

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

MANUFACTURING VENTURES LLC, d/b/a
CRAFTCO HARDWOOD FLOORS, INC.,

Plaintiff/Counter-Defendant,

v.

NO.: 06-2600-JPM-tmp

CUSTOM KILNS, INC.,

Defendant/Counter-Plaintiff,

PATRICK PLASS,

Defendants.

CUSTOM KILNS, INC.,

Third-Party Plaintiff/
Counter-Defendant,

v.

JAMES P. PIERRON,

Third-Party Defendant,

ROSE MACHINE & TOOL LLC, and
PAUL FREUDENBERG d/b/a 55 CORP.,

Third-Party Defendants/
Counter-Plaintiffs.

JURY INSTRUCTIONS

Ladies and gentlemen of the jury, we have now come to the point in the case when it is my duty to instruct you in the law that applies to the case and you must follow the law as I state it to you.

As jurors it is your exclusive duty to decide all questions of fact submitted to you and for that purpose to determine the effect and value of the evidence.

You must not be influenced by sympathy, bias, prejudice or passion.

You are not to single out any particular part of the instructions and ignore the rest, but you are to consider all the instructions as a whole and regard each in the light of all the others.

Now let me outline for you the parts of the charge so that you can follow it more easily. First, I will instruct you as to the burden of proof and upon which party the law places that burden in the case, and I will give you some rules to help you as you consider the evidence. Second, I will review with you the stipulations of the parties. Third, I will outline for you the law to apply in determining the legal issues with respect to breach of contract, fraud, negligent misrepresentation, violations of the Tennessee Consumer Protection Law, conversion, civil conspiracy, tortious interference with business relationships, and inducement to breach a contract. Fourth, I will instruct you on the law with respect to damages. Finally, I will explain to you about the form of your verdict.

I. GENERAL INSTRUCTIONS

Corporate Defendant:
All Persons Equal Before the Law

In this case, Manufacturing Ventures LLC, d/b/a Craftco Hardwood Floors, Inc. ("Craftco"), Custom Kilns, Inc. ("Custom Kilns"), and Rose Machine & Tool LLC ("Rose Machine") are corporations. The fact that a corporation is a party must not prejudice you in your deliberations or in your verdict.

You may not discriminate between corporations and natural individuals. Both are persons in the eyes of the law, and both are entitled to the same fair and impartial consideration and to justice by the same legal standards.

This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations of life. A corporation is entitled to the same fair trial at your hands as a private individual. All persons, including corporations, partnerships, unincorporated associations, and other organizations, stand equal before the law and are to be dealt with as equals in a court of justice.

While corporations are parties in this case, that does not mean that only the actions of the corporation as one body can be considered by you in determining its liability in this case. A corporation acts not only through the policies and decisions that it makes, but also through its designated supervisory employees, such as its managers, supervisors, and others designated by the corporation to act on its behalf.

Pay close attention to the remainder of these instructions. As you apply subsequent portions of these instructions, you will have to determine whether or not individual corporate employees were authorized to act on behalf of their corporation.

Separate Consideration

Although there may be more than one party on each side in this case, it does not follow from that fact alone that if one is liable both are liable. Each party is entitled to fair and separate consideration of the case and is not to be prejudiced by your decision concerning the other party or parties.

In our system of justice, it is your duty to separately consider the evidence as to each party and to return a separate verdict for each one. For each party, you must decide what the evidence establishes as to that particular party.

Your decision as to one party, whatever that decision is, should not influence your decision as to any of the other parties.

Each party is entitled to fair and separate consideration of his or its own case and is not to be prejudiced by your decision concerning the other parties.

Burden of Proof and
Consideration of the Evidence

I will now instruct you with regard to where the law places the burden of making out and supporting the facts necessary to prove the theories in the case.

When, as in this case, a party denies the material allegations of the other party's claims, the law places upon the party bringing a claim the burden of supporting and making out each element of each claim by the greater weight or preponderance of the evidence.

Preponderance of the evidence means that amount of factual information presented to you in this trial which is sufficient to cause you to believe that an allegation is probably true. In order to preponderate, the evidence must have the greater convincing effect in the formation of your belief. If the evidence on a particular issue appears to be equally balanced, the party having the burden of proving that issue must fail.

You must consider all the evidence pertaining to every issue, regardless of who presented it.

Clear and Convincing Evidence

As I have indicated, the law places the burden of proof on the party asserting a claim by the greater weight or preponderance of the evidence as to each claim asserted in this case.

There is, however, a different burden of proof as to the claim asserted by Custom Kilns against Mr. Freudenberg for allegedly inducing Rose Machine & Tool to breach its contract with Custom Kilns.

Clear and convincing evidence is a higher standard than preponderance of the evidence. It means evidence that clearly shows there is no serious or substantial doubt about the correctness of the conclusion to be drawn from the evidence.

This is the burden of proof that applies when determining whether or not Mr. Freudenberg induced a breach by Rose Machine of its contract with Custom Kilns.

Weighing the Evidence (2-12)

You members of the jury are judges of the facts concerning the controversy involved in this lawsuit. In order for you to determine what the true facts are, you are called upon to weigh the testimony of every witness who has appeared before you, and to give the testimony of each witness the weight, faith, credit, and value to which you think it is entitled.

You will note the manner and demeanor of each witness while on the stand. You must consider whether the witness impressed you as one who was telling the truth or one who was telling a falsehood and whether or not the witness was a frank witness. You should consider the reasonableness or unreasonableness of the testimony of the witness; the opportunity or lack of opportunity of the witness to know the facts about which he or she testified; the intelligence or lack of intelligence of the witness; the interest of the witness in the result of the lawsuit, if any; the relationship of the witness to any of the parties to the lawsuit, if any; and whether the witness testified inconsistently while on the witness stand, or if the witness said or did something or failed to say or do something at any other time that is inconsistent with what the witness said while testifying.

If a witness is shown to have knowingly testified falsely concerning any material matter, you have a right to distrust such witness's testimony in other particulars, and you may reject all the testimony of that witness or give it such credibility as you may think it deserves. An act or omission is done "knowingly" if it is done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

These are the rules that should guide you, along with your common judgment, your common experience, and your common observations gained by you in your various walks in life, in weighing the testimony of the witnesses who have appeared before you in this case. If there is a conflict in the testimony of the witnesses, it is your duty to reconcile that conflict if you can, because the law presumes that every witness has attempted to and has testified to the truth. But if there is a conflict in the testimony of the witnesses which you are not able to reconcile, in accordance with these instructions, then it is with you absolutely to determine which ones of the witnesses you believe have testified to the truth and which ones you believe have testified to a falsehood.

Immaterial discrepancies do not affect a witness's testimony, but material discrepancies do. In weighing the effect

of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

The greater weight or preponderance of the evidence in a case is not determined by the number of witnesses testifying to a particular fact or a particular state of facts. Rather, it depends on the weight, credit, and value of the total evidence on either side of the issue, and of this you jurors are the exclusive judges.

If in your deliberations you come to a point where the evidence is evenly balanced and you are unable to determine which way the scales should turn on a particular issue, then the jury must find against the party upon whom the burden of proof has been cast in accordance with these instructions.

Direct and Circumstantial Evidence

There are two kinds of evidence - direct and circumstantial. Direct evidence is testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is indirect evidence - that is, it is proof of one or more facts from which one can find another fact.

You may consider both direct and circumstantial evidence in deciding this case. The law permits you to give equal weight to both, but it is for you to decide how much weight to give to any evidence.

Statements of Counsel

You must not consider as evidence any statements of counsel made during the trial. If, however, counsel for the parties have stipulated to any fact, or any fact has been admitted by counsel, you will regard that fact as being conclusively established.

As to any questions to which an objection was sustained, you must not speculate as to what the answer might have been or as to the reason for the objection, and you must assume that the answer would be of no value to you in your deliberations.

You must not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken out by the court. Such matter is to be treated as though you had never known it.

You must never speculate to be true any insinuation suggested by a question asked a witness. A question is not evidence. It may be considered only as it supplies meaning to the answer.

Comments by the Court

During the course of a trial on a few occasions, I occasionally asked questions of a witness in order to bring out facts not then fully covered in the testimony. Please do not assume that I hold any opinion on the matters to which my questions may have related. Remember that you, as jurors, are at liberty to disregard all comments of the Court in arriving at your own findings as to the facts.

Totality of the Evidence (2-A)

The jury may consider all evidence admitted in the case. Testimony and documents that the Court allowed into evidence over a hearsay objection may be considered by you as evidence, on the same basis as all other evidence, for the purpose for which it was admitted. For example, matters and things that a decisionmaker is told may be considered for the purpose of explaining the basis upon which that person acted or made a decision. This, of course, is all for you, the jury, to decide.

Evidence Regarding Settlement Discussions

The law encourages settlements and does not allow the introduction of proof regarding settlement discussions or negotiations for the purpose of proving that one side or the other side is liable.

In this case, the parties have agreed to allow the discussion of the December 11 settlement conference because it may be relevant in understanding the sequence of events. The failure to settle or participate in settlement discussions may not be considered by you as establishing any fact in this case. Information regarding settlement discussions is to be used by you for the limited purpose of determining the sequence of events and for no other purpose.

II. STIPULATED FACTS

Before the trial of this case, the parties agreed to the truth of certain facts in this action. As a result of this agreement, the parties entered into certain stipulations in which they agreed that the stipulated facts could be taken as true without any party presenting further proof on the matter. This procedure is often followed to save time in establishing facts which are undisputed.

Facts stipulated to by the parties in this case include the following:

1. In January 2006, Craftco Hardwood Floors, Inc. and Custom Kilns entered into the Craftco Contract for the sale and installation of wood drying Kilns.
2. The Craftco Contract states "Craftco Hardwood Floors, Inc. promises to pay the Contract balance in 3 installments as follows: 70% of the Contract price upon execution of the Contract and order of equipment[;] 20% of Contract price upon initial shipment of equipment[;] 10% balance of Contract price on completion of installation not to exceed 60 days from shipment."

3. Craftco made the initial installment.
4. In mid-July 2006, Custom Kilns began making shipments to Craftco Hardwood Floors, Inc.
5. On August 15, 2006, Custom Kilns faxed Craftco an invoice for the second installment.
6. After receiving several shipments, and the invoice for the second installment, Craftco attempted to modify the payment terms of the Craftco Contract and Custom Kilns rejected the modification.
7. Craftco made no further payments to Custom Kilns.
8. Custom Kilns made no more shipments, nor did it authorize further shipments after August 17, 2006.
9. For the Craftco project, Custom Kilns entered into a contract with Phoenix Metals for the purchase of raw materials.
10. For the Craftco project, Custom Kilns entered into the Freudenberg Contract with Mr. Freudenberg for the purchase

of raw materials. Mr. Freudenberg delivered all of the raw materials that Custom Kilns had requested to the delivery location on or before July 20, 2006.

11. Custom Kilns also entered into the Rose Machine Contract with Rose Machine for the fabrication of the raw materials provided by Phoenix Metals and Mr. Freudenberg.
12. At Custom Kilns request, Mr. Freudenberg had delivered the raw materials to Rose Machine for fabrication.
13. Rose Machine performed in accordance with the terms of the Rose Machine Contract until it was instructed to stop performing by Keith Paluso of Custom Kilns on August 30, 2006.
14. Custom Kilns did not pay Mr. Freudenberg for the raw materials that he had provided pursuant to the Freudenberg Contract.
15. Custom Kilns did not pay Rose Machine for the services it rendered pursuant to the Rose Machine Contract.

16. After a period of time had passed and Mr. Freudenberg still had not been paid, Mr. Freudenberg contacted Rose Machine to determine who the ultimate purchaser of the kilns was.
17. Rose Machine did not provide a name but stated the kilns were to be shipped to Portsmouth, Ohio.
18. Mr. Freudenberg made contact with Craftco Hardwood Floors, Inc. to determine if it was the ultimate purchaser of the materials he had delivered to Rose Machine's property.
19. Jim Pierron of Craftco Hardwood Floors, Inc. told Mr. Freudenberg that Craftco was the ultimate purchaser.
20. Mr. Freudenberg requested payment in the amount of \$103,213.14 for the raw materials that he had provided.
21. Thereafter, an agreement was entered into between Craftco and Mr. Freudenberg in which Mr. Freudenberg agreed to provide Craftco with the materials he had provided Custom Kilns pursuant to the Freudenberg Contract.
22. On December 19, 2006, Rose Machine and Mr. Freudenberg entered into a written agreement in which Rose Machine

agreed to allow Mr. Freudenberg to remove the materials he had provided pursuant to the Freudenberg Contract and that were still present on Rose Machine's premises.

23. Mr. Freudenberg received a total amount of \$90,000.00 from Craftco Hardwood Floors, Inc. in exchange for the materials he had provided pursuant to the Freudenberg Contract.

24. Rose Machine and Mr. Freudenberg also agreed that Mr. Freudenberg would pay Rose Machine for the fabrication of the materials pursuant to the Rose Machine Contract.

25. Mr. Freudenberg further agreed to pay Phoenix Metals for the materials that it furnished since those materials had been combined with the materials that Mr. Freudenberg had provided during the fabrication process at Rose Machine's facility.

III. CLAIMS OF THE PARTIES AND THE LAW REGARDING LIABILITY

Turning now to the law in the case, it is my duty to tell you what the law is. If any lawyer has told you that the law is different from what I tell you it is, you must, of course, take the law as I give it to you. That is my duty. However, it is your duty, and yours alone, to determine what the facts are, and after you have determined what the facts are, to apply those facts to the law as I give it to you, free from any bias, prejudice, or sympathy, either one way or the other.

I will first instruct you regarding the elements that must be established by a preponderance of the evidence as to the breach of contract claims. I will then instruct you regarding the elements that must be established by a preponderance of the evidence as to the tort claims: (1) fraud, (2) negligent misrepresentation, (3) violations of Tennessee Consumer Protection Law, (4) conversion, (5) civil conspiracy, and (6) tortious interference with business relationships. Lastly, I will instruct you regarding the elements that must be established by clear and convincing evidence as to the claim of inducement to breach a contract.

A. CONTRACT ISSUES

The Court will now instruct you regarding the parties' first theory of relief - Breach of Contract. Custom Kilns asserts breach of contract claims against Craftco, Mr. Pierron, and Rose Machine. Mr. Freudenberg asserts a breach of contract claim against Custom Kilns. Rose Machine asserts a breach of contract claim against Custom Kilns.

You must decide the contract issues according to the instructions that I will give to you. There are three contracts that are the subject of some of the claims that you must decide in this case. The contracts are:

1. An agreement entered into between Craftco and Custom Kilns for the sale and installation of four kilns and a steamer;
2. An agreement entered into between Custom Kilns and Mr. Freudenberg to supply raw materials for the Craftco project; and
3. An agreement entered into between Custom Kilns and Rose Machine for the fabrication of materials for the Craftco project.

1. Contracts Generally

Instruction Regarding Certain Contract Claims

The Court has made certain legal findings concerning the contracts between Craftco and Custom Kilns and between Mr. Freudenberg and Custom Kilns.

