

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

LAKENDUS COLE and LEON EDMOND,)	
individually and as)	
representatives of all others)	
similarly situated,)	
)	
Plaintiffs,)	
v.)	No. 2:13-cv-02117-JPM-dkv
)	
CITY OF MEMPHIS, TENNESSEE,)	
)	
Defendant.)	
)	
)	

JURY INSTRUCTIONS

Ladies and gentlemen of the jury, we have now come to the point in the case when it is my duty to instruct you in the law that applies to the case and you must follow the law as I state it to you.

As jurors it is your exclusive duty to decide all questions of fact submitted to you and for that purpose to determine the effect and value of the evidence.

You must not be influenced by sympathy, bias, prejudice or passion.

You are not to single out any particular part of the instructions and ignore the rest, but you are to consider all the instructions as a whole and regard each in the light of all the others.

All of the instructions are equally important. The order in which these instructions are given has no significance. You must follow all of the instructions and not single out some and ignore others.

I. GENERAL INSTRUCTIONS

A. Burden of Proof and Consideration of the Evidence

I will now instruct you with regard to where the law places the burden of making out and supporting the facts necessary to prove the theories in the case.

When, as in this case, the Defendant denies the material allegations of the Plaintiffs' claims, the law places upon the Plaintiffs the burden of supporting and making out his claims upon every material issue in controversy by the greater weight or preponderance of the evidence.

At various points in the instructions the Court will instruct on whom the law places the burden of proof regarding each particular issue.

Preponderance of the evidence means that amount of factual information presented to you in this trial which is sufficient to cause you to believe that an allegation is probably true. In order to preponderate, the evidence must have the greater convincing effect in the formation of your belief. A preponderance of the evidence means evidence, which taken as a

whole, shows that the fact sought to be proved is more probable than not. If the evidence on a particular issue appears to be equally balanced, the party having the burden of proving that issue must fail.

B. Corporation Not to Be Prejudiced

In this case, Defendant City of Memphis is for legal purposes a corporation. The fact that some of the parties are corporations must not influence you in your deliberations or in your verdict.

You may not discriminate between corporations and natural individuals, such as Plaintiffs Cole and Edmond. Each is a person in the eyes of the law, and each is entitled to the same fair and impartial consideration and to justice by the same legal standards.

This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations of life. A corporation is entitled to the same fair trial at your hands as a private individual. All persons, including corporations, stand equal before the law, and are to be dealt with as equals in a court of justice.

When a corporation is a party in a case, that does not mean that only one body can be considered by you in determining its

claims or its liability in the case. I have provided additional instructions for municipal liability in Sections III.G and III.H on pages 48-52. Those instructions will guide your findings for municipal liability.

C. Multiple Plaintiffs

Although there are two individual plaintiffs in this action, and there is a plaintiff class, it does not follow from that fact alone that if one plaintiff is entitled to recover, all are entitled to recover. The defendant is entitled to fair consideration as to each plaintiff, just as each plaintiff is entitled to fair consideration of that plaintiff's claim against the defendant. Unless otherwise stated, all instructions I give you govern the case as to all plaintiffs.

D. Weighing the Evidence

You, members of the jury are judges of the facts concerning the controversy involved in this lawsuit. In order for you to determine what the true facts are, you are called upon to weigh the testimony of every witness who has appeared before you and to give the testimony of the witnesses the weight, faith, credit, and value to which you think it is entitled.

You must consider all the evidence pertaining to every issue, regardless of who presented it. You are, however, the sole and exclusive judges of the credibility or believability of the witnesses who have testified in this case. You must decide which witnesses you believe and how important you think their testimony was. You are not required to accept or reject everything a witness says. You are free to believe all, none, or part of any person's testimony.

In weighing the testimony of the witnesses who have appeared before you in this case, you should rely on your own common sense and everyday experience. You should note the manner and demeanor of witnesses while on the stand. You may also consider whether the witness impressed you as one who was

telling the truth or one who was telling a falsehood and whether or not the witness was a frank witness. You may consider, among other things, the reasonableness or unreasonableness of the testimony of the witness; the opportunity or lack of opportunity of the witness to know the facts about which he or she testified; the intelligence or lack of intelligence of the witness; the interest of the witness in the result of the lawsuit, if any; the relationship of the witness to any of the parties to the lawsuit, if any; and whether the witness testified inconsistently while on the witness stand, or if the witness said or did something or failed to say or do something at any other time that is inconsistent with what the witness said while testifying.

If there is a conflict in the testimony of the witnesses, it is your duty to reconcile that conflict if you can, because the law presumes that every witness has attempted to and has testified to the truth. But if there is a conflict in the testimony of the witnesses which you are not able to reconcile, in accordance with these instructions, then it is with you absolutely to determine which ones of the witnesses you believe have testified to the truth and which ones you believe have testified to a falsehood.

Immaterial discrepancies do not affect a witness's testimony, but material discrepancies do. 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.

The greater weight or preponderance of the evidence in a case is not determined by the number of witnesses testifying to a particular fact or a particular state of facts. Rather, it depends on the weight, credit, and value of the total evidence on either side of the issue, and of this you jurors are the exclusive judges.

If in your deliberations you come to a point where the evidence is evenly balanced and you are unable to determine which way the scales should turn on a particular issue, then the jury must find against the party, upon whom the burden of proof has been cast in accordance with these instructions.

