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11 UNITED STATES DISTRICT COURT
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA

13 VERNELL LUNDBERG, et al.,

14 Plaintiffs,

15 vs.

16 COUNTY OF HUMBOLDT, et al.,

17 Defendants.
18
19

Case No.: C97-3989-SI

REPLY TO PLAINTIFFS'
OPPOSITION TO
DEFENDANTS' POST-
TRIAL MOTIONS

DATE: November 12, 2004
TIME: 9:00 a.m.
CTRM: 10, 19th Floor

1 **A. INTRODUCTION**

2 Defendants concede that plaintiffs' opposition supplies an abundance of artful
3 prose and pontification to the Court. However, plaintiffs' presentation begs the not-so-
4 delicate question: Where's the beef? That is to say, where is the *evidence* that would
5 lead any reasonable juror to conclude that the use of pepper spray - as an alternative to
6 electric power tools to overcome resistance to lawful arrest - violated the Fourth
7 Amendment? Where is the evidence that would cause any reasonable trier of fact to
8 conclude that defendants Lewis or Philp were "plainly incompetent" or "knowingly
9 violated the law" when they approved the pepper spray alternative? Where is the
10 evidence that would lead a reasonable juror to conclude that the defendant policy makers
11 acted with "reckless or callous indifference" to plaintiffs' Fourth Amendment rights?

12 For the most part, plaintiffs' opposition can best be characterized as a critique of
13 the evidence in support of judgment as a matter of law. The fundamental problem with
14 this approach is that plaintiffs cannot, and do not, reference any contrary evidence. For
15 example, plaintiffs failed to offer any testimony to controvert the testimony of the Special
16 Services Deputies – who can accurately claim to be the world's leading authorities on the
17 use of Makita grinders to extract protesters from metal devices – concerning both the
18 potential and actual risks of serious injury posed by the use of Makita grinders. Instead,
19 plaintiffs offer what amounts to a belated objection to this testimony – and one which is
20 not well taken. Nor do plaintiffs identify any testimony or other evidence to controvert
21 the evidence establishing that pepper spray poses absolutely no risk of lasting physical
22 injury or disease.

23 In short, because argument and belated objections cannot substitute for evidence,
24 plaintiffs offer no substantive opposition to defendants' renewed motion for judgment as
25 a matter of law.

1 **B. NO EVIDENCE WAS PRESENTED TO SUBSTANTIATE PLAINTIFFS'**
2 **CLAIMS OF LASTING INJURY**

3 The absence of lasting physical injury, in and of itself, does not necessarily
4 preclude a viable Fourth Amendment claim. *Headwaters I*, 240 F.3d 1185, 1199 (9th Cir.
5 2000) ("Whether the use of force poses a risk of permanent or significant injury is a
6 factor to be considered in evaluating a need for the force used in a particular case – but is
7 certainly not dispositive."). Nor, of course, does the existence of a physical injury
8 preclude a finding of reasonableness under the Fourth Amendment. See, e.g., *Forrester*
9 *v. City of San Diego*, 25 F.3d 804 (9th Cir. 1994) (affirming determination that use of pain
10 compliance that caused lasting physical injuries – including tendon damage and a broken
11 wrist – was reasonable under the circumstances).

12 Be this as it may, the fact remains that plaintiffs failed to present one iota of
13 evidence establishing that any of them suffered any lasting physical injury from the use
14 of pepper spray. It is undisputed that no plaintiff sought or received medical treatment.
15 No physician testified that plaintiffs suffered, or continue to suffer, from any medical
16 condition as a result of the exposure to pepper spray. Nor was any evidence presented
17 that any plaintiff was ever diagnosed or treated for any "psychological injury," such as
18 post-traumatic stress disorder – notwithstanding the "testimony" of a juror.

