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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

VERNELL LUNDBERG, et al., Plaintiffs, vs. COUNTY OF HUMBOLDT, et al., Defendants.	Case No.: C97-3989-SI DEFENDANTS' OPPOSITION TO PLAINTIFFS' POST-TRIAL MOTIONS DATE: November 12, 2004 TIME: 9:00 a.m. CTRM: 10, 19th Floor

I. INTRODUCTION

Plaintiffs have filed a brief entitled "Plaintiffs' Post-Trial Motions," requesting judgment as a matter of law, injunctive relief, declaratory relief, leave to amend their complaint to add the P.O.S.T. Commission as a defendant, and permission to re-open discovery to retain at least three expert witnesses.

For the most part, the various motions represent an attempt by plaintiffs to modify their litigation strategy with the benefit of hindsight. The requests are not supported by good cause, and would impose substantial burdens on both the Court and the defendants in a case which has now proceeded through trial twice and is seven years old.

In addition, plaintiffs' motion for summary judgment, motion for injunctive relief, and motion to re-open discovery to add expert witnesses duplicate previous motions made and denied, and plaintiffs offer nothing new which would warrant departure from the Court's prior rulings on these matters.

II. PLAINTIFFS' "MOTION FOR SUMMARY JUDGMENT" SHOULD BE DENIED

It should be initially noted that plaintiffs have waived any opportunity to move for judgment as a matter of law ("JMOL") under Rule 50. "In order to preserve the right to move for judgment notwithstanding the verdict under Rule 50(b), a [pre-verdict] motion under Rule 50(a) first must be made." *Desrosiers v. Light Int'l of Fla., Inc.*, 156 F.3d 952, 956 (9th Cir. 1998); *Lifshitz v. Walter Drake & Sons, Inc.*, 806 F.2d 1426, 1429 (9th Cir. 1986) (JMOL motion made at close of evidence can serve as prerequisite to renewed JMOL motion only if it includes specific grounds asserted in the renewed motion). Without such a rule, the pre-verdict JMOL motion "would not serve its purpose of providing clear notice of claimed evidentiary insufficiencies." *Lifshitz,* 806 F.2d at 1429.

In an apparent attempt to circumvent the procedural requirements for a Rule 50 motion, plaintiffs characterize the motion as one for summary judgment. However,

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plaintiffs' cite no authority for the proposition that a motion for summary judgment under Rule 56 may substitute for a motion for judgment as a matter of law under Rule 50. Indeed, at least one Ninth Circuit decision suggests that such a substitution is improper. *Wang Laboratories, Inc. v. Toshiba Corp.*, 993 F.2d 858, 869 (9th Cir. 1993) (Although the evidentiary standards for summary judgment and directed verdict are virtually the same, "this does not mean that a motion for summary judgment is a substitute for a motion for a directed verdict.")

Assuming for the sake of argument that plaintiffs have preserved their right to advance a dispositive post-trial motion, the motion is without merit.

Plaintiffs have failed to direct the Court to any new evidence presented at the second trial that would entitle the plaintiffs to JMOL. Instead, plaintiffs once again invoke various statements in *Headwaters I* and *Headwaters II*. [1]

Plaintiffs previously moved for summary judgment following remand in *Headwaters II*, and prior to the second (aborted) trial. In that motion – as in the present one – plaintiffs failed to acknowledge that the Ninth Circuit repeatedly admonished that it

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[1] Plaintiffs also continue to parrot the proposition that "[I]f no force was needed, no force was reasonable..." PTM, pg. 6:15. Had the Ninth Circuit panel determined that no reasonable jury could conclude that there was a need for the use of force in this case, it would have directed judgment against the defendants. Instead, it remanded the case for another trial.

Furthermore, the case cited for this proposition – *P.B. v. Koch*, 96 F.3d 1298 (9th Cir. 1996) – is clearly distinguishable. In *Koch*, a high school coach forcefully squeezed the necks of three students, in addition to pushing and shoving them. One of the students was sent to an emergency room as a result, and sustained physical injuries. The force was used because two of the students had made statements perceived by the coach to be disrespectful, and another refused to remove his hat.

