IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

VERNELL LUNDBERG, et al.,

Plaintiffs,

v.

COUNTY OF HUMBOLDT, et al.,

Defendants.
/

No. C 97-03989 SI

ORDER RE: POST-TRIAL MOTIONS AND PLAINTIFFS' ENTITLEMENT TO ATTORNEYS' FEES

On July 29, 2005, the Court heard oral argument on post-trial motions by the parties and plaintiffs' motion regarding their entitlement to reasonable attorneys' fees. Having carefully considered the arguments of counsel and the papers submitted, the Court hereby DENIES defendants' motions for judgment as a matter of law and a new trial, DENIES plaintiffs' request for injunctive relief, and GRANTS plaintiffs' motion for entitlement to fees.

BACKGROUND

This case arose out of three protests in the fall of 1997, staged by environmental activists who opposed the logging of ancient redwood trees in the Headwaters Forest along California's northern coasts. During the events, protestors locked themselves together using self-releasing lock-down devices called "black bears," steel cylinders with a rod welded into the center. From 1990 to 1997, law enforcement officers from the Humboldt County Sheriff's Department used hand-held electric grinders to remove black bears from the arms of protestors. Beginning in the fall of 1997, the Sheriff's Department organized a "special response team" that began using olesoresin capsicum aerosol ("OC" or "pepper spray") to force the protestors to release themselves from the black bears. This use of pepper

spray under these circumstances was "entirely unprecedented: . . . it had never been used in Humboldt County, the State of California, or anywhere in the country against nonviolent protestors." Headwaters Forest Defense v. Humboldt County, 276 F.3d 1125, 1128 (9th Cir. 2002) ("Headwaters II").

Nine protestors[1] filed an action under 42 U.S.C. § 1983, alleging that the use of pepper spray at the three events constituted excessive force in violation of the Fourth Amendment. The plaintiffs sought damages for pain, emotional trauma, and the violation of their constitutional rights, as well as punitive damages. Because none sought medical treatment for any physical injuries, they claimed no special damages. The case was originally assigned to another judge of this court. Defendants brought a motion for summary judgment, and that judge granted qualified immunity to all individual defendants except for Humboldt County Sheriff Dennis Lewis and Chief Deputy Sheriff Gary Philp, the policymakers who authorized the use of pepper spray. The court did not grant summary judgment to the defendants on excessive force, finding that there were too many factual disputes about whether the use of pepper spray was necessary to effect the arrests of the protestors.

The case went to trial in 1998. At the close of plaintiffs' case, defendants Lewis and Philp moved for judgment as a matter of law on qualified immunity. The court granted the motion and dismissed the case against the two individual defendants. The jury deadlocked on the issue of municipal liability for excessive force. The judge declared a mistrial, set a new trial date, and took under submission defendants' renewed motion for judgment as a matter of law. Eight weeks later, the judge granted defendants' motion and entered judgment in their favor.

Plaintiffs appealed, and the Ninth Circuit Court of Appeals reversed the grant of judgment as a matter of law, holding that the district court erred in failing to view the evidence in the light most favorable to the plaintiffs, the non-moving party. Headwaters Forest Defense v. Humboldt County, 240 F.3d 1185, 1197 (9th Cir. 2001) ("Headwaters I"). The Ninth Circuit first considered "whether a reasonable jury could conclude that police use of pepper spray constitutes excessive force," and held that it could. Id. at 1206. Then, it turned to the qualified immunity inquiry and also reversed the district

[1] Plaintiff Molly Burton was part of the original lawsuit but is no longer participating in the case. Plaintiff "Headwaters Forest Defense" was dismissed from the lawsuit in 1997 pursuant to Fed. R. Civ. P. 41(a)(1). There remain eight individual plaintiffs.

court's grant of immunity to defendants Lewis and Philp, finding that historical facts were in dispute regarding the reasonableness of the use of pepper spray, and regarding what Lewis and Philp "knew and did" when they authorized its use. Id. at 1209.

After Headwaters I, the U.S. Supreme Court granted certiorari, vacated the Ninth Circuit's judgment, and remanded the case for further consideration by the Court of Appeals in light of Saucier v. Katz, 533 U.S. 194, 121 S. Ct. 2151 (2001). In Saucier, the Supreme Court clarified the appropriate test for qualified immunity in excessive force cases. First, a court must ask whether the facts alleged, taken in the light most favorable to the party asserting the injury, show that the officers' conduct violated a constitutional right. Saucier, 533 U.S. at 205. If this question is answered in the affirmative, the court must then move to the second step of the inquiry and ask "whether the right was clearly established," such that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Id. at 206.

