

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Wiley Y. Daniel

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO

Civil Action No. 07-cv-00004-WYD-KLM

NOV 16 2009

STONE INTERNATIONAL MARKET, INC.,

GREGORY C. LANGHAM
CLERK

Plaintiff,

v.

CITY OF WHEAT RIDGE COLORADO

Defendant.

JURY INSTRUCTIONS

JURY INSTRUCTION NO. 1

Members of the Jury, now that you have heard the evidence and before the argument, it is my duty to instruct you about the applicable law. It is your duty to follow the law as I will state it and to apply it to the facts as you find them from the evidence in the case. Do not single out one instruction as stating the law, but consider the instructions as a whole. You are not to be concerned about the wisdom of any rule of law stated by me. You must follow and apply the law.

The lawyers may properly refer to some of the governing rules of law in their arguments. If there is any difference between the law stated by the lawyers and as stated in these instructions, you are governed by these instructions.

You must perform your duties as jurors without bias or prejudice as to any party. The law does not permit you to be controlled by sympathy, prejudice, or public opinion. All parties expect that you will carefully and impartially consider all of the evidence, follow the law as it is now being given to you, and reach a just verdict, regardless of the consequences.

JURY INSTRUCTION NO. 2

The parties to this lawsuit are plaintiff Stone International Market, Inc. and defendant the City of Wheat Ridge. Plaintiff is the owner of the El Dorado, an event hall located in the City of Wheat Ridge that caters predominantly to the Hispanic community.

Plaintiff claims that defendant violated plaintiff's constitutional rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by intentionally discriminating against plaintiff because of the race and ethnicity of the ownership and clientele of plaintiff at the El Dorado. Plaintiff claims that the City, among other conduct, enforced city ordinances regarding noise violations and disturbances of the peace in a discriminatory manner against plaintiff. Plaintiff claims that this discrimination significantly chilled plaintiff's ability to carry on business, to the point where plaintiff was forced to close the El Dorado. Plaintiff further claims that defendant's conduct has impeded plaintiff's ability to sell plaintiff's business and the associated real estate. Plaintiff accordingly alleges that as a result of defendant's conduct plaintiff has suffered lost profits and a decrease in the value of its business and property.

Defendant City of Wheat Ridge denies that any of its employees violated plaintiff's rights in any way or that its actions regarding the El Dorado were in any way motivated by race or ethnicity. The City asserts that its actions were instead a response to numerous complaints it received from residential neighbors of the El Dorado and made to the City's Police Department and included attempts to mediate between the neighbors and plaintiff, and that plaintiff's damages were caused by people or entities

other than the City over whom the City had no control nor right to control. The City has asserted the affirmative defense of failure to mitigate.

These are the issues you will be asked to determine, but are not to be considered by you as evidence in this case.

JURY INSTRUCTION NO. 3

Plaintiff, Stone International Market, has the burden in a civil action, such as this, to prove every essential element of its claims by a preponderance of the evidence. If the proof should fail to establish any essential element of plaintiff's claims by a preponderance of the evidence, you should find for the defendant City of Wheat Ridge.

The defendant has the burden of establishing the essential elements of certain affirmative defenses by a preponderance of the evidence.

"Establish by a preponderance of the evidence" means to prove that something is more likely so than not so. In other words, a preponderance of the evidence means such evidence as, when considered and compared with the evidence opposed to it, has more convincing force, and produces in your minds believe that what is sought to be proved is more likely true than not true. This standard does not require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.

In determining whether a fact in issue has been proved by preponderance of the evidence you may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.

JURY INSTRUCTION NO. 4

You should consider and decide this case as a dispute between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. The City of Wheat Ridge, a home rule municipality, is entitled to the same fair trial as a private individual. All persons, including the City of Wheat Ridge and its employees stand equal before the law, and are to be treated as equals.

JURY INSTRUCTION NO. 5

Spanish has been used during this trial. If an interpreter has been used, you are to consider only that evidence provided through the official court interpreter. Although some of you may know Spanish, it is important that all jurors consider the same evidence. Therefore, you must base your decision on the evidence presented in the English translation. You must ignore any different meaning of the non-English words.

