11**

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

**INSTRUCTION NO. 12**

When a person agrees to do something for a specified consideration to be paid 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. Performance is excused where one party clearly rejects the contract by giving notice to the other that they will not perform.

**INSTRUCTION NO. 13**

With respect to proposition No. 3 of Instruction No. 9, Grace Label, as the seller of the trading cards, contends that its performance of the contract is shown in part by the fact that Kliff, as buyer of the cards from Grace Label, accepted the cards shipped to Barcel. Kliff denies he accepted the cards and contends the parties understood that the cards would not be accepted unless and until they were accepted by Barcel.

Under commercial law, acceptance of the trading cards occurred if: (1) Kliff, after a reasonable opportunity to inspect the cards, signified to Grace Label that the cards conformed to the contract; or (2) Kliff failed to give notice to Grace Label that the cards were rejected within a reasonable period after delivery and a reasonable opportunity to inspect the cards.

If Kliff accepted the cards, he must pay the agreed price unless within a reasonable period of time after his acceptance, he revoked the acceptance because the cards did not conform to the contract. Kliff could revoke any acceptance if the non-conformity substantially impaired the value of the cards to him and if he accepted the cards without discovery of the non-conformity if his acceptance was reasonably induced by the difficulty of discovering the non-conformity before he accepted the cards or by Grace Label's assurances.

**PAGE TWO OF INSTRUCTION NO. 13**

Goods "conform" to a contract when they are in accordance with the obligations under the contract.

Grace Label has the burden to prove the acceptance claimed by it. If you find it has proved Kliff accepted the cards, to avoid payment Kliff then has the burden to prove the trading cards did not conform to the contract and that he rightfully revoked the acceptance.

**INSTRUCTION NO. 14**

Kliff contends that Grace Label breached the trading card contract. To recover on this claim Kliff must prove all of the following propositions:

1. A contract existed between Grace Label and Kliff under which Grace Label was to produce and ship to Kliff's customer Barcel trading cards bearing the likeness of Britney Spears for a price to be paid by Kliff. It is undisputed that such a contract existed.

2. The terms of the contract.

3. Kliff has done what the contract requires, or has been excused from doing what the contract requires.

4. Grace Label has breached the contract.

5. The amount of any damage caused by Grace Label's breach.

If Kliff has failed to prove any of these propositions, Kliff is not entitled to recover any damages and you will answer the special verdict form accordingly. If Kliff has proved all of these propositions, then Kliff is entitled to recover damages in some amount from Grace Label and you will answer the special verdict form accordingly.

**INSTRUCTION NO. 15**

With respect to proposition Nos. 2 and 4 of Instruction No. 14, you will consider Instruction Nos. 10 and 11 previously given.

**INSTRUCTION NO. 16**

With respect to proposition No. 3 of Instruction No. 14, Kliff contends that he rejected the trading cards produced by Grace Label, and terminated the contract, because the cards produced and shipped by Grace Label did not conform to the terms of the contract. Goods conform to a contract when they are in accordance with the obligations under the contract. If Kliff has proved the non-conformity of the cards, then he is excused from performing the contract by paying the agreed price for the cards.

**INSTRUCTION NO. 17**

Kliff contends that Grace Label breached an express warranty with respect to the trading cards. To recover on this claim, Kliff must prove all of the following propositions:

1. Grace Label sold the trading cards and expressly warranted:

- a. That the cards would be direct food contact compatible; and/or
- b. That the cards would conform to the sample or prototype cards provided by Grace Label.

2. Kliff made the purchase relying on the express warranty.

3. The trading cards did not conform to the express warranty because they were not compatible for direct contact with food and/or did not conform to the sample or prototype cards.

4. The breach of express warranty caused damage to Kliff.

5. The amount of damage.

If Kliff has failed to prove any of these propositions, Kliff is not entitled to recover any damages on his claim of breach of express warranty and you will answer the special verdict form accordingly. If Kliff has proved all of these propositions, then Kliff is entitled to recover damages in some amount from Grace Label and you will answer the special verdict form accordingly.

**INSTRUCTION NO. 18**

An express warranty is any affirmation of fact or promise made by a seller about a product or service which naturally or ordinarily leads the buyer to purchase the product or service, and the buyer purchases the product or service relying upon the affirmation or promise.

In order for an affirmation of fact or promise to be an express warranty, no particular form of words have to be used, nor do the terms "warrant" or "guarantee" have to be used, nor does the seller have to intend to make a warranty. The warranty must relate to a fact and not an opinion about the quality or condition of the product or service sold. An expression of opinion or belief only, a statement of value, or mere words of praise do not create a warranty.

Also, any sample or model provided by the seller which is a basis for the contract creates an express warranty that the goods sold will conform to the sample or model. The manner and extent to which the parties understood the goods were to conform to a sample or model is for you to decide.

**INSTRUCTION NO. 19**

The fact that a buyer may, to some extent, rely upon his or her judgment in purchasing the goods does not prevent the buyer from also relying upon an express warranty made by the seller.

**INSTRUCTION NO. 20**

A breach of express warranty occurs when defects are substantial and sufficiently serious so that the product fails to materially comply with the express warranty. It is not enough if the defects are small, minor, or insignificant.

