

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

George David Fossyl, *et al.*,

Plaintiffs,

v.

Case No. 1:02cv722

Thomas Aubrey Watson, *et al.*,

Judge Michael H. Watson

Defendants.

JURY INSTRUCTIONS

Members of the Jury:

Now that you have heard all of the evidence and the arguments of counsel, it is my duty to give you the instructions of law applicable to the case.

As jurors, it is your duty to apply the law to the facts as you find them from the evidence in the case. You are not to single out any one instruction as stating the law, but rather you must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by me.

I will start by explaining your duties and the general rules that apply in every civil case. Next, I will explain some of the rules that you must use in evaluating particular testimony and evidence. Then, I will explain the elements of the claims that Plaintiffs Dave Fossyl, Marty Fossyl and Toni Harris are bringing against Defendants Thomas Watson and Michael Milligan in this case. And last, I will explain the rules that you must follow during your deliberations in the jury room and the possible verdicts that you may return. Please listen carefully to everything I say.

Regardless of any opinion you may have as to what the law is or ought to be, it would be a violation of your sworn duty to base your verdict upon any view of the law other than that given in the instructions of the Court, just as it would also be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything other than the evidence in the case.

In deciding the facts of this case you must not be swayed by bias, prejudice, or sympathy as to any party. Our system of law does not permit jurors to be governed by prejudice, sympathy or public opinion. The parties and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated by the Court, and reach a just verdict regardless of the consequences.

In a civil action such as this, the burden is on the Plaintiffs to prove every essential element of his or her case by a "preponderance" of the evidence. If Plaintiffs fail to do so then you must find for the Defendants.

Preponderance of the evidence is the greater weight of the evidence; that is, evidence that you believe because it outweighs or overbalances in your mind the evidence opposed to it. A preponderance means evidence that is more probable, more persuasive, or of greater probative value. It is the quality of the evidence that must be weighed. Quality may, or may not, be identical with quantity.

In determining whether an issue has been proved by a preponderance of the evidence, you should consider all of the evidence, regardless of who produced it.

To establish a fact by a preponderance of the evidence means to prove that something is more likely than not. Stated otherwise, a preponderance of the evidence means such evidence that, when considered and compared with the evidence opposed

to it, has more convincing force and produces in your minds a belief that what is sought to be proved is more likely than not true.

The burden of proof by a preponderance does not require proof to an absolute certainty. As we all know, in human affairs absolute certainty is seldom possible.

Nor does the burden of proof by a preponderance mean that you are bound to decide an issue of fact on the basis of the number of witnesses who testify concerning that fact.

If the weight of the evidence is equally balanced, or if you are unable to determine which side of an issue has the preponderance, the party who has the burden of proof has not established such issue by a preponderance of the evidence.

The evidence in this case consists of the sworn testimony of the witnesses, the stipulations of counsel and all the exhibits which have been received in evidence.

The evidence does not include any statement of counsel made during the trial, unless such statement was an admission or agreement admitting certain facts. The opening statements and the closing arguments of counsel are designed to assist you, however, they are not evidence.

In your consideration of the evidence in the case, you are not limited solely to the mere statements of the witnesses, but you are permitted to draw, from the facts which you find have been proved, such reasonable inferences as seem justified in the light of your own experience. That is to say, from the facts which have been proved, you may draw an inference based upon reason and common sense.

Testimony that has been stricken or excluded is not evidence and may not be considered by you in rendering your verdict. If certain testimony was received for a

limited purpose, such as for the purpose of assessing a witness' credibility, you must follow any limiting instruction I have given.

There are two types of evidence from which a jury may properly find the facts. One is direct evidence. An example of direct evidence is the testimony of an eyewitness. The other type is circumstantial evidence. An example of circumstantial evidence is the proof of a chain of events or circumstances which point to the existence or non-existence of certain facts.

It is your job to decide how much weight to give direct and circumstantial evidence. The law makes no distinction between the weight that you should give to either one; nor does the law say that one is any better evidence than the other. You should consider all the evidence, both direct and circumstantial, and give it whatever weight you believe it deserves.

