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MAY 15 2013

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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

CLAYTON WALKER,
Plaintiff,

vs.

SHAWN PETERSON and
BRIAN FRANKLIN, in their individual
capacity,
Defendants.

CIV. 12-4078-KES

**FINAL
INSTRUCTIONS
TO THE JURY**

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FINAL INSTRUCTION

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VERDICT FORM

FINAL INSTRUCTION NO. 1 – INTRODUCTION

Members of the jury, the instructions I gave at the beginning of the trial and during the trial remain in effect. I now give you some additional instructions.

You must continue to follow the instructions I gave you earlier, as well as those I give you now. You must not single out some instructions and ignore others, because **all** are important. This is true even though some of those I gave you at the beginning of and during the trial are not repeated here.

The instructions I am about to give you, as well as the preliminary instructions given to you at the beginning of the trial, are in writing and will be available to you in the jury room. This does not mean they are more important than my oral instructions. **All** instructions, whenever given and whether in writing or not, must be followed.

Neither in these instructions nor in any ruling, action, or remark that I have made during the course of this trial have I intended to give any opinion or suggestion as to what your verdict should be.

FINAL INSTRUCTION NO. 2 – BURDEN OF PROOF

In civil actions, the party who asserts the affirmative of an issue must prove that issue by the greater weight of the evidence.

Greater weight of the evidence means that after weighing the evidence on both sides there is enough evidence to convince you that something is more than likely true than not true. In the event that the evidence is evenly balanced so that you are unable to say that the evidence on either side of an issue has the greater weight of the evidence, then your finding upon the issue must be against the party who has the burden of proving it. In determining whether or not an issue has been proved by the greater weight of the evidence, you should consider all of the evidence bearing upon that issue, regardless of who produced it.

FINAL INSTRUCTION NO. 3 – IMPEACHMENT

In Preliminary Instruction No. 3, I instructed you generally on the testimony of witnesses. I now give you this further instruction on how the testimony of a witness can be “impeached” and how you may treat certain evidence.

A witness may be discredited or impeached by:

1. Contradictory evidence
2. A showing that the witness testified falsely concerning a material matter
3. Evidence that at some other time the witness said or did something, or failed to say or do something, that is inconsistent with the witness’s present testimony
 - a. If earlier statements of a witness were admitted into evidence, they were not admitted to prove that the contents of those statements were true.
 - b. You may consider those earlier statements only to determine whether you think they are consistent or inconsistent with the trial testimony of the witness, and therefore whether they affect the credibility of that witness.

If you believe that a witness has been discredited or impeached, it is your exclusive right to give that witness’s testimony whatever weight you think it deserves.

FINAL INSTRUCTION NO. 4 – EXCESSIVE FORCE

Walker claims that defendants violated his constitutional rights by using excessive force against him. Your verdict must be for Walker on his excessive force claim if Walker has proved all of the following elements by the greater weight of the evidence:

One, defendants sprayed Walker with Oleoresin Capsicum (pepper) spray and/or hit him when arresting him;

Two, the force used was excessive because it was not reasonably necessary to arrest Walker;

In determining whether the force was “excessive,” you must consider such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of the injury inflicted, and whether a reasonable officer on the scene, without the benefit of hindsight, would have used that much force under similar circumstances.

You should keep in mind that the decision about how much force to use often must be made in circumstances that are tense, uncertain, and rapidly changing. You must determine whether the defendants’ actions were reasonable in the light of the facts and circumstances confronting the defendants without regard to the defendants’ states of mind, intentions, or motivations.

And third, as a direct result, Walker was injured;

If any of the above elements has not been proved by the greater weight of the evidence, then your verdict must be in favor of the defendants and against Walker on this claim.

FINAL INSTRUCTION NO. 5 – UNLAWFUL ARREST

Walker claims to have been unlawfully arrested. Under the law of the United States and the State of South Dakota, police officers may not arrest a person without an arrest warrant unless they have probable cause to believe that a crime has been committed and that the person in question has committed that crime. Probable cause exists if the facts and circumstances known to the officer and of which the officer had reasonable, trustworthy information are sufficient to warrant a prudent person to believe that the suspect has committed a crime.

