

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

JAMES JERMAINE DAVIS,

Plaintiff,

v.

SANDRA ASHTON, *et al.*,

Defendants.

ORDER

15-cv-268-slc

CLOSING INSTRUCTIONS

Introduction

Members of the jury, you have seen and heard all the evidence. Before the arguments of the attorneys, I will instruct you on the law. Afterward I will give you brief instructions on conducting your deliberations and then the case will be in your hands. It is my job to decide what rules of law apply to the case and to explain those rules to you. It is your job to follow the rules, even if you disagree with them or don't understand the reasons for them. You must follow all of the rules; you may not follow some and ignore others.

The decision you reach in the jury room must be unanimous. In other words, you must all agree on the answer to each question.

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 15 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.

Note that certain questions in the special verdict form are to be answered only if you answer a preceding question in a certain manner. Read the introductory portion of

each question very carefully before you undertake to answer it. Do not answer questions needlessly.

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. On the liability questions in the special verdict, the burden of proof is on the party contending that the answer to a question should be “yes.” 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 having 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 in order to satisfy the burden of proof on the question under consideration.

Personal Involvement

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.

Department of Corrections

Defendants are being sued as individuals. Neither the Wisconsin Department of Corrections nor the State of Wisconsin is a party to this lawsuit.

Evidence of Statutes, Administrative Rules, Regulations, and Policies

You have heard evidence about whether the Defendants' conduct complied with policies and procedures. You may consider this evidence in your deliberations. But remember that the issues are whether the Defendant was deliberately indifferent to Plaintiff's objectively serious medical need, whether the Defendant intentionally issued false conduct reports in retaliation for First Amendment protected activity, whether Defendants used excessive force, and whether Defendants failed to intervene and stop the use of excessive force, nor whether a policy or procedure might have been complied with.

Multiple Defendants

You must give separate consideration to each party in this case. Although there are several defendants, it does not follow that if one is liable, others are also liable. In considering a claim against one defendant, you must not consider evidence admitted only against any other defendant.

What is Not Evidence

First, if I told you to disregard any testimony or exhibits or struck any testimony or exhibits from the record, such testimony or exhibits are not evidence and must not be considered.

Second, anything that you may have seen or heard outside the courtroom is not evidence and must be entirely disregarded. This includes any press, radio, Internet or

television reports you may have seen or heard. Such reports are not evidence and your verdict must not be influenced in any way by such publicity.

Third, questions and objections or comments by the lawyers are not evidence. Lawyers have a duty to object when they believe a question is improper. You should not be influenced by any objection, and you should not infer from my rulings that I have any view as to how you should decide the case.

Fourth, the lawyers' opening statements and closing arguments to you are not evidence. Their purpose is to discuss the issues and the evidence. If the evidence as you remember it differs from what the lawyers said, your memory is what counts.

Consideration of All Evidence

In determining whether any fact has been proved, you should consider all of the evidence bearing on the question regardless of who introduced it.

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.

Limited Use of Cell Extraction Evidence

During the trial you heard evidence of a cell extraction. This evidence was admitted to provide context for the events that preceded the cell extraction that day. The fact that plaintiff received a conduct report for acts related to the cell extraction was admitted as evidence of plaintiff's motive to make claims that he had requested his asthma inhaler that day but had been denied. You may consider this evidence only for these limited purposes.

First Amendment Claim

An inmate's right to submit truthful offender complaints is protected by the Constitution. In this case, Plaintiff claims that Defendant Ashton issued him false conduct reports in retaliation for submitting truthful offender complaints.

To succeed on this claim, Plaintiff must prove each of the following four things by a preponderance of the evidence:

1. Plaintiff submitted truthful offender complaints.
2. Ashton intentionally issued a conduct report against Plaintiff.
3. Plaintiff's truthful offender complaints were a reason that Ashton issued a particular conduct report against Plaintiff. It need not have been the only reason.
4. Defendant's issuance of this particular conduct report against Plaintiff would be likely to deter an average person in Plaintiff's circumstances from filing truthful offender complaints in the future.

If you find that Plaintiff did not prove each of these things by a preponderance of the evidence, then you must decide for Ashton.

If you find that Plaintiff did prove each of these four things by a preponderance of the evidence as to Ashton, then you must consider whether Ashton has proved by a preponderance of the evidence that there were other reasons that would have led Ashton to issue the conduct reports against Plaintiff even if Plaintiff had not submitted truthful offender complaints. If you find that Ashton proved this by a preponderance of the

evidence, then you must decide for defendant. If you find that Ashton did not prove this by a preponderance of the evidence, then you must decide for Plaintiff and consider the issue of damages.

Seventh Circuit Federal Jury Instructions – Civil § 6.03 (2017 proposed version) (modified).

Eighth Amendment Excessive Force Claim

To succeed on his claim of excessive force against Defendants Sandra Ashton, Ronald Swenson, Tracy Kopfhamer, or Michael Rataczak, Plaintiff must prove each of the following elements by a preponderance of the evidence, as to each Defendant:

1. The defendant you are considering intentionally used force on plaintiff.
2. This defendant did so for the purpose of harming Plaintiff, and not in a good faith effort to maintain or restore security or order.
3. This conduct by this Defendant harmed Plaintiff. Plaintiff does not need to prove that he suffered a serious injury. If the Defendant's use of force caused pain to Plaintiff, that is sufficient harm, even if Plaintiff did not require medical attention or did not have long lasting injuries.

If you find that Plaintiff has proved each of these things by a preponderance of the evidence as to the Defendant you are considering, then you must decide for Plaintiff, and go on to consider the question of damages.

If, on the other hand, you find that Plaintiff has failed to prove any one of these three elements by a preponderance of the evidence as to the Defendant you are considering, then you should find for that Defendant, and you will not consider the question of damages.