An important part of your job will be making judgments about the testimony of the witnesses who testified in this case. You should decide whether you believe what each person had to say, and how important that person's testimony was. In making that decision, I suggest that you ask yourself a few questions: Did the person impress you as honest? Did he or she have any particular reason not to tell the truth? Did he or she have a personal interest in the outcome of the case? Did the witness seem to have a good memory? Did the witness have the opportunity and the ability to observe accurately the things he or she testified about? Did he or she appear to understand the questions clearly and answer them directly? Did the witness's testimony differ from the testimony of other witnesses? These are a few of the considerations that will help you determine the accuracy of what each witness said. In judging the credibility of

witnesses, you should apply the same tests of truthfulness that you apply in your own personal affairs.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; an innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

You are not required to believe the testimony of any witness simply because he or she was under oath. You may choose to believe all or part or none of the testimony of any witness.

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, which is inconsistent with the witness's present testimony.

If you believe that any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may deem appropriate.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness's testimony in other particulars; and you may reject all the testimony of that witness or give it such credibility as you think it deserves.

The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. However, when knowledge of technical subject matter may be helpful

to the jury, a person who has special training or experience in that technical field—he or she is called an expert witness—is permitted to state his or her opinion on those technical matters. Witnesses who, by education and experience, have become expert in some art, science, profession or calling, may state their opinions as to relevant and material matters, in which they profess to be an expert, and may also state their reasons for their opinions.

You are not required to accept the opinion of an expert witness. As with any other witness, it is up to you to decide whether to rely upon it. You should consider each expert opinion received in evidence in this case and give it as much weight as you may think it deserves.

If you should decide that the opinions of an expert witness are not based upon sufficient education or experience, or if you should conclude that the reasons given in support of the opinion are not sound, or if you feel that it is outweighed by other evidence, you may disregard the opinion entirely.

In resolving disputed issues of fact, you should not permit your decision concerning any particular question to be determined merely by the number or quantity of witnesses or exhibits that one side or the other has introduced into evidence. Once again, the test is not which side brings the greater number of witnesses or presents the greater quantity of evidence, but which witnesses and which evidence you find sufficiently believable and trustworthy. You may find that the testimony of a smaller number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

It is the duty of an attorney to object when the other side offers testimony or other evidence which the attorney believes is not properly admissible. You should not hold it against an attorney or their client because the attorney has made objections.

Upon allowing testimony or other evidence to be introduced over the objection of an attorney, the Court does not, unless expressly stated, indicate any opinion as to the weight or effect of such evidence.

When the Court has sustained an objection to a question, the jury must disregard the question entirely, and may draw no inference from the wording of it, or speculate as to what the witness might have said if he or she had been permitted to answer the question.

No statement, ruling, remark, question or comment which I may have made during the course of the trial is intended to indicate my opinion as to how you should decide the case or to influence you in any way in your determination of the facts.

Plaintiffs Dave Fossyl, Marty Fossyl and Toni Harris sue Thomas Watson and Michael Milligan for the wrongful death of their sister Cheryl Fossyl in 1977, for spoliation of the evidence of her death, for conspiracy and for intentional infliction of emotional distress. Defendants deny liability for these claims.

The Court will now instruct you on Plaintiffs' wrongful death claim.

Plaintiffs allege that Defendants Thomas Watson and Michael Milligan committed a battery on Cheryl Fossyl and caused her death. A battery is the intentional, unconsented contact with another. When the death of a person is caused by wrongful act, neglect, or default which would have entitled the party injured to maintain an action and recover damages if death had not ensued, the person who would have been liable if death had not ensued shall be liable in an action for damages.

If you find for the plaintiffs you will determine what sum of money will compensate the beneficiaries for the injury and loss to them resulting by reason of the wrongful death of Cheryl Fossyl.

In determining damages suffered by reason of the wrongful death, you may consider all factors existing at the time of Cheryl Fossyl's death. The factors that you may consider include:

- loss of services of the decedent;
- loss of the society of the decedent, including loss of companionship, care, assistance, attention, protection, advice, guidance, and counsel suffered by the surviving next of kin;
- the mental anguish incurred by the surviving next of kin.

You may award future damages. "Future damages" means damages that result from the wrongful death and that will accrue after the verdict or determination of liability by the jury or court is rendered in the civil action for wrongful death.

Plaintiffs may bring an action and obtain a judgment against more than one wrongdoer for their damage. Regardless of the number of defendants, however, Plaintiffs may only receive full compensation once for the same injury.

The Court will now instruct you on Plaintiffs' spoliation of evidence claim.

Plaintiffs claim that each of the Defendants interfered with or destroyed evidence. In order for Plaintiffs to recover you must find by the greater weight of the evidence that

- a. there was a probable lawsuit involving the Plaintiffs; and
 - b. the Defendants knew that a lawsuit involving the Plaintiffs was probable;
- and

- c. the Defendants willfully interfered with evidence for the purpose of disrupting the Plaintiffs' ability to prove a claim in the probable lawsuit; and
- d. the Defendants' conduct disrupted the Plaintiffs' ability to prove a claim in the probable lawsuit; and
- e. the Defendants' conduct was a proximate cause of damage to the Plaintiffs.

Willful misconduct is intentionally doing that which is wrong or intentionally failing to do that which should be done. The circumstances must also disclose that the defendant knew or should have known that such conduct would probably cause injury to the plaintiff. It is a general rule of law that every person may be presumed to intend the natural and probable consequences of their acts. Willful misconduct implies an intentional disregard of a clear duty or of a definite rule of conduct, a purpose not to discharge such duty, or the performance of wrongful acts with knowledge of the likelihood of resulting injury. Knowledge of surrounding circumstances and existing conditions is essential; actual ill will or an intent to injure need not be present.

The Court will now instruct you on Plaintiffs' intentional infliction of emotional distress claim.

Whenever an individual intentionally or recklessly acts in an extreme and outrageous manner so as to cause serious emotional distress to another, he may be held liable for any mental or physical injury caused. Liability exists only where the conduct or acts are so outrageous in character and so extreme in degree that they go beyond all possible bounds of decency and may be regarded as atrocious and utterly

intolerable in a civilized community. In order to recover plaintiffs must prove by the greater weight of the evidence three elements:

- a. that Defendants intentionally or recklessly acted in an extreme and outrageous manner.
- b. that Defendants proximately caused Plaintiffs' injuries.
- c. that Plaintiffs' emotional distress was serious.

A person acts intentionally when one's purpose is to produce a specific result. A person intends an act when it is done purposely, not accidentally. A person acts recklessly when with heedless indifference to the consequences he perversely disregards a known risk that his conduct is likely to cause serious emotional distress. An act is extreme and outrageous when it passes all reasonable bounds of decency and is excessive, wanton, or gross. The emotional distress or mental anguish must be serious. Serious emotional distress typically results when a loved one's corpse is mishandled but this must be determined on a case by case basis.

The Court will now instruct you on Plaintiffs' civil conspiracy claim.

A "civil conspiracy" is a malicious combination of two or more persons to injure another in person or property, in a way not competent for one alone, resulting in actual damages. In this case the Plaintiffs allege that Defendants Watson and Milligan conspired to cause the death of and/or hide the remains and/or cover up the killing of Cheryl Fossyl.

I have already instructed you regarding the damages you may award on the claim for wrongful death. If you find that Plaintiffs have proven the essential elements of any of their claims regarding spoliation, intentional infliction of emotional distress,

and/or civil conspiracy, your verdict must be for the Plaintiffs and you should separately consider what damages to award.

As previously stated, by instructing you on damages, the Court does not mean to suggest for which party your verdict should be rendered, or to suggest that if you find for Plaintiffs, you are required to award any damages at all. Plaintiffs have the burden of proving damages by a preponderance of the evidence, and it is for you to determine what damages, if any, have been proved.

You may award damages only for those injuries which you find the Plaintiffs Dave Fossyl, Marty Fossyl and Toni Harris have proved by a preponderance of the evidence to have been the direct result of the conduct of Defendants Thomas Watson or Michael Milligan. Moreover, even if you find Defendants are liable to Plaintiffs on the claims regarding spoliation, intentional infliction of emotional distress, and/or civil conspiracy, you must delve further and determine whether the Plaintiffs have proven by a preponderance of evidence that the Defendants' actions more likely than not caused the damages which Plaintiffs claim to have suffered.

If you find that Plaintiffs have prevailed on any of their claims for spoliation, intentional infliction of emotional distress, or civil conspiracy, then you must determine by a preponderance of the evidence an amount of money that will reasonably compensate each Plaintiff for his or her actual injury caused by the conduct of the defendants.

In awarding compensatory damages, you should consider the nature, character, seriousness, and duration of any emotional pain, suffering, inconvenience, and mental anguish that Plaintiffs may have experienced. No evidence of the monetary value of such intangible things as pain and suffering has been, or need be, introduced into

evidence. The damages that you award must be fair compensation – no more and no less. In determining the amount of any damages that you decide to award, you should be guided by common sense. You must use sound judgment in fixing an award of damages, drawing reasonable inferences from the facts in evidence.

You are not permitted to award speculative damages. This means you are not to include in any verdict compensation for prospective loss that, although possible, is wholly remote or left to conjecture or guess. Damages are considered speculative when their existence is uncertain or when the proof is insufficient to enable you to make a fair and reasonable assessment of damages.

Each Defendant is entitled to fair, separate and individual consideration of the case without regard to your decision as to the other Defendant. If you find that only one Defendant is responsible for a particular injury, then you must impose damages for that injury only upon that Defendant.

However, if two or more persons unite in an intentional act that violates another person's right, then all of those persons are jointly liable for the acts of each of them; the law does not require the injured party establish how much of the injury was done by each particular Defendant that you find liable. Thus, if you find that the Defendants acted jointly, then you may treat them jointly for purposes of ongoing damages. If you decide that both of the Defendants are jointly liable on a particular claim, then you may simply determine the overall amount of damages for which they are liable, without breaking that figure down into individual percentages.

A statute of limitations is a law setting a time period within which a lawsuit must normally be filed. Plaintiffs filed this lawsuit on October 8, 2002. Defendants claim that Plaintiffs failed to file the claims of spoliation, intentional infliction of emotional distress

and civil conspiracy within the four year statute of limitations which applies to those claims. Defendants have the burden of proof on this affirmative defense. In order to prevail on this affirmative defense they must establish by a preponderance of the evidence that before October 8, 1998, reasonable person knew (1) of these harms and (2) that the conduct of Defendants caused these harms.

If you find that one or more of the Plaintiffs is entitled to compensatory damages against one or more of the Defendants, you may consider whether you will separately award punitive damages. Punitive damages may be awarded against a defendant as a punishment to discourage others from committing similar wrongful acts. You are not required to award punitive damages to any of the Plaintiffs, and you may not do so unless you find that the Plaintiffs have met their burden to prove by clear and convincing evidence that the Defendant acted with malice. To be "clear and convincing" the evidence must produce in your minds a firm belief or conviction about the facts to be proved. "Malice" means a conscious disregard for the rights and safety of another person that has a great probability of causing substantial harm. "Substantial" means major or significant, and not trifling or small.

If you determine to award punitive damages, the amount should be fair and reasonable under all the facts and circumstances. It should neither be excessive nor influenced by passion, sympathy, or prejudice.

If you decide that the Defendants are liable for punitive damages, you must also decide whether they are liable for the attorney fees of counsel employed by the Plaintiffs in the prosecution of this action. (If you decide Defendant(s) is(are) liable for those attorney fees, the Court will determine the amount.)