JURY INSTRUCTION NO. 6

Testimony and exhibits can be admitted into evidence during a trial only if it meets certain criteria or standards. It is the duty of the lawyer on each side of a case to object when the other side offers testimony or an exhibit that the lawyer believes is not properly admissible under the rules of law. Only by offering an objection can a lawyer request and obtain a ruling from me on the admissibility of the evidence being offered by the other side. You should not be influenced against any lawyer or the lawyer's client because the lawyer has made objections.

Do not attempt to interpret my rulings on objections as somehow indicating how I think you should decide this case. I am simply making a ruling on a legal question.

JURY INSTRUCTION NO. 7

Unless you are otherwise instructed, the evidence in the case consists of the sworn testimony of the witnesses regardless of who called the witness, all exhibits received in evidence regardless of who may have produced them, and all facts and events that may have been admitted or stipulated to. Statements and arguments by the lawyers are not evidence. The lawyers are not witnesses. What they have said in their opening statement, closing arguments, and at other times is intended to help you interpret the evidence, but it is not evidence. However, when the lawyers on both sides stipulate or agree on the existence of a fact, you must, unless otherwise instructed, accept the stipulation and regard that fact as proved.

Although limited evidence has been introduced on the subject, the Court has taken judicial notice and accepted as validly issued certain provisions of the Wheat Ridge City Code. You must accept the City Code provisions for purposes of this case.

Any evidence to which I have sustained an objection and evidence that I have ordered stricken must be entirely disregarded.

JURY INSTRUCTION NO. 8

Some of the exhibits that will be introduced in this case have material redacted from them. To redact means to obscure or remove information prior to publication. You are not to draw any inferences from the fact that information was redacted.

JURY INSTRUCTION NO. 9

Generally speaking, there are two types of evidence that are generally presented during a trial – direct evidence and circumstantial evidence. “Direct evidence” is the testimony of a person who asserts or claims to have actual knowledge of a fact, such as an eyewitness. “Indirect or circumstantial” evidence is proof of certain facts and circumstances in a given case from which a jury may, under certain conditions, infer other connecting facts which usually and reasonably follow according to common experience.

As a general rule, the law makes no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence. You are simply required to find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

JURY INSTRUCTION NO. 10

You are to consider only the evidence in the case. However, you are not limited to the statements of the witnesses. In other words, you are not limited to what you see and hear as the witnesses testify. You may draw from the facts that you find have been proved such reasonable inferences as seem justified in light of your experience.

“Inferences” are deductions or conclusions that reason and common sense lead you to draw from facts established by the evidence in the case.

JURY INSTRUCTION NO. 11

Evidence as to any oral statements or admissions, claimed to have been made outside of court by a party to any case, should always be considered with caution and weighed with great care. The person making the alleged statement or admission may not have expressed clearly the meaning intended, or the witness testifying to an alleged admission may have misunderstood or may have misquoted what was actually said.

However, when an oral statement or admission made outside of court is proved by reliable evidence, that statement or admission may be treated as trustworthy and should be considered along with all other evidence in the case.

JURY INSTRUCTION NO. 12

You are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You may be guided by the appearance and conduct of the witness, or by the manner in which the witness testifies, or by the character of the testimony given, or by evidence contrary to the testimony.

You should carefully examine all the testimony given, the circumstances under which each witness has testified, and every matter in evidence tending to show whether a witness is worthy of belief. Consider each witness' intelligence, motive and state of mind, and demeanor or manner while testifying.

Consider the witness' ability to observe the matters as to which the witness has testified, and whether the witness impresses you as having an accurate recollection of these matters. Also, consider any relation each witness may have with either side of the case, the manner in which each witness might be affected by the verdict, and the extent to which the testimony of each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses may or may not cause you to discredit such testimony. Two or more persons seeing an event may see or hear it differently.

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

After making your own judgment, you will give the testimony of each witness such weight, if any, that you may think it deserves. In short, you may accept or reject the testimony of any witness, in whole or in part.

JURY INSTRUCTION NO. 13

A witness may be discredited or impeached by contradictory evidence or by evidence that at some other time the witness has said or done something, or has failed to say or do something that is inconsistent with the witness' present testimony.

If you believe any witness has been impeached and thus discredited, you may give the testimony of that witness such credibility, if any, you think it deserves.

If a witness is shown knowingly to have testified falsely about any material matter, you have a right to distrust such witness' other testimony and you may reject all the testimony of that witness or give it such credibility as you may think it deserves.

