

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

STEWART B. FRESH,)
)
 Plaintiff,)
)
 v.) No. 02-2674 Ml/P
)
 ENTERTAINMENT U.S.A. OF)
 TENNESSEE, INC. d/b/a)
 PLATINUM PLUS,)
)
 Defendant.)

JURY INSTRUCTIONS

Ladies and gentleman of the jury, we have now come to the point in the case when it is my duty to instruct you in the law that applies to the case and you must follow the law as I state it to you.

As jurors it is your exclusive duty to decide all questions of fact submitted to you and for that purpose to determine the effect and value of the evidence.

You must not be influenced by sympathy, bias, prejudice or passion.

You are not to single out any particular part of the instructions and ignore the rest, but you are to consider all the

instructions as a whole and regard each in the light of all the others.

I. GENERAL INSTRUCTIONS

Corporate Defendant:
All Persons Equal Before the Law

In this case defendant Entertainment U.S.A. of Tennessee, Inc. d/b/a Platinum Plus ("Platinum Plus") is a corporation. The fact that a corporation is a party must not prejudice you in your deliberations or in your verdict.

You may not discriminate between corporations and natural individuals. Both are persons in the eyes of the law, and both are entitled to the same fair and impartial consideration and to justice by the same legal standards.

This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations of life. A corporation is entitled to the same fair trial at your hands as a private individual. All persons, including corporations, partnerships, unincorporated associations, and other organizations, stand equal before the law, and are to be dealt with as equals in a court of justice.

While Platinum Plus is the defendant in this case, that does not mean that only the actions of Platinum Plus as one body are to be considered by you in determining its liability in this case. Corporations act not only through the policies and decisions it makes, but also through its designated supervisory employees, such as its managers, security personnel and others designated by the corporation to act on its behalf.

Pay close attention to the remainder of these instructions. As you apply subsequent portions of these instructions, you will have to determine whether or not individual Platinum Plus employees were authorized to act on behalf of Platinum Plus.

Burden of Proof and
Consideration of the Evidence

I will now instruct you with regard to where the law places the burden of making out and supporting the facts necessary to prove the theories in the case.

When, as in this case, the defendant denies the material allegations of the plaintiff's claim, the law places upon the plaintiff the burden of supporting and making out his claim upon every essential element of the claim by the greater weight or preponderance of the evidence.

Preponderance of the evidence - - means that amount of factual information presented to you in this trial which is sufficient to cause you to believe that an allegation is probably true. In order to preponderate, the evidence must have the greater convincing effect in the formation of your belief. If the evidence on a particular issue appears to be equally balanced, the party having the burden of proving that issue - in this case, the plaintiff - must fail.

You must consider all the evidence pertaining to every issue, regardless of who presented it.

Weighing the Evidence

You, members of the jury, are judges of the facts concerning the controversy involved in this lawsuit. In order for you to determine what the true facts are, you are called upon to weigh the testimony of every witness who has appeared before you [or whose deposition has been read to you] and to give the testimony of the witnesses the weight, faith, credit and value to which you think it is entitled.

You will note the manner and demeanor of witnesses while on the stand. You must consider whether the witness impressed you as one who was telling the truth or one who was telling a falsehood and whether or not the witness was a frank witness. You should consider the reasonableness or unreasonableness of the testimony of the witness; the opportunity or lack of opportunity of the witness to know the facts about which he or she testified; the intelligence or lack of intelligence of the witness; the interest of the witness in the result of the lawsuit, if any; the relationship of the witness to any of the parties to the lawsuit, if any; and whether the witness testified inconsistently while on the witness stand, or if the witness said or did something or failed to say or do something at any other time that is inconsistent with what the witness said while testifying.

If a witness is shown to have knowingly testified falsely concerning any material matter, you have a right to distrust such witness' testimony in other particulars and you may reject all the testimony of that witness or give it such credibility as you may think it deserves. An act or omission is done "knowingly" if it is done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

These are the rules that should guide you, along with your common judgment, your common experience and your common observations gained by you in your various walks in life, in weighing the testimony of the witnesses who have appeared before you in this case.

