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CLERK

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

<p>VERNON R. TRAVERSIE, an enrolled member of the Cheyenne River Sioux Tribe and citizen of South Dakota,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">vs.</p> <p>RAPID CITY REGIONAL HOSPITAL INC.,</p> <p style="text-align: center;">Defendant.</p>	<p style="text-align: center;">CIV. 12-5048-JLV</p> <p style="text-align: center;">JURY INSTRUCTIONS</p>
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INSTRUCTION NO. 1 - ROLE OF INSTRUCTIONS

Members of the jury, I will take a few minutes to give you some initial instructions about this case and about your duties as jurors. At the end of the trial, I will give you further instructions. I may also give you instructions during the trial. These instructions explain the law that applies to this case. Unless I specifically tell you otherwise, all instructions, both those I give you now and those I give you later, are equally binding on you and must be followed. Consider these instructions with all written and oral instructions given to you during and at the end of the trial and apply them to the facts of the case. You must consider my instructions as a whole and not single out some instructions and ignore others.

This case is presented to you because the parties dispute certain facts. You will decide the facts from the evidence presented in court. "Evidence" is defined in Instruction No. 15. This evidence is governed by various rules of law. Under these rules, it is 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 that I order stricken. You must put such things out of your mind.

You are entitled to consider the evidence in light of your own observations and experiences. You may use reason and common sense to draw conclusions from facts established by the evidence. You will then apply the law, which I will

give you in my instructions, to the facts to reach your verdict. You are the sole judges of the facts, but you must follow the law as stated in my instructions, whether you agree with the law or not.

It is vital to the administration of justice that each of you faithfully perform your duties as jurors. You must carefully and honestly consider this case with due regard for the rights and interests of the parties. Do not allow sympathy or prejudice to influence you. The law demands of you a just verdict based solely on the evidence, your common sense and the law as I give it to you. Your verdict must not be based on speculation, guess or conjecture.

Finally, do not take anything I may say or do during the trial as an indication of what I think about the evidence or what I think your verdict should be. Do not conclude from any ruling or comment I may make that I have any opinion on how you should decide the case.

INSTRUCTION NO. 2 - NATURE OF THE CASE

This is a civil case brought by Vernon Traversie who is the plaintiff, against the defendant Rapid City Regional Hospital, Inc. The lawsuit arises out of conduct allegedly occurring while Mr. Traversie recovered from open heart surgery at Rapid City Regional Hospital. Mr. Traversie asserts hospital employees addressed him using a racial slur, spit on him, slammed his arm into the bed four times, and imprinted the letters “KKK” onto his stomach. Rapid City Regional Hospital disputes the entirety of Mr. Traversie’s factual allegations.

Mr. Traversie makes four claims in this lawsuit. First, Mr. Traversie says Rapid City Regional Hospital engaged in discriminatory conduct against him on account of his race or color. Second, Mr. Traversie asserts Rapid City Regional Hospital interfered with his contract for healthcare on account of his race or color. Third, Mr. Traversie claims Rapid City Regional Hospital committed a battery against him. Fourth, Mr. Traversie alleges Rapid City Regional Hospital intentionally inflicted emotional distress on him. Mr. Traversie seeks money damages from Rapid City Regional Hospital. Mr. Traversie claims the conduct of Rapid City Regional Hospital was willful, wanton or malicious conduct for which he seeks punitive damages.

Rapid City Regional Hospital denies Mr. Traversie was discriminated against in any way and denies all of Mr. Traversie’s claims. Rapid City Regional Hospital denies it is responsible to pay any money damages as a result of any of Mr. Traversie’s claims.

INSTRUCTION NO. 3 - BURDEN OF PROOF

In civil actions, the party who has the burden of proving an issue must prove that issue by the greater convincing weight of the evidence.

“Greater convincing 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 the evidence is evenly balanced so that you are unable to say 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 proven by the greater convincing weight of the evidence, you should consider all of the evidence bearing upon that issue, regardless of who produced it.

