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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

VERNELL LUNDBERG, et al.,

No. C 97-3989 SI

Plaintiffs,

v.

COUNTY OF HUMBOLDT, et al.,

Defendants.

JURY INSTRUCTIONS

DUTIES OF JURY TO FIND FACTS AND FOLLOW LAW

Members of the jury, now that you have heard all the evidence and the arguments of the attorneys, it is my duty to instruct you on the law which applies to this case. A copy of these instructions will be available in the jury room for you to consult if you find it necessary.

It is your duty to find the facts from all the evidence in the case. To those facts you must apply the law as I give it to you. You must follow the law as I give it to you in these instructions whether you agree with it or not. And you must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath promising to do so at the beginning of the case.

In following my instructions, you must follow all of them and not single out some and ignore others; they are all equally important. You must not read into these instructions or into anything I may have said or done during the trial any suggestion as to what verdict you should return — that is a matter entirely up to you

WHAT IS EVIDENCE

The evidence from which you are to decide what the facts are consists of:

- (1) the sworn testimony of witnesses, both on direct and cross-examination, regardless of who called the witness;
- (2) the exhibits which have been received into evidence; and
- (3) any facts to which all the lawyers have agreed or stipulated.

WHAT IS NOT EVIDENCE

In reaching your verdict, you may consider only the testimony and exhibits received into evidence. Certain things are not evidence and you may not consider them in deciding what the facts are. I will list them for you:

1. Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they have said in their opening statements, closing arguments and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory of them controls.
2. Questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it.
3. Testimony that has been excluded or stricken, or that you have been instructed to disregard, is not evidence and must not be considered. In addition, some testimony and exhibits have been received only for a limited purpose; where I have given a limiting instruction, you must follow it.
4. Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

DIRECT AND CIRCUMSTANTIAL EVIDENCE

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is indirect evidence, that is, proof of a chain of facts from which you could find that another fact exists, even though it has not been proved directly. You should consider both kinds of evidence. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

CREDIBILITY OF WITNESSES

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it.

In considering the testimony of any witness, you may take into account:

- (1) the opportunity and ability of the witness to see or hear or know the things testified to;
- (2) the witness' memory;
- (3) the witness' manner while testifying;
- (4) the witness' interest in the outcome of the case and any bias or prejudice;
- (5) whether other evidence contradicted the witness' testimony;
- (6) the reasonableness of the witness' testimony in light of all the evidence; and
- (7) any other factors that bear on believability.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify.

OPINION EVIDENCE, EXPERT WITNESSES

You have heard testimony from persons who, because of education or experience, are permitted to state opinions and the reasons for those opinions.

Opinion testimony should be judged just like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness' education and experience, the reasons given for the opinion and all the other evidence in the case.

TWO OR MORE PARTIES – DIFFERENT LEGAL RIGHTS

You must consider and decide the case as to each defendant and each plaintiff separately. Your verdict as to one defendant should not control your verdict as to any other defendant. Similarly, your verdict as to one plaintiff should not control your verdict as to any other plaintiff. You must consider each defendant and each plaintiff separately.

BURDEN OF PROOF – PREPONDERANCE OF THE EVIDENCE

This is a civil case. In a civil case, the party asserting a claim or affirmative defense must prove every essential element of that claim or affirmative defense by a standard known as preponderance of the evidence. When a party has the burden of proof by a preponderance of the evidence, it means that you must be persuaded by the evidence that the claim or affirmative defense is more probably true than not true.

If the proof should fail to establish by a preponderance of the evidence any essential element of plaintiffs' claim, you must find for the defendants as to that claim.

Similarly, when a defendant asserts an affirmative defense, that defendant has the burden of proving every essential element of that affirmative defense by a preponderance of the evidence.

You should base your decision on all of the evidence, regardless of which party presented it.

CAUSES OF ACTION

On September 25, 1997, plaintiffs Vernell (Spring) Lundberg, Jennifer Schneider, and Eric Samuel Neuwirth were arrested by deputies of the Humboldt County Sheriff's Department at the offices of Pacific Lumber Company in Scotia, California. On October 3, 1997, plaintiffs Michael McCurdy and Noel Tendick were arrested by deputies of the Humboldt County Sheriff's Department at Bear Creek, in Humboldt County, on property owned by Pacific Lumber Company. On October 16, 1997, plaintiffs Terri Slanetz, Lisa Sanderson Fox, Maya Portugal and Jennifer Schneider were arrested by officers of the City of Eureka Police Department and deputies of the Humboldt County Sheriff's Department at the offices of then-Congressman Frank Riggs in Eureka, California.

