

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
SOUTHERN DIVISION

**FILED**  
DEC 01 2011  
  
CLERK

MICHAEL CULLISON, JR., and  
AMBER CULLISON,

CIV. 09-4122-KES

Plaintiffs,

vs.

**FINAL  
INSTRUCTIONS  
TO THE JURY**

HILTI, INC.,

Defendant.

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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.

## FINAL INSTRUCTION NO. 2 – IMPEACHMENT

In Preliminary Instruction No. 3, I instructed you generally on the credibility of witnesses. I now give you this further instruction on how the credibility of a witness can be “impeached” and how you may treat certain evidence.

A witness may be discredited or impeached by contradictory evidence; by a showing that the witness testified falsely concerning a material matter; or by evidence that at some other time the witness said or did something, or failed to say or do something, that is inconsistent with the witness’s present testimony. If earlier statements of a witness were admitted into evidence, they were not admitted to prove that the contents of those statements were true. Instead, you may consider those earlier statements only to determine whether you think they are consistent or inconsistent with the trial testimony of the witness, and therefore whether they affect the credibility of that witness.

If you believe that a witness has been discredited or impeached, it is your exclusive right to give that witness’s testimony whatever weight you think it deserves.

If you believe that any witness testifying in this case has knowingly sworn falsely to any material matter in this case, then you may reject all of the testimony of the witness.

FINAL INSTRUCTION NO. 3 – CORPORATIONS

The fact that one of the parties to this action is a corporation is immaterial. Under the law of this state, a corporation is an individual party to the lawsuit, and all parties are entitled to the same impartial treatment.

#### FINAL INSTRUCTION NO. 4 – BURDEN OF PROOF

In civil actions, the party who asserts the affirmative of an issue must prove that issue by the greater weight of the evidence.

Greater weight of the evidence means that after weighing the evidence on both sides there is enough evidence to convince you that something is more than likely true than not true. In the event that the evidence is evenly balanced so that you are unable to say that the evidence on either side of an issue has the greater weight of the evidence, then your finding upon the issue must be against the party who has the burden of proving it. In determining whether or not an issue has been proved by the greater weight of the evidence, you should consider all of the evidence bearing upon that issue, regardless of who produced it.

## FINAL INSTRUCTION NO. 5 – STRICT LIABILITY – DEFECTIVE PRODUCT

To establish that Hilti is liable to Michael Cullison on the basis of strict liability for the distributor of a defective product, Michael Cullison must prove the following by the greater weight of the evidence:

**One, the product was in a defective condition which made it unreasonably dangerous to Michael Cullison;**

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 it could have been designed to prevent a foreseeable harm without significantly hindering its function or increasing its price.

In determining whether Hilti's product was defective and unreasonably dangerous, you may consider whether Hilti complied with the generally recognized state of the art existing at the time its product 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 does not prevent you from finding in favor of Michael Cullison.

**Two, the defect existed at the time it left the control of Hilti;**

**Three, Hilti knew or through ordinary care should have known of the defective condition of the product;**

**Four, the product was expected to and did reach Michael Cullison without a substantial unforeseeable change in the condition the product was in when it left the control of Hilti;**

**And five, 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, produced 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 possibility or circumstances and conditions remotely connected to the events leading up to an injury. Hilti's conduct must have such an effect in

producing the harm as to lead reasonable people to regard it as a cause of Michael's injury.

FINAL INSTRUCTION NO. 6 – STRICT LIABILITY – FAILURE TO WARN

With regard to Michael Cullison's claim of failure to warn under strict liability, the issue is whether Hilti failed to provide an adequate warning of a danger associated with a foreseeable use of the product and whether that failure, if it exists, rendered the product defective and unreasonably dangerous.

For Michael Cullison to prevail on this claim, he must prove the following by the greater weight of the evidence:

***One, a danger existed associated with a foreseeable use of the product;***

***Two, an inadequate warning was given regarding the danger;***

***Three, as a result of the inadequate warning, the product was rendered defective and unreasonably dangerous;***

***Four, Hilti knew or through ordinary care should have known of the defect created by the inadequate warning;***

***Five, the defective and unreasonably dangerous condition existed at the time it left the control of Hilti;***

***Six, the product was expected to and did reach Michael Cullison without a substantial unforeseeable change in the condition that it was in when it left Hilti's control;***

***And seven, the defective condition was a legal cause of Michael Cullison's injuries.***

Legal cause was defined for you in Final Instruction Number Five.



FINAL INSTRUCTION NO. 7 – REASONABLE CARE

If Michael Cullison proves the elements of a strict liability claim, then Hilti is liable even if Hilti exercised reasonable care in the preparation and sale of the product.

FINAL INSTRUCTION NO. 8 – DISTRIBUTOR NOT INSURER

The distributor of a product is not an absolute insurer against any injuries caused by its product. The distributor of a product is only liable if it knew or through ordinary care should have known of the defective and unreasonably dangerous condition of the product.

FINAL INSTRUCTION NO. 9 – ASSUMPTION OF THE RISK

If a person assumes the risk of injury or damage, the person is not entitled to any recovery. To prove an assumption of the risk defense, Hilti must show by the greater weight of the evidence that:

***One, Michael Cullison had actual or constructive knowledge of the existence of the specific risk involved;***

***Two, that Michael Cullison appreciated the risk's character;***

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

FINAL INSTRUCTION NO. 10 – CONTRIBUTORY NEGLIGENCE

The contributory negligence of Michael Cullison, if any, is not a defense to Michael Cullison's strict liability claims.

## FINAL INSTRUCTION NO. 11 – DAMAGES

If you decide for Michael Cullison on the question of liability on either of his strict liability causes of action, you must then fix the amount of money which will reasonably and fairly compensate him for any of the following elements of loss or harm suffered in person or property proved by the evidence to have been legally caused by Hilti's conduct, whether such loss or harm could have been anticipated or not, namely:

- (1) The disability and disfigurement suffered by Michael Cullison;
- (2) The pain and suffering, mental anguish, and loss of capacity of the enjoyment of life experienced in the past and reasonably certain to be experienced in the future as a result of the injury;
- (3) The reasonable value of necessary medical care, treatment, and services received and the reasonable value of the necessary expense of medical care, treatment, and services reasonably certain to be received in the future; and
- (4) The earnings Michael Cullison has lost, if any, from any sources from the date of the injury until the date of trial.

Whether any of these elements of damages have been proved by the greater weight of the evidence is for you to determine. Your verdict must be based on the evidence and not upon speculation, guesswork, or conjecture.

The mere fact that an incident happened and a party sustained damages because of such incident, in and of itself, does not give rise to an inference that the incident was caused by anyone.

FINAL INSTRUCTION NO. 12 – LOSS OF CONSORTIUM

If you find that Hilti is liable to Michael Cullison, you must then determine the amount of money which will reasonably compensate Amber Cullison for any of the following elements of damages which you find were suffered by Amber Cullison and legally caused by Hilti's wrongful conduct:

- (1) The reasonable value of Michael Cullison's services, aid, comfort, society, companionship, and conjugal affections that Amber Cullison has been deprived of in the past and the present cash value of the services, aid, comfort, society, companionship, and conjugal affections of Michael Cullison which Amber Cullison is reasonably certain to be deprived of in the future.

Whether this element of damages has been proved by the greater weight of the evidence is for you to determine.

## 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 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 court security officer that you are ready to return to the courtroom.

Dated December 1, 2011.

  
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KAREN E. SCHREIER  
CHIEF JUDGE