

**Duty of Jury**

Members of the jury, now that you have heard all the evidence, it is my duty to instruct you on the law that applies to this case. A copy of these instructions will be available in the jury room for you to consult.

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.

Please do not read into these instructions or anything that I may say or do or have said or done that I have an opinion regarding the evidence or what your verdict should be.

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## **What Is Evidence**

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

1. the sworn testimony of any witness;
2. the exhibits that are admitted into evidence;
3. any facts to which the lawyers have agreed; and
4. any facts that I have instructed you to accept as proved.

## **What Is Not Evidence**

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 lawyers are not evidence. The lawyers are not witnesses. What they 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. If the facts as you remember them differ from the way the lawyers have stated them, your memory of them controls.
2. Questions and objections by lawyers are not evidence. Attorneys have a duty to their clients 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 is excluded or stricken, or that you have been instructed to disregard, is not evidence and must not be considered. In addition some evidence was received only for a limited purpose; when I have instructed you to consider certain evidence only for a limited purpose, you must do so and you may not consider that evidence for any other purpose.
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.

## **Burden of Proof—Preponderance of the Evidence**

When a party has the burden of proving 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.

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**Two or More Parties—Different Legal Rights**

You should decide the case as to each defendant separately. Unless otherwise stated, the instructions apply to all parties.

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## **Direct and Circumstantial Evidence**

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what that 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.

By way of example, if you wake up in the morning and see that the sidewalk is wet, you may find from that fact that it rained during the night. However, other evidence, such as a turned on garden hose, may provide a different explanation for the presence of water on the sidewalk. Therefore, before you decide that a fact has been proved by circumstantial evidence, you must consider all the evidence in the light of reason, experience and common sense.

## **Ruling on Objections**

There are rules of evidence that control what can be received into evidence. When a lawyer asks a question or offers an exhibit into evidence and a lawyer on the other side thinks that it is not permitted by the rules of evidence, that lawyer may object. If I overruled the objection, the question was allowed or the exhibit received. If I sustained the objection, the question was not allowed or the exhibit was not received. Whenever I sustained an objection to a question, you were ordered to ignore the question and must not guess what the answer might have been.

If I ordered that that evidence be stricken from the record you must disregard or ignore that evidence. That means when you are deciding the case, you must not consider the stricken evidence for any purpose.

## Credibility of Witnesses

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.

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, if any;
5. the witness's bias or prejudice, if any;
6. whether other evidence contradicted the witness's testimony;
7. the reasonableness of the witness's testimony in light of all the evidence; and
8. any other factors that bear on believability.

Sometimes a witness may say something that is not consistent with something else he or she said. Sometimes different witnesses will give different versions of what happened. People often forget things or make mistakes in what they remember. Also, two people may see the same event but remember it differently. You may consider these differences, but do not decide that testimony is untrue just because it differs from other testimony.

However, if you decide that a witness has deliberately testified untruthfully about something important, you may choose not to believe anything that witness said. On the other hand, if you think the witness testified untruthfully about some things but told the truth about others, you may accept the part you think is true and ignore the rest.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify. What is important is how believable the witnesses were, and how much weight you think their testimony deserves.



### **Stipulations of Fact**

The parties have agreed to certain facts that will be read to you. You should therefore treat these facts as having been proved:

1. At all times relevant to this lawsuit, David Swim, Terri Bittner, Tim Hammer, and Tim Hershberger were acting under color of state law and within the course and scope of their employment with the County of Humboldt.
2. [Add if necessary after evidence.]

## **Expert Witnesses**

You have heard testimony from persons who testified to opinions and the reasons for their opinions. This opinion testimony is allowed, because of the education or experience of this witness.

Such opinion testimony should be judged like any other testimony. You may accept it or reject it, and 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.

## TRANSITION

I will now give you the substantive law with regard to each claim at issue. Plaintiff asserts four different claims.

The first three claims are brought under Title 42 of the United States Code at Section 1983 which provides that any person or persons who, under color of law, deprives another of any rights, privileges, or immunities secured by the Constitution or laws of the United States shall be liable to the injured party.

The First Claim is for denial of medical care under the Fourteenth Amendment of the United States Constitution.

The Second Claim is for interference with familial association under the Fourteenth Amendment of the United States Constitution.

