**ANNOTATIONS AND COMMENTS**

1. **Elements of Failure to Intervene Claim**

The elements of this claim are derived from *Skrtich v. Thornton*, 280 F.3d 1295, 1301 (11th Cir. 2002), and *Ensley v. Soper*, 142 F.3d 1402, 1407-08 (11th Cir. 1998). In *Ensley*, the Eleventh Circuit emphasized that to be held liable, the defendant must have observed the excessive force and have been in a position to intervene. 142 F.3d at 1408.

However, even if the officer did not observe the excessive force but had “an indication of the prospective use of excessive force,” he may still be held liable for his nonfeasance. *Riley v. Newton*, 94 F.3d 632, 635 (11th Cir. 1996). Further, the opportunity to intervene must have been realistic. *Id.* (citing *O’Neill v. Krzeminski*, 839 F.2d 9, 11-12 (2d Cir. 1988)); *cf. Priester v. City of Riviera Beach*, 208 F.3d 919, 925 (11th Cir. 2000) (concluding there was a genuine issue of fact whether the defendant had an opportunity to intervene where one defendant testified the incident lasted 5-10 seconds and another testified it may have lasted two minutes).

The committee notes that the Eleventh Circuit acknowledged the possibility of a failure to intervene claim in an unlawful arrest case if a non-arresting defendant “knew the arrest lacked any constitutional basis and yet participated in some way.” *Wilkerson v. Seymour*, 736 F.3d 974, 980 (11th Cir. 2013) (citing *Jones v. Cannon*, 174 F.3d 1271 (11th Cir. 1999)).

1. **Underlying Excessive Force Claim**

As noted in the first element of the claim, the plaintiff must prove another officer used excessive force. However, if the officer who allegedly used excessive force has settled or is otherwise not involved in the case, the court will need to adjust the instructions to ensure that the jury has a sufficient understanding of the underlying excessive force allegations.

1. **Causation**

Failure to intervene and failure to protect claims potentially present unique causation and damages issues. Necessarily, a third party or perhaps a co-defendant will have committed the actual assault. In this situation, defendants may argue that district courts should apply state law regarding joint liability and apportionment of damages. According to the Supreme Court, in the Civil Rights Statutes “Congress has directed federal courts to follow a three-step process;” the district court should (1) “look to the laws of the United States so far as such laws are suitable to carry the civil and criminal civil rights statutes into effect;” (2) consider state common law; and then (3) “apply state law only if it is not inconsistent with the Constitution and the laws of the United States.” *Burnett v. Grattan*, 468 U.S. 42, 47-48 (1984) (internal citations, quotation marks, and alterations omitted). However, Eleventh Circuit case law suggests that district courts should apply federal law recognizing joint and several liability. *See Finch v. City of Vernon*, 877 F.2d 1497, 1502-03 (11th Cir. 1989) (“In this case, the district court, applying a federal rule of damages, correctly held the City jointly and severally liable for the damages Finch suffered from the wrongful discharge.”); *see also Murphy v. City of Flagler Beach*, 846 F.2d 1306, 1308-09 (11th Cir. 1988) (holding that the federal common law, not law of the forum state, governs the mitigation of damages in § 1983 cases and holding that in such cases, “[i]f a federal damages rule exists, it applies”). Other Circuits have more squarely found that federal common law requires applying joint and several liability in § 1983 cases regardless of the law of the forum state. *See Weeks v. Chaboudy*, 984 F.2d 185, 188 (6th Cir. 1993) (concluding that federal common law requires joint and several liability in § 1983 cases and reversing a district court’s apportionment of damages); *Watts v. Laurent*, 774 F.2d 168, 179 (7th Cir. 1985) (applying federal common law in holding that defendants were jointly and severally liable in a § 1983 case). More generally, the Eleventh Circuit has held that the purpose of § 1983 “is to compensate for the actual injuries caused by the particular constitutional deprivation.” *Gilmere v. City of Atlanta*, 864 F.2d 734, 739 (11th Cir. 1989) (citation omitted). Accordingly, while courts may “look to the common law of the states where this is ‘necessary to furnish suitable remedies’ under 1983,” resort to state law is not necessary if federal law is sufficient to serve the policies of the Civil Rights Acts. *Id*. at 738 (quoting *Carey v. Piphus*, 435 U.S. 247, 258 n.13 (1978) (quoting 28 U.S.C. § 1988)).

For additional information regarding the instruction on causation, see the annotation following Pattern Instruction 5.3.

1. **Damages**

For the damages instruction, see Pattern Instruction 5.13.