In stark contrast to those facts, each of the plaintiffs were trespassing and resisting arrest, as a matter of law, by refusing to comply with lawful orders, and by using devices specifically designed to delay arrest as long as possible. See Penal Code Section 148. The officers were under a legal duty to effect the arrest of each plaintiff and remove them from the property of the complaining property owner. Unlike the coach in *Koch*, the officers had a right (as well as a legitimate reason) to use force -- as a matter of law. See Penal Code Section 835a ("Any peace officer who has reasonable cause to believe that the person to be arrested has committed a public offense may use reasonable force to effect the arrest, to prevent escape or to overcome resistance.")

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was "viewing the facts in the light most favorable to the protesters," as it must, in reversing the district court's JMOL. *Headwaters I*, 240 F.3d 1185, 1196 (9th Cir. 2001) ("Judgment as a matter of law is proper if the evidence, construed in the light most favorable to the non-moving party allows only one reasonable conclusion. . ."); *Headwaters II*, 276 F.3d 1125, 1131 (9th Cir. 2002) (Reversing qualified immunity "[v]iewing the facts in the light most favorable to the protesters. . ."). The same deferential evidentiary standard must also be applied to a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986).

Plaintiffs are not entitled in their post-trial motion to the deferential standard applied by the appellate court. Indeed, the flip-side to this standard must be applied. That is, in determining the propriety of summary judgment for the plaintiffs, the facts and evidence must be viewed in a light most favorable to the *defendants*. *Anderson*, 477 U.S. at 251.

Plaintiffs' previous motion for summary judgment was denied by the district court. (See Order filed March 28, 2003, Docket # 275.) Plaintiffs have identified no new evidence or law that would warrant departure from the Court's previous denial of summary judgment. *U.S. v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997) (mistrial due to hung jury is not an exception to the rule of the case doctrine).

As set forth in defendants' JMOL, the defendants adduced the only new evidence in the second trial, and the disputes in "historical facts" have now been addressed with uncontroverted evidence so as to warrant granting of defendants' Rule 50 motion. Accordingly, plaintiffs' motion should be denied.

III. PLAINTIFFS' MOTION TO RE-OPEN DISCOVERY

Plaintiffs also seek "an Order re-opening discovery for a suitable period, to allow the parties to designate experts and develop their evidence for the Next Trial (sic)." Specifically, plaintiffs seek to retain: (1) an expert with "substantial

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scientific/medical/psychological expertise to refute the heinous canard that pepper spray causes only 'transient discomfort' as opposed to serious and possibly permanent damage to 'non-pain resistant' subjects;"[2] (2) a "witness or witnesses" with "specialized knowledge. . . of the 'historical facts' forming the background of social and political conflict, strategy and tactics in the 'Timber Wars'. over issues of clear cutting and 'liquidated logging,' water shed, stream bed, fishery and habitat preservation, and protection of the sacred groves of ancient redwoods, which forms the 'context' for the police misconduct claims at issue in this case;"[3] and (3) a "DuBay-type witness associated with the tool company [which] might help the jury to understand that the grinder is a safe, reasonable means, as experience showed, of ending lock-down sit-ins."[4] (Plaintiffs' post-trial motion ("PTM"), pp. 10-11.)

The only legal authority offered in support of the motion to re-open discovery is a California state court decision.

Because it is axiomatic that federal law – and not state law – controls the issue, plaintiffs' reference to *Fairmont Ins. Co. v. Superior Court* (2000) 22 Cal.4th 245 provides no authority for the motion. In addition, this case is readily distinguishable.

In *Fairmont Ins. Co.,* the California Supreme Court held that Code of Civil Procedure § 2024, which provides that the cut-off date for completion of discovery proceedings is fifteen days before the date initially set for trial, permits discovery to be re-opened and a new cut-off date recalculated based on the date initially set for a new

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[2] Plaintiffs fail to offer any explanation of how this is relevant to a policy decision -- the issue here -- made based upon overwhelming data to the contrary (e.g., 35,000 uses documented between 1992 and 1996 in California without significant injury).

