

## II. POST-TRIAL INSTRUCTIONS

### Introduction

Ladies and Gentlemen of the Jury:

Now that you have heard the evidence and the arguments, I will give you the instructions that will govern your deliberations in the jury room. It is my job to decide what rules of law apply to the case and to explain those rules to you. It is your job to follow the rules, even if you disagree with them or don't understand the reasons for them. You must follow all of the rules; you may not follow some and ignore others.

The decision you reach in the jury room must be unanimous. In other words, you must all agree on the answer to each question.

Your deliberations will be secret. You will never have to explain your verdict to anyone.

If you have formed any idea that I have an opinion about how the case should be decided, disregard that idea. It is your job, not mine, to decide the facts of this case.

The case will be submitted to you in the form of a special verdict consisting of 5 questions. In answering the questions, you should consider only the evidence that has been received at this trial. Do not concern yourselves with whether your answers will be favorable to one side or another, or with what the final result of this lawsuit may be.

Note that certain questions in the verdict are to be answered only if you answer a preceding question in a certain manner. Read the introductory portion of each question very carefully before you undertake to answer it. Do not answer questions needlessly.

### Burden of Proof

When a party has the burden to prove any matter by a preponderance of the evidence, it means that you must be persuaded by the testimony and exhibits that the matter

sought to be proved is more probably true than not true. On Questions 1 and 3 in the special verdict, the burden of proof is on the party contending that the answer to a question should be “yes” and the standard of proof is preponderance of the evidence. As to Question No. 4, the burden of proof is the higher one of clear and convincing evidence. You should base your decision on all of the evidence, regardless of which party presented it.

As to Questions 2 and 5, which are damages questions, the party asking for damages has the burden of convincing you, by the preponderance of the evidence both that he has been injured or damaged and the amount of the damages.

The party seeking damages need not produce evidence that is as exact as the evidence needed to support findings on other questions in the verdict. Determining damages involves the consideration of many different factors that cannot be measured precisely. In determining the damages you must base your answer on evidence that reasonably supports your determination of damages under all of the circumstances of the case. You should award as damages the amount of money that you find fairly and reasonably compensates the named party for his or her injuries.

Do not measure damages by what the lawyers ask for in their arguments. Their opinions as to what damages should be awarded should not influence you unless their opinions are supported by the evidence. It is your job to determine the amount of the damages sustained from the evidence you have seen and heard. Examine that evidence carefully and impartially. Do not add to the damage award or subtract anything from it because of sympathy to one side or because of hostility to one side. Do not make any deductions because of a doubt in your minds about the liability of any of the parties.

### **Governmental Actions**

Defendant County of Dunn is a government body that acts only through its agents and employees, that is, those officers, agents, employees, or other persons authorized or

employed to act for it. Thus, in determining whether defendant County of Dunn acted in a manner that entitles plaintiff to actual and punitive damages, the actions of County of Dunn employees or officials are the actions of the County of Dunn.

### **Willful or Intentional Conduct**

Defendant County of Dunn has admitted liability for violating the Wisconsin Public Records Law by failing to preserve the video footage plaintiff Troy Scheffler requested. Plaintiff Scheffler is entitled to actual damages if he has proven, by a preponderance of the evidence, that the County of Dunn willfully or intentionally failed to save the requested video recordings before the recordings were destroyed.

When a reasonable person in the defendant's position would believe that a particular result was substantially certain to follow, he can be said to have intended the result. If, however, the conduct of the defendant merely creates the risk of some consequence, which may or may not have resulted, then the defendant's conduct was negligent as opposed to intentional. Willful conduct is conduct that is intentional and done with evil intent.

### **Actual Damages**

If you determine that plaintiff Scheffler has proven by a preponderance of the evidence that the County of Dunn willfully or intentionally failed to save the requested video recordings before the recordings were destroyed, you must then determine what actual damages, if any, he incurred. In other words, you must decide the amount of money that will fairly and reasonably compensate plaintiff for any injury that you find he sustained as a result of defendant's failure to preserve the requested video footage and turn it over to him.

Plaintiff Scheffler must prove his damages by a preponderance of the evidence. Your award must be based on evidence and not speculation or guesswork. This does not mean, however, that compensatory damages are restricted to actual loss of money; they include the

emotional aspects of injury, even if these are not easy to measure. You should consider the emotional pain and suffering that plaintiff Scheffler has experienced. No evidence of the dollar value of emotional pain and suffering has been or needs to be introduced.

There is no exact standard for setting the damages to be awarded on account of pain and suffering. You are to determine an amount that will fairly compensate the plaintiff for the pain and suffering he has sustained.

