

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

JAMES ELMER SHAW,
Plaintiff,

vs.

TROY PONTO, Associate Warden; and
AL MADSEN, Unit Manager,
Defendants.

CIV. 15-4121-KES

**FINAL
INSTRUCTIONS
TO THE JURY**

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VERDICT FORM

FINAL INSTRUCTION NO. 1 – INTRODUCTION AND DEFINITIONS

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 have to follow all of my instructions – the ones I gave you earlier, as well as those I give you now. Do not single out some instructions and ignore others, because they are all important. This is true even though I am not going to repeat some of the instructions I gave you at the beginning of the trial.

You will have copies of all of the instructions in the jury room. Remember, you have to follow all instructions, no matter when I give them, whether or not you have written copies.

I have not intended to suggest what I think your verdict should be by any of my rulings or comments during the trial.

FINAL INSTRUCTION NO. 2 – BURDEN OF PROOF

In civil actions, the party who has the burden of proving an issue must prove that issue by the 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 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 has the burden of proving it.

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

You have probably heard the phrase “proof beyond a reasonable doubt.” That is a stricter standard than “more likely true than not true.” It applies in criminal cases, but not in this civil case; so put it out of your mind.

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 – DELIBERATE INDIFFERENCE

Your verdict must be for Shaw and against defendants Troy Ponto and Al Madsen on Shaw's claim that defendants were deliberately indifferent to Shaw's serious medical needs if all of the following elements have been proved by Shaw:

First, that Shaw had a serious need for pain medication, medical ice, or the ability to elevate his knee above his heart;

A serious medical need is one that has been diagnosed by a physician as requiring treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's treatment.

Second, the defendants, were aware of Shaw's serious need for pain medication, medical ice, or the ability to elevate his knee;

Third, the defendants, with deliberate indifference, failed to direct that the medical care be provided, or failed to allow Shaw to obtain the medical care needed within a reasonable time;

Deliberate indifference is established only if there is actual knowledge of a substantial risk that the plaintiff will be in prolonged pain and suffering and if the defendant disregards that risk by intentionally refusing or intentionally failing to take reasonable measures to deal with the problem. Negligence or inadvertence does not constitute deliberate indifference.

Deliberate indifference can be established by grossly incompetent or inadequate care. Deliberate indifference is also established if defendants intentionally delayed or denied access to medical care.

Fourth, as a direct result, Shaw was injured; and

Fifth, the defendants were acting under color of 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.

If any of the above elements has not been proved, then your verdict must be for the defendants.

FINAL INSTRUCTION NO. 5 – RETALIATION

Your verdict must be for Shaw and against Ponto on Shaw's retaliation claim if all the following elements have been proved by Shaw:

First, Shaw filed a § 1983 claim against Ponto;

Second, Ponto took a material adverse action towards Shaw;

Third, Ponto's adverse action might well dissuade a reasonable person in the same or similar circumstances from filing a § 1983 claim; and

Fourth, Shaw's filing a § 1983 claim was a determining factor in Ponto's conduct.

The filing of a § 1983 claim was a "determining factor" only if Ponto would not have taken a retaliatory action against Shaw but for Shaw's filing of the § 1983 claim; it does not require that the filing of a § 1983 claim was the only reason for the decision made by defendant Ponto. You may find that Shaw's lawsuit was a determining factor in Ponto's decision if it has been proved that Ponto's stated reason(s) for his decision are a pretext to hide retaliation.

If any of the above elements has not been proved, your verdict must be for Ponto.

FINAL INSTRUCTION NO. 6 – ACTUAL DAMAGES

If you find in favor of Shaw, you must award him an amount of money that will fairly compensate him for any damages you find he sustained and is reasonably certain to sustain in the future as a direct result of the violation of Shaw's constitutional rights. You should consider the following elements of damages:

- (1) The physical pain and mental suffering Shaw has experienced and is reasonably certain to experience in the future; the nature and extent of the injury, whether the injury is temporary or permanent and whether any resulting disability is partial or total and any aggravation of a pre-existing condition;
- (2) The reasonable value of the medical hospital, nursing, and similar care and supplies reasonably needed by and actually provided to Shaw and reasonably certain to be needed and provided in the future; and
- (3) The wages, salary, profits, reasonable value of the working time Shaw has lost.

FINAL INSTRUCTION NO. 7 – NOMINAL DAMAGES

If you find in favor of Shaw under Instruction No. 4 or Instruction No. 5, but you find that Shaw's damages have no monetary value, then you must return a verdict for Shaw in the nominal amount of One Dollar (\$1.00).

FINAL INSTRUCTION NO. 8 – 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 Shaw under Instruction No. 4. or Instruction No. 5 and if it has been proved that the conduct of that defendant was malicious or recklessly indifferent to Shaw's medical needs or constitutional rights, then you may, but are not required to, award Shaw an additional amount of money as punitive damages for the purposes of punishing the defendants for engaging in misconduct and discouraging the defendants and others from engaging in similar misconduct in the future. You should presume that Shaw has been made whole for his injuries by the damages awarded under Instruction No. 6.

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

- (1) How reprehensible the defendant's conduct was. In this regard, you may consider whether the harm suffered by Shaw was physical or economic or both; whether there was violence, deceit, intentional malice, reckless disregard for human health or safety; whether the defendant's conduct that harmed Shaw also posed a risk of harm to others; whether there was a~~x~~ repetition of the

wrongful conduct and past conduct of the sort that harmed Shaw.

- (2) How much harm the defendant's wrongful conduct caused Shaw and could cause Shaw in the future.
- (3) What amount of punitive damages, in addition to the other damages already awarded, is needed, considering the defendant's financial condition, to punish the defendant for his wrongful conduct toward Shaw and to deter the defendants and other from similar wrongful conduct in the future.
- (4) The amount of fines and civil penalties applicable to similar conduct.

The amount of any punitive damages award should bear a reasonable relationship to the harm caused to Shaw.

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

FINAL INSTRUCTION NO. 9 – DUTIES DURING DELIBERATION

In conducting 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 an 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 April 26, 2018.



Karen E. Schreier
United States District Judge