[3] Does the First Amendment afford plaintiffs "special rights" absent for those advancing a lesser cause?

[4] Indeed, here, plaintiffs were the first to contact the "real" DuBay and now, is there any doubt that a tool manufacturer representative would be equally unavailing to plaintiffs? Would any tool manufacturer suggest its product will "safely" cut steel from a human limb?

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trial after a mistrial, an order granting a new trial, or remand for a new trial after reversal of judgment on appeal. In that case, the request to re-open discovery came after a bifurcated trial on affirmative defenses only.

The decision involved an extensive analysis of C.C.P. § 2024 – which has absolutely no application in this case. In addition, the court noted "it appears that no discovery on the issues presented for re-trial has been conducted." *Id.*, 22 Cal.4th at 253. This stands in stark contrast to the situation here – where both parties conducted extensive discovery on all of the issues presented at trial.

No federal law is cited in support of plaintiffs' motion to re-open discovery. Instead, plaintiffs simply assert that "[n]o bar is found in federal rules" for the request. (PTM, p. 11:14-15.)

A review of the applicable federal law demonstrates that plaintiffs are mistaken.

Plaintiffs brought a similar motion to re-open discovery prior to the second (aborted) trial in 2003. In that motion, plaintiffs requested to re-open discovery to permit the naming of two new expert witnesses: one of the new expert witnesses would testify on the "toxicity of pepper spray and the ethics of its use," while the other would testify on the medical effects of OC exposure. (Docket #258.)[5]

Seven years ago, plaintiffs' attorneys produced a declaration of John H. Fournier, M.D., an ophthalmologist, in support of their motion to enjoin the use of pepper spray in this case. (Docket #24.) In that declaration, Dr. Fournier stated, among other things, that "I have reviewed the medical/scientific literature related to the harmful effects both short and long term of oleoresin capsicum," and offered various opinions concerning the supposed risk of injury from the subject applications. (See Exhibit A to Dec. of William F. Mitchell.)

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[5] Plaintiffs disclosed that they consulted a former director of the State "Hazard Evaluation System," two professors at the University of California at San Francisco, and a physician.

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In addition, plaintiffs testified at their depositions that they were examined by Dr. Fournier, as well as by a psychologist, shortly after the incidents in question, and admitted that no physician supported any claim of medical injury.[6] These examinations were arranged by plaintiffs' counsel.

The case scheduling order set a discovery cut-off for April 30, 1998, an expert witness disclosure deadline of June 1, 1998, and an expert deposition cut-off date of July 17, 1998. (Minute Order, Docket #41.)

Federal Rule of Civil Procedure, Rule 16, provides, among other things, that "[a] schedule shall not be modified except upon a showing of good cause and upon leave of the district court . . ." FRCP 16(e). The scheduling order "control[s] the subsequent course of the action 'unless modified by the court.'" *Id.* The "good cause" requirement of Rule 16 is primarily a question of diligence. *Johnson v. Mammoth Recreations, Inc.* 975 F.2d 604 (9th Cir. 1992) ("If [the party seeking modification] was not diligent, the inquiry should end.") Prejudice to the non-moving party is not a requirement for denying a motion to modify a scheduling order.[7] *Johnson*, 475 F.2d at 609; *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1295 (9th Cir. 2000).)

Plaintiffs failed to address the good cause requirement for modification of the original scheduling order, and offer no explanation as to why the proposed experts were not disclosed within the time frame set by the district court's scheduling order. Previous

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[6] See deposition excerpts, attached as *Exhibit B* to Declaration of William F. Mitchell, filed herein. (Deposition of Vernell Lundberg, p. 227:24-228:6, p. 229:18-230:9; Eric Neuwirth, p. 69:23-70:5, p. 93:11-94:6; Deposition of Jennifer Schneider, p. 31:5-9, p. 33:18-34:2; Deposition of Lisa Sanderson-Fox, p. 29:22-30:1, p. 34:16-18; Deposition of Maya Portugal, p. 12:17, p. 88:16-21; Deposition of Noel Tendick, p. 146:4-16, p. 165:8-166:25; Deposition of Terri Slanetz, p. 165:5-23, p. 166:2-167:20.)

