

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION**

ADVANCE BRANDS, LLC,

Plaintiff,

vs.

ALKAR-RAPIDPAK, INC.,

Defendant and Third-Party
Plaintiff,

vs.

GLEESON CONSTRUCTORS &
ENGINEERS, LLC and PLAINS
BOILER SERVICE, INC.,

Third-Party Defendants.

No. 08-CV-4057-LRR

FINAL JURY INSTRUCTIONS

Members of the jury, the written instructions I gave you at the beginning of the trial and the oral instructions I gave you during the trial remain in effect. I now give you some additional instructions.

The instructions I am about to give you, as well as the preliminary instructions given to you at the beginning of the trial, are in writing and will be available to you in the jury room. *All* instructions, whenever given and whether in writing or not, must be followed. This is true even though some of the instructions I gave you at the beginning of trial or during trial are not repeated here.

In considering these instructions, the order in which they are given is not important.

INSTRUCTION NO. 1 – JUDGE’S OPINION

Neither in these instructions nor in any ruling, action or remark that I have made during the course of this trial have I intended to give any opinion or suggestion as to what your verdicts should be.

INSTRUCTION NO. 2 - CREDIBILITY OF WITNESSES

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 deciding what testimony to believe, you may consider a witness's intelligence, the opportunity a witness had to see or hear the things testified about, a witness's memory, any motives a witness may have for testifying a certain way, the manner of a witness while testifying, whether a witness said something different at an earlier time, the general reasonableness of the testimony and the extent to which the testimony is consistent with any evidence that you believe.

In deciding whether or not to believe a witness, keep in mind that people sometimes hear or see things differently and sometimes forget things. You need to consider, therefore, whether a contradiction is an innocent misrecollection, a lapse of memory, or an intentional falsehood, and that may depend on whether it has to do with an important fact or only a small detail.

INSTRUCTION NO. 3 - BURDEN OF PROOF

Your verdicts depend on whether you find certain facts have been proven by the greater weight of the evidence. In order to find that a fact has been proven by the greater weight of the evidence, you must find that it is more likely true than not true. It is determined by considering all of the evidence and deciding which evidence is more believable.

You have probably heard of the phrase “proof beyond a reasonable doubt.” That is a stricter standard which applies in criminal cases. It does not apply in civil cases such as this. You should, therefore, put it out of your minds.

INSTRUCTION NO. 4 – EVIDENCE

There are two types of evidence from which a jury may properly find the truth as to the facts of a case: direct evidence and circumstantial evidence. Direct evidence is the evidence of the witnesses to a fact or facts of which they have knowledge by means of their senses. The other is circumstantial evidence—the proof of a chain of circumstances pointing to the existence or nonexistence of certain facts. The law makes no distinction between direct and circumstantial evidence. You should give all evidence the weight and value you believe it is entitled to receive.

INSTRUCTION NO. 5 - SUMMARIES NOT IN EVIDENCE

Certain charts and summaries have been shown to you in order to help explain the facts disclosed by the books, records or other underlying evidence in the case. Those charts or summaries are used for convenience. They are not themselves evidence or proof of any facts. It is for you to decide how much weight, if any, you will give to them. If they do not correctly reflect the facts shown by the evidence in the case, you should disregard these charts and summaries and determine the facts from the books, records or other underlying evidence.

INSTRUCTION NO. 6 – SUMMARIES IN EVIDENCE

You will remember that certain summaries or charts were admitted in evidence. You may use those summaries or charts as evidence, even though the underlying documents and records are not here. However, the accuracy of those summaries or charts has been challenged. It is for you to decide how much weight, if any, you will give to them. In making that decisions, you should consider all of the testimony you heard about the way in which they were prepared.

INSTRUCTION NO. 7 – EXPERT TESTIMONY

You have heard testimony from persons described as experts. Persons who have become experts in a field because of their education and experience may give their opinion on matters in that field and the reasons for their opinion.

Consider expert testimony just like any other testimony. You may accept it or reject it. You may give it as much weight as you think it deserves, considering the witness's education and experience, the reasons given for the opinion, and all the other evidence in the case.

An expert witness was asked to assume certain facts were true and to give an opinion based on that assumption. This is called a hypothetical question. If any fact assumed in the question has not been proven by the evidence, you should decide if that omission affects the value of that opinion.

