

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA  
EASTERN DIVISION**

**JEFF KENNEDY,**

**Plaintiff,**

**vs.**

**NICHOLAS SCHLOSSER and  
CHAD LEITZEN,**

**Defendants.**

**No. C11-1032**

**FINAL JURY INSTRUCTIONS**

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**FINAL INSTRUCTION NO. 1**

Members of the jury, the instructions I gave at the beginning of the trial and during the trial remain in effect. I now give you some additional instructions.

You must, of course, continue to follow the instructions I gave you earlier, as well as those I give you now. You must not single out some instructions and ignore others, because all are important. This is true even though some of those I gave you at the beginning of trial are not repeated here.

The instructions I am about to give you now are in writing and will be available to you in the jury room. I emphasize, however, that this does not mean they are more important than my earlier instructions. Again, all instructions, whenever given and whether in writing or not, must be followed.

Neither in these instructions nor in any ruling, action, or remark that I have made during the course of this trial have I intended to give any opinion or suggestion as to what your verdict should be.

**FINAL INSTRUCTION NO. 2**

You were advised at the beginning of the trial that the City of Dubuque had been named as a defendant. I have dismissed the claim against the City and you will disregard it.

**FINAL INSTRUCTION NO. 3**

In these instructions you are told that your verdict depends on whether you find certain facts have been proved. The burden of proving a fact is upon the party whose claims rely upon that fact. The party who has the burden of proving a fact must prove it by the greater weight or preponderance of the evidence. To prove something by the greater weight or preponderance of the evidence is to prove that it is more likely true than not true. It is determined by considering all of the evidence and deciding which evidence is more believable. If, on any issue in the case, the evidence is equally balanced, you cannot find that issue has been proved.

The greater weight or preponderance of the evidence is not necessarily determined by the greater number of witnesses or exhibits a party has presented.

You may have heard of the term "proof beyond a reasonable doubt." That is a stricter standard which applies in criminal cases. It does not apply in civil cases such as this. You should, therefore, put it out of your minds.

**FINAL INSTRUCTION NO. 4**

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it, or none of it.

In deciding what testimony to believe, you may consider a witness' intelligence, the opportunity a witness had to see or hear the things testified about, a witness' memory, any motives a witness may have for testifying a certain way, the manner of a witness while testifying, whether a witness said something different at an earlier time, the general reasonableness of the testimony, and the extent to which the testimony is consistent with any evidence that you believe.

In deciding whether or not to believe a witness, keep in mind that people sometimes hear or see things differently and sometimes forget things. You need to consider therefore whether a contradiction is an innocent misrecollection or lapse of memory, or an intentional falsehood; and that may depend on whether it has to do with an important fact or only a small detail.

**FINAL INSTRUCTION NO. 5**

You have heard testimony from persons described as experts. Persons who have become experts in a field because of their education and experience may give their opinion on matters in that field and the reasons for their opinion.

Consider expert testimony just like any other testimony. You may accept it or reject it. You may 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.

**FINAL INSTRUCTION NO. 6**

You have heard testimony that Kennedy was convicted of assaulting a police officer as a consequence of the incident on September 1, 2009. The assault conviction does not preclude Kennedy from recovering on his claim of excessive force. You should consider the conviction, along with all of the other evidence, in deciding whether Kennedy has proved his claim.

**FINAL INSTRUCTION NO. 7**

Kennedy claims Schlosser and Leitzen used excessive force against him on September 1, 2009. Defendants deny this claim. Whether or not excessive force was used has nothing to do with whether or not the arrest of Kennedy, or taking him into custody, was lawful. The lawfulness of the arrest is not before you. The only issue before you is whether the force Defendants used was excessive.

To recover on his “excessive force” claim, Kennedy must prove all of the following propositions:

- 1. Schlosser and/or Leitzen used physical force in arresting Kennedy.**
- 2. The use of such force was excessive because it was not reasonably necessary to arrest Kennedy.** In determining whether such force was “excessive,” you must consider such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of the injury inflicted, and whether a reasonable officer on the scene, without the benefit of 20/20 hindsight, would have used such force under similar circumstances. You must consider whether the officer’s actions are reasonable in the light of the facts and circumstances confronting the officer, without regard to the officer’s own state of mind, intention, or motivation.
- 3. As a direct result, Kennedy suffered damages.**

If Kennedy has failed to prove any of these propositions, then he is not entitled to damages on his excessive force claim. If Kennedy has proved all of these propositions, then he is entitled to recover damages in some amount.

**FINAL INSTRUCTION NO. 8**

Kennedy also claims that Schlosser and/or Leitzen failed to intervene while the other used excessive force. Defendants deny this claim. A police officer who fails to prevent the use of excessive force by another officer may be held liable for the resulting damages.