[7] Here, however, the prejudice to defendants is manifest as plaintiffs effectively denied to defendants the right to have plaintiffs examined for seven years, by abandoning their medical experts. When defendants attempted to arrange medical examinations, plaintiffs' counsel refused to cooperate and apparently made the tactical decision to defeat "good cause" for same by eliminating any such expert on plaintiffs' side.

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retention of Dr. Fournier, as well as the medical examination of plaintiffs prior to the first trial, clearly demonstrates that the "medical effects" of pepper spray exposure were foreseeable issues.

Nor have plaintiffs offered any explanation for the failure to disclose a "tool expert" in a timely manner. The use of power tools to defeat the lock-down devices has been a central issue in this case since day one. Plaintiffs cannot possibly claim that the use of an expert in this area was unforeseeable.

Courts strictly apply the "good cause" standard to re-open discovery. See, *Johnson*, 975 F.2d at 611 (request to join an additional defendant after scheduling order cut-off date for joinder denied under Rule 16 because plaintiff failed to demonstrate diligence); *Zikovic v. Southern Cal. Edison, Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002) (district court properly denied request to amend complaint and conduct additional discovery four months after issuance of scheduling order because plaintiffs did not demonstrate diligence and good cause); *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1295 (9th Cir. 2000) (*Id.*).

The fact that plaintiffs are seeking to re-open discovery after a (second) trial does not alter the analysis. A new trial is not "an invitation to re-open discovery for a newly retained expert witness and to enlarge trial time unnecessarily through the addition of totally new exhibits and testimony." *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438, 1449 (10th Cir. 1993), *cert. denied*, 510 U.S. 908 (1993). Only if the court perceives "manifest injustice" in limiting evidentiary proof at a new trial will it, with proper notice, allow additional witnesses and relevant proof." *Id.*, 985 F.2d at 1450. Inadvertence or the benefit of hindsight provided by a prior trial does not constitute good cause for re-opening discovery. *Cleveland*, 985 F.2d at 1449 ("It is always easy in hindsight for counsel to realize that there may be a better way to try a case the second time around."); *Martin's Herend Imports, Inc. v. Diamond & Gem Trading Co.*, 195 F.3d 765, 775-76

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(5th Cir. 1999) (post-remand request to re-open discovery and proffer additional evidence at a second trial "without any explanation of why [moving party] did not offer it at the first trial" was properly denied); see also, *Whitehead v. Kmart Corporation,* 137 F.Supp.2d 553, 565 (S.D. Miss. 2000) (Court denied request to permit a new expert witness for medical examination "because these were matters which easily could have been pursued prior to the first trial of this case."); *Steadfast Insurance Co. v. Auto Marketing Network, Inc.*, 2003 WL22902604 (N. D. Ill.) (Plaintiffs' motion to augment expert witness list to rebut defendants trial expert denied because, even assuming manifest injustice, it was the result of plaintiffs' "own strategies and decisions" which should not be disturbed by the court).

In denying plaintiffs' previous request to re-open discovery in March, 2003, the district court observed that plaintiffs offered no legitimate basis for the request, other than the implied desire to change their trial tactics:

> Not surprisingly, plaintiffs do not contend that they were unable to meet the discovery deadlines despite their diligence. They did not raise any such objections prior to the first trial. Instead, plaintiffs seek to re-open discovery because they wish to alter their litigation strategy with the benefit of hindsight. (Order filed March 28, 2003, p. 20:8-15.)

There can be even less justification for a request to add expert witnesses following a *second* trial. It has now been seven years since the incidents which are the subject of this litigation. While defendants are not required to show prejudice in opposing the request, *Johnson*, 975 F.2d at 611, prejudice to the non-moving party provides an additional reason to deny the request.

