

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

CHRISTOPHER HAMLIN,

Plaintiff,

v.

JASON WENZEL, MATTHEW BURNS,
SCOTT ROSS, ANTHONY LO BIANCO,
and DEREK SCHOUTEN,

Defendants.

DRAFT
POST-TRIAL
INSTRUCTIONS

13-cv-202-jdp

INTRODUCTION

Ladies and Gentlemen of the Jury:

Now that you have heard the evidence and the arguments, I will give you the instructions that will govern your deliberations in the jury room. It is my job to decide what rules of law apply to the case and to explain those rules to you.

You have two duties as a jury. Your first duty is to decide the facts from the evidence in the case. This is your job, and yours alone.

Your second duty is to apply the law that I give you to the facts. You must follow these instructions, even if you disagree with them. Each of the instructions is important, and you must follow all of them.

Perform these duties fairly and impartially. Do not allow sympathy, prejudice, fear, or public opinion to influence you.

The verdict must represent the considered judgment of each juror. Your verdict, whether for or against any party, must be unanimous. You should make every reasonable effort to reach a verdict. In doing so, you should consult with one another, express your own views, and listen to the opinions of your fellow jurors. Discuss your

differences with an open mind. Do not hesitate to reexamine your own views and change your opinion if you come to believe it is wrong. But you should not surrender your honest beliefs about the weight or effect of evidence solely because of the opinions of other jurors or for the purpose of returning a unanimous verdict. All of you should give fair and equal consideration to all the evidence and deliberate with the goal of reaching an agreement that is consistent with the individual judgment of each juror. You are impartial judges of the facts.

Your deliberations will be secret. You will never have to explain your verdict to anyone.

If you have formed any idea that I have an opinion about how the case should be decided, disregard that idea. It is your job, not mine, to decide the facts of this case.

The case will be submitted to you in the form of a special verdict, consisting of several questions. In answering the questions, you should consider only the evidence that has been received at this trial. Do not concern yourselves with whether your answers will be favorable to one side or another, or with what the final result of this lawsuit may be.

LIABILITY

Eighth Amendment—Unlawful Strip Search

I will now instruct you more specifically on the law you must apply to this case. Mr. Hamlin's claims in this case are based on the Eighth Amendment to the United States Constitution. This amendment protects inmates from cruel and unusual punishment. Prison strip searches do not violate the Eighth Amendment unless they are conducted in a harassing manner intended to humiliate and inflict psychological pain rather than for legitimate prison purposes.

You must answer three sets of questions on the verdict form.

The first set of questions relates to the decision by defendant Wenzel to authorize a staff-assisted strip search of plaintiff. Question No. 1 asks whether plaintiff has proven by a preponderance of the evidence that defendant Wenzel violated plaintiff's Eighth Amendment rights by authorizing that type of search.

The second set of questions relates to the manner in which defendant Lo Bianco conducted the staff-assisted search. Question No. 5 asks whether plaintiff has proven by a preponderance of the evidence that defendant Wenzel violated plaintiff's Eighth Amendment rights in the way he conducted the search.

To succeed on either of these claims, plaintiff must show by a preponderance of evidence that the defendant acted in a way intended to humiliate and inflict psychological pain rather than for legitimate prison purposes.

In making these determinations, you must give prison officials leeway to adopt and carry out policies and practices that, in their reasonable judgment, are needed to preserve order and discipline and to maintain security in the prison.

If you find that plaintiff has proven either of his claims by a preponderance of the evidence, then you should find for plaintiff, and go on to consider the question of damages for that particular claim.

If, on the other hand, you find that plaintiff has failed to prove a particular claim by a preponderance of the evidence, then you should find for the defendant, and you will not consider the question of damages for that particular claim.

Eighth Amendment Claim for Failure of "Bystander" Officer to Intervene

The third set of questions relates to (1) defendants Burns', Ross's, and Schouten's decisions not to intervene in defendant Wenzel's authorization of a staff-assisted strip search; and (2) defendants Wenzel's, Burns', Ross's, and Schouten's

decisions not to intervene in defendant Lo Bianco's strip search of plaintiff.

Plaintiff must prove by a preponderance of the evidence that the defendants were personally involved in the conduct that plaintiff complains about. You may not hold the defendants liable for what other employees did or did not do.

You must give separate consideration to each defendant in this case. Although there are five defendants, it does not follow that if one is liable, any of the others is also liable.

[In considering a claim against a defendant, you must not consider evidence admitted only against other defendants. GIVE ONLY IF NEEDED]

If you find that plaintiff has not met his burden to show that defendant Wenzel, defendant Lo Bianco, or both of them, violated his Eighth Amendment rights, this instruction does not apply, and you should not answer the third set of questions on the verdict form.

If you have found that plaintiff has met his burden on either of these claims, you must consider the failure to intervene claim. Question No. 9 asks whether plaintiff has proven by a preponderance of the evidence that defendants Wenzel, Burns, Ross, and Schouten violated plaintiff's Eighth Amendment rights by failing to intervene.

