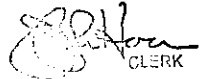


UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

FILED
JUL 01 2008

CLERK

BRITTANY ANN PLAMP,

CIV. 07-4009

Plaintiff,

-vs-

FINAL JURY
INSTRUCTIONS

MITCHELL SCHOOL DISTRICT
NO. 17-2,

Defendant, Third-Party
Plaintiff,

v.

ANDREW TATE,

Third-Party Defendant.

Attorneys for Plaintiff:

Richard D. Casey
Lynn, Jackson, Shultz & Lebrun P.C.
P.O. Box 1920
Sioux Falls, SD 57101

Ryland Deinert
Lynn, Jackson, Shultz & Lebrun P.C.
P.O. Box 1920
Sioux Falls, SD 57101

Dana Van Beek Palmer
Lynn, Jackson, Shultz & Lebrun P.C.
P.O. Box 1920
Sioux Falls, SD 57101

Attorneys for Defendant: Jessica L. Filler
Tieszen Law Office
P.O. Box 550
Pierre, SD 57501

Richard Tieszen
Tieszen Law Office
P.O. Box 550
Pierre, SD 57501

Attorneys for Third Party
Defendant:

Michael Tobin
Boyce, Murphy, McDowell & Greenfield
P.O. Box 5015
Sioux Falls, SD 57117

INSTRUCTION NO. 1

EXPLANATORY

MEMBERS OF THE JURY: Now that you have heard the evidence, 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 will 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. You must continue to follow the instructions I gave you earlier, as well as those I give you now.

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.

The instructions I am about to give you 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.

Source: Eighth Circuit Model Instructions (Civil) 3.01 (modified)
Eighth Circuit Model Instructions (Civil) 3.02 (modified)
SDPJI 1-02-1 (modified)

INSTRUCTION NO. 2

EVIDENCE TO BE CONSIDERED

It is your duty as a jury to determine the facts, and you must do this from the evidence that has been produced here in open court. This consists of the testimony of the witnesses and the exhibits which have been received. This evidence is governed by various rules of law. Under these rules, it has been my duty as judge to rule on the admissibility of the evidence from time to time. You must not concern yourselves with the reasons for these rulings, and you must not consider any exhibit which was not received in evidence or any testimony which has been ordered stricken. Such things you must put out of your mind.

And you must not consider anything you may have heard or read about this case other than the evidence which has been properly received as evidence.

INSTRUCTION NO. 3

ATTORNEYS' ARGUMENTS NOT EVIDENCE

The attorneys for the respective parties will present to you their arguments of the case for your assistance in coming to a decision. The order of their appearance and the length of the time of their arguments is regulated by the court. While the final argument of counsel is intended to help you in understanding the evidence and applying the law as set forth in these instructions, their remarks are not evidence. Any argument or any statement or any remark of counsel which has no basis in the evidence should be disregarded by you. (However, an admission of fact by an attorney for a party is binding on that party.)

INSTRUCTION NO. 4

COMMON EXPERIENCES

In weighing the evidence in this case, you have a right to consider the common knowledge possessed by all of you, together with the ordinary experiences and observations in your daily affairs of life.

INSTRUCTION NO. 5

QUOTIENT VERDICT NOT ALLOWED

If you should determine that the 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 the plaintiff, the verdict you are to return must be for such an amount as you all 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. 6

NOTES

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.

Source: Eighth Circuit Model Jury Instructions (Civil) 1.04 (modified)

INSTRUCTION NO. 7

CREDIBILITY OF WITNESSES

You are the sole judges of all facts and credibility of witnesses. In deciding what testimony to believe, you may consider:

- (1) the witnesses' ability and opportunity to observe;
- (2) their intelligence;
- (3) their memories;
- (4) their manner while testifying;
- (5) whether they said or did something different at an earlier time;
- (6) their qualifications and experience;
- (7) any apparent interest, bias, or prejudice they may have; and
- (8) the reasonableness of their testimony in light of all the evidence in the case.

