IN THE UNITED STATE DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

MALCOLM DOUGLAS CLARK, II,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**No. 2-98-0103**
	)	**Magistrate Judge Brown**
RICK BROWN, individually and in his official capacity as Police Officer for the City of Livingston; STEVE LEFFEW, individually and in his official capacity as Police Officer for the City of Livingston; and ROGER PHILLIPS individually and in his official capacity as Chief of Police for the City of Livingston,	)	**JURY DEMAND**
	)	
Defendants.	)	

J U R Y C H A R G E

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I. Introduction

Members of the jury, you have now heard all the evidence in the case, as well as the closing arguments. Now it is time for me to instruct you about the law that you must follow in deciding this case. I will start by explaining your duties as jurors; then, I will explain the theories of the parties; then, I will explain certain principles of law; then, I will explain the elements of the Plaintiff's claims; then, I will explain the Defendant's defenses to the Plaintiff's claims; then, I will explain certain general rules that apply in every civil 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.

II. Jurors' Duties

You have two main duties as jurors. The first one is to decide what the facts are from the evidence that you saw and heard here in Court. Deciding what the facts are is your job, not mine, and nothing that I have said or done during this trial was meant to influence your decision about the facts in any way.

Your second duty is to take the law that I give you and apply it to the facts. It is my job to instruct you about the law, and you are bound by the oath that you took at the beginning of the trial to follow the instructions that I give you, even if you personally disagree with them. This includes the instructions that I gave you before and during the trial and these instructions. All the instructions are important, and you should consider them together as a whole. The parties have talked about the law during their arguments. But if what they said is different from what I say, you must follow what I say. What I say about the law controls.

Perform these duties fairly. Do not let any sympathy or prejudice that you may feel toward one side or the other influence your decision in any way.

III. Theories of the Parties

I will now instruct you on the specific claims and defenses made by the parties in this case and the law that applies to the case. As members of the jury, it is your duty to determine the facts and consider whether they support the theories of the Plaintiff or the theories of the Defendant. In reaching your conclusions, you are to apply the rules of law that I provide, to the facts you ascertain from the evidence which has been presented in Court.

(1) The Plaintiff's Theory

The following is the Plaintiff's theory of the case.

The Plaintiff was sitting in his car on the courthouse square along with Brian Keith Karper late one evening in the City of Livingston. Officer Brown pulled in behind the Plaintiff's car, and accused him of blowing his horn, which was allegedly against the law in the City of Livingston. Smelling alcohol on the Plaintiff's breath, Officer Brown demanded the Plaintiff to submit to field sobriety tests. Officer Brown then determined the Plaintiff should be arrested and proceeded to take him into custody. By this time, Officer Leffew had driven up to the scene and assisted Officer Brown in seizing the body of the Plaintiff. During the process of arresting the Plaintiff, Officer Brown injured the Plaintiff's thumb, and Officer Leffew sprayed the Plaintiff with mace. The Plaintiff

contends that the actions of the Defendants were unnecessary, unreasonable, and an excessive use of force under the circumstances, which is a clear violation of the Fourth Amendment.

(2) The Defendant's Theory

The following is the Defendant's theory of the case.

Defendants contend that the minimal force used to accomplish Plaintiff's arrest was reasonable and justified under the circumstances. Plaintiff was intoxicated and had failed a field sobriety test. He had lied to Officer Brown. He was uncooperative, belligerent and hostile towards Officer Brown. He refused to place his hands behind his back, despite being asked to do so by Officer Brown on several occasions. Officers Brown and Leffew had no choice under the circumstances but to use physical force to place Plaintiff in custody. When they were unable to force Plaintiff's hands behind his back using physical force, Officer Brown was justified in using pepper spray against Plaintiff. Neither Officer struck Plaintiff at any time, or used any more force than was reasonable or necessary to protect themselves and place Plaintiff in custody.

Chief Roger Phillips had absolutely no involvement in the altercation between Plaintiff and the two officers. He had no idea that the incident even

occurred until the following Monday. Chief Phillips does not believe that Officers Brown or Leffew did anything wrong. Nevertheless, he cannot be held liable for their actions under federal law.

IV. Burden of Proof

Now that you have heard the parties' respective theories, there are several principles of law that I must explain to you. You must apply these rules of law to the facts as you find them.

The Plaintiff has the burden of proof in this case. The party who has the burden of proof must carry that burden by a preponderance of the evidence. This means, simply, the greater weight of the evidence. It may be helpful to envision a set of balancing scales. After considering all the proof on a particular element of the Plaintiff's case, the scales must be tipped in favor of the Plaintiff on that issue, be it ever so slightly, for the Plaintiff to prevail on that issue.