You must make an individualized determination of the actions or inactions of each of the defendants. To succeed on his failure to intervene claim, plaintiff must prove each of the following things by a preponderance of the evidence:

- 1. Plaintiff's Eighth Amendment rights were violated by defendant Wenzel, defendant Lo Bianco, or both of them;**
- 2. Defendants Wenzel, Burns, Ross, or Schouten knew that plaintiff's Eighth Amendment rights were being violated;**
- 3. Defendants Wenzel, Burns, Ross, or Schouten had a realistic**

opportunity to do something to prevent harm from occurring;

- 4. Defendant Wenzel, Burns, Ross, or Schouten failed to take reasonable steps to prevent harm from occurring; and**
- 5. Defendant Wenzel's, Burns's, Ross's, or Schouten's failure to act caused plaintiff to suffer harm.**

If you find that plaintiff has proved each of these things against a particular defendant by a preponderance of the evidence, then you should find for plaintiff, and go on to consider the question of damages against that defendant.

If, on the other hand, you find that plaintiff has failed to prove his claim against a particular defendant by a preponderance of the evidence, then you should find for that defendant, and you will not consider the question of damages against that defendant.

EVIDENTIARY AND OTHER MATTERS

Burden of Proof

When a party has the burden to prove any matter by a preponderance of the evidence, it means that you must be persuaded by the testimony and exhibits that the matter sought to be proved is more probably true than not true. You should base your decision on all of the evidence, regardless of which party presented it.

Answers Not Based on Guesswork

If, after you have discussed the testimony and all other evidence that bears upon a particular question, you find that the evidence is so uncertain or inadequate that you have to guess what the answer should be, then the party with the burden of proof as to that question has not met the required burden of proof. Your answers are not to be based on guesswork or speculation. They are to be based upon credible

evidence from which you can find the existence of the facts that the party must prove to satisfy the burden of proof on the question under consideration.

All Litigants Equal Before the Law

In this case plaintiff was a prisoner. All parties are equal before the law. A prisoner is entitled to the same fair consideration that you would give any individual person.

Definition of “Direct” and “Circumstantial” Evidence

You may have heard the phrases “direct evidence” and “circumstantial evidence.”

Direct evidence is proof that does not require an inference, such as the testimony of someone who claims to have personal knowledge of a fact. Circumstantial evidence is proof of a fact, or a series of facts, that tends to show that some other fact is true.

As an example, direct evidence that it is raining is testimony from a witness who says, “I was outside a minute ago and I saw it raining.” Circumstantial evidence that it is raining is the observation of someone entering a room carrying a wet umbrella.

The law makes no distinction between the weight to be given to either direct or circumstantial evidence. You should decide how much weight to give to any evidence. In reaching your verdict, you should consider all the evidence in the case, including the circumstantial evidence.

Number of Witnesses

You may find the testimony of one witness or a few witnesses more persuasive than the testimony of a larger number. You need not accept the testimony of the

larger number of witnesses.

Use of Interrogatories (to be used only when interrogatories are read without admission into evidence)

Evidence has been presented to you in the form of written answers of one of the parties to written interrogatories submitted by the other side. These answers were given in writing and under oath before this trial in response to written questions.

You must give the answers the same consideration as if the answers were made from the witness stand.

Absence of Evidence

The law does not require any party to call as a witness every person who might have knowledge of the facts related to this trial. Similarly, the law does not require any party to present as exhibits all papers and things mentioned during this trial.

Evidence of Statutes, Administrative Rules, Regulations, and Policies

You have heard evidence about whether defendants' conduct violated a state statute/administrative rule/locally-imposed procedure or regulation.

You may consider this evidence in your deliberations. But remember that the issue is whether plaintiff has proven the elements of his claim, not whether a statute/rule/procedure/regulation might have been violated.

DAMAGES

If you find that plaintiff has proved any of his claims against any of the defendants, then you must determine what amount of damages, if any, plaintiff is

entitled to recover. If you find that plaintiff has failed to prove all of his claims, then you will not consider the question of damages.

On the damages question, the party asking for damages has the burden of convincing you, by the preponderance of the evidence, both that he has been injured or damaged and the amount of the damages.

The party seeking damages need not produce evidence that is as exact as the evidence needed to support findings on other questions in the verdict. Determining damages involves the consideration of many different factors that cannot be measured precisely. In determining the damages you must base your answer on evidence that reasonably supports your determination of damages under all of the circumstances of the case. You should award as damages the amount of money that you find fairly and reasonably compensates the named party for his injuries.

Do not measure damages by what the lawyers ask for in their arguments. Their opinions as to what damages should be awarded should not influence you unless their opinions are supported by the evidence. It is your job to determine the amount of the damages sustained from the evidence you have seen and heard. Examine that evidence carefully and impartially. Do not add to the damage award or subtract anything from it because of sympathy to one side or because of hostility to one side. Do not make any deductions because of a doubt in your minds about the liability of any of the parties.