The Ninth Circuit applied Saucier and answered both questions in the affirmative, concluding that the officers were not entitled to qualified immunity "because the use of pepper spray on the protestors' eyes and faces was plainly in excess of the force necessary under the circumstances, and no reasonable officer could have concluded otherwise." Headwaters II, 276 F.3d at 1131. The Court of Appeals then remanded this case to the district court for further proceedings consistent with its decisions: specifically, the decision in Headwaters II that defendants Lewis and Philp were not entitled to qualified immunity prior to trial, and the decision in Headwaters I reversing the district court's entry of judgment as a matter of law on behalf of the County and City defendants.

The case was re-assigned to this Court, which held a re-trial to a jury in September 2004 on the issue of excessive force. That jury deadlocked, and the Court declared a mistrial. The Court then heard post-trial motions from the parties. It denied all of these motions except for a renewed motion by defendants for judgment as a matter of law on punitive damages and a motion by plaintiffs to re-open discovery to allow experts to testify at the third trial.

A third jury trial was held in April 2005. At this trial, police practices experts for each party testified. The jury returned a verdict in favor of plaintiffs, finding that defendants' application of pepper spray to plaintiffs constituted excessive force. Nominal damages were awarded to plaintiffs in the

amount of $1 each. On May 3, 2005, the Court entered judgment in favor of plaintiffs.

Now before the Court are a renewed motion by defendants for judgment as a matter of law on the excessive force claim, or in the alternative, for a new trial, and a motion by plaintiffs regarding their entitlement to attorneys' fees. [2] In plaintiffs' opposition to defendants' post-trial motions, they also request injunctive relief.

LEGAL STANDARDS

1. Renewed Motion for Judgment as a Matter of Law ("JMOL")

If for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment. In ruling on a renewed motion after a verdict is returned, the court may: (A) allow the judgment to stand, (B) order a new trial, or (C) direct entry of judgment as a matter of law.

Under Rule 50, the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). The burden borne by the party moving for judgment as a matter of law is a heavy one. All credibility determinations, weighing of evidence, and drawing of inferences from the evidence are jury functions. Id. at 253. Hence, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Id. at 255. If, however, there is "no substantial evidence" to support the non-moving party's claim, the court must grant judgment as a matter of law. California Computer Products v. IBM, 613 F.2d 727, 733 (9th Cir.1979). Substantial evidence is more than a scintilla of evidence. See Consolidated Edison Co. v. NLRB, 305 U. S. 197, 229 (1938); Chisholm Bros. Farm Equip. Co. v. International Harvester Co., 498 F.2d 1137, 1140 (9th Cir. 1974). Rather, it is defined as such relevant evidence as reasonable minds might accept as adequate to support a conclusion even if it

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[2] The parties stipulated to bifurcate the attorneys' fees issue so that plaintiffs could present this motion regarding entitlement to fees first, and subsequently file a fee petition if warranted.

is possible to draw two inconsistent conclusions from the evidence. See Landes Constr. Co. v. Royal Bank of Canada, 833 F.2d 1365, 1371 (9th Cir. 1987).

2. **Motion for New Trial**

Rule 59 of the Federal Rules of Civil Procedure provides that "[a] new trial may be granted . . . for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." Rule 59 gives the trial judge the power to prevent a miscarriage of justiceMoist Cold Refrigerator Co. v. Lou Johnson Co., 249 F.2d 246 (9th Cir. 1957). A new trial may be ordered to correct manifest errors of law or fact, but "the burden of showing harmful error rests on the party seeking the new trial." Malhiot v. Southern California Retail Clerks Union, 735 F.2d 1133 (9th Cir. 1984).

A motion for new trial may invoke the court's discretion insofar as it is based on claims that "the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to party moving; and may raise questions of law arising out of alleged substantial errors in admission or rejection of evidence or instructions to the jury ." Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 251 (1940). A new trial should be granted where, after giving full respect to the jury's findings, the judge "is left with the definite and firm conviction that a mistake has been committed" by the jury. Landes Const. Co., Inc. v. Royal Bank of Canada, 833 F.2d 1365, 1371-72 (9th Cir. 1987).

