

**UNITED STATES DISTRICT COURT**

**DISTRICT OF SOUTH DAKOTA**

**NORTHERN DIVISION**

---

**BRENDA BEHM, CHRISTOPHER BEHM,  
COTTONWOOD RANCH, LLC,**

**Plaintiffs,**

**vs.**

**LANCE SCHADE, GEORGE SCHADE,  
INDIVIDUALLY AND AS TRUSTEE FOR  
GEORGE SCHADE TRUST ETUX; L&K  
FARMS INC., SCHADE FARMS INC.,**

**Defendants.**

---

**1:22-CV-01013-MAM**

**FINAL JURY INSTRUCTIONS**

## Table of Contents

FINAL INSTRUCTION NO. 1 – General Admonishment.....	3
FINAL INSTRUCTION NO. 2 – Weighing Evidence.....	4
FINAL INSTRUCTION NO. 3 – “Evidence” Defined.....	5
FINAL INSTRUCTION NO. 4 – Weighing Testimony .....	6
FINAL INSTRUCTION NO. 5 – Inconsistent Statements .....	7
FINAL INSTRUCTION NO. 6 – Deposition Testimony.....	8
FINAL INSTRUCTION NO. 7 – Expert Opinion.....	9
FINAL INSTRUCTION NO. 8 – General Outline of Case.....	10
FINAL INSTRUCTION NO. 9 – Burdens of Proof.....	11
FINAL INSTRUCTION NO. 10 – Negligence Outline .....	12
FINAL INSTRUCTION NO. 11 – Reasonable Care .....	13
FINAL INSTRUCTION NO. 12 – DANR’s Guidance.....	14
FINAL INSTRUCTION NO. 13 – Legal Cause .....	15
FINAL INSTRUCTION NO. 14 – Causation of Herbicide Damage.....	16
FINAL INSTRUCTION NO. 15 – Trespass .....	17
FINAL INSTRUCTION NO. 16 – Nuisance .....	18
FINAL INSTRUCTION NO. 17 – Vicarious Liability .....	19
FINAL INSTRUCTION NO. 18 – Principal-Agent Relationship.....	20
FINAL INSTRUCTION NO. 19 – Independent Contractor .....	21
FINAL INSTRUCTION NO. 20 – Employee vs. Independent Contractor Considerations.....	22
FINAL INSTRUCTION NO. 21 – Damages Generally.....	24
FINAL INSTRUCTION NO. 22 – General Measure of Damages.....	25
FINAL INSTRUCTION NO. 23 – Damages to Trees .....	26
FINAL INSTRUCTION NO. 24 – Susceptibility .....	27
FINAL INSTRUCTION NO. 25 – Prejudgment Interest.....	28

FINAL INSTRUCTION NO. 1  
– GENERAL ADMONISHMENT –

Members of the jury, the instructions I gave you at the beginning of the trial and during the trial remain in effect. Here are my final instructions. They are in writing and will be available in the jury room.

You must, of course, continue to follow the instructions I gave you earlier, as well as those I give you now. Each instruction is important, so you must not single out some instructions while ignoring others.

All instructions, whenever given and whether in writing or not, must be followed.

FINAL INSTRUCTION NO. 2  
– WEIGHING EVIDENCE –

In broad strokes, this case is about the liability of each Defendant, if any, for Defendant Lance Schade's herbicide spraying on September 3, 2019. The parties have submitted their evidence and made their final arguments on how you should interpret that evidence. It is now for you to decide what the facts are from that evidence. You may consider the evidence in the light of your own observations and experiences. You may use reason and common sense to draw deductions or conclusions from facts which the evidence has established. You will then apply those facts to the law which I give you in these and in my other instructions, and in that way, you will reach your verdict. You are the sole judges of the facts. But you must follow the law as stated in my instructions, whether you agree with it or not.

Do not allow sympathy or prejudice to influence you. The law demands of you a just verdict, unaffected by anything except the evidence, your common sense, and the law as I instruct you on it.