**INSTRUCTION NO. 8 - CONTRADICTORY STATEMENT
BY WITNESS NOT UNDER OATH**

You have heard evidence claiming certain witnesses made statements before this trial while not under oath which were inconsistent with what those witnesses said in this trial. Because the witnesses did not make the earlier statements under oath, you may use them only to help you decide if you believe the witness.

Decide if the earlier statements were made and whether they were inconsistent with the testimony given at trial. You may disregard all or any part of the testimony if you find the statements were made and they were inconsistent with the testimony given at trial, but you are not required to do so. Do not disregard the testimony if other evidence you believe supports it or if you believe it for any other reason.

**INSTRUCTION NO. 9 - CONTRADICTORY STATEMENT
BY WITNESS UNDER OATH**

You have heard evidence claiming certain witnesses made statements before this trial while under oath which were inconsistent with what those witnesses said in this trial. If you find these statements were made and were inconsistent, then you may consider them as part of the evidence, just as if they had been made at this trial.

You may also use these statements to help you decide if you believe these witnesses. You may disregard all or any part of the testimony if you find the statements were made and were inconsistent with the testimony given at trial, but you are not required to do so. Do not disregard the trial testimony if other evidence you believe supports it, or if you believe it for any other reason.

INSTRUCTION NO. 10 – STATEMENTS BY A PARTY

You have heard evidence claiming a party made statements before this trial either while under oath or while not under oath.

If you find such a statement was made, you may regard the statement as evidence in this case the same as if the party had made it under oath during the trial.

If you find such a statement was made and was inconsistent with that party's testimony during the trial you may also use the statement as a basis for disregarding all or any part of the party's testimony during the trial but you are not required to do so. You should not disregard the party's testimony during the trial if other credible evidence supports it or if you believe it for any other reason.

INSTRUCTION NO. 11 - PARTY IS A BUSINESS

The fact that the parties in this case are businesses should not affect your decisions. All persons are equal before the law, and businesses, whether large or small, are entitled to the same fair and conscientious consideration by you as any other person.

INSTRUCTION NO. 12 – LIABILITY OF CORPORATION

Although a corporation is often treated under the law as if it were a person, a corporation can act only through its employees, officers, directors and agents. Therefore, a corporation can be held responsible under the law for the acts or omissions of its employees, officers, directors and agents performed within the scope of their authority.

INSTRUCTION NO. 13 – FAULT

In these instructions I use the term “fault.” Fault means one or more acts or omissions towards the property of the actor or of another which constitutes negligence, breach of warranty, misuse of a product for which the defendant otherwise would be liable or unreasonable failure to mitigate damages.

INSTRUCTION NO. 14 – COMPARATIVE FAULT

Damages may be the fault of more than one person. In comparing fault, you should consider all of the surrounding circumstances as shown by the evidence, together with the conduct of Plaintiff Advance Brands, Defendant Alkar and Third-Party Defendants Gleeson and Plains Boiler and the extent of the causal relation between their conduct and the damages claimed. You should then determine what percentage, if any, each person's fault contributed to the damages.

In arriving at a percentage of fault, you cannot arrive at a figure by taking down the estimate of each juror as to the percentage of fault, and agreeing in advance that the average of these estimates will be your percentage of fault.

**INSTRUCTION NO. 15 – COMPARATIVE FAULT:
EFFECTS OF VERDICT**

After you have compared the conduct of all parties, if you find Advance Brands was at fault and that its fault was more than 50% of the total fault, Advance Brands cannot recover damages.

However, if you find Advance Brands's fault was 50% or less of the total fault, then I will reduce the total damages by the percentage of Advance Brands's fault.

If you assign to a party less than 50% of the total fault, that party will only be liable to the extent of the percentage of fault assigned by you. I will order Defendant Alkar and Third-Party Defendants Gleeson and Plains Boiler to contribute to the payment of damages awarded on the basis of the percentages of fault you insert in your answers to the questions at the end of these instructions.