The Third Claim is for municipal and supervisory liability under the Fourteenth Amendment of the United States Constitution.

The Fourth Claim arises under the California Government Code at Section 845.6 and is for failure to summon medical care.

**First Claim**

**Fourteenth Amendment Denial of Medical Care**

With respect to her First Claim that each defendant deprived Daren Borges of his rights under the Due Process clause of the Fourteenth Amendment when he was denied access to adequate medical care, Stephany Borges must prove, by a preponderance of the evidence, each of the following elements as to each individual defendant, namely, David Swim, Terri Bittner, Tim Hammer, and Tim Hershberger:

1. The defendant made an intentional decision with respect to the conditions under which Daren Borges was confined;
2. Those conditions put Daren Borges at substantial risk of suffering serious harm;
3. The defendant did not take reasonable available measures to abate that risk, even though a reasonable officer in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant’s conduct obvious; and
4. By not taking such measures, the defendant caused Daren Borges’ injuries.

If you find that plaintiff has proved each of these elements as against each defendant, your verdict should be for Stephany Borges as to that claim. If on the other hand, you find that plaintiff has failed to prove any one or more of the elements as to a claim concerning any particular defendant, your verdict should be for that defendant.

## **Second Claim**

### **Fourteenth Amendment Interference With Familial Association**

Parents and children have a constitutionally protected right to familial association. In order to prevail on her Second Claim against defendants David Swim, Terri Bittner, Tim Hammer, and Tim Hershberger, Stephany Borges must prove each the following elements with respect to her claim that each defendant deprived her of her rights under the Due Process Clause of the Fourteenth Amendment to be free from governmental interference with a familial relationship:

1. The defendant made an intentional decision which interfered with Stephany Borges' familial association with Daren Borges; and
2. The defendant acted in a manner which shocks the conscience; and
3. The action of the defendant was the moving force of Daren Borges' death.

Where, as here, each defendant had an opportunity to deliberate before the action, the action "shocks the conscience" if undertaken with deliberate indifference to Stephany Borges' rights.

Deliberate indifference is the conscious or reckless disregard of the consequence of one's acts or omissions. It entails something more than negligence, on the one hand, and on the other hand, is satisfied by something less than acts or omissions committed for the very purpose of causing harm or with knowledge that harm will result.

If you find that plaintiff has proved each of these elements as against each defendant, your verdict should be for Stephany Borges as to that claim. If other hand, you find that plaintiff has failed to prove any one or more of the elements as to a claim concerning any particular defendant, your verdict should be for that defendant.

### **Third Claim – Introduction**

With respect to plaintiff's Third Claim under the United States Constitution, she proceeds on one theory as against defendant Michael Downey and two separate theories as against defendant County of Humboldt. I will instruct you on all three theories.

With respect to the County of Humboldt, if she prevails on either theory, your verdict should be for plaintiff. If she fails on both theories, your verdict should be for defendant County of Humboldt.

### Third Claim

#### Section 1983 Claim Against Supervisory Defendant Sheriff Michael Downey

#### Elements and Burden of Proof

In order to prevail on her Third Claim against supervisory defendant Michael Downey, Stephany Borges must prove each of the following three elements by a preponderance of the evidence.

1. The act or failure to act of Michael Downey's subordinates, specifically David Swim, Terri Bittner, Tim Hammer, or Tim Hershberger, deprived Daren Borges or Stephany Borges of their particular rights under the United States Constitution as was explained in earlier instructions; and
2. For this second element, there are five options:
  - A. Michael Downey directed any of these subordinates in the act or failure to act that deprived Daren Borges or Stephany Borges of his or her rights;  
or
  - B. Michael Downey set in motion a series of acts by any of these subordinates, or knowingly refused to terminate a series of acts by any of these subordinates, that he knew or reasonably should have known would cause the subordinate to deprive Daren Borges or Stephany Borges of his or her rights;  
or
  - C. Michael Downey knew, or reasonably should have known, that a subordinate was engaging in these acts or failures to act and that the subordinates' conduct would deprive Daren Borges or Stephany Borges of these rights; and Michael Downey failed to act to prevent his subordinate from engaging in such conduct;  
or

D. Michael Downey disregarded the known or obvious consequence that a particular training deficiency or omission would cause his subordinate to violate the constitutional rights of Daren Borges or Stephany Borges; and that deficiency or omission actually caused his subordinate to deprive the Daren Borges or Stephany Borges of his or her constitutional rights;

or

E. Michael Downey engaged in conduct that showed a reckless or callous indifference to the deprivation by the subordinate of the rights of others; and

3. Michael Downey's conduct was so closely related to the deprivation of Daren Borges' or Stephany Borges' rights as to be the moving force that caused the ultimate injury.