If there is a conflict in the testimony of the witnesses, it is your duty to reconcile that conflict if you can, because the law presumes that every witness has attempted to and has testified to the truth. But if there is a conflict in the testimony of the witnesses which you are not able to reconcile, in accordance with these instructions, then it is with you absolutely to determine which ones of the witnesses you believe have testified to the truth and which ones you believe have testified to a falsehood.

Immaterial discrepancies do not affect a witness's testimony, but material discrepancies do. 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.

The greater weight or preponderance of the evidence in a case is not determined by the number of witnesses testifying to a particular fact or a particular set of facts. Rather, it depends on the weight, credit and value of the total evidence on either side of the issue, and of this you jurors are the exclusive judges.

If in your deliberations you come to a point where the evidence is evenly balanced and you are unable to determine which way the scales should turn on a particular issue, then the jury must find against the plaintiff, upon whom the burden of proof has been cast in accordance with these instructions.

Direct and Circumstantial Evidence

There are two kinds of evidence - direct and circumstantial. Direct evidence is testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is indirect evidence, that is, it is proof of one or more facts from which one can find another fact.

You may consider both direct and circumstantial evidence in deciding this case. The law permits you to give equal weight to both, but it is for you to decide how much weight to give to any evidence.

Statements of Counsel

You must not consider as evidence any statements of counsel made during the trial. If, however, counsel for the parties have stipulated to any fact, or any fact has been admitted by counsel, you will regard that fact as being conclusively established.

As to any questions to which an objection was sustained, you must not speculate as to what the answer might have been or as to the reason for the objection, and you must assume that the answer would be of no value to you in your deliberations.

You must not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken out by the court. Such matter is to be treated as though you had never known it.

You must never speculate to be true any insinuation suggested by a question asked a witness. A question is not evidence. It may be considered only as it supplies meaning to the answer.

Evidence has been admitted in this case for a limited purpose. When evidence has been admitted for a limited purpose, you may consider it only for that purpose.

Totality of the Evidence

The jury may consider all evidence admitted in the case. Testimony and documents which the court allowed into evidence over a hearsay objection may be considered by you as evidence, on the same basis as all other evidence, for the purpose for which it was admitted. This, of course, is all for you, the jury, to decide.

Interrogatories and Depositions (D-3)

During the course of the trial you may have heard reference made to the word "interrogatory." You have also seen a video deposition. An interrogatory is a written question that must be answered under oath in writing and a deposition is testimony taken under oath at a time before trial. You are to consider interrogatories and their answers and depositions as if the questions had been asked and answered in court.

II. STIPULATED FACTS

Stipulated Facts

Before the trial of this case, the parties agreed to the truth of certain facts in this action. As a result of this agreement, the plaintiff and defendant entered into certain stipulations in which they agreed that the stipulated facts could be taken as true without either party presenting further proof on the matter. This procedure is often followed to save time in establishing facts which are undisputed.

Facts stipulated to by the parties in this case include the following:

1. On January 20, 2002, Byron Brown entered Platinum Plus as a customer.
2. Byron Brown paid a cover charge to enter Platinum Plus.
3. While in the club, Byron Brown used his credit card and was charged \$88.00, and he obtained two cash advances in the amounts of \$65.00 and \$25.00 respectively.
4. Stewart Fresh underwent surgery by Dr. John F. Laurenzo to repair a nasal fracture on January 31, 2002.
5. The Plaintiff incurred \$4,402.59 in medical expenses related to the allegations in the complaint.