An act or omission is "knowingly" done, if voluntarily and intentionally and not because of mistake or accident or other innocent reason.

JURY INSTRUCTION NO. 14

The weight of the evidence is not necessarily determined by the number of witnesses testifying to the existence or nonexistence of any fact. You may find that the testimony of a small number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

You are not bound to decide any issue of fact in accordance with the testimony of any number of witnesses that does not produce in your minds belief in the likelihood of truth, as against the testimony of a lesser number of witnesses or other evidence producing such belief in your minds.

The test is not which side brings the greater number of witnesses or takes the most time to present its evidence, but which witnesses and which evidence appeal to your minds as being most accurate and otherwise trustworthy.

JURY INSTRUCTION NO. 15

There is no instruction to be given.

JURY INSTRUCTION NO. 16

The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists for “expert witnesses.” An expert witness is a person who, by education and experience has become expert in some art, science, profession, or calling. Expert witnesses may state their opinions as to matters in which they profess to be expert, and may also state their reasons for their opinions.

You should consider each expert opinion received in evidence in this case, and give it such weight as you think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or if you feel that it is outweighed by other evidence, you may disregard the opinion entirely.

JURY INSTRUCTION NO. 17

Plaintiff Stone International Market's claim against the City of Wheat Ridge is asserted under 42 U.S.C. § 1983 for the violation of its right to equal protection of the laws under the Fourteenth Amendment to the United States Constitution.

42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding seeking redress.

The Fourteenth Amendment to the United States Constitution provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

The Equal Protection Clause of the Fourteenth Amendment requires that all similarly situated persons be treated similarly. Federal law provides that a person may sue in this Court for an award of money damages against anyone who, "under color" of any state law or custom, intentionally violates the plaintiff's rights under the Constitution of the United States.

Section 1983, the federal civil rights statute under which plaintiff sues, provides that a person may seek relief in this Court by way of damages against any person or persons who, under color of any state law, subjects such person to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

JURY INSTRUCTION NO. 18

Plaintiff Stone International Market, Inc. claims that defendant the City of Wheat Ridge, a municipality, is liable to plaintiff under 42 U.S.C. § 1983 for the denial of its equal protection rights under the Fourteenth Amendment of the United States Constitution. Defendant City of Wheat Ridge may be liable if you find that plaintiff Stone International Market, has been deprived of its equal protection rights and such deprivation was done pursuant to a policy or custom of the City of Wheat Ridge. Whether a custom exists is a question of fact for you to determine.

When a person is injured as the proximate result of a government's custom, whether made by its lawmakers or by those officials whose statements or acts may fairly be said to represent official policy, defendant City of Wheat Ridge itself is responsible for the injury that it caused.

Plaintiff Stone International Market must prove each of the following facts by a preponderance of the evidence:

- (1) that a City of Wheat Ridge employee(s) violated plaintiff's equal protection rights by intentionally discriminating against plaintiff Stone International Market on the basis of race;
- (2) that a custom or policy of the City of Wheat Ridge was the moving force behind the deprivation of plaintiff's equal protection rights; and
- (3) that the custom of the City of Wheat Ridge was the proximate cause of the deprivation of plaintiff's equal protection rights.

To establish a deprivation of its equal protection rights, plaintiff must show that Plaintiff Stone International Market was treated differently than similarly situated persons or entities within the City of Wheat Ridge by employees of the City of Wheat Ridge in the enforcement of applicable City of Wheat Ridge Ordinances.

If you find that plaintiff Stone International Market has proved each of these elements, then you must return a verdict for plaintiff and against the City of Wheat Ridge. However, if you find that one or all of the elements has not been proved, then you must return a verdict for the defendant City of Wheat Ridge.

JURY INSTRUCTION NO. 19

In order to establish that plaintiff's equal protection rights were violated by an employee(s) of the City of Wheat Ridge, plaintiff Stone International Market must prove by a preponderance of the evidence that employee(s) of the City of Wheat Ridge were motivated by a racially discriminatory purpose. In other words, plaintiff Stone International Market must prove that an employee(s) of City of Wheat Ridge intentionally and purposefully discriminated against plaintiff on the basis of race. The discriminatory purpose need not be the only purpose, but it must be a motivating factor in the decision. It is not enough for plaintiff Stone International Market to show that the conduct of the City of Wheat Ridge employees had a negative effect on members of the race.

