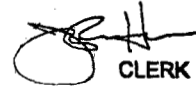


UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

FILED

FEB 23 2008


CLERK

MINDY KAHLE

Plaintiff,

vs.

JERMAINE LEONARD and
DEPUTY TIM MALONE

Defendants.

CIV. 04-5024-KES

**FINAL
INSTRUCTIONS
TO THE JURY**

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FINAL INSTRUCTION NO. 1 – INTRODUCTION

Members of the jury, the instructions I gave you at the beginning of the trial and during the trial remain in effect. I will now give you some additional instructions.

You must, of course, continue to follow the instructions I gave you earlier, as well as those I give you now. You must not single out some instructions and ignore others, because all are important. This is true even though some of those I gave you at the beginning of trial are not repeated here.

The instructions I am about to give you now as well as those I gave you earlier are in writing and will be available to you in the jury room. I emphasize, however, that this does not mean they are more important than my oral instructions. Again, all instructions, whenever given and whether in writing or not, must be followed.

Neither in these instructions nor in any ruling, action or remark that I have made during the course of this trial have I intended to give any opinion or suggestion as to what your verdict should be.

FINAL INSTRUCTION NO. 2 – BURDEN OF PROOF

In civil actions, the party who asserts the affirmative of an issue must prove that issue by the greater weight of the evidence.

Greater weight means that after weighing the evidence on both sides there is enough evidence to convince you that something is more likely true than not true. In the event that the evidence is evenly balanced so that you are unable to say that the evidence on either side of an issue has the greater weight, then your finding upon the issue must be against the party who has the burden of proving it.

In determining whether or not an issue has been proved by the greater weight of the evidence, you should consider all of the evidence bearing upon that issue, regardless of who produced it.

FINAL INSTRUCTION NO. 3 - IMPEACHMENT

In Preliminary Instruction No. 3, I instructed you generally on the credibility of witnesses. I now give you this further instruction on how the credibility of a witness can be “impeached” and how you may treat certain evidence.

A witness may be discredited or impeached by contradictory evidence; by a showing that the witness testified falsely concerning a material matter; or by evidence that at some other time the witness said or did something, or failed to say or do something, that is inconsistent with the witness’s present testimony. If earlier statements of a witness were admitted into evidence, they were not admitted to prove that the contents of those statements were true. Instead, you may consider those earlier statements only to determine whether you think they are consistent or inconsistent with the trial testimony of the witness, and therefore whether they affect the credibility of that witness.

If you believe that a witness has been discredited or impeached, it is your exclusive right to give that witness’s testimony whatever weight you think it deserves.

FINAL INSTRUCTION NO. 4 – DEFENDANT LEONARD’S PRIOR CONVICTION

You have heard evidence that defendant Jermaine Leonard was convicted of a crime. The crime for which Leonard was convicted made it unlawful for a correctional officer to engage in any sexual contact, regardless of whether the sexual contact was consensual or nonconsensual, with a detainee at the Pennington County Jail. You may use that evidence only to help you to decide whether to believe his testimony and how much weight to give it. That evidence does not mean that Leonard engaged in nonconsensual sexual contact with Kahle.

FINAL INSTRUCTION NO. 5 – PLAINTIFF'S PRIOR CONVICTIONS

You have heard evidence that Mindy Kahle was previously convicted of crimes. You may use that evidence only to help you decide whether to believe her testimony and how much weight to give it.

FINAL INSTRUCTION NO. 6 – VIOLATION OF CIVIL RIGHTS

Your verdict must be in favor of Kahle, and against Leonard, on Kahle's claim for violation of civil rights, if Kahle has proved all of the following elements by the greater weight of the evidence:

First, Leonard had sexual contact with Kahle, which is not disputed;

Second, Kahle did not consent to the sexual contact by or from Leonard; and

Third, as a direct result of Leonard's conduct, Kahle suffered damage, pain, misery, anguish or similar harm.

If any of the above elements has not been proved by the greater weight of the evidence, then your verdict must be in favor of Leonard and against Kahle on this claim.

FINAL INSTRUCTION NO. 7 – BATTERY

Kahle alleges a claim of civil battery against Leonard. Battery is intentionally harmful or offensive physical contact upon another person. Your verdict must be in favor of Kahle, and against Leonard, on Kahle's claim for civil battery, if Kahle has proved all of the following elements by the greater weight of the evidence:

First, Leonard intended to cause a harmful or offensive physical contact with Kahle, or an imminent apprehension of such contact;

Second, such contact actually occurred;

Third, Kahle did not consent to the contact; and

Fourth, as a direct result of Leonard's contact, Kahle suffered damage, pain, misery, anguish or similar harm.

