

U.S. DISTRICT COURT
DISTRICT OF WYOMING
CHEYENNE

JUN 17 2003 PM 4 26

IN THE UNITED STATES DISTRICT COURT
U.S. DISTRICT COURT
FOR THE DISTRICT OF WYOMING

GRACE UNITED METHODIST CHURCH,)
)
 Plaintiff,)
)
 UNITED STATES OF AMERICA,)
)
 Plaintiff-)
 Intervenor,)
)
 vs.)
)
 CITY OF CHEYENNE; CITY OF)
 CHEYENNE BOARD OF ADJUSTMENT;)
 DOROTHY WILSON, City of)
 Cheyenne Development Director;)
 and CHEYENNE CITY COUNCIL,)
)
 Defendants,)
)
 MOUNTVIEW PARK HOMEOWNERS')
 ASSOCIATION,)
)
 Defendant-)
 Intervenor.)

Case No. 02-CV-35-B

JURY INSTRUCTIONS

INSTRUCTION NO. 1

MEMBERS OF THE JURY:

Now that you have heard the evidence and the argument, it is my duty to instruct you about the applicable law. It is your duty to follow the law as I will state it and to apply it to the facts as you find them from the evidence in the case. Do not single out one instruction as stating the law, but consider the instructions as a whole. You are not to be concerned about the wisdom of any rule of law stated by me. You must follow and apply the law.

The lawyers have properly referred to some of the governing rules of law in their arguments. If there is any difference between the law stated by the lawyers and as stated in these instructions, you are governed by my instructions.

Nothing I say in these instructions indicates that I have any opinion about the facts. You, not I, have the duty to determine the facts.

You must perform your duties as jurors without bias or prejudice as to any party. The law does not permit you to be controlled by sympathy, prejudice, or public opinion. All parties expect that you will carefully and impartially consider all the evidence, follow the law as it is now being given to you, and reach a just verdict, regardless of the consequences.

INSTRUCTION NO. 2

There are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence--such as the testimony of an eyewitness. The other is indirect or circumstantial evidence--the proof of a chain of circumstances pointing to the existence or non-existence of certain facts.

As a general rule, the law makes no distinction between direct or circumstantial evidence, but simply requires that the jury find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

INSTRUCTION NO. 3

During the course of the trial, I occasionally asked questions of the witnesses, in order to bring out facts not then fully covered in the testimony. Please do not assume that I hold any opinion on the matters to which my questions may have related. Remember that you, as jurors, are at liberty to disregard all comments of the Court in arriving at your own findings as to the facts.

INSTRUCTION NO. 4

The evidence in the case will consist of the sworn testimony of the witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.

Statements and arguments of counsel are not evidence in the case, unless made as an admission or stipulation of fact. Where the attorneys on both sides stipulated or agreed to the existence of a fact, you must, unless otherwise instructed, accept the stipulation as evidence, and regard that fact as proved.

Any evidence as to which an objection is sustained by the court, and any evidence ordered stricken by the court, must be entirely disregarded. Anything you may have seen or heard outside the courtroom is not evidence, and must be entirely disregarded.

Some evidence is admitted for a limited purpose only. Where I instructed you that an item of evidence has been admitted for a limited purpose, you must consider it only for that limited purpose and for no other.

INSTRUCTION NO. 5

You are to consider only the evidence in the case. But in your consideration of the evidence you are not limited to the bald statements of the witnesses. In other words, you are not limited to what you see and hear as the witnesses testify. You are permitted to draw, from facts which you find have been proved, such reasonable inferences as seem justified in the light of your experience.

Inferences are deductions or conclusions which reason and common sense lead the jury to draw from facts which have been established by the evidence in the case.

Unless and until outweighed by evidence in the case to the contrary, you may find that official duty has been regularly performed; that private transactions have been fair and regular; that the ordinary course of business or employment has been followed; that things have happened according to the ordinary course of nature and the ordinary habits of life; and that the law has been obeyed.

INSTRUCTION NO. 6

During the trial of this case, certain testimony has been presented to you by way of deposition, consisting of sworn recorded answers to questions asked of the witness in advance of the trial by one or more of the attorneys for the parties to the case. The testimony of a witness who, for some reason, cannot be present to testify from the witness stand may be presented in writing under oath or on a video recording played on a television set. Such testimony is entitled to the same consideration, and is to be judged as to credibility, and weighed, and otherwise considered by the jury, insofar as possible, in the same way as if the witness had been present, and had testified from the witness stand.

INSTRUCTION NO. 7

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' present testimony.

If you believe 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 think it deserves.