Under the law of the State of South Dakota, a police officer may, without a warrant, arrest a person for a public offense committed or attempted in his presence. It is a public offense for any person to obstruct a law enforcement officer, to engage in disorderly conduct, to maintain a place constituting a common nuisance, and to resist arrest.

In determining whether defendant police officers had reasonable grounds to believe that a person has committed an offense, the facts known to defendant police officers need not meet the standard of conclusiveness upon which a conviction must be based. Rather, the actions of defendant police officers in making an arrest are to be measured by the test of what a reasonable person would have believed under the same circumstances at the time of the arrest.

Your role as the jury is to determine, by the greater weight of the evidence, the facts on which the arrest is based by answering the following questions:

- a. **Did Walker strike defendant Peterson before Walker attempted to close the door to his apartment? Yes or no.**
- b. **Did Walker forcibly remove his driver's license from defendant Peterson's hand before Walker attempted to close the door to**

his apartment? Yes or no.

- c. Did Walker use the door to his apartment to forcibly exclude defendants Peterson and Franklin from his apartment? Yes or no.**

If you answer yes to any one of these questions, your verdict should be in favor of defendants on Walker's claim for unlawful arrest. If you answer no to all three of the questions, your verdict should be in favor of Walker on his claim for unlawful arrest.

FINAL INSTRUCTION NO. 6 – VALIDITY OF ARREST

The validity of an arrest does not depend on whether the person arrested actually committed a crime, whether he is later acquitted of the offense for which he is arrested, or whether the charges are later dismissed.

FINAL INSTRUCTION NO. 7 – TRESPASS

Trespass occurs when a person intentionally and without consent enters the property of another. Your verdict must be for Walker on his trespass claim if Walker has proved all of the following elements by the greater weight of the evidence:

One, defendants intended to enter Walker’s apartment;

Two, such entrance actually occurred;

Three, Walker did not consent to the entrance;

And four, defendants did not have authority to enter.

Any law enforcement officer having authority to make an arrest may forcibly enter a dwelling for the purpose of making the arrest if, after giving reasonable notice of his intention, the law enforcement officer is refused admittance and exigent circumstances justified a warrantless arrest.

“Exigent circumstances” includes when a law enforcement officer is in hot pursuit of a fleeing suspect. Hot pursuit may include any pursuit of a suspect, regardless of the length. The fact that the pursuit ends almost as soon as it begins does not render it any less of a hot pursuit.

When there is probable cause to believe that only a minor offense has been committed, application of the exigent circumstances exception to justify a home entry should rarely be applied.

If any of the above elements has not been proved by the greater weight of the evidence, then your verdict must be in favor of the defendants and against Walker on this claim.

FINAL INSTRUCTION NO. 8 – SEPARATE LIABILITY OF EACH DEFENDANT

Each party is entitled to have the case decided solely on the evidence which applies to that party. In considering the evidence, you should determine each defendant's liability, if any, separately.

FINAL INSTRUCTION NO. 9 – ACTUAL DAMAGES

If you find in favor of Walker, then you must award Walker such sum as you find will fairly and justly compensate Walker for any damages you find he sustained as a direct result of defendants' wrongful conduct. You should consider the following elements of damages:

(1) The physical pain and emotional suffering Walker has experienced and is reasonably certain to experience in the future; the nature and extent of the injury; whether the injury is temporary or permanent; and any aggravation of a pre-existing condition; and

(2) The reasonable value of the medical care and supplies reasonably needed by and actually provided to Walker.

Remember, throughout your deliberations you must not engage in speculation, guess, or conjecture, and you must not award any damages under this Instruction by way of punishment or through sympathy.