In determining whether an employee of City of Wheat Ridge intentionally discriminated on the basis of race, you may consider all the evidence presented in this case. Plaintiff Stone International Market may use either direct or indirect evidence.

JURY INSTRUCTION NO. 20

The fact that an employee of a municipality deprived the plaintiff of a federal right is not alone a sufficient basis for holding the municipality liable to the plaintiff. To hold the municipality liable, the plaintiff must establish by a preponderance of the evidence that the action of the employee that deprived plaintiff of plaintiff's federal right was the result either of an official policy of the municipality or a municipal custom that was in place even though such a custom had not necessarily received formal approval through the body's official decision-making channels.

JURY INSTRUCTION NO. 21

Whether an official municipal practice or custom exists is a question of fact for you to determine. A practice or custom is a persistent, well-established pattern of conduct by municipal officials (or employees) that has become a traditional way of carrying out policy, and has acquired the force of law, even though the municipality has not necessarily formally adopted or announced the custom.

JURY INSTRUCTION NO. 22

The defendant City of Wheat Ridge, or an official or body to whom the City of Wheat Ridge has delegated final policymaking authority, are policymaking entities or officials whose actions can be said to represent a decision of the government itself. The defendant City of Wheat Ridge, or the policymaking official, may cause injury by direct orders, by ratifying a subordinate's decision and the basis for it, or by establishing a policy for municipal employees that, when followed by those employees, results in the injury.

I instruct you that the defendant City of Wheat Ridge, or an official or body to whom the defendant City of Wheat Ridge has delegated final policymaking authority, are policymaking officials whose actions may be attributed to the municipality.

The Chief of Police for the City of Wheat Ridge is a policy making official for defendant City of Wheat Ridge.

JURY INSTRUCTION NO. 23

An injury or damage is proximately caused by an act or a failure to act whenever it appears from the evidence that the act or failure to act played a substantial part in bringing about or actually causing the injury or damage, and that the injury or damage was either a direct result or a reasonably probable consequence of the act or omission.

JURY INSTRUCTION NO. 24

If you find for plaintiff Stone International Market on its claim against the City of Wheat Ridge under § 1983 for deprivation of its Constitutional right to equal protection, you must determine plaintiff's damages. Plaintiff Stone International Market has the burden of proving damages by a preponderance of the evidence. Damages means the amount of money that will reasonably and fairly compensate plaintiff for the deprivation of its rights proximately caused by defendant the City of Wheat Ridge. Actual damages must not be based on speculation or sympathy. They must be based on the evidence presented at trial.

You should consider the following elements of damage to the extent you find them proved by a preponderance of the evidence to be the result of a custom or policy of the City of Wheat Ridge:

1. Plaintiff's lost profits and decrease in the value of its business and property.

JURY INSTRUCTION NO. 25

In determining the amount of any damages that you decide to award, you should be guided by dispassionate common sense. You must use sound discretion in fixing an award of damages, drawing reasonable inferences from the facts in evidence. You may not award damages based on sympathy, speculation or guess work. On the other hand, the law does not require that the plaintiff prove the amount of its losses with mathematical precision, but only with as much definiteness and accuracy as circumstances permit.

JURY INSTRUCTION NO. 26

If you find plaintiff Stone International Market was injured as a result of conduct by the City of Wheat Ridge in violation of 42 U.S.C. §1983, you must determine whether plaintiff could have done something to lessen the harm suffered. To prove its affirmative defense that plaintiff Stone International Market failed to mitigate or minimize its injuries or losses, defendant City of Wheat Ridge has the burden to prove by a preponderance of the evidence that plaintiff Stone International Market could have lessened or reduced the harm done to plaintiff and that plaintiff failed to use such means as were reasonable under the circumstances to avoid or minimize the damages.

If defendant establishes by a preponderance of the evidence that plaintiff Stone International Market could have reduced the harm done to plaintiff but failed to do so, plaintiff Stone International Market is entitled only to damages sufficient to compensate for the injury that plaintiff would have suffered had plaintiff taken appropriate action to reduce the harm.

JURY INSTRUCTION NO. 27

The fact that I have instructed you as to the proper measure of damages should not be considered as indicating any view of mine as to which party is entitled to your verdict in this case. Instructions as to the measure of damages are given for your guidance only in the event you should find in favor of the plaintiff from a preponderance of the evidence in the case in accordance with the other instructions.