INSTRUCTION NO. 4 - LEGAL CAUSE

A legal cause is a cause that produces a result in a natural and probable sequence and without which the result would not have occurred. The legal cause need not be the only cause, nor the last or nearest cause. It is sufficient if it concurs with some other cause acting at the same time, which in combination with it caused the result. However, for legal cause to exist, you must find that the cause complained of was a substantial factor in bringing about the result.

INSTRUCTION NO. 5 - EQUALS BEFORE THE LAW

Plaintiff Vernon Traversie is an individual. Defendant Rapid City Regional Hospital, Inc. is a corporation. A corporation is entitled to the same fair trial as a private individual. No inference or presumption may be drawn against any party that would be improper in a case between individuals. You should consider and decide this case with the same fairness and consideration as though it is a case between individuals.

INSTRUCTION NO. 6 - AGENCY

A corporation can only act through its officers, employees and agents. An officer, employee or agent may bind the corporation by acts, statements or omissions made while acting within the scope of the individual's duties for the corporation.

INSTRUCTION NO. 7 - TITLE VI DISCRIMINATION CLAIM

To establish a Title VI Discrimination Claim against Rapid City Regional Hospital, Mr. Traversie must prove by the greater convincing weight of the evidence all of the following elements:

First, Rapid City Regional Hospital engaged in discriminatory conduct;

An employee's intentional misconduct is within the scope of his employment if:

1. The conduct is of the kind the employee is employed to perform;
2. The conduct occurs within the employee's authorized work hours and at the employee's authorized work location; and
3. The conduct is carried out, at least in part, by a motivation to serve the employer.

If these conditions are met, an employee is acting within the scope of employment even if the employee engages in acts specifically forbidden by the employer or the employee uses forbidden means to accomplish a work task.

and

Second, Mr. Traversie's race or color was the motive for Rapid City Regional Hospital's conduct.

If you determine Rapid City Regional Hospital intentionally marked Mr. Traversie's stomach with the letters "KKK," the defendant's discriminatory motive is established.

You must find in favor of Mr. Traversie on his Title VI Discrimination Claim if you find all the elements of the claim are proven by the greater convincing weight of the evidence. If you find Mr. Traversie did not prove all the elements of the claim by the greater convincing weight of the evidence, then you must find for the defendant on this claim.

INSTRUCTION NO. 8 - SECTION 1981 DISCRIMINATION CLAIM

To establish a Section 1981 Discrimination Claim against Rapid City Regional Hospital, Mr. Traversie must prove by the greater convincing weight of the evidence all of the following elements:

First, Mr. Traversie is a member of a protected class;

Native Americans are a protected class.

Second, Mr. Traversie entered into a contract for healthcare with Rapid City Regional Hospital;

You are instructed Mr. Traversie had a contract for healthcare with Rapid City Regional Hospital.

Third, Rapid City Regional Hospital interfered with the performance of the contract for healthcare or interfered with Mr. Traversie's enjoyment of the benefits, privileges, terms or conditions of the contractual relationship; and

Fourth, Rapid City Regional Hospital acted with a discriminatory intent against Mr. Traversie on account of his race or color.

An employee's intentional misconduct is within the scope of his employment if:

1. The conduct is of the kind the employee is employed to perform;
2. The conduct occurs within the employee's authorized work hours and at the employee's authorized work location; and
3. The conduct is carried out, at least in part, by a motivation to serve the employer.

If these conditions are met, an employee is acting within the scope of employment even if the employee engages in acts specifically forbidden by the employer or the employee uses forbidden means to accomplish a work task.

If you determine Rapid City Regional Hospital intentionally marked Mr. Traversie's stomach with the letters "KKK," the defendant's discriminatory intent is established.

