

U.S. DISTRICT COURT  
DISTRICT OF VERMONT  
FILED

UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF VERMONT

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CLERK

BY  DEPUTY CLERK

KEVIN ELNICKI, )

Plaintiff, )

v. )

RYAN ASHE, )

Defendant. )

Case No. 2:17-cv-00048

**JURY CHARGE**

Members of the Jury:

Now that you have heard the evidence and the arguments, it is my duty to instruct you on the law. It is your duty to accept these instructions of law and apply them to the facts as you determine them. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. You are not to be concerned with the wisdom of any rule of law stated by the court. Regardless of any opinion you may have as to what the law is or ought to be, it would be a violation of your sworn duty to base a verdict upon any view of the law other than that given in the instructions of the court, just as it would also be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything other than the evidence presented during the trial.

The lawyers may have referred to some of the rules of law in their arguments. If any difference appears between the law as stated by the lawyers and the law as stated by the court in these instructions, you must follow the court's instructions.

Our judicial system requires you to carefully and impartially consider all of the evidence, follow the law, and reach a just verdict, regardless of the consequences.

**JURORS AS FINDERS OF FACT/RULINGS OF THE COURT**

You and you alone are the triers of the facts. Each of you, as jurors, must determine the facts for yourselves in reaching a verdict. By the rulings which I made

during the course of the trial, I did not intend to indicate to you or to express my own views about this case.

**SYMPATHY/PREJUDICE**

Neither sympathy nor prejudice, for or against the parties, or any other person involved with this case, should influence you in any manner in reaching your verdict. Your deliberations should be well-reasoned and impartial.

**IMPORTANT CASE**

This is an important case to the parties and the court. You should give it serious and fair consideration.

**ARGUMENTS/STATEMENTS/OBJECTIONS OF THE ATTORNEYS**

The opening statements and closing arguments of the attorneys, their questions and objections, and all other statements that they made during the course of the trial are not evidence. The attorneys have a duty to object to evidence that they believe is not admissible. You may not hold it against either side if any attorney feels it is necessary to make an objection.

**NUMBER OF WITNESSES**

The fact that one side may have called more witnesses than the other side is of no significance. Your task is to evaluate the credibility of the witnesses and to weight all of the evidence.

**EVIDENCE IN THE CASE**

The evidence in this case consists of the sworn testimony of the witnesses and the exhibits admitted into evidence, regardless of which party presented the evidence. Any evidence to which an objection was sustained or stricken by the court must be disregarded.

**EVIDENCE – DIRECT OR CIRCUMSTANTIAL**

There are two types of evidence from which you may find the facts of this case: direct and circumstantial evidence. Direct evidence is the testimony of someone who asserts actual knowledge of a fact, such as an eyewitness or the exhibits in the trial. Circumstantial evidence is proof of a chain of facts and circumstances tending to prove or disprove an issue in the case.

For example, if a witness were to testify that he or she had seen cows in a field, that would be an example of direct evidence that there were cows in a field. On the other hand, if a witness were to testify that he or she had seen fresh cow tracks in the field, that would be an example of circumstantial evidence that there had been cows in the field.

The law does not require a party to prove its claims or defenses by direct evidence alone, that is, by testimony of an eyewitness. One or more of the essential elements, or all of the essential elements, may be established by reasonable inference from other facts that are established by direct testimony. Circumstantial evidence may alone be sufficient to prove a claim or defense.

The law makes no distinction between the weight to be given to direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should consider all the evidence in the case and give it such weight as you think it deserves.

### **CREDIBILITY OF WITNESSES**

You are the sole judges of the credibility of the witnesses, and the weight to give their testimony is up to you. In considering the testimony of any witness, you may take into account his or her ability and opportunity to observe; his or her demeanor while testifying; any interest or bias he or she may have; and the reasonableness of his or her testimony, considered in light of all of the evidence in the case. 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 a witness's testimony. Two or more persons witnessing an incident or transaction may see or hear it differently. It is your duty to reconcile conflicting testimony if you can do so.

In weighing the effect of a discrepancy, consider whether it pertains to a matter of importance or to 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, you think it deserves. You may believe all of the testimony of any witness, you may believe it in part and disbelieve it in part, or you may reject it altogether. You do not have to accept the testimony of any witness, even if it is uncontradicted. It is for you to say what you will believe and what you will disbelieve.

**INTEREST IN THE OUTCOME**

As a general matter, in evaluating the credibility of each witness, you should take into account any evidence that the witness who testified may benefit in some way from the outcome of this case. Such an interest may create a motive to testify falsely and may sway the witness to testify in a way that advances his or her own interests. Therefore, if you find that any witness whose testimony you are considering has an interest in the outcome of this trial, then you should bear that factor in mind when evaluating the credibility of his or her testimony and accept it only with great care.

This is not to suggest that any witness who has an interest in the outcome of a case will testify falsely. It is for you to decide to what extent, if at all, the witness's interest has affected or colored his or her testimony.

**SPECIALIZED KNOWLEDGE AND PERSONAL EXPERIENCE OF JURORS**

In deliberating upon your verdict, you are not expected to put aside your common sense or your own observations or experience of the general affairs of life. However, a juror having special knowledge of a subject may neither state this knowledge to fellow jurors nor act upon it himself or herself in arriving at a verdict. You must not tell your fellow jurors about matters which are based on special knowledge concerning an issue in the case that did not come from the evidence received in the courtroom.

**INSTRUCTIONS ON THE SUBSTANTIVE LAW OF THE CASE**

Having explained the general guidelines by which you will evaluate the evidence in this case, I will now instruct you with regard to the law that is applicable to your determinations in this case.

**BURDEN OF PROOF — PREPONDERANCE OF EVIDENCE**

To “establish by a preponderance of the evidence” means to prove that something is



more likely than not. In other words, a preponderance of the evidence means such evidence that, when considered and compared with that opposed to it, has more persuasive force, and produces in your minds a belief that what is sought to be proved is more likely true than not true. A preponderance of the evidence means the greater weight of the evidence. In determining whether a fact, claim, or defense has been proven by a preponderance of the evidence, you may consider the testimony of witnesses, regardless of who may have called them, and the exhibits in evidence, regardless of who may have produced or introduced them. No proof of absolute certainty is required.

**PLAINTIFF KEVIN ELNICKI'S CLAIM FOR EXCESSIVE FORCE IN VIOLATION OF THE FOURTH AMENDMENT UNDER 42 U.S.C. § 1983**

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 or statutory rights under color of state law. We call this type of a claim a "section 1983 claim" because of the title of the particular federal law authorizing a lawsuit for deprivation of federal rights.

**QUESTIONS ON THE VERDICT FORM**

On the Verdict Form, you will be required to answer certain questions regarding what you have found took place on December 20, 2016. In addition, you will be asked to determine whether Plaintiff Kevin Elnicki has proved each essential element of his section 1983 claim.

Plaintiff Kevin Elnicki has the burden of proving each and every element of his section 1983 claim by a preponderance of the evidence. If you find that Plaintiff Kevin Elnicki has proved each and every element of his section 1983 claim by a preponderance of the evidence, you must return a verdict for Plaintiff Kevin Elnicki. If you find that any one of the elements of Plaintiff Kevin Elnicki's section 1983 claim has not been proven by a preponderance of the evidence, you must return a verdict for Defendant Ryan Ashe.

**ELEMENTS OF A SECTION 1983 CLAIM**

To establish a claim under section 1983, Plaintiff Kevin Elnicki must establish, by a preponderance of the evidence, each of the following four elements:

First, that the conduct complained of was committed by a person acting under color of state law;

Second, that this conduct deprived Plaintiff Kevin Elnicki of rights, privileges, or immunities secured by the Constitution or laws of the United States. In this case, Plaintiff Kevin Elnicki alleges a claim of excessive force in violation of the Fourth Amendment's protections against unreasonable seizure;

Third, that Defendant Ryan Ashe's acts were intentional; and

Fourth, that Defendant Ryan Ashe's alleged constitutional violation directly and proximately caused the pain, suffering, and emotional distress Plaintiff Kevin Elnicki claims he suffered.

#### **ACTION UNDER COLOR OF STATE LAW**

The first element of Plaintiff Kevin Elnicki's claim is that Defendant Ryan Ashe acted under color of state law. Because Defendant Ryan Ashe was a police officer employed by the City of Rutland and was on duty at the time of the acts in question, there is no dispute that he was acting under color of state law.

#### **DEPRIVATION OF A FEDERAL RIGHT**

The second element of Plaintiff Kevin Elnicki's claim is that Defendant Ryan Ashe deprived him of a federal constitutional right. In order for Plaintiff Kevin Elnicki to establish the second element, he must show four things by a preponderance of the evidence:

1. That Defendant Ryan Ashe committed the acts alleged by Plaintiff Kevin Elnicki;
2. That those acts resulted in the use of excessive force;
3. That, in performing the acts alleged, Defendant Ryan Ashe acted with the requisite state of mind; and
4. That Defendant Ryan Ashe's alleged use of excessive force was the direct and proximate cause of Plaintiff Kevin Elnicki's claimed damages.

#### **EXCESSIVE FORCE/VIOLATION OF THE FOURTH AMENDMENT**

Plaintiff Kevin Elnicki claims that Defendant Ryan Ashe deprived him of his right to be free from an unreasonable seizure in violation of the Fourth Amendment to the

United States Constitution. In this case, he alleges that Defendant Ryan Ashe used excessive force during the traffic stop on December 20, 2016, when he stopped Plaintiff Kevin Elnicki for allegedly speeding in Rutland, Vermont.

In general, a seizure or arrest of a person is unreasonable under the Fourth Amendment of the Constitution if a police officer uses excessive force in making a traffic stop or arrest, or in defending himself or others.

Under the Fourth Amendment, a police officer may only use such force as is “objectively reasonable” under all the circumstances. In other words, a law enforcement official may only use the amount of force reasonably necessary under the circumstances to carry out the police officer’s lawful duties and responsibilities.

The right to make a traffic stop or arrest or to protect the public necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect the arrest or to protect. A police officer is justified in using reasonable physical force upon another person when and to the extent that it is necessary to achieve a lawful purpose. A police officer is not justified in using physical force which exceeds the amount reasonably required.

The Fourth Amendment does not require that an officer choose the wisest or best or least intrusive alternative available. Officers must act within a range of objective reasonableness. You should consider the circumstances through the eyes of a reasonable and cautious police officer on the scene, guided by his or her training and experience, with the facts known to that police officer at the time, as opposed to with the benefit of hindsight.

The calculus of reasonableness must embody allowance for 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. Not every push or shove is excessive use of force and de minimis uses of force generally do not suffice to state a constitutional claim. The mere drawing of a weapon by the police and even pointing it in the direction of the Plaintiff Kevin Elnicki alone does not constitute excessive use of force. You, however, can consider whether

Defendant Ryan Ashe pointed a firearm at Plaintiff Kevin Elnicki as part of the totality of the circumstances.

In determining whether Defendant Ryan Ashe's acts constituted excessive force, you must ask whether the amount of force he used was the amount which a reasonable officer would have used in similar circumstances. You should consider all the facts and circumstances, including but not limited to:

- The severity of the crime or other circumstances to which Defendant Ryan Ashe was responding;
- Whether Plaintiff Kevin Elnicki posed an immediate threat to the safety of Defendant Ryan Ashe or others;
- The possibility that Plaintiff Kevin Elnicki was armed;
- Whether Plaintiff Kevin Elnicki was actively resisting arrest or attempting to evade arrest by flight;
- The amount of time and any changing circumstances during which Defendant Ryan Ashe had to determine the type and amount of force that appeared to be reasonably necessary;
- The availability of alternative methods to effectuate the stop;
- The number of persons with whom Defendant Ryan Ashe had to contend; and
- Whether the physical force applied was of such an extent as to lead to unnecessary injury.

#### **STATE OF MIND**

Plaintiff Kevin Elnicki must prove by a preponderance of the evidence that Defendant Ryan Ashe intended to commit the acts in question. Apart from this requirement, Defendant Ryan Ashe's actual motivation is irrelevant. If the force Defendant Ryan Ashe used, if any, was unreasonable, it does not matter whether he had good motivations. And an officer's improper motive will not establish excessive force if the force used was objectively reasonable. What matters is whether Defendant Ryan Ashe's acts were objectively reasonable in light of the facts and circumstances



confronting him. Put another way, in the particular circumstances faced by the officer, would a reasonable officer believe that the force employed was lawful? Your task is to determine whether Defendant Ryan Ashe acted intentionally. An act is intentional if it is done knowingly, that is if it is done voluntarily and deliberately and not because of mistake, accident, negligence, or other innocent reason.

### **DIRECT AND PROXIMATE CAUSE**

Plaintiff Kevin Elnicki must prove that but for Defendant Ryan Ashe's actions, he would not have suffered damages. If Plaintiff Kevin Elnicki's damages were not caused by Defendant Ryan Ashe's actions, or if Plaintiff Kevin Elnicki would have suffered damages regardless of Defendant Ryan Ashe's actions, Plaintiff Kevin Elnicki has failed to prove causation. That is, if Plaintiff Kevin Elnicki probably would have suffered damages regardless of the way in which Defendant Ryan Ashe acted, then the acts or omissions of Defendant Ryan Ashe are not the cause of Plaintiff Kevin Elnicki's damages.

The law also requires Plaintiff Kevin Elnicki to prove that Defendant Ryan Ashe's actions were a "proximate cause" of his damages. Proximate cause is a cause which results in damages in a natural and continuous sequence, unbroken by any other cause. It is a cause without which the result would not have occurred. This does not mean that the act or omission must be the only cause. On the contrary, many facts or things, or the conduct of two or more persons or entities may operate at the same time, either independently or together, to cause injury or damage and in such a case, each may be a proximate cause.

### **DAMAGES GENERALLY**

If you decide in favor of Defendant Ryan Ashe, you will not consider these instructions about damages. But, if you decide in favor of Plaintiff Kevin Elnicki, you must determine the amount of money that will compensate him for each item of harm that was caused by Defendant Ryan Ashe's conduct. This compensation is called "damages."

Please keep in mind the following general principles as you deliberate. Remember that Plaintiff Kevin Elnicki has the burden of proving damages by a preponderance of the

evidence. Damages may not be based on sympathy, speculation, or guesswork. In making your decision, you should be guided by the evidence, common sense, and your best judgment.

**COMPENSATORY ACTUAL DAMAGES**

If you return a verdict for Plaintiff Kevin Elnicki, then you must consider the issue of actual damages which is that sum of money you believe will fairly and justly compensate him for any injury you believe he actually sustained as a consequence of the conduct of Defendant Ryan Ashe.

You shall award actual damages only for those injuries which you find Plaintiff Kevin Elnicki has proven by a preponderance of the evidence that constituted excessive force. That is, you may not simply award actual damages for any injury suffered by Plaintiff Kevin Elnicki—you must award actual damages only for those injuries that are a direct result of actions by Defendant Ryan Ashe which violated Plaintiff Kevin Elnicki's Fourth Amendment right.

Plaintiff Kevin Elnicki may be awarded compensation for any bodily injury and any pain and suffering, mental anguish, and loss of enjoyment of life he has experienced.

**DUTY TO MITIGATE**

Under the law, a party seeking an award of damages must make reasonable attempts to minimize or eliminate those damages. If you find that Plaintiff Kevin Elnicki has failed to mitigate his damages by a preponderance of the evidence, you must subtract the monetary amount of any such failure from your award. In other words, a party is not entitled to recover damages to the extent it could have avoided or reduced those damages.

**CONCLUDING INSTRUCTIONS**

**JURY DELIBERATIONS/UNANIMOUS VERDICT**

The verdict must represent the considered judgment of each juror. In order to return a verdict, you must all agree. Your verdict must be unanimous.

You must consult with one another. You must try to reach an agreement if you can do so without sacrificing your individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with

your fellow jurors. Do not hesitate to re-examine your views and change your opinions if you are convinced they are wrong. But do not surrender your honest opinion as to the weight or effect of evidence solely because of the opinions of your fellow jurors, or for the mere purpose of returning a verdict.

If you need to communicate with me, you should send a note through the Court Officer, signed by your foreperson. You must not discuss with the court or with any other person what is said in deliberations, and any note you send to the court must not include this information. In other words, you may ask the court questions but, in doing so, you must not reveal what the jurors are thinking or saying. You must not tell anyone how the jury stands numerically or otherwise until after you have reached a unanimous verdict and you have been discharged. Even then you need not speak to anyone about this case unless you want to.

When you have reached a verdict, tell the Court Officer that you have reached a verdict, but do not tell the Court Officer what the verdict is. You will then be brought into the courtroom where I shall ask you if you have reached a verdict, and, if you have, what it is.

### **JUROR NOTE TAKING**

During the trial, you have been provided with pen and paper, and some of you have taken notes. As I explained at the beginning of the trial, all jurors should be given equal attention during the deliberations regardless of whether or not they have taken notes. Any notes you have taken may only be used to refresh your memory during deliberations. You may not use your notes as authority to persuade your fellow jurors as to what a witness did or did not say. In your deliberations you must rely upon your collective memory of the evidence in deciding the facts of the case. If there is any difference between your memory of the evidence and your notes, you may ask that the record of the proceedings be read back. If a difference still exists, the record must prevail over your notes. I will now describe the process for a read back.

### **READ BACK OF EVIDENCE**

If, during your deliberations, you are unable to recall with any degree of accuracy,



a particular part of the testimony, or part of these instructions, you may do the following:

1. Write out your question, and have the foreperson sign it;
2. Knock on the door of the jury room; and
3. Deliver your note to the Court Officer, to give to me.

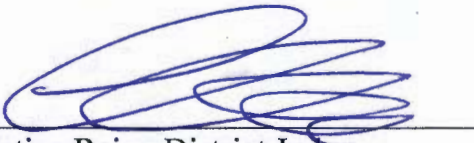
After the attorneys have been consulted, and the record has been reviewed, I shall decide what action to take. I will tell you my ruling.

**SELECTION AND DUTIES OF A FOREPERSON**

I select [REDACTED] to act as your foreperson. The foreperson acts as a chairperson or moderator. It is your duty to see that discussions are carried out in a sensible and orderly manner and to see that the issues submitted for the jury's decision are fully and fairly discussed, and that every juror has a chance to say what he or she thinks upon every question. When ballots should be taken, you will see that it is done. You will act as the jury's spokesperson in the courtroom. In all other respects, the foreperson is the same as every other juror. His or her vote or opinions do not count more or less than those of his or her fellow jurors.

Ladies and gentlemen of the jury, you may now take the case and retire to begin your deliberations.

Dated at Burlington, in the District of Vermont, this 20<sup>th</sup> day of August, 2019.

  
Christina Reiss, District Judge  
United States District Court