

UNITED STATES DISTRICT COURT  
DISTRICT OF VERMONT

AMADEO DEL MONACO, and  
PATRIOT MUTUAL INSURANCE CO.,

Plaintiffs,

v.

JAMES GREEN d/b/a JIM GREEN & SONS  
CONTRACTING,

Defendant.

No. 1:08-cv-63-jgm

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CHARGE TO THE JURY

Now that you have heard the evidence and arguments, it becomes my duty to give you the instructions of the Court as to the law applicable to this case.

It is your duty as jurors to follow the law as I shall state it to you, and not question it, and to apply that law to the facts as you find them from the evidence in the case. You are not to single out one instruction alone as stating the law, but you must consider the instructions as a whole.

The lawyers may have referred to some of the governing rules of law in their arguments. If, however, any difference appears to you between the law as stated by the lawyers and the law stated by me in these instructions, you are to follow my 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 it is 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.

All parties expect that you will carefully and impartially consider all of the evidence, follow the law as it is now being given to you, and reach a just verdict, regardless of the consequences.

#### Corporations

The law makes no distinction between corporations and private individuals, nor does it distinguish between the size or type of business in which a corporation engages. All persons, including corporations, stand equal before the law, and you should decide the case with the same impartiality you would use in deciding a case between individuals.

#### 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.

Unless you are otherwise instructed, the evidence in the case always consists of the sworn testimony of the witnesses, and all facts which may have been admitted or stipulated.

Any evidence to which an objection was sustained by me, and any evidence ordered stricken by me, 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.

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, by the manner in which the witness testifies, by the character of the testimony given, or by evidence contrary to the testimony given.

You should carefully scrutinize all the testimony given, 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 while on the stand. 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, as you think it deserves, and accept or reject the testimony in whole or in part.

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

Some of the testimony you heard was given by expert witnesses. An expert witness is a person who, by education, training or experience, has developed expertise beyond the level of the average person in some field. An expert is allowed to state opinions on matters within the area of his or her expertise and the reasons for those opinions.

You are not required to accept an expert's opinion. Rather, you should consider the expert opinion and give it the weight you think it deserves. As with the testimony of any witness, you must decide whether it is believable. For instance, you may disregard an expert's opinion entirely or in part if: you conclude the opinion is not based on sufficient education, training, and experience; the reasons given by an expert in support of his or her opinion are not sound; the expert's testimony is outweighed by other evidence; or the expert is biased.

The determination of the facts rests solely with you.

Deposition Testimony

Some of the testimony before you is in the form of a videotaped and transcribed deposition which has been received into evidence. A deposition is simply a procedure where the attorneys may question a witness or adversary party under oath before a court stenographer prior to trial. You may consider the

testimony of a witness given at a deposition according to the same standards you would use to evaluate the testimony of a live witness at trial.

Earlier Trial Involving Same Parties

You have heard testimony about an earlier trial involving the same parties. The fact that there was a trial between the same parties is irrelevant to your consideration of this case. You should not consider the fact of this other trial in any way. Your verdict in this case must be based solely upon the facts as you find them from the evidence introduced at this trial in accordance with the law as I charge you.

Verdict -- Unanimous -- Duty to Deliberate

The verdict must represent the considered judgment of each juror. To return a verdict, all jurors must agree. 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, if you can do so without violence to individual judgment. You must each decide the case for yourself, but only after 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 as to the weight or effect of evidence 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 of the facts. Your sole interest is to seek the truth from the evidence in the case.

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 are to determine the facts in this case. By these instructions, I do not intend to indicate in any way how you should decide any question of fact.

Burden of Proof and Preponderance of the Evidence

A party must prove every element of a claim by a preponderance of the evidence. To prove "by preponderance of the evidence" means to prove that something is more likely so than not so.

Stated another way, a preponderance of the evidence means the greater weight of the evidence. It refers to the quality and persuasiveness of the evidence, not to the number of witnesses or documents. In determining whether a fact, claim, or defense has been proven by a preponderance of the evidence, you may consider the relevant testimony of all witnesses, regardless of who may have called them, and all the relevant exhibits received in

evidence, regardless of who may have produced them.

