UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

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| NORTH STAR MUTUAL INSURANCE COMPANY, AS SUBROGEE OF KYLAN MEIER,<br><br>Plaintiff,<br><br>vs.<br><br>CNH AMERICA LLC, A DELAWARE LIMITED LIABILITY COMPANY,<br><br>Defendant. | CIV. 11-4133-KES<br><br>**FINAL INSTRUCTIONS TO THE JURY** |

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VERDICT FORM

FINAL INSTRUCTION NO. 1 – INTRODUCTION AND DEFINITIONS

Members of the jury, the instructions I gave 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 and during the trial are not repeated here.

The instructions I am about to give you now as well as those I gave you earlier 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 oral instructions. Again, all instructions, whenever given and whether in writing or not, must be followed.

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.

This is a subrogation case. In a subrogation case, the insurance company, North Star Mutual Insurance Company, stands in the shoes of its insured, Kylan Meier, and is entitled to all the rights and remedies available to him, to the extent of North Star Mutual Insurance Company's payments for his loss. You are to treat each party fairly in reaching your decision.

FINAL INSTRUCTION NO. 2 – BURDEN OF PROOF

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 or defense depends upon that fact. The party who has the burden of proving a fact must prove it by the greater convincing force of the evidence. To prove something by the greater convincing force 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. If, on any issue in the case, the evidence is equally balanced, you cannot find that issue has been proved.

In determining whether or not an issue has been proved by greater convincing force of the evidence, you should consider all of the evidence bearing upon that issue, regardless of who produced it.

FINAL INSTRUCTION NO. 3 – STRICT LIABILITY FOR DESIGN DEFECT

North Star alleges that CNH is liable because CNH defectively designed the 2010 Case IH AF9120 combine. To establish that CNH is liable for design defect under strict liability, North Star must prove the following four elements by the greater convincing force of the evidence:

***One*, that the 2010 Case IH AF9120 combine was in a defective condition which made it unreasonably dangerous to Meier;**

> A product is in a defective condition and unreasonably dangerous to the user if it is not reasonably fit for the ordinary and reasonably foreseeable purposes for which it was sold or manufactured and expected to be used or if the product could have been designed to prevent a foreseeable harm without significantly hindering its function or increasing its price.
>
> In determining whether the 2010 Case IH AF9120 combine was defective and unreasonably dangerous, you may consider whether CNH complied with the generally recognized state of the art existing at the time the 2010 Case IH AF9120 combine was first sold to any person not engaged in the business of selling the product. However, compliance with such state of the art does not prevent you from finding in favor of North Star.

***Two*, that the defect existed at the time the 2010 Case IH AF9120 combine left the control of CNH;**

***Three*, that the 2010 Case IH AF9120 combine was expected to and did reach Meier without a substantial unforeseeable change in the condition it was in when it left the control of CNH;**

> This element is not satisfied if there was a substantial unforeseeable change in the product, and this change was the cause of the defective condition in the 2010 Case IH AF9120 combine.

***And four*, that the defective condition was a legal cause of the injuries.**

The term "legal cause" means an immediate cause which, in the natural or probable sequence, produces the injury complained of. For legal cause to exist, the harm suffered must be a foreseeable consequence of the act complained of. In other words, liability cannot be based on mere speculative possibilities or circumstances and conditions remotely connected to the events leading up to an injury. The conduct must have such an effect in producing the harm as to lead reasonable people to regard it as a cause of the plaintiff's injury.

A legal cause is a cause that produces a result in a natural and probable sequence, and without which the result would not have occurred.

A legal cause does not need to be the only cause of a result. A legal cause may act in combination with other causes to produce a result. For legal cause to exist, you must find that the conduct was a substantial factor in bringing about the harm.

In considering whether conduct is a substantial factor in producing harm, consider:

(1) the number of other factors which contributed in producing the harm;
(2) the extent to which any other factors produced the harm;
(3) whether CNH's conduct created a force or series of forces which were in continuous and active operation up to the time of the harm, or instead created a harmless situation which became harmful only after the operation of other forces for which CNH is not responsible; and
(4) the lapse of time.

If North Star proves the elements of this strict liability claim, then CNH is liable even if it exercised reasonable care in the preparation and sale of the 2010 Case IH AF9120 combine.

If you find that each of the four elements has been proved by the greater convincing force of the evidence, you should consider whether Meier misused the product as explained in Final Instruction No. 4. If, on the other hand, any of these elements has not been proved by the greater convincing force of the evidence, then your verdict must be for CNH on this claim.