6. Stewart Fresh was 22 years old on January 20, 2002 and a student at The University of Mississippi.
7. Stewart Fresh was assaulted and had his nose broken sometime before January 23, 2002 when plaintiff presented to The University of Mississippi Student Health Center for treatment of facial injuries.
8. Stewart Fresh was first seen by Dr. Jeff Tombrello of The University of Mississippi Student Health Center on January 23, 2002 for the broken nose he sustained as a result of an assault.
9. Stewart Fresh was referred to Dr. John F. Laurenzo by Dr. Jeff Tombrello for further treatment of the nasal fracture the plaintiff sustained.
10. Stewart Fresh first saw Dr. John F. Laurenzo on January 24, 2002.
11. Stewart Fresh is not seeking any damages for lost wages or loss of future income.
12. The plaintiff is not seeking damages for permanent disfigurement.
13. The plaintiff is not seeking damages for physical pain and suffering or any medical expenses beyond March 9, 2002.

III. GENERAL INSTRUCTIONS ON THE APPLICABLE LAW

Turning now to the legal theories in the case, it is my duty to tell you what the law is. If any lawyer has told you that the law is different from what I tell you it is, you must, of course, take the law as I give it to you. That is my duty. However, it is your duty, and yours alone, to determine what the facts are and after you have determined what the facts are, to apply those facts to the law as I give it to you, free from any bias, prejudice, or sympathy, either one way or the other.

There are two legal theories of recovery in the case; (1) whether, under the laws of the State of Tennessee, the plaintiff was the subject of an assault and battery by the defendant and (2) whether, under the laws of the State of Tennessee, the plaintiff was falsely imprisoned by the defendant.

Assault - Defined
(T.P.I. 3 - 8.01)

The plaintiff's first theory of recover in this case is assault and battery under the laws of the State of Tennessee. An assault is an intentional attempt, or the unequivocal appearance of an intentional attempt, coupled with the present ability, or the unequivocal appearance of the present ability, to do harm to the person of another.

Battery - Defined
(T.P.I. 3 - Civil 8.02)

A battery is any intentional, unlawful, and harmful physical contact by one person with another person.

The intent required for a battery is not an intent to cause harm. It is an intent to do the act that causes the harm.

Right to Recover
(T.P.I. 3 - Civil 8.03)

A plaintiff who has suffered any bodily harm legally caused by an assault and battery by a defendant is entitled to recover compensation for such injury from that defendant.

In summary, an assault is an attempt or the unequivocal appearance of an attempt, to do a corporal injury to another, the intent to do harm being essential.

A battery is any unlawful beating, or the unlawful wrongful physical violence or constraint inflicted on a human being without his consent.

The circumstances must be such as to satisfy the jury, that there was an intent, coupled with an ability, to do harm, or that the plaintiff had a right so to believe from the facts before him; otherwise there is no assault.

An act or series of acts does not in law become an assault and battery until it has reached the point of being excessive. An assault or an assault and battery is committed where there were no circumstances justifying any character of force or demonstration, or where the force and demonstration, although to an extent justified, exceeded the point of justification.

Self Defense - Defense of Property (D-11)

A person who is unlawfully attacked or who reasonably fears an unlawful attack may use as much force in self defense as reasonably appears necessary.

A person whose property is unlawfully intruded upon may use such force in defense of self and property as reasonably appears necessary.

False Imprisonment - Defined
(T.P.I. 3 - CIVIL 8.10)

The plaintiff's second theory of recovery in the case under the laws of the State of Tennessee is false imprisonment. False imprisonment is the unlawful violation of the personal liberty of another. It is an intentional and unlawful restraint, confinement, or detention that compels the person to stay or go somewhere against the person's will.

The restraint necessary to create a false imprisonment may result either from the use of force or from a threat of force. The threat may be either stated or implied from all of the circumstances. False imprisonment does not require confinement in a jail or prison.

Arrest by Private Person (D-13)

A person who is not a law enforcement officer may lawfully arrest another person for a public offense committed in the arresting person's presence.

