

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CITY OF SPEARFISH, a South Dakota
Municipal Corporation, and ELKHORN
RIDGE MANAGEMENT, LLC, a South
Dakota Limited Liability Company,

Plaintiffs,

vs.

DUININCK, INC., (MN), f/k/a
DUININCK BROS., INC., d/b/a DBI,
A Minnesota Corporation,

Defendant and
Third-Party Plaintiff,

vs.

AMERICAN TECHNICAL SERVICES,
INC.,

Third-Party
Defendant.

CIV. 14-5039-KES

**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.

FINAL INSTRUCTION NO. 2 – BURDEN OF PROOF

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

Greater convincing force 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 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 convincing force, 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 convincing force of the evidence, you should consider all of the evidence bearing upon that issue, regardless of who produced it.

You have probably heard the phrase “proof beyond a reasonable doubt.” That is a stricter standard than “more likely true than not true.” It applies in criminal cases, but not in this civil case; so put it out of your mind.

FINAL INSTRUCTION NO. 3 – 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.

FINAL INSTRUCTION NO. 4 – EXPERT WITNESS TESTIMONY

A witness may qualify as an expert and give an opinion on a matter at issue if the witness has special knowledge, skill, experience, training, or education concerning the matter on which the expert testifies. In deciding the weight to give to the opinion, you should consider the expert's qualifications, credibility, and reasons for the opinion. You are not bound by the opinion. If you decide that the reasons for the expert's opinion are unsound, or that other evidence outweighs the opinion, you may disregard the opinion entirely.

FINAL INSTRUCTION NO. 5 – CORPORATION AS PARTY

The fact that the parties to this action are corporations is immaterial. In the eyes of the law, the corporation is an individual party to the lawsuit, and all parties are entitled to the same impartial treatment.

FINAL INSTRUCTION NO. 6 – CORPORATE EMPLOYEES

A corporation can act only through its officers, employees, and agents. Any act or omission of an officer, employee, or agent within the scope of his or her employment is the act or omission of the corporation for which he or she was then acting.

FINAL INSTRUCTION NO. 7 – BREACH OF CONTRACT ELEMENTS

The City of Spearfish (Spearfish) and Elkhorn Ridge Management, LLC (Elkhorn) allege that Duininck, Inc. breached its contract when it incorrectly installed a pipe and drainage system for an irrigation pond on the Elkhorn Ridge Golf Course. Duininck denies any wrongdoing. To establish that Duininck is liable on the breach of contract claim, Spearfish and Elkhorn must prove each of the following four elements by the greater convincing force of the evidence:

One, Duininck, Spearfish, and Elkhorn had an enforceable promise;

The parties stipulate that they entered into a valid contract.

Under the contract, Duininck was responsible to ensure that the golf course was constructed pursuant to the plans and specifications.

Two, Duininck breached that promise;

The court has determined as a matter of law that Duininck cannot be held liable for deficient construction that arises from the work that was completed by Colorado Lining. Thus Duininck can only be held liable for deficient work that was completed by Duininck or another subcontractor—other than Colorado Lining. The burden is on Duininck to prove by the greater convincing force of the evidence that the deficient work, if any, was completed by Colorado Lining.

Three, the breach was the legal cause of Spearfish and Elkhorn's damages;

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, nor the last or nearest cause. A legal cause may act in combination with other causes to produce a result.

And four, Spearfish and Elkhorn were damaged.

If you find that Spearfish and Elkhorn proved each of the four elements by the greater convincing force of the evidence, your verdict on the breach of contract claim must be for Spearfish and Elkhorn. If, on the other hand, they failed to prove any of these elements by the greater convincing force of the evidence, then your verdict must be for Duininck.

**FINAL INSTRUCTION NO. 8 – BREACH OF CONTRACT – COMPENSATORY
DAMAGES**

If you determine that Duininck breached its contract with Spearfish and Elkhorn, you must then fix the amount of money that will reasonably and fairly compensate Spearfish and Elkhorn for all detriment legally caused by the breach, or which, in the ordinary course of things, would be likely to result from the breach.

Damages for breach of contract that are not clearly ascertainable in both their nature and origin are not recoverable.

FINAL INSTRUCTION NO. 9 – NEGLIGENCE – ELEMENTS

If you find that Duininck breached its contract with Spearfish and Elkhorn, then you should determine if American Technical Services was negligent. Duininck alleges that American Technical Services was negligent in the opinion it gave concerning the gypsum found in the irrigation pond, and in the recommendations and advice it gave or failed to give to address the gypsum in the irrigation pond. To show that American Technical Services is liable, Duininck must prove by the greater convincing force of the evidence the following two elements:

First, American Technical Services 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 facts similar to those shown by the evidence. That is for you to decide.

An engineer has the duty to possess that degree of knowledge and skill ordinarily possessed by an engineer of good standing engaged in the same line of practice in the same or similar locality.

An engineer also has the duty to use that care and skill ordinarily exercised under similar circumstances by members in good standing of the profession engaged in the same profession in the same or similar locality and to be diligent in an effort to accomplish the purpose for which employed.

A failure to fulfill any such duty is negligence.

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

You must decide whether American Technical Services possessed and used the knowledge, skill, and care that the law demands of an engineer based on the testimony and evidence of members of the profession who testified as expert witnesses.

However, you are permitted to consider the opinions and conclusions of lay witnesses on those subjects that are within the common knowledge and comprehension of people who have ordinary education, experience, and opportunity for observation.

And *Second*, American Technical Services' negligence was a legal cause of an injury to Duininck.

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 natural and probable sequence 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. American Technical Services' conduct must have such an effect in producing the harm as to lead reasonable people to regard it as a cause of Duininck'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, nor the last or nearest cause. A legal cause may act in combination with other causes to produce a result.

If you find that Duininck has not proved both of the above elements by the greater convincing force of evidence, enter your verdict for American Technical Services on the verdict form. If you find that Duininck has proved both of the above elements by the greater convincing force of the evidence, proceed to Final Instruction Number 10.

FINAL INSTRUCTION NO. 10 – CONTRIBUTORY NEGLIGENCE

Contributory negligence is negligence on the part of a third-party plaintiff which, when combined with the negligence of a third-party defendant, contributes as a legal cause in bringing about the injury to the third-party plaintiff. If you find that the third-party plaintiff is contributorily negligent, it may still recover damages if that contributory negligence is slight, or less than slight, when compared with the negligence of the third-party defendant.

In determining this issue, you must answer two questions:

One, whether both Duininck and American Technical Services, Inc. were negligent; and

Two, if both were negligent, whether Duininck's negligence was

(a) slight or less than slight, or

(b) more than slight in comparison with American Technical Services' negligence.

The term "slight" means small when compared with the negligence of American Technical Services.

In making this determination, you must make a direct comparison between the conduct of Duininck and American Technical Services.

If you find Duininck's contributory negligence is more than slight when compared with the negligence of American Technical Services then Duininck will be solely responsible for the damages caused to Spearfish and Elkhorn.

If you find Duininck's contributory negligence is slight, or less than slight, when compared with the negligence of American Technical Services,

then Duininck is not solely responsible for the damages caused to Spearfish and Elkhorn. If you enter a verdict in favor of Duininck, you will be asked to assign a percentage of fault to Duininck and American Technical Services as to the damages caused to Spearfish and Elkhorn.

FINAL INSTRUCTION NO. 11 – 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.

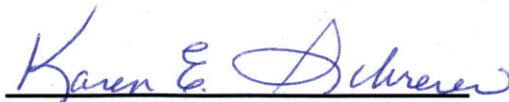
Third, if you need to communicate with me during your deliberations, you may send a note to me through the marshal or court security officer,

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 January 19th, 2017.

A handwritten signature in blue ink that reads "Karen E. Schreier". The signature is written in a cursive style and is underlined.

KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE

Plaintiff's Proposed Jury Instruction No. 3 Revised

DBI claims that the liner leaks were caused by Colorado Lining, Inc. DBI's claim is that when Colorado Lining installed the pond liner, Colorado Lining cut the drainage pipe that DBI had installed, placed a non-water tight coupling underground and behind the liner at an elevation below the water surface of the pond, and then installed an additional piece of drainage pipe from the coupling and into the pond.

DBI further claims that these acts of Colorado Lining were the legal cause of the 2012 leaks.

DBI has the burden of proving these claims by the greater convincing force of the evidence.

Source: SDPJI 1-60-10: This revision deletes references to 2013 leak to reflect the Court's ruling that the Release applies to bar Plaintiffs' Claims for the 2013 leak.

FILED

JAN 19 2017


CLERK

1-19-17
Refused
K. Schreier