You must not take anything I said, or did, during the trial as indicating what I think the evidence and facts are or what I think your verdict should be.

FINAL INSTRUCTION NO. 3  
– “EVIDENCE” DEFINED –

I have mentioned the word “evidence.” Evidence includes the testimony of witnesses, documents, and other things received as exhibits. Certain things are not evidence. I shall list those things again for you now:

- (1) Lawyers’ statements, arguments, questions, and comments.
- (2) Objections. Lawyers have a right to object when they believe something is improper. You should not be influenced by the objection. If I sustained an objection to a question, then you must ignore the question and must not try to guess what the answer might have been.
- (3) Testimony that I have told you to disregard.
- (4) Anything you have seen or heard about this case from outside the courtroom. If you received information about this case outside of what has been presented to you, I now instruct you to disregard that information in its entirety and not discuss it with your fellow jurors.

If certain evidence was received for a limited purpose, then you must consider it solely for the purpose it is limited to, and not in other ways.

Some of you may have heard the terms “direct” and “circumstantial” evidence. Do not concern yourselves with these terms, the law does not distinguish between them. You should give all evidence the weight and value you believe it deserves.

FINAL INSTRUCTION NO. 4  
– WEIGHING TESTIMONY –

In determining the facts, you may have to decide what testimony you believe. You may believe all, part, or none of what a witness said.

In deciding what testimony to believe, you are able to consider factors such as the witness's intelligence, the opportunity the witness had to have heard or seen the things testified about, the witness's memory, any motives that witness may have for testifying a certain way, the witness's manner 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 fits other evidence you believe or do not believe.

In deciding whether to believe a witness, keep in mind that people sometimes hear or see things differently and sometimes forget things. You need to consider therefore whether a contradiction is an innocent misrecollection, lapse in memory, or an intentional falsehood.

You should judge the testimony of the parties in this case in the same manner you judge the testimony of any other witness.

FINAL INSTRUCTION NO. 5  
– INCONSISTENT STATEMENTS –

A witness's credibility may be attacked by introducing evidence that, at some earlier time, the witness made a statement or acted in a manner inconsistent with the witness's testimony on a matter material to the issues. You may consider this with all other facts and circumstances in evidence to decide the weight the witness's testimony deserves.

FINAL INSTRUCTION NO. 6  
– DEPOSITION TESTIMONY –

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



FINAL INSTRUCTION NO. 7  
– EXPERT OPINION –

You have heard testimony from several expert witnesses who testified to their opinions and reasons for those opinions. These opinions are allowed because of the witness's education or experience.

You should judge this opinion testimony as you would any other testimony. You may accept, or reject, the testimony and weigh it as you see fit. You may consider aspects like the witness's education and experience, the soundness for the reasons given in their opinion, and all other evidence here alongside the other considerations I have already instructed you on.

FINAL INSTRUCTION NO. 8  
– GENERAL OUTLINE OF CASE –

You have just heard the parties summarize their positions to you. As you heard, this case is about Defendant Lance Schade’s herbicide spraying on September 3, 2019. Plaintiffs claim that the herbicides drifted onto their property and injured their trees. Plaintiffs contend that Lance Schade was negligent in spraying that day, that the herbicides caused a trespass to the land, and that it was a nuisance. They further contend that Lance was acting for the other Defendants at that time, so those Defendants should also be liable for the same acts.

All Defendants deny these allegations. They argue that natural factors or other peoples’ herbicide spraying caused any tree decline.

FINAL INSTRUCTION NO. 9  
– BURDENS OF PROOF –

In this case, the party with the burden of proving an issue must prove that issue by greater convincing force of the evidence (or the preponderance of the evidence if you have heard that term before).

What that means is that the party with the burden of proof must convince you, after you have weighed the evidence on both sides, that something is more likely true than not. If the evidence is evenly balanced so that you cannot decide what is more likely, then your finding on the issue must be against the party who has the burden of proving it. In this action, Plaintiffs have the burden of proving the following issues:

- Negligence
- Trespass
- Nuisance
- Causation (for negligence, trespass, and nuisance)
- Vicarious Liability
- Damages

You will get more detailed instructions on what the party must prove to carry each burden later in these instructions. In determining whether an issue has been proven by the greater convincing force of the evidence, you should consider all the evidence bearing on that issue, no matter who produced it.

