

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

FILED

JUL 02 2008

[Signature]
CLERK

VIOLA FOTI,

Plaintiff,

vs.

ROGER GERLACH,
in his individual capacity,

Defendant.

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CIV 06-4152

JURY INSTRUCTIONS

INSTRUCTION NO. 7

Members of the jury, the instructions I gave at the beginning of the trial and during the trial remain in effect. I 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 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 earlier instructions. Again, all instructions, whenever given and whether in writing or not, must be followed.

INSTRUCTION NO. 2

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.

INSTRUCTION NO. 3

As I stated earlier, it is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in this case. "Evidence" includes the testimony of witnesses, documents and other things received as exhibits, any facts that are stipulated – that is, formally agreed to by the parties, and any facts that are judicially noticed – that is, facts which I say you may, but are not required to, accept as true, even without evidence.

Certain things are not evidence. I will list those things for you now:

1. Statements, arguments, questions and comments by lawyers representing the parties in the case are not evidence.
2. Objections are not evidence. Lawyers have a right to object when they believe something is improper. You should not be influenced by the objection. If I sustained an objection to a question, you must ignore the question and must not try to guess what the answer might have been.
3. Testimony that I have stricken from the record, or have told you to disregard, is not evidence and must not be considered.
4. Anything you have seen or heard about this case outside the courtroom is not evidence, unless I specifically told you otherwise during the trial.

A particular item of evidence is sometimes received for a limited purpose only. That is, it can be used by you for only one particular purpose, and not for any other purpose. When this occurred during the trial, I instructed you on the purposes for which the item can and cannot be used.

INSTRUCTION NO. 3, continued

Finally, some of you may have heard the terms “direct evidence” and “circumstantial evidence.” You are instructed that you should not be concerned with those terms. The law makes no distinction between direct and circumstantial evidence. You should give all evidence the weight and value you believe it is entitled to receive.

INSTRUCTION NO. 4

If any reference by the Court or by counsel to matters of testimony or exhibits does not coincide with your own recollection of that evidence, it is your recollection which should control during your deliberations and not the statements of the Court or of counsel.

You are the sole judges of the evidence received in this case.

INSTRUCTION NO. 5

If you took notes during the trial, your notes should be used only as memory aids. You should not give your notes precedence over your independent recollection of the evidence. If you did not take notes, you should rely on your own independent recollection of the proceedings and you should not be influenced by the notes of other jurors. I emphasize that notes are not entitled to any greater weight than the recollection or impression of each juror as to what the testimony may have been.

INSTRUCTION NO. 6

During the trial I instructed you that certain evidence may only be considered for limited purposes. Although I will not repeat those instructions here, I will tell you that those limitations remain in effect unless I have instructed you otherwise. You may consider that evidence in your deliberations only for the purposes for which it was admitted. It may not be considered for any other purposes.

INSTRUCTION NO. 7

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it, or none of it.

In deciding what testimony to believe, you may consider the witness's intelligence, the opportunity the witness had to have seen or heard the things testified about, the witness's memory, any motives that witness may have for testifying a certain way, the manner of the witness while testifying, whether that witness said something different at an earlier time, the general reasonableness of the testimony, and the extent to which the testimony is consistent with any evidence that you believe.

In deciding whether or not to believe a witness, keep in mind that people sometimes hear or see things differently and sometimes forget things. You need to consider therefore whether a contradiction is an innocent misrecollection or lapse of memory or an intentional falsehood, and that may depend on whether it has to do with an important fact or only a small detail.

INSTRUCTION NO. 8

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's 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's 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.

INSTRUCTION NO. 9

Plaintiff claims that Defendant, while acting under color of state law, violated Plaintiff's constitutional rights and caused her to sustain damages by wrongfully interfering with her possession and use of property.

Defendant denies any wrongful conduct toward Plaintiff, and he further denies Plaintiff sustained any damages as a result of any wrongful conduct on his part.

Plaintiff's Requested Instruction No. 1 (modified); Defendant's Requested Instruction No. 12.

INSTRUCTION NO. 10

Plaintiff is suing under Section 1983, a civil rights law passed by Congress that provides a remedy to persons who have been deprived of their federal constitutional rights under color of state law.