If you find Stephany Borges has proved each of these elements, and if you find that she has proved all the elements she is required to prove under the instructions regarding the Section 1983 claims against the individual defendants, your verdict should be for Stephany Borges. If, on the other hand, Stephany Borges has failed to prove any one or more of these elements, your verdict should be for Michael Downey.



**Third Claim**

**Section 1983 Claim against Defendant County of Humboldt**

**Official Policy**

In order to prevail on her Third Claim against defendant County of Humboldt alleging liability based on an official policy, practice, or custom, Stephany Borges must prove each of the following elements by a preponderance of the evidence:

1. The act or failure to act of David Swim, Terri Bittner, Tim Hammer, or Tim Hershberger deprived Stephany Borges or Daren Borges of his or her particular rights under the United States Constitution as was explained in earlier instructions;
2. The act or failure to act of David Swim, Terri Bittner, Tim Hammer, or Tim Hershberger was pursuant to an expressly adopted official policy or a widespread or longstanding practice or custom of the defendant County of Humboldt; and
3. The County of Humboldt's official policy or widespread or longstanding practice or custom caused the deprivation of Stephany Borges' or Daren Borges' rights by David Swim, Terri Bittner, Tim Hammer, or Tim Hershberger; that is, the County of Humboldt's official policy or widespread or longstanding practice or custom is so closely related to the deprivation of Stephany Borges' or Daren Borges' rights as to be the moving force that caused the ultimate injury.

“Official policy” means a formal policy, such as a rule or regulation adopted by the defendant County of Humboldt, resulting from a deliberate choice to follow a course of action made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.

“Practice or custom” means any permanent, widespread, well-settled practice or custom that constitutes a standard operating procedure of the defendant County of Humboldt. A practice or custom can be established by repeated constitutional violations that were not properly investigated and for which the violators were not disciplined, reprimanded or punished.

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### **Third Claim**

#### **Section 1983 Claim against Defendant County of Humboldt**

#### **Failure to Train**

In order to prevail on her Third Claim against defendant County of Humboldt alleging liability based a policy of a failure to train its correctional officers, Stephany Borges must prove each of the following elements by a preponderance of the evidence:

1. The act or failure to act of defendants Tim Hershberger, Terri Bittner, Tim Hammer or David Swim deprived Daren Borges or Stephany Borges of his or her particular rights under the United States Constitution as was explained in earlier instructions;
2. The training policies of the defendant County of Humboldt were not adequate to train its correctional officers to handle the usual and recurring situations with which they must deal;
3. The defendant County of Humboldt was deliberately indifferent to the known or obvious consequences of its failure train its correctional officers adequately; and
4. The failure of the defendant County of Humboldt to provide adequate training caused the deprivation of Stephany Borges' or Daren Borges' rights by Tim Hershberger, Terri Bittner, Tim Hammer or David Swim; that is, the defendant's failure to train is so closely related to the deprivation of rights as to be the moving force that caused the ultimate injury.

A policy is a deliberate choice to follow a course of action made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.

A policy of inaction or omission may be based on a failure to implement procedural safeguards to prevent constitutional violations. To establish that there is a policy based on a failure to preserve constitutional rights, a plaintiff must show, in addition to a constitutional violation, that this policy amounts to deliberate indifference to the plaintiff's constitutional rights, and that the policy caused the violation, in the sense that the municipality could have prevented the violation with an appropriate policy.

The plaintiff may prove "deliberate indifference" in this case by showing that the defendant County of Humboldt knew or should have known that its failure to train adequately made it highly predictable that its correctional officers would engage in conduct that would deprive persons such as Daren Borges or Stephany Borges of their rights.