You must find in favor of Mr. Traversie on his Section 1981 Discrimination Claim if you find all the elements of the claim are proven by the greater convincing weight of the evidence. If you find Mr. Traversie did not prove all the elements of the claim by the greater convincing weight of the evidence, then you must find for the defendant on this claim.

INSTRUCTION NO. 9 - BATTERY CLAIM

To establish a Battery Claim against Rapid City Regional Hospital, Mr. Traversie must prove by the greater convincing weight of the evidence all of the following elements:

First, Rapid City Regional Hospital intended to cause a harmful or offensive physical contact with Mr. Traversie, or intended to cause an imminent apprehension of harmful or offensive physical contact;

An employee's intentional misconduct is within the scope of his employment if you determine: (1) the purpose of the employee's act was to serve the employer; and (2) the act was foreseeable by the employer.

An employee acts to serve the employer even when the employee's purpose, however misguided, is wholly or in part to further the employer's business. An act furthers the employer's business if it carries out the objectives of the employee's work. An employee's actions are foreseeable when the employee's work puts him in a position where his harmful conduct is not so unusual or startling that it is unfair to include the harm caused by an injury among the costs of the employer's business. In other words, your inquiry should be whether the harm was one that may fairly be regarded as typical of or broadly incidental to the enterprise undertaken by the employer.

Second, the harmful or offensive physical contact actually occurred;

and

Third, Mr. Traversie did not consent to the contact.

You must find in favor of Mr. Traversie on his Battery Claim if you find all the elements of the claim are proven by the greater convincing weight of the evidence. If you find Mr. Traversie did not prove all the elements of the claim by the greater convincing weight of the evidence, then you must find for the defendant on this claim.

INSTRUCTION NO. 10 -

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIM

To establish an Intentional Infliction of Emotional Distress Claim against Rapid City Regional Hospital, Mr. Traversie must prove by the greater convincing weight of the evidence all of the following elements:

First, Rapid City Regional Hospital engaged in extreme and outrageous conduct;

“Extreme and outrageous conduct” is defined in Instruction No. 11.

An employee’s intentional misconduct is within the scope of his employment if you determine: (1) the purpose of the employee’s act was to serve the employer; and (2) the act was foreseeable by the employer.

An employee acts to serve the employer even when the employee’s purpose, however misguided, is wholly or in part to further the employer’s business. An act furthers the employer’s business if it carries out the objectives of the employee’s work. An employee’s actions are foreseeable when the employee’s work puts him in a position where his harmful conduct is not so unusual or startling that it is unfair to include the harm caused by an injury among the costs of the employer’s business. In other words, your inquiry should be whether the harm was one that may fairly be regarded as typical of or broadly incidental to the enterprise undertaken by the employer.

Second, Rapid City Regional Hospital intended to cause or recklessly caused Mr. Traversie severe emotional distress;

“Recklessly caused” means to deliberately disregard a high degree of probability that a certain outcome would result from the conduct.

“Severe emotional distress” means emotional distress that is substantial or enduring, not merely trivial or passing. It means emotional distress to such a degree and of such a duration that no person in a decent society should be expected to experience and endure it.

Third, the conduct of Rapid City Regional Hospital in fact caused Mr. Traversie to suffer severe emotional distress; and

Fourth, Mr. Traversie suffered severe emotional distress in response to the conduct of Rapid City Regional Hospital.

To recover for intentional infliction of emotional distress, it is not necessary for Mr. Traversie to prove that he experienced a physical manifestation of the distress.

You must find in favor of Mr. Traversie on his Intentional Infliction of Emotional Distress Claim if you find all the elements of the claim are proven by the greater convincing weight of the evidence. If you find Mr. Traversie did not prove all the elements of the claim by the greater convincing weight of the evidence, then you must find for the defendant on this claim.

INSTRUCTION NO. 11 -

EXTREME AND OUTRAGEOUS CONDUCT DEFINED

“Extreme and outrageous conduct” is conduct which exceeds all bounds of decency usually tolerated by a civilized society and would cause a reasonable member of the community to immediately react in outrage. The conduct must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and be regarded as atrocious, and utterly intolerable in a civilized community. Whether conduct is extreme and outrageous is determined from the surrounding circumstances.