**INSTRUCTION NO. 21**

Kliff contends that Grace Label breached an implied warranty of fitness for a particular purpose. To recover on this claim Kliff must prove all of the following propositions:

1. At the time of the sale of the trading cards Grace Label had reason to know the particular purpose of the trading cards was that they were to be inserted in bags of snack food in direct contact with the food. This proposition is undisputed.

2. Grace Label had reason to know Kliff was relying on Grace Label's skill or judgment to furnish the trading cards.

3. Kliff relied on Grace Label's skill or judgment.

4. The trading cards were not fit for the particular purpose described.

5. The failure of the trading cards to fit the particular purpose caused damage to Kliff.

6. The amount of damage.

If Kliff has failed to prove any of these propositions, Kliff is not entitled to recover any damages on his claim of implied warranty of fitness for a particular purpose and you will answer the special verdict form accordingly. If Kliff has proved all of these propositions, then Kliff is entitled to recover damages in some amount from Grace Label and you will answer the special verdict form accordingly.

**INSTRUCTION NO. 22**

It is not enough that the buyer relied on the general reputation or integrity of the seller. It must appear that the seller had special skill or judgment regarding the product and its intended use, and the buyer relied upon the seller's special skills or judgment.

The buyer's reliance on the seller's skill or judgment need not be total reliance. The buyer may rely partly on their own judgment and partly on the seller's skill and judgment.

**INSTRUCTION NO. 23**

If you find in favor of a party, that party is entitled to recover damages and you must determine the amount. The measure of damages for breach of contract or breach of warranty is that reasonable amount which would place the injured party in as good a position as the party would have enjoyed if the breach of contract not occurred or the goods had been as warranted. Any damages you award must be foreseeable, or have been reasonably foreseen at the time the trading cards were sold or a warranty made.

With respect to the claim of Grace Label you will consider the following items:

1. The agreed price for the trading cards actually produced by Grace Label less the amount paid by Kliff.
2. The cost of materials and supplies purchased by Grace Label for trading cards it did not produce and which could not be used for other projects.

With respect to the claims of Kliff you will consider the following items:

1. The amount Kliff would have earned from Barcel for the Britney Spears trading cards.
2. Damage arising out of Kliff's loss of his relationship with Barcel.

**PAGE TWO OF INSTRUCTION NO. 23**

The fact that I have instructed you on items of damage to consider awarding to a party should not be taken as an indication that I have any view as to which party is entitled to your verdict or whether any item of claimed damage has been proved.

In determining damages you must use your sound judgment based upon impartial consideration of the evidence. The amount you assess for any item of damage must not exceed the amount caused by the opposing party as proved by the evidence. In awarding damages you must not engage in speculation, guess or conjecture. The damages must have a reasonable basis in the evidence, but need not be proven with precision. Also, your judgment must not be exercised arbitrarily or out of sympathy or prejudice for or against the parties.

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.

**INSTRUCTION NO. 24**

In arriving at an item of damage you cannot arrive at a figure by taking down the estimate of each juror as to an item of damage and agreeing in advance that the average of those estimates shall be your item of damage.

**INSTRUCTION NO. 25**

Your first duty on retiring to the jury room for your deliberations is to elect one of your members foreperson of the jury. The person elected is responsible for the orderly, proper and free discussion of the issues by any jurors who wish to express their views. The foreperson will supervise the balloting and sign the verdict form and any written inquiries addressed to the Court.

If you need to communicate with me during your deliberations, you may send a note to me through the court security officer signed by the foreperson. It may be necessary for me to confer with counsel before responding. Requests regarding instructions are not encouraged. Experience teaches that questions regarding the law are normally covered in the instructions, and the jury is encouraged to examine them very carefully before making any further requests of the Court. Unless I instruct you to do so, do not tell anyone -- including me -- how your votes stand numerically.

The attitude of jurors at the outset of their deliberations is important. It is seldom helpful for a juror, upon entering the jury room, to announce an emphatic opinion in a case or a determination to stand for a certain verdict. When a juror does that at the outset, individual pride may become involved, and the juror may later hesitate to recede from an announced position even when it is incorrect. You are not partisans or advocates.

**PAGE TWO OF INSTRUCTION NO. 25**

You are judges--judges of the facts. Your sole interest is to ascertain the truth.

**INSTRUCTION NO. 26**

The verdict must represent the considered judgment of each juror.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. An inconclusive trial is always undesirable. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

**INSTRUCTION NO. 27**

Submitted to you with these instructions is the special verdict form. After you have agreed and appropriately signed the interrogatories in accordance with the directions contained therein, inform the jury officer outside the room. If you return a unanimous verdict, that is, a verdict to which you all agree, you will have the verdict form signed only by one of your number whom you will have selected as your foreperson.

After deliberating for six hours from the time this case is submitted to you, excluding meals or recesses outside the jury room, then it is necessary that only seven of you agree upon a verdict. In that case the verdict must be signed by the seven jurors who agree on the verdict. If your foreperson is a dissenting juror, he or she should not sign the verdict.

When you have agreed upon and appropriately signed your verdicts, you will return with them into court.

This case is submitted to you at 11:45 .m. at which time your deliberations are deemed to commence.

Dated this 3<sup>rd</sup> day of April, 2005.

  
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ROSS A. WALPERS  
CHIEF UNITED STATES MAGISTRATE