

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

FAB-TECH, INC. :
 : Civil No. 1:04CV275
 v. :
 :
 E.I. DU PONT DE NEMOURS :
 AND COMPANY :

CHARGE TO THE JURY

Now that you have heard the evidence and arguments, it becomes my duty to instruct you as to the applicable law.

It is your duty as jurors to follow the law, and not question it, and to apply that law to the facts as you find them from the evidence in the case.

The lawyers may have referred to some of the rules of law in their arguments. If, however, any difference appears between the law as stated by the lawyers and the law stated by the Court in these instructions, you are to follow the Court's instructions.

Nothing I say in these instructions is an indication that I have any opinion about the facts of the case. It is not my function to determine the facts, but rather yours.

You must perform your duties as jurors without bias or prejudice as to any party. You are not to be governed by sympathy, prejudice or public opinion. Sympathy and emotion should play no part in your deliberations. You may not decide

this case on the basis that you may feel sorry for the plaintiff. Rather, your deliberations should be well-reasoned, impartial and unemotional. You must decide this case by applying the principles of law, which this Court defines for you, to the facts of this particular case as you objectively find them to be.

All parties expect that you will carefully and impartially consider all of the evidence, follow the law, and reach a just verdict, regardless of the consequences.

Corporations

As you know, the plaintiff and defendant are corporations. You should consider this case, however, as an action between persons. A corporation is entitled to the same treatment as a private individual. All persons, including corporations, stand equal before the law.

Agents of a Corporation

A corporation may only act through natural persons as its agents or employees. In general, agents or employees of a corporation may bind the corporation by their acts and declarations made while acting within the scope of their authority delegated to them by the corporation, or within the scope of their duties as employees.

Evidence in the Case

Statements and arguments of counsel are not evidence in the case. However, when the attorneys on both sides stipulate or agree as to the existence of a fact, you must, unless otherwise instructed, accept the stipulation and regard that fact as proved.

The evidence in the case consists of the sworn testimony of the witnesses, admitted exhibits, and any stipulated facts.

Any evidence to which an objection was sustained or stricken by the Court must be disregarded.

Evidence--Direct, Indirect, or Circumstantial

There are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence--such as the testimony of an eyewitness. The other is indirect or circumstantial evidence --the proof of a chain of circumstances pointing to the existence or non-existence of certain facts.

There is no distinction between direct or circumstantial evidence. You may find the facts by a preponderance of all the evidence in the case, both direct and circumstantial.

Deposition Testimony

During the trial of this matter, certain testimony has been read to you by the way of deposition and presented by way of a video, consisting of sworn recorded answers to questions asked of the witness in advance of the trial by one or more attorneys for the parties to the case. The testimony of a witness who, for some reason, cannot be present to testify from the witness stand may be presented in the form of a deposition. Such testimony is entitled to the same consideration, and is to be judged as to credibility, and weighed, and otherwise considered by the jury in the same way as if the witness had been present and had testified from the witness stand.

Credibility of Witnesses -- Discrepancies in Testimony

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You may be guided by the appearance and conduct of the witness, the manner in which the witness testifies, by the character of the testimony given, or by contrary evidence.

You should carefully scrutinize all the testimony, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is believable. Consider each witness' intelligence, motive and state of mind, and demeanor or manner. Consider the witness' ability to observe the matters to which the witness testifies, and whether the witness impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case, any bias or prejudice, the manner in which each witness might be affected by the verdict, and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you to discredit their testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently, which is not an uncommon experience.

In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

You may give the testimony of each witness such weight, if any, you think it deserves, and accept or reject the testimony of any witness in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying. You may find that the testimony of a small number of witnesses is more credible than the testimony of a larger number of witnesses to the contrary.

Expert Witnesses

You have heard expert witnesses express their opinions. A witness may be permitted to testify to an opinion on those matters about which he or she has special knowledge, skill, experience and training. Such testimony is presented to you on the theory that someone who is experienced and knowledgeable in the field can assist you in understanding the evidence or in reaching an independent decision on the facts.

In weighing this opinion testimony, you may consider the witness' qualifications, his opinions, the reasons for testifying, as well as all of the other considerations that ordinarily apply when you are deciding whether or not to believe a witness' testimony. You may give the opinion testimony whatever weight, if any, you find it deserves in light of all the evidence. You should not, however, accept opinion testimony merely because the witness was allowed to testify concerning his judgment, nor should you substitute it for your own reason, judgment and common sense. The determination of the facts rests solely with you.

Verdict -- Unanimous -- Duty to Deliberate

The verdict must represent the considered judgment of each juror. All of you must agree with the verdict. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement, without violence to individual judgment. You must decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction solely because of the opinion of other jurors, or for the mere purpose of returning a verdict.

