IN THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF NEBRASKA

THOMAS GRIMM, Plaintiff, v. WERNER CO., Defendant.	)	8:11CV392 COURT'S CHARGE TO THE JURY

INSTRUCTION NO. 1

Now that you have heard the evidence and the arguments of counsel have been made, it is my duty to inform you of the legal principles and considerations you are to use in arriving at a proper verdict.

In accordance with the oath which each of you took when you were selected as jurors to try this case, it is your duty to determine the disputed issues of fact in this case from the evidence produced and seek thereby to reach a verdict which shall speak the truth of the case and thereby do justice between the parties hereto, uninfluenced by sympathy, favor, affection or prejudice for or against any party. It is your duty to receive and accept as correct the law as given you in this charge, and you are not privileged to entertain an opinion as to the law or what the law should be which conflicts in any respect with the law as stated in this charge. However, I have not attempted to embody all the law applicable to this case in any one of the instructions which I have given you, and therefore, you must

consider the instructions in their entirety, giving due weight to each instruction, and construing each instruction in the light of, and in harmony with, the other instructions, and so apply the principles set forth to all of the evidence received during the trial.

INSTRUCTION NO. 2

At the outset, I urge you to make every effort to reach an agreement in your deliberations. Inconclusive trials are not desirable. A common understanding among competent and intelligent people ought to be possible.

However, this observation must not be construed by any juror as a suggestion of the abandonment of an opinion held understandably and earnestly, just for the sake of agreement. The Court must never coerce agreements by jurors. It is appropriate to suggest that if you should find yourselves in apparent disagreement, each of you should carefully reexamine your opinions before assuming a position of dissent.

I should give you one preliminary word of caution. It is seldom wise or beneficial for a juror to make an emphatic expression of his or her opinion of the case, or to announce a determination to stand for a certain verdict, immediately upon entering the jury room at the beginning of deliberations. The reason for this is obvious. We are all human, and it is difficult to recede from a position once it has been firmly and definitely stated.

INSTRUCTION NO. 3

While you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case.

You have heard the terms "direct evidence" and "circumstantial evidence." You are instructed that you should not be concerned with those terms since the law makes no distinction between the weight to be given to direct and circumstantial evidence.

INSTRUCTION NO. 4

During the trial I have ruled on objections to certain evidence. You must not concern yourselves with the reason for such rulings since they are controlled by rules of law.

You must not speculate or form or act upon any opinion as to how a witness might have testified in answer to questions which I have rejected during the trial, or upon any subject matter to which I have forbidden inquiry.

In coming to any conclusion in this case, you must be governed by the evidence before you and by the evidence alone.

You have no right to indulge in speculation, conjecture or inference not supported by the evidence.

The evidence from which you are to find the facts consists of the following: (1) the testimony of the witnesses; (2) documents and other things received as exhibits; and (3) any facts that have been stipulated -- that is, formally agreed to by the parties.

The following things are not evidence: (1) statements, comments, questions and arguments by lawyers for the parties; (2) objections to questions; and (3) anything you may have seen or heard about this case outside the courtroom.

INSTRUCTION NO. 5

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves.

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it, or none of it.

In determining the weight to be given to the testimony of the witnesses, you should take into consideration their interest in the result of the suit, if any appears, their conduct and demeanor while testifying, their apparent fairness or bias, their relationship to the parties, if any appears, their opportunities for seeing or knowing and remembering the things about which they testified, the reasonableness or unreasonableness of the testimony given by them, any previous statement or conduct of the witness that is consistent or inconsistent with the testimony of the witness at this trial, and all of the evidence, facts, and circumstances proved which tend to corroborate or contradict such evidence, if any appear. You are not bound to take the testimony of any witness as true, and should not do so if you are satisfied from all the facts and circumstances proved at the trial that such witness is mistaken in the matter testified to, or that for any other reason appearing in the evidence, the testimony is untrue or unreliable.

The fact that one side may have used a greater number of witnesses or presented a greater quantity of evidence should not affect your decision. Rather, you should determine which witness or witnesses, and which evidence appears accurate and trustworthy. It is the weight of the evidence that counts -- not the number of witnesses.

The testimony of a single witness which produces in your minds belief in the likelihood of truth is sufficient for proof of any fact, and would justify a verdict in accordance with such testimony, even though a number of witnesses may have testified to the contrary if, after consideration of all of the evidence in the case, you hold greater belief in the accuracy and reliability of the one witness.

INSTRUCTION NO. 6

A witness who has special knowledge, skill, experience, training, or education in a particular area may testify as an expert in that area. You determine what weight, if any, to give to an expert's testimony just as you do with the testimony of any other witness. You should consider the expert's credibility as a witness, the expert's qualifications as an expert, the sources of the expert's information, and the reasons given for any opinions expressed by the expert.

INSTRUCTION NO. 7

In these instructions you are told that your verdict depends on whether you find certain facts have been proved. The burden of proving a fact is upon the party whose claim depends upon that fact. The party who has the burden of proving a fact must prove it by the greater weight of the evidence.

The greater weight of the evidence means evidence sufficient to make a claim more likely true than not true. The greater weight of the evidence is not determined by the greater number of witnesses testifying in relation to the facts and circumstances, but by considering all of the evidence and deciding which is more believable.

In determining whether a party to this action has sustained its burden of proof, you are not limited to the evidence introduced by that party. Any party to the case is entitled to the benefit of any evidence tending to establish its contention, even though such evidence comes from witnesses presented by the other party.

If the evidence upon a claim is evenly balanced, or if it weighs in favor of the other party, then the burden of proof has not been met.

INSTRUCTION NO. 8

This is a civil action brought by Thomas Grimm who is the sole plaintiff in this action. It is brought against Werner Co., who is the only defendant in this action. Hereafter I may occasionally refer to the parties simply as the "plaintiff" or by his proper or legal name. The defendant may be referred to as "defendant" or by its proper or legal name.

INSTRUCTION NO. 9

All of the parties to a lawsuit are entitled to the same fair and impartial consideration, whether they are corporations or individuals.

Every act of every officer, employee or other agent, on behalf of or in the name of the corporation, if done within the scope of his authority, is in law the act of the corporation itself.

Authority to act for a corporation in a particular matter, or in a particular way, may be inferred from the surrounding facts and circumstances shown by the evidence in the case. That is to say, authority to act for a corporation, like any other fact in issue in a civil case, may be established by direct evidence or by circumstantial evidence.

INSTRUCTION NO. 10

This case arises out of an accident which occurred on November 28, 2008. The plaintiff, Thomas Grimm, was standing on a Keller model KMT2-13 ladder manufactured by the defendant, Werner, Co. when the ladder slipped out from under him. As a result, he claims he sustained permanent injuries resulting in medical bills in the amount agreed to by the parties. Mr. Grimm makes the following claims against the defendant.

(1) The defendant failed to use reasonable care to see that the ladder was safe for the use for which it was made; (2) the defendant failed to provide reasonably foreseeable users of the ladder with adequate warnings regarding the safe use of the ladder; (3) the defendant's ladder was sold with a design defect that made it unreasonably dangerous for the use for which it was made; (4) the defendant's ladder was defective because it was not accompanied by a warning that would inform users of a risk that was foreseeable to the defendant.

The plaintiff further claims that he was injured as a result of the negligence and seeks a judgment against the defendant for his damages. The parties have also stipulated to certain facts which are set forth in Exhibit A.

Defendant admits that it designed, manufactured, and sold the ladder involved in the accident. The defendant admits that plaintiff was a foreseeable user of the ladder and was using the ladder in a foreseeable manner when the accident occurred.

The defendant also admits that the ladder slipped out from beneath plaintiff on the day of the accident and that plaintiff was injured as a result of the fall.

Defendant denies that it failed to use reasonable care in designing the ladder or that it failed to provide adequate warnings. Defendant further denies that the ladder was defective in design or because of insufficient warnings, denies that the ladder was unreasonably dangerous, and denies the ladder was not accompanied by sufficient warnings.

The defendant claims that plaintiff misused the ladder and that said misuse was a proximate cause of the accident. Further, defendant claims that it could not have reasonably foreseen the plaintiff's misuse. Finally, the defendant claims the design of the ladder conformed with the generally recognized and prevailing state of the art in the industry on November 28, 2008.

INSTRUCTION NO. 11

Plaintiff's Claim of Negligence

Before the plaintiff can recover against the defendant, on his claim that the defendant was negligent in failing to use reasonable care to see that its ladder was safe for the use for which it was made, the plaintiff must prove, by the greater weight of the evidence, each and all of the following:

1) The defendant failed to use reasonable care to see that the ladder was safe for the use for which it was made;

2) The failure to use reasonable care to see that the ladder was safe for the use for which it was made was a proximate cause of some damage to the plaintiff; and

3) The nature and extent of that damage.

INSTRUCTION NO. 12

Plaintiff's Claim of Defendant's Negligent Failure to Warn

Before the plaintiff can recover against the defendant on his claim that the defendant failed to warn him that the ladder was dangerous, the plaintiff must prove, by the greater weight of the evidence, each and all of the following:

1) That the defendant knew or had reason to know that its ladder was or was likely to be dangerous when put to the use for which it was made;

2) That the defendant knew or had reason to know that those for whose use the ladder was made would not realize the danger;

3) That the defendant failed to provide reasonably foreseeable users of the product with adequate warning of that danger;

4) That this failure to warn reasonably foreseeable users of the product of the danger was a proximate cause of some damage to the plaintiff; and

5) The nature and extent of that damage.

INSTRUCTION NO. 13

Plaintiff's Claims of Strict Liability

Before the plaintiff can recover against the defendant on his claims that defendant's ladder was unreasonably dangerous because of a defective design or unreasonably dangerous because of a defect in the product warnings, the plaintiff must prove, by the greater weight of the evidence, each and all of the following:

1) That, at the time the ladder left the defendant's possession, it was defective in its design or by reason of insufficient warnings;

2) That this defect made the ladder unreasonably dangerous for its intended use, or any use the defendant could have reasonably foreseen;

3) That this defect was a proximate cause of some damage to the plaintiff; and

4) The nature and extent of that damage.

INSTRUCTION NO. 14

A product is defective in its design if it fails to perform as safely as an ordinary consumer would expect when it is used in a manner either intended by the manufacturer or reasonably foreseeable by the manufacturer.

INSTRUCTION NO. 15

A product is defective if it is not accompanied by sufficient warnings. To be sufficient, a warning must inform a product's user of any risk of harm not readily recognizable by the ordinary user while using the product in a manner reasonably foreseeable by the manufacturer.

INSTRUCTION NO. 16

A product is unreasonably dangerous if it creates a risk of harm beyond that which would be contemplated by the ordinary foreseeable user.

INSTRUCTION NO. 17

Effect of Findings

If the plaintiff has not met the burden of proof on any of his claims, then your verdict must be for the defendant.

On the other hand, if the plaintiff has met this burden of proof for at least one of his claims, then you must consider the defendant's affirmative defenses.

INSTRUCTION NO. 18

Defendant's Claim of Contributory Negligence

In defense to plaintiff's claim that defendant failed to use reasonable care to insure the ladder was safe for its intended use, the defendant claims that the plaintiff was negligent in failing to use reasonable care in setting up and using the ladder.

In connection with its claim that plaintiff's negligence caused the fall and plaintiff's resulting injuries, the burden is on the defendant to prove by the greater weight of the evidence both of the following:

1) That the plaintiff was negligent as claimed by the defendant; and

2) That this negligence on the part of the plaintiff was a proximate cause of his own injury.

INSTRUCTION NO. 19

Effect of Defendant's Claim of Contributory Negligence

If the plaintiff has met his burden of proof as to either of plaintiff's claims that defendant failed to use reasonable care and defendant has not met its burden of proof as to plaintiff's negligence, then your verdict must be for the plaintiff.

If both the plaintiff and the defendant have met their burdens of proof on their claims of negligence and contributory negligence, then you must compare the negligence of the defendant with the negligence of the plaintiff as follows:

If the negligence of the plaintiff equals 50% or more, you must return a verdict for the defendant. If the negligence of the plaintiff is less than 50%, you must return a verdict for the plaintiff.

Note, the amount of money that will actually be awarded to the plaintiff is not the total amount of plaintiff's damages. Once you have returned you verdict, the court will take the figure you have entered as the total amount of plaintiff's damage and reduce it by the percentage of the negligence you have attributed to the plaintiff. That amount is the amount of money that will be awarded to the plaintiff. In other words, if the plaintiff's negligence was X%, then the court will reduce the plaintiff's total damages by X%, and the remainder will be awarded to the plaintiff.

Defendant's claims of contributory negligence are a defense only to plaintiff's claims that defendant failed to use reasonable care in the design of the ladder and that defendant failed to adequately warn that the ladder was dangerous.

INSTRUCTION NO. 20

Defendant's Claim of Misuse

In defense to the plaintiff's claim that the ladder was unreasonably dangerous because of a defective design or insufficient warnings, the defendant claims that the plaintiff misused the ladder.

In connection with defendant's claim that the plaintiff misused the ladder, the burden is on the defendant to prove by the greater weight of the evidence each and all of the following:

1) That the plaintiff used the ladder in the way claimed by the defendant.

2) That the defendant could not have reasonably foreseen such a use of the product.

3) That this misuse by the plaintiff was a proximate cause of his own injury.

INSTRUCTION NO. 21

Effect of Defendant's Claim of Misuse

If the defendant has met this burden of proof, then your verdict must be for the defendant on the plaintiff's claims that the ladder was unreasonably dangerous because of a defective design or insufficient warnings. Finding that the defendant has met its burden with respect to this defense does not in itself require a finding for the defendant in regard to the plaintiff's other claims.

Defendant's claims of misuse are a defense only to plaintiff's claims that the ladder was unreasonably dangerous because of a defective design or insufficient warnings.

INSTRUCTION NO. 22

Defendant's Claims of State of the Art

In defense to all of the plaintiff's claims, defendant claims the design and labeling of the ladder conformed with the state of the art.

In connection with this defense, the burden is upon the defendant to prove, by the greater weight of the evidence, that the design or labeling of the ladder conformed with the generally recognized and prevailing state of the art in the industry on November 28, 2008. "State of the art" means the best technology reasonably available at the time.

INSTRUCTION NO. 23

Effect of Defendant's Claim on State of the Art

If the defendant has proved by the greater weight of the evidence that the design of its ladder conformed to the state of the art, then your verdict regarding negligent design and defective design must be for the defendant.

If the defendant has proved by the greater weight of the evidence that the labeling of its ladder conformed to the state of the art, then your verdict regarding negligent failure to warn and defective warning must be for the defendant.

INSTRUCTION NO. 24

Negligence is doing something that a reasonably careful person would not do under similar circumstances, or failing to do something that a reasonably careful person would do under similar circumstances.

INSTRUCTION NO. 25

A proximate cause is a cause that produces a result in a natural and continuous sequence, and without which the result would not have occurred.

INSTRUCTION NO. 26

If you return a verdict for the plaintiff, then you must decide how much money will fairly compensate the plaintiff for his injury.

I am about to give you a list of the things you may consider in making this decision. From this list, you must only consider those things you decide were proximately caused by the defendant's negligence:

1) The nature and extent of the injury, including whether the injury is temporary or permanent (and whether any resulting disability is partial or total);

2) The reasonable value of the medical (hospital, nursing, and similar) care and supplies reasonably needed by and actually provided to the plaintiff (and reasonably certain to be needed and provided in the future);

3) The wages, salary, profits, reasonable value of the working time the plaintiff has lost because of his inability or diminished ability to work;

4) The reasonable value of the earning capacity the plaintiff is reasonably certain to lose in the future;

5) The physical pain and mental suffering the plaintiff has experienced (and is reasonably certain to experience in the future);

6) The plaintiff's wife's loss of consortium. Consortium means those things to which a person is entitled by

reason of the marriage relationship. It includes affection, love, companionship, comfort, assistance, services, moral support, and the enjoyment of sexual relations.

Remember, throughout your deliberations you must not engage in any speculation, guess, or conjecture and you must not award any damages by way of punishment or through sympathy.

INSTRUCTION NO. 27

A 52-year-old male such as Thomas Grimm has a remaining life expectancy of 27.32 years. This may assist you in determining probable life expectancy. However, this is only an estimate based on average experience. It is not conclusive. You should consider it along with any other evidence bearing on probable life expectancy, such as evidence of health, occupation, habits, and the like.

INSTRUCTION NO. 28

The amount of damages for any loss to be suffered in the future would not be the present payment of the total of such damages, but must be discounted to the present cash value of such future benefit. Therefore, in determining the present value of any future benefit lost to the plaintiff as a result of the injury he suffered on November 28, 2008, you should calculate the same on the basis that any sum you might award will be invested with reasonable wisdom and frugality, and that all of it, except the amount currently needed to compensate for the loss sustained will be kept so invested as to yield the rate of interest consistent with current interest rates and reasonable security. The present value will be the sum which, when supplemented by such interest income, will equal the total of lost future benefits.

INSTRUCTION NO. 29

In the trial of this case and in this charge, I have in no way attempted to express my opinion as to who should prevail upon the issues submitted to you. You must not construe any statement, action, or ruling on my part in the trial of this case as an indication of any opinion on my part respecting the proper course of your verdict. During the course of a trial, I occasionally ask questions of a witness in order to bring out facts not fully covered in the testimony. Do not assume that I hold any opinion on the matters to which the questions related.

So regardless of what I may have chosen to say, I must admonish you that you are the sole judges of the facts, and your verdict must respond to your own conclusions from the evidence.

INSTRUCTION NO. 30

Upon retiring to the jury room, you shall first select one of your number as foreperson to preside over your deliberations and who alone will sign the verdict form. You will then proceed immediately with your study and deliberations of the case.

In arriving at your verdict, remember it must be unanimous. Short of unanimity, you cannot consider that you have reached a verdict.

You will take with you a verdict form which you will use to reflect your verdict.

After you have arrived at your verdict, your foreperson will simply fill in the appropriate blank spaces provided in the form of verdict. Your foreperson will then date and sign the verdict form and this will constitute your verdict.

If it becomes necessary during your deliberations to communicate with the Court, you can pick up the phone in the jury room, and it will connect directly to my office. Bear in mind you are not to reveal to me or to anyone else how the jury stands, numerically or otherwise, until you have reached a unanimous verdict.

You will be allowed to separate for your meals and for any necessary intermission between 5 p.m. today and Tuesday morning at 9 a.m. In addition, you are to keep in mind all of the earlier admonitions of the Court and especially to refrain

from any discussion of the case with anyone and to avoid reading or viewing any news about this case.

As the Judge presiding over the trial, I shall be available in this building throughout your deliberations and until your verdict has been returned and shall receive it promptly upon its return.