The Court has determined that, when Craftco sent the facsimile on August 16, 2006, regarding modifications to the payment terms of the contract between Craftco and Custom Kilns, Craftco provided Custom Kilns with a basis for reasonable concern regarding Craftco's willingness to perform under the contract. In response, Custom Kilns sent Craftco a written request for adequate assurances that Craftco would perform under the contract. Craftco was required to provide Custom Kilns with such adequate assurances within thirty days of this request, and it failed to do so. This conduct by Craftco as a matter of law constitutes a breach - an unexcused non-performance - of its contract with Custom Kilns.

In addition, there is no dispute among the parties that, by failing to meet its obligations to pay under its contract with Mr. Freudenberg, Custom Kilns breached that contract.

While the Court has determined that, under the law, material breaches have been established as a matter of law, it remains the

jury's duty, and yours alone, to determine all of the remaining disputed issues in this case.

Rose Machine's Duties as Bailee of Custom Kilns

The Court has made certain legal determinations regarding the contract between Rose Machine and Custom Kilns.

Because the parties contracted for Rose Machine to fabricate materials for Custom Kilns to use on the Craftco project, which required delivery of raw materials to Rose Machine in order to perform the fabrication work, two independent contractual agreements were established: (1) the contract for the fabrication services to be performed by Rose Machine, and (2) a bailment for mutual benefit.

A bailment for mutual benefit is where one party holds the property of another to perform services on the property, receiving compensation for the services. The bailment arises as an incident to the services, and it is not required for the parties to arrange for compensation for the bailment as such.

Here, the delivery of raw materials to Rose Machine to fabricate into parts for the Craftco project created a bailment for mutual benefit. As bailee of Custom Kilns's materials, Rose acquired a bailee's lien on the materials. Although this lien gave Rose the right to retain possession of the goods until it received payment from Custom Kilns, Rose could not lawfully sell the goods without conforming to certain written notice requirements under the law. The parties do not dispute that Rose

Machine did not meet these requirements. The Court has determined, therefore, that Rose Machine's sale of the goods was a breach of its contractual duties as bailee of Custom Kilns.

Contract - Definition

A contract is an agreement or exchange of promises between two or more persons to do or not to do certain things. This agreement or exchange of promises can be oral or in writing and must be supported by something of value. The requirements for a valid contract are an offer, an acceptance, and consideration.

Offer

An offer occurs when one party communicates to the other a willingness to enter into a contract. The communication must be made under circumstances that would justify the other party in understanding that an agreement would result if the offer were accepted.

Acceptance

An acceptance occurs when a party communicates by words or actions an agreement to an offer. It must be made before the offer is withdrawn and must match the terms of the offer.

Consideration

For there to be a sufficient exchange of consideration, something of value must be bargained for and given in exchange for the other party's promise. "Something of value" may be a promise, an act, or forbearance. It can be a benefit to one party or a detriment to the other party. Its actual value in money terms is not important.

Form of Contract

A contract can be entirely oral or entirely written, or it can be partly oral and partly in writing. It is not necessary that the parties use any particular words or form of agreement. Words and phrases commonly used in daily life are sufficient, such as agreement, purchase order, letter, e-mail, and telephone call. In each instance the essential ingredient is that the parties agree on the object of the contract.

The Court will now instruct you regarding Custom Kilns's theory that Manufacturing Ventures LLC was the alter ego of James Pierron. You must decide the alter ego issues according to the instructions that I will give to you.

Custom Kilns claims that Mr. Pierron is the alter ego of Manufacturing Ventures LLC, and accordingly, any liability for Manufacturing Ventures's actions should be assessed against Mr. Pierron individually.

Although a corporation is presumptively treated as a distinct entity from its officers, that distinction may be disregarded, or "pierced," under certain circumstances. In other words, under some circumstances, you may disregard the separate existence of a corporation. One such circumstance is when the corporation is shown to be a "sham or dummy," sometimes referred to as the "alter ego theory" of piercing the corporate veil.

To find that a corporation is the alter ego of another individual(s), you must consider the following factors:

- (1) Whether there was a failure to collect paid in capital;
- (2) Whether the corporation was grossly undercapitalized;
- (3) The nonissuance of stock certificates;
- (4) The sole ownership of stock by one individual;

- (5) The use of the same office or business location;
- (6) The employment of the same employees or attorneys;
- (7) The use of the corporation as an instrumentality or business conduit for an individual or another corporation;
- (8) The diversion of corporate assets by or to a stockholder or other entity to the detriment of creditors, or the manipulation of assets and liabilities in another;
- (9) The use of the corporation as a subterfuge in illegal transactions;
- (10) The formation and use of the corporation to transfer to it the existing liability of another person or entity;
and
- (11) The failure to maintain arms length relationships among related entities.

Custom Kilns bears the burden of presenting facts in support of the above factors, but it is not necessary for all of the factors to weigh in Custom Kilns's favor.

2. Breach of Contract

Breach of Contract - Law

I will now instruct you as to the law regarding the breach of contract claims.

The following three elements must be proven by the greater weight or preponderance of the evidence in order to prove a breach of contract:

1. The existence of the contract;
2. An unexcused non-performance of an obligation under the contract amounting to a breach of contract; and
3. Damages caused by the breach.

I will instruct you concerning damages later in these instructions.

I will now further define the terms I have just set out regarding breach of contract.

Breach of Contract - Definition

If you find that a valid contract or contracts was or were entered into, you must determine whether either party breached the contract. If a party does not perform according to the contract terms, that party has committed a breach of the contract. Any unexcused breach of contract allows a non-breaching party to recover damages.

Thus, the first thing that you must determine in deciding these breach of contract claims is whether the party accused of breach of contract did something that was prohibited by the specific provisions of their contracts, or failed to do something that their contracts specifically required.

The breach of contract must be a material breach. A minor and insubstantial failure of a party to meet the terms of a contract does not entitle the other party to reject the contract and not be responsible under it. To be a "breach" under these instructions, the action or inaction by the non-performing party (the party "in breach" of the contract) must be material in the overall context of the contract terms you are considering. Factors that you may consider in determining whether a breach is material include the following: (1) the extent to which the injured party will be deprived of the expected benefits under the contract; (2) the extent to which the injured party can be

adequately compensated for loss of benefit;(3) the extent to which the non-performing party will suffer forfeiture (i.e., a divestiture of specific property without compensation); (4) the likelihood that the non-performer will cure the failure or has cured the failure, taking into account the circumstances including any reasonable assurances; and (5) the extent to which the behavior of the non-performing party comports to standards of good faith and fair dealing. Although none of the above factors alone is dispositive on the question of whether a breach is material, they should guide your decision.

Normally, a party who commits the first substantial breach of a contract cannot enforce the contract against the other party even if the other party later fails to abide by the terms of the contract. There must be a financial loss in order to recover damages for breach of contract.

Breach of Contract - Waiver

Waiver is the voluntary surrender of a known right. It can be proved by statements, acts, or conduct of a party showing an intent not to claim a right.

The parties may jointly agree to waive one or more requirements of the contract. If a party to the contract claims the other party waived a contract right, the burden of proof is on the party claiming the waiver to show that the other party gave up a contract right and did so with full and complete knowledge of the relevant facts.

If a party waived a particular term in the contract, that party can no longer enforce that part of the contract.

Breach of Contract - Repudiation
Tn Civil 13.11

Any party to a contract has a legal right to abandon or refuse to perform the contract where the other party has actually defaulted, has unequivocally renounced the contract, or is completely unable to perform the terms of the contract.

Seller's Remedies on Discovery of Buyer's Insolvency
47-2-702

Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within ten (10) days after the receipt, but if misrepresentation of solvency has been made to the particular seller in writing within three (3) months before delivery the ten (10) day limitation does not apply. Except as provided in this subsection the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay.

Any receipt of goods on credit by an insolvent buyer may constitute a tacit business misrepresentation of solvency and therefore may be fraudulent as against the particular seller.