Overview of the Claims in this Case

Plaintiffs Amadeo Del Monaco and Patriot Mutual Insurance claim Defendant James Green breached a contract with Del Monaco when Green constructed and installed a deck and fire pit at Del Monaco's home. The Plaintiffs claim this breach caused the fire and damage to Del Monaco's home.

Defendant Green denies Plaintiffs' allegations. He contests the terms of any contract with Del Monaco and whether there was a breach, and argues that Del Monaco's actions, not the alleged breach, caused the fire and damage to his home. Green's defenses apply to both Del Monaco's and Patriot Mutual's claims.

Breach of Contract

In order to prevail on a breach of contract claim, Plaintiffs have 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) that a breach of the contract occurred; (4) that damages were caused by the breach; and (5) the amount of those damages.

In this case, Plaintiffs claim when Green constructed and installed the deck and fire pit at Del Monaco's home, Green had a contract with Del Monaco that expressly included the term, "all material guaranteed to be as specified, and the above work was performed in accordance with the drawings and specifications

provided for the above work, and was completed in a substantial workmanlike manner for the agreed upon sum of \_\_\_\_,” and that their agreement also included other statements by Green that the deck material used was fire retardant or fireproof. Green denies the invoice was a contract, or that any alleged contract included such express or additional terms.

To find there was a contract, you must decide that it is more likely true than not true that:

- (1) Green promised the alleged terms of the contract.
- (2) Del Monaco accepted Green’s promises in exchange for something Del Monaco offered or promised; and
- (3) Both Del Monaco and Green agreed to a contract including those terms.

Agreement as to the essential terms may be implied from conduct or words. The law does not require that the conduct or words be in any special form, or that the words be in writing, or signed.

In order to determine whether Green breached the contract, you must determine the terms of the contract. The burden is on Plaintiffs to prove by a preponderance each term on which they rely.

Once you have determined the terms of the contract, the next step is to determine if Green has in fact breached one or more of the terms. I instruct you that a person breaches a contract when

his conduct does not comply with the terms of the contract as agreed to by the parties. In considering whether Green breached any contract, he is responsible for any work performed by Jeffrey Miserocchi.

Next, Plaintiffs must prove by a preponderance of the evidence that they have suffered damages as a proximate result of Green's breach. Injuries or damages are proximately caused by the act of another whenever it appears by a preponderance of the evidence that the act played a substantial part in bringing about or actually causing the harm. Proximate cause is shown when you can find by a preponderance of the evidence that Plaintiffs' damages were either a direct result, or a reasonably probable consequence, of Green's breach of contract.

Lastly, Plaintiffs must prove the amount of their damages by a preponderance of the evidence.

If you find Plaintiffs have proved each of these elements, then you may find Green liable for damages caused by his breach of contract, and proceed to my instructions on the amount of damages. If, however, you find that Plaintiffs have failed to prove any one of these essential elements, you will not need to determine the amount of damages.

As part of his defense to Plaintiffs' breach of contract claim, Green claims Del Monaco's use of the fire pit and deck caused the alleged damages.

Effect of Instructions as to Damages

I will instruct you as to the proper measure of damages, but you should not consider this instruction as an indication of whether you should award damages. The instructions are given only for your guidance.

Compensatory Damages

If you find by a preponderance of the evidence that defendant Green is liable for damages caused by his breach of contract to Plaintiffs, then you must consider the issue of damages. The amount of damages Plaintiffs may recover, if any, is a matter for you as the jury to decide.

In a case such as this one, damages are awarded on a theory of compensation. An award of compensatory damages is intended to place the damaged person in the position he or she was in immediately before the damage occurred, as nearly as can be done with an award of money damages.

In determining the compensation to Plaintiffs for their damages in this case, you may consider the cost of restoring and replacing the Plaintiffs' damage and loss so that Plaintiffs are returned to the position they were in before the fire.

The burden is on the Plaintiffs to prove by a preponderance of the evidence the amount of damages to which they are entitled. Damages must be based only on the evidence presented at trial.

Where the Plaintiffs' damages are capable of being

calculated in dollars and cents, the Plaintiffs must demonstrate their loss in dollars and cents. You may not award damages that are speculative.