### **Causation**

In determining whether to award damages for a particular injury, you must decide whether defendant County of Dunn's failure to preserve the video recordings caused that injury. Defendant's conduct does not have to be "the" cause but rather "a" cause because an injury may have more than one cause. Someone's conduct caused the injury if that conduct was a substantial factor in producing the injury. A injury may be caused by one person's conduct or by the combined conduct of two or more people.

### **Emotional Distress**

In determining how much money will fairly and reasonably compensate plaintiff for emotional distress, you should consider any past emotional distress, including mental anguish and apprehension, sorrow and anxiety plaintiff has endured from the time of the incident up to the present time. There is no exact standard for deciding how much to award plaintiff for these damages. Your award should be fair and just in the light of the evidence. You are not to award any damages for future emotional distress.

### **Duty to Mitigate Damages**

A person who has been damaged may not recover for losses that he could have reduced by reasonable efforts. "Reasonable efforts" do not include efforts that might cause

serious harm or subject the person making the effort to an unreasonable risk, unreasonable inconvenience, unreasonable expense, disorganization of his or her business or loss of honor and respect.

If you find that a reasonable person would have taken steps to reduce any wage loss he incurred, and if you find that plaintiff Scheffler did not take such steps, then you should not include as damages any amount the plaintiff could have avoided. If you find that a reasonable person would not have taken steps to reduce the loss under all of the circumstances existing in the case, then you should not consider the plaintiff's failure to act when you determine damages.

It is defendant's burden to satisfy you by the preponderance of the evidence that plaintiff should have taken steps to reduce the loss and failed to do so.

### **Punitive Damages**

If you answered "yes" to Question No. 4, you may award punitive damages in addition to actual damages. Punitive damages are never a matter of right. This means that you are not required to make any award of punitive damages, but you may do so if you think it is proper under the circumstances. It is in the jury's discretion to award or withhold them.

Punitive damages may be awarded even if the violation of plaintiff's rights resulted in only nominal actual damages, such as \$1. The purposes of punitive damages are to punish the defendant for its conduct and to serve as an example or warning to the defendant and others not to engage in similar conduct in the future.

You may assess punitive damages only if you find that a defendant's conduct was arbitrary and capricious. An action is arbitrary and capricious if it lacks a rational basis or results from a reckless, unconsidered, willful and irrational choice of conduct. An inadvertent act, that is, an unintended act, cannot be found to be arbitrary and capricious.

In answering this question, you are instructed that the burden is on the plaintiff to convince you to a reasonable certainty by evidence that is clear, satisfactory, and convincing that the answer should be "yes."

If you find that punitive damages are appropriate, then you must use sound reason in setting the amount of those damages. Punitive damages, if any, should be in an amount sufficient to fulfill the purposes that I have described to you. They should not reflect bias, prejudice or sympathy toward either party. In determining the amount of any punitive damages, you should consider the following factors:

- the unjustifiability of defendant's conduct;
- the effect of defendant's conduct on plaintiff Scheffler;
- the relationship between plaintiff and defendant;
- the likelihood that defendant would repeat the conduct if an award of punitive damages is not made;
- defendant's financial condition; and
- the relationship of any award of punitive damages to the amount of actual harm the plaintiff suffered.

#### **Answers Not Based on Guesswork**

If, after you have discussed the testimony and all other evidence that bears upon a particular question, you find that the evidence is so uncertain or inadequate that you have to guess what the answer should be, then the party having the burden of proof as to that question has not met the required burden of proof. Your answers are not to be based on guesswork or speculation. They are to be based upon credible evidence from which you can find the existence of the facts that the party must prove in order to satisfy the burden of proof on the question under consideration.

**Selection of Presiding Juror; Communication with the Judge; Verdict**

When you go to the jury room to begin considering the evidence in this case you should first select one of the members of the jury to act as your presiding juror. This person will help to guide your discussions in the jury room.

You are free to deliberate in any way you decide or select whomever you like as a presiding juror. When thinking about who should be presiding juror, you may want to consider the role that the presiding juror usually plays. He or she serves as the chairperson during the deliberations and has the responsibility of insuring that all jurors who desire to speak have a chance to do so before any vote. The presiding juror should guide the discussion and encourage all jurors to participate. I encourage you at all times to keep an open mind if you ever disagree or come to conclusions that are different from those of your fellow jurors. Listening carefully and thinking about the other juror's point of view may help you understand that juror's position better or give you a better way to explain why you think your position is correct.

Once you are in the jury room, if you need to communicate with me, the presiding juror will send a written message to me. However, don't tell me how you stand as to your verdict.

As I have mentioned before, the decision you reach must be unanimous; you must all agree.

When you have reached a decision, the presiding juror will sign the verdict form, put a date on it, and all of you will return with the verdict into the courtroom.