A person/business is "insolvent" when it has ceased to pay its debts in the ordinary course of business or cannot pay its debts as they become due.

Written Misrepresentation of Solvency

Whether a writing constitutes a written misrepresentation of solvency is a question of fact. As a general rule, checks given in payment for goods are written representations of solvency.

Bailment

A bailee who has sufficient notice of the title or paramount claim of a third person must yield to that claim or title.

Unless otherwise explicitly agreed, title passes to the buyer at the time and place at which the seller completes his/its performance with reference to the physical delivery of the goods.

If the contract requires or authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment, but if the contract requires delivery at destination, title passes on tender (i.e. delivery to) that destination.

Seller's Stoppage of Delivery in Transit or Otherwise
47-2-705

The seller may stop delivery of goods in the possession of a carrier or other bailee when he discovers the buyer to be insolvent and may stop delivery when the buyer repudiates or fails to make a payment due before delivery or if for any other reason the seller has a right to withhold or reclaim the goods.

To stop delivery the seller must so notify as to enable the bailee by reasonable diligence to prevent delivery of the goods.

After such notification the bailee must hold and deliver the goods according to the directions of the seller but the seller is liable to the bailee for any ensuing charges or damages.

Breach of Contract - Claims of the Parties

Custom Kilns claims that Craftco and Mr. Pierron breached a contract with it by failing to make installment payments as dictated by the contract and by repudiating the contract in an attempt to substantially modify the payment terms.

Custom Kilns also claims that Rose Machine breached a contract with it by delivering materials that Rose Machine had contracted to fabricate for Custom Kilns to Mr. Freudenberg without Custom Kilns's permission.

Mr. Freudenberg claims that Custom Kilns breached a contract with it by failing to make payment under the terms of the contract.

Rose Machine claims that Custom Kilns breached a contract with it by failing to make payment under the terms of the contract.

3. Summary of Contract Issues

If Custom Kilns has proven by a preponderance of the evidence that Craftco breached the contract between Custom Kilns and Craftco (and recall that the Court has determined that Craftco committed a material breach), you must return a verdict for Custom Kilns and answer Verdict Form Question No. 2 "Yes" as to Craftco. If Custom Kilns has failed to prove by a preponderance of the evidence that Craftco breached the contract, and Custom Kilns has failed to prove by a preponderance of the evidence any of the other claims it brings against Craftco, you must return a verdict for Craftco and answer Verdict Form Question No. 2 "No" as to Craftco.

If Custom Kilns has proven by a preponderance of the evidence that Mr. Pierron breached the contract between Custom Kilns and Craftco, you must return a verdict for Custom Kilns and answer Verdict Form Question No. 2 "Yes" as to Mr. Pierron. If Custom Kilns has failed to prove by a preponderance of the evidence that Mr. Pierron breached the contract, and Custom Kilns has failed to prove by a preponderance of the evidence any of the other claims it brings against Mr. Pierron, you must return a verdict for Mr. Pierron and answer Verdict Form Question No. 2 "No" as to Mr. Pierron.

If Custom Kilns has proven by a preponderance of the evidence that Rose Machine breached the contract between Custom Kilns and Rose Machine, you must return a verdict for Custom Kilns and answer Verdict Form Question No. 2 "Yes" as to Rose Machine. If Custom Kilns has failed to prove by a preponderance of the evidence that Rose Machine breached the contract, and Custom Kilns has failed to prove by a preponderance of the evidence any of the other claims it brings against Rose Machine, you must return a verdict for Rose Machine and answer Verdict Form Question No. 2 "No" as to Rose Machine.

If Mr. Freudenberg has proven by a preponderance of the evidence that Custom Kilns breached the contract between Mr. Freudenberg and Custom Kilns, you must return a verdict for Mr. Freudenberg and answer Verdict Form Question No. 4(a) "Yes." If Mr. Freudenberg has failed to prove by a preponderance of the evidence that Custom Kilns breached the contract, and Mr. Freudenberg has failed to prove by a preponderance of the evidence the fraud claim he brings against Custom Kilns, you must return a verdict for Custom Kilns and answer Verdict Form Question No. 4(a) "No."

If Rose Machine has proven by a preponderance of the evidence that Custom Kilns breached the contract between Rose Machine and Custom Kilns, you must return a verdict for Rose Machine and answer Verdict Form Question No. 5 "Yes." If Rose Machine has failed to prove by a preponderance of the evidence that Custom Kilns breached the contract, you must return a verdict for Custom Kilns and answer Verdict Form Question No. 5 "No."

B. TORT ISSUES

1. Promissory Fraud

Promissory Fraud - Law
Tn Civil 8.41

I will now instruct you as to the law regarding the parties' next claim, promissory fraud. Craftco alleges a claim of fraud against Custom Kilns and Mr. Plass. Custom Kilns alleges a claim of fraud against Mr. Pierron and Craftco. Mr. Freudenberg alleges a claim of fraud against Custom Kilns.

Generally, the subject of a misrepresentation must be a past or existing fact and not a mere promise. If the promise is made without the intent to perform, however, the promise may be a misrepresentation. To recover under this theory, a plaintiff must prove each of the following:

1. The defendant made a promise as to a material matter and, at the time the promise was made, the defendant did not intend to perform it;
2. The defendant made the promise with an intent to deceive the plaintiff. In other words, the defendant made the promise to induce the plaintiff to rely upon it and to act or not act in reliance upon it;

3. The plaintiff was unaware that the defendant did not intend to perform the promise; the plaintiff acted in reliance upon the promise; and the plaintiff was justified in relying upon the promise made by the defendant; and
4. As a result of the reliance upon defendant's promise, the plaintiff has sustained damage.

Promissory Fraud - Proof of Intent Not to Perform
Tn Civil 8.42

Evidence of the defendant's conduct before or after the promise was made may be considered in determining whether the defendant intended to perform when the promise was made.

A party seeking recovery for promissory fraud must have relied upon the representation. In other words, the plaintiff would not have entered into the transaction without the representation. You must determine whether reliance upon the representation substantially influenced the party's action, even though other influences operated as well.

Reliance upon a representation may be shown by direct evidence or may be inferred from the circumstances.

A person claiming to have been damaged by a false representation must not only have acted in reliance on the representation but must have been justified in that reliance. That is, it must be reasonable for the person, in light of the circumstances and that person's intelligence, experience, and knowledge, to accept the representation without making an independent inquiry or investigation.

Summary of Promissory Fraud

If you find that Craftco has proven by a preponderance of the evidence that Custom Kilns is liable for fraud against Craftco, you must return a verdict for Craftco and answer Verdict Form Question No. 1(a) "Yes" as to Custom Kilns. If Craftco has failed to prove by a preponderance of the evidence that Custom Kilns is liable for fraud, and Craftco has failed to prove by a preponderance of the evidence the negligent misrepresentation claim it brings against Custom Kilns, you must return a verdict for Custom Kilns and answer Verdict Form Question No. 1(a) "No" as to Custom Kilns.

If you find that Craftco has proven by a preponderance of the evidence that Mr. Plass is liable for fraud against Craftco, you must return a verdict for Craftco and answer Verdict Form Question No. 1(a) "Yes" as to Mr. Plass. If Craftco has failed to prove by a preponderance of the evidence that Mr. Plass is liable for fraud, and Craftco has failed to prove by a preponderance of the evidence the negligent misrepresentation claim it brings against Mr. Plass, you must return a verdict for Mr. Plass and answer Verdict Form Question No. 1(a) "No" as to Mr. Plass.

