

804.10 EXCESSIVE FORCE IN MAKING ARREST-SECTION 1983 CLAIM-DAMAGES.

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").

NOTE WELL: 804.10 is similar to the damages instruction for a state law claim, 804.04, with the primary difference being the inclusion of language in this instruction regarding the defendant's violation of plaintiff's constitutional rights. Because a jury may determine that the violation of plaintiff's constitutional rights enhances the ordinary elements of damage for which the jury may award damages under the state law claim, if state law and federal law claims are submitted to the jury, the court should instruct both as to the damages available for a state law claim and the damages available for a federal claim. If damages are returned as to each claim, the plaintiff must elect between the awards.

The (state number) issue reads:

"What amount is the plaintiff entitled to recover as a result of the defendant's use of excessive force in violation of the plaintiff's constitutional rights?"

If you have answered either the third issue or the fourth issue "Yes," then you will consider the remaining issue(s). If, on the other hand, you have answered the third issue and fourth issue "No," then you will not consider the remaining issue(s).

If you have answered either the third issue (804.08) "Yes" or the fourth issue (804.09) "Yes" in favor of the plaintiff, then the plaintiff is entitled to recover nominal damages even without proof of actual damages. Nominal damages consist of some trivial amount such as one dollar in recognition of a technical injury to the plaintiff. The mere fact that a constitutional deprivation has been shown to have occurred as a

result of the defendant's use of excessive force is an injury to the plaintiff, even when no actual damages flow from the deprivation.

The plaintiff may also be entitled to recover actual damages. Actual damages are the fair compensation to be awarded to a person for any [past] [present] [future] injury caused by the wrongful conduct of another.

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, the amount of actual damages proximately caused by defendant's deprivation of plaintiff's constitutional rights.

Actual damages are the fair compensation to be awarded to a person for any [past] [present] [future] injury caused by the wrongful conduct of another.

In determining the amount, if any, to award the plaintiff for actual damages, you will consider the evidence you have heard as to (each of the following types of damages):

[medical expenses]

[loss of earnings]

[pain and suffering]

[scars or disfigurement]

[(partial) loss (of use) of part of the body]

[permanent injury]

[state any other type of damage supported by the evidence].

The total of all damages is to be awarded in one lump sum.

I will now explain the law of damages as it relates to each of these types of damages.

NOTE WELL: *Insert here the actual damages*

instructions found in Chapter 12 (810.04-810.22 et seq.) as supported by the evidence.

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 the amount of actual damages caused by the defendant's use of excessive force in violation of plaintiff's constitutional rights, then it would be your duty to write that amount in the blank space provided.

If, on the other hand, you fail to so find, then it would be your duty to write a nominal sum such as "One Dollar" in the blank space provided.

NOTE WELL: If instruction regarding punitive damages is supported by the evidence, this instruction should be followed by 804.11 ("Excessive Force in Making Lawful Arrest-Section 1983-Punitive Damages").

- 1 Plaintiff's entitlement to relief in state court for a Section 1983 claim is the same that he "might have in federal court." *Truesdale v. University of North Carolina*, 91 N.C. App. 186, 197, 371 S.E.2d 503, 510 (1988), *overruled on other grounds by Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276 (1992). The United States Court of Appeals for the Fourth Circuit does not publish model instructions, so the following instructions utilize the model from Federal Jury Practice and Instructions, 3B Fed. Jury Prac. & Instr. § 165:70-71 (6th ed. 2014).
- 2 The Federal Jury Practice and Instructions model includes as notes on compensatory and nominal damages available in a Section 1983 claim the following:

In a Section 1983 action, compensatory damages for actual injury are available upon proper proof. See *Carey v. Piphus*, 435 U.S. 247, 254-55 (1978) (basic purpose of damages under Section 1983 should be to compensate persons for injuries caused by deprivation of constitutional rights and thus such awards should be governed by principles of compensation). *Accord Farrar v. Hobby*, 506 U.S. 103, 112 (1992); *Slicker v. Jackson*, 215 F.3d 1225, 1229 (11th Cir. 2000); *Amato v. City of Saratoga Springs*, 170 F.3d 311, 317 (2d Cir. 1999); *Fontroy v. Owens*, 150 F.3d 239, 244 (3d Cir. 1998); *Price v. City of Charlotte*, 93 F.3d 1241, 1245 (4th Cir. 1996), *cert. denied*, 520 U.S. 1116 (1997); *Bushce v. Burkee*, 649 F.2d 509, 518 (7th Cir. 1981), *cert. denied*, 454 U.S. 897 (1981); *Corriz v. Naranjo*, 667 F.2d 892, 896 (10th Cir. 1981); *cert. dismissed*, 458 U.S. 1123 (1982).

The principles governing the propriety of compensatory and punitive damages under Section 1983 are derived from the common law. *Cunningham v. City of Overland*, 804 F.2d 1066, 1069 (8th Cir. 1986). Damages may not be based on the abstract “value” or “importance” of a constitutional right. *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 308 (1986). Presumed damages (the type of damages awarded in some defamation actions to compensate for “presumed” harm to reputation from defamation even in the absence of proof of actual injury) are not recoverable in a Section 1983 action. *Carey v. Piphus*, 435 U.S. 247, 264 (1978).

