

CLOSING INSTRUCTION NO. 1

Members of the Jury: Now that you have heard all the evidence and the arguments of the parties, it is my duty to instruct you as to the law of the case. Each of you is in possession of a copy of the jury instructions, which you may take into the jury room if you desire.

You must not infer from these instructions or from anything I may say or do as indicating that I have an opinion regarding the evidence or what your verdict should be.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. And you must not be influenced by any personal likes or dislikes, opinions, prejudices or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath to do so.

In following my instructions, you must follow all of them and not single out some and ignore others; they are all important.

CLOSING INSTRUCTION NO. 2

The evidence you are to consider in deciding what the facts are consists of:

- (1) the sworn testimony of any witness;
- (2) the exhibits which are received into evidence; and
- (3) any facts to which Plaintiff and defense counsel have agreed.

CLOSING INSTRUCTION NO. 3

In reaching your verdict, you may consider only the testimony and exhibits received into evidence. Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you:

(1) Arguments and statements by Plaintiff and Defendant's counsel are not evidence other than when Plaintiff gave sworn testimony. At other times Plaintiff was not a witness. What Plaintiff and Defendant's counsel have said in their opening statements, closing arguments, and at other times, is intended to help you interpret the evidence, but it is not evidence.

(2) Questions and objections by these individuals are not evidence. They have a duty to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it.

(3) Testimony that has been excluded or stricken, or that you have been instructed to disregard, is not evidence and must not be considered. In addition sometimes testimony and exhibits have been received only for a limited purpose; when I give a limiting instruction, you must follow it.

(4) Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

CLOSING INSTRUCTION NO. 4

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what the witness personally saw or heard or did. Circumstantial evidence is proof of one or more facts from which you could find another fact. You should consider both kinds of evidence. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

It is also for you to decide whether a fact has been proved by circumstantial evidence. In making that decision, you must consider all the evidence in the light of reason, common sense, and experience.

CLOSING INSTRUCTION NO. 5

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it. Proof of fact does not necessarily depend on the number of witnesses who testify about it.

In considering the testimony of any witness, you may take into account:

1. the opportunity and ability of the witness to see or hear or know the things testified to;
2. the witness's memory;
3. the witness's manner while testifying;
4. the witness's interest in the outcome of the case and any bias or prejudice;
5. whether other evidence contradicted the witness's testimony;
6. the reasonableness of the witness's testimony in light of all the evidence; and
7. any other factors that bear on believability.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify about it.

CLOSING INSTRUCTION NO. 6

The evidence that a witness has been convicted of a crime may be considered, along with all other evidence, in deciding whether or not to believe the witness and how much weight to give to the testimony of the witness and for no other purpose.

CLOSING INSTRUCTION NO. 7

Plaintiff claims each Defendant deprived him of his Eighth Amendment right under the United States Constitution by returning him to an upper bunk in his jail cell following Plaintiff's right inguinal hernia surgery.

To prevail on this claim, Plaintiff must prove each of the following elements by a preponderance of the evidence:

first, Plaintiff had a serious need for placement in a lower bunk because of his condition following his inguinal hernia surgery;

second, Defendant acted with deliberate indifference to Plaintiff's serious need when he returned Plaintiff to an upper bunk in Plaintiff's jail cell; and

third, Defendant's act of placing Plaintiff in the upper bunk in Plaintiff's jail cell caused Plaintiff to be harmed and suffer damages.

CLOSING INSTRUCTION 8

Deliberate indifference is established only if there is actual knowledge of a substantial risk that Plaintiff's post hernia surgery condition required Plaintiff to be placed in a lower bunk. "Deliberate indifference" is evidenced only when "the official knows of and disregards an excessive risk to an inmate's health or safety; the prison official must both be aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists, and must also draw the inference. Mere negligence is insufficient for liability, since a prison official's failure to alleviate a significant risk that he should have perceived but did not fails to satisfy the subjective component of the deliberate indifference term.

CLOSING INSTRUCTION 9

When a party has the burden of proof on any claim or affirmative defense by a preponderance of the evidence, it means you must be persuaded by the evidence that the claim or affirmative defense is more probably true than not true.

You should base your decision on all of the evidence, regardless of which party presented it.

CLOSING INSTRUCTION NO. 10

I am required to instruct you about the measure of damages. By instructing you on damages, I do not mean to suggest for which party your verdict should be rendered.

If you find for Plaintiff on Plaintiff's Eighth Amendment claim, you must determine Plaintiff's damages. Plaintiff has the burden of proving damages by a preponderance of the evidence. Damages means the amount of money which will reasonably and fairly compensate Plaintiff for any injury you find was caused by Defendant. In determining the measure of damages, you should consider the nature and extent of the injuries suffered.

It is for you to determine what damages, if any, have been proved. Your award must be based upon evidence and not upon speculation, guesswork, or conjecture.

CLOSING INSTRUCTION NO. 11

Plaintiff has a duty to use reasonable efforts to mitigate damages. To mitigate means to avoid or reduce damages.

Defendant has the burden of proving by a preponderance of the evidence:

1. that Plaintiff failed to use reasonable efforts to mitigate damages; and
2. the amount by which damages would have been mitigated.

It is the duty of any person who has been injured to use reasonable diligence and reasonable means under the circumstances, in order to prevent the aggravation of such injuries and to effect a recovery from such injuries.

CLOSING INSTRUCTION NO. 12

Some of you have taken notes during the trial. Such notes are only for the personal use of the person who took them.

There is always a tendency to attach undue importance to matters which one has written down. Some testimony which is considered unimportant at the time presented, and thus not written down, takes on greater importance later in the trial in light of all the evidence presented. Therefore, you are instructed that your notes are only a tool to aid your own individual memory and you should not compare your notes with other jurors in determining the content of any testimony or in evaluating the importance of any evidence. Your notes are not evidence, may not be accurate, and are by no means a complete outline of the proceedings or a list of the highlights of the trial. Above all, your memory should be your greatest asset when it comes time to deliberate and render a decision in this case.

CLOSING INSTRUCTION NO. 13

When you begin your deliberations, you should elect one member of the jury as your presiding juror. That person will preside over the deliberations and speak for you here in Court.

You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict must be unanimous.

Each of you must decide the case for yourself, but you should do so only after you have considered all of the evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors.

Do not hesitate to change your opinion if the discussion persuades you that you should. Do not come to a decision simply because other jurors think it is right.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do not change an honest belief about the weight and effect of the evidence simply to reach a verdict.

CLOSING INSTRUCTION NO. 14

If it becomes necessary during your deliberations to communicate with me, you may send a note through the Marshal's representative, signed by your presiding juror or by one or more members of the jury. No member of the jury should ever attempt to communicate with me except by a signed writing; I will communicate with any member of the jury on anything concerning the case only in writing, or here in open court. If you send out a question, I will consult with the parties before answering it, which may take some time. You may continue your deliberations while waiting for the answer to any question. Remember that you are not to tell anyone—including me—how the jury stands, numerically or otherwise, until after you have reached a unanimous verdict or have been discharged. Do not disclose any vote count in any note to the court.

CLOSING INSTRUCTION NO. 15

A verdict form has been prepared for you. After you have reached unanimous agreement on a verdict, your presiding juror will fill in the form that will be given to you, sign and date it and advise the court that you are ready to return to the courtroom.