Source: SDPJI 2-01

INSTRUCTION NO. 8

FALSE TESTIMONY

If you believe that any witness testifying in this case has knowingly sworn falsely to any material matter in this case, then you may reject all of the testimony of the witness.

Source: SDPJ1 2-04

INSTRUCTION NO. 9

IMPEACHMENT

The credibility of a witness may be attacked by introducing evidence that on some former occasion the witness made a statement or acted in a manner inconsistent with the witness's testimony in this case on a matter material to the issues. Evidence of this kind may be considered by you in connection with all the other facts and circumstances in evidence in deciding the weight to be given to the testimony of that witness.

Source: SDPJI 3-01 (Civil)

INSTRUCTION NO. 10

EXPERT TESTIMONY—QUALIFICATIONS OF EXPERT

A witness may qualify as an expert and give an opinion on a matter at issue if the witness has special knowledge, skill, experience, training, or education concerning the matter on which the expert testifies. In deciding the weight to give to the opinion, you should consider the expert's qualifications, credibility, and reasons for the opinion. You are not bound by the opinion. If you decide that the reasons for the expert's opinion are unsound, or that other evidence outweighs the opinion, you may disregard the opinion entirely.

Source: SDPJ 2-12

Plaintiff's Proposed Instruction No. 24

INSTRUCTION NO. 11

TITLE IX

Earlier you heard Title IX mentioned by the lawyers and the Court. The Title IX issue has been resolved by the Court. You need not concern yourselves further about it.

Source: Court's ruling on Defendant's Motion for Judgment as a matter of law, June 26, 2008.

INSTRUCTION NO. 12

CONTRIBUTION

Earlier you heard the term “contribution” mentioned by the lawyers and the Court in connection with the District’s Third-Party Claim against Andrew Tate. This issue has been resolved by the Court. You need not concern yourselves further about it.

Source: Court’s ruling on Defendant’s Motion for Contribution June 30, 2008.

INSTRUCTION NO. 13

BATTERY–DEFINITION

Battery is the intentional harmful or offensive physical contact upon another person. To establish battery, plaintiff must prove:

1. That Andrew Tate intended to cause a harmful or offensive physical contact with the plaintiff, or an imminent apprehension of such contact;
2. Such contact actually occurred; and
3. The plaintiff did not consent to such contact.

Source: SDPJI 170-20-1

Tate's Proposed Instruction No. 5

Plaintiff's Proposed Instruction No. 9 (modified)

District's Proposed Instruction No. 11

INSTRUCTION NO. 14

INTENT-DEFINITION

Intent requires more than the existence and appreciation of risk. Intentional tortious conduct occurs when one acts for the purpose of causing an invasion of the interest of another in a way that the law forbids, or where one acts with knowledge to a substantial certainty that such an invasion of another's interest will occur.

Neither a hostile intent nor a desire to do harm is required. Rather, the intent required is an intent to bring about an unlawful result.

Source: SDPJI 14-01-2

Tate's Proposed Instruction No. 49

INSTRUCTION NO. 15

EMPLOYER'S LIABILITY FOR ACTS OF EMPLOYEE

A principal may be liable for the conduct of an agent within the agent's ostensible authority, even though the agent acts solely to benefit himself. Whether a principal is liable for the conduct of an agent is determined by the connection between the agent's employment and the activity which actually caused the injury. A principal is liable for harm caused by an agent if a connection between the agent's employment and the activity makes the harm foreseeable. If the agent's employment puts the agent in a position where the agent's harmful conduct is not so unusual or startling that it is unfair to include the loss caused by the injury among the costs of the employer's business, then the principal is liable for the injury.

Source:

Red Elk v. United States, 62 F.3d 1102, 1106 (8th Cir. 1995)

Brown v. Youth Services International of South Dakota, Inc., 89 F.Supp.2d 1095 (D.S.D. 2000)

Plaintiff's Proposed Instruction No. 20 (modified)

District's Proposed Instruction No. 46 (modified)

SDPJI 50-16 (modified)

INSTRUCTION NO. 16

LEGAL CAUSE

The term “legal cause” means an immediate cause which, in the natural or probable sequence, produces the injury complained of. For legal cause to exist, the harm suffered must be a foreseeable consequence of the act complained of. In other words, liability cannot be based on mere speculative possibilities or circumstances and conditions remotely connected to the events leading up to an injury. The defendant’s conduct must have such an effect in producing the harm as to lead reasonable people to regard it as a cause of the plaintiff’s injury.

Source: SDPJI 15-02

District’s Proposed Instruction No. 32

INSTRUCTION NO. 17

EMOTIONAL DISTRESS-DEFINITION

For purposes of your consideration of damages, emotional distress is defined as mental suffering, mental anguish, mental or nervous shock, fright, and all highly unpleasant mental or emotional reactions. If you determine that Ms. Plamp is entitled to damages for emotional distress, you should award an amount which, in your judgment, will fairly compensate Ms. Plamp for such emotional distress.

Source: Restatement (Second) of Torts § 46

Plaintiff's Proposed Instruction No. 17

INSTRUCTION NO. 18

ELEMENTS OF DAMAGE

If you decide for Brittany Plamp on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate her for any of the following elements of loss or harm proved by the evidence to have been legally caused by Andrew Tate's conduct, taking into consideration the nature, extent and duration of the injury, whether such loss or harm could have been anticipated or not, namely:

1. The existence of any ailment or condition;
2. The aggravation of any pre-existing ailment or condition; and
3. The emotional pain and suffering, mental anguish, and loss of capacity of the enjoyment of life experienced in the past and reasonably certain to be experienced in the future as a result of the injury.

Whether any of these elements of damages have been proved by the evidence is for you to determine. Your verdict must be based on evidence and not on speculation, guesswork, or conjecture.

Source: SDPJI 30-01, 30-03, 30-05, SDCL §§ 21-1-1, 21-1-3, 21-3-1. (modified)

Plaintiff's Proposed Instruction No. 11 (modified)

Defendant's Proposed Instruction No. 38 (modified)

INSTRUCTION NO. 19

“EGGSHELL PLAINTIFF”

If you find that plaintiff had a prior condition making her more susceptible to injury than a person in normal health, then you may award damages for the injuries caused by defendant's conduct, even though those injuries may be greater than what might have been experienced by a person in normal health under the same circumstances. Before awarding such damages, however, plaintiff must prove that the conduct of the defendant at issue was a substantial factor in bringing about the harm alleged.

Source: SDJPI 30-03-2

Plaintiff's Proposed Instruction No. 18

INSTRUCTION NO. 20

AGGRAVATION OF PRE-EXISTING CONDITION

If you determine Brittany Plamp has proven each element of her claim by a preponderance of the evidence, you must then consider whether she is entitled to an award of damages for an aggravation of any pre-existing condition. In order to award Brittany Plamp damages for an aggravation, she must prove that a subsequent act (in this case Andrew Tate's alleged actions) aggravated a preexisting condition. This requires Brittany Plamp to prove the subsequent act had a worsening effect on a preexisting condition, or that the subsequent act adds to a preexisting condition.

Source: *Shippen v. Parrott*, 553 N.W.2d 503 (S.D. 1996)

District's Proposed Instruction No. 44

INSTRUCTION NO. 21

**AGGRAVATION OF PRE-EXISTING INJURY OR CONDITION-NON-
APPORTIONMENT EXCEPTION**

If you find that the plaintiff is entitled to recover for an aggravation of a pre-existing condition, but you cannot logically, reasonably or practically apportion the plaintiff's present and future injuries between the injury caused by the pre-existing condition and the aggravation caused by the defendant's conduct, then you may award damages for all present and future injuries caused by both the pre-existing condition and the defendant's conduct.