To prevail on her claim under Section 1983, Plaintiff must prove both of the following elements by a preponderance of the evidence:

1. Defendant acted under color of state law; and
2. While acting under color of state law, Defendant deprived Plaintiff of a federal constitutional right.

I will now give you more details on action under color of state law, after which I will tell you the elements Plaintiff must prove to establish the violation of her federal constitutional right.

Third Circuit Model Jury Instructions Civil, Nos. 4.1 and 4.3 (2007); Plaintiff's Requested Instruction No. 2 (modified); Defendant's Requested Instruction No. 13.

INSTRUCTION NO. 11

The first element of Plaintiff's claim is that the Defendant acted under color of state law. Acts are done under color of law when a person acts or purports to act in the performance of official duties under any state, county or municipal law, ordinance or regulation.

INSTRUCTION NO. 12

The Defendant in this case is a prosecutor. Prosecutors are entitled to what is called absolute immunity for all conduct reasonably related to their functions as prosecutors. Thus, you cannot hold Defendant liable based upon Defendant's actions as an advocate engaged in the judicial phase of the criminal process - - that is, his actions in filing, pursuing, and prosecuting criminal charges against Plaintiff. You cannot decide that Defendant violated Plaintiff's constitutional rights based on Defendant's conduct in this regard.

However, Plaintiff also alleges that Defendant engaged in conduct not reasonably related to his function as a prosecutor. Absolute immunity does not apply to such conduct, and thus if you find that Defendant engaged in such conduct, you should consider it in determining Defendant's liability.

INSTRUCTION NO. 13

I have already instructed you on the first element of Plaintiff's claim, which requires Plaintiff to prove that Defendant acted under color of state law.

The second element of Plaintiff's claim is that Defendant deprived her of a federal constitutional right. Here, Plaintiff contends that Defendant violated her federal constitutional rights under the Fourth Amendment. Under the Fourth Amendment, a person has the right to be free from an unreasonable seizure of her property. In order to prove the Defendant deprived the Plaintiff of this Fourth Amendment right, the Plaintiff must prove the following additional elements by a preponderance of the evidence:

1. Defendant seized the Plaintiff's property;
2. In seizing the Plaintiff's property, Defendant acted intentionally; and
3. The seizure was unreasonable.

A person "seizes" the property of the Plaintiff when the person meaningfully interferes with the Plaintiff's right to possess the property.

A person acts "intentionally" when the person acts with a conscious objective to engage in particular conduct. Thus, the Plaintiff must prove the defendant meant to engage in the acts that caused the seizure of Plaintiff's property. Although Plaintiff does not need to prove that Defendant intended to violate Plaintiff's Fourth Amendment Rights, it is not enough if Plaintiff only proves that Defendant acted negligently, accidentally, or inadvertently.

Third Circuit Model Jury Instructions Civil, No. 4.5 (2007); Ninth Circuit Manual of Model Jury Instructions Civil, No. 9.16 (2007); Plaintiff's Requested Instruction No. 4; Defendant's Requested Instruction No. 16. All of these were modified with regard to the meaning of "seizure" as set forth in *Soldal v. Cook County*, 506 U.S. 56, 61 (1992) (seizure of property occurs when "there is some meaningful interference with an individual's possessory interest in that property"). See also *Dixon v. Lowery*, 302 F.3d 857, 862 (8th Cir. 2002) (same).

INSTRUCTION NO. 14

In these instructions you are told that your verdict depends on whether you find certain facts have been proved. The burden of proving a fact is upon the party whose claim depends upon that fact. The party who has the burden of proving a fact must prove it by the greater weight of the evidence. To prove something by the greater weight of the evidence is to prove that it is more likely true than not true. It is determined by considering all of the evidence and deciding which evidence is more believable. If, on any issue in the case, the evidence is equally balanced, you cannot find that issue has been proved.

In this action, the Plaintiff has the burden of proof on her claim that Defendant deprived Plaintiff of a federal constitutional right.

The greater weight of the evidence is not necessarily determined by the greater number of witnesses or exhibits a party has presented.

You may have heard of the term “proof beyond a reasonable doubt.” That is a stricter standard which applies in criminal cases. It does not apply in civil cases such as this. You should, therefore, put it out of your minds.

Eighth Circuit Manual of Model Civil Jury Instructions, No. 3.04 (2005); Defendant’s Requested Instruction No. 10.