If any of the above elements has not been proved by the greater weight of the evidence, then your verdict must be in favor of Leonard and against Kahle on this claim.

FINAL INSTRUCTION NO. 8 – INTENTIONAL INFLICTION OF
EMOTIONAL DISTRESS

Kahle alleges a claim of intentional infliction of emotional distress against Leonard. Your verdict must be in favor of Kahle, and against Leonard, on Kahle's claim for intentional infliction of emotional distress, if Kahle has proved all of the following elements by the greater weight of the evidence:

First, Leonard engaged in extreme and outrageous conduct;

"Extreme and outrageous conduct" is conduct exceeding all bounds of decency usually tolerated by a civilized society.

Extreme and outrageous conduct does not consist of mere insults, indignities, threats, annoyances, petty oppressions or other trivialities. All persons must expect a certain amount of rough language and occasional inconsiderate or unkind acts.

Extreme and outrageous conduct, however, is conduct that would cause a reasonable member of the community to immediately react in outrage.

Whether Leonard's conduct was extreme and outrageous is to be determined from the surrounding circumstances.

Extreme and outrageous conduct may arise from Leonard's abuse of a position, or relationship to Kahle, which gives Leonard actual or apparent authority over Kahle, or power to affect Kahle's interests.

**Second, Leonard intended to cause Kahle severe emotional distress,
or recklessly caused Kahle severe emotional distress;**

"Severe emotional distress" means substantial or enduring, not merely trivial or passing. It means

emotional distress to such a degree and duration that no person in a decent society should be expected to endure and experience it.

In order to find that Leonard intended to cause Kahle severe emotional distress, you must find that Leonard desired to inflict severe emotional distress or knew that such emotional distress was certain or substantially certain to result from his conduct.

In order to find that Leonard recklessly caused Kahle severe emotional distress, you must find that Leonard deliberately disregarded a high degree of probability that emotional distress would result from the conduct.

Third, Leonard's conduct, in fact, caused Kahle to suffer severe emotional distress; and

Fourth, Kahle suffered an extreme disabling emotional response to Leonard's conduct.

In a cause of action alleging intentional infliction of emotional distress, it is not necessary for Kahle to experience physical manifestation of the distress to recover.

If any of the above elements has not been proved by the greater weight of the evidence, then your verdict must be in favor of Leonard and against Kahle on this claim.

FINAL INSTRUCTION NO. 9 – FAILURE TO SUPERVISE

Your verdict must be in favor of Kahle, and against Malone, on Kahle's claim for failure to supervise, if Kahle has proved all of the following elements by the greater weight of the evidence:

First, Leonard had sexual contact with Kahle without her consent;

Second, Malone was aware of a substantial risk of serious harm to Kahle;

You may conclude that Malone was aware of a substantial risk of harm to Kahle, even if he was not aware that the harm had, in fact, occurred.

You may conclude that Malone knew of a substantial risk from the very fact that the risk was obvious. It is not enough, however, merely to find that a reasonable person would have known or that Malone should have known of the substantial risk.

Third, Malone, with deliberate indifference to the substantial risk that Leonard would seriously harm Kahle, or with tacit authorization of Leonard's conduct, failed to supervise Leonard; and

Deliberate indifference is established only if Malone had actual knowledge of a substantial risk that Leonard would seriously harm Kahle and if Malone disregarded that risk by intentionally refusing or failing to take reasonable measures to deal with the problem. Mere negligence or inadvertence does not constitute deliberate indifference.

Tacit means implied but not actually expressed and may be approved by silence.

Fourth, as a direct result of Malone's failure to supervise Leonard, Kahle suffered damage, pain, misery, anguish or similar harm.

If any of the above elements has not been proved by the greater weight of the evidence, then your verdict must be in favor of Malone and against Kahle on this claim.

FINAL INSTRUCTION NO. 10 – SEPARATE LIABILITY OF EACH DEFENDANT

Each party is entitled to have the case decided solely on the evidence which applies to that party. In considering the evidence, you should determine each defendant's liability, if any, separately.

FINAL INSTRUCTION NO. 11 – VIOLATION OF JAIL POLICY

In order to return a verdict in Kahle's favor with respect to her claim against defendant Malone you must find, by the greater weight of the evidence, that defendant Malone's failure to supervise defendant Leonard resulted in a violation of Kahle's civil rights, as set forth in Final Instruction Number 9. A finding that Malone's behavior violated an internal Pennington County Jail Policy is insufficient to entitle Kahle to your verdict against Malone.

FINAL INSTRUCTION NO. 12 – ACTUAL DAMAGES

If you find in favor of Kahle on any of her claims asserted against Leonard and/or Malone as explained in Instructions 6-9, then you must award Kahle such sum as you find from the greater weight of the evidence will fairly and justly compensate Kahle for any damages you find Kahle sustained and is reasonably certain to sustain in the future as a direct result of the conduct of Leonard and/or Malone as alleged by Kahle. You should consider the following elements of damages:

1. The physical pain and mental and emotional suffering Kahle has experienced and is reasonably certain to experience in the future.
2. The nature and extent of the injury, whether the injury is temporary or permanent.
3. The reasonable value of the psychological care reasonably needed by Kahle and reasonably certain to be needed and provided in the future.

Remember, throughout your deliberations you must not engage in any speculation, guess, or conjecture and you must not award any damages under this Instruction by way of punishment or through sympathy.

FINAL INSTRUCTION NO. 13 – NOMINAL DAMAGES

If you find in favor of Kahle on any of her claims asserted against Leonard and/or Malone as explained in Instructions 6-9, but you find that Kahle's damages have no monetary value, then you must return a verdict for Kahle in the nominal amount of One Dollar (\$1.00).

FINAL INSTRUCTION NO. 14 – PUNITIVE DAMAGES

In addition to the damages mentioned in other instructions, the law permits the jury under certain circumstances to award punitive damages. If you find in favor of Kahle on any of her claims asserted against Leonard and/or Malone as explained in Instructions 6, 7, 8 and/or 9, and if you find by the greater weight of the evidence that the conduct of that defendant as submitted in Instructions 6, 7, 8 and/or 9 was malicious or recklessly indifferent to Kahle's right to bodily integrity then you may, but are not required to, award Kahle an additional amount as punitive damages for the sole purposes of punishing the defendant for engaging in such misconduct and deterring the defendant and others from engaging in such misconduct in the future.

If you decide to award punitive damages, you should consider the following in deciding the amount of punitive damages to award:

1. How reprehensible or offensive the defendant's conduct was. In this regard, you may consider whether the harm suffered by Kahle was physical; whether there was violence, deceit, intentional malice, reckless disregard for human health or safety; and whether there was any repetition of the wrongful conduct of the sort that harmed Kahle;
2. How much harm actually resulted to Kahle, but not to others, from the defendant's wrongful conduct;
3. What amount of punitive damages, in addition to the other damages already awarded, is needed, to punish the defendant for his wrongful conduct toward Kahle and to deter the defendant and others from similar wrongful conduct in the future;
4. In order to achieve the purposes of punitive damages set forth above, the amount of any punitive damages award should bear a reasonable relationship to the amount of compensatory damages you awarded, if

any;

5. The amount of possible harm the defendant's conduct could cause Kahle in the future;
6. In order to achieve the purposes of punitive damages set forth above, the amount of any punitive damages award should bear a reasonable relationship to the harm likely to be caused in a similar situation by conduct similar to the defendant's wrongful conduct; and
7. The amount of fines and civil penalties applicable to similar conduct.

You may assess punitive damages against any or all defendants or you may refuse to impose punitive damages. If punitive damages are assessed against more than one defendant, the amounts assessed against such defendants may be the same or they may be different.

FINAL INSTRUCTION NO. 15 – DUTIES DURING DELIBERATIONS

In conducting your deliberations and returning your verdict, there are certain rules you must follow.

First, when you go to the jury room, you must select one of your members as your foreperson. That person will preside over your discussions and speak for you here in court.

Second, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach agreement if you can do so without violence to individual judgment, because a verdict must be unanimous.

Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinions if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right, or simply to reach 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.

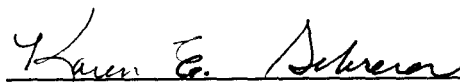
Third, if you need to communicate with me during your deliberations, you may send a note to me through the marshal or court security officer signed by one or more jurors. I will respond as soon as possible either in writing or orally in open court. Remember that you should not tell anyone—including

me—how your votes stand numerically.

Fourth, your verdict must be based solely on the evidence and on the law which I have given to you in my instructions. The verdict must be unanimous. Nothing I have said or done is intended to suggest what your verdict should be—that is entirely for you to decide.

Finally, the verdict form is simply the written notice of the decision that you reach in this case. You will take this form to the jury room, and when each of you has agreed on the verdict, your foreperson will fill in the form, sign and date it, and advise the marshal or court security officer that you are ready to return to the courtroom.

Dated February 23, 2008.



KAREN E. SCHREIER
CHIEF JUDGE