

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

LOWELL LUNDSTROM, JR.,

Plaintiff,

vs.

DANIEL M. HOMOLKA P.A., DANIEL M.
HOMOLKA, WATTS GUERRA LLP,
AND MIKAL C. WATTS,

Defendants.

1:19-CV-01006-CBK

JURY INSTRUCTIONS

INSTRUCTION NO. 1

Ladies and gentlemen of the jury, it is my duty now to explain the rules of law you must apply to this case.

You as jurors are the sole judges of the facts. But it is your duty to follow the law stated in these instructions, and to apply that law to the facts as you find them from the evidence before you. It would be a violation of your sworn duty to base your verdict upon any rules of law other than the ones given you in these instructions, regardless of your personal feelings as to what the law ought to be.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

INSTRUCTION NO. 2

You have been chosen and sworn as jurors to try the issues of fact presented in this case. You are to perform this duty without bias or prejudice, because the law does not permit jurors to be governed by sympathy or public opinion. The parties and the public expect that you will carefully and impartially consider all of the evidence and will follow the law as stated by the Court, in order to reach a just verdict, regardless of the consequences to any party.

INSTRUCTION NO. 3

This is a civil action. The plaintiff, Lowell Lundstrom, Jr., seeks to recover monetary damages against the defendants, Daniel M. Homolka and Mikal C. Watts, and their respective law firms, Daniel M. Homolka, P.A. and Watts Guerra, LLP. Plaintiff alleges that he and defendants entered into a contract wherein plaintiff would provide marketing services relating to mass tort claims against Syngenta in exchange for compensation and reimbursement of expenses.

Plaintiff has asserted claims against all four defendants: (1) breach of contract, (2) fraudulent misrepresentation, and, as an alternative, (3) unjust enrichment. Plaintiff claims that all four defendants were in a joint venture. Plaintiff also claims that defendant Daniel M. Homolka and his law firm were acting as an agent of defendant Watts Guerra, LLP.

If you decide there was a breach of contract and award damages, you cannot consider or decide any issue as to unjust enrichment.

Defendants deny all liability, deny the existence of a joint venture, and deny that defendant Daniel Homolka or his law firm were acting as agents of defendant Watts Guerra, LLP. All defendants also deny that there was any unjust enrichment.

One of the defendants is a professional association and one of the defendants is a limited liability partnership. These facts are immaterial. In the eyes of the law, all persons, associations, and partnerships, are entitled to the same impartial treatment. When business entities are involved, they may act only through their employees, agents, and officers. In general, business entities are responsible under the law for any of the acts and statements of their authorized agents made or done within the scope of their duties as agents of the company.

INSTRUCTION NO. 4

I have mentioned the word “evidence.” The evidence in this case consists of the testimony of witnesses and the documents and other things received as exhibits.

You may use reason and common sense to draw deductions or conclusions from facts which have been established by the evidence in the case.

Certain things are not evidence. I shall list those things again for you now:

1. Statements, arguments, questions and comments by lawyers representing the parties in the case are not evidence.
2. 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 sustained any objection to a question or an exhibit, you must ignore the question or the exhibit and must not try to guess what the answer or information may have been.
3. Testimony and questions that I struck from the record, or told you to disregard, are not evidence and must not be considered.
4. Anything you saw or heard about this case outside the courtroom is not evidence.

INSTRUCTION NO. 5

There are two types of evidence from which you may find the truth as to the facts of a case--direct evidence and circumstantial evidence. Direct evidence is the testimony of one who asserts actual knowledge of a fact, such as an eyewitness; circumstantial evidence is proof of a chain of facts and circumstances indicating the liability or non-liability of a party. The law makes no distinction between the weight to be given to either direct evidence or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all the evidence in the case.

INSTRUCTION NO. 6

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 said, or 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 have seen or heard the things testified about, the witness's memory, any motives that witness may have for testifying a certain way, the manner of the witness while testifying, whether that 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 that people sometimes hear or see things differently and sometimes forget things. You need to consider therefore whether a contradiction is an innocent misrecollection or lapse of memory or an intentional falsehood, and that may depend on whether it has to do with an important fact or only a small detail.

INSTRUCTION NO. 7

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 that a witness has been discredited or impeached, it is your exclusive right to give that witness's testimony whatever weight, if any, 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.

INSTRUCTION NO. 8

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

INSTRUCTION NO. 9

In these instructions you are told that your verdict depends on whether you find certain facts have been proved. The burden of proof is solely upon the plaintiff as to his claims against the defendants. The defendants do not have the burden to prove anything as to the plaintiff's claims.

The plaintiff must prove all the facts necessary to support the claims by the "greater weight" of the evidence.

Evidence is of "greater weight" if, when considered and compared with that opposed to it, it is more persuasive and convinces you that what a party seeks to prove is more likely true than not true.

You have heard in criminal cases the term "proof beyond a reasonable doubt." That is a stricter standard which applies in criminal cases. It does not apply in civil cases such as this. You should, therefore, put it out of your minds.

INSTRUCTION NO. 10

Plaintiff has asserted claims against all of the defendants for breach of contract. Plaintiff claims defendants breached a contract to (1) pay him a \$3.4 million bonus, (2) to reimburse him for the cost of a pickup truck, and (3) to pay him \$10,000 per month through the end of the Syngenta litigation.

INSTRUCTION NO. 11

A contract is an agreement to do or not to do a certain thing. The elements to the existence of a contract are:

1. Consent,
2. A lawful object, and
3. Sufficient cause or consideration.

The consent of the parties must be:

1. Free,
2. Mutual, and
3. Communicated to each other.

Consent is not mutual unless the parties all agree upon the same thing in the same sense.

Consent must be communicated by each party of the contract to the other party of the contract. The communication must establish a meeting of the minds on all essential terms of the contract.

The creation of a contract requires an offer by one party and an acceptance by the other.

An acceptance must be absolute and unqualified.

A contract that has no fixed duration continues for a time that is reasonable under the circumstances and may be terminated at any time by either party upon reasonable notification to the other party.

INSTRUCTION NO. 12

A contract is either express or implied. In an express contract, the terms are stated in words. In an implied contract, the existence and terms are shown by conduct.

An express contract is an agreement of the parties that is created by distinct and explicit language at the time of making the contract. An express contract may be created orally or in writing.

A contract may be implied in fact. A contract is implied in fact where the parties do not directly or expressly in words set forth an intention to enter a contract, but where their conduct, language, or acts or other pertinent circumstance attending the transaction causes you to conclude they did, in fact, intend to enter into a contract.

INSTRUCTION NO. 13

Every contract contains an implied covenant of good faith and fair dealing that prohibits either contracting party from preventing or injuring the other party's right to receive the agreed benefits of the contract. The implied duty of good faith is not a limitless duty. It must arise from the language used in the contract or it must be indispensable to carry out the intention of the parties to the contract.

A party may breach the duty of good faith and fair dealing even though that party's conduct did not violate any of the express terms of the contract agreed to by the parties.

INSTRUCTION NO. 14

If and when the payment of any bonus is discretionary, a person has no legally enforceable claim to receive a bonus. If the parties agreed to a bonus, the parties could later agree as to the amount.

If the payment of any bonus is within the discretion of the person asked to pay, there is no legal claim to demand payment.

A lawyer or law firm is not allowed to share legal fees with a non-lawyer. The Court has determined as a matter of law that the claimed agreements and compensation sought by the plaintiff would not constitute sharing of legal fees.

INSTRUCTION NO. 15

Plaintiff has also asserted claims against all of the defendants for fraudulent misrepresentations. Plaintiff's fraudulent misrepresentation claims are based upon two separate allegations: (1) the alleged misrepresentation that plaintiff needed to enter into an oral contract, rather than a written contract, due to Model Rule of Professional Conduct 5.4, and (2) the allegation that a promise was made to plaintiff to pay \$3.4 million in a bonus with no intention to perform that promise.

INSTRUCTION NO. 16

On a claim of fraudulent misrepresentation, the plaintiff must prove all of the following elements by the greater weight of the evidence:

1. A defendant or a defendant's agent made a representation as a statement of fact,
2. The representation was untrue,
3. A defendant or a defendant's agent knew the representation was untrue or he made the representation recklessly,
4. A defendant or a defendant's agent made the representation with intent to deceive the plaintiff and for the purpose of inducing the plaintiff to act upon it,
5. The plaintiff justifiably relied on the representation, and
6. The plaintiff suffered damage as a result.

INSTRUCTION NO. 17

Plaintiff has asserted alternative claims against all of the defendants for unjust enrichment.

If you found against any defendant on the basis of breach of contract or fraudulent misrepresentation, do not consider anything as to claims of unjust enrichment.

If you found against the plaintiff as to his claims of breach of contract and fraudulent misrepresentation, you may then consider the claims of the plaintiff that one or more of the defendants were unjustly enriched.

INSTRUCTION NO. 18

On a claim of unjust enrichment, the plaintiff must prove all of the following elements by the greater weight of the evidence:

1. A benefit was received,
2. The recipient was cognizant of the benefit, and
3. The retention of the benefit without reimbursement would unjustly enrich the recipient.

There is no “unjust enrichment” if the plaintiff was paid everything agreed to by the parties.

INSTRUCTION NO. 19

Plaintiff claims that defendants Daniel M. Homolka, Daniel M. Homolka, P.A., Mikal C. Watts, and Watts Guerra LLP are liable for breach of contract, fraudulent misrepresentation, or the alternative claim of unjust enrichment based upon the principles of agency.

Agency is the representation of one called the principal by another called the agent in dealing with third persons.

There are two types of agency, actual agency and apparent agency.

The law implies that an apparent agency exists when the principal, by conduct or lack of ordinary care, causes a third party to believe another, who is not actually appointed, is serving as the agent for the principal. An apparent agency must be traceable to the acts or omissions of the principal and cannot be established solely by the acts, declarations, or conduct of the agent.

INSTRUCTION NO. 20

An agent's authority, like the agency relationship itself, may be either actual authority or apparent authority.

Actual authority is authority that a principal intentionally confers upon the agent, or intentionally or by want of ordinary care, allows the agent to believe himself to possess.

Apparent authority is authority that a principal intentionally, or by want of ordinary care, causes or allows a third person to believe the agent possesses.

An act of an agent done for the benefit of the principal is within the general scope of an agent's authority, but an act done solely to serve the interest of the agent is not within that scope and the principal is not liable.

INSTRUCTION NO. 21

A principal may be liable to third persons for the negligence of his agent in conducting the business of the agency, including wrongful acts committed by such agent in and as part of the conduct of such business, and for the agent's willful omission to fulfill the obligation of the principal.

A principal may be held liable for fraud and deceit committed by the principal's agent within the agent's apparent authority, even though the agent acts solely to benefit himself. However, the harm perpetrated by the agent must be foreseeable, which means there must be a sufficient connection between the agent's employment and the activity that causes the harm. A sufficient connection exists if the agent's conduct is not so unusual or startling that it would be unfair to include the loss caused by the injury among the costs of the principal's business.

INSTRUCTION NO. 22

Watts Guerra, LLP is a limited liability partnership and is distinct from its agents. The agents of a limited liability partnership include its partners. The agents of a limited liability partnership are generally not personally liable for contracts entered into on behalf of the limited liability partnership. Instead, only the limited liability partnership is liable for breach of contract if the agent was acting within the scope of their agency.

Daniel M. Homolka, P.A. is a professional association and is distinct from its agents. The agents of a professional association include its members. The agents of a professional association are generally not personally liable for their actions on behalf of the professional association. The agents of a professional association are generally not personally liable for contracts entered into on behalf of the professional association. Instead, only the professional association is liable for breach of contract if the agent was acting within the scope of their agency.

INSTRUCTION NO. 23

Plaintiff has also asserted that defendants are liable based upon the principles of joint venture.

To establish a joint venture, plaintiff must prove all of the following elements by the greater weight of the evidence:

1. An intent to enter into a joint venture,
2. An agreement, express or implied, among members of a group,
3. A common purpose to be carried out by the group,
4. A joint pecuniary interest in that purpose,
5. An equal right to a voice in the direction and control of the group, and
6. A right to share in the profits and a duty to share in any losses.

If you concluded that plaintiff did not prove any one of the elements by the greater weight of the evidence, then you must enter a verdict stating that no joint venture exists.

INSTRUCTION NO. 24

If you decide for the plaintiff on the question of liability, then you must then fix the amount of money which will reasonably and fairly compensate the plaintiff for the loss or harm proved by the evidence to have been legally caused by a defendant's conduct, whether such loss or harm could have been anticipated or not.

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

INSTRUCTION NO. 25

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 does not need to be the only cause of the harm. A legal cause may act in combination with other causes to produce the harm.

INSTRUCTION NO. 26

Any person who is entitled to recover damages is entitled to recover interest thereon from the day that the loss or damage occurred except:

1. During a period of time, the person liable for the damages was prevented by law, or an act of the person entitled to recover the damages from paying the damages.

You must decide:

1. The amount of damages (if any), and
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 the plaintiff, you must indicate on the verdict form whether you find plaintiff is entitled to prejudgment interest, and if so, the amount of damages upon which interest is granted and the beginning date or dates of such interest. Based upon your findings, the Court will calculate the amount of interest, if any, the plaintiff is entitled to recover.

INSTRUCTION NO. 27

Upon retiring to the jury room, you will select one of your number to act as your foreperson. The foreperson will preside over your deliberations, and will be your spokesperson here in Court.