INSTRUCTION NO. 15

I am now going to instruct you on damages. Just because I am instructing you on how to award damages does not mean that I have any opinion on whether or not Defendant should be held liable.

If you find Defendant liable, then you must consider the issue of compensatory damages. You must award Plaintiff an amount that will fairly compensate her for the damages she actually sustained as a result of Defendant's conduct.

Plaintiff must show that the damages would not have occurred without Defendant's act. Plaintiff must also show that Defendant's act played a substantial part in bringing about the damages, and that the damages were either a direct result or a reasonably probable consequence of Defendant's act. There can be more than one cause of damages. To find that Defendant's act caused damages, you need not find that Defendant's act was the nearest cause, either in time or space. However, if Plaintiff's damages were caused by a later, independent event that intervened between Defendant's act and Plaintiff's damages, Defendant is not liable unless the damages were reasonably foreseeable by Defendant.

Compensatory damages must not be based on speculation or sympathy. They must be based on the evidence presented at trial, and only on that evidence. Plaintiff has the burden of proving compensatory damages by a greater weight of the evidence.

Plaintiff claims the following items of damages: The reasonable value of the damage to her property as well as the reasonable value of loss of use of her property while the property was wrongfully withheld.

Third Circuit Model Jury Instructions Civil, No. 4.8.1 (2007).

INSTRUCTION NO. 16

If you find in favor of Plaintiff but you find that Plaintiff's damages have no monetary value, then you must return a verdict for Plaintiff in the nominal amount of One Dollar (\$1.00)

Eighth Circuit Manual of Model Civil Jury Instructions, No. 4.50B (2005); Plaintiff's Requested Instruction No. 9 (modified).

INSTRUCTION NO. 17

The fact that I have instructed you as to the proper measure of damages should not be considered as intimating 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, in the event you should find in favor of the Plaintiff from the greater weight of the evidence in accordance with the other instructions.

INSTRUCTION NO. 18

If you should determine that Plaintiff should recover a verdict, you should not return what is known as a quotient verdict in this case. By a quotient verdict is meant one which is reached pursuant to a prior agreement made by all the jurors to add up the amount which each of the several jurors would award and divide such sum by the number of jurors and treat the quotient or result of such division as the amount of the verdict to be returned by the jury.

If you find the issues in favor of Plaintiff, the verdict you are to return must be for such an amount as you unanimously agree upon as the proper amount in this case. A verdict reached by adding the amounts suggested by the several jurors and then dividing in the manner I have indicated would not be the judgment of the individual jurors and such a method is likely to produce a verdict at variance with the sound judgment of each member of the jury. The rights of the parties to a suit should never be finally determined in this manner. It is for you to determine by the use of your best judgment the verdict which you should return in this case without resort to chance or the method above indicated.

INSTRUCTION NO. 19

In conducting your deliberations and returning your verdicts, 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 bailiff, 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 verdicts must be based solely on the evidence and on the law which I have given to you in my instructions. The verdicts must be unanimous. Nothing I have said or done is intended to suggest what your verdicts should be - that is entirely for you to decide.

INSTRUCTION NO. 19, page 2

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

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

*
VIOLA FOTI, * CIV 06-4152
*
Plaintiff, *
*
-vs- * VERDICT FORM
*
ROGER GERLACH, *
in his individual capacity, *
*
Defendant. *

Please return your verdicts by placing an "X" or "√" in the spaces provided, or as otherwise instructed below.

VERDICT ONE

We, the jury in the above entitled and numbered case, on Plaintiff Viola Foti's claim that Defendant Roger Gerlach violated Plaintiff's constitutional rights by wrongfully interfering with her possessory interests in property, find in favor of:

- _____ Plaintiff, Viola Foti
- _____ Defendant, Roger Gerlach

If you find for Plaintiff Viola Foti in Verdict One, go on to consider Verdict Two. If you find for Defendant Roger Gerlach in Verdict One, skip Verdict Two and have your Foreperson sign and date the Verdict form below.

VERDICT TWO

We find Plaintiff Viola Foti's total compensatory damages to be:

\$ _____ (stating the amount, or if you find that Plaintiff's damages have no monetary value, set forth a nominal amount of \$1.00).

Dated this ____ day of July, 2008.

Foreperson