Compensatory Damages

If you find in favor of plaintiff, then you must determine the amount of money that will fairly compensate plaintiff for any injury that you find he sustained [**and is reasonably certain to sustain in the future**] as a direct result of the Eighth Amendment violations related to the strip search. These are called “compensatory damages.”

Plaintiff must prove his damages by a preponderance of the evidence. Your award must be based on evidence and not speculation or guesswork. This does not mean, however, that compensatory damages are restricted to the actual loss of money; they include both the physical and mental aspects of injury, even if they are not easy to measure.

You should consider the following types of compensatory damages, and no others: The physical and mental/emotional pain and suffering and disability/loss of a normal life that plaintiff has experienced [and is reasonably certain to experience in the future]. No evidence of the dollar value of physical or mental/emotional pain and suffering or disability/loss of a normal life has been or needs to be introduced. There is no exact standard for setting the damages to be awarded on account of pain and suffering. You are to determine an amount that will fairly compensate plaintiff for the injury he has sustained.

If you find in favor of plaintiff but find that the plaintiff has failed to prove compensatory damages, you must return a verdict for Plaintiff in the amount of one dollar (\$1.00).

Income Taxes

You must not consider state or federal income taxes in determining damages.

Pain and Suffering

In determining how much money will fairly and reasonably compensate plaintiff for past pain and suffering [disability] [disfigurement] [mental anguish] [loss of capacity for enjoyment of life], you should consider any pain and suffering, mental anguish and apprehension, sorrow and anxiety plaintiff has endured from the time of the incident up to the present time. There is no exact standard for deciding how much to award plaintiff for these damages. Your award should be fair and just in the

light of the evidence.

Punitive Damages

If you find for plaintiff, you may, but are not required to, assess punitive damages against defendants. The purposes of punitive damages are to punish a defendant for his conduct and to serve as an example or warning to the defendant and others not to engage in similar conduct in the future.

Plaintiff must prove by a preponderance of the evidence that punitive damages should be assessed against a defendant. You may assess punitive damages only if you find that the defendant's conduct was malicious or in reckless disregard of plaintiff's rights. Conduct is malicious if it is accompanied by ill will or spite, or is done for the purpose of injuring plaintiff. Conduct is in reckless disregard of plaintiff's rights if, under the circumstances, it reflects complete indifference to plaintiff's safety or rights.

If you find that punitive damages are appropriate, then you must use sound reason in setting the amount of those damages. Punitive damages, if any, should be in an amount sufficient to fulfill the purposes that I have described to you, but should not reflect bias, prejudice, or sympathy toward either/any party. In determining the amount of any punitive damages, you should consider the following factors:

- the reprehensibility of a defendant's conduct;
- the impact of a defendant's conduct on plaintiff;
- the relationship between plaintiff and a defendant;
- the likelihood that a defendant would repeat the conduct if an award of punitive damages is not made; and
- the relationship of any award of punitive damages to the amount of actual harm the plaintiff suffered.

AFTER ARGUMENTS OF COUNSEL

Selection of Presiding Juror; Communication with the Judge; Verdict

When you go to the jury room to begin considering the evidence in this case

you should first select one of the members of the jury to act as your presiding juror (foreperson). This person will help to guide your discussions in the jury room.

You are free to deliberate in any way you decide, or select whomever you like as the presiding juror. When thinking about who should be presiding juror, you may want to consider the role that a presiding juror usually plays. He or she serves as the chairperson during the deliberations and has the responsibility of insuring that all jurors who desire to speak have a chance to do so before any vote. The presiding juror should guide the discussion and encourage all jurors to participate. I encourage you at all times to keep an open mind if you ever disagree or come to conclusions that are different from those of your fellow jurors. Listening carefully and thinking about the other juror's point of view may help you understand that juror's position better or give you a better way to explain why you think your position is correct.

Once you are in the jury room, if you need to communicate with me, the presiding juror will send a written message to me. However, don't tell me how you stand as to your verdict.

As I have mentioned before, the decision you reach must be unanimous; you must all agree.

When you have reached a decision, the presiding juror will sign the verdict form, put a date on it, and all of you will return to the courtroom with the verdict.

Suggestions for Conducting Deliberations

To help you determine the facts, you may want to consider discussing one claim at a time, and use my instructions to the jury as a guide to determine whether there is sufficient evidence to prove all the necessary legal elements for each claim or defense. I also suggest that any public votes on a verdict be delayed until everyone can have a chance to say what they think without worrying what others on the panel might think of their opinion. I also suggest that you assign separate tasks, such as

note taking, time keeping and recording votes to more than one person to help break up the workload during your deliberations. I encourage you at all times to keep an open mind if you ever disagree or come to conclusions that are different from those of your fellow jurors. Listening carefully and thinking about the other juror's point of view may help you understand that juror's position better or give you a better way to explain why you think your position is correct.