UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

KENNETH THOMPSON,

Plaintiff,

-v-

J. BURGE, Acting Superintendent;
GLENN S. GOORD, Commissioner;
C. CAYNE; Nurse Administrator,

Defendants.

DEFENDANTS' PROPOSED JURY INSTRUCTIONS

9:02-CV-00394

DNH/DRH

DEFENDANTS' REQUEST TO CHARGE

At the trial, date and time to be determined, defendants request the Court adopt the jury instructions that are annexed hereto.

Dated: Syracuse, New York
June 5, 2007

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1. General Introduction

Province of the Court and Jury

MEMBERS OF THE JURY:

Now that you have heard the evidence and the arguments, it becomes my duty to give you the instructions of the Court as to the law applicable to this case.

It is your duty as jurors to follow the law as I shall state it to you, and to apply that law to the facts as you find them from the evidence in the case. You are not to single out one instruction

alone as stating the law, but must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by me.

Counsel have quite properly referred to some of the governing rules of law in their arguments. If, however, any difference appears to you between the law as stated by counsel and that stated by the Court in these instructions, you are of course to be governed by the Court's instructions.

Nothing I say in these instructions is to be taken as an indication that I have any opinion about the facts of the case, or what that opinion is. It is not my function to determine the facts, but rather yours.

You must perform your duties as jurors without bias or prejudice as to any party. The law does not permit you to be governed 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.

Authority: Devitt & Blackmar, § 71.01.

2. Multiple Defendants

Although there are three defendants in the action, it does not follow from that fact alone that if one is liable, all are liable. Each defendant is entitled to a fair consideration of his own defense, and is not to be prejudiced by the fact, if it should become a fact, that you find against another. Now, keep in mind here that each of these defendants is chargeable only for his own individual actions. None of the defendants are chargeable with the acts of the New York State Department of Correctional Services, or any other employee of the Department. Unless otherwise stated, all instructions given you govern the case as to each defendant.

Authority: Devitt & Blackmar, § 71.06; Vetters v. Berry, 575 F.2d 90, 95 (6th Cir. 1978).

3. State Not a Defendant

The State of New York is not a defendant in this case. This is a suit against individual defendants.

In reaching your verdict, you are not to consider whether or not the State might or might not indemnify the defendants in the event that you render a verdict for the plaintiff. You are only to consider the potential liability of each of the individual defendants solely on the basis of the evidence that has been presented in this case.

Authority: Wilson v. Prasse, 325 F.Supp. 9 (W.D. Pa. 1971), affirmed 463 F.2d 109 (3d Cir. 1972).

4. Instructions Apply to Each Party

Unless otherwise stated, the jury should consider each instruction given to apply separately and individually to the plaintiff and to each defendant in the case. As I have told you, you must consider each defendant individually. If I have instructed you to consider evidence only against one particular defendant you may not consider that evidence in considering whether plaintiff has met his burden of proving his claim against another defendant.

The law requires that a defendant be personally involved in conduct that deprived another person of his or her constitutional rights before that defendant may be held liable for such deprivation. You, therefore, may not find a defendant liable for the actions taken by another; nor may you, in consideration of damages, if you reach the question, award damages against a defendant based on actions taken by another individual, whether or not the individual is a party in this case. You may not hold a defendant liable merely because of the position he holds.

Authority: McKinnon v. Patterson, 568 F.2d 930 (2d Cir. 1977), cert denied, 434 U.S. 1087 (1978); Devitt, Blackmar & Wolff, Federal Jury Practice and Instructions, §§ 71.03 and 71.07.

5. Burden of Proof - Preponderance of Evidence

The plaintiff in this case has what is known as the burden of proof on the issues in this lawsuit, and must meet his burden of proof if he is to prevail in this lawsuit.

This case is a civil lawsuit. The law provides that in a civil suit, the plaintiff, here Mr. Allred, has the burden of proving the elements of his case.

In the course of my instructions to you, I will identify the essential elements of the claim asserted by the plaintiff that the law requires him to prove against the defendants in order to sustain his claims against them. Only if the plaintiff meets his burden as to each essential element of his claim, is he entitled to a verdict against the defendants in this case.

In order to prevail on his claim against the defendants, the plaintiff must prove each essential element of his claim by what is called a fair preponderance of the credible evidence. A fair preponderance of the credible evidence means proof that something is more likely so than not so. A fair preponderance of the credible evidence means the greater weight of the believable evidence. That does not necessarily mean the greater number of witnesses or exhibits produced by either side, but rather refers to the convincing quality of the evidence and the weight and effect that it has on your own minds. A fair preponderance of the evidence does not require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case. In other words, a preponderance of the evidence in this case means such evidence as, when considered and compared with that opposed to it, has more convincing force, and produces in your mind a belief that what is sought to be proved is more likely true than not true.