E. Direct and Circumstantial Evidence

There are two kinds of evidence - direct and circumstantial. Direct evidence is testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is indirect evidence; that is, it is proof of one or more facts from which one can find another fact.

You may consider both direct and circumstantial evidence in deciding this case. The law permits you to give equal weight to both, but it is for you to decide how much weight to give to any evidence.

F. (1) Limited Admission of Evidence - Parties or Purpose

Whenever evidence was admitted for a limited purpose, you must not consider it for any other purpose. You must, however, follow the limiting instructions I have given you. Your attention was called to these matters when the evidence was admitted.

F. (2) Judge's Questions to Witnesses

During the trial, I sometimes asked a witness questions. Please do not think I have any opinion about the subject matter of my questions. I may ask a question simply to clarify a matter, not to help one side of the case or harm another side.

At all times you, as jurors, are the sole judges of the facts of this case.

G. Statements of Counsel

You must not consider as evidence any statements of counsel made during the trial. If, however, counsel for the parties have stipulated to any fact, or any fact has been admitted by counsel, you will regard that fact as being conclusively established.

As to any questions to which an objection was sustained, you must not speculate as to what the answer might have been or as to the reason for the objection, and you must assume that the answer would be of no value to you in your deliberations.

You must not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken out by the Court. Such matter is to be treated as though you had never known of it.

You must never speculate to be true any insinuation suggested by a question asked a witness. A question is not evidence. It may be considered only as it supplies meaning to the answer.

H. Decision Must Be Based on the Record

The law does not require any party to call as witnesses all persons who may have been present at any time or place involved in the case, or who may appear to have some knowledge of the matters in issue at this trial. Nor does the law require any party to produce as exhibits all papers and things mentioned in the evidence in the case.

If either party has failed to call a witness, you must ask yourself if the witness was equally available to the other party. Neither party is required to call witnesses who are equally available to the other party.

"Equally available" simply means that there is no legal impediment to the witness talking to a party. Other than a party's managerial employees, generally other witnesses are "equally available" under the law to all parties, despite the fact that it may be inconvenient or expensive for a party to obtain the witness' testimony.

In reaching your verdict you may consider only the evidence that was admitted. Remember that any questions, objections,

statements or arguments made by the attorneys during the trial are not evidence. You must not speculate about witnesses or documents that were not presented in the courtroom. If the attorneys have stipulated or agreed to any fact, however, you will regard that fact as having been proved.

Although you must only consider the evidence in this case in reaching your verdict, you are not required to set aside your common knowledge. You are permitted to weigh the evidence in the light of your common sense and observations.

I. Totality of the Evidence

The jury may consider all evidence admitted in the case. Testimony and documents which the Court allowed into evidence over a hearsay objection may be considered by you as evidence, on the same basis as all other evidence, for the purpose for which it was admitted. This, of course, is all for you, the jury, to decide.

II. STIPULATED FACTS AND CONTENTIONS OF THE PARTIES

A. Stipulated Facts

Before the trial of this case, the parties agreed to the truth of certain facts in this action. As a result of this agreement, the Plaintiffs and Defendant entered into certain stipulations in which they agreed that the stipulated facts could be taken as true without either party presenting further proof on the matter. This procedure is often followed to save time in establishing facts which are undisputed.

The following facts have been stipulated by the parties:

1. The Memphis Police Department is a division of the City of Memphis.
2. On May 5, 2012, the police officers who detained Leon Edmond were employees of the City of Memphis and were acting under color of state law.
3. On August 26, 2012, the police officers who announced the clearing of Beale Street were employees of the City of Memphis and were acting under color of state law.

4. On August 26, 2012, the police officers who placed Lakendus Cole under arrest were employees of the City of Memphis and were acting under color of state law.

The parties have also stipulated to the authenticity and admissibility of certain video evidence taken during the early morning hours of August 26, 2012:

1. Video from Handy and Beale that runs from 2:45 a.m. to 3:30 a.m.
2. Video from Third St. and Beale St. that runs from 2:40 a.m. to 3:39 a.m.
3. Three videos from Second St. and Beale St.:
 - a. 2:39 a.m. to 3:31 a.m.
 - b. 3:31 a.m. to 4:39 a.m.
 - c. 4:39 a.m. to 4:42 a.m.
4. Video from Club 152 that runs from 3:55:17 a.m. to 4:40:32 a.m.

III. GENERAL INSTRUCTIONS ON THE APPLICABLE LAW

A. Legal Theories of the Case

Turning now to the legal theories in the case, it is my duty to tell you what the law is. If a lawyer or party has told you that the law is different from what I tell you it is, you must, of course, take the law as I give it to you. That is my duty, but it is your duty, and your duty alone, to determine what the facts are and after you have determined what the facts are, to apply those facts to the law as I give it to you, free from any bias, prejudice, or sympathy, either one way or the other.

B. Nature of Action

This is a class action against the City of Memphis for violations of Plaintiffs' constitutional rights by the Memphis Police Department.

The Court has certified the following class in this action:

All persons who have been unlawfully removed from Beale Street and/or adjacent sidewalks by City of Memphis police officers pursuant to the custom, policy and practice known as the Beale Street Sweep.