The parties disagree about the extent of damages Plaintiffs suffered as a result of the fire and have presented evidence in support of their claims. It is up to you, as jurors, to determine the damages Plaintiffs are entitled to recover, if any.

If you find by a preponderance of the evidence that defendant Green is liable for breach of contract, Plaintiffs may recover for "direct" damages. "Direct" damages naturally and usually flow from the breach itself. In other words, "direct" damages are usually measured by the value or cost of the work described in the contract itself.

To recover for any further "special or consequential" damages from the breach, such damages must pass the tests of causation, certainty, and foreseeability, and in addition, be reasonably supposed to have been in the contemplation of both parties at the time they made the contract. Therefore, Plaintiffs must prove by a preponderance of the evidence that consequential damages (1) were caused by the breach of contract, (2) were reasonably certain to have resulted from the breach of contract, and (3) were reasonably within the contemplation of the parties at the time they entered into the contract.

Del Monaco has been indemnified or paid for some of his

property loss by his insurance company, Patriot Mutual Insurance Company. As a result, Patriot Mutual Insurance Company stands in Del Monaco's shoes, and has no greater claim, in seeking to recover those damages - up to the amount Patriot indemnified or paid Del Monaco for his loss.

You may also consider how much Del Monaco is entitled to recover. Del Monaco offered his opinion as to the value of the damaged personal property, and you may consider his opinion as the owner of the property. However, you must also take into consideration the depreciation of the property between the time of the original purchase and the time of loss; that is, damages must be assessed in light of the age and use of the property and its condition at the time of loss.

Election of a Foreperson

I will select \_\_\_\_\_ 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.

The answer to each question on the form must be the unanimous answer of the jury. Your foreperson will write the unanimous answer of the jury in the space provided for each question and, when completed, will date and sign the verdict.

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 me, please reduce your message or question to writing, signed by the foreperson, and pass the note to the court security officer. The officer 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.

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DISTRICT OF VERMONT

AMADEO DEL MONACO, and	:	
PATRIOT MUTUAL INSURANCE CO.,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	No. 1:08-cv-63-jgm
	:	
JAMES GREEN d/b/a JIM GREEN & SONS	:	
CONTRACTING,	:	
	:	
Defendant.	:	
_____	:	

VERDICT FORM

1. Was there a contract between Amadeo Del Monaco and James Green?

\_\_\_\_\_ yes                      \_\_\_\_\_ no

If your answer is "no," please stop at this point. If your answer is "yes," please proceed to question 2.

2. Did James Green breach the contract?

\_\_\_\_\_ yes                      \_\_\_\_\_ no

If your answer to question 2 is "no," please stop at this point. If your answer to question 2 is "yes," then proceed to question 3.

3. Were any of Plaintiffs' damages proximately caused by James Green's breach of contract?

\_\_\_\_\_ yes                      \_\_\_\_\_ no

If your answer is "no," please stop at this point. If your answer is "yes," please proceed to question 4.

4. Direct damages. What is the amount of direct damages sustained as a result of Green's breach of contract to be awarded to Patriot Mutual Insurance Company and--for those damages for which Amadeo Del Monaco was not indemnified by Patriot--to Del Monaco?

a. Patriot Mut. Ins. Co.: \_\_\_\_\_

b. Del Monaco: \_\_\_\_\_

5. Consequential damages. Do you find that Plaintiffs are entitled to consequential damages?

\_\_\_\_\_ yes \_\_\_\_\_ no

If your answer is "no," please stop at this point. If your answer is "yes," please continue:

What is the amount of consequential money damages sustained as a result of Green's breach of contract to be awarded to Patriot Mutual Insurance Company and--for those damages for which Amadeo Del Monaco was not indemnified by Patriot--to Del Monaco?

a. Damage to Del Monaco's home, including debris removal and landscaping:

Patriot Mut. Ins. Co.: \_\_\_\_\_

Del Monaco: \_\_\_\_\_

b. Damage to Del Monaco's personal property:

Patriot Mut. Ins. Co.: \_\_\_\_\_

Del Monaco: \_\_\_\_\_

c. Loss of use:

Patriot Mut. Ins. Co.: \_\_\_\_\_

\_\_\_\_\_  
Foreperson Date