FINAL INSTRUCTION NO. 10  
– NEGLIGENCE OUTLINE –

Plaintiffs first allege negligence. To decide this claim, you must determine:

- First, did Defendant Lance Schade fail to exercise reasonable care?  
[Instruction No. 11]

If your answer is “no,” then you must return a verdict for all Defendants. If your answer is “yes,” then you must determine:

- Second, was Lance’s negligence a legal cause of any injury to Plaintiffs?  
[Instruction Nos. 13, 14]

If your answer is “no,” then you must return a verdict for all Defendants. If your answer is “yes,” then you must consider the amount of damages, if any, you find Plaintiffs have suffered.

FINAL INSTRUCTION NO. 11  
– REASONABLE CARE –

Negligence is the failure to use reasonable care.

The failure to use reasonable care is the doing of something which a reasonable person would not do under similar facts as shown by the evidence. In turn, a “reasonable person” is a somewhat fictitious person who always acts prudently and is reasonably considerate of others. You are to decide whether, generally, Defendant Lance Schade’s herbicide application at that time was something a reasonable person exercising reasonable care would not do.

The law can also set the standard for “reasonable care.” Here, the law provides that applying herbicides inconsistent with their labeling instructions is a failure to use reasonable care. If you find that Lance did not follow the labeling instructions, then he failed to use reasonable care.

FINAL INSTRUCTION NO. 12  
– DANR’S GUIDANCE –

The Department of Agriculture and Natural Resources’s (DANR) guidance on label interpretation may not be considered in determining whether Lance Schade violated the federal labeling requirements of any herbicide. Nor may DANR’s guidance be construed to relieve any person from liability for any damage to another caused by the use of herbicides even if that guidance was followed.

FINAL INSTRUCTION NO. 13  
– LEGAL CAUSE –

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

A legal cause need not be the only or last cause of the harm. A legal cause may act in combination with other causes to produce the harm. For legal cause to exist, however, you must find the person's conduct was a substantial factor in bringing about the harm. Consider these factors to determine whether a person's conduct was a "substantial factor":

- (1) The number of other factors which contributed to producing the harm;
- (2) The extent to which any other factors likely produced the harm;
- (3) Whether Defendants' conduct created a continuous chain-reaction resulting in the harm, rather than the creation of a harmless situation that only became harmful after the operation of other forces for which Defendants are not responsible; and
- (4) Lapse of time

Causation cannot be based on mere speculative possibilities or circumstances connected to the events leading up to the harm. The person's conduct must have such an effect in producing the harm as to lead reasonable people to regard it as a cause of Plaintiffs' harm.

FINAL INSTRUCTION NO. 14  
– CAUSATION OF HERBICIDE DAMAGE –

How herbicides interact with trees and whether that interaction caused the damage Plaintiffs allege is an area considered beyond the ordinary experience of an average person. Therefore, when determining whether herbicides were the cause of the harm to Plaintiffs' trees, you must consider the testimony of expert witnesses whose education and experience qualify them to give opinions on the issue.



FINAL INSTRUCTION NO. 15  
– TRESPASS –

Defendants are liable for trespass if they intentionally, and without consent or other privilege, caused herbicides to enter Plaintiffs' property regardless of whether any harm resulted. It is not necessary that the herbicide should be sprayed directly or immediately onto Plaintiffs' property. It is sufficient that the act was done with knowledge that it will, to a substantial certainty, result in the herbicide's entry.

FINAL INSTRUCTION NO. 16  
– NUISANCE –

There are two ways different ways Defendants may be liable for nuisance.

The first is if Plaintiffs prove that Defendants unlawfully did an act which either:

- (1) Annoys, injures, or endangers the comfort, repose, health, or safety of Plaintiffs, or
- (2) In any way renders other persons insecure in life or in use of property.

The second is if Plaintiffs prove that Defendants' conduct is the legal cause of an invasion of Plaintiffs' private use and enjoyment of land, and the invasion is either:

- (1) intentional and unreasonable, or
- (2) unintentional but resulted from negligent or reckless conduct.

FINAL INSTRUCTION NO. 17  
– VICARIOUS LIABILITY –

If you find Defendant Lance Schade liable for negligence, trespass, or nuisance resulting from his spraying, then you must determine the legal relationship between Lance and Defendants George Schade, Schade Farms Inc., and the George Schade Trust for that spraying. It may be a:

- (1) principal-agent/employer-employee [Instruction Nos. 18, 20],
- (2) independent contractor [Instruction Nos. 19, 20], or
- (3) neither.

If you find a principal-agent or independent contractor relationship, then George is also liable for what Lance is liable of.

FINAL INSTRUCTION NO. 18  
– PRINCIPAL-AGENT RELATIONSHIP –

A principal-agent relationship (also known as an employer-employee relationship) requires:

- (1) Manifestation by Defendant George Schade that Defendant Lance Schade would act for George,
- (2) Lance's acceptance of that undertaking, and
- (3) An understanding between them that George controls how Lance would undertake his responsibilities to George.

If any of these are not present, then a principal-agent relationship does not exist. If you find a principal-agent relationship exists, then you must also find that Lance's spraying fell under their principal-agent relationship.

FINAL INSTRUCTION NO. 19  
– INDEPENDENT CONTRACTOR –

Defendant Lance Schade will be an independent contractor if you find that he contracted with Defendant George Schade to spray herbicides, but that George did not control the means by which Lance would accomplish his spraying, only the ends that George hoped to achieve. In different terms, if George controlled *what* Lance was doing, but not *how* he was doing it, then Lance would be an independent contractor.

FINAL INSTRUCTION NO. 20

– EMPLOYEE VS. INDEPENDENT CONTRACTOR CONSIDERATIONS –

When determining whether Defendant Lance Schade is an agent/employee or independent contractor at the time of the spraying, consider his conduct and all surrounding circumstances of his relationship, including:

- (1) The extent of control which Defendant George Schade could exercise control over the details of Lance's work. An employer typically exercises more control over the details of work performed by an agent, and less control over the details of work performed by an independent contractor.
- (2) Whether Lance was engaged in a distinct occupation or business. An employee typically is not engaged in an occupation or business that exists separate from the employment relationship, while an independent contractor is typically engaged in an occupation or business that exists separate from the employment relationship.
- (3) The kind of occupation, with reference to whether, in the locality where the work was performed, the work is usually done under the direction of the employer or by a specialist without supervision. An employee typically works under the direction of the employer, while an independent contractor typically works without supervision.
- (4) The skill required in the work. If more skill is required; that suggests the worker is an independent contractor.
- (5) Whether George or Lance supplied the equipment and tools. An employee typically uses equipment and tools the employer provides, while an independent contractor typically provides their own.
- (6) The length of time Lance was employed. An employee is typically employed for an extended period, while an independent contractor is typically employed for a short period of time.
- (7) The method of payment, whether by the hour or by the job. An employee is typically paid by the hour, while an independent contractor is typically paid by the job.

- (8) Whether the work is part of George's regular business. An employee typically performs work that is part of the regular business of the employer, while an independent contractor typically performs work that is not part of the regular business of the employer.
- (9) Whether George and Lance believed they were creating the relationship of employer and employee.

FINAL INSTRUCTION NO. 21  
– DAMAGES GENERALLY –

If you decide for Plaintiffs on the question of liability on any one of their claims, you must then fix the amount of money which will reasonably compensate Plaintiffs for their losses caused by Defendants' conduct. Whether and how much damages Plaintiffs have proven is for you to determine. Your verdict must be based on the evidence, not speculation, guesswork, or conjecture. In all cases, damages must be reasonable.