Extreme and outrageous conduct may arise from an actor’s knowledge that an individual is particularly susceptible to emotional distress. Conduct may become extreme and outrageous when an actor proceeds in the face of such knowledge, even though that conduct may not be considered extreme and outrageous under other circumstances.

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

INSTRUCTION NO. 12 - COMPENSATORY DAMAGES

If you find by the greater convincing weight of the evidence in favor of Mr. Traversie on his Title VI Discrimination Claim or Section 1981 Discrimination Claim or Battery Claim, or Intentional Infliction of Emotional Distress Claim, you must then decide the amount of money that will fairly and justly compensate Mr. Traversie for any of the following elements of loss or harm caused by the conduct of the defendant, whether such loss or harm could have been anticipated or not.

1. Disfigurement;
2. Pain and suffering, humiliation, and mental anguish experienced in the past and reasonably certain to be experienced in the future as a result of the defendant's conduct; and
3. The loss of capacity for the enjoyment of life experienced in the past and reasonably certain to be experienced in the future as a result of the defendant's conduct.

Whether any of these elements of loss or harm were proven by the greater convincing weight of the evidence is for you to decide. Your verdict must be based on the evidence and not on speculation, guesswork or conjecture and you must not award any damages based on sympathy.

INSTRUCTION NO. 13 - FUTURE DAMAGES

The law allows damages for losses reasonably certain to occur in the future. By their nature, all future happenings are somewhat uncertain. The fact and cause of the loss must be established with reasonable certainty. Once future loss is established, the law does not require certainty as to the amount of those damages. Once the existence of those damages is established, recovery is not barred by uncertainty as to the measure or extent of damages, or the fact that they cannot be measured with exactness. On the other hand, an award of future damages cannot be based on conjecture, speculation or mere possibility.

INSTRUCTION NO. 14 - NOMINAL DAMAGES

If you find by the greater convincing weight of the evidence in favor of Mr. Traversie on either his Title VI Discrimination Claim or his Section 1981 Discrimination Claim, but you find that his damages have no monetary value, then you must return a verdict for Mr. Traversie in the nominal amount of One Dollar (\$1.00) for each claim.

INSTRUCTION NO. 15 - DEFINITION OF EVIDENCE

I mentioned the word “evidence.” “Evidence” includes the testimony of witnesses, documents and other things received as exhibits and stipulated facts. Stipulated facts are facts that are formally agreed to by the parties. Certain things are not evidence. I shall list those things for you now:

- Statements, arguments, questions and comments by lawyers representing the parties in the case are not evidence. Opening statements and closing arguments by lawyers are not evidence.
- Objections and rulings on 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 sustain an objection to a question, you must ignore the question and must not try to guess what the answer might have been.
- Testimony I strike from the record or tell you to disregard is not evidence and must not be considered.
- Anything you see or hear about this case outside the courtroom is not evidence.

The fact an exhibit may be shown to you does not mean you must rely on it more than you rely on other evidence.

Furthermore, a particular item of evidence is sometimes received for a limited purpose only. That is, it can be used by you only for one particular purpose and not for any other purpose. I will tell you when that occurs and instruct you on the purposes for which the item can and cannot be used.

Some of you may have heard the terms “direct evidence” and “circumstantial evidence.” 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.

Finally, the weight of the evidence is not determined by the number of witnesses testifying as to the existence or non-existence of any fact. Also, the weight of the evidence should not be determined merely by the number or volume of documents or exhibits. The weight of evidence depends on its quality, not quantity. The quality and weight of the evidence are for you to decide.

INSTRUCTION NO. 16 - CREDIBILITY OF WITNESSES

You are the sole judges of all questions of fact and the credibility of witnesses. 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 says, only part of it or none of it.