The parties have stipulated that defendants had probable cause to place plaintiffs under arrest. Plaintiffs claim, however, that defendants used excessive force in effecting the arrests and that the arrests therefore were unreasonable in violation of the Fourth Amendment to the United States Constitution. You are called upon to decide whether or not defendants caused excessive force to be used to effect the arrests of the plaintiffs.

You must also decide whether or not defendants Lewis and Philp violated the constitutional rights of any plaintiff by authorizing the optional use of pepper spray to effect plaintiffs' arrests.

**ELEMENTS AND BURDEN OF PROOF – VIOLATION OF FEDERAL CIVIL
RIGHTS**

In order for plaintiffs to prevail on their claim that defendants deprived plaintiffs of their rights protected by the Fourth Amendment of the United States Constitution, plaintiffs must prove each of the following by a preponderance of the evidence:

- (1) defendants acted intentionally;
- (2) defendants acted under color of law; and
- (3) defendants caused plaintiffs to be deprived of their rights under the Fourth Amendment to the United States Constitution.

INTENTIONAL ACTS DEFINED

Acts or omissions are done intentionally when the person is aware of the act or omission and does not act or fail to act through ignorance, mistake or accident. The parties have stipulated that the defendants acted intentionally and you need not further consider this element.

UNDER COLOR OF LAW DEFINED

Acts are done under color of law when the person acts or purports to act in the performance of official duties under any state, county or municipal law, ordinance or regulation. The parties have stipulated that the defendants acted under color of law and you need not further consider this element.

FOURTH AMENDMENT – UNREASONABLE SEIZURE

The Fourth Amendment to the United States Constitution prohibits the unreasonable seizure or arrest of a person. In this case, the plaintiffs claim that the defendants used excessive force in making otherwise lawful arrests and thereby deprived the plaintiffs of their right under the Fourth Amendment to be free from an unreasonable seizure.

Because the Fourth Amendment applies to all seizures or arrests, you must consider each arrest separately. You must evaluate each arrest in light of all the circumstances surrounding that arrest.

LEGAL STANDARD FOR EXCESSIVE FORCE

During this trial you have heard witnesses and attorneys mention various legal cases – the “Graham case,” the “Forrester case,” and some others. Those are prior cases decided by various courts in developing the law as it relates to use-of-force issues. These cases are sometimes consulted by various people involved in the process of devising or challenging use-of-force policies for law enforcement agencies.

However, at this point, I will instruct you on what the law is that you are to apply in deciding this case. You are to reach your verdict in this case based on the law which I give you in these instructions. You need not be concerned about those other cases that were mentioned during the trial, since the law to be applied is given to you in these instructions.

EXCESSIVE FORCE DEFINED

A law enforcement officer has the right to use such force as is reasonably necessary under the circumstances to make a lawful arrest. An unreasonable seizure occurs when a law enforcement officer uses excessive force in making a lawful arrest. In deciding whether excessive force was used, you should consider the totality of the circumstances at the time. The reasonableness of a particular use of force must be judged objectively from the information available at the time, from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.

Whether force is reasonably necessary or excessive is measured by the force a reasonable and prudent law enforcement officer would use under the circumstances.

Some of the things you may want to consider in determining whether the defendants used excessive force are the severity of the crimes at issue; whether the plaintiffs posed a reasonable threat to the safety of themselves, the officers or others; whether the plaintiffs were actively resisting detention or attempting to escape; and any other exigent circumstances that existed at the time of the arrests.

A law enforcement officer is not required to use the least force that would effect an arrest. But you may consider alternative means of effecting an arrest reasonably available to the officer in determining whether the force used was reasonably necessary under the circumstances.

DUTY TO EFFECT ARREST

A law enforcement officer who has probable cause to make an arrest has the right to use such force as is reasonably necessary under the circumstances to make the arrest, to prevent escape or to overcome resistance. In this case, the officers had probable cause to arrest plaintiffs.

A law enforcement officer has a duty under California law to effect the arrest of any person who refuses or fails to leave the property of another person when the officer has been requested to do so by the lawful owner or occupant of the property, and the person refusing or failing to leave is interfering with the lawful enjoyment of the property by the owner or occupant.

The parties have stipulated that the defendants had probable cause to arrest the plaintiffs. So the question before you is whether the defendants caused the arrests to be made with excessive force.