Remember at all times that you are not partisans. You are judges -- judges of the facts.

INSTRUCTIONS OF LAW

Now I will give you instructions concerning the law that applies to this case. You must follow the law as stated in these instructions. You must then apply these rules of law to the facts you find from the evidence.

You determine the facts in this case. By these instructions, I am not indicating how you should decide any question of fact.

Burden of Proof and Preponderance of the Evidence

The burden is on the plaintiff in a civil action to prove every essential element of its claim by a preponderance of the evidence. In this case, it is the plaintiff's burden of proof to prove every essential element of its breach of contract claims, as well as its claim of breach of the covenant of good faith and fair dealing, by a preponderance of the evidence.

To "establish by a preponderance of the evidence" means to prove that something is more likely so than not so. In other words, a preponderance of the evidence in the case means such evidence as, when considered and compared with that opposed to it, has more convincing force, and produces in your minds belief that what is sought to be proved is more likely true than not true. This rule does not, of course, require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.

A preponderance of the evidence means the greater weight of the evidence. It refers to the quality and persuasiveness of the evidence. In determining whether a fact, claim or defense has been proven by a preponderance of the evidence, you may consider the relevant testimony of witnesses, regardless of who may have called them, and relevant exhibits in evidence, regardless of who may have produced them.

Breach of Contract

Fab-Tech alleges that it suffered damages as a result of a breach of two contracts by Du Pont. In order to prevail on its claims, Fab-Tech has the burden of proving the following essential elements:

1. that a contract or agreement existed between the parties;
2. the terms of the contract;
3. a breach of the contract occurred;
4. damages resulted from that breach; and
5. the amount of those damages.

In order to establish a breach of contract, Fab-Tech must first establish that a contract existed between the parties. To do so, Fab-Tech must prove both that there was a meeting of the minds between Fab-Tech and Du Pont and that there was consideration for the agreement. Fab-Tech must prove that both parties to the contract understood what was being negotiated and assented to it.

Consideration, the other prerequisite of a valid contract, is simply another way of saying "value." Fab-Tech must show that the parties to the contract each exchanged something of value in return for what they planned to receive. The consideration exchanged between the parties need not, in your opinion, be equal. Your job here is not to weigh whether

one side or the other got the better of the deal, but instead is to determine whether any deal existed. Thus, although the particular form and amount of the consideration exchanged is not important, plaintiff Fab-Tech does have the burden of proving that some consideration was exchanged.

If you find that a contract existed between the parties, then your next task is to determine the terms of the contract. Again, the burden is on Fab-Tech to prove by a preponderance of the evidence each of the terms on which it relies.

Once you have determined the terms of the contract, the next step is to determine if Du Pont has in fact breached one or more of the terms. A person breaches a contract when its conduct does not comply with the terms of the contract as agreed to by the parties.

Next, Fab-Tech must prove by a preponderance of the evidence that it has suffered damages as a proximate result of Du Pont's breach. Proximate cause is shown when you can find that Fab-Tech's damages were either a direct result or a reasonably probable consequence of Du Pont's breach of contract.

Lastly, Fab-Tech must prove the amount of its damages by a preponderance of the evidence.

If you find that the plaintiff has proved each of these elements, then you may find the defendant is liable for breach

of contract, and assess damages in the amount proved. If, however, you find that plaintiff has failed to prove any one of these elements, then you should enter a verdict on behalf of the defendant.

Parol Evidence

I have determined that the writings in evidence in this case were not the entire agreement between the parties. The agreements may consist of both written and oral promises. The oral portions of the agreements may be enforced and damages awarded for breach of the agreements, just as though those portions had appeared in the written agreements.

A complete contract can only result when there is a meeting of the minds of the parties on all terms, whether written or oral. The parties must agree to the same things at the same time. There must be an offer by one side that is accepted and agreed to by the other side. It is for you to determine what additional provisions there were in the parties' agreements, and whether there has been a breach of these agreements. The burden of proof is on the plaintiff to prove any agreement between the parties.

Breach of Contract Damages

The fact that I am about to instruct you as to the proper measure of damages should not be considered as my opinion as to liability. Instructions as to the measure of damages are given for your guidance in the event you find in favor of the plaintiff by a preponderance of the evidence in accordance with other instructions.

If you decide that Fab-Tech is entitled to damages arising from either Du Pont's breach of the agreement or its duty of good faith and fair dealing, it is your duty to determine the amount of money that reasonably, fairly and adequately compensates Fab-Tech. You must decide this element of damages based upon reasonable certainty and not speculation. The measure of damages is intended to compensate Fab-Tech, and not to punish Du Pont.

The plaintiff has the burden of proving that its damages were sustained as a direct result of the defendant's actions and the damages directly flowed from the breach of the contracts.

In determining the amount of compensatory damages, you may consider whether the plaintiff suffered any measurable loss of profits by reason of the defendant's conduct. You should be guided by the rule that the plaintiff is entitled to any profits that plaintiff would, with reasonable certainty,

have enjoyed, were it not for the breach of the plaintiff's contract. In arriving at the amount of profits lost by the plaintiff, you are entitled to consider the plaintiff's past earnings, and other evidence concerning general economic and competitive conditions that you may find to have a bearing on the issue of lost profits.

In addition to lost profits, the plaintiff is entitled to recover any reasonable costs it incurred in an effort to mitigate or reduce its damages and to recover business plaintiff lost due to the defendant's wrongful conduct.

Good Faith and Fair Dealing

Fab-Tech also claims Du Pont breached the covenant of good faith and fair dealing. Again, to prevail, Fab-Tech must prove its claim by a preponderance of the evidence.

Under Vermont law, every contract contains an implied covenant of good faith and fair dealing requiring that neither party do anything that will injure the right of the other party to receive benefits of the contract. You must decide whether Du Pont fulfilled this obligation.

The concept of "good faith and fair dealing" emphasizes faithfulness to an agreed common purpose and consistency with the justified expectation of the other party. In other words, good faith and fair dealing means an attitude or state of mind denoting honesty of purpose and freedom from intention to defraud.

Good faith may also be thought of as the opposite of bad faith. Generally speaking, bad faith implies a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation not prompted by an honest mistake. Bad faith is not simply bad judgment or negligence; instead, it contemplates a state of mind affirmatively operating with furtive design or ill will.

Punitive Damages

Fab-Tech has brought a claim for punitive damages against Du Pont under its claim for breach of the covenant of good faith and fair dealing. Punitive damages do not compensate the plaintiff for losses, but instead are meant to punish behavior and to stop others from acting similarly in the future. Punitive damages may be awarded by you for a breach of the covenant of good faith and fair dealing if you find that Du Pont's actions have been intentional and deliberate, causing the type of outrage that is frequently associated with crime. This can be shown by conduct showing personal ill will toward Fab-Tech or other evidence of bad motive. Mere, negligence, or even recklessness, by Du Pont is not enough to permit an award of punitive damages.

Where the plaintiff seeks damages from a corporation, such as is the case here, in order to find the corporation must pay punitive damages, you must find that the behavior justifying the punitive damages were corporate acts. Generally, where responsible management of the corporation has knowledge of wrongdoing on the part of lower-level employees, or was involved in the acts themselves, they are considered "corporate" acts.

In determining the amount of punitive damages, you should consider the character and standing of Du Pont, its financial

status, and the degree of bad motive or personal ill will in its acts.

Mitigation of Damages

A party which claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages - that is, to take advantage of any reasonable opportunity it may have had under the circumstances to reduce or minimize the loss or damage.

If you find that the defendant has proven by a preponderance of the evidence that the plaintiff failed to seek out or take advantage of an opportunity that was reasonably available to it under all the circumstances shown by the evidence, then you should reduce the amount of Fab-Tech's damages by the amount it could have reasonably realized if it had taken advantage of such opportunity.

Court Costs, Attorney's Fees and Interest

If you find that the plaintiff is entitled to a verdict, you may not include in your award to the plaintiff any sum for court costs or attorney's fees.

Furthermore, if you award damages, you are not to include any amount for interest. The law automatically provides for interest on any damages awarded, and such calculations are performed by the clerk or court and are not for the jury. Therefore, you should not add interest to any sum.

Election of a Foreperson

I will select Scott DeLoia to act as your foreperson. The foreperson will preside over your deliberations and will be your spokesperson here in court.

A verdict form has been prepared for your convenience. You will take this form to the jury room. I direct your attention to the verdict form.

Your foreperson will indicate the unanimous answer of the jury in the space provided for each question and, when completed, will date and sign it.

Conclusion

To return a verdict, all jurors must agree to the verdict. In other words, your verdict must be unanimous.

Upon retiring to the jury room your foreperson will preside over your deliberations and be your spokesperson here in court.

When you have reached a unanimous verdict, your foreperson should sign and date the verdict form.

If, during your deliberations, you should desire to communicate with the Court, please reduce your message or question to writing, signed by the foreperson, and pass the note to the court security officer. He will then bring the message to my attention. I will respond as promptly as possible, either in writing or by having you return to the courtroom so that I may address your question orally. I caution you, with regard to any message or question you might send, that you should never specify where you are in your deliberations or your numerical division, if any, at the time.