FINAL INSTRUCTION NO. 4 – MISUSE OF PRODUCT

CNH claims that Meier misused the 2010 Case IH AF9120 combine. If CNH establishes that Meier misused the 2010 Case IH AF9120 combine, then CNH is not liable for design defect under strict liability or for negligence.

To establish that Meier misused the 2010 Case IH AF9120 combine, CNH must prove the following three elements by the greater convincing force of the evidence:

***One*, that Meier's conduct constituted a misuse;**

> "Misuse" means that the user used the product for an unintended purpose or for an intended purpose but in an improper manner.

***Two*, that this misuse was unforeseeable;**

***And three*, that this unforeseeable misuse was a legal cause of the accident.**

> The term "legal cause" was defined in Final Instruction No. 3.

If you find that each of the three elements has been proved by the greater convincing force of the evidence, then CNH is not liable for design defect under strict liability or for negligence, and your verdict must be for CNH on these claims.

FINAL INSTRUCTION NO. 5 – NEGLIGENCE

North Star also claims that CNH is liable because CNH acted negligently in designing the 2010 Case IH AF9120 combine. To establish that CNH is liable for negligence, North Star must prove the following two elements by the greater convincing force of the evidence:

***One*, that CNH was negligent;**

Negligence is the failure to use reasonable care. It is the doing of something which a reasonable person would not do, or the failure to do something which a reasonable person would do, under facts similar to those shown by the evidence. The law does not say how a reasonable person would act under the facts similar to those shown by the evidence. That is for you to decide.

Each manufacturer of a product has a duty to exercise reasonable care in the design, manufacture, testing, and inspection of its product so that the product may be safely used in a manner reasonably foreseeable to the manufacturer.

A manufacturer of a product has a duty to use reasonable care in the design of its product. This means the manufacturer must design the product so it fairly meets the uses which can reasonably be anticipated.

A manufacturer of a product has a duty to give adequate instructions as to the use of the product where injury to the user can be reasonably anticipated if adequate instruction is not given for a reasonably foreseeable use of the product.

A failure to fulfill any of these duties is negligence.

The mere fact that a fire happened and a party sustained damages because of such fire, in and of itself, does not give rise to any inference that it was caused by negligence of anyone.

> In determining whether CNH was negligent, you may consider whether CNH complied with the standards and customs of its own industry and with the generally recognized state of the art existing at the time the 2010 Case IH AF9120 combine was first sold to any person not engaged in the business of selling the product. However, compliance with such standards, customs, or state of the art is not controlling and does not prevent you from finding in favor of North Star if you conclude that a reasonable manufacturer in CNH's position would have taken additional precautions.

***And two*, that CNH's negligence was a legal cause of North Star's damages.**

> The term "legal cause" was defined in Final Instruction No. 3.

If you find that both of these elements have been proved by the greater convincing force of the evidence, you should consider whether Meier was contributorily negligent as explained in Final Instruction No. 6, whether Meier assumed the risk as explained in Final Instruction No. 7, and whether Meier misused the product as explained in Final Instruction No. 4. If, on the other hand, either of these elements has not been proved by the greater convincing force of the evidence, then your verdict must be for CNH on this claim.

FINAL INSTRUCTION NO. 6 – CONTRIBUTORY NEGLIGENCE

CNH claims that Meier was contributorily negligent. Contributory negligence is negligence on the part of Meier, which, when combined with the negligence of CNH and Titan Machinery, contributes as a legal cause in bringing about the damage to the 2010 Case IH AF9120 combine.

If Meier is contributorily negligent, North Star may still recover damages if Meier's contributory negligence is slight, or less than slight, when compared with the combined negligence of CNH and Titan Machinery.

In determining this issue, you must determine the answer to two questions:

***One*, whether both Meier and CNH were negligent;**

***And two*, if both were negligent, whether Meier's negligence was (a) slight or less than slight, or (b) more than slight in comparison with the combined negligence of CNH and non-party Titan Machinery, Inc.**

> The term "slight" means small when compared with the combined negligence of CNH and Titan Machinery.
>
> In making this determination, you must make a direct comparison between the conduct of Meier and of CNH and Titan Machinery.

If you find Meier's contributory negligence is more than slight when compared with the combined negligence of CNH and Titan Machinery, then North Star is not entitled to recover any damages on its negligence claim.

If you find Meier's contributory negligence is slight, or less than slight, when compared with the combined negligence of CNH and Titan Machinery, then North Star is entitled to recover damages.