A preponderance of the evidence, thus, means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your minds a belief that what is sought to be proved is more likely true than not true. In determining whether any fact in issue has been proved by a preponderance of the evidence, you may consider the testimony of all the witnesses, regardless of who may have called them, and all the exhibits received in evidence, regardless of who may have produced them.

V. Substantive Law

In this case, the Plaintiff has brought a cause of action against the Defendants under a federal statute called 42 U.S.C. § 1983. Section 1983 of Title 42 of the United States Code provides that any citizen may seek redress in this court by way of damages against any person who, under color of state law or custom, intentionally deprives that citizen of any rights, privileges, or immunities secured or protected by the constitution or laws of the United States.

In order to prove his claim under this statute, the plaintiff must establish by a preponderance of the evidence each of the following elements:

(1) the defendant intentionally committed acts which operated to deprive the plaintiff of a right secured by the Constitution of the United States;

(2) the defendant acted under color of the authority of the State of Tennessee; and

(3) that the defendant's acts were the legal cause of the plaintiff's damages.

In this case you are instructed that the defendant was acting under color of state law at the time of the acts complained of. The parties have stipulated that this element has been established. The plaintiff alleges that the defendant

used excessive force in arresting him. You must determine whether the Plaintiff has proved by a preponderance of the evidence that Officer Brown and/or Officer Leffew used excessive force when they arrested the Plaintiff.

In making a lawful arrest, an officer has the right to use such force as is necessary under the circumstances to complete the arrest. However, the use of force by officers simply because the subject is argumentative or contentious is illegal. A lack of provocation or need to use force would make any use of force excessive. The use of more force than is necessary or of force for an improper purpose is illegal.

You must determine whether the force used in making the arrest of the plaintiff was unnecessary, unreasonable or excessively violent. The force used in making an arrest is unnecessary, unreasonable or excessively violent if the arresting officer exceeded that degree of force which a reasonable and prudent law enforcement officer would have applied in making the arrest under the same circumstances.

The proper application of this standard requires a careful attention to the facts and circumstances of the particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting

to evade arrest by flight. For example, an officer's reasonable use of force to overcome resistance to arrest does not violate a person's Fourth Amendment rights even if injury results from the use of force.

The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight, allowing for the fact that police officers are often forced to make split-second judgments-- in circumstances that are tense, uncertain, and rapidly evolving--about the amount of force that is necessary in a particular situation.

This reasonableness inquiry is an objective one: the question is whether the officer's actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.

In addition to his claims against police officers whom the plaintiff claims violated his constitutional rights, the plaintiff is suing their superior officer, the chief of police, Roger Phillips. In order to find Chief Roger Phillips liable to the Plaintiff for his damages, you must find that he personally directed, or had actual knowledge of and acquiesced in the constitutional violation. You may

not find him liable simply by virtue of his position as the superior of officers Brown and Leffew.

VI. DAMAGES

If you find that the defendants are liable, you must award the amount you find by a preponderance of the evidence to be full and just compensation for all of the plaintiff's damages. You also will be asked to determine if the Defendant is liable for punitive damages, and, if so, you will be asked to fix the amount of those damages. Because the method of determining punitive damages and compensatory damages differ, I will instruct you separately on punitive damages. The instructions I now give you apply only to your award, if any, of compensatory damages. Compensatory damages are not allowed as a punishment against a party. Such damages cannot be based on speculation, for it is only actual damages—what the law calls compensatory damages—that are recoverable. However, compensatory damages are not restricted to actual loss of time or money; they include both the mental and physical aspects of injury, tangible and intangible. They are an attempt to make the plaintiff whole, or to restore him to the position he would have been in if the accident had not happened.

You should consider the following elements of damages, to the extent you find that the plaintiff has established such damages by a preponderance of

the evidence: physical pain and suffering and the effect of the plaintiff's injuries and inconvenience on the normal pursuits and pleasures of life; mental anguish; and medical expenses.

Some of these damages, such as mental or physical pain and suffering, are intangible things about which no evidence of value is required. In awarding these damages, you are not determining value, but you should award an amount that will fairly compensate the plaintiff for his injuries.

Any award you make to the plaintiff is not subject to income tax; neither the state nor the federal government will tax it. Therefore, you should determine the amount that plaintiff is entitled to receive without considering the effect of taxes upon it.

VII. Punitive Damages

If you find that the defendant is liable for the plaintiff's injuries, you must award the plaintiff the compensatory damages that he has proven. You also may award punitive damages, if the plaintiff has proved that the defendant's conduct was motivated by evil motive or intent, or if the defendant's conduct constituted reckless or callous indifference to the federally protected rights of the plaintiff. One acts with reckless indifference to the rights of others when he acts in disregard of a high and excessive degree of danger about which he knows or which would be apparent to a reasonable person in his condition.