Plaintiffs Cole and Edmond, as representatives of the class, seek a declaratory judgment on behalf of the Certified Class declaring that the Beale Street Sweep violated the Class Members' constitutional rights under the Fourteenth Amendment of the Constitution of the United States of America. Plaintiffs Cole and Edmond also seek on behalf of the Certified Class a Permanent Injunction restraining and prohibiting Defendant City of Memphis from engaging in the Beale Street Sweep or any similar conduct on Beale Street.

Plaintiffs seek declaratory relief for the Certified Class that the alleged sweep and clearing of Beale Street is an unconstitutional custom of the Memphis Police Department.

Plaintiffs further seek an injunction from the Court to prohibit this alleged custom from continuing. Defendant City of Memphis claims that the practice of sweeping and clearing Beale Street was an occasional practice executed only when necessary to protect public safety. Accordingly, Defendant City of Memphis believes it is not liable to the Certified Class.

Plaintiffs Cole and Edmond also seek monetary damages individually for injuries suffered in violation of their Fourth Amendment rights. Plaintiff Lakendus Cole seeks a judgment for compensatory damages for personal injuries, pain and suffering, emotional distress, and deprivation of his liberty. Plaintiff Cole alleges he was unlawfully arrested without probable cause and was slammed into a police car by the arresting officers. Defendant City of Memphis contends that police officers made an announcement to clear Beale Street only after a series of events occurred which threatened the police officers' control of the street. According to Defendant, Plaintiff Cole was arrested only after he was advised that he was not following the announcement to leave the street or enter a club.

Plaintiff Leon Edmond seeks a judgment for compensatory damages for emotional distress and deprivation of his liberty.

Plaintiff Edmond alleges he was unlawfully detained without probable cause or reasonable suspicion. Defendant City of Memphis contends that the police officers' detention of Plaintiff Edmond was in response to a communication from Cindy Wilson, manager of Club 152, in which she reported a disturbance between Plaintiff Edmond and a doorman of Club 152.

C. Due Process under the Fourteenth Amendment

The Due Process Clause of the Fourteenth Amendment provides that a person may not be deprived of life, liberty, or property without due process of law. I am instructing you as a matter of law that class members suffered a deprivation of liberty. The issue for you to be determined is whether that deprivation of liberty was unconstitutional. In the context of this case, the Due Process Clause protects private citizens against arbitrary, egregious, or abusive exercises of governmental power.

A claim for due process violations may arise under the Fourteenth Amendment when a municipal government restricts an individual's fundamental constitutional right. Individuals have a fundamental right to intrastate travel which encompasses freedom of movement. This right extends to an individual's right to travel or remain on a public roadway while participating in lawful activities. When the government restricts an individual's right to intrastate travel and freedom of movement, the government's action is unconstitutional unless the government proves by a preponderance of the evidence that it had a compelling interest in enforcing its policy and whether the policy was narrowly tailored to achieve the government's

goals.

Under these circumstances, the burden of proof has shifted to Defendant City of Memphis. The Court has already determined that the City of Memphis has a compelling interest in maintaining public safety. Therefore, Defendant City of Memphis must prove by a preponderance of the evidence that its custom of sweeping and clearing Beale Street was narrowly tailored to achieve public safety.

Whether the City of Memphis' practice to sweep and clear Beale Street is narrowly tailored is a question of law that I will determine. In order to make this determination, however, certain factual questions must be answered first by you the jury:

- 1) Whether a custom and/or well-established practice of preventing persons from standing and/or walking on the sidewalk or street of Beale Street occurs mainly on weekends at or about 3:00 a.m. and without consideration to whether conditions throughout the Beale Street area pose an existing, imminent or immediate threat to public safety? (The related

question on the Jury Verdict Form is Question 4.)

2) Whether, since at least 2007, thousands of persons not breaking a law were cleared off of Beale Street pursuant to the custom and/or well-established practice described in Question 1? (The related question on the Jury Verdict Form is Question 5.)

3) Whether the custom and/or well-established practice described in Question 1 was executed for the purpose of facilitating the end of a police work shift? (The related question on the Jury Verdict Form is Question 6.)

Remember, the burden of proof for each of the above questions is on Defendant City of Memphis. Therefore, the City of Memphis must prove their position on each of these questions by a preponderance of the evidence.

Additionally, whether an unconstitutional practice of sweeping and clearing Beale Street occurred on the nights that Plaintiffs allege they were arrested must also be determined. The burden is on Plaintiffs to prove that such a practice did occur on those nights. Accordingly, you the jury must answer the following questions:

- 1) Whether a custom and/or well-established practice of preventing persons from standing and/or walking on the sidewalk or street of Beale Street occurred at or about 3:00 a.m. on May 5, 2012. (The related question on the Jury Verdict Form is Question 18.)

- 2) Whether a custom and/or well-established practice of preventing persons from standing and/or walking on the sidewalk or street of Beale Street occurred at or about 3:00 a.m. on August 26, 2012. (The related question on the Jury Verdict Form is Question 7.)

- 3) Whether conditions throughout the Beale Street area posed an existing, imminent or immediate threat to public safety at or about 3:00 a.m. on May 5, 2012? (The related question on the Jury Verdict Form is Question 19.)

- 4) Whether conditions throughout the Beale Street area posed an existing, imminent or immediate threat to public safety at or about 3:00 a.m. on August 26, 2012? (The related question on the Jury Verdict Form is Question 8.)

Remember, the burden of proof for these questions is on Plaintiffs. Therefore, Plaintiffs must prove their position on each of these questions by a preponderance of the evidence.