Reasonable Cause for Arrest (D-14)

In order to find a reasonable cause for the arrest and detention of the plaintiff, the defendant must have actually believed, and had a reasonable basis for the belief, that the plaintiff did the act that was the basis for the arrest. That is, the defendant must have examined the situation in the same manner as an ordinarily careful person would have done. Factors to be considered in determining whether a careful examination has been made include:

1. What information concerning the act was available;
and
2. The source of the information; and
3. Whether or not the accused had the opportunity to explain the information.

Use of Force in Arrest
by a Private Person (D-15)

A private person who may lawfully arrest another person may take, seize, or detain the other person by showing an intention to take the person into custody and to control that person. The use of force is permitted if the force employed:

1. Is not more than the force the arresting person reasonably believed to be necessary to make the arrest; and
2. If the force did not subject the person arrested to unnecessary risk of harm.

The plaintiff claims that the security guards and/or staff employees for the defendant, who are not a party to this suit, were acting as agents for the defendant, Entertainment U.S.A. of Tennessee (Platinum Plus) and within the scope of the agent's employment at the time that the incident occurred.

If you find that the security guards, bouncers, or staff employees were the agents of the defendant and were acting within the scope of their employment during that time, then any act or omission of that person or persons was in law the act or omission of the defendant.

However, if you find that at the time of the incident the persons involved were not the agents of the defendant, or were not acting within the scope of the agent's employment during that time, then you must find in favor of the defendant.

Agent or Independent Contractor (D-19)

One of the issues which you must decide is whether, at the time of the incident, the persons alleged to have been involved in the beating of the plaintiff were the agents of the defendant or whether they were independent contractors.

While both an agent and an independent contractor work for another person, there is an important distinction between them.

An "agent" of another person, called the principal, is authorized to act for or in place of the principal. A principal has the right to control the agent's actions. A principal ordinarily is legally responsible for the acts or omissions of the principal's agent.

An independent contractor is answerable to the employer only as to the results of the work and not as to how the work is to be performed. A person who employs an independent contractor ordinarily is not legally responsible to others for the acts or omissions of the independent contractor.

Whether one is an agent or independent contractor depends upon who has the right to general and immediate control over the methods and manner in which work is done. If the one who

performs the work has that right, then that person is an independent contractor. If the employer has that right, then the employer is a principal and the one who performs the work is the agent.

An independent contractor may consider and follow any suggestions that the employer may make. These actions do not change the independent contractor into an agent so long as the independent contractor retains the right of control over the methods and manner in which the work is done.

Principal and Agent - Defined (D-16)

A principal can be held responsible for the acts or omissions of the principal's agent.

A person who is authorized to act for another person or in place of another person is an agent of that person. A person may be an agent whether or not payment is received for the authorized act.

For purposes of this case, the term "agent" includes an employee.

The person who authorizes the agent to act is called a principal. For purposes of this case, the term "principal" includes an employer.

Scope of Authority (D-17)

In order to be considered the act of the principal, the act of the agent must be within the scope of the agent's employment.

It is not necessary that a particular act or failure to act be expressly authorized by the principal to bring it within the scope of the agent's employment. Conduct is within the scope of the agent's employment if it occurs while the agent is engaged in the duties that the agent was employed to perform and if the conduct relates to those duties. Conduct for the benefit of the principal that is incidental to, customarily connected with, or reasonably necessary to perform an authorized act is within the scope of the agent's employment.

IV. DAMAGES

In this case, if you find for the defendant, you will not be concerned with the question of damages as to the defendant. But if you find in favor of the plaintiff, you will of course be concerned with the question of damages. It is my duty to instruct you as to the proper measure of damages to be applied in that circumstance.

I shall now instruct you on the award of damages allowed under the law for assault and battery and false imprisonment. The fact that I am giving you instructions on damages should not be considered as an indication of any view of mine as to which party is entitled to your verdict. Instructions as to the measure of damages are given only for your guidance and are to be applied only in the event that you should find in favor of the plaintiff by a preponderance of the evidence, in accordance with the instructions that I have given you. If you decide that the plaintiff is not entitled to prevail with respect to his claims, you shall not answer any questions on the Verdict Form with regard to damages.