To recover on his “failure to intervene” claim, Kennedy must prove all of the following propositions:

- 1. Schlosser and/or Leitzen used excessive force on Kennedy.**
- 2. Schlosser and/or Leitzen observed or had reason to know that excessive force would be or was being used by the other officer.**
- 3. Schlosser and/or Leitzen had the opportunity to prevent the other officer from using excessive force.**
- 4. Schlosser and/or Leitzen had the means to prevent the other officer from using excessive force.**
- 5. As a direct result of Schlosser’s and/or Leitzen’s failure to intervene, Kennedy suffered damages.**

If Kennedy has failed to prove any of these propositions, then he is not entitled to damages on his failure to intervene claim. If Kennedy has proved all of these propositions, then he is entitled to damages in some amount.

**FINAL INSTRUCTION NO. 9**

If you find in favor of Kennedy on any of his claims, then you must award him an amount of money that will fairly compensate him for any damages you find he sustained and is reasonably certain to sustain in the future as a direct result of Schlosser's and/or Leitzen's wrongful conduct. You should consider the physical pain and mental or emotional suffering Kennedy has experienced and is reasonably certain to experience in the future, the nature and extent of his injuries, whether the injuries are temporary or permanent, whether any resulting disability is partial or total, and any aggravation of a pre-existing condition.

Remember, throughout your deliberations you must not engage in speculation, guess, or conjecture, and you must not award any damages under this Instruction by way of punishment or through sympathy.

**FINAL INSTRUCTION NO. 10**

Kennedy also claims he is entitled to punitive damages. The law permits the jury under certain circumstances to award punitive damages.

If you find in favor of Kennedy under his “excessive force” and/or his “failure to intervene” claims, and if it has been proved that the conduct of Schlosser and/or Leitzen was malicious or recklessly indifferent to Kennedy’s rights, then you may, but are not required to, award Kennedy an additional amount of money as punitive damages for the purposes of punishing Schlosser and/or Leitzen for engaging in misconduct, and deterring or discouraging Schlosser, Leitzen, and others from engaging in similar misconduct in the future. You should presume that Kennedy has been made whole for his injuries by the damages awarded under Instruction No. 9.

If you decide to award punitive damages, you should consider the following in deciding the amount of punitive damages to award:

1. How reprehensible Schlosser’s and/or Leitzen’s conduct was. In this regard, you may consider whether the harm suffered by Kennedy was physical or economic or both; whether there was violence, deceit, intentional malice, or reckless disregard for human health or safety; whether the conduct that harmed Kennedy also posed a risk of harm to others; and whether there was any past conduct by Schlosser and/or Leitzen of the sort that harmed Kennedy.
2. How much harm Schlosser’s and/or Leitzen’s wrongful conduct caused Kennedy and could cause him in the future.
3. What amount of punitive damages, in addition to the other damages already awarded, is needed to punish Schlosser and/or Leitzen for their wrongful conduct toward Kennedy, and to deter and discourage Schlosser and/or Leitzen and others from similar wrongful conduct in the future.

(CONTINUED...)

**FINAL INSTRUCTION NO. 10 (Cont'd)**

The amount of any punitive damages award should bear a reasonable relationship to the harm caused to Kennedy.

You may award punitive damages against Schlosser and/or Leitzen, or you may refuse to award punitive damages. If punitive damages are awarded, the amounts awarded against Schlosser and/or Leitzen may be the same or they may be different.

**FINAL INSTRUCTION NO. 11**

In conducting your deliberations and returning your verdict, there are certain rules you must follow.

*First*, when you go to the jury room, you must select one of your members as your foreperson. That person will preside over your discussions and speak for you here in court.

*Second*, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach agreement if you can do so without violence to individual judgment, because a verdict must be unanimous.

Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinions if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right, or simply to reach a verdict. Remember at all times that you are not partisans. You are judges - judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

*Third*, if you need to communicate with me during your deliberations, you may send a note to me through the Court Security Officer, signed by one or more jurors. I will respond as soon as possible either in writing or orally in open court. Remember that you should not tell anyone - including me - how your votes stand numerically.

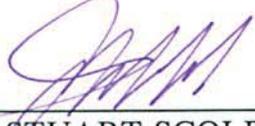
*Fourth*, your verdict must be based solely on the evidence and on the law which I have given to you in my instructions. The verdict must be unanimous. Nothing I have said or done is intended to suggest what your verdict should be - that is entirely for you to decide.

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FINAL INSTRUCTION NO. 11 (Cont'd)

*Finally*, the verdict form is simply the written notice of the decision that you reach in this case. You will take this form to the jury room, and when each of you has agreed on the verdict, your foreperson will fill in the form, sign and date it, and advise the court security officer that you are ready to return to the courtroom.

DATED this 31<sup>st</sup> day of January, 2013.

  
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JON STUART SCOLES  
CHIEF MAGISTRATE JUDGE  
UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF IOWA