If you determine that the defendant's conduct was so shocking and offensive as to justify an award of punitive damages, you may exercise your discretion to award those damages. Should you determine that punitive damages are appropriate, the parties will put on proof to help you determine the proper amount of punitive damages, and I will instruct you on how you are to calculate such an amount. You should not consider the amount of any punitive damages award at this time.

VIII. General Rules

(1) Evidence Defined

You must make your decision based only on the evidence that you saw and heard here in Court. Do not let rumors, suspicions, or anything else that you may have seen or heard outside of Court influence your decision in any way.

The evidence in this case includes only what the witnesses said while they were testifying under oath and the exhibits that I allowed into evidence. Nothing else is evidence. My legal rulings are not evidence. And my comments and questions are not evidence. The opening and closing statements by the lawyers are not evidence. Questions asked by the lawyers of witnesses are not evidence.

During the trial I sustained objection to some questions that were asked. You must completely ignore those questions. Do not even think about them. Do not speculate about what a witness might have said. These questions are not evidence, and you are bound by your oath not to let them influence your decision in any way.

Make your decision based only on the evidence, as I have defined it here, and nothing else.

(2) Consideration of Evidence

You should use your common sense in weighing the evidence. Consider it in light of your everyday experience with people and events, and give it whatever weight you believe it deserves. If your experience tells you that certain evidence reasonably leads to a conclusion, you are free to reach that conclusion.

(3) Direct and Circumstantial Evidence

Now, some of you may have heard the terms "direct evidence" and circumstantial evidence."

Direct evidence is simply evidence like the testimony of an eyewitness which, if you believe it, directly proves a fact. If a witness testified that he saw it raining outside, and you believed him, that would be direct evidence that it was raining.

Circumstantial evidence is simply a chain of circumstances that indirectly proves a fact. If you look out the window you can see if it is raining. That is direct evidence. If this courtroom had no windows and someone walked into the courtroom wearing a raincoat covered with drops of water and carrying a wet umbrella, that would be circumstantial evidence from which you could

conclude that it was raining. However, you could not go further and decide how long it had been raining, only that it was raining.

It is your job to decide how much weight to give the direct and circumstantial evidence. The law makes no distinction between the weight that you should give to either one. Neither 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.

(4) Evidence for a Limited Purpose

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

(5) Depositions - Use as Evidence

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, prior to 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 or on a video recording under oath. Such testimony is entitled to the same consideration, and is to be judged as to credibility, weighed and otherwise

considered by the jury, in so far as possible, in the same way as if the witness had been present and had testified from the witness stand.

(6) Credibility of Witness

Now, I have said that you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate. You are the sole judges of the credibility or "believability" of each witness and the weight to be given to that witness' testimony. In weighing the testimony of a witness, you should consider the circumstances under which each witness has testified. Consider the witness' manner of testifying and the opportunity to observe or acquire knowledge concerning the facts about which the witness testified. Consider the witness' candor, fairness and intelligence; and the extent to which the witness has been supported or contradicted by other credible evidence. Consider also any relationship which the witness may have to the Plaintiff or the Defendant; how the 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. 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.

A witness may be discredited or "impeached" by contradictory evidence, by a showing that the witness testified falsely concerning a material matter, 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 a person is shown to have knowingly testified falsely concerning any important or material matter, you obviously have a right to distrust the testimony of such an individual concerning other matters. You may reject all of the testimony of that witness or give it such weight or credibility as you may think it deserves.

Discrepancies in a witness' testimony or between his testimony and that of others do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience, and innocent misrecollection is not uncommon. It is also possible that two persons witnessing an incident or a transaction may see or hear it differently. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance.

(7) Expert Testimony

You have also heard the testimony of expert witnesses. An expert witness is one who possesses special or technical knowledge or skill upon the subject about which the witness testifies, that is, a subject with which ordinary people are not familiar. An expert witness differs from the ordinary witness in that an expert is permitted to express opinions as to the results of proven facts, although an expert witness may also testify to the facts themselves, as any other witness. Expert opinions are not to be accepted as facts. You should weigh carefully those opinions by considering the expert's training, experience, and sources of knowledge, as well as the expert's prejudices, if any appear. Expert witnesses are frequently paid special compensation by the party for whom they testify. Such compensation is entirely proper. Yet, because of it, you should receive the expert's testimony with caution and weigh it carefully.

When there is a conflict between expert testimony and testimony as to the facts, you must determine the relative weight of the evidence. You are not bound to accept expert testimony in preference to other testimony, and you may consider the facts upon which the expert relied in reaching opinions or conclusions. If you find that the expert's opinions are inconsistent with proven facts, you may disregard the testimony of the expert completely.