Source: SDJPI 30-03-4

Plaintiff's Proposed Instruction No. 21

INSTRUCTION NO. 22

FUTURE DAMAGES

The law allows damages for detriment reasonably certain to result in the future. By their nature, all future happenings are somewhat uncertain. The law simply requires that facts exist which establish a basis for measuring any claimed future damages with reasonable certainty. The requirement of reasonable certainty applies only to whether future damages exist; once such detriment is established, the law does not require certainty as to the amount of such damages. Thus, once the existence of such damages is established, uncertainty as to the measure or extent of damages or the fact that they cannot be measured with exactness does not bar their recovery. On the other hand, conjecture, speculation, or the mere possibility of future damages does not warrant such an award.

Source: SDJPI 34-01

District's Proposed Instruction No. 45

INSTRUCTION NO. 23

FUTURE DAMAGES-MORTALITY TABLE

According to the mortality table, the life expectancy of a 20.5-year old person is to live to the age of 80.75 years.

The court takes judicial notice of this fact, which is now evidence for you to consider.

You should note the restricted significance of this evidence. Life expectancy shown by the mortality table is merely an estimate of the probable average length of life of all persons of a given age in the United States. It is an estimate because it is based on a limited record of experience. Because it reflects averages, the table applies only to one who has the same health and exposure to danger as the average person that age.

Therefore, in connection with the mortality table evidence, you should also consider other evidence bearing on life expectancy. For example, you should consider the occupation, health, habits, and activities of the person whose life expectancy is in question.

Source: SDPJI 34-04 (modified); Social Security Administration Period Life Table, 2004
Plaintiff's Proposed Instruction No. 15

INSTRUCTION NO. 24

ISSUES TO BE DECIDED

The issues to be determined by you in this case are these:

First, was a battery committed upon Plaintiff Brittany Plamp by Third Party Defendant Andrew Tate on May 9, 2006?

If yes, is the District liable for Tate's battery upon Plamp?

If yes, did Plamp suffer any injury or aggravation of preexisting condition as a result of the battery?

If yes, what are Plamp's damages?

As indicated in this instruction, you should first determine the question of liability before you undertake to fix an amount that would compensate for damages, if any, found to have been suffered.

INSTRUCTION NO. 25

DAMAGES INSTRUCTION DOES NOT MANDATE FINDING OF LIABILITY

You have been instructed on the subject of the measure of damages in this case because it is my duty to instruct you as to all of the law that may become pertinent to your deliberations. The fact that you have been instructed on the subject of damages must not be considered as intimating any view of my own on the issue of liability or as to which party is entitled to your verdict.

Your verdict must be based on evidence and not upon speculation, guesswork, or conjecture.

Source: Federal Jury Practice and Instructions (5th Ed.) §106.02 (modified)
District's Proposed Instruction No. 34 (modified)

INSTRUCTION NO. 26

BURDEN OF PROOF; ISSUES IN THE CASE

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

Greater convincing force means that after weighing the evidence on both sides there is enough evidence to convince you that something is more than 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 convincing force, then your finding upon the issue must be against the party who had the burden of proving it. In this action, the plaintiff has the burden of proving the following issues:

1. That Andrew Tate committed a battery upon her on May 9, 2006.
2. That Defendant School District is legally responsible for Andrew Tate's battery on Brittany Plamp, if any.
3. That she, Brittany Plamp, sustained injury or aggravation of any preexisting condition and damage as a result of the alleged battery.
4. The amount of damage, if any sustained.

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

Source: SDPJI 21-01 (modified)

District's Proposed Instruction No. 18 (modified)

INSTRUCTION NO. 27

ELECTION OF FOREPERSON; DUTY TO DELIBERATE; COMMUNICATIONS WITH COURT; CAUTIONARY; UNANIMOUS VERDICT; VERDICT FORM

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 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 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 bailiff that you are ready to return to the courtroom.