Authority: Adapted from Some Suggested General Instructions for Federal Civil Cases, Civ. 2.01, 28 F.R.D. 401, 415 and from 2 Devitt & Blackmar, §§ 71.13 and 71.14.

6. Inferences Defined - Presumption of Regularity - Ordinary Course of Business - Obedience to Law

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

Inferences are deductions or conclusions which reason and common sense lead the jury to draw from facts which have been established by the evidence in the case.

Unless and until outweighed by evidence in the case to the contrary, you may find that official duty has been regularly performed; that private transactions have been fair and regular; that the ordinary course of business or employment has been followed; that things have happened according to the ordinary course of nature and the ordinary habits of life; and that the law has been obeyed.

Authority: Devitt and Blackmar, § 72.04.

7. Evidence - Direct and Indirect or Circumstantial

There are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence – such as the testimony of an eyewitness. The other is indirect or circumstantial evidence – the proof of a chain of circumstances pointing to the existence or non-existence of certain facts. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that the jury find the facts in accordance with the preponderance of all evidence in the case, both direct and circumstantial.

Authority: 2 Devitt & Blackmar, § 72.02; Some Suggested General Instructions for Federal Civil Cases, Civ. 2.02, 28 F.R.D. 401, 416.

8. Objections - Stricken Testimony - Sidebar Conferences

As you know, the parties' counsel have made a number of objections throughout the trial, as they are required to do. The Court's rulings on objections made by counsel are not to be considered by you in any respect. Counsel have not only the right, but the duty, to make whatever legal objections there may be to the admission of evidence. And while interruptions of the testimony to voice and discuss objections may have been frustrating to you at times, you must recognize that the law provides for such a procedure in order to ensure a fair trial.

When the Court has sustained an objection, you must disregard the question and may not speculate as to what the answer would have been. Similarly, if the Court has overruled an objection and permitted a question, the Court has not expressed any opinion as to the weight or effect of the evidence.

Whenever testimony was stricken, the reason is of no concern to you, and such stricken testimony must be disregarded by you.

From time to time during the trial, "sidebar" conferences were held out of your hearing. They related to matters of law which do not concern you, and these conferences or their purposes may not enter into your consideration.

9. Admissions and Pleadings and Stipulated Facts

Prior to the trial of this case, the parties filed written statements of their claims, known as the pleadings. Statements in the pleadings are not evidence, but simply set forth the facts that the parties claim to exist.

Before and during the trial of this case the parties entered into certain stipulations or agreements in which they agreed that certain facts could be taken as true without further proof. By this procedure it is often possible to save time.

Since the parties have so agreed, you are to take such facts as true for purposes of this case.

Authority: 2 Devitt & Blackmar, §§ 70.03-70.04.

10. Credibility of Witnesses

When I explained the burden of proof a moment ago, you may recall that I said that the plaintiff is required to prove certain elements by a preponderance of the credible evidence. Credible evidence means believable evidence. You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. That is, you must determine whether and to what extent you believe or do not believe each of the witnesses.

There are, however, various guidelines or factors to consider which may assist you in making these determinations of credibility. You start by using your everyday common sense. You should carefully scrutinize all of the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. You should consider the candor, accuracy of recollection, appearance, background, and demeanor of each witness on the stand, to help you determine his or her frankness or lack of frankness in testifying. You may and should consider whether a witness' testimony is supported by or contradicted by other credible and believable evidence. Consider also the certainty and clarity with which each witness testifies as to given points. Consider any possible motive or lack of motive the various witnesses may have had for testifying in the way they did; any interest or lack of interest in the outcome of the trial which the witnesses may have; and any relation the witness may bear to either side of the case. Consider any inconsistencies between the testimony of the witness and any previous statements that the witness may have made. Consider the factual probability or improbability of the witness' testimony and consider the witness' opportunity for observation or for acquisition of information with respect to the matter

about which the witness has testified. In weighing the effect of any discrepancy, always consider whether the discrepancy pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

Evidence that the plaintiff or any witness has been convicted of a crime may be considered in weighing credibility.

Authority: 2 Devitt & Blackmar, § 73.01.

11. Impeachment - Inconsistent Statements or Conduct - Conviction of a Felony

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, which is inconsistent with the witness' present testimony; or by evidence that the witness has been convicted of a felony, that is, an offense punishable by imprisonment for a term of years.

