

**FILED**

**FEB 10 2014**

*[Signature]*  
CLERK

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

D & M IRON HORSE INN, LLC,	)	CIV. 11-5075-JLV
	)	
Plaintiff,	)	
	)	INSTRUCTIONS
vs.	)	TO THE JURY
	)	
UNITED FIRE & CASUALTY	)	
COMPANY,	)	
	)	
Defendant.	)	

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SPECIAL INTERROGATORIES TO THE JURY

**INSTRUCTION NO. 1 - ROLE OF INSTRUCTIONS**

Members of the jury, I will take a few minutes to give you some initial instructions about this case and about your duties as jurors. At the end of the trial, I will give you further instructions. I may also give you instructions during the trial. These instructions explain the law that applies to this case. Unless I specifically tell you otherwise, all instructions, both those I give you now and those I give you later, are equally binding on you and must be followed. Consider these instructions with all written and oral instructions given to you during and at the end of the trial and apply them to the facts of the case. You must consider my instructions as a whole and not single out some instructions and ignore others.

This case is presented to you because the parties dispute certain facts. You will decide the facts from the evidence presented in court. "Evidence" is defined in Instruction No. 3. This evidence is governed by various rules of law. Under these rules, it is my duty as judge to rule on the admissibility of the evidence from time to time. You must not concern yourselves with the reasons for these rulings, and you must not consider any exhibit which was not received in evidence or any testimony which I order stricken. Such things you must put out of your mind.

You are entitled to consider the evidence in light of your own observations and experiences. You may use reason and common sense to draw

conclusions from facts established by the evidence. You will then apply the law, which I will give you in my instructions, to the facts to answer the special interrogatories, that is, questions submitted to you for resolution. You are the sole judges of the facts, but you must follow the law as stated in my instructions, whether you agree with the law or not.

It is vital to the administration of justice that each of you faithfully perform your duties as jurors. You must carefully and honestly consider this case with due regard for the rights and interests of both parties. Do not allow sympathy or prejudice to influence you. The law demands of you a just result based solely on the evidence, your common sense, and the law as I give it to you. Your answers must not be based on speculation, guess or conjecture.

Finally, do not take anything I may say or do during the trial as an indication of what I think about the evidence or what I think your answers should be. Do not conclude from any ruling or comment I may make that I have any opinion on how you should decide the case.

**INSTRUCTION NO. 2 - NATURE OF CASE**

This is a civil case brought by D & M Iron Horse Inn, LLC, the plaintiff, against United Fire & Casualty Company, the defendant. D & M Iron Horse Inn, LLC, is a South Dakota corporation and operates the Iron Horse Inn located in Deadwood, South Dakota. United Fire & Casualty Company is an insurance company licensed to write insurance in the state of South Dakota.

United Fire issued to Iron Horse Inn a commercial property policy providing, among other things, coverage for its premises, business interruptions and business personal property, with a policy period from October 1, 2009 to October 1, 2010. On August 3, 2010, a hail and rain storm occurred in Deadwood causing damage to Iron Horse Inn's premises.

Following the incident, Iron Horse submitted a claim for property loss and business interruption to United Fire. Iron Horse alleges the damages sustained to its premises were a covered loss under the terms of the policy. United Fire denied Iron Horse's claim, pointing to various exclusions contained within the policy. United Fire admits the incident caused property damage, but denies the damage is covered under the policy.

You will be asked to resolve factual disputes between the parties, after which the court will determine whether the damage is covered under the policy.

**INSTRUCTION NO. 3 - DEFINITION OF EVIDENCE**

I mentioned the word “evidence.” “Evidence” includes the testimony of witnesses, documents and other things received as exhibits, and stipulated facts. Stipulated facts are facts that are formally agreed to by the parties. Certain things are *not* evidence. I shall list those things for you now:

1. Statements, arguments, questions, and comments by lawyers representing the parties in the case are not evidence. Opening statements and closing arguments by lawyers are not evidence.
2. Objections and rulings on objections are not evidence. Lawyers have a right to object when they believe something is improper. You should not be influenced by the objection. If I sustain an objection to a question, you must ignore the question and must not try to guess what the answer might have been.
3. Testimony that I strike from the record or tell you to disregard is not evidence and must not be considered.
4. Anything you see or hear about this case outside the courtroom is not evidence.