### **Third Claim**

#### **Section 1983 Claim against Defendant County of Humboldt Based on Either Theory**

If you find Stephany Borges has proved each of the elements of the third claim against the defendant County of Humboldt on either of the two theories alleged, and if you find that Stephany Borges has proved all the elements she is required to prove under the instructions regarding the section 1983 claims against the individual defendants, your verdict should be for Stephany Borges. If, on the other hand, Stephany Borges has failed to prove any one or more of these elements on both theories, your verdict should be for the County of Humboldt.

## **Fourth Claim**

### **California Denial of Medical Care—Essential Factual Elements**

Stephany Borges' Fourth Claim arises under California Government Code Section 845.6 against defendants David Swim, Terri Bittner, Tim Hammer, and Tim Hershberger for failure to summon medical care for Daren Borges.

For purposes of this California state law claim only, a public entity is responsible for harm caused by the wrongful conduct of its employees or agents while acting within the scope of their employment or authority.

The parties have agreed that David Swim, Terri Bittner, Tim Hammer, and Tim Hershberger acted within the course and scope of their employment or authority with the County of Humboldt.

To establish this claim, Stephany Borges must prove each of the following elements by a preponderance of the evidence:

1. Daren Borges had a serious and obvious medical condition;
2. Daren Borges was in need of immediate medical care;
3. David Swim, Terri Bittner, Tim Hammer, and/or Tim Hershberger knew or had reason to know of Daren Borges's need;
4. David Swim, Terri Bittner, Tim Hammer, and/or Tim Hershberger failed to take reasonable action to summon such medical care;
5. Daren Borges was actually harmed; and

6. The conduct of David Swim, Terri Bittner, Tim Hammer, and/or Tim Hershberger was a substantial factor in causing Daren Borges' harm.

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### **Causation - Substantial Factor**

A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm. [Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct.]

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### **Causation—Multiple Causes**

A person's conduct may combine with another factor to cause harm. If you find that a defendant's conduct was a substantial factor in causing harm to Daren Borges, then that defendant is responsible for the harm. A defendant cannot avoid responsibility just because some other person, condition, or event was also a substantial factor in causing Daren Borges' harm.

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## Damages—Proof and Types of Damages

It is the duty of the Court to instruct you about the measure of damages. By instructing you on damages, the Court does not mean to suggest for which party your verdict should be rendered. Stephany Borges has the burden of proving damages by a preponderance of the evidence. Damages means the amount of money that will reasonably and fairly compensate Stephany Borges both in her individual capacity and as the successor-in-interest to Daren Borges for any injury you find was caused by the defendants.

If you find for Stephany Borges on any of her claims, you must determine Stephany Borges' and/or Daren Borges' damages.

If you find for plaintiff on the First and/or Third Claim under the Fourteenth Amendment, you should consider the following as to the damages of Daren Borges, which Stephany Borges is legally entitled to recover as her son's successor-in-interest:

1. The nature and extent of Daren Borges's injuries;
2. The loss of enjoyment of life; and
3. The mental, physical, and emotional pain and suffering experienced.

If you find for Stephany Borges on her Second Claim for Interference with Familial Association, you should consider the following:

1. The loss of Daren Borges' love, companionship, comfort, assistance, protection, affection, society, and moral support.
2. The mental, physical, and emotional pain and suffering experienced by Stephany Borges and which with reasonable probability will be experienced in the future.

If you find for Stephany Borges on her Fourth Claim under California law, you should consider the following:

1. The mental, physical, and emotional pain and suffering experienced by Stephany Borges and which with reasonable probability will be experienced in the future.

For the purposes of plaintiff's Fourth Claim under California law, in determining Stephany Borges' loss, do not consider:

1. Stephany Borges' grief, sorrow, or mental anguish;
2. Daren Borges' pain and suffering; or
3. The poverty or wealth of Stephany Borges.

It is for you to determine what damages, if any, have been proved. No fixed standard exists for deciding the amount of noneconomic damages, such as the loss of Daren Borges' love, companionship, comfort, care, assistance, protection, affection, society, and moral support. You must use your judgment to decide a reasonable amount based on the evidence and your common sense.

Your award must be based upon evidence and not upon speculation, guesswork or conjecture.

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**STOP**

### **Duty to Deliberate**

Before you begin your deliberations, elect one member of the jury as your presiding juror. The presiding juror will preside over the deliberations and serve as the spokesperson for the jury in court.