If you find that Custom Kilns has proven by a preponderance of the evidence that Mr. Pierron is liable for fraud against Custom Kilns, you must return a verdict for Custom Kilns and answer Verdict Form Question No. 2 "Yes" as to Mr. Pierron. If Custom Kilns has failed to prove by a preponderance of the evidence that Mr. Pierron is liable for fraud, and Custom Kilns has failed to prove by a preponderance of the evidence any of the other claims it brings against Mr. Pierron, you must return a verdict for Mr. Pierron and answer Verdict Form Question No. 2 "No" as to Mr. Pierron.

If you find that Mr. Freudenberg has proven by a preponderance of the evidence that Custom Kilns is liable for fraud against Mr. Freudenberg, you must return a verdict for Mr. Freudenberg and answer Verdict Form Question No. 4(a) "Yes." If Mr. Freudenberg has failed to prove by a preponderance of the evidence that Custom Kilns is liable for fraud, and Mr. Freudenberg has failed to prove by a preponderance of the evidence the breach of contract claim he brings against Custom Kilns, you must return a verdict for Custom Kilns and answer Verdict Form Question No. 4(a) "No."

2. Negligent Misrepresentation

Negligent Misrepresentation - Law
Tn Civil 8.43

I will now instruct you as to the law regarding negligent misrepresentation. Craftco alleges claims of negligent misrepresentation against Custom Kilns and Mr. Plass.

To prove negligent misrepresentation, plaintiff must prove that:

1. The defendant was acting in the course of his business or in any other transaction in which defendant has a financial interest;
2. The defendant negligently supplied materially false information;
3. The defendant intended the information to guide plaintiff in plaintiff's business transaction;
4. The plaintiff justifiably relied upon the false information; and
5. As a result, plaintiff suffered a financial loss.

Plaintiff may prove that defendant negligently supplied false information by proving that (a) defendant failed to exercise reasonable care or competence in obtaining information

about the business transaction or that (b) defendant failed to exercise reasonable care or competence in communicating that information.

Summary of Negligent Misrepresentation

If you find that Craftco has proven by the preponderance of the evidence that Custom Kilns is liable for negligent misrepresentation, you must return a verdict for Craftco and answer Verdict Form Question No. 1(a) "Yes" as to Custom Kilns. If Craftco has failed to prove by a preponderance of the evidence that Custom Kilns is liable for negligent misrepresentation, and Craftco has failed to prove by a preponderance of the evidence the fraud claim it brings against Custom Kilns, you must return a verdict for Custom Kilns and answer Verdict Form Question No. 1(a) "No" as to Custom Kilns.

If you find that Craftco has proven by the preponderance of the evidence that Mr. Plass is liable for negligent misrepresentation, you must return a verdict for Craftco and answer Verdict Form Question No. 1(a) "Yes" as to Mr. Plass. If Craftco has failed to prove by a preponderance of the evidence that Mr. Plass is liable for negligent misrepresentation, and Craftco has failed to prove by a preponderance of the evidence the fraud claim it brings against Mr. Plass, you must return a verdict for Mr. Plass and answer Verdict Form Question No. 1(a) "No" as to Mr. Plass.

3. Violations of the Tennessee Consumer Protection Law

Tennessee Consumer Protection - Law

I will now instruct you as to the law regarding Craftco's and Mr. Freudenberg's claims against Custom Kilns and Mr. Plass under the Tennessee Consumer Protection Law.

Craftco claims that Custom Kilns and Mr. Plass violated the Tennessee Consumer Protection Law. Mr. Freudenberg also claims that Custom Kilns violated the Tennessee Consumer Protection Law. The Tennessee Consumer Protection Law allows a plaintiff to recover actual damages for a loss of money, property, or thing of value as a result of a defendant's use of an unfair or deceptive act or practice.

To recover damages from the defendant for violation of this law, the plaintiff must prove by a preponderance of the evidence that:

1. The defendant's act or practice is unfair or deceptive under this law; and
2. The plaintiff suffered a loss of money, property or thing of value as a result of the unfair or deceptive act or practice.

Craftco claims that Custom Kilns and Mr. Plass used the following unfair or deceptive acts or practices that violate the Tennessee Consumer Protection Law:

1. Refusing to sell goods or services offered in accordance with the terms of the offer; and
2. Engaging in any other act(s) or practice(s) that are deceptive to the consumer or to any other person, including, but not limited to, making fraudulent misrepresentations and soliciting special payment terms but not acting consistent with those terms.

If you find that Craftco has proven by a preponderance of the evidence that Custom Kilns and/or Mr. Plass used any one or more of these acts or practices, then Custom Kilns and/or Mr. Plass have violated the Tennessee Consumer Protection Law. Craftco is entitled to actual damages for any loss of money, property, or thing of value that was caused by Custom Kilns's and/or Mr. Plass's use of the unfair or deceptive act or practice.

Mr. Freudenberg claims that Custom Kilns used the following unfair or deceptive acts or practices that violate the Tennessee Consumer Protection Law:

1. Engaging in any act(s) or practice(s) that are deceptive to the consumer or to any other person.

If you find that Mr. Freudenberg has proven by a preponderance of the evidence that Custom Kilns used any one or more of these acts or practices, then Custom Kilns has violated the Tennessee Consumer Protection Law. Mr. Freudenberg is entitled to actual damages for any loss of money, property, or thing of value that was caused by Custom Kilns's use of the unfair or deceptive act or practice.

Summary of the Tennessee Consumer Protection Law

If you find that Craftco has proven by the preponderance of the evidence that Custom Kilns violated the Tennessee Consumer Protection Law, you must return a verdict for Craftco and answer Verdict Form Question No. 1(b) "Yes" as to Custom Kilns. If Craftco has failed to prove by a preponderance of the evidence that Custom Kilns violated the Tennessee Consumer Protection Law, you must return a verdict for Custom Kilns and answer Verdict Form Question No. 1(b) "No" as to Custom Kilns.

If you find that Craftco has proven by the preponderance of the evidence that Mr. Plass violated the Tennessee Consumer Protection Law, you must return a verdict for Craftco and answer Verdict Form Question No. 1(b) "Yes" as to Mr. Plass. If Craftco has failed to prove by a preponderance of the evidence that Custom Kilns violated the Tennessee Consumer Protection Law, you must return a verdict for Mr. Plass and answer Verdict Form Question No. 1(b) "No" as to Mr. Plass.

If you find that Mr. Freudenberg has proven by the preponderance of the evidence that Custom Kilns violated the Tennessee Consumer Protection Law, you must return a verdict for Mr. Freudenberg and answer Verdict Form Question No. 4(b) "Yes."

If Mr. Freudenberg has failed to prove by a preponderance of the evidence that Custom Kilns violated the Tennessee Consumer Protection Law, you must return a verdict for Custom Kilns and answer Verdict Form Question No. 4(b) "No."

4. Conversion

Conversion - Law

I will now instruct you as to the law regarding the parties' sixth theory of recovery, conversion. Custom Kilns alleges claims of conversion against Craftco, Mr. Pierron, Mr. Freudenberg, and Rose Machine.

A conversion is any assumption of control over property that is inconsistent with the rights of the owner. A conversion may consist of the:

1. Use and enjoyment of personal property of another without the owner's consent; or
2. Destruction or dominion over the property of another by excluding or defying the owner's right; or
3. Withholding of personal property from the owner under a claim of title, inconsistent with the owner's claim of title.

Summary of Conversion

If you find that Custom Kilns has proven by the preponderance of the evidence that Craftco is liable for conversion, you must return a verdict for Custom Kilns and answer Verdict Form Question No. 2 "Yes" as to Craftco. If Custom Kilns has failed to prove by a preponderance of the evidence that Craftco is liable for conversion, and Custom Kilns has failed to prove by a preponderance of the evidence any of the other claims it brings against Craftco, you must return a verdict for Craftco and answer Verdict Form Question No. 2 "No" as to Craftco.

If you find that Custom Kilns has proven by the preponderance of the evidence that Mr. Pierron is liable for conversion, you must return a verdict for Custom Kilns and answer Verdict Form Question No. 2 "Yes" as to Mr. Pierron. If Custom Kilns has failed to prove by a preponderance of the evidence that Mr. Pierron is liable for conversion, and Custom Kilns has failed to prove by a preponderance of the evidence any of the other claims it brings against Mr. Pierron, you must return a verdict for Mr. Pierron and answer Verdict Form Question No. 2 "No" as to Mr. Pierron.

If you find that Custom Kilns has proven by the preponderance of the evidence that Mr. Freudenberg is liable for conversion, you must return a verdict for Custom Kilns and answer Verdict Form Question No. 2 "Yes" as to Mr. Freudenberg. If Custom Kilns has failed to prove by a preponderance of the evidence that Mr. Freudenberg is liable for conversion, and Custom Kilns has failed to prove by a preponderance of the evidence any of the other claims it brings against Mr. Freudenberg, you must return a verdict for Mr. Freudenberg and answer Verdict Form Question No. 2 "No" as to Mr. Freudenberg.

If you find that Custom Kilns has proven by the preponderance of the evidence that Rose Machine is liable for conversion, you must return a verdict for Custom Kilns and answer Verdict Form Question No. 2 "Yes" as to Rose Machine. If Custom Kilns has failed to prove by a preponderance of the evidence that Rose Machine is liable for conversion, and Custom Kilns has failed to prove by a preponderance of the evidence any of the other claims it brings against Rose Machine, you must return a verdict for Rose Machine and answer Verdict Form Question No. 2 "No" as to Rose Machine.

5. Civil Conspiracy

Civil Conspiracy - Law

I will now instruct you as to the law regarding the next claim of the parties - civil conspiracy. Custom Kilns alleges that Craftco, Mr. Pierron, Mr. Freudenberg, and Rose Machine were engaged in a civil conspiracy to convert the property of Custom Kilns.

A civil conspiracy is a combination between two or more persons to accomplish, by acting together, an unlawful purpose; or to accomplish a lawful act by unlawful means. There must be a common design, actions on each person's part, and an overt act. In a civil conspiracy, all conspirators have liability for all damages flowing from the conspiracy.

Civil Conspiracy - Elements

To recover under this theory, the plaintiff must prove all of the following elements by a preponderance of the evidence:

1. Two or more individuals agreed to do something that the law forbids;
2. That the defendant you are considering joined in that agreement with the intent to advance the purpose of the conspiracy;
3. One or more of the defendants did, or caused to be done, an act in furtherance of the object of the conspiracy; and
4. Plaintiff must have suffered some injury as a result of the conspiracy.

To find against a defendant on the theory of civil conspiracy, you, the jury, must find the conspirator you are considering had the intent to accomplish a common purpose, and each conspirator knew of the others's intent. However, the agreement to conspire need not be formal, the understanding may be a tacit one, and it is not essential that each conspirator have knowledge of the details of the conspiracy.

Finally, it is a basic principle that each conspirator is responsible for everything done by his confederate which the execution of the common design makes probable as a consequence; in other words, each conspirator is liable for the damage caused by the other.

Please keep in mind that if you do not find that the defendant you are considering is liable for conversion, then there can be no claim for civil conspiracy. However, if you do find that the defendant you are considering is liable for conversion, you are not required to necessarily find that that defendant is also liable for civil conspiracy. You, the jury, may only find a defendant liable for civil conspiracy if you find that the elements of civil conspiracy, as set out in these instructions, have been established by the greater weight or

preponderance of the evidence as to the defendant you are considering.

Summary of Civil Conspiracy

If you find that Custom Kilns has proven by the preponderance of the evidence that Craftco engaged in a civil conspiracy, you must return a verdict for Custom Kilns and answer Verdict Form Question No. 2 "Yes" as to Craftco. If Custom Kilns has failed to prove by a preponderance of the evidence that Craftco engaged in a civil conspiracy, and Custom Kilns has failed to prove by a preponderance of the evidence any of the other claims it brings against Craftco, you must return a verdict for Craftco and answer Verdict Form Question No. 2 "No" as to Craftco.

If you find that Custom Kilns has proven by the preponderance of the evidence that Mr. Pierron engaged in a civil conspiracy, you must return a verdict for Custom Kilns and answer Verdict Form Question No. 2 "Yes" as to Mr. Pierron. If Custom Kilns has failed to prove by a preponderance of the evidence that Mr. Pierron engaged in a civil conspiracy, and Custom Kilns has failed to prove by a preponderance of the evidence any of the other claims it brings against Mr. Pierron, you must return a verdict for Mr. Pierron and answer Verdict Form Question No. 2 "No" as to Mr. Pierron.

If you find that Custom Kilns has proven by the preponderance of the evidence that Mr. Freudenberg engaged in a civil conspiracy, you must return a verdict for Custom Kilns and answer Verdict Form Question No. 2 "Yes" as to Mr. Freudenberg. If Custom Kilns has failed to prove by a preponderance of the evidence that Mr. Freudenberg engaged in a civil conspiracy, and Custom Kilns has failed to prove by a preponderance of the evidence any of the other claims it brings against Mr. Freudenberg, you must return a verdict for Mr. Freudenberg and answer Verdict Form Question No. 2 "No" as to Mr. Freudenberg.

If you find that Custom Kilns has proven by the preponderance of the evidence that Rose Machine engaged in a civil conspiracy, you must return a verdict for Custom Kilns and answer Verdict Form Question No. 2 "Yes" as to Rose Machine. If Custom Kilns has failed to prove by a preponderance of the evidence that Rose Machine engaged in a civil conspiracy, and Custom Kilns has failed to prove by a preponderance of the evidence any of the other claims it brings against Rose Machine, you must return a verdict for Rose Machine and answer Verdict Form Question No. 2 "No" as to Rose Machine.

6. Tortious Interference with Business Relationships

Tortious Interference - Law

I will now instruct you as to the law regarding the parties' next theory of recovery - tortious interference with business relationships. Custom Kilns alleges a claim of tortious interference with business relationships against Craftco, Mr. Pierron, and/or Mr. Freudenberg.

The law does not permit a complaining party to recover damages from another party who has engaged in proper competitive business practices. However, the law does prohibit a party from unfairly interfering with a business relationship.

Tortious Inteference - Elements

There are five elements required to prove tortious interference with business relationships. To recover damages, Custom Kilns must prove, by a preponderance of the evidence, each of the following five elements:

1. Custom Kilns had a business relationship with an identifiable class of third persons - Rose Machine; and
2. The defendant you are considering, at the time he/it committed the acts complained of, knew of these relationships and did not have just a mere awareness of Custom Kilns's business dealings with others in general;
3. The defendant you are considering intended to cause a breach or termination of the business relationship or expectancy;
4. The defendant you are considering had an improper motive or used improper means; and
5. Custom Kilns suffered damages as a result of the tortious interference.

Tortious Interference - Formal Contract Not Required

A prospective business relationship with an identifiable class of persons is protected against the intentional interference by another party if that relationship is of pecuniary value to the complaining party, or would otherwise lead to potentially profitable contracts.

Tortious Interference - Improper Motive or Means

"Improper motive" is established by proving that the interfering party's predominant purpose was to injure the complaining party. A purpose is "predominant" if it is greater or superior in influence as compared to other facts. Injuring the complaining party does not have to be the interfering party's sole purpose for its motive to be improper.

"Improper means" of interference include those means that are illegal or independently tortious, such as fraud, duress, undue influence, misuse of inside or confidential information, or breach of a fiduciary relationship. Improper means also includes those methods that involve unethical conduct, such as overreaching.

Summary of Tortious Interference

If you find that Custom Kilns has proven by the preponderance of the evidence that the party you are considering (either Craftco, Mr. Pierron, or Mr. Freudenberg, or each of them) is liable for tortiously interfering with Custom Kilns's business relationships, you must return a verdict for Custom Kilns and answer Verdict Form Question No. 2 "Yes" as to that party. If Custom Kilns has failed to prove by a preponderance of the evidence that a party is liable for tortious interference, and Custom Kilns has failed to prove by a preponderance of the evidence any of the other claims it brings against that party, you must return a verdict for that party and answer the applicable Verdict Form Question No. 2 "No."

7. Inducement to Breach a Contract

Inducement to Breach a Contract - Law

I will now instruct you as to the law regarding the parties' next theory of recovery - inducement to breach a contract. Custom Kilns alleges a claim of inducement to breach a contract against Mr. Freudenberg.

The plaintiff is entitled to recover for inducement to breach a contract if the plaintiff establishes all of the following by clear and convincing evidence:

1. There was a contract;
2. The defendant had knowledge of the existence of the contract;
3. The defendant intended to bring about or cause its breach;
4. The defendant acted maliciously;
5. The contract was in fact breached;
6. Defendant's actions were the legal cause of the breach;
7. Plaintiff suffered damages as a result of the breach.

Summary of Inducement to Breach a Contract

If you find that Custom Kilns has proven by clear and convincing evidence that Mr. Freudenberg is liable for inducement to breach a contract, you must return a verdict for Custom Kilns and answer Verdict Form Question No. 3 "Yes" as to Mr. Freudenberg. If Custom Kilns has failed to prove by clear and convincing evidence that Mr. Freudenberg is liable for inducement to breach a contract, you must return a verdict for Mr. Freudenberg and answer Verdict Form Question No. 3 "No" as to Mr. Freudenberg.

IV. DAMAGES

If you find that the party you are considering has carried his/its burden of proving by a preponderance of the evidence any claim brought by that party, or where required by clear and convincing evidence, you must then consider the issue of damages.

I shall now instruct you on the award of damages. The fact that I am giving you instructions on damages should not be considered as an indication of any view of mine as to which party is entitled to your verdict. Instructions as to the measure of damages are given only for your guidance and are to be applied only in the event that you should find in favor of the party you are considering by a preponderance of the evidence, or where required by clear and convincing evidence, in accordance with the instructions that I have given you. If you decide that the party you are considering is not entitled to prevail with respect to his/its claims, you shall not answer any questions on the Verdict Form with regard to damages.

First, I will discuss the law as it relates to damages under the contract theories. I will then discuss the law regarding damages related to the tort issues.

If you find for the party that you are considering on a particular claim, then you must determine an amount that is fair and reasonable compensation for damages. You may award compensatory damages only for damages or injuries that the party proves were caused by the defendant's allegedly unlawful conduct. The damages that you award must be fair compensation - no more and no less.

A. CONTRACT DAMAGES

Contract Damages - Law

I will now instruct you as to the law regarding contract damages.

In this case, if you find that none of the parties, Craftco, Mr. Pierron, Custom Kilns, or Rose Machine, breached its contract, you will not be concerned with the question of contract damages. But if you find that either Craftco or Mr. Pierron or Custom Kilns or Rose Machine did breach the contract or contracts and that the breach caused damage to one of the parties, you will be concerned with the question of contract damages. It is my duty to instruct you as to the proper measure of damages to be applied in the event you find there was a breach of contract.

When a contract is breached, the plaintiff is entitled to be placed in as good a position as would have been occupied had the contract been fulfilled in accordance with its terms. The plaintiff is not entitled to be put in a better position by a recovery of damages for breach of contract than would have been realized had there been full performance. The damages to be awarded are those that may fairly and reasonably be considered as arising out of the breach or those that may reasonably have been

in the contemplation of the parties when the contract was made.
Damages that are remote or speculative may not be awarded.

If you find that Custom Kilns and/or Mr. Freudenberg and/or Rose Machine is entitled to a verdict for breach of a contract, you may award damages to the non-breaching party in an amount that will reasonably compensate the non-breaching party only if you find that the damage resulted from the breach.

If you find that the party you are considering is entitled to a verdict against the defendant you are considering, you must then award damages in an amount that will reasonably compensate the plaintiff for all the loss suffered by the plaintiff that was legally caused by the breach of contract.

A legal cause of a damage is a cause which, in natural and continuous sequence, produces the damage, and without which the damage would not have occurred.

Additional Instructions on Contract Damages

The preceding instructions on contract damages apply to the claims for breach of any of the three contracts at issue in this case. I will now provide you with special instructions as to the calculation of damages for any claim for breach of the contract between Craftco and Custom Kilns and/or the contract between Mr. Freudenberg and Custom Kilns. These instructions do not apply to any claims for breach of the contract between Rose Machine and Custom Kilns.

As to the claims of breach of contract involving the contract between Craftco and Custom Kilns and/or the contract between Mr. Freudenberg and Custom Kilns, the amount of such award may include:

- (1) Prejudgment Interest
- (2) Any reasonable charges, expenses, or commissions incurred by the seller in stopping delivery of the goods, or in the transportation, care, and custody of returned or resold goods together with any other expenses reasonably resulting from the buyer's breach may be recovered.

- (3) Where goods have been resold in good faith and in a commercially reasonable manner, the amount by which the resale price is less than the contract price less any costs saved due to the breach of contract may be recovered.
- (4) A seller may recover the greater of the following:
- a. The amount by which the contract price of any goods whose purchase was repudiated exceeded the market price at the time and place delivery was to have been made, less expenses saved by the seller due to the breach of contract; or
 - b. The profit, including reasonable overhead, that the seller would have made had the contract been fully performed.

The buyer is to receive credit against either amount for any payments made on the contract and for the proceeds of any resale of the goods.

- (5) A seller may recover the price of goods that were identified to the contract and for which the seller was not able to obtain a fair price after a reasonable effort to resell them or the circumstances indicated such an effort would be useless.

B. TORT DAMAGES

Damages for Promissory Fraud or Negligent Misrepresentation
Tn Civil 8.49

If you find that the party you are considering is entitled to a verdict against the defendant you are considering based on promissory fraud or negligent misrepresentation, you must then award damages in an amount that will reasonably compensate the plaintiff for all the loss suffered by the plaintiff that was legally caused by the promissory fraud or negligent misrepresentation upon which you base your finding of liability.

Damages for Violation of the Tennessee Consumer Protection Law

If you find that the party you are considering has proven by a preponderance of the evidence that the defendant you are considering violated the Tennessee Consumer Protection Law, the plaintiff is entitled to actual damages for any loss of money, property, or thing of value that was caused by the defendant's use of the unfair or deceptive act or practice.

Damages for Conversion

The measure of damages for conversion of personal property is the value of the property converted at the time and place of the conversion.

Damages for Civil Conspiracy

In regard to damages under a claim of civil conspiracy, the injured party may recover the damages that flow from the conspiracy. The plaintiff is entitled to recover only such damages as naturally and proximately result from the wrongful act or acts done in pursuance of the conspiracy and which directly result from it. The elements of actual damage that may be awarded are any damage or injury done to the profession, business, or occupation of the person, any loss of business, and any loss of profits resulting from the conspiracy.

Damages for Tortious Interference
or Inducement to Breach a Contract

If you find by a preponderance of the evidence that Custom Kilns is entitled to recover damages for tortious interference with business relationships or if you find by clear and convincing evidence that Custom Kilns is entitled to recover for inducement to breach a contract, you may award Custom Kilns an amount that will compensate it for all damages resulting from the interference. The award of damages may include compensation for:

1. The pecuniary loss of the benefits of the business relationships resulting from the interference or the benefits of the contract. This may include Custom Kilns's loss of profits from the business relationships.
2. Any consequential losses legally caused by the interference. A consequential loss is any direct out-of-pocket expense incurred by Custom Kilns as a direct and legal result of the interference or breach of contract.
3. Actual harm to Custom Kilns's reputation, where such losses should have been reasonably expected to result from the interference.