3. **Attorneys' Fees Recoverable under 42 U.S.C. § 1983**

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, provides that plaintiffs who successfully bring actions under certain civil rights acts are eligible for attorney's fees. In a § 1983 action, the district court "in its discretion, may allow the prevailing party . . . a reasonable attorney's fee." 42 U.S.C. § 1988. Generally, a prevailing plaintiff should recover attorney's fees unless special circumstances would render such an award unjust. Vernon v. City of Los Angeles, 27 F.3d 1385, 1402 (9th Cir. 1994).

DISCUSSION

I. Defendants' Post-Trial Motions

Defendants seek judgment as a matter of law on the excessive force claim and on qualified immunity, or in the alternative, a new trial. Defendants' motion is DENIED.

The excessive force inquiry is a fact-specific determination, which requires "a careful balancing of the 'nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." Graham v. Connor, 490 U.S. 386, 396, 109 S. Ct. 1865 (1989) (internal citations omitted). The reasonableness of the force used to effect an arrest is ordinarily a question of fact for the jury. See Liston v. County of Riverside, 120 F.3d 965, 976 n. 10 (9th Cir. 1997); Forrester v. City of San Diego, 25 F.3d 804, 806 (9th Cir. 1994). Here, the reasonableness of force was indubitably a close question – as evidenced by two prior hung juries – and there was "substantial evidence" to support the third jury's verdict; the verdict was not against the clear weight of the evidence.

With regard to qualified immunity, the Court finds for the same reasons set forth in its November 24, 2004 Order that defendants Lewis and Philp are not entitled to qualified immunity. Under Saucier v. Katz, the Court must first ask whether the plaintiffs' allegations constitute a constitutional violation. If the answer is yes, the Court must then determine whether the officers' actions violate a clearly established constitutional right. The Supreme Court has stated that this inquiry is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. Saucier, 533 U.S. at 202. As the Ninth Circuit has since articulated the Saucier inquiry: "the first step in the analysis is an inquiry into the objective reasonableness of the officer's belief in the *necessity* of his actions . . . [t]he second step of the analysis . . . is an inquiry into the reasonableness of the officer's belief in the *legality* of his actions." Wilkins v. City of Oakland, 350 F.3d 949, 954 (9th Cir. 2003) (italics in original). An officer's "reasonable but mistaken belief that [the officer's] conduct was lawful would result in the grant of qualified immunity." Id.

The Court finds that, viewing the evidence in the light most favorable to plaintiffs, the officers' actions violated the Fourth Amendment, meeting the first step in the Saucier inquiry. For the second step, the defendants argue that the Ninth Circuit's holding in Headwaters II should not bind this Court

because the Court of Appeals did not have before it the testimony of David DuBay regarding the pepper spray product, the expert testimony of Don Cameron, or the jury finding of no injury to plaintiffs. Defs.' Renewed Mot. at 12:8-12. Despite this evidence, other facts adduced at trial remained the same, and this Court's and the Court of Appeals' prior rulings on qualified immunity are not altered by the introduction of expert testimony by both parties. As the Ninth Circuit found, based on the officers' repeated use of OC, the refusal to provide water until the protestors released themselves,[3] the nonviolent nature of the protests, and the availability of other alternatives, these officers are not entitled to qualified immunity under Saucier. Thus, the motion for JMOL or a new trial on this ground is DENIED.

II. Plaintiffs' Post-Trial Motions

Plaintiffs move to strike a juror affidavit submitted by defendants in support of their motion, and also request "such equitable relief as may be needed to consolidate, define and/or protect the Judgment recovered by plaintiffs in the recent trial." Pls.' Opp'n at 2:1-3. Defendants oppose plaintiffs' request for equitable relief.

The Court GRANTS the motion to strike the juror declaration because it is clearly inadmissible under Federal Rule of Evidence 606(b), which prohibits a juror from testifying "as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith." F.R.E. 606(b).

Plaintiffs' request for an injunction and/or declaratory relief is DENIED. As defendants point out, the request is procedurally improper under Rules 50 and 59, and any equitable claims in plaintiffs' action were dismissed by April 14, 2003. In addition, plaintiffs' request fails on the merits because they cannot demonstrate irreparable injury or inadequacy of the legal remedy they have obtained. As plaintiffs acknowledge, the City of Eureka Police Department and Humboldt County Sheriff's Department stopped using pepper spray in this manner when this lawsuit was filed. Even if the defense

[3] This fact is not contradicted by defendants' statement that "[n]o videotape of any event in issue reflects the use of pepper spray without affording an opportunity for use of water immediately after (and often before) compliance with the lawful order of the arresting officer to cease resistance." See Defs.' Supp. Br. at 9:10-13).

has made "public statements that the verdict is no bar to their continuation of the unconstitutional practice," see Pls.' Opp'n at 8:23-24, these statements are insufficient to show irreparable injury in the absence of an order from the Court.