A special verdict form has been prepared for your convenience. You will take this form to the jury room and, when you have reached unanimous agreement as to your verdict, you will have your foreperson fill in, date and sign the form to state the verdict upon which you unanimously agree, and then return with your verdict form to the courtroom.

Do not give the verdict form to the Marshal. The foreperson should retain the form until the Clerk gives it to me in open court.

You will be required to provide written answers to certain questions on the verdict form. The questions are to be answered with a "Yes" or a "No" or other brief answer. When all the jurors have agreed to all of the answers to the questions (other than the ones that are immaterial), that will be the verdict of the jury. The foreperson will write the answers of the jury in the space provided under the question. You will refrain from answering any question that has become no longer relevant because of your answer to a previous question.

INSTRUCTION NO. 28

The verdict must represent the considered judgment of each juror. In order to return any verdict, it is necessary that each juror agree thereto. 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. Each of you must decide the case for himself or herself, but do so only after an impartial consideration of the evidence in the case with the other jurors. In the course of your deliberations, do not hesitate to re-examine 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 the other jurors, or for the mere purpose of returning a verdict.

Remember at all times, 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.

INSTRUCTION NO. 29

If you have questions, you may send a note by a marshal, signed by your foreperson, or by one or more members of the jury.

You will note from the oath about to be taken by the marshal that he, as well as all other persons, are forbidden to communicate in any way or manner with any member of the jury on any subject touching the merits of the case.

Bear in mind also that you are never to reveal to any person--not even to the Court--how the jury stands, numerically or otherwise, on any question on the verdict form until after you have reached unanimous verdict.

INSTRUCTION NO. 30

It is proper to add a final caution.

Nothing that I have said in these instructions -- and nothing that I have said or done during the trial -- has been said or done to suggest to you what I think your verdicts should be.

What the verdicts shall be is your exclusive duty and responsibility.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

<p>LOWELL LUNDSTROM, JR., Plaintiff, vs. DANIEL M. HOMOLKA P.A., DANIEL M. HOMOLKA, WATTS GUERRA LLP, AND MIKAL C. WATTS, Defendants.</p>	<p>1:19-CV-01006-CBK SPECIAL VERDICT</p>
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We, the jury, duly impaneled in the above-entitled action, and sworn to try the issues therein, make the following findings:

QUESTION NO. 1: Did Daniel M. Homolka breach the contract he made with Lowell Lundstrom, Jr.?

_____ Yes

_____ No

QUESTION NO. 2: Did Daniel M. Homolka fraudulently induce Lowell Lundstrom, Jr. to perform work regarding the Syngenta litigation?

_____ Yes

_____ No

If your answer to Question No. 2 was “No,” you should proceed to Question No. 3.

If your answer to Question No. 2 was “Yes,” you should skip Question No. 3 and proceed to Question No. 4.

QUESTION NO. 3: Was Daniel M. Homolka unjustly enriched by Lowell Lundstrom, Jr.’s work regarding the Syngenta litigation?

_____ Yes

_____ No

If your answer to Question Nos. 1, 2 and 3 is “No,” you should proceed to the end of this form and sign it.

If your answer to Question No. 1, 2 or 3 is “Yes,” you should proceed to Question No. 4.

◦ **QUESTION NO. 4:** If your answer to Questions Nos. 1, 2 or 3 is “Yes,” what damages will compensate Lowell Lundstrom, Jr.?

\$ _____
(Amount of Damages)

QUESTION NO. 5: If you have awarded damages, do you find that Lowell Lundstrom, Jr. is entitled to prejudgment interest?

_____ Yes
_____ No

If your answer is “Yes,” what amount of damages are subject to prejudgment interest?

\$ _____
(Amount of Damages)

If your answer is “Yes,” from what date should prejudgment interest be calculated?

Date of Loss

QUESTION NO. 6. Was Daniel M. Homolka acting as an agent for Daniel M. Homolka, P.A.?

_____ Yes
_____ No

QUESTION NO. 7: Was Daniel M. Homolka acting as an agent for Mikal C. Watts?

_____ Yes
_____ No

QUESTION NO. 8: Was Daniel M. Homolka acting as an agent for Watts Guerra
LLP?

_____ Yes

_____ No

QUESTION NO. 9: Was Mikal C. Watts acting as a partner for Watts Guerra
LLP?

_____ Yes

_____ No

QUESTION NO. 10: Were Mikal C. Watts and Watts Guerra LLP and Daniel
M. Homolka and Daniel M. Homolka, P.A. engaged in a joint venture?

_____ Yes

_____ No

Dated this _____ day of November, 2021.

Foreperson