In deciding what testimony to believe, consider the witness' intelligence; the opportunity the witness had to see or hear the things testified about; the witness' memory; any motives the witness may have for testifying a certain way; the behavior of the witness while testifying; whether the 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 people sometimes see or hear things differently and sometimes forget things. You need to consider whether a contradiction results from an innocent misrecollection or sincere lapse of memory or instead from an intentional falsehood or pretended lapse of memory.

INSTRUCTION NO. 17 - IMPEACHMENT

In the last instruction, I instructed you generally on the credibility of witnesses. I now instruct you further on how the credibility of a witness may 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’ trial 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 a witness has been discredited or impeached, it is your exclusive right to give that witness’ testimony whatever weight you think it deserves.

INSTRUCTION NO. 18 - EXPERT WITNESSES

You may hear testimony from persons described as experts. Persons who, by knowledge, skill, training, education or experience have become an expert in some field may state their opinions on matters in that field and may also state the reasons for their opinion.

Expert testimony should be considered just like any other testimony. You may accept or reject the testimony and give it as much weight as you think it deserves considering the witness' education, experience, the soundness of the reasons given for the opinion, the acceptability of the methods used and all the other evidence in the case.

INSTRUCTION NO. 19 - BENCH CONFERENCES AND RECESSES

During the trial it may be necessary for me to talk with the lawyers out of the hearing of the jury, either by having a bench conference while the jury is present in the courtroom or by calling a recess. The purpose of these conferences is to decide how certain evidence is to be treated under the rules of evidence, to avoid confusion and error and to save your valuable time. We will do what we can to keep the number and length of these conferences to a minimum.

Please be patient because while you are waiting, we are working.

INSTRUCTION NO. 20 - OBJECTIONS

The lawyers may make objections and motions during the trial that I must rule upon. If I sustain an objection to a question before it is answered, do not draw any inferences or conclusions from the question itself. The lawyers have a duty to object to testimony or other evidence they believe is not properly admissible. Do not hold it against a lawyer or the party the lawyer represents because the lawyer may make objections.

INSTRUCTION NO. 21 - DEPOSITION EVIDENCE

Testimony may be presented to you in the form of a deposition. A deposition is the recorded answers a witness made under oath to questions asked by lawyers before trial. You should consider the deposition testimony, and judge its credibility, as you would that of any witness who testifies here in person.

INSTRUCTION NO. 22 - CHARTS AND SUMMARIES

During trial charts and summaries may be shown to you in order to help explain the facts disclosed by the books, records or other evidence in the case. These charts or summaries are used for convenience. They are not themselves evidence or proof of any facts. If they do not correctly reflect the facts shown by the evidence, you should disregard these charts and summaries.

INSTRUCTION NO. 23 - NOTE TAKING

At the end of the trial, you must make your decision based on the evidence. We have an official court reporter making a record of the trial. However, we will not have a typewritten transcript of the trial available for your use in reaching a verdict. You must pay close attention to the evidence as it is presented.

If you want to take notes during the trial, you may, but be sure your note taking does not interfere with listening to and considering all the evidence. If you choose not to take notes, remember it is your personal responsibility to listen carefully to the evidence.

Notes you take during the trial are not necessarily more reliable than your memory or another juror's memory. Therefore, you should not be overly influenced by the notes.

If you take notes, do not discuss them with anyone before you begin your deliberations. At the end of each day, please leave your notes in the jury room. At the end of the trial, you may take your notes out of the notebook and keep them or leave them, and we will destroy them. No one will read the notes, either during or after the trial.

INSTRUCTION NO. 24 - MEDIA AND TECHNOLOGY

You are required to decide this case based solely on the evidence and exhibits that you see and hear in the courtroom. If one or more of you were to get additional information from an outside source, that information might be inaccurate or incomplete, or for some other reason not applicable to this case, and the parties would not have a chance to explain or contradict that information because they would not know about it. This is why it is so important that you base your verdict only on information you receive in this courtroom.