In deciding whether Plaintiff has proved that a Defendant used force for the purpose of harming Plaintiff, you should consider all of the circumstances. When considering all the circumstances, among the factors you may consider are the need to use force, the relationship between the need to use force and the amount of force used, the extent of Plaintiff's injury, whether the Defendant reasonably believed there was a threat to the safety of staff or prisoners, and any efforts made by the Defendant to limit the amount of force used, and whether the Defendant was acting pursuant to a policy or practice of the prison that in the reasonable judgment of prison officials was needed to preserve security or order.

An officer is entitled to use some force if a prisoner disobeys a valid command. You may still consider, however, whether the amount of force used was excessive.

Seventh Circuit Federal Jury Instructions – Civil § 7.18 (2017 proposed version) (modified).

Eighth Amendment Failure to Intervene Claim

To succeed on his failure to intervene claim against Defendants Theodore Anderson, Kevin Pitzen, or Randy Schneider, Plaintiff must prove each of the following five things by a preponderance of the evidence:

1. One or more defendant used excessive force on Plaintiff.
2. The defendant whom you are considering knew that another Defendant was using or was about to use excessive force on Plaintiff.
3. This defendant had a realistic opportunity to do something to prevent this harm from occurring.
4. This defendant failed to take reasonable steps to prevent harm from occurring.
5. This defendant's failure to act caused Plaintiff to suffer harm.

If you find that Plaintiff has proved each of these things by a preponderance of the evidence as to the Defendant you are considering, then you must decide for Plaintiff, and go on to consider the question of damages.

If, on the other hand, you find that Plaintiff has failed to prove any one of these three elements by a preponderance of the evidence as to the Defendant you are considering, then you should find for that Defendant, and you will not consider the question of damages.

Seventh Circuit Federal Jury Instructions – Civil § 7.22 (2017 proposed version) (modified).

Eighth Amendment Failure to Provide Medical Attention Claim

To succeed on his claim that Defendant Philip Kerch failed to provide medical care, Plaintiff must prove each of the following four things by a preponderance of the evidence:

1. Plaintiff had a serious medical need. A serious medical need is a condition that a doctor says requires treatment or something so obvious that even someone who is not a doctor would recognize that it requires treatment.

2. Kerch was aware that Plaintiff had a serious medical need, or strongly suspected facts showing a strong likelihood that Plaintiff had a serious medical need, but refused to confirm whether those facts were true.

You may infer this from the fact that the need was obvious.

3. Kerch consciously failed to take reasonable measures to provide treatment for the serious medical need.

Plaintiff does not have to show that Kerch ignored him or provided no care. If Kerch provided some care, Plaintiff must show that Kerch knew his actions likely would be ineffective or that Kerch's actions were clearly inappropriate.

In deciding whether Kerch failed to take reasonable measures, you may consider the seriousness of Plaintiff's medical need, how difficult it would have been for Kerch to provide treatment, and whether Kerch had legitimate reasons related to safety or security for failing to provide treatment.

You may infer that Kerch consciously failed to take reasonable measures if Kerch's action or failure to act was such a substantial departure from accepted professional judgment, practice or standards, that it showed a complete abandonment of medical judgment.

4. As a result of Kerch's actions or inaction, Plaintiff was harmed. Plaintiff may prove that Kerch harmed him with evidence that his condition worsened as a result of Kerch's conduct or that he suffered prolonged, unnecessary pain.

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

If, on the other hand, you find that Plaintiff has failed to prove any one of these four things by a preponderance of the evidence, then you should find for Kerch, and you will not consider the question of damages.

Seventh Circuit Federal Jury Instructions – Civil § 7.17 (2017 proposed version) (modified).

III. JURY INSTRUCTIONS ON DAMAGES

General

Certain questions in the special verdict relate to damages. Plaintiff 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. Plaintiff 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 plaintiff for his injuries.

Do not measure damages by what parties 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

In answering the damages questions, 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 result of defendants' failure to provide him with an inhaler for his asthma. 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 these are not easy to measure. You should consider the physical, mental and emotional pain and suffering that Plaintiff has experienced. No evidence of the dollar value of physical, mental or emotional pain and suffering 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 the Plaintiff for the pain and suffering that he has sustained. If you find in favor of Plaintiff but find that he has failed to prove compensatory damages, you must return a verdict for plaintiff in the amount of one dollar.

Punitive Damages

Certain questions in the special verdict form ask whether Defendants' conduct demonstrated a willful or reckless disregard for the plaintiff's constitutional rights. If you answer "yes" any of those questions, you may award punitive damages in the following question.

Punitive damages are never a matter of right. This means that you are not required to make any award of punitive damages, but you may do so if you think it is proper under the circumstances. It is in the jury's discretion to award or withhold them.

Punitive damages may be awarded even if the violation of Plaintiff's rights resulted in only nominal compensatory damages. That is, you may award punitive damages even if Plaintiff can show no damages or other injury as a result of a Defendant's actions.

The purposes of punitive damages are to punish the Defendants for their conduct and to serve as an example or warning to the Defendants 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 Defendants.

You may assess punitive damages only if you find that a Defendant's conduct was in reckless disregard of plaintiff's constitutional rights. An action 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 a Defendant's conduct was motivated by evil motive or intent, such as ill will or spite or a grudge either toward Plaintiff individually or toward all persons such as Plaintiff, then you may find that the Defendant deliberately violated the plaintiff's rights. In addition, if the Defendant was in a position in which he certainly should have known that his conduct would violate Plaintiff's rights, and proceeded to act in disregard of that knowledge and of the harm or the risk of harm that would result to Plaintiff, then he acted with reckless disregard for Plaintiff's 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 any party. In determining the amount of any punitive damages, you should consider the following factors:

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