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

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

Authority: Devitt & Blackmar, § 73.04.

12. All Available Evidence Need Not be Produced

The law does not require any party to call as witnesses all persons who may have been present at any time or place involved in the case, or who may appear to have some knowledge of the matters in issue at this trial. Nor does the law require any party to produce as exhibits all papers and things mentioned in the evidence in the case.

Authority: Devitt and Blackmar, § 73.11.

13. Statute Involved

Section 1983 of Title 42 of U.S.C. provides that any inhabitant of this Federal District may seek redress in this Court, by way of a claim for damages, against any person or persons who, under color of any law, statue, ordinance, regulation, or custom, knowingly subject such inhabitant to the deprivation of any rights, privileges, or immunities, secured or protected by the Constitution or laws of the United States. This statute does not create any substantive right in and of itself, but rather serves as the statutory vehicle by which individuals can seek redress in this Court for alleged violations of substantive federal constitutional rights.

Authority: Adapted from Devitt & Blackmar, §103.04.

14. Elements of a Claim Under Section 1983

Plaintiff claims a right to recovery under Section 1983 of Title 42 of the United States Code which reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state, subjects any citizen of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law.

In order to prove this claim, the burden is upon the plaintiff to establish by a preponderance of the evidence the following three propositions:

First, that the conduct complained of was committed by a person acting under color of state law;

Second, that this conduct deprived the plaintiff of rights, privileges or immunities secured by the Constitution or laws of the United States; and

Third, that the defendants' acts were the proximate cause of the injuries and consequent damages sustained by the plaintiff.

I shall now examine each of the three elements in greater detail.

15. First Element:

Action Under Color of State Law

Acts are done "under color of ... law" of a state not only when state officials act within the bounds or limits of their lawful authority, but also when such officers act without and beyond the bounds of their lawful authority. In order for unlawful acts of an official to be done "under color of any law," however, the unlawful acts must be done while the official is purporting or pretending to act in the performance of his official duties; that is to say, the unlawful acts must consist of an abuse or misuse of power which is possessed by the official only because he is an official; and the unlawful acts must be of such a nature, and be committed under such circumstances, that they would not have occurred but for the fact that the person committing them was an official, purporting to exercise his official powers.

Authority: Devitt & Blackmar, § 103.04

16. Second Element:

Deprivation of a Constitutional Right

The second element of the plaintiff's claims is that he was deprived of a federal right by the defendants. In order for the plaintiff to establish this second element, he must show these things by a preponderance of the evidence: first, that the defendants committed the acts alleged by the plaintiff; second, that those acts cause the plaintiff to suffer the loss of a right under the Constitution of the United States. This element requires some explanation.

17. Second Element - Inadequate Medical Treatment Claim

The plaintiff alleges that he was provided with constitutionally inadequate treatment for his medical condition while he was in the custody of the N.Y.S. Commissioner of Correctional Services. An inmate who is the subject of the State's care and custody is entitled to have his medical needs addressed in a manner consistent with the principles embodied in the Eighth Amendment to the United States Constitution, which in pertinent part prohibits cruel and unusual punishment.

As I will explain, the plaintiff must prove more than simple negligence or medical malpractice in order to sustain such a claim. The plaintiff must demonstrate that the defendant evinced "deliberate indifference" to his "serious medical needs."

A prisoner's Eighth Amendment claim thus requires that you decide two factual questions: 1) whether the plaintiff had a serious medical need, and 2) if he did have such a need, whether the defendant was deliberately indifferent to seeing that this need was taken care of, to the extent the defendant was in a position to address it.

The first question you have to address relates to the objective seriousness of the plaintiff's medical problem, that is: was the defendant's alleged wrongdoing harmful enough to plaintiff's serious medical needs to establish a constitutional violation? Serious medical conditions or needs include those which are urgent, produce death, degeneration or extreme pain, are life threatening, or are fast degenerating. Because society does not expect that prisoners will have unqualified access to health care, deliberate indifference to medical needs amounts to an Eighth Amendment violation only if those needs are "serious". Therefore, in your deliberation you must first find that

the plaintiff had serious medical needs. If you find that plaintiff did not have serious medical needs, then your deliberations are to go no further and you must find in favor of the defendant.

If you find that the plaintiff did have serious medical needs, you must then go on to consider the second element of plaintiff's Eighth Amendment claim. The second question you must answer is the subjective question of the defendant's intent, that is, did the defendant act with deliberate indifference to the plaintiff's serious medical needs?

If you find that plaintiff did not make his serious medical needs known to the defendant then your deliberations are to go no further and you must find in favor of the defendant. A defendant cannot be said to be deliberately indifferent to a condition unless he or she has actual knowledge of it.