In order for your verdict to be fair, you must not be exposed to any other information about the case, the law or any of the issues involved in this trial during the course of your jury duty. This is very important, so I am taking the time to give you a detailed explanation about what you should do and not do during your time as jurors.

First, you must not try to get information from any source other than what you see and hear in this courtroom. That means you may not speak to anyone, including your family and friends, about this case. You may not use any printed or electronic sources to get information about this case or the issues involved. This includes the internet, reference books or dictionaries, newspapers, magazines, television, radio, computers, smartphones, PDAs or any other electronic device. You may not do any personal investigation, such as visiting any of the places involved in this case, using internet maps or Google Earth or any other such technology, talking to any possible witnesses, or creating your

own demonstrations or reenactments of the events which are the subject of this case.

Second, you must not communicate with anyone about this case or your jury service, and you must not allow anyone to communicate with you. In particular, you may not communicate about the case through emails, text messages, tweets, blogs, chat rooms, comments or other postings, social networking sites, including but not limited to Facebook, Myspace, Twitter, or any other website. This applies to communicating with your fellow jurors, your family members, your employer and the people involved in the trial, although you may notify your family and employer that you have been seated as a juror in the case. If you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter and immediately report the contact to the court.

I recognize these rules and restrictions may affect activities you would consider to be normal and harmless. I assure you that I am very much aware I am asking you to refrain from activities which may be very common and very important in your daily lives. However, the law requires these restrictions to ensure the parties have a fair trial based on the evidence each party has an opportunity to address.

Any juror who violates these restrictions I have explained to you jeopardizes the fairness of these proceedings, and a mistrial could result which would require the entire trial process to start over. As you can imagine, a

mistrial is a tremendous expense and inconvenience to the parties, the court and the taxpayers. If any juror is exposed to any outside information or has any difficulty whatsoever in following these instructions, please notify the court immediately. If any juror becomes aware that one of your fellow jurors has done something that violates these instructions, you are obligated to report that violation to the court as well.

These restrictions remain in effect throughout this trial. Once the trial is over, you may resume your normal activities. At that point, you will be free to read or research anything you wish. You will be able to speak—or choose not to speak—about the trial to anyone you wish. You may write, post or tweet about the case if you choose to do so. The only limitation is that you must wait until after the verdict, when you have been discharged from your jury service.

INSTRUCTION NO. 25 - CONDUCT OF THE JURY

Finally, to insure fairness, you as jurors must obey the following rules:

First, do not talk among yourselves about this case, or about anyone involved with it, until the end of the case when you go to the jury room.

Second, do not talk with anyone else about this case, or about anyone involved with it, until the trial has ended and I discharge you as jurors. This means you must not talk to your spouse, other family members or friends about this case until I discharge you as jurors.

Third, when you are outside the courtroom, do not let anyone tell you anything about the case or about anyone involved with it, until the trial has ended and I accept your verdict. If someone tries to talk to you about the case, please report it to me.

Fourth, during the trial, you should not talk with or speak to any of the parties, lawyers or witnesses involved in this case—you should not even pass the time of day with any of them. It is important you not only do justice in this case, but that you also give the appearance of doing justice. If a person from one side of the case sees you talking to a person from the other side, even if it is simply to pass the time of day, an unwarranted and unnecessary suspicion about your fairness might be created. If any lawyer, party or witness does not speak to you when you pass in the hall, ride the elevator or the like, it is because they are not supposed to talk or visit with you.

Fifth, do not read any news stories or articles, in print, on the internet or in any blog, about the case or about anyone involved with it. Do not listen to any radio or television reports about the case or about anyone involved with it. If you want, you may have your spouse or a friend clip out any stories and set them aside to give you after the trial is over. I can assure you, by the time you have heard the evidence, you will know more about the case than anyone will learn through the news media.