The fact an exhibit may be shown to you does not mean you must rely on it more than you rely on other evidence.

Furthermore, a particular item of evidence is sometimes received for a limited purpose only. That is, it can be used by you only for one particular

purpose and not for any other purpose. I will tell you when that occurs and instruct you on the purposes for which the item can and cannot be used.

During the trial, certain evidence may be presented to you by deposition. The witness testified under oath at the deposition, just as if the witness was in court, and you should consider this testimony together with all other evidence received.

Some of you may have heard the terms “direct evidence” and “circumstantial evidence.” You should not be concerned with those terms. The law makes no distinction between direct and circumstantial evidence. You should give all evidence the weight and value you believe it is entitled to receive.

Finally, the weight of the evidence is not determined by the number of witnesses testifying as to the existence or non-existence of any fact. Also, the weight of the evidence should not be determined merely by the number or volume of documents or exhibits. The weight of evidence depends on its quality, not quantity. The quality and weight of the evidence are for you to decide.

**INSTRUCTION NO. 4 - CREDIBILITY OF WITNESSES**

You are the sole judges of all questions of fact and the credibility of witnesses. In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness says, only part of it, or none of it.

In deciding what testimony to believe, consider the witness's intelligence; the opportunity the witness had to see or hear the things testified about; the witness's memory; any motives the witness may have for testifying a certain way; the behavior of the witness while testifying; whether the witness said something different at an earlier time; the general reasonableness of the testimony, and the extent to which the testimony is consistent with any evidence that you believe.

In deciding whether or not to believe a witness, keep in mind people sometimes see or hear things differently and sometimes forget things. You need to consider whether a contradiction results from an innocent misrecollection or sincere lapse of memory or instead from an intentional falsehood or pretended lapse of memory.

**INSTRUCTION NO. 5 - IMPEACHMENT**

In the previous instruction, I instructed you generally on the credibility of witnesses. I now give you this further instruction on how the credibility of a witness may 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 trial 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 a witness has been discredited or impeached, it is your exclusive right to give that witness’s testimony whatever weight you think it deserves.

**INSTRUCTION NO. 6 - EXPERT WITNESSES**

You may hear testimony from persons described as experts. Persons who, by knowledge, skill, training, education or experience, have become an expert in some field may state their opinions on matters in that field and may also state the reasons for their opinion.

Expert testimony should be considered just like any other testimony. You may accept or reject it and give it as much weight as you think it deserves considering the witness's education and experience, the soundness of the reasons given for the opinion, the acceptability of the methods used, and all the other evidence in the case.

**INSTRUCTION NO. 7 - BURDEN OF PROOF**

In civil actions, the party who has the burden of proving an issue must prove that issue by the greater weight of the evidence.

Greater weight means that after weighing the evidence on both sides there is enough evidence to convince you that something is more likely true than not true. In the event the evidence is evenly balanced so that you are unable to say the evidence on either side of an issue has the greater weight, 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.

**INSTRUCTION NO. 8 - LEGAL CAUSE**

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. The legal cause need not be the only cause, nor the last or nearest cause. It is sufficient if it concurs with some other cause acting at the same time, which in combination with it caused the result. However, for legal cause to exist, you must find that the cause complained of was a substantial factor in bringing about the result.

**INSTRUCTION NO. 9 - EQUALS BEFORE THE LAW**

In this case, the plaintiff D & M Iron Horse Inn, LLC, is a corporation and defendant United Fire & Casualty Company is an insurance company. A corporation and an insurance company are entitled to the same fair trial as private individuals. No inference or presumption may be drawn against either party that would be improper in a case between individuals. You should consider and decide this case with the same fairness and consideration as though it were a case between individuals. The parties in this case stand equal before the law and are entitled to a fair and impartial consideration of the entire case.

