

Cooley, et. al. v. Foreman, et. al.
CVH 2023 0069
JURY INSTRUCTIONS

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INTRODUCTION

Members of the jury, you have heard the evidence and the arguments of counsel. It is now the duty of the court to instruct you on the law which applies to this case. The court and the jury have separate functions. You decide the disputed facts and the court provides the instructions of law. It is your sworn duty to accept these instructions and to apply the law as it is given to you. You are not permitted to change the law, nor to apply your own conception of what you think the law should be.

BURDEN OF PROOF

OJI 303.03

The person who claims that certain facts exist, must prove them by a preponderance of the evidence. This obligation is known as the burden of proof. Generally, the burden of proof is upon the Plaintiff(s) to prove the facts necessary for his or her case by a preponderance of the evidence.

OJI 303.05

For certain elements of these claims, there is another burden of proof known as "clear and convincing evidence." This will be explained where applicable.

The point of understanding the burden of proof is to recognize which party has to convince you. Here, as a general rule, the Plaintiffs must convince you that (1) they were defamed by Defendants and/or (2) they were placed in a false light by Defendants.

PREPONDERANCE

OJI 303.05

Preponderance of the evidence is the greater weight of the evidence; that is, evidence that you believe because it outweighs or overbalances in your minds 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 the greater number of witnesses.

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.

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.

If an issue may reasonably be determined in two or more ways and you cannot decide which is more probably true, you cannot resort to guesswork, conjecture or possibilities.

“Clear and convincing evidence” is a higher or greater amount of proof than preponderance. **Clear and convincing evidence** means that the evidence produces in your minds a firm belief or conviction about the truth of the matter. Clear and convincing evidence is a greater amount of evidence than a preponderance of the evidence

OJI CV 303.07, modified

EVIDENCE AND INFERENCES

OJI 305.01

What is the evidence? Evidence is all the testimony received from the witness and the exhibits admitted during the trial and facts agreed to by counsel and any facts which the court requires you to accept as true.

Evidence may be direct or circumstantial, or both.

Direct evidence is the testimony given by a witness who has seen or heard the facts to which he testifies. It includes exhibits admitted into evidence during the trial.

Circumstantial evidence is the proof of facts or circumstances by direct evidence from which you may reasonably infer other related or connected facts which naturally and logically follow, according to the common experience of mankind.

To infer, or **to make an inference**, is to reach a reasonable conclusion of fact which you may, but are not required to make, from other facts which you find have been established by direct evidence. Whether an inference is made rests entirely with you.

You may not build one inference upon another inference; but you may make more than one inference from the same facts or circumstances. You may not infer a fact from a speculative or remote basis that has not been established by the greater weight of the evidence.

EXHIBITS

OJI 405.60

A number of **exhibits** and testimony related to them have been introduced. You may consider whether the exhibits are the same objects and in the same condition as originally taken. You will determine what weight, if any, the exhibits should receive in light of all the testimony. The fact that exhibits are admitted into evidence does not imply that you must give them any weight.

You are not to make any inferences or conclusions based upon the numbers of the exhibits. Frequently, numbers used for trial preparation purposes are not the same as used in trial.

VIDEO EXHIBITS

You will have the video exhibits also available to you along with a laptop computer. If you need assistance operating this equipment, please notify the Court so assistance can be provided.

WHAT IS NOT EVIDENCE

OJI 305.03

However, 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. They are not evidence. Likewise, assumptions of fact by counsel cannot be considered as evidence.

Statements and answers that were stricken by the court and which you were instructed to disregard are not evidence and must be treated as though you never heard them.

You must not speculate as to why the court sustained the objection to any question or what the answer to such question might have been. You must not draw any inference or speculate on the truth of any suggestion included in a question that was not answered.

CREDIBILITY

OJI 305.05

You are the judges of the facts, the credibility (or believability) of the witnesses, and the weight of the evidence. To weigh the evidence, you must consider the **credibility** of the witnesses. You will apply the tests of truthfulness which you apply in your daily lives.

These tests include the appearance of each witness upon the stand; his/her manner of testifying; the reasonableness of the testimony; the opportunity he/she had to see, hear and know the things concerning which he/she testified; the accuracy of memory; frankness or lack of it; intelligence, interest and bias, if any; together with all the facts and circumstances surrounding the testimony. Applying these tests, you will assign to each witness such weight as you deem proper.

You are not required to believe the testimony of any witness simply because he or she was under oath. You may believe or disbelieve all or any part of the testimony of any witness. It is your province to determine what testimony is worthy of belief and what testimony is not worthy of belief.

