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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

VERNELL LUNDBERG, et al.,

Plaintiffs,

vs.

COUNTY OF HUMBOLDT, et al.,

Defendants.

No. C-97-3989-SI

PLAINTIFFS' REPLY ON THE POST-TRIAL MOTIONS

Date: November 12, 2004
Time: 9:00 p.m.
Judge ILLSTON

I.

Plaintiffs continue their effort to break down the misguided pretense that the police Know What's Best for us, and must be deferred to, with respect to the use of force at issue in this case, and the reasons they've given to justify it. To that end we have invoked what we take to be the authority to the contrary of the Court of Appeals, embodied in the very unequivocal if still provisional decision(s) it made between the two trials. There, the Court said qualified immunity must be denied to these defendants, because, No reasonable officer could have believed the police uses of force shown by plaintiffs' evidence (to have resulted from their policy) was lawful.

The unlawful character of those 'applications', in the euphemism, was evident to the Court by way of the Clearly Established rule of *Graham v. Connor*, that the need for the use of force by police governs the reasonableness of the use of force, in any situation. The Court pointed out there is no need for the use of force when there is a reasonable alternative not requiring force, as there was in this case. It said, "[T]he officers could remove the 'black bears' with electric grinders in a matter of minutes and without causing pain or injury to the protesters. They had always done so, dozens if not hundreds of times.

That is what the evidence has shown each time, and will show again, and against that showing defendants have mustered nothing but a nightmare. That is, they offer a figment of the police imagination, not *evidence*. Instead of concrete facts showing concrete danger, they have presented a typical,100-proof, certified police fright scenario, portraying an imaginary disaster they "just know" is bound to happen —'not if but when'— and insisting that it be given controlling effect in the determination of reasonableness, despite its complete implausibility in light of actual experience, 100% to the contrary.

On the same imaginary basis, they insist further that their new approach to 'busting the movement' is more than reasonable, because, Pepper spray is Harmless — despite that this use of it meets the definition of torture, and was graphically shone to be brutally done and heedless of possible injury, let alone gratuitous pain and suffering, and great, lasting (anti-First Amendment) fear; after all it's never been listed as the cause of death...

Defendants complain that in seeking judgment, we ignore their right to have the evidence viewed in the light most favorable to them; but, *au contraire!* What we say about the grinder evidence, and the nightmare, shows the matter absolutely in the Best Light available to defendants on this record, and it is thereby — mostly thru their own words and affirmations — concluded on them: "[T]he officers could remove the 'black bears' with electric grinders in a matter of minutes and without causing pain or injury to the protesters," just as the Court saw. Nothing happened in the recent trial to change that fact, and no *evidence* was offered to contradict it, only the nightmare. Because a black bear could be removed with a grinder, "The pepper spray was unnecessary to subdue, remove or arrest the protesters," as the Court also saw. "The protesters were sitting peacefully,... and did not threaten or harm the officers," and so, "because the officers had control over the protesters ... it was unnecessary to use pepper spray to bring them under control, and even less necessary to repeatedly use pepper spray ... when they refused to release." *Headwaters II*, 376 F.3d 1125 at 1130; Order of 10/7/04, p.2.

These are factual as well as legal interpretations of the evidence, essentially the tape, which the Court made in considering whether the plaintiffs had a case. Whether defendants had a case was not before it. It is the question now, however, because defendants' case has been exposed, in their Best Light, as a will-o-the-wisp. Only if the dark nightmare is given substance, can it be said there is a triable case for defendants, against the *Graham* rule, on liability; only if the fear scenario is permitted to rule.

II.

As for the qualified immunity claim, at this point, the higher Court's decision that defendants were not entitled to immunity stands as the Law of the Case, requiring that the renewed demand also be denied, unless the evidence was "substantially different" in the second trial from what the Court of Appeals saw. "'The law of the case doctrine states that the decision of an appellate court on a legal issue "must be followed in all subsequent proceedings in the same case."' *Waggoner v. Dallaire*, 767 F.2d 589, 593 (9th Cir.1985), *cert. denied*, 475 U.S. 1064, 106 S.Ct. 1374, 89 L.Ed.2d 601 (1986) (quoting *Planned Parenthood v. Arizona*, 718 F.2d 938, 949 479 U.S. 925, 107 S.Ct. 391, 93 L.Ed.2d 346 (1986), and citing *Moore v. Jas. H. Matthews & Co.*, 682 F.2d 830, 833-34 (9th Cir.1982)). Moreover, '[t]he law of the case controls unless the first decision is clearly erroneous and would result in manifest injustice, there has been an intervening change in the law, *or the evidence on remand is substantially different*.' *Id.* at 593 (citing Planned Parenthood, 718 F.2d at 949)." *Walleri v. Federal Home Loan Bank of*

Seattle, 965 F.Supp. 1459, 1464 (D.Or.1997) (Emphasis added). We take it this means the renewed demand cannot be entertained unless the evidence is now substantially different; if it were entertained, it must still be denied.

As noted, we don't believe the evidence is different, only clearer; and to be made still more clear next time around. Defendants argue there were three New Things in the evidence in this trial (Motion, p.2-3): there is the DuBay testimony, that the pepper spraying didn't really hurt, and was no risk of harm — which is collateral, as well as tendentious and false; there is the testimony of Deputy Daastol, which, except for two *ex post facto* war stories — not involving catastrophes — was the same as at the1998 trial; finally there was dramatic enhanced testimony by Rhonda Pellegrini — gripping, but really probative of nothing relevant to these motions...