**INSTRUCTION NO. 16 – ADVANCE BRANDS’S CLAIMS OF
ALKAR’S COMPARATIVE FAULT**

Advance Brands claims Alkar was at fault in one or more of the following ways:

- a. Alkar defectively designed the oven;
- b. Alkar failed to warn Advance Brands that the oven was dangerous;
- c. Alkar breached an implied warranty of merchantability; and/or
- d. Alkar breached an implied warranty of fitness for a particular purpose.

These grounds of fault are explained to you in other instructions.

In order to succeed on any of these claims, Advance Brands must prove all of the following propositions:

1. Alkar was at fault. In order to prove fault, Advance Brands must prove that Alkar defectively designed the oven as set out in Instruction No. 21; that Alkar failed to warn Advance Brands that the oven was dangerous as set out in Instruction No. 24; that Alkar breached an implied warranty of merchantability as set out in Instruction No. 30; or that Alkar breached an implied warranty of fitness for a particular purpose as set out in Instruction No. 26;
2. Alkar’s fault was a cause of Advance Brands’s damages; and
3. The amount of damages.

If Advance Brands has failed to prove any of these propositions, Advance Brands is not entitled to damages. If Advance Brands has proven all of these propositions, you will consider the defense of comparative fault as explained in Instruction Nos. 14 through 20.

**INSTRUCTION NO. 17 – ALKAR’S CLAIMS OF
ADVANCE BRANDS’S COMPARATIVE FAULT**

Alkar claims Advance Brands was at fault in one or more of the following ways:

- a. Negligence; and/or
- b. Failure to mitigate damages.

These grounds of fault are explained to you in other instructions.

In order to prove this defense, Alkar must prove both of the following propositions:

1. Advance Brands was at fault. In order to prove fault, Alkar must prove Advance Brands was negligent as set out in Instruction No. 36 or that Advance Brands failed to mitigate its damages as set out in Instruction No. 20; and
2. Advance Brands’s fault was a cause of Advance Brands’s damages.

If Alkar has failed to prove either of these propositions, Alkar has not proven its defense with respect to Advance Brands. If Alkar has proven both of these propositions, then you will assign a percentage of fault against Advance Brands and include the percentage of Advance Brands’s fault in your answer to the appropriate question on the Verdict Form.

**INSTRUCTION NO. 18 - ALKAR'S CLAIMS OF
GLEESON'S COMPARATIVE FAULT**

Alkar claims Gleeson was at fault for negligence. This ground of fault is explained to you in other instructions.

In order to prove this claim, Alkar must prove both of the following propositions:

1. Gleeson was at fault. In order to prove fault, Alkar must prove Gleeson was negligent as set out in Instruction No. 37; and
2. Gleeson's fault was a cause of Advance Brands's damages.

If Alkar has failed to prove either of these propositions, Alkar has not proven its claim with respect to Gleeson. If Alkar has proven both of these propositions, then you will assign a percentage of fault against Gleeson and include the percentage of Gleeson's fault in your answer to the appropriate question on the Verdict Form.

**INSTRUCTION NO. 19 – ALKAR’S CLAIMS OF
PLAINS BOILER’S COMPARATIVE FAULT**

Alkar claims Plains Boiler was at fault for negligence. This ground of fault is explained to you in other instructions.

In order to prove this claim, Alkar must prove both of the following propositions:

1. Plains Boiler was at fault. In order to prove fault, Alkar must prove Plains Boiler was negligent as set out in Instruction No. 38; and
2. Plains Boiler’s fault was a cause of Advance Brands’s damages.

If Alkar has failed to prove either of these propositions, Alkar has not proven its claim with respect to Plains Boiler. If Alkar has proven both of these propositions, then you will assign a percentage of fault against Plains Boiler and include the percentage of Plains Boiler’s fault in your answer to the appropriate question on the Verdict Form.

**INSTRUCTION NO. 20 - COMPARATIVE FAULT:
FAILURE TO MITIGATE DAMAGES**

Alkar claims Advance Brands was at fault for failing to mitigate its damages by not exercising ordinary care to (1) repair the oven, rather than purchasing a new oven; or (2) increase the use of the undamaged portion of its facility.

Advance Brands has a duty to exercise ordinary care to reduce, minimize, or limit its damages. However, Advance Brands has no duty to do something that is unreasonable under the circumstances.

To prove its claim of failure to mitigate damages, Alkar must prove all of the following propositions:

1. There was something Advance Brands could do to mitigate its damages;
2. Requiring Advance Brands to do so was reasonable under the circumstances;
3. Advance Brands acted unreasonably in failing to undertake the mitigating activity; and
4. Advance Brands's failure to undertake the mitigating activity caused an identifiable portion of its damages.

If Alkar has proven all of these numbered propositions, then it has proven this defense, and you shall assign a percentage of fault to Advance Brands for the time period after the failure to mitigate. This amount will be used in answering the appropriate question on the Verdict Form. If Alkar has failed to prove one or more of these numbered propositions, then it has not proven Advance Brands failed to mitigate its damages.

**INSTRUCTION NO. 21 – ADVANCE BRANDS’S CLAIM:
DESIGN DEFECT**

In order to recover on the claim that Alkar’s product was defective in design, Advance Brands must prove all of the following propositions:

1. Alkar sold or distributed the oven;
2. Alkar was engaged in the business of selling or distributing the oven;
3. The product was in a defective condition at the time it left Alkar’s control, in one or more of the following ways:
 - a. The oven lacked adequate pressure relief;
 - b. The heat from one zone of the oven heated fluid in other zones of the oven; and/or
 - c. The oven lacked a mechanism to detect and alarm the user of over-pressurization, trapped fluid and/or leaks;
4. A reasonable alternative safer design could have been practically adopted at the time of sale or distribution;
5. The alternative design would have reduced or avoided the foreseeable risks of harm posed by the oven;
6. The omission of the alternative design renders the oven not reasonably safe;

(CONTINUED)

INSTRUCTION NO. 21 (Cont'd)

7. The alternative design would have reduced or prevented Advance Brands's harm;
8. The design defect was a cause of Advance Brands's damages; and
9. The amount of damages.

If Advance Brands has failed to prove any of these propositions, Advance Brands is not entitled to damages on this claim. If Advance Brands has proven all of these propositions, then you will consider the defenses of comparative fault, as explained in Instruction Nos. 14 through 20, and state of the art, as explained in Instruction No. 23.

INSTRUCTION NO. 22 – REASONABLE ALTERNATIVE DESIGN

Concerning propositions 4, 5 and 6 of Instruction No. 21, you may consider the following factors and their interaction to determine whether an alternative design is reasonable and whether its omission renders the oven not reasonably safe:

- The magnitude and probability of the foreseeable risks of harm;
- The instructions and warnings accompanying the oven;
- Consumer expectations about product performance and the dangers attendant to use of the oven, including expectations arising from product portrayal and marketing;
- Whether the risk presented by the oven is open and obvious to, or generally known by, foreseeable users;
- The technological feasibility and practicality of the alternative design;
- Whether the alternative design could be implemented at a reasonable cost;
- The relative advantages and disadvantages of the oven as designed and as it alternatively could have been designed;
- The likely effects of the alternative design on product longevity, maintenance, repair, aesthetics and on the efficiency and utility of the oven;
- The range of consumer choice among similar products, with and without the alternative design;
- The overall safety of the oven with and without the alternative design and whether the alternative design would introduce other dangers of equal or greater magnitude;
- Custom and practice in the industry and how Alkar's design compares with other competing products in actual use; and
- Any other factor shown by the evidence bearing on this question.

INSTRUCTION NO. 23 - STATE OF THE ART

If the oven conformed to the state of the art, then Alkar is not liable for Advance Brands's design defect claim. "State of the art" is what feasibly could have been done. It means what technologically could have been done at the time, based on the latest scientific knowledge and discoveries in the field, to design an oven that would have prevented Advance Brands's injuries while meeting the needs of the user. Custom in the industry is not necessarily state of the art, nor is every alternative design for which technology exists necessarily feasible.

To establish this defense to Advance Brands's design defect claim, Alkar must prove the oven conformed to the state of the art in existence at the time the oven was designed. If Alkar proves the oven conformed to the state of the art with respect to Advance Brands's design defect claim, then Alkar is not at fault and you should answer the appropriate question on the Verdict Form accordingly. If Alkar fails to prove its product conformed to the state of the art, then you will consider whether Advance Brands is entitled to recover under the other instructions.