C. General Damages Instructions

Duty to Mitigate

A person whose property has been damaged by the wrongful act of another is bound to use reasonable care to avoid loss and to minimize damages. A party may not recover for losses that could have been prevented by reasonable efforts or by expenditures that might reasonably have been made.

Multiple Claims

You cannot award compensatory damages more than once for the same injury. For example, if a party were to prevail on two claims and establish a total injury of one dollar, you could not award him one dollar compensatory damages on each claim - he or it is only entitled to be made whole again, not to recover more than he or it lost.

Further, you must be careful to impose any damages that you may award on a claim solely upon the party or parties that you find to be liable on that claim. Although there may be multiple parties on one side in this case, it does not follow that if one is liable, the other is liable as well. Each party is entitled to fair, separate and individual consideration of the case without regard to your decision as to the other parties. If you find that only one party is responsible for a particular injury, then you must impose damages, if any, for that injury only upon that party.

In addition, if you find for the plaintiff you are considering on both the Tennessee Consumer Protection Law claim and the claim based on fraud or negligent misrepresentation, the plaintiff will not be permitted to collect damages under both

claims but instead will have to choose whether to accept the damages under the Tennessee Consumer Protection Law or the damages under the claim based on fraud or negligent misrepresentation. In other words, if you decide the plaintiff should recover monetary damages from the defendant, the plaintiff will be able to recover those damages only once, even if you find that the plaintiff has proved both the Tennessee Consumer Protection Law claim and the claim based on fraud or negligent misrepresentation.

Prejudgment Interest
Tn Civil 13.35

Mr. Freudenberg, Rose Machine, and Custom Kilns seek awards of prejudgment interest as part of their breach of contract claims. If you find that the party you are considering is entitled to recover a judgment for breach of contract, you may in your discretion award interest on the amount awarded at a rate not greater than 10% per year calculated from any date you choose. You may only award interest up to the date of your verdict.

No Speculative Damages

You may not award remote or speculative damages. You may not, therefore, include any damages which compensate for loss or harm that, although possible, are based on conjecture, speculation, or are not reasonably certain.

To state this principle in another way, damages are prohibited as speculative when their existence is uncertain, not when merely their amount is uncertain. Mathematical certainty is not required. Instead, the amount of damages must be shown with such reasonable degree of certainty as the situation permits.

In determining whether the proof meets the requisite degree of certainty, you may consider whether a party is responsible for creating the difficulty in ascertaining the exact amount of damages. If you make that determination, then you may, but are not required to, resolve any doubt about the amount of damages against the party responsible.

Reasonable Certainty

A party is not entitled to recover damages for a particular loss or type of harm unless the party proves that it is reasonably certain that the party has suffered such a loss or type of harm as a result of an action or inaction by the accused party. However, once a party proves that it is reasonably certain that the party has suffered a particular loss or type of harm as a result of an action or inaction by the accused party, the law does not require the party to prove the exact amount of that loss or harm.

If it is reasonably certain that the party has suffered a particular loss or type of harm as a result of a wrongful action or failure to act by the accused party, the injured party is entitled to recover damages for that loss or harm as long as there is some reasonable basis for estimating or approximating the amount of the loss or harm. A party may not be denied damages merely because the amount of the loss or harm is uncertain or difficult to determine.

Punitive Damages

Craftco, Custom Kilns, and Mr. Freudenberg have asked that you make an award of punitive damages, but this award may be made only under the following circumstances. You may consider an award of punitive damages only if you find that the party you are considering has suffered actual damage as a result of fault of the defendant you are considering and have made an award for compensatory damages.

The purpose of punitive damages is not to further compensate the plaintiff, but to punish the wrongdoer and deter others from committing similar wrongs in the future. Punitive damages may be considered if, and only if, the plaintiff you are considering has shown by clear and convincing evidence that the defendant has acted either intentionally, recklessly, maliciously, or fraudulently.

Clear and convincing evidence is a different and higher standard than preponderance of the evidence. It means that the defendant's wrong, if any, must be so clearly shown that there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.

A person acts intentionally when it is the person's purpose or desire to do a wrongful act or to cause the result.

A person acts recklessly when the person is aware of, but consciously disregards a substantial or unjustifiable risk of injury or damage to another. Disregarding the risk must be a gross deviation from the standard of care that an ordinary person would use under the circumstances.

A person acts maliciously when the person is motivated by ill will, hatred, or personal spite.

A person acts fraudulently when: (1) the person intentionally either misrepresents an existing material fact or causes a false impression of an existing material fact to mislead or to obtain an unfair or undue advantage; and (2) another person suffers injury or loss because of reasonable reliance upon the representation.

If you decide to award punitive damages, you will not assess an amount of punitive damages at this time. You will, however, report your findings to the Court.

If you, the jury, find that the conduct of the defendant you are considering, as determined under these instructions, was intentional, reckless, malicious, or fraudulent towards the plaintiff you are considering, then indicate so in your response on the Verdict Form, but do not indicate the amount of punitive damages you would award.

Of course, if you find that the actions of the defendant you are considering were not intentional, reckless, malicious, or fraudulent towards the plaintiff you are considering, then you should so indicate in your response on the Verdict Form.

V. VERDICT FORM

Finally, ladies and gentlemen, we come to the point where we will discuss the form of your verdict and the process of your deliberations. You will be taking with you to the jury room the verdict form which will reflect your findings. The verdict form reads as follows:

[Read Verdict Form]

You will be selecting a presiding juror after you retire to the jury room. That person will preside over your deliberations and be your spokesperson here in court. When you have completed your deliberations, your presiding juror will fill in and sign the verdict form.

Your verdict must represent the considered judgment of each of you. In order to return a verdict, it is necessary that each of you agree to that verdict. That is, 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 judgments. Each of you must

decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow 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 your fellow jurors, or for the mere purpose of returning a verdict.

We will be sending with you to the jury room all of the exhibits in the case. You may have not seen all of these previously and they will be there for your review and consideration. You may take a break before you begin deliberating but do not begin to deliberate and do not discuss the case at any time unless all eleven of you are present together in the jury room. Some of you have taken notes. I remind you that these are for your own individual use only and are to be used by you only to refresh your recollection about the case. They are not to be shown to others or otherwise used as a basis for your discussion about the case.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

MANUFACTURING VENTURES LLC, d/b/a
CRAFTCO HARDWOOD FLOORS, INC.,

Plaintiff/Counter-Defendant,

v.

NO.: 06-2600-JPM-tmp

CUSTOM KILNS, INC.,

Defendant/Counter-Plaintiff,

PATRICK PLASS,

Defendants.

CUSTOM KILNS, INC.,

Third-Party Plaintiff/
Counter-Defendant,

v.

JAMES P. PIERRON,

Third-Party Defendant,

ROSE MACHINE & TOOL LLC, and
PAUL FREUDENBERG d/b/a 55 CORP.,

Third-Party Defendants/
Counter-Plaintiffs.

SUPPLEMENTAL INSTRUCTION NO. 1

Willful or Knowing

If you determine that the defendant you are considering violated the Tennessee Consumer Protection Law, then you must determine if that defendant's violation was willful or knowing.

A person acts "willfully" if the act was committed voluntarily and purposely, with the specific intent to do something the law forbids; that is with bad purpose either to disobey or disregard the law.

A person acts "knowingly" if the act was done voluntarily and intentionally and not because of mistake or accident.