

FILED

JUL 21 2016

[Signature]
CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

TAMRA WELBIG,

Plaintiff,

vs.

JORDAN HANSEN; JORDAN MCCASKILL;
and JUSTINA HILMOE,

Defendants.

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CIV 15-4085

JURY INSTRUCTIONS

INSTRUCTION NO. 1

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, of course, 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 trial are not repeated here.

The instructions I am about to give you now are in writing and will be available to you in the jury room. I emphasize, however, that this does not mean they are more important than my earlier instructions. Again, **all** instructions, whenever given and whether in writing or not, must be followed.

Eighth Circuit Jury Instructions, No. 3.01 (2013) (modified).

INSTRUCTION NO. 2

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.

Eighth Circuit Model Jury Instructions, No. 3.02 (2013) (modified).

INSTRUCTION NO. 3

As I stated earlier, it is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in this case. “Evidence” includes the testimony of witnesses, documents and other things received as exhibits, any facts that are stipulated – that is, formally agreed to by the parties – and any facts that are judicially noticed – that is, facts which I say you may, but are not required to, accept as true, even without evidence.

Certain things are not evidence. I will list those things for you now:

1. Statements, arguments, questions and comments by lawyers representing the parties in the case are not evidence.
2. Objections are not evidence. Lawyers have a right to object when they believe something is improper. You should not be influenced by the objection. If I sustained an objection to a question, you must ignore the question and must not try to guess what the answer might have been.
3. Testimony that I have stricken from the record, or have told you to disregard, is not evidence and must not be considered.
4. Anything you have seen or heard about this case outside the courtroom is not evidence, unless I specifically told you otherwise during the trial.

A particular item of evidence is sometimes received for a limited purpose only. That is, it can be used by you for only one particular purpose, and not for any other purpose. When this

INSTRUCTION NO. 3, page 2

occurred during the trial, I instructed you on the purposes for which the item can and cannot be used.

Finally, some of you may have heard the terms “direct evidence” and “circumstantial evidence.” You are instructed that you should not be concerned with those terms. The law makes no distinction between direct and circumstantial evidence. You should give all evidence the weight and value you believe it is entitled to receive.

INSTRUCTION NO. 4

If any reference by the Court or by counsel to matters of testimony or exhibits does not coincide with your own recollection of that evidence, it is your recollection which should control during your deliberations and not the statements of the Court or of counsel.

You are the sole judges of the evidence received in this case.

O'Malley, Grenig, and Lee, Federal Jury Practice and Instructions, § 12.07 (5th ed. 2000) (modified).

INSTRUCTION NO. 5

If you took notes during the trial, your notes should be used only as memory aids. You should not give your notes precedence over your independent recollection of the evidence. If you did not take notes, you should rely on your own independent recollection of the proceedings and you should not be influenced by the notes of other jurors. I emphasize that notes are not entitled to any greater weight than the recollection or impression of each juror as to what the testimony may have been.

United States v. Rhodes, 631 F.2d 43, 46 n.3 (5th Cir. 1980).

INSTRUCTION NO. 6

As mentioned moments ago, during the trial I instructed you that certain evidence may only be considered for limited purposes. Although I will not repeat those instructions here, I will tell you that those limitations remain in effect unless I have instructed you otherwise. You may consider that evidence in your deliberations only for the purposes for which it was admitted. It may not be considered for any other purposes.

Eighth Circuit Manual of Model Civil Jury Instructions, No. 2.08B (2005) (modified); Eighth Circuit Model Jury Instructions, No. 2.09 (2013) (modified).

INSTRUCTION NO. 7

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it, or none of it.

In deciding what testimony to believe, you may consider the witness's intelligence, the opportunity the witness had to have seen or heard the things testified about, the witness's memory, any motives that witness may have for testifying a certain way, the manner of the witness while testifying, whether that witness said something different at an earlier time, the general reasonableness of the testimony, and the extent to which the testimony is consistent with any evidence that you believe.

In deciding whether or not to believe a witness, keep in mind that people sometimes hear or see things differently and sometimes forget things. You need to consider therefore whether a contradiction is an innocent misrecollection or lapse of memory or an intentional falsehood, and that may depend on whether it has to do with an important fact or only a small detail.

INSTRUCTION NO. 8

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 that is inconsistent with the witness's present testimony.

If you believe any witness has been impeached and thus discredited, you may give the testimony of that witness such credibility, if any, you think it deserves.

If a witness is shown knowingly to have testified falsely about any material matter, you have a right to distrust such witness's other testimony 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. 9

Plaintiff Tamra Welbig claims damages alleged to have been sustained as the result of a deprivation, under color of state law, of rights secured to Plaintiff by the First, Fourth, and Fourteenth Amendments of the United States Constitution and by 42 U.S.C. § 1983, a federal statute protecting the civil rights of all persons within the United States. 42 U.S.C. § 1983 will be explained further momentarily.

Plaintiff alleges that the Defendant police officers, Officer Jordan Hansen, Officer Jordan McCaskill, and Officer Justina Diamond f/k/a Justina Hilmoe, subjected Plaintiff to a deprivation of rights and privileges secured and protected by the Constitution and laws of the United States, namely the constitutional right to be free from the excessive use of force against Plaintiff's person during the course of an arrest, the constitutional right to freedom of speech, and the constitutional right to be free from an arrest without probable cause. Specifically, Plaintiff asserts claims for excessive force, unlawful arrest, and violation of her right to freedom of speech against Officers Hansen and McCaskill. Plaintiff's sole claim against Officer Diamond f/k/a Hilmoe is for unlawful arrest. Each of these claims arises from the officers' involvement with Plaintiff on June 5, 2012, when they were dispatched to Plaintiff's location due to Plaintiff's suspected overdose.

Officers Hansen, McCaskill, and Diamond f/k/a Hilmoe deny that any of their actions during the time in question violated Plaintiff's constitutional rights or federal law. Officers Hansen, McCaskill, and Diamond f/k/a Hilmoe assert that they were acting in good faith and with probable cause and that their actions were reasonable. Officers Hansen, McCaskill,

INSTRUCTION NO. 9, page 2

and Diamond f/k/a Hilmoie further claim that they were not guilty of any fault or wrongdoing in regard to the incident sued upon.

Defendants' Requested Instruction No. 10 (citing O'Malley, Grenig, & Lee, Federal Jury Practice & Instructions, § 165:1 (6th ed. 2011) (modified)) (modified).

INSTRUCTION NO. 10

As mentioned a few moments ago, Plaintiff is suing under 42 U.S.C. § 1983, a civil rights law passed by Congress that provides a remedy to persons who have been deprived of their federal constitutional rights under color of state law.

In order for Plaintiff to prove her separate claims of excessive force, unlawful arrest, and violation of her right to freedom of speech, the burden is upon Plaintiff to establish by greater weight of the evidence each of the following elements:

- (1) That Officer Jordan Hansen, Officer Jordan McCaskill, and Officer Justina Diamond f/k/a Justina Hilmoie then and there acted under the color of state law;
- (2) That Officers Hansen, McCaskill, and Diamond f/k/a Hilmoie performed acts that operated to deprive Plaintiff of one or more of her Constitutional rights, as defined and explained in these instructions, by arresting Plaintiff without probable cause or by using excessive force against Plaintiff while restraining her or by using excessive force due to Plaintiff's exercise of her right to free speech or making the unlawful arrest due to Plaintiff's exercise of her right to free speech, in violation of the First Amendment; and
- (3) That the acts of Officers Hansen, McCaskill, and Diamond's f/k/a Hilmoie were the proximate cause of damages sustained by Plaintiff.

Third Circuit Model Jury Instructions Civil, Nos. 4.1 and 4.3 (2007) (modified); Defendants' Requested Instruction, Doc. 31, No. 11 (citing O'Malley, Grenig, & Lee, Federal Jury Practice & Instructions, § 165:20 (6th ed. 2011) (modified)) (modified).

INSTRUCTION NO. 11

The first element of Plaintiff's claim is that the Defendant acted under color of state law. Acts are done under color of law when a person acts or purports to act in the performance of official duties under any state, county or municipal law, ordinance or regulation.

