

N.C.P.I.-Civil. 804.01
EXCESSIVE FORCE IN MAKING ARREST - COMMON LAW CLAIM FOR
BATTERY - ISSUE OF BATTERY.
GENERAL CIVIL VOLUME
MARCH 2016

804.01 EXCESSIVE FORCE IN MAKING ARREST - COMMON LAW CLAIM
FOR BATTERY - ISSUE OF BATTERY.

NOTE WELL: This series of instructions is designed to be used with 804.05 ("Excessive Force in Making Arrest - Common Law Claim for Battery - Sample Verdict Sheet").¹

The (*state number*) issue reads:

"Did the defendant commit a battery upon the plaintiff during 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, two things:²

First, that the defendant committed a battery³ upon the plaintiff.

The law defines a battery as intentional⁴ bodily contact that occurs without the consent of the person being contacted and [actually offends a reasonable sense of personal dignity] [causes physical pain or injury].

And, Second, that the battery occurred during an arrest.

An individual has been arrested when a law enforcement officer interrupts the individual's activities and significantly restricts *his* freedom of action.⁵

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 committed a battery upon the plaintiff and that such battery occurred during defendant's arrest of plaintiff, 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

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to answer this issue "No" in favor of the defendant.

1 The use of excessive force to effect an arrest may give rise to either a common law claim for battery or a federal claim under 42 U.S.C.A. § 1983, or both. *Myrick v. Cooley*, 91 N.C. App. 209, 214, 371 S.E.2d 492, 496 (1988). The pattern instruction for a federal claim begins at 804.06.

2 See *Andrews v. Peters*, 75 N.C. App. 252, 256, 330 S.E.2d 638, 640-41, *aff'd*, 318 N.C. 133, 347 S.E.2d 409 (1986); *Myrick v. Cooley*, 91 N.C. App. at 215, 371 S.E.2d at 496.

3 If the evidence supports a claim for assault during arrest rather than battery during arrest, it may be appropriate to replace the first element of this instruction with the elements of an assault. See *N.C.P.I.-Civil 800.50*.

4 For an instruction on intent, see *N.C.P.I.-Civil 101.46*.

5 See *State v. Morgan*, 299 N.C. 191, 200, 261 S.E.2d 827, 832-33 (1980). "An arrest requires *either* physical force . . . *or*, where that is absent, *submission* to the assertion of authority." *California v. Hodari D.*, 499 U.S. 621, 626 (1991). An arrest is a more significant restriction of an individual's freedom than a seizure. See *Glenn-Robinson v. Acker*, 140 N.C. App. 606, 614-15, 538 S.E.2d 601, 609 (2000) ("A seizure becomes an arrest when 'a reasonable person in the suspect's position would have understood the situation to constitute a restraint on freedom of movement of the degree which the law associates with formal arrest.'" (quoting *United States v. Ienco*, 182 F.3d 517, 523 (7th Cir. 1999) (subsequent citation omitted))).

A seizure occurs when a law enforcement officer, "by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *State v. Foreman*, 133 N.C. App. 292, 296, 515 S.E.2d 488, 492 (1999) (quoting *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968)). Circumstances that might indicate a seizure include "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the . . . citizen, or the use of language or tone of voice" suggesting that compliance is mandatory. See *State v. Farmer*, 333 N.C. 172, 187, 424 S.E.2d 120, 129 (1993) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)). Circumstances that do not amount to a seizure include the following: an officer approaching an individual in a public place and asking questions, see *State v. Foreman*, 133 N.C. App. at 296, 515 S.E.2d at 492 (citing *State v. Brooks*, 337 N.C. 132, 446 S.E.2d 579 (1994)); an officer following an individual on foot, *State v. Foreman*, 133 N.C. App. at 296, 515 S.E.2d at 492; or an officer following an individual's vehicle, *id.* (citing *State v. Cuevas*, 121 N.C. App. 553, 468 S.E.2d 425 (1996)). *But see State v. Hendrickson*, 124 N.C. App. 150, 154-155, 476 S.E.2d 389, 392 (1996) (even "investigatory stop" or traffic stop is a seizure).