OPINION TESTIMONY

OJI 309.09

Generally, a witness may not **express an opinion**. As a general rule, witnesses should only provide facts within their own knowledge. However, a person who had an opportunity to observe facts is also permitted to express an opinion about the meaning of the facts. In determining the value of such opinion, you will consider the opportunity that such witnesses had to observe the facts and their knowledge of and experience on the subject. In addition, you will apply the usual rules for testing credibility and determining the weight to be given to testimony. You may accept or disregard such opinions. It is for you to determine what weight, if any, should be given to them.

SUBSTANTIVE INSTRUCTIONS

Members of the jury, you must now decide whether the Plaintiffs have proven their claims against the Defendant. The Plaintiffs have brought two claims: (1) defamation and (2) invasion of privacy based on false light publicity. I will now instruct you on the law applicable to each of these claims.

DEFAMATION

Each Plaintiff claims that the Defendant defamed him/her which caused damages. To establish defamation, each Plaintiff must show (1) that a statement (oral, written and/or video) portrayal of fact was published or made; (2) that the statement was untrue; (3) that the Defendant acted with either actual malice or reckless disregard; and (4) that each Plaintiff suffered injury as a proximate result of the publication.

Because the Plaintiffs are considered "public officials," Plaintiffs must prove by **clear and convincing evidence** that Defendant made the statement(s) with **actual malice** or **reckless disregard** for the truth.

Clear and convincing evidence means that you are thoroughly convinced of the truthfulness of the evidence regarding the motive for making or publishing the statement(s) (i.e clear and convincing proof of actual malice, or clear and

convincing proof of reckless disregard for the truth). It must be more than evidence that simply outweighs or overbalances the evidence opposed to it.

Actual malice occurs when a Defendant makes a false statement with knowledge that it is false.

Reckless disregard means that a Defendant acted while aware that the statement was probably false, or the Defendant entertained serious doubts about the truth of the statement. The Defendant's failure to investigate may be considered evidence that the Defendant acted with reckless disregard to the statement's truth or falsity when the Defendant had serious doubts about the truth of the statement.

A statement is **false** when it is not substantially true. It is substantially true when the essence of the statement is true when considering the statement as a whole. The Defendants' statements / portrayals must be given their natural and ordinary meaning, taking into consideration the circumstances in which the statement was made. You must ignore any minor ways in which any statement is false. In deciding whether the statement was false, you may not consider the Defendants' subjective belief as to the truth of the statement. You must consider whether it is true or false from an objectively reasonable perspective.

This instruction communicates the concept that “truth” is a defense. If you find that the Defendant has proven that the statements at issue are not false, you must find in favor of the Defendant on the defamation claim.

Plaintiffs must also prove that the statements / portrayals were published.

"Published" means that the Defendant's statement was read or heard by another person other than the Plaintiff. Based on the testimony, this Court finds as a matter of law that issue is not disputed. The Court directs you that the Defendant published the statements / portrayals.

FACTS or OPINION:

In a defamation claim, the distinction between portraying statements as fact and portraying statements as opinion is critical in defamation and invasion of privacy cases. Only false statements of fact can form the basis of claims for defamation and invasion of privacy.

To determine whether a statement constitutes fact or opinion, you must apply a "totality of the circumstances" test involving these four factors: (1) the specific language used; (2) whether the statement is verifiable; (3) the general context of the statement; and (4) the broader context in which the statement appeared.

You must examine the precise wording of the statement to determine whether it conveys a factual assertion or whether it conveys an opinion. You must determine whether a reasonable reader would view the statements as conveying information of factual nature or conveys an opinion.

If an opinion statement is portrayed, false opinions cannot support defamation claims. If a statement is verifiable, then the statement is considered a fact and then subject to analysis of whether it is true or false.

If you find that the statement was portrayed to the public as a fact, and that the portrayal was false, you must find in favor of the Plaintiff. If you find that the statement was portrayed to the public as an opinion, you must find in favor of the Defendant. It must be more than evidence that simply outweighs or overbalances the evidence opposed to it.

Conclusion

If you find that any one or more of the Plaintiffs proved all the elements of Defamation, then you must enter a verdict in their favor. You will then continue to deliberate whether any one or more of the Plaintiff proved their claim for false light invasion of privacy. Only if you find that any one or more Plaintiff prevailed under either claim will you consider what amount of damages were suffered.

If you find that any one or more of the Plaintiffs failed to prove all the elements of Defamation, then you must enter a verdict in favor of the Defendant. You then continue to deliberate whether any one or more of the Plaintiff proved their claim for false light invasion of privacy.

INVASION OF PRIVACY - FALSE LIGHT

OJI 433.05

A person who invades the right of privacy of another person may be subject to liability for the resulting harm to the interests of the other person. The right of privacy is the right of a person to be let alone. It is the right to be free from the unwarranted appropriation or exploitation of one's personality or private affairs in such a manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities

OJI CV 433.04 intro

Each Plaintiff claims that the Defendant violated his/her right to privacy by publicizing false information that places the Plaintiff in a false light before the public.

Each Plaintiff must prove that (1) the false light in which the Plaintiff was placed would be highly offensive to a reasonable person, and (2) the Defendant had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the Plaintiff would be placed.

"False light" means the Defendant knows that the Plaintiff, as a reasonable person, would be justified in the eyes of the community in feeling seriously offended and aggrieved by the publicity. The Plaintiff's privacy is not invaded when an unimportant false statement is made. It is only when there is such a major

misrepresentation of the Plaintiff's character, history, activities, or beliefs that serious offense may reasonably be expected to be taken by a reasonable person in his/her position.

You must determine whether statements made by the Defendant would place a reasonable person in the Plaintiffs position in a false light, not merely whether the Plaintiff personally believes it places him or her in a false light.

A person **has knowledge or acts "knowingly"** when that a person is aware of the existence of the facts and that his/her conduct will probably cause a certain result. Since you cannot look into the mind of another, knowledge is determined from all the facts and circumstances in evidence.

To be "**highly offensive,**" the Plaintiff must be justified in the eyes of the community in feeling seriously offended and aggrieved by the publicity. The statement must be "such a major misrepresentation of his or her character, history, activities or beliefs that serious offense may reasonably be expected.

You must determine whether a reasonable person in the Plaintiff's position would find the false light highly offensive, not merely whether the Plaintiff personally found it offensive. The publicity given to Plaintiff must be to the extent that a reasonable person would feel justified in feeling seriously offended.

"False" has the same definition as previously provided for defamation.

Conclusion

If you find that any one or more of the Plaintiffs proved all the elements of False Light Invasion of Privacy, then you must enter a verdict in their favor. Only if you find that any one or more Plaintiff prevailed under either claim will you consider what amount of damages were suffered.

If you find that any one or more of the Plaintiffs failed to prove all the elements of False Light Invasion of Privacy, then you must enter a verdict in favor of the Defendant. If any one or more Plaintiff did not prevail on both claims, you do not consider damages.

CAUSATION

A party who seeks to recover for injuries must prove not only that the other party caused the conduct, but also that the conduct was a proximate cause of the injury suffered by the Plaintiff(s).

"Proximate cause" is an act or failure to act that in the natural and continuous sequence directly produced the injuries and without which the injuries would not have occurred.

DAMAGES

Awarding damages should serve the following purposes: (1) to compensate the Plaintiff for injury to reputation, for pecuniary loss and for emotional distress, (2) to vindicate the Plaintiff and aid in restoring reputation, and (3) to dissuade Defendant and others from the wrongful conduct.

OJI CV 431.09

If you find for any one or more Plaintiff, on one or both claims, you will then decide by the greater weight of the evidence an amount of money that will reasonably compensate the Plaintiff for the actual loss that was caused by the actions of the Defendant.

You may take into consideration all facts and circumstances in evidence to decide the amount of compensation for the Plaintiff's damages. The following are the types of injuries for which you may award compensation: (1) the harm to the Plaintiff's reputation, including exposure to public hatred, contempt, ridicule and scorn; (2) loss of professional income and out of pocket expenses; (3) physical and mental anguish, pain and suffering; and (4) loss of society, companionship, and friendship.

If you find that any Plaintiff was defamed or placed in a false light, but that the Plaintiff failed to prove by the greater weight of the evidence any amounts of damages, then you may award the Plaintiff nominal damages. "Nominal" means trifling or small.

As a matter of law, the Court has determined that the claimed damage to Defendant's home was permitted under the circumstance of serving a search warrant. Therefore, you should not consider a reduction in damages to any Plaintiff for claimed damage to Defendant's house.