Remember, the questions in the Jury Verdict Form will guide you in making these determinations. It is important that you pay close attention to the questions and directions in the Jury Verdict Form.

D. Fourth Amendment - Unlawful Arrest

Plaintiff Edmond claims that he was unlawfully arrested on May 5, 2012, without probable cause to believe he committed a crime. Plaintiff Cole claims that he was unlawfully arrested on August 26, 2012, without probable cause to believe he committed a crime. The Fourth Amendment to the United States Constitution provides as follows:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourth Amendment prohibits the police from carrying out unreasonable seizures. To succeed on a claim for unlawful arrest, a plaintiff must show by a preponderance of the evidence: 1) the plaintiff was seized by a person or persons acting under the color of law; and 2) the seizure was unreasonable. It has been stipulated by the parties that the police officers who arrested Plaintiff Cole and detained Plaintiff Edmond were acting under color of law.

It has also been stipulated that Plaintiff Cole was arrested. An arrest is considered a "seizure" within the

meaning of the Fourth Amendment. Although the parties have stipulated that Plaintiff Edmond was detained, you must decide whether Plaintiff Edmond's detention amounted to an arrest. An arrest occurs when a reasonable person would feel that he is under arrest or otherwise deprived of his freedom of action in any significant way.

You must also determine whether Plaintiff Cole's arrest and Plaintiff Edmond's detention, should you find Plaintiff Edmond's detention constituted an arrest, was unreasonable. Under the Fourth Amendment, an arrest may be made only when a police officer has probable cause to believe that the person arrested has engaged in criminal conduct. An arrest without probable cause is an unreasonable seizure.

The critical question for you to decide regarding the issue of reasonableness of an arrest is whether the police officers had probable cause to believe that the person who was arrested was committing any offenses. In this case, the police officers did not have an arrest warrant. The law, however, does not require an arrest warrant when, as in this case, the conduct that justifies the arrest is observed by a police officer and the arrest occurs in a public place.

Probable cause is not proof beyond a reasonable doubt or proof sufficient to convict. Neither, however, is it mere speculation or surmise. Probable cause exists when the facts and circumstances within the knowledge of the police officer at the time the arrest was made were sufficient to warrant a person of reasonable prudence to believe that an offense or a crime was being committed by the person arrested. This determination is made on the basis of the totality of the circumstances viewed from the vantage point of a prudent, reasonable, cautious person on the scene at the time of the arrest.

Even if the charge against the plaintiff was ultimately dismissed, that is not evidence that the police officers lacked probable cause to arrest for such a charge. The ultimate dismissal is not relevant on the issue of initial probable cause to arrest. This is because whether the police officers had probable cause must be determined on the basis of the facts and circumstances facing the police officer at the time of the arrest.

Plaintiffs have the burden of establishing by a preponderance of the evidence that the plaintiff you are considering was arrested without probable cause. If probable cause existed for an arrest, then the plaintiff you are considering was not subjected to an unreasonable seizure.

It may be that the plaintiff you are considering's only possible offense was to remain on Beale Street after a police announcement was made to either leave the street or enter a club. Under these circumstances, the police officers lacked probable cause to arrest the plaintiff you are considering if 1) the plaintiff's only offense was to remain on Beale Street during Memphis Police Department's sweep and clearing of the street; and 2) the sweep and clearing on the night of the plaintiff's arrest was unconstitutional.

In order for you to determine whether the police officers had probable cause to arrest the plaintiff you are considering for the charge made against him, I shall instruct you as to the elements of the crimes with which each plaintiff was charged, or arguably charged, at the time of arrest.

Plaintiff Cole:

At the time of Plaintiff Cole's arrest, he was charged with three crimes: 1) vandalism over \$500; 2) disorderly conduct; and 3) resisting stop, arrest.

Vandalism Over \$500:

For Plaintiff Cole to be guilty of vandalism, the state would have to prove the following essential elements:

- (1) that Plaintiff Cole caused damage to any real or personal property;
- (2) that Plaintiff Cole caused such damage knowingly;
- (3) that the property was owned by the City of Memphis; and
- (4) that Plaintiff Cole knew he did not have the City of Memphis' effective consent.

"Damage" includes, but is not limited to:

- (A) destroying, polluting, or contaminating property; or
- (B) tampering with the property and causing pecuniary loss or substantial inconvenience to the owner or a third person.

"Knowingly" means that a person acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstance exists. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result.

The requirement of "knowingly" is also established if it is shown that the individual charged acted intentionally.

"Intentionally" means that a person acts intentionally with

respect to the nature of the conduct or the result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result.

"Property" means anything of value.

"Effective consent" means assent in fact, whether express or apparent, including assent by one legally authorized to act for another. Consent is not effective when:

(a) induced by deception or coercion; or

(b) given by a person the individual charged knows is not authorized to act as an agent;

(c) given by a person who, by reason of youth, mental disease or defect, or intoxication, is known by the individual charged to be unable to make reasonable decisions regarding the subject matter; or

(d) given solely to detect the commission of an offense.

Disorderly Conduct:

For Plaintiff Cole to be guilty of disorderly conduct, the state would have to prove the existence of the following essential elements:

Part A:

(1) that Plaintiff Cole was in a public place and with the intent to cause public alarm or public annoyance;

(2) that Plaintiff Cole engaged in fighting, violent behavior, or threatening behavior; and

(3) that Plaintiff Cole acted either intentionally, knowingly or recklessly.

Or

Part B:

(1) that Plaintiff Cole was in a public place and with the intent to cause public alarm or public annoyance;

(2) that Plaintiff Cole refused to obey an official order to disperse issued to maintain public safety in dangerous proximity to a fire, hazard or other emergency; and

(3) that Plaintiff Cole acted either intentionally, knowingly or recklessly.

Or

Part C:

(1) that Plaintiff Cole was in a public place and with the intent to cause public alarm or public annoyance;

(2) that Plaintiff Cole created a hazardous or physically offensive condition by an act that served no legitimate purpose; and

(3) that Plaintiff Cole acted either intentionally, knowingly or recklessly.

Or

Part D:

(1) that Plaintiff Cole made unreasonable noise which prevented others from carrying on lawful activities; and

(2) that Plaintiff Cole acted either intentionally, knowingly or recklessly.

"Public place" means a place to which the public or a group of persons has access and includes, but is not limited to, highways, transportation facilities, schools, places of amusement, parks, places of business, playgrounds and hallways, lobbies and other portions of apartment houses and hotels not constituting rooms or apartments designed for actual residence.

An act is deemed to occur in a public place if it produces its proscribed or offensive consequences in a public place.

"Recklessly" means that a person acts recklessly with respect to circumstances surrounding the conduct or the result of the conduct when the person is aware of, but consciously disregards, a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint.

Resisting Stop, Arrest:

For Plaintiff Cole to be guilty of this offense, the state would have to prove the existence of the following essential elements:

- (1) that Plaintiff Cole prevented or obstructed a stop, frisk, halt, arrest, or search by a person known to be a law enforcement officer;
- (2) that Plaintiff Cole used force against the law enforcement officer;
- (3) that Plaintiff Cole acted intentionally.

"Force" means compulsion by the use of physical power or violence.

It is not a defense to the crime of resisting a stop or arrest that the stop, frisk, halt, arrest or search was unlawful. If, however, you find that the police arrested Plaintiff Cole for reasons other than resisting arrest, and Plaintiff Cole subsequently resisted arrest, then you must NOT consider the charge of resisting arrest in your determination of whether Plaintiff Cole's arrest was unlawful.

Plaintiff Edmond:

Should you find that Plaintiff Edmond was arrested by Memphis police officers, you must determine whether there was probable cause for his arrest. The criminal offenses you should consider in making the probable cause determination as to Plaintiff Edmond's detention are the same criminal offenses that apply to Plaintiff Edmond's claim for an unlawful "stop." Section III.E beginning on page 39 includes a description of those criminal offenses.

Summary/Unlawful Arrest (Both Plaintiffs Cole and Edmond)

I instruct you that so long as the police officers had probable cause to arrest Plaintiff Cole for the offenses charged, then Plaintiff Cole was not unlawfully arrested, and your verdict must be in favor of Defendant City of Memphis on Plaintiff Cole's claims for unlawful arrest. Similarly, should you determine that Plaintiff Edmond was arrested, so long as the police officers had probable cause to arrest Plaintiff Edmond, Plaintiff Edmond's arrest was not unlawful, and your verdict must be in favor of Defendant City of Memphis on Plaintiff Edmond's claims for unlawful arrest.

Remember, the questions in the Jury Verdict Form will guide you in making these determinations. On the Jury Verdict Form, Question 21 relates to whether Plaintiff Edmond was arrested. Questions 10 and 22 relate to whether an unlawful arrest was made.

E. Fourth Amendment - Unlawful Stop

Plaintiff Edmond alleges that he was arrested by the police officers without probable cause in violation of the Fourth Amendment. Plaintiff Edmond alternatively alleges that if his detainment did not amount to an arrest, he was subjected to an unlawful "stop" by the police.

There are significant legal distinctions between an investigatory "stop" and an arrest. A "stop" occurs when an officer, by means of physical force or show of authority, has in some way restrained a person's liberty such that in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. In addition, an individual must actually yield to the show of authority to be "stopped." An arrest occurs when a reasonable person would feel that he is under arrest or otherwise deprived of his freedom of action in any significant way.

A "stop" may last only for as long as necessary for the police to conduct a reasonable investigation. There is no fixed time or mechanical formula to determine whether the amount of time taken by the police officer or officers to investigate his or their suspicions was reasonable. A police officer is

required to diligently investigate and use the least intrusive means available to confirm or dispel his or her suspicions. You must consider the particular facts and circumstances known to the officer.

There is no bright line to determine whether police action constitutes an arrest or "stop." In making the determination you are to consider all of the facts and circumstances surrounding the encounter between the police officers and the plaintiff. In particular you should consider such factors as: the amount of force used by the police; the need for the force used; the extent to which the individual's freedom of movement was restrained; the number of police officers involved in this encounter; whether the plaintiff was suspected of being armed; the duration of the encounter; the officer's physical treatment of the plaintiff; and whether the police officers used handcuffs. The fact that no formal words were employed by the police officers like, "you are under arrest," does not necessarily mean that the plaintiff was not arrested. An arrest need not be formal; it can occur if the subject is restrained and his freedom of movement is significantly restrained.

Further, it is possible that a person can be "stopped" and arrested in the course of the same encounter. A "stop" can at some point ripen into an arrest under the totality of the

circumstances. To repeat, to determine whether Plaintiff Edmond was "stopped" or arrested, you are to consider all of the circumstances.