Compensatory damages may be awarded for emotional and mental distress as well as for pecuniary loss. *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 307 (1986) (compensatory damages in Section 1983 action may include not only out-of-pocket loss and other monetary harms, but also such injuries as impairment of reputation, personal humiliation, and mental anguish and suffering). See also *Chatman v. Slagle*, 107 F.3d 380, 385 (6th Cir. 1997); *Walz v. Town of Smithtown*, 46 F.3d 162, 170 (2d Cir. 1995), cert. denied, 515 U.S. 1131 (1995); *Bolden v. Southeastern Penn. Transp. Auth.*, 21 F.3d 29, 35 (3d Cir. 1994); *Chalmers v. City of Los Angeles*, 762 F.2d 753, 761 (9th Cir. 1985); *Flores v. Pierce*, 617 F.2d 1386, 1392 (9th Cir. 1980).

Nominal damages are permitted under Section 1983. See *Farrar v. Hobby*, 506 U.S. 103, 112 (1992). Nominal damages may be awarded when no actual injury of any consequence is established to make the symbolic point that the plaintiff was wronged and that society demands that constitutional rights be scrupulously observed. *Carey v. Piphus*, 435 U.S. 247, 266-67. See *Smith v. Coughlin*, 748 F.2d 783, 789 (2d Cir. 1984) (even when plaintiff fails to prove actual compensable injury, plaintiff may be entitled to award of nominal damages upon proof of violation of substantive constitutional right); *Wescott v. Crinklaw*, 133 F.3d 658 (8th Cir. 1998) (giving of nominal damages instruction and award of only one dollar plain error where it was clear from undisputed evidence that plaintiff’s injuries were caused by defendant’s excessive use of force).

In *Lawson v. Trowbridge*, 153 F.3d 368, 370 (7th Cir. 1998), the plaintiff, who suffered from schizophrenia, was arrested for carrying a concealed weapon. Because he had no money and could not post a cash bond, he remained in custody for ten months. He brought suit under Section 1983, claiming there was no probable cause for his arrest and also alleging that while in custody, government officials provided him with no medical care for his disease. The jury awarded plaintiff only \$2 in damages. The plaintiff appealed the jury’s award, arguing that it was error for the district court to instruct the jury that he had a duty to mitigate his damages. At trial, the government aggressively pursued the theory that plaintiff failed to help himself by posting the \$500 bond, causing him to linger in jail for an extraordinary length of time (10 months). The Seventh Circuit agreed with plaintiff that it was error to instruct the jury that plaintiff had a duty to mitigate his damages by posting bond. The Seventh Circuit explained:

Even if we . . . generally saw a place for the avoidance of consequences doctrine in a failure-to-post bond case, we would be uncomfortable with the conclusion these facts present: that a mentally ill man, who [the jury found] was held unconstitutionally in solitary confinement for at least 65 days, and [the jury found] was not provided medical care for his disease, and spent three months of his confinement in a state mental hospital because he was adjudged to be incompetent to stand trial, acted unreasonably by not applying his VA check [use for rent money] toward his bond and not asking his family members to bail him out.

In a detainee's Section 1983 suit against a police officer for wrongful detention the Ninth Circuit held that the jury should not have been given the following indemnification instruction:

If an employee of a public entity requests the public entity to defend him against any claim arising out of an act made within the scope of his employment, and gives the entity sufficient notice, and reasonably cooperates in good faith in the defense of the claim, the public entity shall pay any compensatory damages awarded.

Larez v. Holcomb, 16 F.3d 1513, 1518 (9th Cir. 1994). The indemnification issue had no relevance to the proper calculation of compensatory damages. *Id.* at 1520. The Ninth Circuit also held that "the district court erred when it allowed the information on potential punitive damages indemnification to come before the jury." *Id.* at 1520.

In *Briggs v. Marshall*, 93 F.3d 355, 360 (7th Cir. 1996), the Seventh Circuit recognized three situations where nominal damages might be appropriate to remedy an excessive force violation: (1) where an arresting officer uses both justifiable and excessive force, but any injury results from the use of justifiable force; (2) where a jury reasonably concludes that evidence of plaintiff's injury is not credible; or (3) where a plaintiff's injuries are insufficient to justify with reasonable certainty a more substantial measure of damages. See *Frizzell v. Szabo*, 647 F.3d 698 (7th Cir. 2011) (nominal damages instruction was appropriate in arrestee's excessive force case against arresting officer; given the lack of focus throughout the trial on anything other than the pain and negative after-effects caused by arresting officer's tasing of arrestee, the jury might have believed that arresting officer's use of pepper spray or jumping on arrestee's chest, following the tasing, and after the arrestee was down was excessive, but that those applications of force caused little or no quantifiable injury or pain).

See *Guzman v. City of Chicago*, 689 F.3d 740 (7th Cir. 2012) (court should use caution in giving a nominal damages instruction for an unlawful search or seizure because an unlawful search or seizure will often produce, at a minimum, a compensable claim for loss of time).

3 Nominal damages are permitted under Section 1983. See endnote 2, *supra*.

4 "[A] Section 1983 plaintiff must demonstrate that the defendant's actions were the proximate cause of the violation of his federally protected right." *Rivas v. City of Passaic*, 365 F.3d 181, 193 (3d Cir. 2004) scussing defendants' contentions that their conduct did not "proximately cause[] [the decedent's] death").