The Court cannot embody all of the law in any single part of these instructions. In considering one portion, you must consider it in the light of and in harmony with all of the instructions.

The Court has now instructed you on all of the law necessary for your deliberations. Whether or not certain instructions are applicable may depend upon the conclusions you reach on the facts. If you have an impression that the Court indicated how any disputed fact should be decided, you must set aside such impression because only you determine such matters.

It is your duty, as jurors, to confer with one another, and to deliberate with a view to reaching an agreement, if you can do so without surrendering your individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of all the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion, if you are convinced it is erroneous.

However, do not surrender your honest conclusion as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember always that you are not partisans. You are judges -- impartial triers of the facts. Your sole interest is to ascertain the truth from the evidence in the case. Don't take a firm position at the outset and then be too proud to change your position.

Circumstances in the case, as in any case, may arouse sympathy for one party or the other. Sympathy is a common human emotion. The law does not expect you to be free of such normal reactions. However, the law and your oath as jurors require you to disregard sympathy and not to permit it to influence your verdict in any degree.

It is your duty to weigh the evidence, to decide the disputed questions of fact, to apply the instructions to your findings, and to render your verdict accordingly. In fulfilling your duty as jurors, you must strive to arrive at a fair and just verdict.

Your initial conduct upon entering the jury room is important. It is not wise to immediately insist upon a certain verdict because your sense of pride may be aroused, and you may later hesitate to give up your position even if it is shown that it is not correct.

Upon retiring, you should first, select a Foreperson. This person will help to guide your discussions in the jury room. Once you are there, if you need to communicate with me, the Foreperson shall notify the Court Security Officer and send a signed, written message to me. However, do not tell me how you stand as to your verdict, for instance, if you are split 4-4 or 5-3, do not tell me that in the note. No member of the jury should ever attempt to communicate with the Court other than by a signed written message. Once you begin your deliberations, the Court will not communicate with you other than in writing or in open court, on the record, and with counsel present.

The verdict in this case must represent the considered judgment of each juror. In order to return a verdict, one way or the other, it is necessary that each juror agree thereto. In other words, your verdicts must be unanimous.

Each of you has a copy of the instructions that I am now reading and the verdict forms. The verdict forms contains a series of questions called "interrogatories." You must answer each of them in writing. You must be unanimous as to the answer to each question.

These will accompany you to the jury room. You are invited to use these instructions in any way that will assist you in your deliberations and in arriving at your verdicts. These written instructions which are in substantially the same language as I have given them to you verbally, represent the law that is applicable to the facts, as you find the facts to be.

You will also have in your possession the exhibits. The foreperson will retain possession of these records and return them to the courtroom at the appropriate time. If you are unable to readily locate any particular exhibit, please have the foreperson notify the Court Security Officer of the exhibit in question, and the number of that exhibit will be given to you in order to facilitate your search for them.

Nothing that the Court has said in these instructions and nothing in the verdict forms that have been prepared is intended to suggest or convey in any way the verdict that the Court thinks you should return. The verdict is the exclusive duty and responsibility of the jury.

If you find Plaintiffs proved all of the elements of wrongful death, spoliation of evidence, intentional infliction of emotional distress and/or civil conspiracy, as described above, by a preponderance of the evidence, then you shall mark the finding on the verdict form against Defendants. If you find Plaintiffs failed to prove one or more of the above elements by a preponderance of the evidence, then you shall mark the finding on the verdict form for the Defendants.

When you have reached your verdict, you will mark the finding which corresponds to your decision and date the appropriate verdict forms. All members of the jury must agree upon the verdict and must sign the verdict in ink.

The foreperson of the jury shall notify the Court Security Officer the jury has reached its verdict. Again, do not reveal to anyone exactly how the jury stands, numerically or otherwise, until it comes time for you to return to court with a complete verdict. You will then be returned to the courtroom.

Ladies and gentlemen, you may now retire to begin our deliberations.