The prejudice to defendants of allowing plaintiffs to retain and use a "scientific/medical/psychological" expert(s) at this juncture is manifest. An independent medical or psychological examination of the plaintiffs, more than seven years after the incidents in question, would be meaningless.

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In short, plaintiffs should not be permitted to impose substantial burdens on the defendants as well as the Court for the sake of implementing a new litigation strategy.

IV. PLAINTIFFS' REQUESTS FOR INJUNCTIVE AND DECLARATORY RELIEF SHOULD BE DENIED

Plaintiffs' requests for an injunction and declaratory judgment require little discussion.

The proverbial injunctive relief "ship" set sail seven years ago. That is, plaintiffs began this litigation with a motion for a preliminary injunction, to enjoin the direct application of pepper spray to plaintiffs and other "peaceful protesters" by the defendants. This motion was denied by the Court and plaintiffs then dismissed their claim for injunctive relief prior to the first trial.

Plaintiffs provide no authority for resurrecting a claim long ago dismissed. Nor have plaintiffs identified any new evidence adduced at the second trial which would warrant departure from the Court's previous order on this issue.

Plaintiffs also seek "judgment declaring that the use of pepper spray to coerce non-violent/non-resistant[8] locked down protesters to release themselves, where other means are available, violates the Fourth Amendment, and, that P.O.S.T. guidelines cannot and must not be said to lawfully authorize such use . . ." PTM, p. 12:2-5.

Plaintiffs' complaint also contained a claim for declaratory relief – virtually identical to the one now sought – which plaintiff also abandoned before the first trial.

To the extent that the declaratory judgment request is subsumed under the previously denied motion for injunctive relief, once again, plaintiffs have offered nothing new to warrant departure from the Court's previous order.

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[8] Ironically, plaintiffs would not be covered by such a declaration, as it is undisputed that each was resisting arrest at the time of the application of OC. See Penal Code § 148.

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Assuming for the sake of argument that the request for declaratory judgment constitutes a new claim, plaintiffs have provided no authority whatsoever for amending their complaint at this juncture to add a new cause of action.

V. PLAINTIFFS' REQUEST TO JOIN A NEW DEFENDANT SHOULD BE DENIED

Plaintiffs seek leave to amend their complaint to join or "interplead" the P.O.S.T. Commission.[9]

This request is not well taken.

Plaintiffs' request would require modification of the Court's previous scheduling order. As discussed in detail above, modification of a scheduling order requires a showing of good cause – which is essentially a question of diligence. See *Johnson*, 975 F.2d at 611 (request to join an additional defendant after the scheduling order cut-off date for joinder denied under Rule 16 because plaintiff failed to demonstrate diligence).

Plaintiffs have provided absolutely no explanation why circumstances prevented a timely request to interplead or join P.O.S.T. as a defendant. At a minimum, plaintiffs were aware of the importance of the P.O.S.T. Commission, and the guidelines, in 1998, in the course of factual discovery, and later in the first trial. No showing of diligence can be made to justify this request.

Furthermore, plaintiffs have failed to articulate any legitimate reason why the P.O.S.T. Commission belongs in this case. There has never been any evidence presented that P.O.S.T. was in any way involved in the initial policy decision. Indeed, the P.O.S.T. Commission does not establish required police practices for any law enforcement agency. This is made clear on the "guideline" attached to plaintiffs' post-trial motion, which

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[9] This is intriguing -- and difficult to fathom -- in that plaintiffs objected to even witness status being afforded to Olliver Sansen, a current P.O.S.T. employee, and subject matter use of force expert with special expertise in chemical agents.

states: "This guideline is not intended to be a standard for any agency. Each agency should adopt and follow its own policy in accordance with existing law and the jurisdiction it serves."

VI. CONCLUSION

For all the above-stated reasons, all of plaintiffs' post-trial motions should be denied.

DATED: October 21, 2004

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