PAIN COMPLIANCE

Law enforcement officers are not categorically prohibited from using pain compliance as a means to overcome resistance to arrest, regardless of whether the resistance is characterized as “passive” or “active.” Nor, however, are they categorically permitted to use such methods. Rather, whether such methods are reasonably necessary or are excessive is to be evaluated based on what force a reasonable and prudent law enforcement officer would use under the circumstances.

USE OF PEPPER SPRAY IN GENERAL

Under California law, the use of pepper spray by law enforcement officers is not limited to situations involving self-defense, or situations involving "hostile" or "violent" subjects. It is up to you to determine whether, under the totality of the circumstances at the time, the use of pepper spray in this case was reasonably necessary or was excessive.

PLAINTIFFS' "CAUSE" IS IRRELEVANT

In determining whether or not the force used to effect the arrest of any plaintiff was excessive or not, the "cause" which any plaintiff intended to further by his or her actions is not relevant, nor is it relevant whether the arresting officers agreed or disagreed with the plaintiffs' "cause."

MUNICIPAL LIABILITY

When a plaintiff is deprived of a constitutional right as a result of the official policy of a city or county, the city or county is liable for the violation. The parties have stipulated that the application of pepper spray to the plaintiffs was the result of the official policy of the County of Humboldt and the City of Eureka.

SUPERVISORY LIABILITY

Defendant Sheriff Dennis Lewis and defendant Chief Deputy Gary Philp supervised the Humboldt County Sheriff's Deputies in the incidents involved in this case. In a case alleging a constitutional violation such as this, a supervisor may be held liable only if he is:

(1) personally involved in the constitutional violation; or

(2) there exists a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation.

SUPERVISORY LIABILITY – CAUSATION

There is a sufficient causal connection between the supervisor's wrongful conduct and the violation if the supervisor implemented a policy or practice so deficient that the policy or practice itself is a repudiation of constitutional rights and is the moving force of the constitutional violation.

A supervisor is liable for a constitutional violation committed by his or her subordinates if the supervisor participated in, ordered or authorized the actions or omissions which resulted in a violation, or if the supervisor set in motion a series of acts by others, or knowingly refused to terminate a series of acts by others, which he or she knew or reasonably should have known would cause others to inflict the constitutional violation.

**DAMAGES – FOR DEPRIVATION OF CIVIL RIGHTS – ACTUAL OR
NOMINAL**

It is the duty of the Court to instruct you about the measure of damages. By instructing you on damages, the Court does not mean to suggest for which party your verdict should be rendered.

If you find for the plaintiffs, you must determine each plaintiff's damages. Plaintiffs have the burden of proving damages by a preponderance of the evidence. Damages means the amount of money which will reasonably and fairly compensate each plaintiff for the deprivation of civil rights legally caused by the defendants. You should consider the following:

The mental, physical and emotional pain and suffering each plaintiff experienced and which with reasonable probability will experience in the future.

If you find for a plaintiff, but you find that that plaintiff has failed to prove actual damages, you shall return an award of nominal damages not to exceed one dollar for that plaintiff.

Remember you must consider each plaintiff separately, and your finding with regard to one plaintiff should not determine your decision regarding any of the other plaintiffs. Similarly, you must consider the liability of each defendant separately.

Your award must be based upon evidence and not upon speculation, guess work or conjecture.

LEGAL CAUSE DEFINED

The law defines "cause" in its own particular way. A cause of injury, damage, loss or harm is something that is a substantial factor in bringing about an injury, damage, loss or harm.

The injury, damage, loss or harm that plaintiffs claim in this case is the deprivation of their right under the Fourth Amendment to the United States Constitution to be free from arrest effected by the use of excessive force.

COMMUNICATION WITH COURT

If it becomes necessary during your deliberations to communicate with me, you may send a note through the clerk or court security officer, signed by your foreperson or by one or more members of the jury. No member of the jury should ever attempt to communicate with me except by a signed writing; and I will communicate with any member of the jury on anything concerning the case only in writing or orally here in open court. If you send out a question, I will consult with the parties before answering it, which may take some time. You may continue your deliberations while waiting for the answer to any question. Remember that you are not to tell anyone — including me — how the jury stands, numerically or otherwise, on your deliberations until after you have reached a unanimous verdict or have been discharged.

DUTY TO DELIBERATE

When you retire, you should elect one member of the jury as your foreperson. That person will preside over the deliberations and speak for you here in court.

You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict must be unanimous.

Each of you must decide the case for yourself, but you should do so only after you have considered all the evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinion if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do not change an honest belief about the weight and effect of the evidence simply to reach a verdict.