

1 CUSTOM DESIGN, INC. V. FAMILY DOLLAR STORES

2 03-CV-522ML

3 APRIL 7, 2005

4 THE COURT: Thank you, Mr. Tarro.

5 Members of the jury, you've now heard the
6 closing arguments of counsel. And as I told you at the
7 beginning of the case, at this time I would give you
8 those final and detailed instructions on the law which
9 you must follow during the course of your
10 deliberations.

11 Now, I know that for some of you hearing the
12 instructions may not be enough. I'm an old
13 schoolteacher, and so I know that some people learn
14 better by reading, some better by hearing. And so I
15 will tell you now that in addition to my giving you
16 these instructions orally in the courtroom, you will
17 also be provided with a written copy which you may
18 refer to during the course of your deliberations should
19 you find it necessary to do so.

20 For those of you who learn it better by hearing,
21 you'll also receive an audio tape and a tape player so
22 that if you want to listen to them again, you can do
23 that as well. For now, however, I do ask that you give
24 me your undivided attention.

25 Members of the jury, now that you have heard the

1 evidence and the arguments of counsel, it becomes my
2 duty to give you instructions as to the law applicable
3 in this case.

4 It is your duty as jurors to follow the law as I
5 shall state it to you and to apply that law to the
6 facts of the case as you determine those facts to be
7 from the evidence in the case.

8 You are not to single out any one instruction
9 alone as stating the law but must consider the
10 instructions as a whole. Neither are you to be
11 concerned with the wisdom of any rule of law as stated
12 by me.

13 Now, counsel have quite properly referred to
14 some of the governing rules of law in their arguments.
15 If, however, any difference appears to you between the
16 law as stated by counsel and that stated by the Court
17 in these instructions, you are to adhere to the Court's
18 instructions.

19 Further, nothing I say in these instructions is
20 to be taken as an indication that I have any opinion
21 about the facts of the case or what that opinion is.
22 It is not my function to determine the facts; but,
23 rather, that is yours.

24 You must perform your duties as jurors without
25 bias or prejudice as to any party. The law does not

1 permit you to be governed by sympathy, prejudice or
2 public opinion.

3 All parties expect that you will carefully and
4 impartially consider all the evidence, follow the law
5 as it is now being given to you and reach a just
6 verdict regardless of the consequences.

7 This case should be considered and decided by
8 you as an action between persons of equal standing in
9 the community, of equal worth, and holding the same or
10 similar stations of life.

11 A corporation is entitled to the same fair trial
12 at your hands as a private individual. All persons,
13 including corporations, stand equal before the law and
14 are to be dealt with as equals in a court of justice.

15 The evidence in this case consists of the sworn
16 testimony of the witnesses regardless of who may have
17 called them and all exhibits received in evidence
18 regardless of who may have produced them.

19 In determining the facts in this case, you are
20 to consider only the evidence that properly has been
21 put before you.

22 It is the duty of the Court during the course of
23 trial to pass upon the admissibility of proffered
24 evidence, that is, to decide whether or not you should
25 consider proffered evidence.

1 Such evidence as the Court admits is properly
2 before you for your consideration. Such evidence as
3 the Court has refused to admit is not a proper subject
4 for your deliberations and should not be given
5 consideration by you.

6 Papers, documents and other objects admitted
7 into evidence by the Court are a part of the evidence
8 properly before you and will be available to you in the
9 jury room for consideration during your deliberations
10 with the exception of the actual display units
11 themselves.

12 It's too difficult for us to try to move them
13 into the jury room, and I think you know that room's a
14 little small to be bringing those in.

15 So if you find a need to come and actually look
16 at them, let Jim know that, and we'll make arrangements
17 to bring you into the courtroom to do that.

18 All of the other paper exhibits that have been
19 admitted in the case, however, you will have in the
20 jury room for your review.

21 The fact that the Court has admitted evidence
22 over objection should not influence you in determining
23 the weight you should give the evidence.

24 Nor should statements made by counsel either for
25 or against the admission of evidence influence your

1 determination of the weight you will give the evidence
2 if admitted. In other words, you should determine the
3 weight you will give such evidence on the basis of your
4 own consideration of it and without regard to the
5 ruling of the Court or the statements of counsel
6 concerning the admissibility of such evidence.

7 Nor should you permit objection by counsel to
8 the admission of evidence or the rulings of the Court
9 thereon to create any bias or prejudice in your minds
10 with respect to counsel or the party he represents.

11 It is the duty of counsel to protect the rights
12 and interests of his client; and in the performance of
13 that duty, he freely may make objection to the
14 admission of proffered evidence and should not in any
15 manner be penalized for doing so.

16 The burden is on the Plaintiff in a civil action
17 such as this to prove every essential element of its
18 claim by a preponderance of the evidence.

19 If the proof should fail to establish any
20 essential element of Plaintiff's claim by a
21 preponderance of the evidence in this case, you should
22 find for the Defendant.

23 To establish by a preponderance of the evidence
24 means to prove that something is more likely so than
25 not so. In other words, a preponderance of the

1 evidence in the case means such evidence as, when
2 considered and compared with that opposed to it, has
3 more convincing force and produces in your minds the
4 belief that what is sought to be proved is more likely
5 true than not true.

6 This rule does not, of course, require proof to
7 an absolute certainty since proof to an absolute
8 certainty is seldom possible in any case.

9 In determining whether any fact in issue has
10 been proven by a preponderance of the evidence in this
11 case, you may, unless otherwise instructed, consider
12 the testimony of all witnesses regardless of who may
13 have called them and all exhibits received in evidence
14 regardless of who may have produced them.

15 When I say in these instructions that a party
16 has the burden of proof on any proposition or use the
17 expression "if you find," I mean you must be persuaded,
18 considering all the evidence in the case, that the
19 proposition is more probably true than not true.

20 As I told you at the beginning of the case,
21 there are two types of evidence from which you may
22 properly find the truth as to the facts of the case.

23 One is direct evidence, such as the testimony of
24 an eyewitness. The other is indirect or circumstantial
25 evidence, that is, the proof of a chain of

1 circumstances pointing to the existence or nonexistence
2 of certain facts.

3 As a general rule, the law makes no distinction
4 between direct or circumstantial evidence but simply
5 requires that you find the facts in accordance with the
6 preponderance of all the evidence in the case, both
7 direct and circumstantial.

8 You are to consider only the evidence in the
9 case. In your consideration of the evidence, however,
10 you are not limited to the bald statements of the
11 witnesses. In other words, you are not limited to what
12 you see and hear as the witnesses testify.

13 You are permitted to draw, from facts which you
14 find have been proven, such reasonable inferences as
15 seem justified in light of your experience.

16 Inferences are simply deductions or conclusions
17 which reason and common sense lead you to draw from
18 facts which have been established by the evidence in
19 the case. Inferences may not be based on speculation
20 or conjecture.

21 You, as jurors, are the sole judges of the
22 credibility of the witnesses and the weight their
23 testimony deserves. You may be guided by the
24 appearance and conduct of the witnesses, the manner in
25 which the witness testified, the character of the

1 testimony given or evidence to the contrary of the
2 testimony given.

3 You should carefully scrutinize all the
4 testimony given, the circumstances under which each
5 witness has testified and every matter in evidence
6 which tends to show whether a witness is worthy of
7 belief.

8 Consider each witness's intelligence, motive,
9 state of mind and demeanor or manner while on the
10 stand. Consider the witness's ability to observe the
11 matters as to which he or she has testified and whether
12 he or she impresses you as having an accurate
13 recollection of these matters.

14 Consider also any relation each witness may bear
15 to either side of the case; the manner in which each
16 witness might be affected by the verdict; and the
17 extent to which, if at all, each witness is either
18 supported or contradicted by other evidence in the
19 case, including statements that he or she may have made
20 on some prior occasion.

21 Inconsistencies or discrepancies in the
22 testimony of a witness or between the testimony of
23 different witnesses may or may not cause you to
24 discredit such testimony.

25 Two or more persons witnessing an incident or

1 transaction may see or hear it differently. An
2 innocent misrecollection, like failure of recollection,
3 is not an uncommon experience.

4 In weighing the effect of a discrepancy, always
5 consider whether it pertains to a matter of importance
6 or an unimportant detail and whether the discrepancy
7 results from innocent error or intentional falsehood.

8 After making your own judgment, you will give
9 the testimony of each witness such weight, if any, as
10 you may think it deserves. You may, in short, accept
11 or reject the testimony of any witness in whole or in
12 part.

13 Also, the weight of the evidence is not
14 necessarily determined by the number of witnesses
15 testifying to the existence or nonexistence of any
16 fact.

17 You may find that the testimony of a small
18 number of witnesses as to any fact is more credible
19 than the testimony of a larger number of witnesses to
20 the contrary.

21 As you know, the Plaintiff in this case is
22 Custom Design, Incorporated. The Defendant in this
23 case is Family Dollar Stores, Incorporated.

24 The Plaintiff filed suit against the Defendant
25 alleging breach of contract for actions arising from an

1 agreement to supply customized merchandise displays to
2 the Defendant. The Plaintiff alleges that as a result
3 of the Defendant's conduct, it suffered damages.

4 In order for the Plaintiff to prevail on its
5 breach of contract claim, it must prove three elements
6 by a preponderance of the evidence:

7 First, that a contract existed between the
8 Plaintiff and the Defendant; second, that the Defendant
9 breached that contract; and third, that the loss or
10 damages being claimed were caused by the Defendant's
11 breach.

12 A contract is a legally binding agreement
13 between two or more parties. A contract need not be in
14 any particular form or words. It may be written or
15 oral.

16 A contract need not be contained in any single
17 document. It may consist of any number of documents or
18 conversations or both as long as they all constitute
19 part of the same agreement.

20 The key factor in determining whether a contract
21 exists is the intent of the parties as evidenced by
22 their acts in the surrounding circumstances.

23 It is not what the parties secretly intend that
24 governs; but, rather, it is what they manifest to each
25 other by words or conduct that determines whether a

1 contract exists and, if so, what its provisions are.

2 In order for a contract to be formed, both
3 parties must manifest agreement to all of the essential
4 terms and they must also manifest an intent to be bound
5 by the agreement.

6 There can be no contract if only one party
7 consents or agrees to be bound. Both parties have to
8 consent and agree to be bound.

9 As a general rule, however, silence does not
10 constitute an acceptance of an offer. In addition, in
11 order for a contract to be legally binding, something
12 must be given up or given in exchange for the promises
13 of each party.

14 One who gives nothing in exchange for another's
15 promise is not entitled to enforce that promise. What
16 is given up or given in exchange for a promise is
17 called consideration.

18 A breach of a contract is an unjustified failure
19 to comply with a material or important term of a
20 contract. A material term is an important term or, to
21 put it differently, it is a term that if not complied
22 with will deprive the other party of the benefit that
23 it bargained for under the contract.

24 I will now turn to the question of damages. In
25 doing so, the Court does not intend to indicate that it

1 is of the opinion that the Defendant is liable. You
2 are instructed on damages in order that you may reach a
3 sound and proper determination of the amount you will
4 award, if any, in the event that you find that the
5 Defendant is liable.

6 You need consider the question of damages only
7 if you find that the Plaintiff has proven its claim,
8 for if you do not find the Defendant liable, no award
9 of damages can be made.

10 Damages must be proved. The burden of proof as
11 to the existence and extent of damages is on the
12 Plaintiff. In other words, you may make an award for
13 damages only to the extent that you find damages have
14 been proven by a preponderance of the evidence.

15 You may not base an award of damages or the
16 amount of any such award on speculation or conjecture.
17 You must base an award of damages on the evidence
18 presented and on what you consider to be fair and
19 adequate compensation for such damages as you find have
20 been proved. In making an award of damages, it is
21 required that you determine the precise amount to be
22 awarded.

23 I will now instruct you on the law of damages
24 for the specific claim involved in this case.

25 If you determine that the Plaintiff has proven

1 its claim that the Defendant breached a contract, you
2 may award damages only with respect to the 48
3 merchandise display units and the 78 glass doors that
4 were completely manufactured and shipped to the ISS
5 warehouse. You may not award damages as to the 62
6 merchandise display units that were not fully
7 assembled.

8 The Plaintiff is entitled to recover the value
9 of the bargain that was originally contemplated by the
10 parties when they entered into the contract.

11 You may award that amount of damages that will
12 put the Plaintiff in the same position it would have
13 been in had the breach not occurred.

14 The underlying rationale on a breach of contract
15 action is to place the innocent party in the position
16 it would have been in if the contract had been fully
17 performed.

18 Now, I have a few other things I need to say to
19 you; but before I do that, I want to meet once more
20 with counsel here at the bench to make sure I haven't
21 left anything out. Just bear with us for a couple of
22 moments.

23 (Bench conference held on the record)

24 MR. SHERMAN: The Defendant has no objections.

25 THE COURT: Okay. Mr. Tarro?

1 MR. TARRO: Yes. The Plaintiff would object to
2 the Court's instruction with regard to the 62 units
3 that were not assembled.

4 The Plaintiff had requested an instruction with
5 regard to a claim for the price of those goods based
6 upon Rhode Island General Law Section 6A-2-709.

7 Specifically, the request for a charge was as
8 follows: Under the Rhode Island General Laws, when a
9 contract involves unique goods, especially manufactured
10 goods which are not reasonably resalable, the seller is
11 entitled to recover the profit it would have gained if
12 the parties had fully performed the contract under the
13 terms of the contract, Rhode Island General Law Section
14 6A-2-709.

15 In the instant matter, the Plaintiff submits
16 that the subject displays were custom made for the
17 Defendant Family Dollar Stores, Inc., to their
18 specifications and specifically for the products that
19 Family Dollar Stores intended to display on them.

20 Pursuant to Rhode Island General Laws, when a
21 buyer fails to pay the price as it becomes due under
22 contract, the seller may recover the price of the goods
23 together with any incidental damages for goods
24 identified to the contract if resale of the goods is
25 not practical.

1 The second instruction that was requested in
2 this regard was the elements of an action for price
3 under Rhode Island General Laws Section 6A-2-709.

4 Under the Rhode Island law, the Plaintiff must
5 establish by a preponderance of the evidence that the
6 following elements in an action for price under Rhode
7 Island General Laws Section 6A-2-709:

8 One, that the Defendant/buyer has refused to
9 accept delivery or to pay the price for the goods as
10 agreed to in the contract; two, that the goods have
11 been identified to the contract; and three, that the
12 seller/Plaintiff has made reasonable efforts to resell
13 the goods at a reasonable price with no success, citing
14 Rhode Island General Laws Section 6 A-2-709(1).

15 THE COURT: In view of the Court's ruling on the
16 Defendant's Rule 50 motion, that's the reason why the
17 Court obviously has not given the instructions that
18 counsel for the Plaintiff has requested.

19 (End of bench conference)

20 THE COURT: Members of the jury, in a moment I
21 will dismiss you so that you may commence your
22 deliberations.

23 However, before I do that, I do need to give you
24 some instructions about the procedures you must use in
25 the course of your deliberations.

1 As I said at the beginning of my instructions,
2 it goes without saying that prejudice, sympathy or
3 compassion should not be permitted to influence you in
4 the course of your deliberations.

5 From what I have said, I do not and did not mean
6 to imply that you should approach your consideration of
7 this case in an intellectual vacuum.

8 You are not required to put aside or to
9 disregard your experiences and observations in the
10 ordinary, everyday affairs of life.

11 Indeed, your experiences and observations in the
12 ordinary, everyday affairs of life are essential to
13 your exercise of reasonably sound judgment and
14 discretion in the course of your deliberations. It is
15 your right and duty to consider the evidence in light
16 of such experiences and observations.

17 In order for you to return a verdict, your
18 decision must be a unanimous decision; that is, all six
19 of you must concur in the decision. You cannot return
20 a verdict either for the Plaintiff or for the Defendant
21 unless and until you are in unanimous agreement as to
22 what your verdict shall be.

23 It is your duty as jurors to consult with one
24 another and to deliberate with a view to reaching an
25 agreement. Each of you must decide this for yourself,

1 but you should do so only after a consideration of the
2 case with your fellow jurors, and you should not
3 hesitate to change an opinion when convinced that it is
4 erroneous.

5 Your verdict must be unanimous, but you are not
6 bound to surrender your honest convictions concerning
7 the effect or weight of the evidence for the mere
8 purpose of returning a verdict or solely because of the
9 opinion of other jurors.

10 Discuss and weigh your respective opinions
11 dispassionately, without regard to sympathy, without
12 regard to prejudice or favor for either party, and
13 adopt that conclusion which in your good conscience
14 appears to be in accordance with the truth.

15 Again, each of you must make your own decision
16 about the proper outcome of this case based on your
17 consideration of the evidence and your discussions with
18 your fellow jurors.

19 No juror should surrender his or her
20 conscientious beliefs solely for the purpose of
21 returning a unanimous verdict.

22 Now, during your deliberations, if you need
23 further instruction or assistance by the Court in any
24 way, I ask that through your foreperson you reduce such
25 requests or questions as you may have to writing.

1 The foreperson may then hand such written
2 request or questions to the officer in whose charge you
3 will now be placed. The officer will then bring such
4 written requests to me, and I will attempt to fulfill
5 your request or answer the question as the case may be.

6 Other than the method outlined, please do not
7 attempt to communicate privately or in any other way
8 with the Court.

9 Now, I've told you every time you've left here
10 you can't take the notebooks with you. You may now use
11 any notes that you may have taken during your
12 deliberations.

13 I remind you, however, as I told you at the
14 beginning of the case, that if you did take notes,
15 those notes are for your personal and individual use
16 only. They are not to be considered the unofficial
17 record of the case. Remember, Karen is the one who
18 keeps the official record.

19 Mr. Siegler, I'm appointing you foreperson of
20 this jury. It will be your responsibility to make sure
21 that each and every one of your fellow jurors has an
22 equal and ample opportunity to voice his or her
23 opinion.

24 It will also be your responsibility to sign any
25 notes that the jury may send to me if you should need

1 to do so. And finally, when the jury has reached a
2 unanimous verdict, it will be your responsibility to
3 fill out and sign the verdict form. You'll see it's a
4 very simple form. It poses two questions with some
5 very simple instructions.

6 Members of the jury, finally, you are never to
7 reveal to any person, not even to the Court, how you
8 stand numerically or otherwise on the questions before
9 you until you have reached a unanimous verdict.

10 Jim.

11 (Court security officer sworn)

12 THE COURT: Members of the jury, you may now
13 collect your notebooks and follow Jim out across to the
14 deliberation room.

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