III. Plaintiffs' Entitlement to Fees[4]

The parties have agreed to bifurcate the attorneys' fees issue presented by this case into two separate motions: one to consider whether plaintiffs may recover fees at all based on their nominal damages award, and a second, if they are entitled to a fee award, to determine the reasonable amount.

The controlling U.S. Supreme Court case is Farrar v. Hobby, 506 U.S. 103 (1992), in which the Supreme Court considered whether a plaintiff who recovers only nominal damages is still a "prevailing party" under 42 U.S.C. § 1988. It held that such a plaintiff is a prevailing party because a plaintiff prevails when "actual relief on the merits of [the] claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff," 506 U.S. at 111-12, and an enforceable judgment against the defendant is such a material alteration. Here, clearly, plaintiffs are the prevailing party, entitled to enforce their judgment against defendants and to obtain a reasonable fee award under § 1988.

The Farrar court also stated that, "[i]n a civil rights suit for damages . . . the awarding of nominal damages also highlights the plaintiff's failure to prove actual, compensable injury," and observed that "[w]hen a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the only reasonable fee is usually no fee at all." Farrar, 506 U.S. at 115 (citations omitted). Here, the question of plaintiffs' entitlement to fees is essentially the same question as whether "no fee at all" is the reasonable amount. Farrar established that "the degree of the plaintiff's overall success goes to the reasonableness of a fee award." Id. at 114, citing Hensley v. Eckerhart, 461 U.S. 424, 103 S. Ct. 1933 (1983). As the Supreme Court explained, "having considered the amount and nature of damages awarded, [a district] court may lawfully award low fees or no fees without reciting

[4] Defendants have filed objections to evidence submitted by plaintiffs in support of their motion. The Court does not rely on any of the objectionable statements or documents in rendering its decision on the motion, and thus does not rule on the objections.

the 12 factors bearing on reasonableness, or multiplying 'the number of hours reasonably expended by a reasonable hourly rate." Id. at 115 (citations omitted). Specifically, the lodestar amount, calculated as the product of hours reasonably expended and a reasonably hourly rate, may not be an appropriate amount where a plaintiff has achieved only partial success relative to the relief sought. Id. at 114.

Applying Farrar, the Ninth Circuit has held that "[n]othing in Farrar . . . suggests that district courts may never award fees to a party who recovers only nominal damages." Wilcox v. City of Reno, 42 F.3d 550, 554 (9th Cir. 1994). It reasoned:

> Farrar teaches that district courts, in the exercise of their discretion, should consider the extent of success in calculating a fee award. When the sole purpose of a civil rights claim is the recovery of money damages, a failure to obtain a judgment awarding actual damages is a strong indication of a low degree of success . . . Thus, if a lawsuit achieves nothing other than an award of nominal damages, the prevailing party *might* deserve to receive no attorney's fees at all. Farrar therefore teaches that an award of nominal damages is not enough. If a district court chooses to award fees after a judgment for only nominal damages, it must point to some way in which the litigation succeeded, in addition to obtaining a judgment for nominal damage. If the lawsuit achieved other tangible results – such as sparking a change in policy or establishing a finding of fact with potential collateral estoppel effects – such results will, in combination with an enforceable judgment for a nominal sum, support an award of fees. The determination whether to make an award in such circumstances, however, remains within the discretion of the district court.

Wilcox, 42 F.3d at 554-55 (emphasis in original) (citations omitted).

Thus, the Court must consider the "overall success" of the litigation, including whether plaintiffs obtained any tangible result beyond the nominal damage amount.

