

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EMMANUEL PALMER,

Plaintiff,

v.

RYAN ALLEN & CRISTOVAL TREVINO,

Defendants.

Case No. 14-cv-12247

UNITED STATES DISTRICT COURT JUDGE
GERSHWIN A. DRAIN

UNITED STATES MAGISTRATE JUDGE
DAVID R. GRAND

JURY INSTRUCTIONS

Faithful Performance of Duties; Jury to Follow Instructions3
Facts to Be Determined from Evidence4
Admission of Evidence5
Evidence Introduced for a Limited Purpose6
Jury to Consider All the Evidence7
Circumstantial Evidence8
Jurors May Take into Account Ordinary Experience and Observations9
Prior Inconsistent Statement of Witness10
Credibility of Witnesses11
Witness Who Has Been Interviewed by an Attorney12
Weighing Conflicting Evidence—Number of Witnesses13
Police Guidelines Relevant to Force Analysis14
Consideration of Deposition Evidence15
Impeachment by Proof of Conviction of Crime16
Two or More Defendants—Separate Consideration—Repeating Instructions17
Definition of Burden of Proof18
Assault—Definition19

Assault—Burden of Proof.....	20
Battery—Definition	21
Battery—Burden of Proof.....	22
Battery—Defense—Use of Force by Law Enforcement Officer in Lawful Arrest.....	23
Intentional Infliction of Emotional Distress—Burden of Proof	24
Ethnic Intimidation	25
42 USC § 1983 Against the Individual Defendants.....	26
The Fourth Amendment	27
Constitutional Rights Protected By 42 U.S.C. § 1983.....	28
Essential Elements of an Excessive Force Claim	29
Excessive Force Claim and the Reasonableness Inquiry	30
Force—No Injury At All Required To Recover	32
Damages, Introductory.....	33
Damages Where There Is No Allocation of Fault Between Defendants	34
Measure of Damages—Personal and Property	35
Mitigation of Damages—Failure to Exercise Ordinary Care	36
Defendants Take Plaintiff As They Find Him	37
Aggravation or Activation of Disease or Defect	38
Nominal Damages.....	39
Punitive Damages (Constitutional Claims Only).....	40
Jury Deliberations	42

Faithful Performance of Duties; Jury to Follow Instructions

Members of the jury, the evidence and argument in this case have been completed and I will now instruct you on the law. That is, I will explain the law that applies to this case.

Faithful performance by you of your duties is vital to the administration of justice.

The law you are to apply in this case is contained in these instructions, and it is your duty to follow them. In other words, you must take the law as I give it to you. You must consider them as a whole and not pick out one or some instructions and disregard others.

Following my instructions you will go to the jury room and deliberate and decide on your verdict.

Facts to Be Determined from Evidence

It is your duty to determine the facts from evidence received in open court. You are to apply the law to the facts and in this way decide the case. Sympathy must not influence your decision. Nor should your decision be influenced by prejudice regarding race, sex, religion, national origin, age, handicap, or any other factor irrelevant to the rights of the parties.

Admission of Evidence

The evidence you are to consider consists of testimony of witnesses and exhibits offered and received. The admission of evidence in court is governed by rules of law. From time to time it has been my duty as judge to rule on the admissibility of evidence. You must not concern yourselves with the reasons for these rulings, and you must not consider any exhibit to which an objection was sustained or any testimony or exhibit which was ordered stricken.

Evidence Introduced for a Limited Purpose

Whenever evidence was received for a limited purpose or limited to one party, you must not consider it for any other purpose or as to any other party.

Jury to Consider All the Evidence

In determining whether any fact has been proved, you shall consider all of the evidence bearing on that fact without regard to which party produced the evidence.

Circumstantial Evidence

Facts can be proved by direct evidence from a witness or an exhibit. Direct evidence is evidence about what we actually see or hear. For example, if you look outside and see rain falling, that is direct evidence that it is raining.

Facts can also be proved by indirect or circumstantial evidence. Circumstantial evidence is evidence that normally or reasonably leads to other facts. For example, if you see a person come in from outside wearing a raincoat covered with small drops of water, that would be circumstantial evidence that it is raining.