FINAL INSTRUCTION NO. 22  
– GENERAL MEASURE OF DAMAGES –

In determining the amount you should award as actual damages for trees, you must determine whether the injury is permanent or temporary.

If trees are dead or cannot be reasonably restored, then they are permanently injured, and the actual damages are the value of those trees. If the trees are temporarily injured so that they may be returned to their former condition, then the actual damages are the cost to restore them and the difference in price, if any, between the fair market value of the trees before the injury and after their restoration. The award for temporary injuries, though, may not exceed the value of the trees. You may find that some of Plaintiffs' trees were permanently damaged, and others were only temporarily damaged, and award damages accordingly.

FINAL INSTRUCTION NO. 23  
– DAMAGES TO TREES –

When measuring the actual damages for the wrongful injury to trees or plants, you must use the Guide for Plant Appraisal, Ninth Edition, as a guide. A copy of the Guide has been provided as Exhibit 86.

FINAL INSTRUCTION NO. 24  
– SUSCEPTIBILITY –

If you find that Plaintiffs' trees had a prior condition or injury making them more susceptible to injury than a tree in normal health, then you may award damages for the injuries caused by Defendants' conduct, even though those injuries may be greater than what might have been experienced by a tree in normal health under the same circumstances. Before awarding such damages, however, Plaintiffs must prove that the conduct of Defendants was a substantial factor in bringing about the harm alleged.

FINAL INSTRUCTION NO. 25  
– PREJUDGMENT INTEREST –

Any person who is entitled to recover damages is entitled to recover interest, except that interest is not recoverable on future damages or for punitive damages.

You must decide:

- (1) The amount of damages, if any,
- (2) The amount of damages which are subject to prejudgment interest, if any, and
- (3) The date or dates on which the loss or damage occurred.

If you return a verdict for Plaintiffs, you must indicate on the verdict form whether you find Plaintiffs are entitled to prejudgment interest, and if so, the amount of damages on which interest is granted and the beginning date of such interest. Based on your findings, the Court will calculate the amount of interest that Plaintiffs are entitled.

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

NORTHERN DIVISION

BRENDA BEHM, CHRISTOPHER BEHM,  
COTTONWOOD RANCH, LLC,

Plaintiffs,

vs.

LANCE SCHADE, GEORGE SCHADE,  
INDIVIDUALLY AND AS TRUSTEE FOR  
GEORGE SCHADE TRUST ETUX; L&K  
FARMS INC., SCHADE FARMS INC.,

Defendants.

1:22-CV-01013-MAM

VERDICT FORM

We, the jury, duly empaneled and sworn to try the issues in this case, do hereby answer the questions submitted by the Court as follows:

**Question 1:** Do you find Defendant Lance Schade liable to Plaintiffs on any of Plaintiffs' claims?

YES:\_\_\_\_ NO:\_\_\_\_

If your answer to Question 1 is "no," then the case is complete and you should not answer any more questions on this verdict form. Have your foreperson sign and date the form and inform the clerk that you are done. If your answer is "yes," then continue by answering the remaining questions.

**Question 2:** If you find Defendant Lance Schade liable to Plaintiffs for negligence, do you find he failed to exercise reasonable care because he:

Failed to act as a reasonable person would? YES:\_\_\_\_ NO:\_\_\_\_

Violated labeling requirements? YES:\_\_\_\_ NO:\_\_\_\_

**Question 3:** Do you find that Defendants George Schade/Schade Farms Inc./George Schade Trust/all are liable for Defendant Lance Schade's conduct as either an agent/employee or independent contractor?

YES:\_\_\_\_ NO:\_\_\_\_

**Question 4:** What amount of money will reasonably and fairly compensate Plaintiffs for the damage caused by Defendants based on the instructions given to you?

\$\_\_\_\_\_

**Questions 5:** State the date on which you find that prejudgment interest should begin:

\_\_\_\_\_

DATED this \_\_\_\_\_ day of November, 2024.

\_\_\_\_\_  
Foreperson