804.00 SECTION 1983 - EXCESSIVE FORCE IN MAKING LAWFUL ARREST.

The (*state number*) issue reads:

"Did the defendant violate the plaintiff's constitutional rights by using excessive force in *his* arrest of the plaintiff?"

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, three things.

First, that the defendant acted under color of state law. An official acts under color of state law if *he* acts within the limits of lawful authority or if, while purporting to act in performance of official duties, *he* exceeds lawful authority. On the other hand, an official who does not use state authority and acts for purely private purposes, does not act under color of state law.[1]

Second, that the defendant, by using excessive force in making a lawful arrest, deprived the plaintiff of *his* Fourth Amendment[2] constitutional right to be free from an unreasonable seizure.[3]

A law enforcement officer has the right to use such force as is reasonably necessary under the circumstances to make a lawful arrest. An unreasonable seizure occurs when a law enforcement officer uses excessive force in making a lawful arrest. In deciding whether excessive force was used, you should consider the totality of the circumstances at the time. The reasonableness of a particular use of force must be judged objectively,[4] in light of the facts and circumstances viewed from the perspective of a reasonable officer on the scene at that time [,rather than with the 20/20 vision of hindsight].[5]

You may take into consideration all the facts and circumstances

surrounding the arrest, including the severity of the crime at issue, whether the plaintiff posed an immediate threat to the safety of the officer or others, and whether the plaintiff was actively resisting arrest or attempting to escape.[6]

And Third, that the use of excessive force was a proximate cause of the [injury] [damage] sustained by the plaintiff. A law enforcement officer is not liable for [injury] [damage] that results from the use of reasonable force in making an arrest. Therefore, in order to satisfy this third element, the plaintiff must show that the defendant's use of excessive force proximately caused *his* [injury] [damage] and not simply that *he* sustained some [injury] [damage] in the course of arrest. A proximate cause is a cause which in a natural and continuous sequence produces a person's [injury] [damage], and is a cause which a reasonable and prudent person could have foreseen would probably produce such [injury] [damage] or some similar injurious result.

There may be more than one proximate cause of [an injury] [damage]. Therefore, the plaintiff need not prove that the defendant's conduct was the sole proximate cause of the [injury] [damage]. The plaintiff must prove, by the greater weight of the evidence, only that the defendant's conduct was a proximate cause.

Finally, as to this (*state number*) issue on which the plaintiff has the burden of proof, if you find, by the greater weight of the evidence, that the defendant, acting under color of state law, used excessive force in arresting the plaintiff, and that the use of the excessive force was a proximate cause of the plaintiff's [injury] [damage], then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the defendant.

1. *See West v. Atkins*, 487 U.S. 42, 49-50 (1998); *Mentavlos v. Anderson*, 249 F.3d 301, 321 (4th Cir. 2001); *Scott v. Vandiver*, 476 F.2d 238, 241 (4th Cir. 1973).

2. U.S.C.A. Const. Amend. IV.

3. 42 U.S.C.A. § 1983. § 1983 provides a civil action for deprivation of rights.

4. *Glenn-Robinson v. Acker*, 140 N.C. App. 606, 622, 538 S.E.2d 601, 613 (2000) (citing *Graham v. Conner*, 490 U.S. 386, 395-97 (1989). If an officer attempts an arrest without probable cause, any use of force is inappropriate. *Id*. at 623, 538 S.E.2d at 614, (citing *Nolin v. Isbell*, 207 F.3d 1253, 1258 (11th Cir. 2000)).

5. *See Graham*, 490 U.S. at 396.

6. *Id*.