19 Indeed, any claim of injury – be it physical or psychological – at this stage of the
20 game can not be reconciled with the abandonment of any such claim following the
21 medical and psychological examinations of the plaintiffs, arranged by their counsel years
22 ago.¹

23 More importantly for qualified immunity purposes, plaintiffs have identified no
24 evidence to controvert the undisputed evidence presented at trial that, at the time the
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¹ See Defendants' Opposition to Plaintiffs' Post-Trial Motions, including attached deposition transcripts of the plaintiffs.

1 policymakers authorized the use of pepper spray, it posed no known risk of lasting injury.
2 This was established by the testimony of then-Chief Deputy Philp, as well as by the
3 testimony of research scientist DuBay.

4 The fact that pepper spray caused transient pain is, of course, also undisputed.
5 That is the intended effect. Nor can it be disputed that, at the time of the incidents in
6 question, the use of pepper spray by law enforcement officers in the State of California
7 was not limited to use against hostile or violent subjects. The fact that P.O.S.T. approved
8 training for direct application as a pain compliance technique confirmed this. In other
9 words, the fact that law enforcement officers inflicted temporary pain to compel
10 compliance with lawful orders to submit to lawful arrest cannot be the basis of plaintiffs'
11 Fourth Amendment claim, and does not supply a basis to oppose judgment as a matter of
12 law.

13 **C. THE TESTIMONY OF THE SPECIAL SERVICES DEPUTIES THAT USE**
14 **OF THE MAKITA GRINDERS POSED A SUBSTANTIAL RISK OF**
INJURY WAS UNCONTROVERTED

15 Plaintiffs admit that the risk of injury posed by the use of the Makita grinder, or, as
16 plaintiffs would have it, the absence of risk of injury, is "at the heart of the matter." This
17 is because, if the evidence established that the grinders posed a substantial risk of injury
18 to the plaintiffs and/or the officers, the "need" for the use of pepper spray as a non-
19 injurious alternative is thereby established.

20 Plaintiffs contend that (1) defendants offered nothing but speculation and
21 conjecture concerning the potential risks posed by the use of the Makita grinders and (2)
22 the opinions of Special Services Deputies concerning potential dangers should have been
23 excluded because they did not qualify as experts on this subject under Rule 702.

24 The second point requires little discussion. It does not require scholarly research
25 or citation to establish that plaintiffs' belated objection has no bearing on defendants'
26 motion for JMOL. The issue is whether defendants are entitled to JMOL under the

1 uncontroverted evidence presented to the jury – and not whether a post-trial objection can
2 be raised as to the admissibility of that evidence.²

3 The fact remains that plaintiffs offered nothing to controvert the testimony of
4 Deputies Held, Reynolds, and Daastol that the continued use of electric power tools on
5 increasingly sophisticated metal devices posed a substantial risk of serious injury. This
6 testimony included:

- 7 ▪ Although the Special Services deputies had been successful in quickly
8 defeating the earlier devices, the black bear devices posed a much greater
9 safety threat, and they had much more limited experience using the Makita
10 grinder on these devices (20-30 occasions). (Testimony of Daastol, Held,
11 Reynolds.)
- 12 ▪ In each of the subject incidents, the use of the Makita grinders posed a serious
13 risk of physical injury to both the officers and the plaintiffs. These included
14 the possibility of injury as a result of a grinding wheel exploding, the risk of
15 cutting the arm or hand of a protester, or the leg of the operator if the grinder
16 “got away” and the risk of fire from sparks. (Testimony of Held, Reynolds,
17 Daastol.)
- 18 ▪ In the Scotia incident, the configuration of the group and the placing of their
19 legs over the devices (the “human pretzel”) made it “impossible” to safely use
20 the Makita grinder to extract the plaintiffs. (Videotape, Testimony of Held.
21 Ciarabellini.)