In deciding whether a defendant acted with deliberate indifference, you must consider the contemporary standards of decency in the context of a prison setting. Deliberate indifference to an inmates serious medical needs is conduct that is repugnant to the conscience of mankind. Thus, the plaintiff must demonstrate by a fair preponderance of the evidence that a defendant actually delayed or denied medical treatment so that it can be said such delays or denials shock the conscience. In conducting this inquiry, I must tell you that society does not expect that prisoners will have unqualified access to health care. Moreover, it is equally recognized that routine discomfort is part of the penalty that criminal offenders pay for their offenses against society...[and] only those deprivations denying "minimal civilized measure of life's necessities" are sufficiently grave to form the basis of an Eighth Amendment violation".

Moreover, the defendant is not liable if the plaintiff caused the alleged delay or denial of medical care.

Should you find that the defendant's conduct amounted to faulty judgment, negligence or medical malpractice, or that the plaintiff simply disagreed with his prescribed medical treatment, or that the plaintiff himself refused to go through further treatment of his medical condition, then you must find in favor of the defendant and proceed no further with your deliberations.

Authority: Farmer v. Brennan, 114 S.Ct 1970 (1994); Wilson v. Seiter, 501 U.S. 294 (1991); Whitley v. Albers, 475 U.S. 312, 319 (1986); Estelle v. Gamble, 429 U.S. 97, 106 (1976); Romano v. Howarth, 998 F.2d 101, 105 (2d Cir. 1993); Liscio v. Warren, 901 F.2d 274 (2d Cir. 1990); Todaro v. Ward, 565 F.2d 48, 51 (2d Cir. 1977).

17. Third Element:

Proximate Cause

The third element that the plaintiff must prove is that the acts by the defendants were a proximate cause of the injuries sustained by the plaintiff. Proximate cause means that there must be a sufficient causal connection between the act or omission of a defendant and any injury or damage sustained by the plaintiff. An act or omission is a proximate cause if it was a substantial factor in bringing about or actually causing injury, that is, if the injury or damage was a reasonably foreseeable consequence of the defendant's act or omission. If any injury was a direct result or a reasonably probable consequence of a defendant's act or omission, it was proximately caused by such act or omission. In other words, if a defendant's act or omission had such an effect in producing the injury that reasonable persons would regard it as being a cause of the injury, then the act or omission is a proximate cause.

In order to recover damages for any injury, the plaintiff must show by a preponderance of the evidence that such injury would not have occurred without the conduct of the particular defendant whom you are considering.

A defendant is not liable if the plaintiff's injury was caused by a new or independent source of an injury which intervenes between the defendant's act or omission and the plaintiff's injury and which produces a result which was not reasonably foreseeable by the particular defendant which you are considering.

If you find that the plaintiff has proven by a preponderance of the evidence all elements of his claim with respect to a particular defendant who you are considering separately, you should find that defendant liable. If you find that the plaintiff has not proven any one of the elements with respect to the particular defendant you are considering, then you must find that defendant not liable and return a verdict for him. Remember that the case as to each of these individual defendants must be considered separately by you. The fact that you find that one of the defendants is or is not liable does not determine your verdict as to the other defendants.

Authority: Morello v. James, 797 F.Supp 223, 231 (W.D.N.Y. 1992).

18. Verdict - Unanimous - Duty to Deliberate

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

It is you duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without violence to 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.

Authority: Devitt & Blackmar, § 74.01.

19. Liability

If you determine that the defendants deprived the plaintiff of his constitutional rights, your verdict will be in favor of the plaintiff. If you determine that the defendants did not deprive the plaintiff of his constitutional rights, your verdict will be in favor of the defendants. I remind you that your verdict, either for the plaintiff or for the defendants, must be unanimous.

20. Negligence Cannot Be a Basis for Imposing Liability

Should you determine in the course of your deliberations, that the conduct of the defendants constituted negligence on their part or reflected a simple lack of due care with respect to the plaintiff, then you must find in favor of the defendants.

Authority: Daniels v. Williams, 474 U.S. 327 (1986); Davidson v. Cannon, 474 U.S. 344 (1987).

21. Damages

If your verdict is in favor of the plaintiff, I instruct you that based on current law, because plaintiff claims no physical injury, he may not recover compensatory damages. If you determine plaintiff's Constitutional rights were violated, you may, however, award him nominal damages in the amount of $1.00.

Authority: 42 U.S.C. § 1997e(e).