Eighth Circuit Manual of Model Civil Jury Instructions, No. 4.40 (2005) (modified); Eighth Circuit Model Jury Instructions, No. 4.20 (2013) (modified); Defendant's Requested Instruction No. 17 (citing 8th Cir. Civil Jury Instr. § 4.20 (2014) (modified)) (modified).

INSTRUCTION NO. 12

I have already instructed you on the first element of Plaintiff's claim, which requires Plaintiff to prove that Defendant acted under color of state law.

The second element of Plaintiff's claim is that Defendants deprived her of a federal constitutional right. Plaintiff claims to have been unlawfully arrested insofar as she was arrested without probable cause to believe that she had committed a crime. Probable cause exists when the facts and circumstances within the knowledge of the police officer at the time the arrest was made were sufficient to warrant a person of reasonable prudence to believe that an offense or a crime was being committed by the person arrested. A police officer must have information that would lead a reasonable person possessing the same official expertise as the officer to conclude that the person being arrested committed or is about to commit a crime.

Under the laws 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. Simple assault against a law enforcement officer while such officer was engaged in the performance of the officer's duties, is a public offense.

In determining whether Officer Jordan Hansen, Officer Jordan McCaskill, and Officer Justina Diamond f/k/a Justina Hilmoe had reasonable grounds to believe that Plaintiff committed the offense, the facts known to Officers Hansen, McCaskill, and Diamond f/k/a Hilmoe need not meet the standard of conclusiveness upon which a conviction must be based. Rather, the actions of Officers Hansen, McCaskill, and Diamond f/k/a Hilmoe are to be measured by the test of what a reasonable person would have believed under the same circumstances.

INSTRUCTION NO. 12, page 2

Your role as the jury is to determine, by greater weight of the evidence, the predicate facts on which the alleged unlawful arrest is based. The Court will then apply the appropriate standard for determining the legal issue of whether the facts establish probable cause for the arrest. You as the jury must answer the following questions:

- (1) Did Plaintiff Welbig attempt to cause bodily harm to Officer Hansen before being placed under arrest by the officers? Yes or no?
- (2) Did Plaintiff Welbig have the actual ability to cause an injury to Officer Hansen? Yes or no.

If you answer no to either of the questions, your verdict should be in favor of Plaintiff on her claim for unlawful arrest. If you answer yes to both questions, your verdict should be in favor of Defendants on Plaintiff's claim for unlawful arrest.

Defendants' Requested Instruction No. 12 (citing O'Malley, Grenig, & Lee, Federal Jury Practice & Instructions, § 165:21 (6th ed. 2011) (modified)) (modified); *Peterson v. City of Plymouth*, 60 F.3d 469, 475 (8th Cir. 1995) (the jury determines the factual issues and probable cause is a legal issue for the court)); *see Kurtz v. City of Shrewbury*, 245 F.3d 753, 758 (8th Cir. 2001) ("[A] false arrest claim under § 1983 fails as a matter of law where the officer had probable cause to make the arrest."); Plaintiff's Requested Instruction No. 3 (citing Section 1983 Litigation, § 8.01.1 (Schwartz) (2015 modified)) (modified); *State v. McGarrett*, 535 N.W.2d 765, 769 (S.D. 1995) (elements of simple assault).

INSTRUCTION NO. 12, page 3

In Plaintiff's Instruction No. 3, she included an abundance of language describing what probable cause is. Whether or not probable cause exists, however, is a question of law that is for the Court to decide. *See City of Plymouth, supra*, at 475-76. The jury is tasked only with deciding the facts that would or would not support probable cause. *See* Judge Schreier's 2013 Jury Instructions from excessive force case. For their part, Defendants offer a two-part test found in the O'Malley treatise. In case law and other jury instructions I have reviewed, that two-part test has not been used. Instead, I borrowed the test for simple assault from the Plaintiff's Instruction No. 3 and modified it with the allegations in this case.

INSTRUCTION NO. 13

Plaintiff also claims that Officer Jordan Hansen and Officer Jordan McCaskill used excessive force when arresting Plaintiff. The right to be free from excessive force is a clearly established right under the Fourth Amendment's prohibition against unreasonable seizures of the person. Moreover, officers are liable for the use of excessive force when they use force that is not objectively reasonable in light of the facts and circumstances confronting them. Your verdict must be for the Plaintiff and against Officers Hansen and McCaskill on Plaintiff's excessive force claim if all the following elements have been proved:

- (1) Officers Hansen and McCaskill forced Plaintiff to the ground while handcuffing her, causing her head to hit concrete;
- (2) The force used was excessive because it was not reasonably necessary to restrain Plaintiff; and
- (3) As a direct result, Plaintiff was injured.

You must determine the degree of force that a reasonable and prudent police officer would have applied in effecting the arrest under the circumstances shown from the evidence received in this case. In determining whether the defendant police officers used excessive force, you may consider:

1. The extent of the injury suffered. To the degree the injury tends to show the amount and type of force used is also relevant to your determination of whether excessive force was used,
2. The need for the application of force,

INSTRUCTION NO. 13, page 2

3. The relationship between the need and the amount of force used,
4. The threat reasonably perceived by the responsible officials, and
5. Whether a reasonable officer on the scene, without the benefit of hindsight, would have used that much force under similar circumstances.

In considering whether the use of force was reasonable, you should consider the totality of the circumstances, including the severity of the crime, the danger the suspect poses to the officer or others, and whether the suspect is actively resisting arrest or attempting to flee. You should bear 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 should further bear in mind that injuries resulting from, for example, an officer's use of force to overcome resistance to arrest does not involve constitutionally protected interests. The use of force by officers simply because a suspect is argumentative or contentious, however, is not to be condoned. Force can only be used to overcome physical resistance or threatened force.

The reasonableness inquiry is an objective one. The question is whether Officers Hansen and McCaskill's actions were objectively reasonable in the light of the facts and circumstances confronting them, without regard to their own state of mind, intention, or motivation.

If any one of the three elements I detailed moments ago has not been proved, then your verdict must be for the Defendants.

O'Malley, Grenig, & Lee, Federal Jury Practice & Instructions, § 165:21 (6th ed. 2011) (modified); Eighth Circuit Manual of Model Jury Instructions, No. 4.40 (2013) (modified); Defendants' Requested Instruction No. 13

INSTRUCTION NO. 13, page 3

(modified); Plaintiff's Requested Jury Instruction No. 1, Doc. 37 (citing *Guite v. Wright*, 147 F.3d 747, 750 (8th Cir. 1988)) (modified); Plaintiff's Requested Jury Instruction No. 2 (citing *Montoya v. City of Flandreau*, 669 F.3d 867, 870-71 (8th Cir. 2012); *Agee v. Hickman*, 490 F.2d 210, 212 (8th Cir. 1974)) (modified). There is a fourth prong in the above test, which Plaintiff recites in her requested instruction: that the Defendant was acting under the color of state law. I did not include that portion of the test for two interrelated reasons. One, according to the 2013 Eighth Circuit Model, that prong should only be included if it is in dispute. Two, Defendants did not request it and it does not appear to be in dispute. Since the burden would be on Plaintiff to prove the "under color of state law" prong, it seems to me that Defendants would have included that part of the test if they thought it was in dispute.

INSTRUCTION NO. 14

Plaintiff also claims that Officer Jordan Hansen, Officer Jordan McCaskill, and Officer Justina Diamond f/k/a Justina Hilmoie conspired with each other to cause the unlawful arrest of Plaintiff and deprive her of her constitutional rights. The Plaintiff has the burden of proving, by the greater weight of the evidence:

- (1) That Officers Hansen, McCaskill, and Diamond f/k/a Hilmoie conspired to deprive Plaintiff of a constitutional or federal right,
- (2) That at least one of the alleged coconspirators engaged in an overt act in furtherance of the conspiracy, and
- (3) That Plaintiff was injured by that overt act.

In addition, Plaintiff is required to prove a deprivation of a constitutional right or privilege in order to prevail on her conspiracy claim. In this case, Plaintiff is asserting that she was deprived of her constitutional right to be free from arrest not based on probable cause. If you find for the Defendants on Plaintiff's unlawful arrest claim, you must also find for Defendants on Plaintiff's conspiracy claim.

In this suit, Plaintiff alleges that Defendants Officers Hansen, McCaskill, and Diamond f/k/a Hilmoie are coconspirators. There can be no conspiracy unless more than one person is involved. But it may be that not all the persons charged with being conspirators are in fact conspirators.

It is not necessary that an agreement to conspire be express. Instead, Plaintiff must show evidence sufficient to support the conclusion that the Defendants reached an agreement to

INSTRUCTION NO. 14, page 2

deprive the plaintiff of constitutionally guaranteed rights. You may infer that an agreement existed from circumstantial evidence such as the coordination or common nature of the Defendants' actions. One may become a member of a conspiracy without full knowledge of all the details of the conspiracy. On the other hand, a person who has no knowledge of a conspiracy but who happens to act in a way which furthers some object or purpose of the conspiracy does not thereby become a conspirator. It is not necessary that a Defendant know all the details of the scheme or exactly how it was to be carried out. All Plaintiff must show is that Defendants shared a common objective.

You have been told that one or more of the conspirators had to engage in an overt act in furtherance of the object of the conspiracy. This means that there should be some act done to demonstrate a carrying out the purpose of the conspiracy. An overt act could be that, for example, Defendants failed to collect or preserve evidence despite having an ability to do so, submitted falsified or incorrect police reports, or failed to file police reports.

You have also been instructed that Plaintiff must prove some injury was done to the person or property of Plaintiff. In this case, Plaintiff must prove, by greater weight of the evidence, that the conspirators caused an injury to Plaintiff, that is, for example, causing charges to be brought against Plaintiff in furtherance of a conspiracy.

Plaintiff's Requested Jury Instruction No. 8, Doc. 39 (citing Section 1983 Litigation: Claims and Defenses Ch. 5 (Schwartz) (4th Ed. 2004)) (modified); O'Malley, Grenig, & Lee, Federal Jury Practice & Instructions, §

INSTRUCTION NO. 14, page 3

167:21 (6th ed. 2011) (modified); *S.L. ex. rel. v. St. Louis Metropolitan Police Dept. Board of Police Commissioners*, 725 F.3d 843, 850 (8th Cir. 2013); *White v. McKinley*, 519 F.3d 806, 816 (8th Cir. 2008) (citing *Larson by Larson v. Miller*, 76 F.3d 1446, 1458 (8th Cir. 1996)) (holding that a plaintiff must show that defendants reached an agreement to deprive plaintiff of constitutional rights and that a plaintiff must prove an actual deprivation of a constitutional right); *Askew v. Millerd*, 191 F.3d 953, 957 (8th Cir. 1999) (same). *See Parsons v. McCann*, 138 F. Supp. 3d 1086, 1112 (D. Neb. 2015) (“[A] civil conspiracy claim does not set forth an independent cause of action, but is sustainable only after underlying violations have been established.”); *Blakeney v. O’Donnell*, 117 F. Supp. 3d 6, 14 (D.D.C. 2015) (quoting *Nader v. Democratic Nat’l Comm.*, 567 F.3d 692, 697 (D.C. Cir. 2009) (citation omitted)) (“A claim for civil conspiracy fails unless the elements of the underlying tort are satisfied.”).

INSTRUCTION NO. 15

As previously explained, the Plaintiff has the burden to prove that the acts of the Defendants deprived the Plaintiff of particular rights under the United States Constitution. In this case, Plaintiff also alleges that Officer Jordan Hansen and Officer Jordan McCaskill deprived her of her rights under the First Amendment of the United States Constitution when she was arrested and when alleged excessive force was used during the arrest.

Under the First Amendment right of free speech, a citizen has a right to question and criticize a police officer regarding the police officer's dealings with the citizen. Any action to punish or deter a citizen for questioning or criticizing a police officer is prohibited by the First Amendment.

Plaintiff makes two distinct First Amendment retaliation claims: one, Officers Hansen and McCaskill arrested her in retaliation for engaging in protected speech; and, two, Officers Hansen and McCaskill used excessive force against her in retaliation for engaging in protected speech. If you find for the Defendants on Plaintiff's unlawful arrest claim, you must also find for Defendants on Plaintiff's First Amendment retaliatory arrest claim. By contrast, finding for the Defendants on Plaintiff's excessive force claim does not mean that you must also find for the Defendants on Plaintiff's First Amendment retaliatory excessive force claim, but you may.

To establish a First Amendment retaliation claim, Plaintiff must prove the following elements by a preponderance of the evidence:

- (1) The Plaintiff exercised her protected First Amendment rights when stopped and arrested on June 5, 2012.

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(2) The Defendants under consideration retaliated against Plaintiff for exercising her protected First Amendment rights; and

(3) The Plaintiff's use of protected speech was a substantial or motivating factor for the alleged retaliation.

Houston v. Hill, 482 U.S. 451 (1987); *Peterson v. Kopp*, 754 F.3d 594 (8th Cir. 2014). In cases involving officers retaliating against First Amendment rights, the Eighth Circuit held in *Kopp* that a retaliation claim based on an unlawful arrest is defeated if probable cause for the arrest exists. By contrast, a retaliation claim based on excessive force may proceed even if probable cause for the eventual arrest exists. Thus, in the verdict form, I split the First Amendment question in two.

INSTRUCTION NO. 16

I am now going to instruct you on damages. Just because I am instructing you on how to award damages does not mean that I have any opinion on whether or not Defendant should be held liable.

If you find in favor of Plaintiff, then you must consider the issue of compensatory damages. You must award Plaintiff an amount that will fairly compensate her for the damages she actually sustained as a result of Defendant's conduct.

Plaintiff must show that the damages would not have occurred without Defendant's act. Plaintiff must also show that Defendants' actions played a substantial part in bringing about the damages, and that the damages were either a direct result or a reasonably probable consequence of Defendants' actions. There can be more than one cause of damages. To find that Defendants' act caused damages, you need not find that Defendants' act was the nearest cause, either in time or space. However, if Plaintiff's damages were caused by a later, independent event that intervened between Defendants' act and Plaintiff's damages, Defendant is not liable unless the damages were reasonably foreseeable by Defendant.

Compensatory damages must not be based on speculation or sympathy. They must be based on the evidence presented at trial, and only on that evidence. Plaintiff has the burden of proving compensatory damages by a greater weight of the evidence.

You should consider the following elements of damages:

- (1) The physical pain and emotional suffering the Plaintiff has experienced and is reasonably certain to experience in the future; the nature and extent of the

INSTRUCTION NO. 16, page 2

injury, whether the injury is temporary or permanent; and any aggravation of a preexisting condition;

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

Plaintiff's Requested Jury Instruction No. 6 (modified); Third Circuit Model Jury Instructions Civil, No. 4.8.1 (2007); Eighth Circuit Model Jury Instructions, No. 4.70 (2013); Defendants' Requested Jury Instruction No. 24 (modified).

INSTRUCTION NO. 17

If you find that Plaintiff was injured as a result of Defendants' conduct, then you must determine whether Plaintiff could have done something to lessen the harm that she allegedly suffered. For example, a plaintiff who suffers a personal injury must exercise reasonable care to minimize the existing injury and prevent further injury and damages. **Defendants** have the burden to prove by the greater weight of the evidence that Plaintiff could have lessened or reduced the harm done to her and that she failed to do so. Plaintiff is entitled only to damages sufficient to compensate her for the injury she would have suffered had she taken appropriate action to reduce the harm.

Defendants' Requested Jury Instruction No. 25 (citing O'Malley, Grenig, & Lee, Federal Jury Practice & Instructions, § 165:72 (6th ed. 2011) (modified)) (modified). See *Ogden v. Wax Works, Inc.*, 29 F. Supp. 2d 1003, 1012 (N.D. Iowa 1998) (in a Title VII case, mitigation of damages was noted to be an affirmative defense).

INSTRUCTION NO. 18

If you find in favor of Plaintiff but you find that Plaintiff's damages have no monetary value, then you must return a verdict for Plaintiff in the nominal amount of One Dollar (\$1.00)

Eighth Circuit Model Jury Instructions, No. 4.71 (2013); Defendants' Requested Jury Instruction No. 24.

INSTRUCTION NO. 19

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 the Plaintiff and if it has been proved that the conduct of that Defendant was malicious or recklessly indifferent, then you may, but are not required to, award the Plaintiff an additional amount as punitive damages for the purposes of punishing the Defendant for engaging in such misconduct and deterring the Defendant and others from engaging in such misconduct in the future. You should presume that a Plaintiff has been made whole for her injuries by the damages awarded under Instruction 16.

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

- (1) How reprehensible the Defendant's conduct was. In this regard, you may consider whether there was violence, deceit, intentional malice, or reckless disregard for human health or safety.
- (2) How much harm the Defendant's wrongful conduct caused the Plaintiff.
- (3) What amount of punitive damages, in addition to the other damages already awarded, is needed, considering the Defendant's financial condition, to punish the Defendant for his wrongful conduct toward the Plaintiff and to deter the Defendant and others from similar wrongful conduct in the future.

INSTRUCTION NO. 19, page 2

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

You may award punitive damages against any or all of the Defendants or you may refuse to award punitive damages. If punitive damages are awarded against more than one of the Defendants, the amounts awarded against those Defendants may be the same or they may be different.

Plaintiff's Requested Jury Instruction No. 7 (citing Eighth Circuit Manual of Model Civil Jury Instructions, No. 4.50C (2011)) (modified); Eighth Circuit Model Jury Instructions, No. 4.72 (2013) (modified).

INSTRUCTION NO. 20

Once again, the fact that I have instructed you as to the proper measure of damages should not be considered as suggesting 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 the greater weight of the evidence in accordance with the other instructions.

O'Malley, Grenig, & Lee, Federal Jury Practice & Instructions, § 106:02 (6th ed. 2011) (modified).

INSTRUCTION NO. 21

If you should determine that Plaintiff should recover a verdict, you should not return what is known as a quotient verdict in this case. By a quotient verdict is meant one which is reached pursuant to a prior agreement made by all the jurors to add up the amount which each of the several jurors would award and divide such sum by the number of jurors and treat the quotient or result of such division as the amount of the verdict to be returned by the jury.

If you find the issues in favor of Plaintiff, the verdict you are to return must be for such an amount as you unanimously agree upon as the proper amount in this case. A verdict reached by adding the amounts suggested by the several jurors and then dividing in the manner I have indicated would not be the judgment of the individual jurors and such a method is likely to produce a verdict at variance with the sound judgment of each member of the jury. The rights of the parties to a suit should never be finally determined in this manner. It is for you to determine by the use of your best judgment the verdict which you should return in this case without resort to chance or the method above indicated.

INSTRUCTION NO. 22

If you find that Defendants violated more than one of Plaintiff's rights, Plaintiff is entitled to be compensated only for the injuries she actually suffered. Thus, if Defendants violated more than one of Plaintiff's rights, but the resulting injury was no greater than it would have been had Defendants violated one of those rights, you should award an amount of compensatory damages no greater than you would award if Defendants had violated only one of Plaintiff's rights.

However, if Defendants violated more than one of Plaintiff's rights and you can identify separate injuries resulting from the separate violations, you should award an amount of compensatory damages equal to the total of the damages you believe will fairly and justly compensate Plaintiff for the separate injuries she has suffered.

Defendants' Requested Jury Instruction No. 26 (citing O'Malley, Grenig, & Lee, Federal Jury Practice & Instructions, § 165:73 (6th ed. 2011) (modified)) (modified).

INSTRUCTION NO. 23

In conducting your deliberations and returning your verdicts, there are certain rules you must follow.

First, when you go to the jury room, you must select one of your members as your foreperson. That person will preside over your discussions and speak for you here in court.

Second, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach agreement if you can do so without violence to individual judgment, because a verdict must be unanimous.

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.

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.

Third, if you need to communicate with me during your deliberations, you may send a note to me through the marshal or bailiff, 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.

INSTRUCTION NO. 23 page 2

Fourth, your verdicts must be based solely on the evidence and on the law which I have given to you in my instructions. The verdicts must be unanimous. Nothing I have said or done is intended to suggest what your verdicts should be - that is entirely for you to decide.

Finally, the verdict form is simply the written notice of the decisions that you reach in this case. You will take this form to the jury room, and when each of you has agreed on the verdicts, your foreperson will fill in the form, sign and date it, and advise the marshal that you are ready to return to the courtroom.