Meier's contributory negligence, if any, is not a defense to North Star's strict liability or breach of warranty claims.

FINAL INSTRUCTION NO. 7 – ASSUMPTION OF RISK

CNH claims that it is not liable for negligence because Meier assumed the risk. If a person assumes the risk of injury or damage, the person is not entitled to any recovery. To support an assumption of the risk defense, CNH must prove the following three elements by the greater convincing force of the evidence:

***One*, that Meier had actual or constructive knowledge of the existence of the specific risk involved;**

> A person has constructive knowledge of a risk if the risk is so plainly observable that anyone of competent faculties could be charged with knowledge of it.

***Two*, that Meier appreciated the risk's character**;

> A person can be deemed to appreciate a risk if it is a risk that no adult person of average intelligence could deny.

***And three*, that Meier voluntarily accepted the risk, having had the time, knowledge, and experience to make an intelligent choice.**

If you find that each of the three elements has been proved by the greater convincing force of the evidence, then CNH is not liable for negligence, and your verdict must be for CNH on this claim.

FINAL INSTRUCTION NO. 8 – ASSUMPTION OF RISK AND CONTRIBUTORY NEGLIGENCE COMPARED

While the same conduct on the part of Meier may amount to both assumption of risk and contributory negligence, the two defenses are distinct. Assumption of the risk involves a voluntary or deliberate decision to encounter a known danger whereas contributory negligence frequently involves the inadvertent failure to notice danger. In addition, contributory negligence must be a legal cause of the injury in order to be a defense, while assumption of the risk need not cause the injury in order to bar recovery.

FINAL INSTRUCTION NO. 9 – BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY

North Star also claims that CNH is liable for breach of the implied warranty of merchantability. For you to find CNH liable to North Star for breach of implied warranty of merchantability, North Star must prove by the greater convincing force of the evidence the following four elements:

***One*, a merchant sold the 2010 Case IH AF9120 combine;**

A merchant is a person who deals in goods of the kind or to whom knowledge or skill specific to the goods involved may be attributed.

***Two*, the 2010 Case IH AF9120 combine was not merchantable at the time of sale;**

In order for goods to be "merchantable," they must at least:

(1) pass without objection in the trade under the contract description;
(2) be fit for the ordinary purposes for which such goods are used;
(3) be adequately contained, packaged, and labeled; and
(4) conform to the promises or affirmation of fact made in the operator's manual.

***Three*, the 2010 Case IH AF9120 combine was defective; and**

***Four*, the defective nature of the 2010 Case IH AF9120 combine was a legal cause of North Star's damage.**

The term "legal cause" was defined in Final Instruction No. 3.

If you find that North Star has proved each element by the greater convincing force of the evidence, you should consider whether Meier misused the 2010 Case IH AF9120 combine as explained in Final Instruction No. 10. If, on the other hand, any of these elements has not been proved by the greater

convincing force of the evidence, then your verdict must be for CNH on this claim.

FINAL INSTRUCTION NO. 10 – MISUSE

Any warranty of the 2010 Case IH AF9120 combine was based on the assumption that it would be used in a reasonable manner appropriate to the purpose for which it was intended. If you should find that the damage in this case resulted solely from Meier's improper use of the 2010 Case IH AF9120 combine, then North Star cannot recover damages for breach of warranty.

FINAL INSTRUCTION NO. 11 – DAMAGES

If you decide for North Star on the question of liability for design defect under strict liability, negligence, or breach of implied warranty of merchantability, you should enter the amount of $323,660.59 as damages in response to Question 4 on the verdict form. This amount was agreed to by both parties in their stipulation regarding damages.

FINAL INSTRUCTION NO. 12 – APPORTIONMENT OF FAULT

If you find that North Star is entitled to a verdict and damages against CNH under strict liability for design defect, you must allocate the fault of CNH and non-party Titan Machinery. To do this, you must determine the respective percentages of fault of CNH and Titan Machinery. If you find in favor of North Star on its negligence claim, and not on its claims for strict liability for design defect, you must determine Meier's percentage of fault as well. The total of these percentages must add up to 100 percent. In making this determination, you shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages suffered.

While you must allocate the fault of CNH and Titan Machinery, you may not allocate the amount of damages among these entities. If you find liability, you must return a verdict in one single sum against CNH.

FINAL INSTRUCTION NO. 13 – DUTIES DURING DELIBERATIONS

In conducting 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 an 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 court security officer, 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 court security officer that you are ready to return to the courtroom.

Dated March 14, 2014.

Karen E. Schreier

KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE