UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Donald T. Nuen, Plaintiff,	:	
v.	:	No. 2:97-CV-111
Joby Feccia and Paul Thayer, Defendants.	:	

JURY CHARGE

The Plaintiff in this case is Donald T. Nuen, represented by William C. Kittel. The Defendants are Joby Feccia and Paul Thayer, represented by Pietro J. Lynn.

Now that you have heard the evidence and the arguments, it becomes 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.

As I mentioned at the beginning of the trial, Mr. Nuen has brought his claims under the legal theories of excessive force , and assault and battery. Defendants deny these claims, and raise the affirmative defense of qualified immunity.

Each theory is separate and distinct, requiring proof of different elements. Later I will instruct you on each theory in turn. First, I would like to give you some general instructions.

Role of the Court, the Jury and Counsel

You have listened carefully to the testimony that has been presented to you. Now you must pass upon and decide the factual issues of this case. You are the sole and exclusive judge of the facts. You pass upon the weight of the evidence, you determine the credibility of the witnesses, you resolve such conflicts as there may be in the evidence, and you draw such inferences as may be warranted by the facts as you find them. I shall shortly define the word "evidence" for you and instruct you on how to assess it, including how to appraise the credibility or, to put it another way, the believability of the witness.

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 ought to be, it would be a violation of your sworn duty as judges of the facts to base a verdict upon anything but the evidence in the case.

Nothing I say in these instructions is to be taken as an indication that I have any opinion about the facts of the case, or what that opinion is. It is not my function to determine the facts. That is your function.

You are to discharge your duty as jurors in an attitude of complete fairness and impartiality. You should appraise the evidence deliberatively and without the slightest trace of

sympathy, bias or prejudice for or against any party. All parties expect that you will carefully 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

As I have said earlier, it is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in the case. Statements and arguments of counsel are not evidence in the case. When, however, the attorneys on both sides stipulate or agree as to the existence of a fact, you must accept the stipulation and regard that fact as proved.

The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing to call your attention to certain facts or inferences that might otherwise escape your notice. In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.

The evidence includes any stipulated facts, the sworn testimony of the witnesses and the exhibits admitted in the record. Any evidence as to which an objection was sustained and any evidence that I ordered stricken from the record must be entirely disregarded.

Also, during the course of the trial I occasionally made

comments to the lawyers, asked questions of a witness, or admonished a witness concerning the manner in which he or she responded to the questions of counsel. Do not assume from anything I have said that I have any opinion concerning any of the issues in this case. Except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own findings as to the facts.

While you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw.

Direct and Circumstantial Evidence

The law recognizes two types of evidence -- direct and circumstantial. Direct evidence is provided when, for example, people testify to what they saw or heard themselves; that is, something which they have knowledge of by virtue of their senses. Circumstantial evidence consists of proof of facts and circumstances from which in terms of common experience, one may reasonably infer the ultimate fact sought to be established.

The following anecdote is a simple example of circumstantial evidence. Assume that when you came into the courthouse this morning the sun was shining and it was a nice day. Assume that you could not look outside. As you were sitting here, someone

walked in with an umbrella which was dripping wet. Then a few minutes later another person also entered with a wet umbrella. Now, you cannot look outside of the courtroom and you cannot see whether it is raining. So you have no direct evidence of that fact. But on the combination of facts which I have asked you to assume, it would be reasonable and logical for you to conclude that it had been raining. That is all there is to circumstantial evidence.

Such evidence, if believed, is of no less value than direct evidence. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that you find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

Burden of Proof

This is a civil case and as such the Plaintiff has the burden of proving every element of his claim by a "preponderance of the evidence." The phrase "preponderance of the evidence" means the evidence of greater weight, logic, or persuasive force. It does not mean the greater number of witnesses or documents. It is a matter of quality, not quantity. In other words, a preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your minds a belief that what is sought to be proved is more likely true than not. In other

words, to establish a claim by a "preponderance of the evidence" merely means to prove that the claim is more likely so than not so.

In determining whether any fact in issue has been proved by a preponderance of the evidence, you may consider the testimony of all the witnesses, regardless of who called them, and all the exhibits received in evidence, regardless of who may have produced them.

If, after considering all of the testimony, you are satisfied that Mr. Nuen has carried his burden of proof on each element of his claim, then you must find for Mr. Nuen on that claim. If, after such consideration, you find the testimony of both parties to be in balance or equally probable, then Mr. Nuen has failed to sustain his burden and you must find for the Defendant(s) on that claim.

Witness Credibility

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, or by the manner in which the witness testifies, or 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 worthy of belief. Consider each witness's intelligence, motive and state of mind, and demeanor or manner while on the stand. Consider the witness' ability to observe the matters to which he or she testified, and whether he or she impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to the Plaintiff or the Defendant, any interest he or she may have in the outcome of the case, 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 such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently, and people naturally tend to forget some things or remember other things inaccurately. Innocent misrecollection, like failure of recollection, 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.

After making your own judgment, you should give the testimony of each witness such weight, if any, as you may think it deserves. You may accept or reject the testimony of any

witness in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying to the existence or non-existence of any fact. You may find that the testimony of a small number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary. The test is not which side brings the greater number of witnesses, or presents the greater quantity of evidence; but which witness, and which evidence, appeals to your minds as being most accurate, and otherwise trustworthy.

A witness may be discredited or impeached by contradictory evidence; or by a showing that the witness testified falsely concerning a material matter; or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness' present testimony.

If you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness's testimony in other particulars and you may reject all the testimony of that witness or give it such credibility as you

may think it deserves.

An act or omission is "knowingly" done if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

Testimony of Law Enforcement Officers

Many law enforcement officers have testified in this case. The testimony of a law enforcement officer should be considered by you just as any other witness in the case, and in evaluating his or her credibility you should use the same guidelines which you apply to the testimony of any witness. You should not give either greater or lesser weight to the testimony of a witness merely because he or she is a law enforcement officer.

Depositions

Ordinarily, under the rules of procedure governing the preparation of a case for trial, the parties are permitted to take and record the testimony of witnesses under oath in the same manner as you have seen witnesses sworn and questioned here before you; and under certain conditions that testimony which is called a "deposition" may then be offered as evidence before the jury at the trial. You should consider such deposition testimony, and evaluate the weight or credibility to which it is entitled, in the same way you consider and evaluate all the other testimony in the case.

Expert Witnesses

You have heard testimony from experts in this case. An expert is allowed to express an opinion on those matters about which the expert has special knowledge and training. Expert testimony is presented to you on the theory that someone who is experienced in the field can assist you in understanding the evidence or in reaching an independent decision on the facts.

In weighing the expert's testimony, you may consider the expert's qualifications, opinions, reasons for testifying, as well as all of the other considerations that ordinarily apply when you are deciding whether to believe a witness' testimony. You may give the expert testimony whatever weight, if any, you find the expert deserves in light of all the evidence in this case. You should not, however, accept this witness' testimony merely because he or she is an expert. Nor should you substitute it for your own reason, judgment, and common sense. The determination of the facts in this case rests solely with you.

It sometimes happens that experts disagree. The way you resolve the conflict between experts is the same way you decide other fact questions and the same way you decide whether to believe ordinary witnesses. In addition, you should consider the soundness of each expert's opinion, reasons for the opinion and his or her motive, if any, for testifying.

It is now my duty to give you instructions on the legal theories that apply to this case.

Claim I: Civil Rights Violations

In this case plaintiff claims damages alleged to have been sustained by him as the result of a deprivation under color of state law of a right secured to the plaintiff by the Constitution of the United States and by a federal statute protecting the civil rights of all persons within the United States.

Specifically, the plaintiff alleges that while the defendants were acting under color of the authority of the State of Vermont as members of the Berlin Police Department, the defendants subjected the plaintiff to deprivation of rights and privileges secured and protected by the Constitution and laws of the United States, namely the constitutional right to be free from the excessive use of force against his person during the course of an arrest.

Under the United States Constitution, a person has the right to be free from the use of unreasonable force when being arrested, even if such arrest is otherwise made in accordance with due process of law.

Section 1983 of Title 42 of the United States Code provides that Plaintiffs may seek damages in this Court against any person or persons, who, under color of state law or custom, subject

Plaintiff to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution of the United States.

Therefore, in order to prove his claim, the burden is on Plaintiff to establish, by a preponderance of the evidence, each of the following elements:

(1) that at the time of the incident, each of the Defendants then and there were acting under color of the authority of the State of Vermont.

The Court finds as a fact that at the time of the arrest in this case, Defendants were acting under color of state law. Consequently, Plaintiff has met the first element of his claim.

(2) that Defendants performed acts that operated to deprive Mr. Nuen of one or more of his constitutional rights, as defined and explained by the Court in these instructions, by: using excessive force against Plaintiff during the course of the arrest

(3) that Defendants' acts were the proximate cause of damages sustained by Plaintiff.

Personal involvement of defendants in the alleged constitutional deprivations is a prerequisite to an award of damages under Section 1983. It is well settled that there is no *respondeat superior* liability in a section 1983 action. Hence, you may not hold any of the defendants liable for the actions of another. It is the plaintiff's burden to prove that each

defendant had personal responsibility for the alleged constitutional deprivation in order for that defendant to be liable for damages.

Excessive Force

Every person has the right not to be subjected to unreasonable or excessive force while being arrested by a law enforcement officer, even though such arrest is made in accordance with the law. It is possible for an arrest to be lawful, yet carried out with excessive force. In other words, it is possible for you to find that Defendants had probable cause to arrest Mr. Nuen, but exercised unreasonable or excessive force in actually carrying out the arrest.

Mr. Nuen has the right to be free of the use of excessive force in being arrested. At the same time, however, in making a lawful arrest, an officer has the right to use such force as is necessary under the circumstances to effect the arrest. Whether or not the force used in making the arrest was unnecessary, unreasonable or violent is an issue for you to decide in light of all the surrounding circumstances. As a guide, you should consider what degree of force a reasonable and prudent officer would have applied in effecting the arrest under the circumstances disclosed in this case. The reasonableness of the officer must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of

hindsight. You should take into consideration the fact that officers are often forced to make split-second judgments in situations that are tense, uncertain, and rapidly evolving. The reasonableness standard here is an objective one: the question is whether Defendants' actions were objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. Evil intentions on the part of Defendants will not convert what was a reasonable use of force into a constitutional violation. On the other hand, Defendants' good intentions will not make an unreasonable use of force constitutional.

If you find Defendants used an excessive or unreasonable amount of force in arresting Plaintiff and they are not protected by qualified immunity, you must proceed to consider the question of whether Defendants' acts were the proximate cause of damages to Plaintiff.

The proximate cause of any injury means that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred.

An injury or damage is proximately caused by an act, or a failure to act, whenever it appears from the evidence in the case that the act or omission played a substantial part in bringing about or actually causing the injury or damage; and that the injury or damage was either a direct result or a failure to act,

whenever it appears from the evidence in the case that the act or omission played a substantial part in bringing about or actually causing the injury or damage; and that the injury or damage was either a direct result or a reasonable probable consequence of the act or omission.

Claim II: Assault and Battery

Mr. Nuen also bases his suit against Defendant Feccia on the intentional tort of assault and battery. The law protects the physical integrity of every person from all unnecessary and unwarranted violation or interference.

Any intentional attempt or threat to inflict injury upon the person of another, when coupled with an apparent present ability to do so, and an intentional display of force such as would give the victim reason to fear or expect immediate bodily harm, constitutes an "assault." An "assault" may be committed without actually touching, or striking, or doing bodily harm to the person of another.

Any intentional use of force upon the person of another is a "battery." So, the least intentional touching of the person of another, if accompanied by an intentional use or display of force such as would give the victim reason to fear or expect immediate bodily harm, constitutes a "battery."

Intent ordinarily may not be proved directly because there

is no way of fathoming or scrutinizing the operations of the human mind. But you may infer a person's intent from surrounding circumstances. You may consider any statement made or act done or omitted by a party whose intent is in issue, and all other facts and circumstances which indicate his state of mind.

You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. It is for you to decide what facts have been established by the evidence.

Thus, if you find by a preponderance of the evidence presented to you, that Defendant Feccia: (1) intended to inflict injury upon Mr. Nuen; (2) apparently possessed the ability to inflict such injury; (3) threatened Mr. Nuen with immediate bodily harm; and (4) directed force against the physical person of Mr. Nuen, intending to harm him, then you must find that Defendant Feccia did commit assault and battery against Plaintiff. However, law enforcement officials are entitled to use force reasonably necessary to bring persons into custody. Hence, if you find that Defendants used reasonable force to take Mr. Nuen into custody, you cannot hold them liable for an assault or battery.

If you find Defendant Feccia committed an assault and battery upon the Plaintiff, you must proceed to consider the question of whether Officer Feccia's acts were the proximate

cause of damages to Plaintiff. Again here, you should use the same standard for proximate cause as you applied in deliberating upon Plaintiff's excessive force claim.

If you find by a preponderance of the evidence that Plaintiff has established that Defendants' actions constituted a civil rights violation and/or assault and battery on the part of Defendant Feccia, and that Defendants' actions proximately caused Plaintiff's injuries and you find there is no qualified immunity, you must proceed to consider the question of damages.

Affirmative Defense: Qualified Immunity

At the time of the incidents giving rise to the lawsuit, it was clearly established law that Mr. Nuen had the constitutional right to be free from the excessive use of force against his person. Even if you find that Defendants did violate Mr. Nuen's constitutional rights as described above, however, the Defendants still may not be liable to Mr. Nuen. This is so because the Defendants may be entitled to what is called a qualified immunity. If you find that they are entitled to such an immunity, you may not find them liable.

Defendants may be entitled to qualified immunity if, at the time they violated Mr. Nuen's constitutional rights as stated above, they neither knew nor should have known that their actions were contrary to federal law. The simple fact that the Defendants acted in good faith is not enough to bring them within

the protection of this qualified immunity. Nor is the fact that Defendants were unaware of the federal law. Defendants are entitled to a qualified immunity only if they did not know that what they did was in violation of federal law and if a competent public official could not have been expected at the time to know that the conduct was in violation of federal law.

In deciding what a competent official would have known about the legality of Defendants' conduct, you may consider the nature of Defendants' official duties, the character of their official positions, the information which was known to Defendants or not known to them, and the events confronting them. You must ask yourself what reasonable officials in Defendants' situations would have believed about the legality of Defendants' conduct. You should not, however, consider what the Defendants' subjective intent was, even if you believe it was harmful to the plaintiff. You may also use your common sense. If you find that a reasonable official in Defendants' situation would believe his conduct to be lawful, then this element will be satisfied.

Defendants have the burden of proving that they neither knew nor should have known that their actions violated federal law. If the Defendants convince you by a preponderance of the evidence that they neither knew nor should have known that their actions violated federal law, then you must return a verdict for the Defendants, even though you may have previously found that the

Defendants in fact violated Mr. Nuen's rights under color of state law.

Damages

The fact that I am about to instruct you as to the proper measure of damages should not be considered as intimating any view of mine as to which party is entitled to your verdict in this case. Instructions as to the measure of damages are given for your guidance, in the event you find in favor of the Plaintiff by a preponderance of the evidence in the case in accordance with the other instructions.

In reaching your verdict in this case, you must carefully consider the evidence presented against the Defendants. You may assess damages against the Defendants only if you find the Defendants are liable under the claim I have outlined above.

Please keep in mind the following general principles as you make your deliberations. In making any award of damages, it is not necessary that the Plaintiff prove the exact amount of his damages with absolute certainty. Nevertheless, the damages you award, if you do so, may not be based on sympathy, speculation, or guesswork, because it is only actual damages which are recoverable. Remember that the Plaintiff has the burden of proving damages by a preponderance of the evidence. In determining the amount of any damages that you decide to award, you should be guided by dispassionate common sense. You must use

sound discretion in fixing an award of damages, drawing reasonable inferences from the facts in evidence.

Compensatory Damages

If you should find any one or all Defendants are liable for a civil rights violation under section 1983, and/or Defendant Feccia did committ assault and battery against Plaintiff, then you must determine an amount that is fair compensation for Plaintiff's damages.

You may award compensatory damages for emotional pain and suffering if you find that Plaintiff has proven by a preponderance of the evidence that such injuries were caused by Defendants' allegedly wrongful conduct. No evidence of monetary value of such intangible things as pain and suffering has been, or need be, introduced into evidence. There is no exact standard for fixing the compensation to be awarded for these elements of damages. Any award you make should be fair in light of the evidence presented at trial.

You may not award compensatory damages more than once for the same injury. However, if you find that different injuries are attributable to different claims, you must compensate Mr. Nuen for all his injuries.

An injury or harm to Mr. Nuen that is not the result of unlawful conduct does not entitle him to damages. Similarly, Mr.

Nuen is not entitled to damages for conduct that does not cause harm or injury.

Among the elements of injury and harm which you should consider are: 1. the reasonable expense for property damaged or destroyed; [illegible] 2. physical harm to the Plaintiff during the incident; and 3. the emotional and mental distress caused by injuries resulting from the incident.

Property Damages

The basic principle of damages is that a person who is entitled to recover at all is entitled to recover full, just and adequate compensation for his injuries and losses. In a case such as this involving damages to real or personal property which can be repaired or replaced, Plaintiff is entitled to recover the costs of repairs necessary to restore his property to the condition in which it existed prior to the incident involving Defendants.

Plaintiff is not entitled to have his property restored to a condition better than it existed immediately prior to the incident. However, if because of the nature of the repairs required, Plaintiff's property receives some incidental benefit which improves its condition better than that which existed at the time of damage, Plaintiff is entitled to such benefits without any deduction therefor by virtue of the fact that his

property may have been incidentally improved.

It is up to you as jurors to determine the damages, if any, which Plaintiff is entitled to recover, as you find from the evidence. The measure of recovery for damage to personal property is the difference between the fair market value of the property immediately before the damage, and the fair market value immediately thereafter. Fair market value can be defined as the amount a willing seller would accept from a ready, willing, and able buyer to purchase the property on the day in question.

Bear in mind that you should be concerned only with losses proximately caused by Defendants' activities, as the object of compensation is to place injured parties in the position they occupied immediately prior to damage.

Nominal Damages

If you find, after considering all the evidence presented, that the Defendants violated Mr. Nuen's rights but that he suffered no injury as a result of this violation, you may award Mr. Nuen "nominal damages." "Nominal damages" are awarded as recognition that the Plaintiff's rights have been violated. You would award nominal damages if you conclude that the only injury that Mr. Nuen suffered was the deprivation of his civil rights, without any resulting physical, emotional, or financial damage.

You may also award nominal damages if, upon finding that some injury resulted from a given unlawful act, you find that you

are unable to compute monetary damages except by engaging in pure speculation and guessing.

You may not award both nominal and compensatory damages to Mr. Nuen; either he was measurably injured, in which case you must award compensatory damages; or else he was not, in which case you may award nominal damages.

Nominal damages may not be awarded for more than a token sum, usually one dollar.

Taxes

If Plaintiff should be awarded damages by you, those damages will not be subject to federal or state income taxation and, consequently, you should not add any sum to the verdict as compensation for those taxes.

Mitigation of Damages

The Plaintiff has a duty to mitigate his damages. Mitigation relates to protective or preventative measures to be taken after the operation of the original causation factor, with a view to reducing the harm or preventing its increase. Thus, if you find that Mr. Nuen is entitled to recover damages, and that some or all of his injuries were exacerbated or increased as a result of a failure by him to do some act which would have avoided that harm, then you must reduce his damages in proportion to the amount of injury attributable to that failure to exercise

reasonable diligence to prevent an increase of the injuries.

Unanimous Verdict

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree. Your verdict must be unanimous as to each claim.

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 your fellow jurors, or for the mere purpose of returning a verdict.

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

Notes

You have been permitted to take notes during the trial for use in your deliberations. You may take these notes with you when you deliberate. They may be used to assist your recollection of the evidence, but your memory, as jurors,

controls. Your notes are not evidence, and should not take precedence over your independent recollections of the evidence. The notes that you took are strictly confidential. Do not disclose your notes to anyone other than your fellow jurors. Your notes should remain in the jury room and will be collected at the end of the case.

Closing Instructions

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

A copy of this charge will go with you into the jury room for your use.

A form of special verdict has been prepared for your convenience. You will take this form to the jury room.

Each of the interrogatories or questions on the special verdict form requires the unanimous answer of the jury. Your foreperson will write the unanimous answer of the jury in the space provided opposite each question, and will date and sign the special verdict, when completed.

Communications with the Court

If it becomes necessary during your deliberations to communicate with the Court, you may send a note through the Courtroom Security Officer, signed by your foreperson. No member

of the jury should ever attempt to communicate with the Court by any means other than a signed writing, and the Court will never communicate with any member of the jury on any subject touching the merits of the case other than in writing, or orally here in open Court.

You will note that all other persons are also forbidden to communicate in any way or manner with any member of the jury on any subject touching the merits of the case.

Bear in mind also that you are never to reveal to any person -- not even to the Court -- how the jury stands, numerically or otherwise, on the questions before you, until after you have reached a unanimous verdict.

Dated at Burlington, in the District of Vermont, this _____ day of October, 1998.

_____
William K. Sessions, III
United States District Judge