

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ATSALIS BROTHERS PAINTING
COMPANY,

Plaintiff,

Case No. 15-12054
Honorable Victoria A. Roberts

v.

CARBOLINE COMPANY,

Defendant.

JURY INSTRUCTIONS

TABLE OF CONTENTS

Jury Instruction	Title	Page
1	General Introduction, Instructions at Close of Evidence: Duty of Court and Jury	1
2	Instructions Apply to Each Party	2
3	All Persons Equal Before the Law – Organizations	3
4	Court’s Comments Not Evidence	4
5	Questions Not Evidence	5
6	Number of Witnesses	6
7	Discrepancies of Testimony	7-8
8	Preponderance of the Evidence	9-10
9	“If You Find” or “If You Decide”	11
10	“Inferences” Defined	12
11	Expert Witnesses	13
12	Charts and Summaries	14
13	Contract Action – UCC: Explanation and Burden of Proof	15
14	Words Given Ordinary Meaning	16
15	Contract Action – UCC: Buyer’s Acceptance of Nonconforming Goods	17-18
16	Contract Action – UCC: Express Warranty – Definition	19
17	Contract Action – UCC: Express Warranty – Burden of Proof	20
18	Cumulation and Conflicts of Warranties Express of Implied	21
19	Contract Damages – UCC: Seller’s Breach by Delivery of Nonconforming Goods Which the Buyer Accepts – Buyer’s Damages	22-23
20	Contract Damages – UCC: Buyer’s Breach by Nonpayment After Acceptance – Seller’s Action for Price	24
21	Definition of Proximate Cause	25
22	Mitigation of Damages	26
23	Effect of Instruction as to Damages	27
24	Election of Foreperson – General Verdict	28
25	Verdict Forms – Jury’s Responsibility	29
26	Duty to Deliberate	30
27	Communications Between Court and Jury During Jury’s Deliberation	31

Instruction No. 1, General Introduction, Instructions at Close of Evidence: Duty of Court and Jury

Now that you have heard the evidence and the argument, it is my duty to instruct you about the applicable law. It is your duty to follow the law as I will state it and to apply it to the facts as you find them from the evidence in the case. Do not single out one instruction as stating the law, but consider the instructions as a whole. Do not be concerned about the wisdom of any rule of law stated by me. You must follow and apply the law.

The lawyers may refer to some of the governing rules of law in their arguments. If there is any difference between the law stated by the lawyers and as stated in these instructions, you are governed by my instructions.

Nothing I say in these instructions indicates that I have any opinion about the facts. You, not I, have the duty to determine the facts.

You must perform your duties as jurors without bias or prejudice as to any party. The law does not permit you to be controlled by sympathy, prejudice, or public opinion. All parties expect that you will carefully and impartially consider all the evidence, follow the law as it is now being given to you, and reach a just verdict, regardless of the consequences.

Instruction No. 2, Instructions Apply to Each Party

Unless I state otherwise, you should consider each instruction given to apply separately and individually to each party in the case.

Instruction No. 3, All Persons Equal Before the Law -- Organizations

You should consider and decide this case as a dispute between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. A corporation is entitled to the same fair trial as a private individual. All persons, including corporations, and other organizations stand equal before the law, and are to be treated as equals.

Instruction No. 4, Court's Comments Not Evidence

The law permits me to comment to you on the evidence in the case. These comments are only an expression of my opinion as to the facts. You may disregard my comments entirely, since you as jurors are the sole judges of the facts and are not bound by my comments or opinions.

Instruction No. 5, Questions Not Evidence

If a lawyer asks a witness a question that contains an assertion of fact, you may not consider the assertion as evidence of that fact. The lawyer's questions and statements are not evidence.

Instruction No. 6, Number of Witnesses

The weight of the evidence is not necessarily determined by the number of witnesses testifying to the existence or nonexistence of any fact. You may find that the testimony of a small number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

You are not bound to decide any issue of fact in accordance with the testimony of any number of witnesses that does not produce in your minds belief in the likelihood of truth, as against the testimony of a lesser number of witnesses or other evidence producing such belief in your minds.

The test is not which side brings the greater number of witnesses or takes the most time to present its evidence, but which witnesses and which evidence appeal to your minds as being most accurate and otherwise trustworthy.

Instruction No. 7, Discrepancies in Testimony

You are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You may be guided by the appearance and conduct of the witness, or by the manner in which the witness testifies, or by the character of the testimony given, or by evidence contrary to the testimony.

You should carefully examine all the testimony given, the circumstances under which each witness has testified, and every matter in evidence tending to show whether a witness is worthy of belief. Consider each witness' intelligence, motive and state of mind, and demeanor or manner while testifying.

Consider the witness' ability to observe the matters as to which the witness has testified, and whether the witness impresses you as having an accurate recollection of these matters. Also, consider any relation each witness may have with either side of the case, the manner in which each witness might be affected by the verdict, and the extent to which the testimony of each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses may or may not cause you to discredit such testimony. Two or more persons seeing an event may see or hear it differently.

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.

After making your own judgment, you will give the testimony of each witness such weight, if any, that you may think it deserves. In short, you may accept or reject the testimony of any witness, in whole or in part.

In addition, the weight of the evidence is not necessarily determined by the number of witnesses testifying to the existence of any fact. You may find that the testimony of a small number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

Instruction No. 8, Preponderance of the Evidence

Atsalis Brothers Painting has the burden in a civil action, such as this, to prove every essential element of its claims by a preponderance of the evidence. If Atsalis Brothers Painting should fail to establish any essential element of its claim(s) by a preponderance of the evidence, you should find for Carboline Company as to that claim(s).

Likewise, Carboline Company has the burden to prove every essential element of its counter-claim by a preponderance of the evidence. If Carboline Company should fail to establish any essential element of its counter-claim by a preponderance of the evidence, you should find for Atsalis Brothers Painting.

Carboline Company has the burden of establishing the essential elements of certain affirmative defenses.

“Establish by a preponderance of the evidence” means evidence, which as a whole, shows that the fact sought to be proved is more probable than not. In other words, a preponderance means that such evidence as, when considered and compared with the evidence opposed to it, has more convincing force, and produces in your minds belief that what is sought to be proved is more likely true than not true. This standard does not require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.

In determining whether any fact in issue has been proved by a

preponderance of the evidence, unless otherwise instructed you may consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.

Instruction No. 9, “If You Find” or “If You Decide”

When I instruct you that a party has the burden of proof on any proposition, or use the expression “if you find,” or “if you decide,” I mean that you must be persuaded, considering all the evidence in the case that the proposition is more probably true than not.

Instruction No. 10, “Inferences” Defined

You are to consider only the evidence in the case. However, you are not limited to the statements of the witnesses. You may draw from the facts that you find have been proved such reasonable inferences as seem justified in light of your experience.

“Inferences” are deductions or conclusions that reason and common sense lead you to draw from facts established by the evidence in the case.

Instruction No. 11, Expert Witness

The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. There is an exception to this rule for “expert witnesses.” An expert witness is a person who, by education and experience has become expert in some art, science, profession, or calling. Expert witnesses state their opinions as to matters in which they profess to be expert, and may also state their reasons for their opinions.

You should consider each expert opinion received in evidence in this case, and give it such weight as you think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or if you feel the expert’s opinion is outweighed by other evidence, you may disregard the opinion entirely.

Instruction No. 12, Charts and Summaries

Certain charts and summaries have been shown to you in order to help explain facts disclosed by books, records, and other documents that are in evidence in the case. These charts or summaries are not themselves evidence or proof of any facts. If the charts or summaries do not correctly reflect facts or figures shown by evidence in the case, you should disregard them.

In other words, the charts or summaries are used only as a matter of convenience. To the extent that you find they are not truthful summaries of facts or figures shown by the evidence in the case, you are to disregard them entirely.

Instruction No. 13, Contract Action—UCC: Explanation and Burden of Proof

This case involves a claim by the buyer for breach of a contract for the sale of goods. A contract for the sale of goods is an agreement between a buyer and a seller who by their words and conduct show that they intend to make a contract.

The Court has determined that there is an agreement between these parties. That agreement includes, at a minimum, the product certifications, Carboline's quote and the Product Data Sheets.

In this case, the buyer, Atsalis Brothers, has the burden of proving that:

- (a) the seller breached the contract
- (b) the buyer was damaged by the breach of contract.

The seller, Carboline Company, has the burden of proving the defense of failure to mitigate damages, if any.

This case also involves a counterclaim by the seller that the buyer breached a contract. With respect to the counterclaim, the seller has the burden of proving that:

- (a) the buyer breached the contract
- (b) the seller was damaged by the breach of contract(s).

The buyer has the burden of proving the defense of breach by the seller.

Instruction No. 14, Words Given Ordinary Meaning

You should interpret the words of the contract by giving them their ordinary and common meaning.

Instruction No. 15, Contract Action—UCC: Buyer’s Acceptance of Nonconforming Goods

The buyer is entitled to accept goods and recover damages if the goods or the manner, time, or place of their delivery do not conform to the contract, and the buyer notifies the seller of the nonconformity within a reasonable time after it discovered or should have discovered the nonconformity. The buyer has the burden of proving that it gave the seller the required notification.

In this case, the buyer accepted all the goods. The buyer claims that the goods did not conform to the contract in that they caused the top coat of paint to peel excessively, necessitating the removal of that top coat, power cleaning the defective goods, and re-applying the top layer at a substantial cost. Carboline contends that the goods were conforming, and that the issues with the peeling topcoat were caused by Atsalis’ failure to follow Carboline’s instructions and the best practices of the painting industry.

Goods are nonconforming if they are not in accordance with the contract requirements and their value to the buyer is substantially impaired.

You must decide whether the goods conformed to the contract and, if not, whether the buyer notified the seller of the nonconformity within a reasonable time after it discovered or should have discovered the nonconformity.

If you determine that the goods did not conform to the contract, and the buyer notified the seller of the nonconformity within a reasonable time after it

discovered or should have discovered the nonconformity, then the seller has breached the contract.

If you determine that the goods conformed to the contract, or that the buyer failed to notify the seller of the nonconformity within a reasonable time after it discovered or should have discovered the nonconformity, then the seller has not breached the contract.

Instruction No. 16, Contract Action—UCC: Express Warranty—Definition

An express warranty is a statement, promise, or description made in writing, orally, or through other means by the seller to the buyer that the goods have certain characteristics or will meet certain standards, which becomes part of the basis of the bargain. A description of the goods, a sample, or a model, which is made a part of the basis of the bargain, creates an express warranty that all of the goods will conform to that description, sample, or model.

A seller can create an express warranty without intending to make a warranty, or without using words such as “warranty” or “guarantee.”

An expression of the seller’s opinion, a statement of value or recommendation is sales talk or trade puffing and is not an express warranty.

Instruction No. 17, Contract Action—UCC: Express Warranty—Burden of Proof

The buyer, Atsalis Brothers Painting, has the burden of proving that:

- (a) the seller made an express warranty, and
- (b) the goods did not conform to the warranty at the time of sale or within the time period covered by the warranty, and
- (c) the buyer notified the seller of the nonconformity within a reasonable time after it discovered or should have discovered the nonconformity, and
- (d) as a result of the nonconformity the buyer sustained damages.

Your verdict will be for the buyer if you find that the buyer has proved all of these elements.

Your verdict will be for the seller if you find that the buyer has not proved one or more of these elements.

Instruction No. 18, Cumulation and Conflict of Warranties Express or Implied

Express warranties shall be construed as consistent with each other and as cumulative, but if such construction is unreasonable the intention of the parties shall determine which warranty is dominant. In ascertaining that intention, exact or technical specifications displace inconsistent general language of description.

Instruction No. 19, Contract Damages—UCC: Seller’s Breach by Delivery of Nonconforming Goods Which the Buyer Accepts—Buyer’s Damages

If you find that the seller has breached the contract, you must compute the buyer’s damages as follows:

(a) First, you must determine the value of the goods at the time and place of acceptance—their actual value.

(b) Second, you must determine the value the goods would have had at the time and place of acceptance if they had conformed to the requirements of the contract.

(c) Then you must subtract the actual value of the goods from the value the goods would have had if they had conformed to the contract.

(d) You must add to this amount any of the following damages you find the buyer had:

(i) any reasonable expenses incident to the seller’s delay or other breach such as the cost of inspecting the goods following application, the costs of paint removal, surface repair, and repainting following that removal.

(ii) other losses that you find resulted from the seller’s breach, such as costs of additional labor, material, equipment, scaffolding, lost profits on future work due to project delays, lost profits on future work due to the loss of bonding capacity, and liquidated

damages assessed against the buyer for delays in the buyer's work, if you find that the seller at the time of contracting had reason to know of them, and the buyer could not reasonably have prevented them.

**Instruction No. 20, Contract Damages—UCC: Buyer’s Breach by
Nonpayment after Acceptance—Seller’s Action for Price**

If you find that the buyer breached the contract by failing to pay for the goods after the buyer had accepted them, or after the buyer wrongfully revoked the acceptance, you must award the seller the price due under the contract together with any commercially reasonable expenses the seller had because of the buyer’s breach.

Instruction No. 21, Definition of Proximate Cause

When I use the words “proximate cause” I mean first, that the failure of the product to conform to the warranty must have been a cause of plaintiff's damages, and second, that the occurrence which is claimed to have produced plaintiff's damages must have been of a type that is a natural and probable result of the failure of the product to conform to the warranty.

Instruction No. 22, Affirmative Defense – Mitigation of Damages

In fixing the amount of damages, if any, you should not include any loss that Atsalis Brothers Painting could have prevented by exercising reasonable care and diligence when it learned or should have learned of the breach. The burden is on Carboline Company to prove that Atsalis Brothers Painting failed to minimize its damages and that the damages should be reduced by a particular amount as a result.

Instruction No. 23, Effect of Instruction as to Damages

The fact that I have instructed you as to the proper measure of damages should not be considered as indicating any view of mine as to which party is entitled to your verdict in this case. Instructions as to the measure of damages are given for your guidance only in the event you should find in favor of the plaintiff from a preponderance of evidence in the case in accordance with the other instructions.

Instruction No. 24, Election of Foreperson—General Verdict

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

Forms of verdict have been prepared for your convenience.

You will take these forms to the jury room and, when at least six of you have reached an agreement on a verdict, you will have your foreperson fill in, date and sign the form that sets forth the verdict upon which the six agree. You will then return with your verdict to the courtroom.

Instruction No. 25, Verdict Forms—Jury’s Responsibility

Nothing said in these instructions and nothing in any form of verdict prepared for your convenience is meant to suggest or convey in any way or manner any suggestion or hint as to what verdict I think you should find. What the verdict shall be is your sole and exclusive duty and responsibility.

Instruction No. 26, Duty to Deliberate

The verdict must represent the considered judgment of at least six of you. In order to return a verdict, it is necessary that at least six jurors agree.

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 disregard of individual judgment. You must each decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine 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.

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.

Instruction No. 27, Communications Between Court and Jury During Jury's Deliberation

If it becomes necessary during your deliberations to communicate with me, you may send a note by a bailiff, signed by your foreperson or by one or more members of the jury. No member of the jury should ever attempt to communicate with me by any means other than a signed writing, and I will never communicate with any member of the jury on any subject touching the merits of the case otherwise than in writing, or orally here in open court.

From the oath about to be taken by the bailiffs you will note that they too, as well as all other persons, are forbidden to communicate in any way or manner with any member of the jury on any subject touching the merits of the case.

Bear in mind also that you are never to reveal to any person—not even to me—how the jury stands, numerically or otherwise, on the questions before you, until after at least six of you have reached a verdict.