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 may think it deserves.

An act or omission is "knowingly" done, if voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

INSTRUCTION NO. 8

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You may be guided by the appearance and conduct of the witness, or by the manner in which the witness testifies, or by the character of the testimony given, or by evidence to the contrary of the testimony given.

You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness's intelligence, motive and state of mind, and demeanor or manner while on the stand. Consider the witness's ability to observe the matters as to which he has testified, and whether he impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

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; and innocent mis-recollection, 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.

After making your own judgment, you will give the testimony of each witness such weight, if any, as you may think it deserves.

You may, in short, accept or reject the testimony of any witness in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying to the existence or non-existence of any fact. You may find that the testimony of a small number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

INSTRUCTION NO. 9

The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists as to those whom we call "expert witnesses." 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 expert, and may also state their reasons for the opinion.

You should consider each expert opinion received in evidence in this case, and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and 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.

INSTRUCTION NO. 10

In determining the weight to be given to an opinion expressed by any witness who did not testify as an expert witness, you should consider his credibility, the extent of his opportunity to perceive the matters upon which his opinion is based, and the reasons, if any, given for it. You are not required to accept such an opinion but should give it the weight to which you find it entitled.

INSTRUCTION NO. 11

You are not bound to decide any issue of fact in accordance with the testimony of any number of witnesses which does not produce in your minds belief in the likelihood of truth, as against the testimony of a lesser number of witnesses or other evidence which does produce such belief in your minds.

The test is not which side brings the greater number of witnesses, or presents the greater quantity of evidence; but which witness, and which evidence, appeals to your minds as being most accurate, and otherwise trustworthy.

INSTRUCTION NO. 12

The testimony of a single witness which produces in your minds belief in the likelihood of truth is sufficient for the proof of any fact, and would justify a verdict in accordance with such testimony, even though a number of witnesses may have testified to the contrary, if, after consideration of all the evidence in the case, you hold greater belief in the accuracy and reliability of the one witness.

INSTRUCTION NO. 13

The Plaintiff has the burden in a civil action, such as this, to prove every essential element of its claim by a preponderance of the evidence. If the Plaintiff should fail to establish any essential element of its claim by a preponderance of the evidence, you should find for Defendants as to that claim.

The Defendants have the burden in a civil action, such as this, to prove every essential element of their claims and affirmative defenses regarding compelling government interest, least restrictive means, and restrictive covenants by a preponderance of the evidence. If the Defendants should fail to establish any essential element of their claims and affirmative defenses by a preponderance of the evidence, you should find for Plaintiff as to that claim or affirmative defense.

"Establish by a preponderance of the evidence" means to prove that something is more likely so than not so. In other words, a preponderance of the evidence means such evidence as, when considered and compared with the evidence opposed to it, has more convincing force, and produces in your minds belief that what is sought to be proved is more likely true than not true. This standard does not require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.

In determining whether any fact in issue has been proved by a preponderance of the evidence you may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.

You may have heard of the term "proof beyond a reasonable doubt." That is a stricter standard that applies in criminal cases. It does not apply in civil cases such as this. You should, therefore, put it out of your minds.

When I instruct you that a party has the burden of proof on any proposition, or use the expression "if you find," or "if you decide," I mean that you must be persuaded, considering all the evidence in the case that the proposition is more probably true than not.

INSTRUCTION NO. 13-A

Any finding of fact you make must be based on probabilities, not possibilities. It may not be based on surmise, speculation, or conjecture.

INSTRUCTION NO. 14

In pertinent part, the Religious Land Use and Institutionalized Persons Act ("RLUIPA") provides:

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution - (A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest.

INSTRUCTION NO. 15

The Religious Land Use and Institutionalized Persons Act includes within the definition of "government" a municipality created under state authority and any branch, department, agency, instrumentality, or official of that municipality.

INSTRUCTION NO. 16

The term "land use regulation" as used in the Religious Land Use and Institutionalized Persons Act means a zoning law, or the application of such law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership or other property interest in the regulated land.

INSTRUCTION NO. 17

The term "religious exercise" as used in the Religious Land Use and Institutionalized Persons Act includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief. The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.

INSTRUCTION NO. 18

In order to prove the essential elements of Plaintiff's claim under RLUIPA, the burden is on Plaintiff to establish by a preponderance of the evidence each of the following:

- First:** The City of Cheyenne's land use regulation, or the Board of Adjustment's application of that land use regulation, imposes a substantial burden on Grace United Methodist Church's exercise of religion;
- Second:** Grace United Methodist Church's operation of the child care or day care center is sincere exercise of religion; and
- Third:** Grace United Methodist Church is a religious assembly or institution.