When the police arrest an individual, they must have probable cause to believe the person arrested committed or was committing a criminal offense. If the police only "stop" an individual, however, they need only have reasonable suspicion to believe that the individual was engaged in criminal activity. Reasonable suspicion requires less justification for police action than probable cause. It is for you, the jury, to determine whether the officers arrested or only "stopped" Plaintiff Edmond.

Reasonable suspicion does not require proof of wrongdoing by a preponderance of the evidence, but requires something more than a mere guess or hunch. Reasonable suspicion means that to justify the particular intrusion upon the individual, the police officer must be able to articulate specific facts which, taken together with rational inferences from the facts, reasonably warrant the officer's conclusion that the individual is engaging in, or is about to engage in, criminal activity.

In this case, Plaintiff Edmond alleges that he was "stopped" for public intoxication. Plaintiff Edmond has the

burden of establishing by a preponderance of the evidence that he was "stopped" without reasonable suspicion. If reasonable suspicion existed for the "stop," then the plaintiff was not subjected to an unreasonable seizure.

I will review the elements for public intoxication for your reference.

For Plaintiff Edmond to be guilty of public intoxication the state would have to prove the existence of the following essential elements:

- (1) that Plaintiff Edmond was under the influence of an intoxicating substance;
- (2) that Plaintiff Edmond was under the influence to the degree that the person being detained or arrested may have been endangered, that there was endangerment to other persons or property, or that the person being detained or arrested unreasonably annoyed people in the vicinity;
- (3) that Plaintiff Edmond was in a public place; and
- (4) that Plaintiff Edmond acted either intentionally, knowingly or recklessly.

Alcohol is an intoxicating substance.

The term "under the influence" covers not only all well-known and easily recognized conditions and degrees of intoxication, but also any mental or physical condition which is the result of taking intoxicants or drugs in any form and which deprives one of the clearness of mind and control of one's self which one would otherwise possess.

If recklessness establishes an element of an offense and the person is unaware of the risk because of voluntary intoxication, the person's unawareness is immaterial in a prosecution for that offense.

I instruct you that so long as the police officers had reasonable suspicion to "stop" Plaintiff Edmond, then Plaintiff Edmond was not unlawfully "stopped," and your verdict must be in favor of Defendant City of Memphis on Plaintiff Edmond's claims for unlawful "stop."

Remember, the questions in the Jury Verdict Form will guide you in making these determinations. On the Jury Verdict Form, Question 25 relates to whether Plaintiff Edmond was "stopped" by police. Question 26 relates to whether an unlawful "stop" was made.

F. Fourth Amendment - Excessive Force

Plaintiff Cole claims that the police officers violated his Fourth Amendment rights by using excessive force when, during the course of his arrest, the officers forcefully grabbed him and twice slammed him against a police car with such force that it dented the car in two spots. The Fourth Amendment to the United States Constitution states that there shall be no unreasonable seizures. An arrest is a seizure. A police officer may use reasonable force in making an arrest, but the Fourth Amendment prohibits the use of unreasonable force. Therefore, a person has a constitutional right under the Fourth Amendment to be free of excessive force when arrested.

Every person has the right not to be subjected to unreasonable or excessive force while being arrested by a law enforcement officer, even though the arrest itself is otherwise in accordance with the law. On the other hand, in making a lawful arrest, police officers have the right to use such force as is necessary under the circumstances to effect the arrest, and at the same time to protect themselves or others from physical harm. Whether or not the force used in making an arrest was reasonable is an issue to be determined by you, on the basis of that degree of force a reasonable and prudent

police officer would have applied in effecting the arrest, under the circumstances in this case.

In a case such as this, where the parties' factual contentions are disputed, you must determine what actually occurred, and how much force was used. The mere fact that the evidence in this case establishes that there was some forcible contact between Plaintiff Cole and the police officers would not be sufficient by itself to demonstrate that the officers violated the plaintiff's constitutional rights. On the other hand, you may find that, under the circumstances, slamming Plaintiff Cole into the car, if you so find, constituted unreasonable and excessive force that would render the City of Memphis liable.

The question before you is whether the actions of the police officers on August 26, 2012 were objectively reasonable, meaning what a reasonably prudent police officer would have done under similar conditions in light of the facts and circumstances confronting the officer. You are to make this determination without regard to the police officers' underlying subjective intent or motivation. That means that "evil intentions" will not be considered excessive force if the force used was in fact reasonable. On the other hand, an officer's good intentions will not make the use of excessive force constitutional. The

reasonableness of a particular use of force must be judged from the perspective of a reasonable police officer on the scene, rather than with the 20/20 vision of hindsight. In determining whether the force exercised was reasonable, you should consider the facts and circumstances as you find them to be, including the severity of the offenses at issue, whether the plaintiff posed an immediate threat to the safety of the police officers or others, and whether the plaintiff was actively resisting arrest at the time the alleged excessive force was applied.

The Constitution must not be trivialized. Not every push or shove by a police officer, even if it may later seem unnecessary in the peace and quiet of this courtroom, constitutes excessive force. The concept of reasonableness makes allowance for the fact that police officers are often forced to make difficult split-second judgments in circumstances that are sometimes tense, uncertain, dangerous, and rapidly evolving, about the amount of force that is necessary in a particular situation.

If you find that the officers' use of force was reasonable, you must return a verdict for Defendant City of Memphis. If you find that the officers' use of force was unreasonable, your verdict must be for Plaintiff Cole. In that case you must then determine whether the plaintiff's alleged injuries were

proximately caused by the police officers' use of excessive force.

Plaintiff Cole has the burden of proving that the officers' actions were a proximate cause of his injuries. An injury is proximately caused by the officers' conduct when it appears from the evidence in the case that the conduct played a substantial role in bringing about the injury.

Remember, the questions in the Jury Verdict Form will guide you in making these determinations. On the Jury Verdict Form, Question 13 relates to whether excessive force was used during Plaintiff Cole's arrest. Question 14 relates to whether the excessive force was the proximate cause of Plaintiff Cole's injuries.

G. Municipal Liability - Existence of a Custom

Plaintiffs claim Defendant City of Memphis, a municipality, is liable for the violation of Plaintiffs' Fourteenth and Fourth Amendment constitutional rights. Defendant City of Memphis may only be liable where you find Plaintiffs have been deprived of their constitutional rights and such deprivation was done pursuant to a governmental custom and/or well-established practice, policy, ordinance, regulation or decision. If you have found that any of the police officers violated the Plaintiffs' constitutionally protected rights, then you must also consider Plaintiffs' claims against the City. If you have found that Plaintiffs have suffered no constitutional violations, then your verdict must be in favor of Defendant City of Memphis on Plaintiffs' claims.

The fact that an employee or employees of the City deprived a Plaintiff of his constitutionally protected rights is not itself a sufficient basis for imposing liability against the City. To find in favor of the Plaintiffs and against City of Memphis you must find: (1) that the individual police officers violated the Plaintiff's federally protected rights; and (2) the violations of Plaintiffs' rights were pursuant to a longstanding custom or practice of the City. If you find that the plaintiff

you are considering has failed to establish either of these elements, your verdict must be for Defendant City of Memphis as to that plaintiff. Of course, making a determination on these two elements requires you to make determinations of many other issues and claims. The questions in the Jury Verdict Form will guide you in making all of the necessary determinations.

Plaintiffs do not contend that the City of Memphis has a formal written policy of sweeping and clearing Beale Street. Plaintiffs allege instead that the City has had a long-standing custom or practice of sweeping and clearing Beale Street. A custom or practice is a well-settled, persistent, widespread course of conduct by municipal officials having the force of law. Whether such a practice or custom existed is a question of fact for you, the jury, to determine. In making this determination you may consider how long the alleged practice existed, the number and percentage of City of Memphis officials or employees engaged in the practice, and the similarity of the conduct engaged in by its employees.

To hold the City liable, Plaintiffs must prove by a preponderance of the evidence that the City of Memphis had a custom or practice to, without adequate provocation, routinely order individuals to either leave Beale Street or enter a club. In other words, Plaintiffs must prove that the violations of

their constitutionally protected rights were not isolated incidents but were part of a persistent, widespread practice of the Memphis Police Department. Whether a custom or policy exists is a question of fact for you to determine.

In this case, there are two relevant time periods when a practice satisfying these requirements may have occurred. It is your duty to determine whether a custom existed during either period of time. The first period of time is prior to June 14, 2012. The second period is on or after June 14, 2012.

Remember, the questions in the Jury Verdict Form will guide you in making these determinations. In this case, all of the questions on the Jury Verdict Form are relevant to the general issue of municipal liability. Questions 1 and 2, however, relate specifically to the issue of the existence of a custom that satisfies municipal liability requirements. Questions 15 and 28 relate to whether the Plaintiffs suffered no constitutional violations.

H. Municipal Liability - Causation

When a person is injured as the result of a government's policy, custom, well-established practice, regulation or decision, whether made by its lawmakers or by those officials whose statements or acts may fairly be said to represent official policy, the municipality itself is responsible for the injury that it caused. Defendant City of Memphis may be liable to Plaintiffs if you find the deprivation was done pursuant to a custom that was the cause of, that is, the moving force in the deprivation of Plaintiffs' constitutional rights.

An injury or damage is proximately caused by an 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 to Plaintiffs, and that Plaintiffs' injury or damage was either a direct result or a reasonably probable consequence of the act or omission. With regards to a municipal custom, causation is satisfied if there is a direct causal link between a municipal custom and the alleged constitutional deprivation.

The Court has already determined that if you find that an unconstitutional custom under the Fourteenth Amendment exists,

then causation is satisfied for Plaintiffs' due process claims. Nevertheless, whether Defendant City of Memphis' policies or customs caused the Plaintiffs Cole and Edmond's individual injuries in violation of the Fourth Amendment is a question of fact for you to determine. Accordingly, you must determine whether the Beale Street Sweep was the cause of any injury suffered by Plaintiff Cole or Plaintiff Edmond in violation of their Fourth Amendment rights. In this case, it is possible that the City of Memphis' custom caused an unlawful arrest or "stop" under the Fourth Amendment. It is also possible that the City of Memphis' custom caused the police officers to arrest Plaintiff Cole with excessive force.

Plaintiffs have the burden of proving each and every element of Plaintiffs' claim by a preponderance of the evidence. If you find the plaintiff you are considering has not proved any one of the elements by a preponderance of the evidence, you must return a verdict for Defendant City of Memphis.

