

804.08 EXCESSIVE FORCE IN MAKING ARREST - SECTION 1983 CLAIM -
ISSUE OF LAWFULNESS OF ARREST.

*NOTE WELL: This series of instructions is designed to
be used with 804.12 ("Excessive Force in Making Arrest
- Section 1983 Claim - Sample Verdict Sheet").*

The (*state number*) issue reads:

"Was the defendant's arrest of the plaintiff unlawful?"¹

If you have answered the second issue "Yes," then you will consider the third issue. If, on the other hand, you have answered the second issue "No," then you will not consider the remaining issues.

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, that the defendant lacked probable cause to arrest the plaintiff.² The law defines probable cause as the facts and circumstances that an officer knows, based upon reasonably trustworthy information, to be sufficient to warrant a prudent person to believe that the suspect had committed or was committing an offense.³

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 lacked probable cause to arrest the 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 to answer this issue "No" in favor of the defendant.

1 *NOTE WELL: "Whether an officer is authorized to make an arrest ordinarily depends, in the first instance, on state law."* Michigan v. DeFillippo, 443 U.S. 31, 36 (1979). *If an officer attempts an arrest without probable cause, it is unlawful, and any use of force by the officer is inappropriate.* Glenn-Robinson v. Acker, 140 N.C. App. 606, 623, 538 S.E.2d 601, 614 (2000) (citing Nolin v. Isbell, 207 F.3d 1253, 1258 (11th Cir. 2000)).

2 Under state law, a police officer may arrest a person without a warrant if the

officer "has probable cause to believe [that person] has committed a criminal offense in the officer's presence." N.C.G.S. § 15A-401(b)(1) ("Offense in Presence of Officer"). For other circumstances in which an officer may arrest a person without a warrant, see N.C.G.S. § 15A-401(b)(2) ("Offense Out of Presence of Officer").

3 See *Glenn-Robinson v. Acker*, 140 N.C. App. at 618, 538 S.E.2d at 611 (quoting *Davis v. Town of Southern Pines*, 116 N.C. App. 663, 671-72, 449 S.E.2d 240, 245 (1995) (defining probable cause as "those facts and circumstances within an officer's knowledge and of which he had reasonably trustworthy information which are sufficient to warrant a prudent [person] in believing that the suspect had committed or was committing an offense")) (internal citation omitted).

NOTE WELL: "The existence or nonexistence of probable cause is a mixed question of law and fact. If the facts are admitted or established, it is a question of law for the court. Conversely, when the facts are in dispute the question of probable cause is one of fact for the jury." *Glenn-Robinson v. Acker*, 140 N.C. App. at 619, 538 S.E.2d at 612 (citing *Pitts v. Village Inn Pizza, Inc.*, 296 N.C. 81, 87, 249 S.E.2d 375, 379 (1978)).

For additional discussion of the determination of probable cause, see N.C.P.I.-Crim. 208.81B.