**INSTRUCTION NO. 10 - BENCH CONFERENCES AND RECESSES**

During the trial it may be necessary for me to talk with the lawyers out of the hearing of the jury, either by having a bench conference while the jury is present in the courtroom or by calling a recess. Please be patient because while you are waiting, we are working. The purpose of these conferences is to decide how certain evidence is to be treated under the rules of evidence, to avoid confusion and error, and to save your valuable time. We will do what we can to keep the number and length of these conferences to a minimum.

**INSTRUCTION NO. 11 - OBJECTIONS**

The lawyers may make objections and motions during the trial that I must rule upon. If I sustain an objection to a question before it is answered, do not draw any inferences or conclusions from the question itself. The lawyers have a duty to object to testimony or other evidence they believe is not properly admissible. Do not hold it against a lawyer or the party the lawyer represents because the lawyer has made objections.

### **INSTRUCTION NO. 12 - NOTE TAKING**

At the end of the trial, you must make your decision based on the evidence. We have an official court reporter making a record of the trial. However, we will not have a typewritten transcript of the trial available for your use in reaching a verdict. You must pay close attention to the evidence as it is presented.

If you want to take notes during the trial, you may, but be sure your note taking does not interfere with listening to and considering all the evidence. If you choose not to take notes, remember it is your own individual responsibility to listen carefully to the evidence.

Notes you take during the trial are not necessarily more reliable than your memory or another juror's memory. Therefore, you should not be overly influenced by the notes.

If you take notes, do not discuss them with anyone before you begin your deliberations. At the end of each day, please leave your notes and your copy of these instructions in the jury room. At the end of the trial, you may take your notes out of the notebook and keep them or leave them, and we will destroy them. No one will read the notes or your copy of these instructions, either during or after the trial.

**INSTRUCTION NO. 13 - MEDIA AND TECHNOLOGY**

You are required to decide this case based solely on the evidence and exhibits that you see and hear in the courtroom. If one or more of you were to get additional information from an outside source, that information might be inaccurate or incomplete, or for some other reason not applicable to this case, and the parties would not have a chance to explain or contradict that information because they would not know about it. This is why it is so important that you base your answers only on information you receive in this courtroom.

At the end of the case, I may give you additional instructions about the law you must apply, and you will be asked to use that law, together with the evidence you have heard, to answer the special interrogatories. In order for your answers to be fair, you must not be exposed to any other information about the case, the law, or any of the issues involved in this trial during the course of your jury duty. This is very important, so I am taking the time to give you a detailed explanation about what you should do and not do during your time as jurors.

*First*, you must not try to get information from any source other than what you see and hear in this courtroom. That means you may not speak to anyone, including your family and friends about this case. You may not use any printed or electronic sources to get information about this case or the

issues involved. This includes the internet, reference books or dictionaries, newspapers, magazines, television, radio, computers, smartphones, PDAs, or any other electronic device. You may not do any personal investigation, such as visiting any of the places involved in this case, using Internet maps or Google Earth or any other such technology, talking to any possible witnesses, or creating your own demonstrations or reenactments of the events which are the subject of this case.

*Second*, you must not communicate with anyone about this case or your jury service, and you must not allow anyone to communicate with you. In particular, you may not communicate about the case through emails, text messages, tweets, blogs, chat rooms, comments or other postings, social networking sites, including but not limited to Facebook, MySpace, or LinkedIn, or any other website. This applies to communicating with your fellow jurors, your family members, your employer, and the people involved in the trial, although you may notify your family and employer that you have been seated as a juror in the case. If you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter and immediately report the contact to the court.

I recognize these rules and restrictions may affect activities you would consider to be normal and harmless. I assure you that I am very much aware I

am asking you to refrain from activities which may be very common and very important in your daily lives. However, the law requires these restrictions to ensure the parties have a fair trial based on the evidence each party has an opportunity to address.

Any juror who violates these restrictions I have explained to you jeopardizes the fairness of these proceedings, and a mistrial could result which would require the entire trial process to start over. As you can imagine, a mistrial is a tremendous expense and inconvenience to the parties, the court, and the taxpayers. If any juror is exposed to any outside information, or has any difficulty whatsoever in following these instructions, please notify the court immediately. If any juror becomes aware that one of your fellow jurors has done something that violates these instructions, you are obligated to report that violation to the court as well.