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24 ² In any case, one does not need to “infer” – as plaintiffs claim – that the Special Services
25 Deputies were sufficiently qualified to provide testimony to the jury concerning risks
26 associated with the use of the grinders. Each testified that he had been using the devices
to extract protesters from various metal devices since 1990. In addition, Deputy Reynolds
testified that he had used grinders long before he became a Deputy, when he helped his
father construct metal trailers. Nor can plaintiffs have it both ways unless we are to
believe that the deputies possess skills that allow them to safely cut metal from limb
under *any* circumstance, but lack the acumen to opine about same.

- 1 ▪ Fuel and oil on the equipment which plaintiffs Tendick and McCurdy were
2 attached to at Bear Creek also posed a risk of fire from sparks. (Testimony of
3 Reynolds.)
- 4 ▪ The generation of sparks from the Makita grinders posed a fire hazard in the
5 Scotia office and at Riggs' office. (Testimony of Held, Ciarabellini, Manos.)
- 6 ▪ The Special Services Deputies had never been confronted with the problem of
7 using the Makita grinders inside a building before the Scotia and Riggs' office
8 incidents. This increased the safety concerns due to the possibility of fire from
9 sparks generated by the grinding process. (Testimony of plaintiffs, Held ,
10 Reynolds.)
- 11 ▪ The concerns of the Special Services Deputies were validated when a protester
12 was cut during manual extraction after the incidents in question. (Testimony of
13 Daastol.)

14 All of this testimony was left unanswered by the plaintiffs. Plaintiffs offered no
15 physical or demonstrative evidence to dispute the testimony of the Special Services
16 Deputies. Plaintiffs offered no evidence of an alternative mechanical means to safely
17 extract the protesters.³ Plaintiffs offered nothing to dispute that the "black bear" devices
18 used in the incidents were substantially more difficult to cut than previous devices.
19 Plaintiffs offered nothing to dispute that the Special Services Deputies had for more
20 limited experience in using the Makita grinders on the much heavier and sturdier "black
21 bear" devices. Plaintiffs offered nothing to controvert the testimony that the grinding
22 wheels rotate at approximately 10,000 RPM, can break apart in use, or that pieces of
23 these, or pieces of the devices being cut, could become projectiles during the cutting
24 process. Plaintiffs offered nothing to dispute that the sparks and intense heat generated

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26 ³ At the first trial, plaintiffs' counsel offered a pipe cutter as an alternative to the Makita
grinders. Testimony by the defendants established that this had already been tried, and
that it utterly failed as a safe alternative to the grinders.

1 by the grinding process posed a fire hazard in each incident. Plaintiffs offered nothing to
2 controvert the testimony that cutting through the metal devices within inches of arms,
3 hands and fingers posed a risk of injury. Plaintiffs offered nothing to dispute that such an
4 injury had occurred.

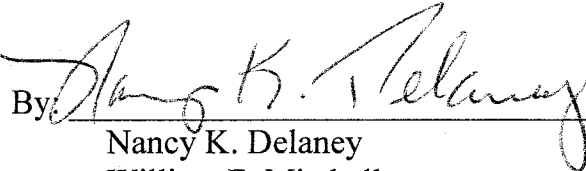
5 In short, the uncontroverted evidence established that use of the Makita grinders
6 on the devices worn by plaintiffs to resist arrest posed a substantial risk of physical
7 injury. In contrast, the uncontroverted evidence established that the subject use of pepper
8 spray, while causing temporary pain, posed no risk of significant injury. No reasonable
9 juror could conclude that the use of, or the authorization of the use of, pepper spray, as an
10 alternative to the use of the Makita grinders, was unreasonable.

11 **D. CONCLUSION**

12 For all of the above reasons, and for the reasons set forth in defendants' Renewed
13 Motion for Judgment as a Matter of Law, defendants are entitled to judgment on the
14 underlying Fourth Amendment claim, judgment dismissing defendants Lewis and Philp
15 on the basis of qualified immunity, and judgment disposing of plaintiffs' punitive damage
16 claims.

17 DATED: October 29, 2004

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19 By 

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