INSTRUCTION NO. 19

A government regulation "substantially burdens" the exercise of religion if the regulation: (1) significantly inhibits or constrains conduct or expression that manifests some tenet of the institution's belief; (2) meaningfully curtails an institution's ability to express adherence to its faith; or (3) denies an institution reasonable opportunities to engage in those activities that are fundamental to the institution's religion.

Thus, for a burden on religion to be "substantial," the government regulation must compel action or inaction with respect to the sincerely held belief; mere inconvenience to the religious institution is insufficient.

INSTRUCTION NO. 20

A religious belief is "sincere" if it is truly held and religious in nature.

INSTRUCTION NO. 21

If the Plaintiff has proved the essential elements of its claim under RLUIPA, the burden is on the Defendants to establish each of the following by a preponderance of the evidence:

- First:** The City of Cheyenne's application of its land use regulation (zoning ordinance 3271) furthers a compelling governmental interest; and
- Second:** The City of Cheyenne's application of its land use regulation (zoning ordinance 3271) was the least restrictive means of furthering the compelling governmental interest.

INSTRUCTION NO. 22

A compelling governmental interest is a vital interest, a paramount interest, or an interest of the highest order. In other words, for the government to demonstrate that an interest is "compelling," it must show that the interest is more than a legitimate public interest. Rather, the interest must truly be "compelling" and designed to eliminate the gravest abuses that endanger paramount interests.

INSTRUCTION NO. 23

A governmental interest is the least restrictive means of furthering a governmental interest if there are no other less restrictive alternative forms of regulation that would further the governmental interest.

INSTRUCTION NO. 24

Defendant-Intervenor, Mountview Park Homeowner's Association, has the burden to prove that restrictive covenants restrict Plaintiff's use of its property, and that Plaintiff's proposed child care or day care center violates restrictive covenants on the property.

Restrictive covenants are contractual in nature and must be given their plain meaning. Restrictive covenants must be construed as a whole in view of their underlying purposes. Construction should, if possible, give effect to all provisions contained in the covenants.

It is for you to determine whether Plaintiff is bound by restrictive covenants, and whether such covenants would be violated by Plaintiff's operation of the child care or day care center.

INSTRUCTION NO. 24-A

A "nuisance" is a class of wrong, which arises from an unreasonable, unwarranted, or unlawful use, by a person of his own property, working an obstruction or injury to the right of another.

INSTRUCTION NO. 25

Damages must be reasonable. If you should find that the Plaintiff is entitled to a verdict, you may award it only such damages as will reasonably compensate it for such injury and damage as you find from a preponderance of the evidence in the case.

Any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under law to "mitigate" those damages - that is, to take advantage of any reasonable opportunity the person may have had under the circumstances to reduce or minimize the loss or damage.

INSTRUCTION NO. 26

The fact that I have instructed you as to the proper measure of damages should not be considered as intimating any view of mine as to which party is entitled to your verdict in this case. Instructions as to the measure of damages are given for your guidance, in the event you should find in favor of the Plaintiff from a preponderance of the evidence in the case in accordance with the other instructions.

INSTRUCTION NO. 27

It is proper to add the caution that nothing said in these instructions and nothing in the verdict is meant to suggest or convey in any way or manner any intimation as to what verdict I think you should find. What the verdict shall be is your sole and exclusive duty and responsibility.

INSTRUCTION NO. 28

Upon retiring to the jury room, you will select one member to act as your foreman or forewoman. The foreman or forewoman will preside over your deliberations, and will be your spokesperson here in Court. A special verdict form has been prepared for your convenience. You will take this form to the jury room.

The answer to each question must be the unanimous answer of the jury. Your foreman or forewoman will write the unanimous answer of the jury in the spaces provided opposite each question.

INSTRUCTION NO. 29

If it becomes necessary during your deliberations to communicate with the Court, you may send a note by a bailiff, signed by your foreman/forewoman or by one or more members of the jury. No member of the jury should ever attempt to communicate with the Court by any means other than a signed writing, and the Court will never communicate with any member of the jury on any subject touching the merits of the case otherwise than in writing, or orally here in open Court.

You will note from the oath about to be taken by the bailiffs that they too, as well as all other persons, are forbidden to communicate in any way or manner with any member of the jury on any subject touching the merits of the case.

Bear in mind also that you are never to reveal to any person - not even to the Court - how the jury stands, numerically or otherwise, on the questions before you, until after you have reached a unanimous verdict.