*****GIVE ONLY IF ARGUED*****.

(8) Potential Witnesses & Exhibits

The law does not require a party to call as witnesses all persons who may have been present at any time or place involved in the case, or who may appear to have some knowledge of the matters in issue at this trial. Nor does the law require any party to produce as exhibits all papers and things mentioned in the evidence in this case.

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(9) Statements of Counsel

You must not consider as evidence any statements of counsel made during the trial. As to any question to which an objection was sustained, you must not speculate on what the answer might have been or on 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 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 and may be considered only as it supplies meaning to the answer.

(10) Lawyers' Objections

The lawyers objected to some of the things that were said or done during the trial. Do not hold that against either side. They have a duty to object whenever they think that something is not permitted by the rules of evidence. Those rules are designed to make sure that both sides receive a fair trial. And do not interpret my rulings on their objections as any indication of how I think the case should be decided. My rulings were based on the rules of evidence, not on how I feel about the case. Remember that your decision must be based only on the evidence that you saw and heard here in Court.

Remember also that any statements, objections or arguments made by the lawyers are not evidence in the case. Lawyers try to point out those things that are most significant or most helpful to their side of the case, and in so doing, to call your attention to certain facts or inferences that might otherwise escape your notice. In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case.

IX. Deliberations and Verdict

(1) Introduction

That concludes the part of my instructions explaining the rules for considering the testimony and evidence. Now let me finish up by explaining some things about your deliberations in the jury room and your possible verdicts.

The first thing that you should do in the jury room is choose someone to be your foreperson. You may select the foreperson in any fair and reasonable way. The foreperson shall preside over your deliberations and speak for the jury in the Courtroom when you have reached your verdict. The case should not be decided simply on what the foreperson wants. You each must exercise your independent judgment. The foreperson's opinion carries no more weight than any other juror's opinion.

Once you start deliberating, do not talk to the court security officer, or to me, or to anyone else except each other about the case. If you have any questions or messages, you must write them down on a piece of paper, sign them, and then give them to the court security officer. The officer will give them to me, and I will respond as soon as I can. I may have to talk to the lawyers about what you have asked, so it may take me some time to get back to you.

Any questions or messages normally should be sent to me through your foreperson and must be in writing.

One more thing about messages. Do not ever write down or tell anyone how you stand on your votes. That should stay secret until you are finished.

(2) Experiments, Research, and Investigation

Remember that you must make your decision based only on the evidence that you saw and heard here in Court. You may consider the exhibits admitted into evidence. Do not try to gather any information about the case on your own while you are deliberating. For example, do not conduct any experiments inside or outside the jury room; do not bring any books with you to help you with your deliberations, and do not conduct any independent research, reading, or investigation about the case. You will be permitted to take with you any notes you may have taken during the course of the trial.

Make your decision based only on the evidence that you saw and heard here in Court.

(3) Unanimous Verdict

Your verdict, whether it is for the Plaintiff or for the Defendant, must be unanimous. In other words, every one of you must agree on the verdict.

After you reach a verdict, and it is announced in the courtroom, I will ask each of you if it is in fact your verdict. This is to make sure the verdict is, in fact, unanimous.

(4) Duty to Deliberate

Now that all the evidence is in and the arguments are completed, you are free to talk about the case in the jury room. In fact, it is your duty to talk with each other about the evidence and to make every reasonable effort you can to reach unanimous agreement. Talk with each other, listen carefully and respectfully to each other's views, and keep an open mind as you listen to what your fellow jurors have to say. Try your best to work out your differences. Do not hesitate to change your mind if you are convinced that other jurors are right and that your original position was wrong. But do not ever change your mind just because other jurors see things differently, or just to get the case over with. In the end, your vote must be exactly that -- your own vote. It is important for you to reach unanimous agreement, but only if you can do so honestly and in good conscience. While you will be permitted to take your notes into the jury room, you must use them only to refresh your own recollection — do not attempt to persuade another juror that the testimony should be construed as you construed it in your notes. Your notes are not evidence, but are allowed only

for your personal benefit in forming your own personal conclusion. You may attempt to persuade your fellow jurors that this conclusion is correct, but not by referring them to your notes.

No one will be allowed to hear your discussions in the jury room, and no record will be made of what you say. So you should all feel free to speak your minds. Listen carefully to what the other jurors have to say, and then decide for yourself if the Plaintiff has proved his claim for damages against the Defendant.

(5) Court Has No Opinion

Let me finish up by repeating something that I said to you earlier. Nothing that I have said or done during this trial was meant to influence your decision in any way. You decide for yourselves whether or not the Plaintiff has proved his claims against the Defendant.

Thank you for your service as jurors. You may now retire to your deliberations.