Remember, the questions in the Jury Verdict Form will guide you in making these determinations. The questions in the Jury Verdict Form that relate specifically to municipal liability causation are Questions 3, 11, 14, 16, 23, 27, and 29.

I. Damages

If you find that the Defendant City of Memphis is liable to the Plaintiff Cole or Plaintiff Edmond, then you must determine an amount that is fair compensation for all of the damages to each plaintiff. These damages are called compensatory damages. The purpose of compensatory damages is to make the plaintiff whole--that is, to compensate the plaintiff for the damage that the plaintiff has suffered. Compensatory damages are not limited to expenses that the plaintiff may have incurred because of his injury. If you find for plaintiff, he is entitled to, in addition to his expenses incurred as a result of his injuries, compensatory damages for the physical injury, pain and suffering, mental anguish, shock, inconvenience, humiliation, and discomfort that he has suffered because of the defendant's conduct.

In regards to Plaintiff Cole and Plaintiff Edmond's claims of unlawful arrest and/or "stop," there are two distinct types of damages: 1) damages for the loss of liberty, which compensate the denial of free movement and the violation done to an individual's dignity as a result of the unlawful detention, and not the physical and mental injuries arising from the incident; and 2) damages for tangible injury, including physical harm,

embarrassment, and emotional suffering. In arriving at an award of compensatory damages, you should consider the time that an individual was detained, the mental anguish suffered, any damage to the individual's reputation, and any other relevant criteria.

You may award compensatory damages only for injuries that the plaintiff you are considering proves were proximately caused by the defendant's allegedly wrongful conduct. That is, you may not simply compensate plaintiff for any injury suffered by him; you must compensate plaintiff only for those injuries that are a direct result of the defendant's conduct that violated the plaintiff's constitutional rights. Plaintiff may not recover for any injury that existed prior to the incidents at issue, or for any injury from which he suffered that was not caused by the violation of his constitutional rights. You may, however, compensate the plaintiff to the extent that you find that he was further injured by the defendant's violations of his constitutional rights.

The damages that you award must be fair compensation for all of the plaintiff's damages, no more and no less. Compensatory damages are not allowed as a punishment and cannot be imposed or increased to penalize the defendant. You should not award compensatory damages for speculative injuries, but only for those injuries which the plaintiff has actually

suffered, or that the plaintiff is reasonably likely to suffer in the future.

If you decide to award compensatory damages, you should be guided by dispassionate common sense. Computing damages may be difficult, but you must not let that difficulty lead you to engage in arbitrary guesswork. On the other hand, the law does not require that the plaintiff prove the amount of his losses with mathematical precision, but only with as much definiteness and accuracy as the circumstances permit.

You must use sound discretion in fixing an award of compensatory damages, drawing reasonable inferences where you find them appropriate from the facts and circumstances.

Remember, the questions in the Jury Verdict Form will guide you in making these determinations. On the Jury Verdict Form, Questions 16 and 29 relate to causation of damages. Questions 17 and 30 relate to amounts of damages.

IV. ROLE OF THE JURORS

Your attitude and conduct at the beginning of your deliberations are very important. It is rarely productive for any juror to immediately announce a determination to hold firm for a certain verdict before any deliberations or discussions take place. Taking that position might make it difficult for you to consider the opinions of your fellow jurors or change your mind, even if you later decide that you might be wrong. Please remember that you are not advocates for one party or another. You are the judges of the facts in this case.

V. VERDICT

Finally, ladies and gentlemen, we come to the point where we will discuss the form of your verdict and the process of your deliberations. You will be taking with you to the jury room a verdict form that will reflect your findings. The verdict form reads as follows:

[Read Verdict Form]

You will be selecting a presiding juror after you retire to the jury room. That person will preside over your deliberations and be your spokesperson here in court. When you have completed your deliberations, your presiding juror will fill in and sign the verdict form.

Each of you should deliberate and vote on each issue to be decided.

Before you return your verdict, however, each of you must agree on the answer to each question so that each of you will be able to state truthfully that the verdict is yours.

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

It is your duty to consult with one another and to reach an agreement if you can do so without violence to 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. In the course of your deliberations, do not hesitate to re-examine your own views and to change your opinion if you are convinced that it is not correct. 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.

We will be sending with you to the jury room all of the exhibits in the case. You may have not seen all of these previously and they will be there for your review and consideration. You may take a break before you begin deliberating, but do not begin to deliberate and do not discuss the case at any time unless all of you are present together in

the jury room. Some of you have taken notes. I remind you that these are for your own individual use only and are to be used by you only to refresh your recollection about the case. They are not to be shown to others or otherwise used as a basis for your discussion about the case.

If a question arises during deliberations and you need further instructions, please print your question on a sheet of paper, knock on the door of the jury room, and give the question to my court officer.

I will read your question and I may call you back into the courtroom for additional instructions. Please understand that I may only answer questions about the law and I cannot answer questions about the evidence.

I remind you that you are to decide this case based only on the evidence you have heard in court and on the law I have given you. You are prohibited from considering any other information and you are not to consult any outside sources for information. You must not communicate with or provide any information, photographs or video to anyone by any means about this case or your deliberations. You may not use any electronic device or

media, such as a telephone, cell phone, smart phone or computer; the Internet, any text or instant messaging service; or any chat room, blog, or website such as Facebook, My Space, LinkedIn, YouTube or Twitter, to communicate with anyone or to conduct any research about this case.