Sixth, during the trial, do not make up your mind about what the verdict should be. Keep an open mind until you have gone to the jury room to decide the case and you and your fellow jurors have discussed the evidence.

Seventh, if at any time during the trial you have a problem you would like to bring to my attention or if you feel ill or need to go to the restroom, please send a note to the court security officer, who will deliver it to me. Or just raise your hand and get my attention. I want you to be comfortable, so please do not hesitate to inform me of any problem.

INSTRUCTION NO. 26 - OUTLINE OF THE TRIAL

The trial will proceed as follows:

After these instructions, the lawyer for the plaintiff may make an opening statement. Next, the lawyer for the defendant may make an opening statement. An opening statement is not evidence. It is simply a summary of what the lawyer expects the evidence to be.

Plaintiff will present its evidence and call witnesses. The lawyer for the defendant may cross-examine them. Following the plaintiff's case, the defendant may present evidence or call witnesses. If the defendant calls witnesses, the lawyer for the plaintiff may cross-examine them.

After presentation of the evidence is complete, the lawyers will make their closing arguments to summarize and interpret the evidence for you. As with opening statements, closing arguments are not evidence. I will give you further instructions. You will then retire to deliberate on your verdict.

Dated March 23, 2015.

BY THE COURT:



JEFFREY L. VIKEN
CHIEF JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

<p>VERNON R. TRAVERSIE, an enrolled member of the Cheyenne River Sioux Tribe and citizen of South Dakota, Plaintiff, vs. RAPID CITY REGIONAL HOSPITAL INC., Defendant.</p>	<p>CIV. 12-5048-JLV SUPPLEMENTAL JURY INSTRUCTIONS</p>
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VERDICT

INSTRUCTION NO. 27 - EQUALLY IMPORTANT INSTRUCTIONS

Members of the jury, I will now take a few minutes to give you additional instructions explaining the law which applies to this case. All instructions, both those I gave you earlier and these instructions, are equally binding on you and must be followed. You must consider my instructions as a whole and not single out some instructions and ignore others.

INSTRUCTION NO. 28 - PUNITIVE DAMAGES

“Punitive damages” are for the purposes of punishing an offending party for engaging in misconduct and deterring it and others from engaging in misconduct in the future. Mr. Traversie seeks punitive damages against Rapid City Regional Hospital. Punitive damages cannot be awarded on Mr. Traversie’s Title VI Discrimination Claim.

If you find in favor of Mr. Traversie and against the defendant on Mr. Traversie’s Battery Claim or Intentional Infliction of Emotional Distress Claim, and if you also find the harm suffered by Mr. Traversie was the result of oppression, malice, intentional misconduct, reckless disregard, or willful and wanton misconduct by the defendant, you may, but are not required to, award an additional amount as punitive damages against the defendant.

If you find in favor of Mr. Traversie and against the defendant on Mr. Traversie’s Section 1981 Discrimination Claim, and if you also find the defendant acted with malice or with a reckless indifference to Mr. Traversie’s federally protected rights, you may, but are not required to, award an additional amount as punitive damages against the defendant.

“Oppression” is conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person’s rights.

“Malice” is not simply the doing of an unlawful or injurious act, rather it implies the act complained of was conceived in the spirit of mischief or with a criminal indifference to civil obligations. Malice may be inferred from the

surrounding facts and circumstances. “Actual malice” is a positive state of mind that is shown by a desire and intention to injure another and motivated by hatred or ill will toward that party. “Presumed malice” is malice which is inferred from certain acts. Presumed malice may be found if the offending party acts willfully or with a wanton or reckless disregard of another’s rights.

“Willful and wanton misconduct” is more than negligent conduct, but less than intentional conduct. Conduct is willful and wanton when an offending party acts or fails to act when the offending party knows, or should have known, that harm to another is likely to occur.

Conduct is “intentional” when an offending party acts or fails to act for the purpose of causing harm or knowing that harm is substantially certain to occur. Knowledge or intent may be inferred from the offending party’s conduct and the surrounding circumstances.