These restrictions remain in effect throughout this trial. Once the trial is over, you may resume your normal activities. At that point, you will be free to read or research anything you wish. You will be able to speak – or choose not to speak – about the trial to anyone you wish. You may write, post, or tweet about the case if you choose to do so. The only limitation is that you must wait until you have been discharged from your jury service.

**INSTRUCTION NO. 14 - CONDUCT OF THE JURY**

Finally, to insure fairness, you as jurors must obey the following rules:

*First*, do not talk among yourselves about this case, or about anyone involved with it, until the end of the case when you go to the jury room.

*Second*, do not talk with anyone else about this case, or about anyone involved with it, until the trial has ended and I discharge you as jurors. This means you must not talk to your spouse, other family members, or friends about this case until I discharge you as jurors.

*Third*, when you are outside the courtroom, do not let anyone tell you anything about the case or about anyone involved with it, until the trial has ended and I accept your answers to the special interrogatories. If someone should try to talk to you about the case, please report it to me.

*Fourth*, during the trial, you should not talk with or speak to any of the parties, lawyers, or witnesses involved in this case—you should not even pass the time of day with any of them. It is important you not only do justice in this case, but that you also give the appearance of doing justice. If a person from one side of the case sees you talking to a person from the other side, even if it is simply to pass the time of day, an unwarranted and unnecessary suspicion about your fairness might be created. If any lawyer, party, or witness does not speak to you when you pass in the hall, ride the elevator or the like, it is because they are not supposed to talk or visit with you.

*Fifth*, do not read any news stories or articles, in print, on the Internet, or in any blog, about the case or about anyone involved with it. Do not listen to any radio or television reports about the case or about anyone involved with it. If you want, you may have your spouse or a friend clip out any stories and set them aside to give you after the trial is over. I can assure you, by the time you have heard the evidence, you will know more about the case than anyone will learn through the news media.

*Sixth*, during the trial, do not make up your mind about what the answers to the special interrogatories should be. Keep an open mind until you have gone to the jury room to decide the case and you and your fellow jurors have discussed the evidence.

*Seventh*, if at any time during the trial you have a problem you would like to bring to my attention or if you feel ill or need to go to the restroom, please send a note to the court security officer, who will deliver it to me. Or just raise your hand and get my attention. I want you to be comfortable, so please do not hesitate to inform me of any problem.

**INSTRUCTION NO. 15 - OUTLINE OF THE TRIAL**

The trial will proceed as follows:

After these instructions, the lawyer for the plaintiff may make an opening statement. Next, the lawyer for the defendant may make an opening statement. An opening statement is not evidence. It is simply a summary of what the lawyer expects the evidence to be.

The plaintiff then will present its evidence and call witnesses. The lawyer for the defendant may cross-examine them. Following the plaintiff's case, the defendant may present evidence or call witnesses. If the defendant calls witnesses, the lawyer for the plaintiff may cross-examine them.

After presentation of the evidence is complete, the lawyers will make their closing arguments to summarize and interpret the evidence for you. As with opening statements, closing arguments are not evidence. I will give you further instructions. You will then retire to resolve the Special Interrogatories to the Jury which accompany these instructions.

Dated February 10, 2014.

BY THE COURT:



JEFFREY L. VIKEN  
CHIEF JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

D & M IRON HORSE INN, LLC	)	CIV. 11-5075-JLV
	)	
Plaintiff,	)	
	)	
vs.	)	SPECIAL
	)	INTERROGATORIES
	)	TO THE JURY
UNITED FIRE & CASUALTY	)	
COMPANY,	)	
	)	
Defendant.	)	

To determine whether the policy issued to the D & M Iron Horse Inn by United Fire & Casualty Company provides coverage for the events that occurred on August 3, 2010, you will answer the following questions based on the evidence presented during trial and my instructions. **Your answer to each question must be unanimous.**

QUESTION NO. 1:

Has D & M Iron Horse Inn shown by the greater weight of the evidence that use of defective methods of construction, remodeling or renovation was a cause of the window frame and window glass caving in?