22. Requested Punitive Damages Instruction -

Requested by Defendants Only in the Event that the Court Determines that the Question of Punitive Damages Should be Submitted to the Jury

[Defendants contend that the evidence does not warrant the submission of the punitive damages issue to the jury. Therefore, the jury should not be charged on punitive damages. In the event the Court rejects this request, defendants propose the following language for a punitive damages charge].

Plaintiff has made a claim for punitive damages in this case. Punitive damages are not favored in law and are to be allowed only with caution and within narrow limits. They are to be awarded in cases brought under section 1983 only if you determine that plaintiff proved, by a preponderance of the evidence, that the conduct of the defendants was motivated by evil motive or intent or where it involved reckless indifference to the constitutionally protected rights of others. Punitive damages may be awarded only to deter or punish violations of constitutional rights. Punitive damages are awarded at the discretion of the jury in order to punish a defendant for extreme or outrageous conduct, or to prevent or deter a defendant or others in his position from engaging in such conduct in the future.

If you determine that the plaintiff has proved, by a preponderance of the evidence, that one or more of the defendants acted with malicious, wanton, or oppressive intent to cause harm, you may indicate this finding on the verdict forms which you shall be provided at the conclusion of these instructions.

An act or a failure to act is "maliciously" done, if prompted or accompanied by ill will, or spite, or grudge, either toward the injured person individually, or toward all persons in one or more groups or categories of which the injured person is a member.

An act or a failure to act is "wantonly" done, if done in reckless or callous disregard of, or indifference to, the rights of one or more persons, including the injured person.

An act or a failure to act is "oppressively" done, if done in a way or manner which injures, or damages, or otherwise violates the rights of another person with unnecessary harshness or severity, as by misuse or abuse of authority or power, or by taking advantage of some weakness, or disability, or misfortune of another person.

If you find that the plaintiff has failed to sustain the burden of showing that punitive damages are appropriate, you should indicate this finding on the verdict form.

If you decide to award punitive damages against the defendants in this case, we will reconvene for a further hearing so that you may consider the amount of personal assets and liabilities of such individual defendant in fixing the amount of punitive damages which you may opt to assess.

Authority: Zarcone v. Perry, 572 F.2d 52, 56 (2d Cir. 1978); McFadden v. Sanchez, 710 F.2d 907, 912-14 (2d Cir.), cert denied, 464 U.S. 961 (1983); Smith v. Wade, 461 U.S. 30, 56 (1983); Carey v. Piphus, 435 U.S. 247, 257 n. 11 (1978); Gagne v. Town of Enfield, 734 F.2d 902 (2d Cir. 1984); 3 Devitt, Blackmar, & Wolff, Federal Jury Practice and Instructions, §§ 104.07, 105.03 (4th ed, 1987) (adapted).

23. Effect of Instructions as to Damages

The fact that I have instructed you on the proper measure of damages should not be considered as an indication of 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 only for your guidance, in the event that you should find in favor of plaintiff on the question of liability, by a preponderance of evidence and in accord with the other instructions.

Authority: Devitt and Blackmar, § 71.1.

24. Conclusion

I have now outlined the rules of law applicable to this case and the processes by which you should weigh the evidence and determine the facts. In a few minutes, you will retire to the jury room for your deliberations. Your first order of business in the jury room will be to elect a foreperson. The foreperson's responsibility is to ensure that deliberations proceed in an orderly manner. This DOES NOT mean that the foreperson's vote is entitled to any greater weight than the vote of any other juror. Your job as jurors is to reach a fair conclusion from the law and evidence. When you are in the jury room, listen to each other, and discuss the evidence and issues. It is the duty of each of you, as jurors, to consult with each other. You must deliberate with a view to reaching an agreement, but only if you can do so without violating your individual judgment and conscience. Remember in your deliberations that the dispute between the parties is for them no passing matter. The parties and the court are relying on you to give full and conscientious consideration to the issues and the evidence before you.

If, in the course of your deliberations, your recollection of any part of the testimony should fail, or if you should find yourself in doubt concerning my instructions, it is your privilege to return to the courtroom to have the testimony or instructions read to you.

Should you desire to communicate with the court during your deliberations, please put your message or question in writing. The foreperson should sign the note and pass it to the marshal who will bring it to my attention. I will then respond, either in writing or orally, by having you returned to the courtroom. I caution you, however, that in your communications with the court, you should never state your numerical division.

Once you have reached a unanimous verdict and the verdict form has been completed, please inform the marshall that a verdict has been reached. Your verdict on each claim for relief must be unanimous, and it must also represent the considered judgment of each juror.

Dated: Syracuse, New York
June 5, 2007

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