Compensatory Damages

You may award the plaintiff a sum of money you believe will justly and fairly compensate him for any injury you believe he has suffered as a direct result of the defendant's conduct (i.e., by the assault and battery and/or false imprisonment).

You must award the plaintiff damages to compensate him for any damages he has proven by a preponderance of the evidence to be a direct result of the defendant's conduct in violation of the laws of the State of Tennessee.

Compensatory damages can be inferred from the circumstances presented to you by the evidence, or they can be proven by testimony going solely to the issue of damages. Compensatory damages include humiliation, embarrassment, and the pain and suffering that a plaintiff incurs as a result of an assault and battery and/or false imprisonment. There is no way to prove these types of damages with exactitude. A jury simply must make a determination based on a full evaluation of the evidence that the jury has before it, using common sense and your common experiences in life in determining a fair amount of compensation in the circumstances presented in the case.

In the determination of the amount of the award it will often be impossible for you to arrive at a precise award. It is, however, necessary to arrive at a reasonable award that is supported by the evidence offered by the plaintiff. There must be evidence presented at trial to support your award of general compensatory damages, for an award cannot be based on speculation or sympathy on your part.

The damages you award may include any costs or expenses incurred by the plaintiff as a result of the defendant's conduct.

If you find the defendant responsible for injury to the plaintiff then you must determine an amount that is fair and reasonable compensation for damages. You may award compensatory damages only for damages or injuries that the plaintiff proves were caused by the defendant's allegedly unlawful conduct. The damages that you award must be fair compensation - no more and no less.

Expenses

The reasonable value of medical care, services, and supplies reasonably required and actually given in the treatment of the plaintiff as shown by the evidence may be recovered as damages.

Remember, Mr. Fresh is not seeking any expenses, including medical expenses, after March 9, 2002.

Pain and Suffering

Reasonable compensation for any physical pain and suffering experienced by the plaintiff and of which his injury was a proximate cause may be recovered as compensatory damages.

Plaintiff may be awarded the following elements of damage experienced in the past:

1. Physical pain and suffering;
2. Mental or emotional pain and suffering, including anguish, distress, fear, humiliation, grief, shame, or worry;
3. Loss of capacity for the enjoyment of life; and
4. Disfigurement (until March 9, 2002).

No definite standard or method of calculation is prescribed by law by which to fix reasonable compensation for pain and suffering. Nor is the opinion of any witness required as to the amount of such reasonable compensation. In making an award for pain and suffering you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in light of the evidence.

Remember, Mr. Fresh is making no claim for pain and suffering after March 9, 2002.

In considering damages you will award to the plaintiff, you must remember that the plaintiff is obligated to mitigate, or diminish the damages suffered. The plaintiff must take reasonable steps to mitigate his damages.

A person who has been injured has the duty to mitigate damages by using reasonable diligence in caring for an injury and employing reasonable means to accomplish healing. When one does not use reasonable diligence to care for injuries and they are aggravated as a result of that failure, the damages you determine must be limited to the amount of damage that would have been suffered had the injured person used the diligence required.

It is the defendant's burden to prove, by a preponderance of the evidence, that the plaintiff failed to take reasonable steps to care for his injuries.

Punitive Damages

The plaintiff has asked that you make an award of punitive damages, but this award may be made only under the following circumstances. You may consider an award of punitive damages only if you find that the plaintiff has suffered actual damage as a result of the defendant's fault and you have made an award for compensatory damages.

The purpose of punitive damages is not to further compensate the plaintiff, but to punish the wrongdoer and deter others from committing similar wrongs in the future. Punitive damages may be considered if, and only if, the plaintiff has shown by clear and convincing evidence that a defendant has acted either intentionally, recklessly, maliciously, or fraudulently.

Clear and convincing evidence is a different and higher standard than preponderance of the evidence. It means that the defendant's wrong, if any, must be so clearly shown that there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.

A person acts intentionally when it is the person's purpose or desire to do a wrongful act or to cause the result.

A person acts recklessly when the person is aware of, but consciously disregards a substantial or unjustifiable risk of

injury or damage to another. Disregarding the risk must be a gross deviation from the standard of care that an ordinary person would use under the circumstances.

A person acts maliciously when the person is motivated by ill will, hatred, or personal spite.

A person acts fraudulently when: (1) the person intentionally either misrepresents an existing material fact or causes a false impression of an existing material fact to mislead or to obtain an unfair or undue advantage; and (2) another person suffers injury or loss because of reasonable reliance upon the representation.

If you decide to award punitive damages, you will not assess an amount of punitive damages at this time. You will, however, report your findings to the Court.

If you, the jury, find that the conduct of the defendant, as determined under these instructions, was with malice or reckless indifference to the rights of the plaintiff then indicate so in your response to Question No. 4 on the Verdict form, but do not indicate the amount of punitive damages you would award. That question will be reserved until the parties have a final opportunity to present some additional evidence on the question.

Of course, if you find that the actions the defendant were neither malicious or with reckless indifference to the rights of the plaintiff, then you should so indicate in your response to Question No. 4 on the Verdict form, and that will be your final verdict in this case.

Verdict Form

Finally, ladies and gentlemen of the jury, we come to the point where we will discuss the form of your verdict and the process of your deliberations. You will be taking with you to the jury room a verdict form which reflects your findings. The verdict form reads as follows:

[Read Verdict Form]

You will be selecting a presiding juror after you retire to the jury room. That person will preside over your deliberations and be your spokesperson here in court. When you have completed your deliberations, your presiding juror will fill in and sign the verdict form.

Your verdict must represent the considered judgment of each of you. In order to return a verdict, it is necessary that each of you agree to that verdict. That is, your verdict must be unanimous.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgments. Each of you must decide the case for yourself, but do so only after an impartial

consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

We will be sending with you to the jury room all of the exhibits in the case. You may not have seen all of these previously and they will be there for your review and consideration. You may take a break before you begin deliberating but do not begin to deliberate and do not discuss the case at any time unless all eight of you are present together in the jury room. Some of you have taken notes. I remind you that these are for your own individual use only and are to be used by you only to refresh your recollection about the case. They are not to be shown to others or otherwise used as a basis for your discussion about the case.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

STEWART B. FRESH,)
)
 Plaintiff,)
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 v.) No. 02-2674 Ml/P
)
 ENTERTAINMENT U.S.A. of)
 TENNESSEE, INC. d/b/a)
 PLATINUM PLUS,)
)
 Defendant.)

V E R D I C T

1. Has the plaintiff proved by a preponderance of the evidence that the defendant ENTERTAINMENT U.S.A of TENNESSEE, INC. (Platinum Plus) is liable for an assault and battery on the plaintiff?

YES _____ NO _____

2. Has the plaintiff proved by a preponderance of the evidence that the defendant ENTERTAINMENT U.S.A of TENNESSEE, INC. (Platinum Plus) falsely imprisoned the plaintiff?

YES _____ NO _____

If your answer to Question No 1 and/or Question No. 2 is "YES," then you should proceed to the following questions. If your answer to both Question No. 1 **and** Question No. 2 is "NO," then the presiding juror should sign the verdict form and you should not go any further.

3. Under the laws given to you in these instructions, state the amount of compensatory damages, if any, that plaintiff STEWART B. FRESH should be awarded from the defendant Entertainment U.S.A of Tennessee, Inc. (Platinum Plus).

Medical Expenses: \$ _____

Compensatory Damages(other than medical expenses): \$ _____

4. Has the plaintiff shown by a clear and convincing evidence that the defendant acted either intentionally, recklessly, maliciously, or fraudulently?

YES _____ NO _____

PRESIDING JUROR

DATE

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