Defendants' Requested Jury Instruction No. 28 (citing Eighth Circuit Civil Jury Instructions, § 3.6 (2014)); Eighth Circuit Model Jury Instructions, No. 3.06 (2013); Eighth Circuit Manual of Model Civil Jury Instructions, No. 3.06 (2005).

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

TAMRA WELBIG,

Plaintiff,

vs.

JORDAN HANSEN; JORDAN MCCASKILL;
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CIV 15-4085

VERDICT FORM

Please return your verdicts by placing an "X" or "√" in the spaces provided, or as otherwise instructed below.

We, the jury in the above entitled action, render the following findings of fact by this verdict as to the claims and issues submitted to us:

QUESTION NO. 1

Did Plaintiff Tamra Welbig attempt to cause bodily injury to Defendant Officer Hansen and have the actual ability to cause the injury on June 5, 2012?

Yes _____ No _____

If you answered "no" to Question 1, you must also answer Question 2. If not, proceed to Question 3.

In addition, only answer Question 3 if you answered "no" to Question 1. If not, proceed to Question 4.

QUESTION NO. 2

If you find that Plaintiff Tamra Welbig did not strike Defendant Officer Hansen, did any of the Defendants violate 42 U.S.C. § 1983 by conspiring to deprive Plaintiff of her rights under the Fourth Amendment of the United States Constitution to be free from unlawful arrest? Remember that to hold Defendants liable for conspiracy, the conspiracy must involve more than one person.

Defendant Jordan Hansen Yes _____ No _____

Defendant Jordan McCaskill Yes _____ No _____

Defendant Justina Diamond, Yes _____ No _____

f/k/a Justina Hilmoe

QUESTION NO. 3

If you find that Plaintiff Tamra Welbig did not strike Defendant Officer Hansen, did any of the Defendants violate 42 U.S.C. § 1983 by unlawfully arresting Plaintiff in retaliation of Plaintiff exercising her rights under the First Amendment of the United States Constitution to freedom of speech?

Defendant Jordan Hansen Yes _____ No _____

Defendant Jordan McCaskill Yes _____ No _____

QUESTION NO. 4

Did any of the Defendants violate 42 U.S.C. § 1983 by depriving Plaintiff Tamra Welbig of her rights under the Fourth Amendment of the United States Constitution to be free from the use of excessive force?

Defendant Jordan Hansen Yes _____ No _____

Defendant Jordan McCaskill Yes _____ No _____

QUESTION NO. 5

Did any of the Defendants violate 42 U.S.C. § 1983 by using excessive force on Plaintiff in retaliation of Plaintiff exercising her rights under the First Amendment of the United States Constitution to freedom of speech?

Defendant Jordan Hansen Yes _____ No _____

Defendant Jordan McCaskill Yes _____ No _____

If you answered “no” to all the questions above, stop here, date and sign the verdict.

If you answered “yes” to any of the questions above, go to the following questions.

QUESTION NO. 6

As to any “yes” answer given above, did the acts or omissions by the Defendant(s) cause Plaintiff damages, harm, or loss?

Yes _____ No _____

QUESTION NO. 7

If you answered "yes" to Question 6, state the amount of damages, if any, awarded to Plaintiff Tamra Welbig for the following:

Medical expenses	\$ _____
Physical pain	\$ _____
Emotional pain	\$ _____

QUESTION NO. 8

Is Plaintiff Tamra Welbig entitled to punitive damages against any of the individual Defendants?

Defendant Jordan Hansen	Yes _____	No _____
Defendant Jordan McCaskill	Yes _____	No _____
Defendant Justina Diamond, f/k/a Justina Hilmoe	Yes _____	No _____

If you answered "No" as to each, sign and return this form. If you answered "yes" as to any or all of the Defendants, answer Question No. 9

QUESTION NO. 9

What is the total amount of punitive damages which you assess against any or all of the Defendants for whom you answered "yes" in Question 8?

Defendant Jordan Hansen	\$ _____
Defendant Jordan McCaskill	\$ _____
Defendant Justina Diamond, f/k/a Justina Hilmoe	\$ _____

Sign and return this form.

Dated this ____ day of June, 2016.

Foreperson