So we are back to the crux, with the earnestly recited bogus mortal fears of Daastol & Co. at the center of things; and of course, in any re-trial, we will need to expose and refute the famous nightmare once again, hopefully in a much tighter context under the rules, as we've suggested. But if the whole rules are applied — as we've argued R.701 FRE on the lack of factual basis for the deputies' opinion that a catastrophe will occur — the nightmare exercise can be excised, or exorcised, so to speak[1]— and plaintiffs' motion for judgment can be granted. What bars it?

At any rate, even assuming the pepper spray was as mildly prepared as DuBay said, that doesn't change the fact that its use was unnecessary; so the qualified immunity claim has nothing new to go on; so the motion doesn't lie.[2]

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[1] They say, riding on a wisp of dicta, that we can't make a motion for judgment as a matter of law, but what else is summary judgment, and why would it not lie at this point in the case, with or without a Rule 50 claim having been "preserved". Indeed, what exactly is and isn't preserved from the "nullity" of the mistrial, is something to contemplate for several reasons...

[2] The police bunk argument is that the after-acquired information about the later event with the alleged cut finger, which Deputy Daastol told of (which we already dubious about, because no one so far polled remembers hearing of any such incident), provides a factual basis for the opinion that catastrophe is inevitable — and set to happen any moment, really, like at about the same time when the 'organized lawless' cadres outside the sit-ins break out the AK-47s and charge... Really, it proves the opposite: that it takes non-cooperation with the grinder to

III.

Defendants argue strenuously that plaintiffs should not be allowed further discovery to add to their evidence for the next trial, but identify no precedent or rule of law which disallows it. Plaintiffs presented a highly cogent and rational statement by the California Supreme Court showing that permitting new discovery after remand makes perfect sense — where the matter is undoubtedly up to the Court's discretion — and, having looked further, we believe federal caselaw will also fully support a decision to allow it.

When a case is retried, the previous trial is a nullity, and the court re-tries the case as if the first trial had never taken place; so said the Supreme Court more than a century ago, in *U.S. v. Ayers,* 76 U.S. 608 (1869); and this principle was reaffirmed 135 years later in *U.S. v. Reico,* 371 F.3d 1093 (9th Cir. 2004). Thus there is no bar to different evidence in the new trial. See, e.g., *Tran v. Le French Baker, Inc.,* No. C-94-0482, 1995 U.S. Dist. WL 374342, at 3 (N.D. Cal. Jun. 14, 1995) (allowing the introduction of new evidence upon retrial); *Continental T.V., Inc. V. G.T.E. Sylvania Inc.,* 694 F.2d 1132 9th Cir.1982) (on remand plaintiff allowed to introduce additional evidence); *Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc.,* 676 F.2d 1291, 1311 (9th Cir. 1982) (on remand court allowed the parties to introduce new evidence.).

More to the point, the court in its discretion may permit needed discovery after remand or mistrial. See *A.O. Smith Corp. v. F.T.C.,* 396 F.Supp. 1125, (D.C.Del. 1975), *aff'd in part, vacated in part,* 530 F.2d 515 (1976); *Pflueger v. Auto Finance Group, Inc.,* No. CV979499, 1999 U.S. Dist. WL 33738434, (C.D. Cal. Jun. 10, 1999); *Britt v. North Carolina,* 404 U.S. 226, 228 (1971) (after mistrial court allowed discovery to continue in preparation for the new trial); and see *Bittaker v. Woodford,* 331 F.3d 715, 727 (9th Cir. 2003)**.** What possible reason is there to forbid it, as a reasonable and proper, non-prejudicial step in the search for truth?

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get you hurt. Daastol's other story was the same, and also showed that cooperation — plus the skill and care of the operator — provides the needed protection against a slip-up. For our purposes, calamity was no part of the narrative

IV.

Defendants of course oppose Injunction, Declaratory Judgment, and impleading (not "interpleading") the P.O.S.T. Commission, in order to stop it from promulgating official state approval of the dreadful practice at issue in this case. They're definitely wrong, as near as we can tell from the docket, to say we dismissed or waived any of those claims back up the line; but if we had, civil rights jurisdiction remains remedial, and it's always up to the Court to fashion the appropriate remedy where rights remain threatened, even long after the events which bring the parties to court. Suffice to say, the context (in a word) in which the probity of equitable relief in one or another form will become clear is developing; but plaintiffs believe, 'prescinding' from the competing claims for judgment, and the immunity claim, that plaintiffs' right — deriving from the same appellate decision(s) — to be free of the menace of the P.O.S.T. evidence in any subsequent trial, and the right of the public to be free from the dreadful practice of using 'direct applications' of pepper spray on non-violent, non-resisting protesters, should be declared now, to defendants, to the world and to P.O.S.T., as we've proposed. Whether an Injunction is necessary is a further question, which can abide consideration of these other issues.

WHEREFORE, plaintiffs respectfully ask the Court to deny defendants' motions for judgment, and qualified immunity; to grant plaintiffs' motions for summary judgment on the liability of defendants for the use of excessive force, and declaratory judgment stating the practice complained of it unlawful; to grant leave to plaintiffs to add the California P.O.S.T. Commission as a defendant, and to re-open discovery for a reasonable period; and to grant such other and further relief as is just and appropriate.

Respectfully submitted,

DATED: Nov.1, 2004

Dennis Cunningham
One Attorney for Plaintiffs

CERTIFICATE

I certify that I served the within REPLY on defendants by FAX and mailing a copy Nancy Delaney and Wm. Mitchell, Esqs. at their offices in Eureka, CA, on Nov. 1, 2004.

Dennis Cunningham