Any Plaintiff can have only have but one recovery for a single instance of publicity, wither it is defamatory or a false light claim. Welling v. Weinfeld, 113 OS3d 464

PUNITIVE DAMAGES

To eliminate any confusion, you are advised that "punitive damages," which are designed as a punishment for conduct, are not part of the initial consideration of damages. As award for punitive damages can only be given in the event there is an award of some amount of compensatory damages. If appropriate, you will later be given further instructions on punitive damages.

VERDICT FORMS

[OJI 23.07]

(Explain the verdict forms)

The decision that you make following your deliberations must be agreed upon by three-fourths of the jurors. In other words, six of the eight jurors must agree upon the verdict and sign in ink the verdict form.

There is a separate verdict form for each Plaintiff and for each claim of the Plaintiff. You should deliberate the claim of each Plaintiff separately and not make a verdict on the Plaintiffs as a group. It may be that you find some claims proven by certain Plaintiff(s) and some claims not proven by certain Plaintiff(s).

INTERROGATORIES

If you find for any one or more of the Plaintiffs, then it will also be your duty to answer in writing the questions as to the amounts of damages to which each Plaintiff may be entitled. Again, there is a separate verdict form for each Plaintiff.

(Read interrogatory)

You will write in ink your answer to the question in the space provided. At least six members of the jury must agree upon your answer to each question, and those six jurors agreeing upon the answer must sign in the space provided. Your answers to this question must be based upon your determination of the facts from the preponderance of the evidence.

CLOSING REMARKS

Your initial conduct upon entering the jury room is a matter of importance. First, select a foreperson. There is no prescribed manner to select a foreperson. Do this as you best can however you decide. However, you should understand that the foreperson has no additional authority or persuasion in the deliberations. Instead, the foreperson should help guide the discussions and keep them orderly. Also, the foreperson should keep track of all the exhibits.

I will place in your possession the exhibits, the verdict form, the interrogatory and a copy of the court's instructions. The foreperson will retain possession of the verdict, the interrogatory and the jury instructions and will return them to the courtroom.

It is not wise to immediately express an opinion or insist upon a certain verdict because your sense of pride may be aroused and you may hesitate to give up your position if shown that it is not correct.

4 OJI 413.50

Consult with one another in the jury room and deliberate with a view of reaching an agreement if you can do so without disturbing your individual judgment. Each of you must decide this case for yourself, but you should do so only after a discussion of the case with your fellow jurors. Do not hesitate to change an opinion if convinced that it is wrong. However, you should not surrender honest, personal convictions concerning the weight of the evidence in order to be congenial or to reach a verdict solely because of the opinion of other jurors.

You must not be influenced by any consideration of **sympathy or prejudice**. The law does not expect you to be free of such normal reactions. The law and your oath as jurors, however, require you to disregard sympathy and not to permit it to influence your verdict. It is your duty to carefully weight the evidence, to decide all disputed questions of fact, to apply the instructions of the court to your findings, and to render your verdict accordingly. In fulfilling your duty, your efforts must be to arrive at a just verdict. Consider all the evidence and make your finding with intelligence and impartiality, and without bias, sympathy or prejudice, so that the plaintiff and the defendant will feel that their case was fairly and impartially tried.

4 OJI 413.60

If, during the course of the trial, the court said or did anything that you consider an indication of the court's view on the facts, you are instructed to disregard it. Please accept my apology if this occurred.

I cannot embody all the law in any single set of instructions. If you wish to review the instructions, you should first consider a broad review of the instructions before focusing on one portion; seek to consider the instructions in light of, and in harmony with, all the instructions.

1 OJI 25.20

The decision that you make following your deliberations must be agreed upon by **six or more jurors**. If six or more jurors agree upon the verdict or verdicts, you will sign the verdict and the interrogatory (or question) in ink and advise the bailiff. You will then return to the courtroom.

If anything arises during deliberations, if there are questions as to the facts you have heard or the law as I have given it to you, **place any request or question in writing**, signal the bailiff and deliver it to the bailiff. If your questions can and should be answered, they will be answered. [Explain "door bell" procedure]

Until your verdict is returned and announced in open court, you are **not to disclose** to anyone else the status of your deliberations or the nature of your verdict.. At that time, your jury services will be completed. You may then discuss this case with anyone but you are not required to do so. Whether you discuss this case with counsel, the press or anyone else after you are discharged is a matter of your own free choice.

1 OJI 413.81

Does counsel have anything to add?

Discharge Alternate Jurors.

On behalf of the public and the parties, the court expresses appreciation for your services in performing this important public function.

1 OJI 413.81

You may now retire and begin your deliberations.

Jonathan P. Stein,
Judge
3/18/2026