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 FOR BRIEFING ON QUALIFIED IMMUNITY

On November 12, 2004, this Court will hear argument on any substantive post-trial motions brought by the parties. The Court hereby ORDERS the parties to submit briefing on the issue of whether Sheriff Lewis and Deputy Sheriff Philp are entitled to qualified immunity based on the facts established at trial.

In 2002, after the first trial and a series of appeals, the Ninth Circuit remanded this case to the district court for further proceedings consistent with its decisions in Headwaters Forest Defense v. County of Humboldt, 276 F.3d 1125, 1130 (9th Cir. 2002) ("Headwaters II") that defendants Lewis and Philp were not entitled to qualified immunity prior to trial, and in Headwaters Forest Defense v. County of Humboldt, 240 F.3d 1185 (9th Cir. 2001) ("Headwaters I") reversing the district court's entry of judgment as a matter of law on behalf of the County and City defendants. Headwaters II, 276 F.3d at 1131. This Court held a re-trial to a jury on excessive force and reserved its decision on qualified immunity until after the trial.[1]

[1]When defendants are not entitled to qualified immunity at summary judgment, the case must proceed to trial. See Act Up!/Portland v. Bagley, 988 F.2d 868, 873 (9th Cir. 1993). Typically, a jury trial is held where there is a genuine issue of fact preventing a determination of qualified immunity at summary judgment. See Wilkins v. City of Oakland, 350 F.3d 949, 955-56 (9th Cir. 2004); Santos v.

Since the first trial in this case, the Supreme Court has clarified that the excessive force and qualified immunity inquiries are distinct and outlined the proper qualified immunity analysis: first, "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" Saucier v. Katz, 533 U.S. 194, 201, 121 S. Ct. 2151 (2001). If so, "the next, sequential step is to ask whether the right was clearly established." Id. In undertaking this second step, the "relevant, dispositive inquiry . . . is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Id. at 202. Both before and after Saucier, courts have agreed that "whether the law was clearly established is a pure question of law for the court to decide." Act Up!/Portland v. Bagley, 988 F.2d 868, 873 (9th Cir. 1993); Crowe v. County of San Diego, 303 F. Supp. 2d 1050, 1068 (S.D. Cal. 2004).

In Headwaters II, the Ninth Circuit, applying Saucier and viewing the facts in the light most favorable to plaintiffs, concluded "that it would be clear to a reasonable officer that using pepper spray against the protestors was excessive under the circumstances." 276 F.3d at 1130. The court of appeals cited the following facts from the trial record in support of its decision:

(1) "the pepper spray was unnecessary to subdue, remove, or arrest the protestors";

(2) "the officers could safely and quickly remove the protestors, while in 'black bears,' from protest sites";

(3) "the officers could remove the 'black bears' with electric grinders in a matter of minutes and without causing pain or injury to the protesters";

(4) "the protestors were sitting peacefully, were easily moved by the police, and did not threaten or harm the officers":

(5) "[b]ecause the officers had control over the protestors . . . it was unnecessary to use pepper spray to bring them under control, and even less necessary to repeatedly use pepper spray against the protestors when they refused to release from the 'black bears'";

(6) "the manner in which the officers used the pepper spray:" "Lewis and Philp

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Gates, 287 F.3d 846, 855 n. 12 (9th Cir. 2002); Curley v. Klem, 298 F.3d 271, 278-82 (3d Cir. 2002) (collecting cases).

'authorized full spray blasts of [pepper spray], not just Q-tip applications,' despite the fact that the manufacturer's label on the canisters of pepper spray defendants used 'expressly discouraged' spraying [pepper spray] from distances of less than three feet;'"

(7) the officers' "refusal to wash out the protestors' eyes with water:" "in two of the protests, officers threatened that they would not provide the protestors with water to wash out their eyes until they released themselves from the 'black bears,' and in one of the protests, the officers did not provide the protestors with water for over twenty minutes."

276 F.3d at 1130-31.

The parties must include in their briefs a discussion of the following question: what is the factual record produced at the second trial that establishes these facts from Headwaters II?

IT IS SO ORDERED.

Dated: October 5, 2004

SUSAN ILLSTON
United States District Judge