Circumstantial evidence by itself, or a combination of circumstantial evidence and direct evidence, can be used to prove or disprove a proposition. You must consider all the evidence, both direct and circumstantial.

Jurors May Take into Account Ordinary Experience and Observations

You have a right to consider all the evidence in the light of your own general knowledge and experience in the affairs of life, and to take into account whether any particular evidence seems reasonable and probable. However, if you have personal knowledge of any particular fact in this case, that knowledge may not be used as evidence.

Prior Inconsistent Statement of Witness

If you decide that a witness said something earlier that is not consistent with what the witness said at this trial, you may consider the earlier statement in deciding whether to believe the witness, but you may not consider it as proof of the facts in this case.

However, there are exceptions. You may consider an earlier statement as proof of the facts in this case if:

- (a) the statement was made by Plaintiff, Defendants, or an agent or employee of either party; or
- (b) the statement was given under oath subject to the penalty of perjury at a trial, hearing, or in a deposition; or
- (c) the witness testified during the trial that the earlier statement was true.

Credibility of Witnesses

You are the judges of the facts in this case, and you must determine which witnesses to believe and what weight to give to their testimony. In doing so you may consider each witness's ability and opportunity to observe, his or her memory, manner while testifying, any interest, bias or prejudice, and the reasonableness of the testimony considered in the light of all the evidence.

Witness Who Has Been Interviewed by an Attorney

It has been brought out that a lawyer or a representative of a lawyer has talked with a witness. There is nothing wrong with a lawyer or a representative of a lawyer talking with a witness for the purpose of learning what the witness knows about the case and what testimony the witness will give.

Weighing Conflicting Evidence—Number of Witnesses

Although you may consider the number of witnesses testifying on one side or the other when you weigh the evidence as to a particular fact, the number of witnesses alone should not persuade you if the testimony of the lesser number of witnesses is more convincing.

Police Guidelines Relevant to Force Analysis

Police department guidelines do not create a constitutional right, but they are relevant to the analysis of constitutionally excessive force.

Consideration of Deposition Evidence

During the trial, you heard testimony from a deposition. A deposition is the sworn testimony of a party or witness taken before trial. All parties and their lawyers had the right to be present and to ask questions.

You are to give this evidence the same consideration as you would have given it had the witnesses testified in open court.

Impeachment by Proof of Conviction of Crime

In deciding whether you should believe a witness you may take into account the fact that he has been convicted of a crime and give that fact such weight as you believe it deserves under the circumstances.

Two or More Defendants—Separate Consideration—Repeating Instructions

There are two defendants in this trial. Each defendant is entitled to separate consideration of his own defense. I shall not repeat my instructions for each defendant. Unless I tell you otherwise, all instructions apply to each defendant.

Definition of Burden of Proof

I will be listing for you the propositions on which Plaintiff has the burden of proof. For Plaintiff to satisfy this burden, the evidence must persuade you that it is more likely than not that the proposition is true.

You must consider all the evidence regardless of which party produced it.

Assault—Definition

An assault is any intentional, unlawful threat or offer to do bodily injury to another by force, under circumstances that create a well-founded fear of imminent peril, coupled with the apparent present ability to carry out the act if not prevented.

Assault—Burden of Proof

Plaintiff has the burden of proving each of the following:

- (a) that Defendants made an intentional and unlawful threat or offer to do bodily injury to Plaintiff;
- (b) that the threat or offer was made under circumstances which created in Plaintiff a well-founded fear of imminent peril;
- (c) that Defendants had the apparent present ability to carry out the act if not prevented;

If you find that Plaintiff has proved each of the elements that I have explained to you, and Defendants have failed to prove the defense of resisting a lawful arrest or detainment, your verdict will be for Plaintiff.

If you find that Plaintiff has failed to prove any one of the elements or if you find that Defendants have proved the defense of resisting a lawful arrest or detainment, your verdict will be for Defendants.

Battery—Definition

A battery is the willful or intentional touching of a person against that person's will by another.

Battery—Burden of Proof

Plaintiff has the burden of proving that Defendants willfully and intentionally touched Plaintiff against Plaintiff's will or Defendants put in motion an object or substance that touched Plaintiff against Plaintiff's will.

If you find that this has been proved, and Defendants have failed to prove the defense of resisting a lawful arrest or detainment, your verdict will be for Plaintiff.

If you find that Plaintiff has failed to prove this, or if you find that Defendants have proved the defense of resisting a lawful arrest or detainment, your verdict will be for Defendants.

Battery—Defense—Use of Force by Law Enforcement Officer in Lawful Arrest

If a person has knowledge, or by the exercise of reasonable care should have knowledge, that he or she is being lawfully arrested or lawfully detained by a law enforcement officer, it is the duty of that person to refrain from resisting the arrest or lawful detainment.

An arresting officer may use such force as is reasonably necessary to effect a lawful arrest or lawful detainment. However, an officer who uses more force than is reasonably necessary to effect a lawful arrest or lawful detainment commits a battery upon the person arrested to the extent the force used was excessive.

Intentional Infliction of Emotional Distress—Burden of Proof

Plaintiff claims that Defendant Trevino is responsible for the intentional infliction of emotional distress. For this claim, Plaintiff has the burden of proving each of the following:

- (a) that Defendant's conduct was extreme and outrageous,
- (b) that Defendant's conduct was intentional or reckless,
- (c) that Defendant's conduct caused Plaintiff severe emotional distress,

and

- (d) that Defendant's conduct caused Plaintiff damages.

Your verdict will be for Plaintiff if Plaintiff has proved all of those elements. Your verdict will be for Defendant Trevino if Plaintiff has failed to prove any one of those elements.

Ethnic Intimidation

Plaintiff alleges that Defendant Trevino engaged in ethnic intimidation against Plaintiff. Michigan law recognizes ethnic intimidation as a basis for pursuing a civil action for damages. Under the law, Plaintiff must prove the following elements by a preponderance of the evidence:

- (1) Defendant Trevino caused physical contact with Plaintiff.
- (2) Defendant Trevino acted with malice.
- (3) Defendant Trevino acted with the specific intent to intimidate or harass Plaintiff because of Plaintiff's race or color.
- (4) Plaintiff suffered injury to his person as a result of the ethnic intimidation.

42 USC § 1983 Against the Individual Defendants

The law to be applied in this case is the federal civil rights law, which provides a remedy for individuals who have been deprived of their constitutional rights under color of state law. Section 1983 of Title 42 of the United States Code states:

Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory of the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Fourth Amendment

Plaintiff claims that Defendants violated his rights under the Fourth Amendment to the United State Constitution. In pertinent part, the Fourth Amendment states that “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated....”

The use of unreasonable or excessive use of force by a police officer against a citizen violates the provision of the Fourth Amendment just read to you. When a police officer uses unreasonable or excessive force against a citizen, the citizen may then recover damages against the police officer under Section 1983.

Constitutional Rights Protected By 42 U.S.C. § 1983

Section 1983 of Title 42 of the United States Code provides that any citizen may seek redress in this court by way of damages against any person who, under color of state law, deprives that citizen of any rights, privileges, or immunities secured or protected by the constitution or laws of the United States.

In order to prove his claim under this statute, and with respect to each Defendant, Plaintiff must establish by a preponderance of the evidence each of the following elements:

- (1) Defendant intentionally committed acts that operated to deprive Plaintiff of a right secured by the Constitution of the United States;
- (2) Defendant acted under color of the authority of the State of Michigan.
- (3) Defendant's acts were the legal cause of Plaintiff's damages.

Essential Elements of an Excessive Force Claim

You are instructed that Defendants were acting under color of state law at the time of the acts complained of in this case. Plaintiff alleges that Defendants used excessive or unreasonable force against him. United States citizens are protected, against the use of excessive force by the Fourth Amendment to the Constitution. In order to prove that Defendants used excessive force in violation of the Fourth Amendment, Plaintiff must prove each of the following claims by a preponderance of the evidence:

- (1) some harm, that
- (2) resulted directly and only from the use of force that was clearly excessive to the need; and the excessiveness of which was
- (3) objectively unreasonable in light of the facts and circumstances at the time.

Excessive Force Claim and the Reasonableness Inquiry

The “reasonableness” inquiry in an excessive force case is an objective one: the question is whether the officer’s actions are “objectively reasonable” in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. An officer’s evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer’s good intentions make an objectively unreasonable use of force constitutional.

The United States Supreme Court has long recognized that the right to make an arrest necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it. Because the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. Not every arrest requires the use of force. You must determine whether the totality of the circumstances justifies a particular sort of seizure.

You must recognize the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation. The “reasonableness” of Defendant’s conduct must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.

You must decide whether Defendants Allen’s and Trevino’s use of force was unreasonable from the perspective of a reasonable officer facing the same circumstances as known by Defendants Allen and Trevino at the time. In deciding whether the use of force was unreasonable, you must not consider whether the police officer’s intentions were good or bad.

Force—No Injury At All Required To Recover

Injury is not an essential element of a Section 1983 claim based on excessive force. No lasting, serious injury need be inflicted. The sustaining of a physical injury is not a prerequisite for an excessive force claim. Rather, it is the use of too much force itself that is needed to sustain the claim.

Damages, Introductory

Plaintiff alleges he has suffered a violation of constitutional rights and that he is entitled to a verdict in his favor for nominal or general and punitive damages.

Defendants dispute these claims.

Damages Where There Is No Allocation of Fault Between Defendants

If you find one of the defendants to be liable, you shall determine the amount of damages he caused and return a verdict in that amount. If you find more than one of the defendants to be liable, you shall return a separate verdict for the amount of damages you determine each defendant caused.

Measure of Damages—Personal and Property

If you decide that Plaintiff is entitled to damages, it is your duty to determine the amount of money which reasonably, fairly and adequately compensates him for each of the elements of damage which you decide has resulted from the actions of each defendant, taking into account the nature and extent of the injury.

You should include each of the following elements of damage which you decide has been sustained by Plaintiff to the present time:

- (a) physical pain and suffering
- (b) mental anguish
- (c) fright and shock
- (d) denial of social pleasure and enjoyments
- (e) embarrassment, humiliation or mortification

Which, if any, of these elements of damage has been proved is for you to decide based upon evidence and not upon speculation, guess or conjecture. The amount of money to be awarded for certain of these elements of damage cannot be proved in a precise dollar amount. The law leaves such amount to your sound judgment. Your verdict must be solely to compensate Plaintiff for his damages, and not to punish Defendants.

Mitigation of Damages—Failure to Exercise Ordinary Care

A person has a duty to use ordinary care to minimize his or her damages after he or she has been injured. It is for you to decide whether Plaintiff failed to use such ordinary care and, if so, whether any damage resulted from such failure. You must not compensate Plaintiff for any portion of his damages which resulted from his failure to use such care.

Defendants Take Plaintiff As They Find Him

You are instructed that Defendants take Plaintiff as they find him. If you find that Plaintiff was unusually susceptible to injury, that fact will not relieve Defendants from liability for any and all damages resulting to Plaintiff as a proximate result of Defendants' negligence.

Aggravation or Activation of Disease or Defect

If you find for Plaintiff, you should compensate him for any aggravation of an existing disease or physical defect (or activation of any such latent condition), resulting from such injury. If you find that there was such an aggravation, you should determine, if you can, what portion of Plaintiff's condition resulted from the aggravation and make allowance in your verdict only for the aggravation. However, if you cannot make that determination or if it cannot be said that the condition would have existed apart from the injury, you should consider and make allowance in your verdict for the entire condition.

Nominal Damages

The law which applies to this case authorizes an award of nominal damages. If you find for Plaintiff but you find that Plaintiff has failed to prove damages as defined in these instructions, you must award damages. Nominal damages may not exceed one dollar.

Punitive Damages (Constitutional Claims Only)

If you find for Plaintiff—on the excessive force claims—you may, but are not required to, award punitive damages. The purposes of punitive damages are to punish a defendant and to deter similar acts in the future. Punitive damages may not be awarded to compensate Plaintiff. Plaintiff has the burden of proving by a preponderance of the evidence that punitive damages should be awarded, and, if so, the amount of any such damages.

You may award punitive damages only if you find that Defendants' conduct that harmed Plaintiff was malicious, oppressive or in reckless disregard of Plaintiff's rights. Conduct is malicious if it is accompanied by ill will, or spite, or if it is for the purpose of injuring Plaintiff. Conduct is in reckless disregard of Plaintiff's rights if, under the circumstances, it reflects complete indifference to Plaintiff's safety or rights, or if Defendants act in the face of a perceived risk that its actions will violate Plaintiff's rights under federal law. An act or omission is oppressive if Defendants injure or damage or otherwise violate the rights of Plaintiff with unnecessary harshness or severity, such as by the misuse or abuse of authority or power or by the taking advantage of some weakness or disability or misfortune of Plaintiff.

If you find that punitive damages are appropriate, you must use reason in setting the amount. Punitive damages, if any, should be in an amount sufficient to fulfill their purposes but should not reflect bias, prejudice or sympathy toward any party. In considering the amount of any punitive damages, consider the degree of reprehensibility of Defendants' conduct, including whether the conduct that harmed Plaintiff was particularly reprehensible because it also caused actual harm or posed a substantial risk of harm to people who are not parties to this case. You may not, however, set the amount of any punitive damages in order to punish Defendants for harm to anyone other than Plaintiff in this case.

In addition, you may consider the relationship of any award of punitive damages to any actual harm inflicted on Plaintiff.

You may impose punitive damages against one or both of the defendants and not others, and may award different amounts against different defendants. Punitive damages may be awarded even if you award Plaintiff only nominal, and not compensatory, damages.

Jury Deliberations

You will be given a written copy of the final jury instructions for your use in the jury room for deliberation.

When you go to the jury room, your deliberations should be conducted in a businesslike manner. You should first select a foreperson. She or he should see to it that the discussion goes forward in an orderly fashion and that each juror has full opportunity to discuss the issues.

When all eight of you agree upon a verdict, it will be received as your verdict. Your verdict must be unanimous. In your deliberations, you should weigh the evidence with an open mind and consideration for each other's opinions.

If differences of opinion arise, you should discuss them in a spirit of fairness and frankness. You should express not only your opinion but also the facts and reasons upon which you base it.

In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if you are convinced that it is wrong. However, none of you should surrender your honest conviction as to the weight and effect of the evidence or lack of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

During your deliberations, and before you reach a verdict, you must not disclose anything about your discussions to others outside the jury room, not even how your voting stands. Therefore, until you reach a verdict, do not disclose that information, even in the courtroom.

During your deliberations you may not communicate with persons outside the jury room (other than the Court), or seek information by any means, including cellular telephones or other electronic devices. In other words, you cannot talk to anyone on the phone, correspond with anyone, or electronically communicate with anyone about this case. You can only discuss the case in the jury room with your fellow jurors during deliberations. You may not use these electronic means to investigate or communicate about the case because it is important that you decide the case based solely on the evidence presented in the courtroom and my instructions on the law. Information from the Internet or available through social media might be wrong, incomplete, or inaccurate.

If you discover a juror has violated my instructions, you should report it to me right away.

That concludes my instructions on the law. If you have any questions about these instructions at this point, please write them down and give them to the bailiff. The bailiff will then give them to me, and after consulting with counsel, I will address your questions.

There being no further questions, it is now time for you to go into the jury room and begin your deliberations.

If you wish to communicate with me or examine the exhibits while you are deliberating, please have your foreperson write a note and give it to the bailiff. If you have any questions about my instructions on the law, please place those particular questions in a sealed envelope. Any questions or communications with me must be given to the bailiff, who will then pass them to me, and I will address the questions or communications with counsel and respond as appropriate.