Plaintiffs argue that the Court should measure the success of the litigation by three factors listed in Justice O'Connor's concurring opinion in Farrar: (1) the amount of damages awarded relative to the amount sought; (2) significance of the legal issue on which plaintiffs prevailed; and (3) the public purpose served. See Farrar, 506 U.S. at 121-22 (O'Connor, J., concurring). As for the public purpose served, plaintiffs contend that this suit sparked tangible changes in the form of (1) the California legislature's enactment of Penal Code § 13514.5, which requires the P.O.S.T. Commission to develop a training course and adopt guidelines on civil disobedience; (2) various revisions to the P.O.S.T. Commission guidelines; (3) alleged changes in defendants' policies regarding pepper spray application; (4) a deterrent effect on law enforcement, as evidenced by the declarations of two law enforcement representatives; (5) the "political message" sent by the case; and (6) the public education and awareness

achieved by publicity about the case. Defendants argue that virtually none of these successes were achieved, and specifically that any changes to state law and the P.O.S.T guidelines were made in response to the pepper spray incidents, but not this litigation; that there have been no changes to defendants' use-of-force policies based on this lawsuit; that there is no palpable deterrent effect; and that the publicity surrounding this case, even if it had an effect on public awareness, has no impact on plaintiffs' entitlement to fees. They contend that, at most, plaintiffs' success amounts to a victory on principle alone, for which a fee award is inappropriate.

The Court finds that plaintiffs are entitled to fees in some amount greater than zero. Under Farrar, the primary measure of success in a civil rights action under Section 1983 is the damages recovered relative to the relief sought. While the award of nominal damages is not enough to justify a fee award, nor does it bar recovery of fees altogether. Giving this factor "primary consideration," see Wilcox, 42 F.3d at 554, the Court recognizes that plaintiffs obtained the lowest possible degree of monetary success. But unlike the plaintiff in Farrar, who sought $17 million and obtained a dollar, these plaintiffs did not seek a specific amount of compensatory damages, nor were monetary damages their stated objective. Indeed, defendants do not dispute that plaintiffs' efforts were directed at the "principle" of the case, and toward the goal of preventing defendants from using pepper spray against non-violent protestors in the future. The focus of settlement discussions throughout the case – and the ultimate barrier to settlement – was defendants' unwillingness to consider voluntarily ceasing the use of pepper spray in similar circumstances. See Lundberg Decl., Ex. A; Cope Decl., Ex. A. The jury found "that the application of pepper spray to plaintiffs, in effecting their arrests during any of the three incidents at issue in this case, constituted excessive force." Jury Verdict, Docket #460. Based on this verdict, the Court must conclude that plaintiffs prevailed on the principle.

Beyond the principle, however, it is a close question whether plaintiffs achieved tangible results. Defendants are correct that the jury verdict carries no collateral estoppel effect. In addition, defendants themselves have not implemented a change in their own use-of-force policies as a result of the verdict. On the issue of "public awareness," "political messages," and publicity, the Court is inclined to agree with defendants that these can have no bearing on the reasonableness of a fee award. On the other hand, plaintiffs have achieved more than a de minimis victory when measured by other changes in California

law and the law of excessive force. The legislative history of Penal Code § 13514.5 reveals that the state assembly was aware of the incidents in Humboldt County resulting in lawsuits for excessive force, and wanted the P.O.S.T. curriculum to address the use of chemical agents in instances of non-violent civil disobedience. See Pls.' Mot. at 15 n. 13. The impact of the two Headwaters decisions by the Court of Appeals is difficult to assess, but they do suggest that plaintiffs' success bore legal significance. Because of their procedural posture, these cases do not constitute binding precedent on whether the use of pepper spray constituted excessive force. But plaintiffs did obtain a reversal of a directed verdict on the excessive force issue in Headwaters I, and Headwaters II is a published decision on the question of qualified immunity, which certainly carries precedential weight in this circuit. Moreover, while defendants apparently maintain their right to continue to use pepper spray in similar circumstances, no doubt the lengthy litigation and ultimate verdict in this case will influence the decisions of law enforcement in the future.

Therefore, in light of all the circumstances, the Court finds that "no fee at all" would not be a reasonable fee in this case. It will give due consideration to "the relationship between the extent of success and the amount of the fee award" in setting a reasonable attorneys' fee.

CONCLUSION

For the foregoing reasons and for good cause shown, the Court hereby DENIES defendants' motions for JMOL and a new trial and finds that plaintiffs are entitled to a reasonable attorneys' fee in an amount to be determined.

IT IS SO ORDERED.

Dated: 8/9/05

SUSAN ILLSTON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

LUNDBERG,

Plaintiff,

v.

HUMBOLDT COUNTY OF,

Defendant.
_____/

Case Number: CV97-03989 SI

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on August 9, 2005, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

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