804.11 EXCESSIVE FORCE IN MAKING LAWFUL ARREST - SECTION 1983 CLAIM - PUNITIVE DAMAGES.[1,2]

The (*state number*) issue reads:

> *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").*

"What amount of punitive damages, if any, does the jury in its discretion award to the plaintiff?"[3]

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

If you have answered the third issue or the fourth issue "Yes" in favor of the plaintiff, then, in addition to any other damages to which you find plaintiff entitled, you may, but are not required to, award plaintiff an additional amount as punitive damages. The plaintiff has the burden of proving punitive damages by the greater weight of the evidence. Punitive damages are awarded to punish the defendant for some extraordinary misconduct and to serve as an example or warning to others not to engage in such conduct. Punitive damages may be awarded when the defendant's conduct is motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.[4] Plaintiff's right to be free from the application of excessive force during an arrest is a federally protected right.

Whether to award plaintiff punitive damages and the amount of those damages are within your sound discretion. In exercising this discretion, you should consider [the following:]

(1) whether the defendant's conduct is made more reprehensible by factors such as vulnerability of the plaintiff, the degree of

violence involved, or previous acts of similar misconduct;

[(2) whether the punitive damages award would be excessive in comparison to the compensatory damages you award;][and]

[(3) whether evidence has been presented of punitive damages awarded or civil penalties imposed in similar cases.]

NOTE WELL: The first factor - reprehensibility of the defendant(s)' conduct - should be included whenever the jury is instructed upon punitive damages. The second and third factors may be included, if the court determines either or both to be supported by the evidence and appropriate given the circumstances of the case.

While you may consider evidence of actual harm to nonparties as part of your determination of reprehensibility, you may not use it to punish a defendant for injury the defendant may have inflicted upon nonparties [or those whom they directly represent].

[(*If there are multiple defendants*)[5] You may assess punitive damages against any or all defendants or you may refuse to impose punitive damages. If punitive damages are assessed against more than one defendant, the amounts assessed against each defendant may be the same or they may be different.]

Finally, as to this *(state number)* issue on which the plaintiff has the burden of proof, if in your discretion you have awarded punitive damages in addition to the amount of plaintiff's actual or nominal damages, then it would be your duty to write that amount in the blank space provided for punitive damages.

On the other hand, if you fail to so find, then it would be your duty to write the word "None" in the space provided on the verdict sheet.

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1 Under N.C. Gen. Stat. § 1D-30, the issues of liability for and amount of punitive

damages may be tried separately from the issues of liability for and amount of compensatory damages upon the motion of a defendant.

2 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).

3 The Federal Jury Practice and Instructions model includes as notes on punitive damages available in a Section 1983 claim the following:

See Philip Morris USA v. Williams, 549 U.S. 346 (2007) (Due Process Clause forbids state from using punitive damages award to punish defendant for injury it inflicts upon nonparties or those whom they directly represent).

According to the Supreme Court, a jury should take into account the following considerations: (1) degree of reprehensibility of the defendant's conduct, (2) the ratio between harm or potential harm to the plaintiff and the punitive damages award, and (3) the relationship between the punitive damages award and civil penalties authorized or imposed in comparable cases. *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003). Accord *Williams v. Kaufmann County*, 352 F.3d 994, 1016 (5th Cir. 2003) (affirming award of $100 in nominal damages and $15,000 in punitive damages for each plaintiff).

Punitive damages in actions under Section 1983 were approved in *Smith v. Wade*, 461 U.S. 30, 35-36. The Court held that a jury "may be permitted to assess punitive damages . . . when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." Id. at 56, 1640. However, municipalities enjoy absolute immunity from punitive damages. *City of Newport v. Fact Concerts*, 453 U.S. 247, 271 (1981).

It has been held permissible to instruct the jury that it may award punitive damages even in the absence of awarding compensatory damages. *See McCardle v. Haddad*, 131 F.3d 43 (2d Cir. 1997); *King v. Macri*, 993 F.2d 294, 297 (2d Cir. 1993). While evidence of actual harm to nonparties can help show conduct that harmed the plaintiff also posed a substantial risk of harm to the general public and so was particularly reprehensible, a jury may not go further and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties. *Phillip Morris USA v. Williams*, 549 U.S. 346, 356 (2007).

Rejecting Model Instruction 7.5 from the Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit, the Ninth Circuit held that the district court should have separately stated the concept of oppressive conduct in the punitive damages instruction. *Dang v. Cross*, 422 F.3d 800, 805 (9th Cir. 2005). *See also Caban-Wheeler v. Elsea*, 71 F.3d 837, 842 (11th Cir. 1996); *Beardsley v. Webb*, 30 F.3d 524, 531 (4th Cir. 1994); *Walker v. Norris*, 917 F.2d 1449, 1459 (6th Cir. 1990); *Garza v. City of Omaha*, 814 F.2d 553, 556 (8th Cir. 1987); *Wren v. Spurlock*, 798 F.2d 1313, 1322 (10th Cir. 1986), *cert. denied*, 479 U.S. 1085 (1987); *Abraham v. Pekarsk*i, 728 F.2d 167, 173 (3d Cir. 1984), *cert. denied*, 467 U.S. 1242 (1984); *McKinley v. Trattles*, 732 F.2d 1320 (7th Cir. 1984); *Stokes v. Delcambre*, 710 F.2d 1120, 1126 (5th Cir. 1983).

See Cameron v. City of New York, 598 F.3d 50 (2d Cir. 2010) (arrestees were entitled to punitive damages jury instruction, in § 1983 action alleging false arrest and malicious prosecution against city and arresting officers, where arrestees presented testimony and other evidence that the officers knew that they lacked probable cause to support arrests, and then provided false information to the prosecutors).

4 Plaintiff may meet this burden of proof by a preponderance of the evidence, rather than by clear and convincing evidence, the standard that applies to plaintiff's entitlement to punitive damages under state law. *See Dang v. Cross*, 422 F.3d 800, 808 (9th Cir. 2005); *see also Butler v. Windsor*, 2015 U.S. Dist. LEXIS 144061 (D. Md. 2015); *McCloud v. Hildebrand et al.*, 2010 U.S. Dist. LEXIS 121703 (W.D.N.C. 2010).

5 Adjust verdict sheet accordingly.