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

1. The intent of the offending party. In considering an offending party’s intent, you should examine the degree of reprehensibility of the offending party’s misconduct, including, but not limited to, the following factors:
 - a. whether the harm caused was physical as opposed to economic;
 - b. whether the conduct reflected indifference to or reckless disregard of the health or safety of another;
 - c. whether the target of the conduct was financially vulnerable;

- d. whether the conduct involved repeated actions or was an isolated incident; and
 - e. whether the harm was the result of intentional malice, trickery or deceit, or mere negligence.
2. The amount already awarded as compensatory damages. In considering this factor, you should consider:
- a. whether the party seeking punitive damages has been completely compensated for the harm caused by the offending party;
 - b. the relationship between the harm suffered by the party seeking punitive damages and the punitive damages award;
 - c. the magnitude of the potential harm, if any, that an offending party's conduct would have caused to its intended victim if the wrongful plan had succeeded; and
 - d. the possible harm to other victims that might result if similar future behavior is not deterred.

The amount of punitive damages must have a reasonable relationship to the amount of compensatory damages.

- 3. The nature and enormity of the wrong;
- 4. The offending party's financial condition; and
- 5. All of the circumstances concerning the offending party's actions, including any mitigating circumstances which may operate to reduce, without wholly defeating, punitive damages.

You may not consider any one factor alone but should consider all five factors in determining the amount, if any, of a punitive damages award.

If you find the defendant had a practice of engaging in wrongful conduct similar to that which harmed Mr. Traversie, that evidence may be considered in deciding the issues of reprehensibility, whether punitive damages should be awarded, and, if so, the amount of punitive damages that should be awarded. In your award of punitive damages, do not include any sum that represents damages for harm to any person or entity other than Mr. Traversie.

Mr. Traversie has the burden of proving by the greater convincing weight of the evidence that he is entitled to punitive damages. It is your decision, and your decision alone, whether to award punitive damages against the defendant.

INSTRUCTION NO. 29 - DUTY TO DELIBERATE

A verdict must represent the considered judgment of each juror. Your verdict must be unanimous. It is your duty to consult with one another and to deliberate with a view of reaching agreement if you can do so without violence to your individual judgment. Of course, you must not surrender your honest convictions as to the weight or effect of the evidence solely because of the opinions of other jurors or for the mere purpose of returning a verdict. Each of you must decide the case for yourself, but you should do so only after consideration of the evidence with your fellow jurors.

In the course of your deliberations, you should not hesitate to re-examine your own views and change your opinion if you are convinced it is wrong. To bring the jury to a unanimous result, you must examine the questions submitted to you openly and frankly with proper regard for the opinions of others and with a willingness to re-examine your own views.

Remember that you are not partisans. You are judges of the facts. Your sole interest is to seek the truth from the evidence. You are the judges of the credibility of the witnesses and the weight of the evidence. You may conduct your deliberations as you choose. You may take all the time you feel is necessary.

There is no reason to think that another trial would be tried in a better way or that a more conscientious, impartial or competent jury would be selected to hear it. Any future jury must be selected in the same manner and from the

same source as you. If you should fail to agree on a verdict, then this case is left open and must be resolved at some later time.

INSTRUCTION NO. 30 - DUTY DURING DELIBERATIONS

There are certain rules you must follow while conducting your deliberations and returning your verdict:

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

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

Third, your verdict must be based solely on the evidence and on the law in these 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.

Fourth, the verdict form is simply the written notice of the decision you reach in this case. You will take this form to the jury room. When you have unanimously agreed on the verdict, the foreperson will fill in the form, date and sign it, and advise the court security officer you have reached a verdict. You will then return to the courtroom where your verdict will be received and announced.

Dated March 26, 2015.

BY THE COURT:



JEFFREY L. VIREN
CHIEF JUDGE