FINAL INSTRUCTION NO. 10 – DUTY TO MITIGATE

If you find Walker was injured as a result of conduct by defendants, you must determine whether Walker could have done something to lessen the harm suffered. Defendants have the burden to prove by the greater weight of the evidence that Walker could have lessened or reduced the harm done to him and that Walker failed to do so. If defendants establish by the greater weight of the evidence that Walker could have reduced the harm done to him but failed to do so, Walker is entitled only to damages sufficient to compensate for the injury that he would have suffered had he taken appropriate action to reduce the harm.

FINAL INSTRUCTION NO. 11 – NOMINAL DAMAGES

If you find in favor of Walker under Instruction 4, 5, or 7, but you find that Walker's damages have no monetary value, then you must return a verdict for Walker in the nominal amount of One Dollar (\$1.00).

FINAL INSTRUCTION NO. 12 – PUNITIVE DAMAGES

In addition to the damages mentioned in other instructions, the law permits the jury under certain circumstances to award punitive damages.

If you find in favor of Walker under Instruction 4, 5, or 7, and if it has been proved that the conduct of defendants was malicious or recklessly indifferent to Walker's civil rights, then you may, but are not required to, award Walker an additional amount of money as punitive damages for the purposes of punishing defendants for engaging in such misconduct and deterring defendants and others from engaging in similar misconduct in the future. You should presume that Walker has been made whole for his injuries by the damages awarded under Instruction 9 or 11.

If you decide to award punitive damages, you should consider the following in deciding the amount of punitive damages to award:

- (1) How reprehensible defendants' conduct was. In this regard, you may consider whether the harm suffered by Walker was physical; whether there was violence, deceit, intentional malice, reckless disregard for human health or safety; and whether there was any repetition of the wrongful conduct and past conduct of the sort that harmed Walker;
- (2) How much harm defendants' wrongful conduct caused Walker; and
- (3) What amount of punitive damages, in addition to the other damages already awarded, is needed, considering defendants' financial conditions, to punish defendants for their wrongful conduct toward Walker and to deter defendants and others from similar wrongful conduct in the future.

The amount of any punitive damages award should bear a reasonable relationship to the harm caused to Walker.

FINAL INSTRUCTION NO. 13 – EFFECT OF DAMAGES INSTRUCTIONS

The fact that I have instructed you as to the proper measure of damages should not be considered as indicating 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 only in the event you should find in favor of Walker in accordance with the other instructions.

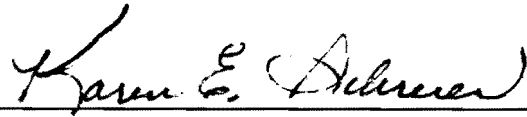
FINAL INSTRUCTION NO. 14 – DUTIES DURING DELIBERATIONS

You must follow certain rules while conducting your deliberations and returning your verdict:

1. Select a foreperson to preside over your discussions and to speak for you here in court.
2. Discuss this case with one another in the jury room. You should try to reach an agreement if you can do so without violence to individual judgment, because a verdict must be unanimous.
3. Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors, and listened to the views of your fellow jurors.
4. Do not be afraid to change your opinions if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right, or simply to reach a verdict. Remember at all times that you are not partisans. You are judges—judges of the facts. Your sole interest is to seek the truth from the evidence in the case.
5. If you need to communicate with me during your deliberations, you may send a note to me through the marshal or court security officer, signed by one or more jurors. I will respond as soon as possible either in writing or orally in open court. **Remember that you should not tell anyone—including me—how your votes stand numerically.**
6. Your verdict must be based solely on the evidence and on the law which I have given to you in my instructions. The verdict must be unanimous. Nothing I have said or done is intended to suggest what your verdict should be—that is entirely for you to decide.
7. The verdict form is simply the written notice of the decision that

you reach in this case. You will take this form to the jury room, and when each of you has agreed on the verdict, your foreperson will fill in the form, sign and date it, and advise the marshal or court security officer that you are ready to return to the courtroom.

Dated May 15, 2013.

A handwritten signature in cursive script, reading "Karen E. Schreier". The signature is written in black ink and is positioned above a horizontal line.

KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE