

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

ROBERT A. FORTUNATI, SUSAN :
FORTUNATI, and MARK FORTUNATI, :

Plaintiffs, :

v. :

File No. 1:07-CV-143

TODD PROTZMAN, ROB SNETSINGER, :
KARL GARDNER, HUGH O'DONNELL, :
and MIKE DUDLEY, :

Defendants. :

CHARGE TO THE JURY

Now that you have heard the evidence and arguments, it becomes my duty to give you the instructions of the Court as to the law applicable to this case.

It is your duty as jurors to follow the law as I shall state it to you, and not question it, and to apply that law to the facts as you find them from the evidence in the case. You are not to single out one instruction alone as stating the law, but you must consider the instructions as a whole.

The lawyers may have referred to some of the governing rules of law in their arguments. If, however, any difference appears to you between the law as stated by the lawyers and the law stated by me in these instructions, you are to follow my instructions.

Nothing I say in these instructions is an indication that I have any opinion about the facts of the case. It is not my function to determine the facts, but rather it is yours.

You must perform your duties as jurors without bias or prejudice as to any party. You are not to be governed by sympathy, prejudice, or public opinion.

All parties expect that you will carefully and impartially consider all of the evidence, follow the law as it is now being given to you, and reach a just verdict, regardless of the consequences.

Evidence in the Case

Statements and arguments of counsel are not evidence in the case. However, when the attorneys on both sides stipulate or agree as to the existence of a fact, you must, unless otherwise instructed, accept the stipulation and regard that fact as proved.

Unless you are otherwise instructed, the evidence in the case always consists of the sworn testimony of the witnesses, and all facts which may have been admitted or stipulated.

Any evidence to which an objection was sustained by me, and any evidence ordered stricken by me, must be disregarded.

Evidence - Direct and Circumstantial

There are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence - such as the testimony of an eyewitness. The other is indirect or circumstantial evidence - the proof of a chain of circumstances pointing to the existence or non-existence of certain facts.

There is no distinction between direct or circumstantial evidence. You may find the facts by a preponderance of all the evidence in the case, both direct and circumstantial.

Evidence - Charts and Summaries

Charts and summaries have been used to help explain the facts disclosed by the books, records and other documents which are in evidence. Such charts or summaries are not evidence or proof of any facts. They are used only used as a matter of convenience. If you find the charts or summaries do not accurately reflect the facts or figures shown by the evidence in this case, you should disregard them entirely.

Credibility of Witnesses - Discrepancies in Testimony

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You may be guided by the appearance and conduct of the witness, by the manner in which the witness testifies, by the character of the testimony given, or by evidence to the contrary of the testimony given.

You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is believable. Consider each witness's intelligence, motive and state of mind, and demeanor or manner while on the stand. Consider the witness's ability to observe the matters to which the witness testifies, and whether the witness impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case, any bias or prejudice, the manner in which each witness might be affected by the verdict, and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you to discredit their testimony. Two or more persons witnessing an incident or a transaction may see or hear

it differently, which is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

You may give the testimony of each witness such weight, if any, as you think it deserves, and accept or reject the testimony in whole or in part.

The weight of the evidence is not necessarily determined by the number of witnesses testifying. You may find that the testimony of a small number of witnesses is more credible than the testimony of a larger number of witnesses to the contrary.

Expert Witnesses

Some of the testimony you heard was given by an expert witness. This witness is a person who, by education, training or experience, has developed expertise beyond the level of the average person in some field. An expert is allowed to state opinions on matters within the area of his or her expertise and the reasons for those opinions.

You are not required to accept an expert's opinion. Rather, you should consider the expert opinion and give it the weight you think it deserves. As with the testimony of any witness, you must decide whether it is believable. For instance, you may disregard an expert's opinion entirely or in part if:

you conclude the opinion is not based on sufficient education, training and experience; the reasons given by an expert in support of his or her opinion are not sound; the expert's testimony is outweighed by other evidence; or the expert is biased.

The determination of the facts rests solely with you.

Unanimous Verdict - Duty to Deliberate

The verdict must represent the considered judgment of each juror. To return a verdict, all jurors must agree. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. You must each decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of other jurors, or for the mere purpose of returning a verdict.

Remember at all times that you are not partisans. You are judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

Instructions of Law

Now I will give you instructions concerning the law that applies to this case. You must follow the law as stated in these instructions. You must then apply these rules of law to the facts you find from the evidence.

You are to determine the facts in this case. By these instructions, I do not intend to indicate in any way how you should decide any question of fact.

Burden of Proof and Preponderance of the Evidence

The plaintiffs must prove every element of their claims by a preponderance of the evidence. To prove "by a preponderance of the evidence" means to prove that something is more likely so than not so.

Stated another way, a preponderance of the evidence means the greater weight of the evidence. It refers to the quality and persuasiveness of the evidence, not to the number of witnesses or documents. In determining whether a fact, claim or defense has been proven by a preponderance of the evidence, you may consider the relevant testimony of all witnesses, regardless of who may have called them, all the relevant exhibits received in evidence, regardless of who may have produced them, and any stipulations the parties may have entered into.

Overview of the Claims in this Case

Plaintiffs Robert Fortunati, Susan Fortunati, and Mark Fortunati claim that defendants Todd Protzman, Robert Snetsinger, Karl Gardner, Hugh O'Donnell and Mike Dudley violated their rights under the Fourth Amendment of the U.S. Constitution by subjecting them to an unreasonable arrest. The plaintiffs ask that the defendants pay damages, to compensate them for their injuries.

Todd Protzman, Robert Snetsinger, Karl Gardner, Hugh O'Donnell, and Mike Dudley deny they subjected the Fortunatis to an unreasonable arrest, and therefore argue they did not violate the Fortunatis' rights under the Fourth Amendment. Accordingly, they deny they should have to pay damages to the plaintiffs.

Section 1983 - Introductory Instruction

Robert Fortunati, Susan Fortunati and Mark Fortunati are suing under Section 1983, a civil rights law passed by Congress that provides a remedy to persons who have been deprived of their federal constitutional rights under color of state law.

Section 1983 - Elements of Claim

In order to prevail on their Section 1983 claim, Robert Fortunati, Susan Fortunati and Mark Fortunati must prove both of the following elements by a preponderance of the evidence:

First: Todd Protzman, Robert Snetsinger, Karl Gardner, Hugh O'Donnell and Mike Dudley acted under color of state law.

Second: While acting under color of state law, the Defendants deprived the Fortunatis of a federal constitutional right.

I will now give you more detail on these two elements.

Section 1983 - Under Color of State Law

The first element of the Section 1983 claim is not in dispute. Because Todd Protzman, Robert Snetsinger, Karl Gardner, Hugh O'Donnell and Mike Dudley were officials of the state of Vermont at the relevant time, I instruct you that they were acting under color of state law. In other words, you must find that this element has been established.

Section 1983 - Deprivation of Constitutional Right

The second element of the Fortunatis' Section 1983 claims is that Todd Protzman, Robert Snetsinger, Karl Gardner, Hugh O'Donnell and Mike Dudley deprived them of a federal constitutional right. In this case, the Fortunatis claim the Defendants subjected them to an unreasonable arrest, in violation of the Fourth Amendment.

The Fourth Amendment to the United States Constitution protects individuals from being subjected to an unreasonable arrest by the police. A law enforcement official may only arrest a person if there is appropriate justification to do so.

To establish that their Fourth Amendment rights were violated, Robert Fortunati, Susan Fortunati and Mark Fortunati must prove each of the following things by a preponderance of the evidence:

First: A particular Defendant or Defendants intentionally detained them.

Second: Those acts subjected them to an "arrest."

Third: The "arrest" was unreasonable.

I will now give you more details on what constitutes an "arrest" within the meaning of the Fourth Amendment, and on how to decide whether an arrest is reasonable.

Section 1983 - Arrest

There is no dispute that Robert Fortunati was arrested in this case. The parties do dispute, however, whether Susan Fortunati and Mark Fortunati were arrested. Susan and Mark claim that the Defendants arrested them, but the Defendants - Todd Protzman, Robert Snetsinger, Karl Gardner, Hugh O'Donnell and Mike Dudley - argue that they merely detained Susan and Mark briefly and that this detention did not rise to the level of an arrest. You must decide whether the encounter between Susan and Mark and the Defendants was merely a detention, or whether at some point it became an arrest. Note that Plaintiffs do not have to be confined in a jail cell or formally charged with a crime, in order to be "arrested" within the meaning of the Fourth Amendment.

In deciding whether an arrest occurred, you should consider all the relevant circumstances. Relevant circumstances can include, for example, the length of the interaction; whether Todd Protzman, Robert Snetsinger, Karl Gardner, Hugh O'Donnell and/or Mike Dudley were diligent in pursuing the investigation, or whether they caused undue delay that lengthened the seizure; whether they pointed a gun at Susan or Mark; whether they physically touched Susan or Mark; whether they used handcuffs on Susan or Mark; whether they moved Susan or Mark to a police facility; and whether they stated that they were placing Susan or

Mark under arrest. Relevant circumstances also include whether Todd Protzman, Robert Snetsinger, Karl Gardner, Hugh O'Donnell and/or Mike Dudley had reason to be concerned about safety. Police conduct such as drawing weapons and using handcuffs do not necessarily convert a lawful detention into an arrest if it is a reasonable response to legitimate safety concerns on the part of the officers.

If you find Susan and/or Mark was arrested, you must continue to the next step and determine whether the arrest was unreasonable. The following instruction will help you in determining this.

Because there is no dispute that Robert was arrested, you must continue to the next step with respect to his claim, and determine whether his arrest was unreasonable.

Section 1983 - Unreasonableness/Probable Cause

An arrest is unreasonable under the Fourth Amendment if the police lack probable cause to make the arrest. Therefore you must determine whether the Defendants lacked probable cause to arrest Robert Fortunati; and if you have concluded that Susan Fortunati and Mark Fortunati were arrested, you must determine whether the Defendants lacked probable cause to arrest them as well.

To determine whether probable cause existed, you should consider all the facts and circumstances available to Todd Protzman, Robert Snetsinger, Karl Gardner, Hugh O'Donnell and Mike Dudley. The question you must ask is whether a prudent person would have believed Robert Fortunati - and Susan and Mark, if you reach this step for their claims - had committed or was committing a crime.

Probable cause requires more than just a suspicion, but it does not need to be based on evidence that would prove guilt beyond a reasonable doubt. Because police officers often confront ambiguous situations, room is allowed for some mistakes on their part - but the mistakes must be those of reasonable officers.

As I told you earlier, the Plaintiffs must prove that Todd Protzman, Robert Snetsinger, Karl Gardner, Hugh O'Donnell and Mike Dudley intended to commit the acts in question; but apart

from that requirement, the Defendants' actual motivation is irrelevant. If Todd Protzman, Robert Snetsinger, Karl Gardner, Hugh O'Donnell or Mike Dudley's actions constituted an unreasonable arrest, it does not matter whether they had good motivations. Likewise, an officer's improper motive is irrelevant to the question whether the facts available to the officer at the time gave rise to probable cause.

Robert Fortunati was arrested for the crimes of careless and negligent operation of a vehicle, and resisting arrest. A person who operates a motor vehicle on a public roadway in a negligent manner commits the crime of careless and negligent operation. A person who intentionally attempts to prevent a lawful arrest on himself, which is being effected or attempted by a law enforcement officer, commits the crime of resisting arrest.

In this case the state prosecutor decided not to prosecute the criminal charge against Robert Fortunati. The decision whether to prosecute is within the prosecutor's discretion, and he or she may choose not to prosecute a charge for any reason. Thus, the decision not to prosecute Robert Fortunati does not establish that Todd Protzman, Robert Snetsinger, Karl Gardner, Hugh O'Donnell or Mike Dudley lacked probable cause to arrest Robert Fortunati. You must determine whether the Defendants had probable cause based upon the facts and circumstances known to them at the time of the arrest.

Personal Involvement

When you consider the Plaintiffs' claims, you should treat each Defendant individually. Plaintiffs must prove by a preponderance of the evidence that Todd Protzman, Robert Snetsinger, Karl Gardner, Hugh O'Donnell and/or Mike Dudley was personally involved in the conduct that Plaintiffs complain about. You may not hold a Defendant liable for what other Defendants did or did not do.

Effect of Instructions as to Damages

I will now instruct you as to the proper measure of damages, but you should not consider this instruction as an indication of whether you should award damages. The instructions are given only for your guidance. If you decide in favor of the Defendants, you need not consider the following instructions on the issue of damages. If you decide for Robert Fortunati, Susan Fortunati, or Mark Fortunati, you must consider the issue of damages.

Compensatory Damages

If you find in favor of Robert Fortunati, Susan Fortunati, or Mark Fortunati, you must award them an amount of money that will fairly compensate them for any injury they actually sustained as a result of Todd Protzman, Robert Snetsinger, Karl Gardner, Hugh O'Donnell or Mike Dudley's conduct.

The Fortunatis must show that the injury would not have occurred without Todd Protzman, Robert Snetsinger, Karl Gardner, Hugh O'Donnell or Mike Dudley's act. The Plaintiffs must also show that this act played a substantial part in bringing about the injury, and that the injury was either a direct result or a reasonably probable consequence of the Defendant's act.

Compensatory damages must not be based on speculation or sympathy. They must be based on the evidence presented at trial, and only on that evidence. Robert Fortunati, Susan Fortunati and Mark Fortunati have to prove their injuries by a preponderance of the evidence.

Robert Fortunati, Susan Fortunati and Mark Fortunati claim the following items of damages:

- o Physical harm to Robert Fortunati during and after the events at issue, including physical pain or discomfort. In assessing such harm, you should consider the nature and extent of the injury and whether the injury is temporary or permanent.

~~o Out of pocket costs to Robert Fortunati, Susan Fortunati and Mark Fortunati during the events at issue, including fear, humiliation, and mental anguish, and any such emotional and mental harm that they are reasonably certain to experience in the future.~~

o Emotional and mental harm to Robert Fortunati, Susan Fortunati and Mark Fortunati during and after the events at issue, including fear, humiliation, and mental anguish, and any such emotional and mental harm that they are reasonably certain to experience in the future.

o Loss of liberty to Robert Fortunati, Susan Fortunati, and Mark Fortunati during the events in question.

If you decide the Fortunatis have shown any of these injuries to a preponderance of the evidence, you must award them damages in an amount that will fairly compensate them. There is no exact standard for determining the amount that will fairly compensate a plaintiff for things like physical or emotional pain, or loss of liberty; you should simply decide what would be fair and just in light of the evidence.

Nominal Damages

If you return a verdict for Robert Fortunati, Susan Fortunati or Mark Fortunati, but find they have failed to prove compensatory damages, then you must award nominal damages of \$1.00.

A person whose federal rights were violated is entitled to a recognition of that violation, even if they suffered no actual injury. Nominal damages (of \$1.00) are designed to acknowledge the deprivation of a federal right, even where no actual injury occurred.

However, if you find the Fortunatis have proved actual injury, you must award compensatory damages (as I instructed you earlier), rather than nominal damages.

Damages - Multiple Defendants

You may impose damages solely upon the defendant or defendants you find are liable on that claim. Although there are five defendants in this case, it does not necessarily follow that if one is liable, all of the others are also liable. Each defendant should receive separate and individual consideration without regard to your decision as to the other defendants. If you find that only one defendant is responsible for a particular injury, then you must award damages for that injury only against that defendant.

You may find that more than one defendant is liable for a particular injury. If so, the plaintiff is not required to establish how much of the injury was caused by each particular defendant whom you find liable. So if you conclude that certain defendants are liable and acted jointly, then you may treat them jointly for purposes of calculating damages. In other words, if you decide that two or more of the defendants are jointly liable on a particular claim, then you may simply determine the overall amount of damages for which they are liable, without determining individual percentages of liability.

Election of a Foreperson

I will select _____ to act as your foreperson. The foreperson will preside over your deliberations and will be your spokesperson here in Court.

A verdict form has been prepared for your convenience. You will take this form to the jury room. I direct your attention to the verdict form.

The answer to each question must be the unanimous answer of the jury. Your foreperson will write the unanimous answer of the jury in the space provided for each question and, when completed, will date and sign the verdict.

Conclusion

To return a verdict, all jurors must agree to the verdict. In other words, your verdict must be unanimous.

Upon retiring to the jury room your foreperson will preside over your deliberations and be your spokesperson here in Court.

When you have reached a unanimous verdict, your foreperson should sign and date the verdict form.

If, during your deliberations, you should desire to communicate with me, please reduce your message or question to writing, signed by the foreperson, and pass the note to the court security officer. The officer will then bring the message to my attention. I will respond as promptly as possible, either in writing or by having you return to the courtroom so that I may address your question orally. I caution you, with regard to any message or question you might send, that you should never specify where you are in your deliberations or your numerical division, if any, at the time.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

ROBERT A. FORTUNATI, SUSAN
FORTUNATI, and MARK FORTUNATI,

Plaintiffs,

v.

File No. 1:07-CV-143

TODD PROTZMAN, ROB SNETSINGER,
KARL GARDNER, HUGH O'DONNELL,
and MIKE DUDLEY,

Defendants.

VERDICT FORM

1A. Do you find, by a preponderance of the evidence, that Susan Fortunati was "arrested" for purposes of her Fourth Amendment claim?

Yes _____ No _____

If not, skip to Question 2A; you have found for the Defendants, and your deliberations are finished with respect to Susan Fortunati.

If so, continue to Question 1B.

1B. Which Defendants arrested Susan Fortunati? Check each that applies:

Todd Protzman _____

Robert Snetsinger _____

Karl Gardner _____

Hugh O'Donnell _____

Mike Dudley _____

1C. Do you find, by a preponderance of the evidence, that there was probable cause to arrest Susan Fortunati?

Yes _____ No _____

If so, skip to Question 2A; you have found for the Defendants, and your deliberations are finished with respect to Susan Fortunati.

If not, you have found the defendants marked in Question 1B liable under the Fourth Amendment for the unlawful arrest of Susan Fortunati; continue to Question 1D.

1D. Do you find Susan Fortunati has proven, by a preponderance of the evidence, that she suffered damages caused by the Defendants' unlawful arrest?

Yes _____ No _____

If so, state the total damages to which you find Susan Fortunati entitled, as compensation for all her injuries:

\$ _____

If not, Susan Fortunati is entitled to nominal damages in the amount of \$1.00 for the violation of her constitutional rights.

2A. Do you find, by a preponderance of the evidence, that Mark Fortunati was "arrested" for purposes of his Fourth Amendment claim?

Yes _____ No _____

If not, skip to Question 3A; you have found for the Defendants, and your deliberations are finished with respect to Mark Fortunati.

If so, continue to Question 2B.

2B. Which Defendants arrested Mark Fortunati? Check each that applies:

Todd Protzman _____

Robert Snetsinger _____

Karl Gardner _____

Hugh O'Donnell _____

Mike Dudley _____

2C. Do you find, by a preponderance of the evidence, that there was probable cause to arrest Mark Fortunati?

Yes _____ No _____

If so, skip to Question 3A; you have found for the Defendants, and your deliberations are finished with respect to Mark Fortunati.

If not, you have found the defendants marked in Question 2B liable under the Fourth Amendment for the unlawful arrest of Mark Fortunati; continue to Question 2D.

2D. Do you find Mark Fortunati has proven, by a preponderance of the evidence, that he suffered damages caused by the Defendants' unlawful arrest?

Yes _____ No _____

If so, state the total damages to which you find Mark Fortunati entitled, as compensation for all his injuries:

\$ _____

If not, Mark Fortunati is entitled to nominal damages in the amount of \$1.00 for the violation of his constitutional rights.

3A. Do you find, by a preponderance of the evidence, that Robert Fortunati was "arrested" for purposes of his Fourth Amendment claim?

Yes _____ No _____

If not, skip to Question 4A; you have found for the Defendants, and your deliberations are finished with respect to Robert Fortunati.

If so, continue to Question 3B.

3B. Which Defendants arrested Robert Fortunati? Check each that applies:

Todd Protzman _____

Robert Snetsinger _____

Karl Gardner _____

Hugh O'Donnell _____

Mike Dudley _____

3C. Do you find, by a preponderance of the evidence, that there was probable cause to arrest Robert Fortunati?

Yes _____ No _____

If so, skip to Question 4A; you have found for the Defendants, and your deliberations are finished with respect to Robert Fortunati.

If not, you have found the defendants marked in Question 3B liable under the Fourth Amendment for the unlawful arrest of Robert Fortunati; continue to Question 3D.

3D. Do you find Robert Fortunati has proven, by a preponderance of the evidence, that he suffered damages caused by the Defendants' unlawful arrest?

Yes _____ No _____

If so, state the total damages to which you find Robert Fortunati entitled, as compensation for all his injuries:

\$ _____

If not, Robert Fortunati is entitled to nominal damages in the amount of \$1.00 for the violation of his constitutional rights.

4A. Did you reach Question 1D, Question 2D, or Question 3D?
(In other words, did you find any of the defendants liable to any of the plaintiffs?)

Yes _____ No _____

If not, stop. Your deliberations are complete.

If so, please continue and answer the following factual questions, beginning with Question 4B. These questions ask you to determine specific facts about what happened on the night in question. You must make your factual findings by a preponderance of the evidence.

4B. Did the State Police set up a roadblock on Coppermine Road on the night of the incident in question?

Yes _____ No _____

4C. If you find there was a roadblock, did the Fortunatis' vehicle drive through the roadblock? (If you find there was no roadblock, skip this question)

Yes _____ No _____

4D. Was it reasonable where the Fortunatis stopped their vehicle?

Yes _____ No _____

4E. Did Robert Fortunati drive at an unreasonable rate of speed to the site where the Defendants were stationed on Coppermine Road?

Yes _____ No _____

4F. Did Robert Fortunati drive up to the Defendants in a manner that threatened harm to any of them?

Yes _____ No _____

4G. Was Robert Fortunati aggressive or hostile towards the State Police at the scene of the incident in question?

Yes _____ No _____

4H. Did Susan Fortunati's behavior create commotion or confusion, at the scene of the incident on Coppermine Road?

Yes _____ No _____

4I. Did Mark Fortunati's behavior create commotion or confusion, at the scene of the incident on Coppermine Road?

Yes _____ No _____

4J. Did the Defendants, based on the information known to them at the time of the incident, believe the Fortunatis were hostile toward the police and owned firearms?

Yes _____ No _____

4K. Was Robert Fortunati nonresponsive to orders from the State Police at the scene of the incident in question?

Yes _____ No _____

4L. Was Susan Fortunati nonresponsive to orders from the State Police at the scene of the incident in question?

Yes _____ No _____

4M. Was Mark Fortunati nonresponsive to orders from the State Police at the scene of the incident in question?

Yes _____ No _____

Your deliberations are complete. Thank you.

UNITED STATES DISTRICT COURT
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and MIKE DUDLEY, :

Defendants. :

NOTIFICATION OF DECISION

Judge Murtha, we have reached a verdict.

Foreperson

Date