You shall diligently strive to reach agreement with all of the other jurors if you can do so. Your verdict must be unanimous.

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 be unwilling to change your opinion if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right, or change an honest belief about the weight and effect of the evidence simply to reach a verdict.

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 their views.

### **Consideration of Evidence—Conduct of the Jury**

Because you must base your verdict only on the evidence received in the case and on these instructions, I remind you that you must not be exposed to any other information about the case or to the issues it involves. Except for discussing the case with your fellow jurors during your deliberations:

Do not communicate with anyone in any way and do not let anyone else communicate with you in any way about the merits of the case or anything to do with it. This includes discussing the case in person, in writing, by phone or electronic means, via email, via text messaging, or any Internet chat room, blog, website or application, including but not limited to Facebook, YouTube, Twitter, Instagram, LinkedIn, Snapchat, or any other forms of social media. This applies to communicating with your family members, your employer, the media or press, and the people involved in the trial. If you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter and to report the contact to the court.

Do not read, watch, or listen to any news or media accounts or commentary about the case or anything to do with it, do not do any research, such as consulting dictionaries, searching the Internet, or using other reference materials; and do not make any investigation or in any other way try to learn about the case on your own. Do not visit or view any place discussed in this case, and do not use Internet programs or other devices to search for or view any place discussed during the trial. Also, do not do any research about this case, the law, or the people involved—including the parties, the witnesses or the lawyers—until you have been excused as jurors. If you happen to read or hear anything touching on this case in the media, turn away and report it to me as soon as possible.

These rules protect each party's right to have this case decided only on evidence that has been presented here in court. Witnesses here in court take an oath to tell the truth, and the accuracy of their testimony is tested through the trial process. If you do any research or investigation outside the courtroom, or gain any information through improper communications, then your verdict may be influenced by inaccurate, incomplete or misleading information that has not been tested by the trial process. Each of the parties is entitled to a fair trial by an impartial jury, and if you decide the case based on information not presented in court, you will have denied the parties a fair trial. Remember, you have taken an oath to follow the rules, and it is very important that you follow these rules. A juror who violates these restrictions jeopardizes the fairness of these proceedings, and a mistrial could result that would require the entire trial process to start over. If any juror is exposed to any outside information, please notify the court immediately.

## **Evidence in Electronic Format**

The exhibits received in evidence that are capable of being displayed electronically will be provided to you in that form, and you will be able to view them in the jury room. A computer will be available to you in the jury room.

A court technician will show you how to operate the computer; and how to locate and view the exhibits on the computer. If you need additional equipment or supplies or if you have questions about how to operate the computer or other equipment, you may send a note to the clerk, signed by your foreperson or by one or more members of the jury. Do not refer to or discuss any exhibit you were attempting to view.

If a technical problem or question requires hands-on maintenance or instruction, a court technician may enter the jury room with the clerk present for the sole purpose of assuring that the only matter that is discussed is the technical problem. When the court technician or any non juror is in the jury room, the jury shall not deliberate. No juror may say anything to the court technician or any non juror other than to describe the technical problem or to seek information about operation of the equipment. Do not discuss any exhibit or any aspect of the case.

The sole purpose of providing the computer in the jury room is to enable jurors to view the exhibits received in evidence in this case. You may not use the computer for any other purpose. At my direction, technicians have taken steps to ensure that the computer does not permit access to the Internet or to any “outside” website, database, directory, game, or other material. Do not attempt to alter the computer to obtain access to such materials. If you discover that the computer provides or allows access to such materials, you must inform the court immediately and refrain from viewing such materials. Do not remove the computer or any electronic data disk from the jury room, and do not copy any such data.



### **Communication with the Court**

If it becomes necessary during your deliberations to communicate with me, you may send a note through the clerk, signed by any one or more of you. No member of the jury should ever attempt to communicate with me except by a signed writing. I will not communicate with any member of the jury on anything concerning the case except in writing or here in open court. If you send out a question, I will consult with the lawyers 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 the court – how the jury stands, whether in terms of vote count or otherwise, until after you have reached a unanimous verdict or have been discharged.

## **Return of Verdict**

A verdict form has been prepared for you. After you have reached unanimous agreement on a verdict, your foreperson should complete the verdict form according to your deliberations, sign and date it, and advise the clerk that you are ready to return to the courtroom.

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