Answer: Yes \_\_\_\_\_ No \_\_\_\_\_

QUESTION NO. 2:

Has D & M Iron Horse Inn shown by the greater weight of the evidence that the caving in of the window frame and window glass was caused in part by hail or the weight of hail pressing against the window?

Answer:            Yes \_\_\_\_\_            No \_\_\_\_\_

Once you have answered these questions, please date and sign this form and notify the court security officer that your deliberations are complete.

Dated \_\_\_\_\_

\_\_\_\_\_  
Foreperson

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
WESTERN DIVISION

**FILED**

FEB 12 2014

  
CLERK

D & M IRON HORSE INN, LLC	)	CIV. 11-5075-JLV
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Plaintiff,	)	SUPPLEMENTAL
	)	INSTRUCTIONS
vs.	)	TO THE JURY
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**INSTRUCTION NO. 16 - EQUALLY IMPORTANT INSTRUCTIONS**

Members of the jury, I will now take a few minutes to give you additional instructions explaining the law which applies to this case. All instructions, both those I gave you earlier and these instructions, are equally binding on you and must be followed. You must consider my instructions as a whole and not single out some instructions and ignore others.

**INSTRUCTION NO. 17 - DUTY TO DELIBERATE**

The answers to the special interrogatories must represent the considered judgment of each juror. Your answers to the special interrogatories must be unanimous. It is your duty to consult with one another and to deliberate with a view of reaching agreement if you can do so without violence to your individual judgment. Of course, you must not surrender your honest convictions as to the weight or effect of the evidence solely because of the opinions of other jurors or for the mere purpose of reaching a decision. Each of you must decide the case for yourself, but you should do so only after consideration of the evidence with your fellow jurors.

In the course of your deliberations, you should not hesitate to re-examine your own views and change your opinion if you are convinced it is wrong. To bring the jury to a unanimous result, you must examine the special interrogatories submitted to you openly and frankly with proper regard for the opinions of others and with a willingness to re-examine your own views.

Remember that you are not partisans. You are judges of the facts. Your sole interest is to seek the truth from the evidence. You are the judges of the credibility of the witnesses and the weight of the evidence.

You may conduct your deliberations as you choose. However, I suggest you carefully consider all of the evidence bearing upon the special interrogatories before you. You may take all the time you feel is necessary.

There is no reason to think that another trial would be tried in a better way or that a more conscientious, impartial, or competent jury would be selected to hear it. Any future jury must be selected in the same manner and from the same source as you. If you should fail to agree on answers to the special interrogatories the case is left open and must be resolved at some later time.

**INSTRUCTION NO. 18 - DUTY DURING DELIBERATIONS**

There are certain rules you must follow while conducting your deliberations and returning your answers to the special interrogatories:

*First*, when you go to the jury room, you must select one of your members as the foreperson. He or she will preside over your discussions and speak for you here in court.

*Second*, 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. After conferring with the lawyers, 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.

*Third*, your answers to the special interrogatories must be based solely on the evidence and on the law in these instructions. **The answers to the special interrogatories must be unanimous.** Nothing I said or did was intended to suggest what your answers should be—that is entirely for you to decide.

When you have unanimously answered the special interrogatories the foreperson will fill in the special interrogatories form, sign and date it, and advise the court security officer that you have completed your deliberations.

You will then return to the courtroom where your answers to the special interrogatories will be received and announced.

Dated February 12, 2014.

BY THE COURT:



JEFFREY L. VIKEN  
CHIEF JUDGE

**FILED**

FEB 12 2014

*[Signature]*  
CLERK

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

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QUESTION NO. 1:

Has D & M Iron Horse Inn shown by the greater weight of the evidence that use of defective methods of construction, remodeling or renovation was a cause of the window frame and window glass caving in?

Answer: Yes ~~\_\_\_\_\_~~ No \_\_\_\_\_

QUESTION NO. 2:

Has D & M Iron Horse Inn shown by the greater weight of the evidence that the caving in of the window frame and window glass was caused in part by hail or the weight of hail pressing against the window?

Answer: Yes  No

Once you have answered these questions, please date and sign this form and notify the court security officer that your deliberations are complete.

Dated 2-12-2014

Ann Marie Ewidge  
Foreperson