JURY INSTRUCTION NO. 28

As members of the jury, you are the sole and exclusive judges of the facts. You pass upon the evidence. You determine the credibility of the witnesses. You resolve such conflicts as there may be in the testimony. You draw whatever reasonable inferences you decide to draw from the facts as you have determined them, and you determine the weight of the evidence.

In determining these issues, no one may invade your province or functions as jurors. In order for you to determine the facts, you must rely upon your own recollection of the evidence. What the lawyers have said in their opening statements, in their closing arguments, in their objections, or in their questions is not evidence. Nor is what I may have said – or what I may say in these instructions – about a fact issue in evidence. In this connection, you should bear in mind that a question put to a witness is never evidence, it is only the answer which is evidence. But you may not consider any answer that I directed you to disregard or that I directed struck from the record. Do not consider such answers.

Since you are the sole and exclusive judges of the facts, I do not mean to indicate any opinion as to the facts or what your verdict should be. The rulings I have made during the trial are not any indication of my views of what your decision should be as to whether or not the plaintiff has proven his case.

As to the facts, ladies and gentlemen, you are the exclusive judges. You are to perform the duty of finding the facts without bias or prejudice to any party.

JURY INSTRUCTION NO. 29

You will now return to decide the case. In order to prevail, the plaintiff must sustain its burden of proof as I have explained to you with respect to each element of the complaint. If you find that the plaintiff has succeeded, you should return a verdict in its favor on that claim. If you find that the plaintiff failed to sustain the burden on any element of the claim, you should return a verdict against the plaintiff. Similarly, if you find that the defendant has failed to sustain its burden with respect to any element of the defendant's affirmative defense, you must return a verdict against the defendant on that defense.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement. Each of you must decide the case for himself or herself, but you should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. Your verdict must be unanimous, but you are not bound to surrender your honest convictions concerning the effect or weight of the evidence for the mere purpose of returning a verdict or solely because of the opinion of other jurors. Discuss and weigh your respective opinions dispassionately, without regard to sympathy, without regard to prejudice or favor for either party, and adopt that conclusion which in your good conscience appears to be in accordance with the truth.

Again, each of you must make your own decision about the proper outcome of this case based on your consideration of the evidence and your discussions with your fellow jurors. No juror should surrender his or her conscientious beliefs solely for the purpose of returning a unanimous verdict.

JURY INSTRUCTION NO. 30

Upon retiring to the jury room, you will select one of you to act as your foreperson. The foreperson will preside over your deliberations, and will be your spokesperson in Court. A form of verdict has been prepared for your convenience. You will take these forms to the jury room. I direct your attention first to the form of verdict.

[Form of verdict read.]

You will note that each of the interrogatories or questions calls for a “Yes” or “No” answer. The answer to each question must be the unanimous answer of the jury. Your foreperson will write the unanimous answer of the jury in the space provided opposite each question, and will date and sign the special verdict, when completed. It will not be necessary to consider or answer question (2), if your answer to question (1) is “No.”

After you have completed your findings as called for by the questions set forth on the special verdict, you will then consider your general verdict, forms of which have been prepared for your convenience. *[Read general verdict form.]*

When you have reached unanimous agreement as to your general verdict, you will have your foreperson fill in, date, and sign the form setting forth the verdict upon which you unanimously agree. You will then return with both the completed special verdict and the completed general verdict to the courtroom.

JURY INSTRUCTION NO. 31

The verdict must represent the considered judgment of each of you. In order to return a verdict, it is necessary that each juror agree. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without disregard of individual judgment. You must each decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence, solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times that you are not partisans. You are judges—judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

JURY INSTRUCTION NO. 32

If it becomes necessary during your deliberations to communicate with me, you may send a note by the court security officer, signed by your foreperson or by one or more members of the jury. No member of the jury should ever attempt to communicate with me by any means other than a signed writing, and I will never communicate with any member of the jury on any subject touching the merits of the case otherwise than in writing, or orally here in open court.

You will note from the oath about to be taken by the court security officer that they too, as well as all other persons, are forbidden to communicate in any way or manner with any member of the jury on any subject touching the merits of the case.

Bear in mind also that you are never to reveal to any person—not even to me—how the jury stands, numerically or otherwise, on the questions before you, until after you have reached a unanimous verdict.