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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' MOTION FOR REVISION OF ORDER AND OTHER RELIEF

Date: February 18, 2005
Time: 9:00 a.m.
Judge ILLSTON

NOTICE OF MOTION

TO: The Defendants and their Attorneys:

PLEASE TAKE NOTICE that, on Friday, February 18, 2005, at 9:00 a.m., or as soon thereafter as counsel can be heard, I shall appear before the Hon. Susan Illston, in her courtroom at the US Courthouse in San Francisco, and then and there present the within Motion for Revision of the Order on Post Trial Motions, at which time you may appear if you so desire.

MOTION

Plaintiffs urgently seek relief from numerous unfounded and highly prejudicial statements in the Court's recent Order on Post-trial Motions (filed Nov. 24, 2004), in the section where the punitive damages claim is so heedlessly killed off. We are not necessarily disposed to fight with the Court about non-inclusion of the claim itself in the next trial — at least, so long as the Court maintains its commitment to the importance of 'context' in the evidence, and does not pre-empt, inadvertently or otherwise, issues of credibility, plausibility, reasonable inference, and truth-telling, *vel non*, with respect to the essential facts, and the contentions of the parties. The Court's misguided statements, however, appear to strongly threaten just that; they pass explicit or implicit judgment on matters of fact, in a way that radically invades the province of the Jury, to plaintiffs' great prejudice, and thereby, in truth, they constitute a legally illicit basis for the Court's action.

Indeed, since the statements and findings in question are so thoroughly bound up with the decision to squash the punitive damages claim, plaintiffs feel we have no choice but to ask *pro forma* that the Court reconsider its action. By the same token, where plaintiffs originally included in their Complaint a claim of denial of First Amendment rights, broadly based on the same facts and allegations as the claim for punitive damages, and where, from the docket, the same has never been disposed of, plaintiffs now wish to assert it in the new trial; so we also ask for any needed action by the Court to enable this. That being said, we remain far more concerned with the stated bases for the Court's decision than with the decision itself.

For it is one thing to conclude that "the evidence and inferences, considered as a whole and viewed in the light most favorable to plaintiffs can reasonably support only a finding for the defendants on this (reckless/callous disregard) issue." (Order, p.17:23-25). It is something much more to have made pronouncements on the merits of specific, crucial factual, evidentiary and credibility issues in the case as a whole, in advance of trial on the remaining claim.

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I.

To get to specifics, it is incorrect to say, "[P]laintiffs' argument [is] that the policy decision itself should" serve as a basis for a finding of callous indifference to the plaintiffs' rights. (Order, p.17, L.26-27) That was only the start of the argument. In the circumstances, the choice to inflict great, frightening, unremitting pain on docile subjects, where non-pain, non-force methods had been 1000% successful in the past, was certainly a quantum of real proof of callous

disregard, notwithstanding defendants' blandishments. But the point is, it did not stand by itself; there was much more.

Indeed, the Court itself just previously in the Order stated the full claim — albeit most reductively — just two paragraphs above (*id*. at L.8-13), noting that plaintiffs rely on the "bare fact" (of the decision to adopt the tactic where there was no need for it), <u>together with</u> "collusion" with PL, and (resultant) "escalation" of police hostilities against the forest protesters during the period in question. Left out of this iteration was the history of concerted Sheriff's Department animosity, and frequent resultant maltreatment of protesters — notwithstanding the lugubrious performances of several of the main culprits on the videotapes and in the courtroom — over years leading up to these events. It is true that history is part of the Big Picture, which the Court at least mentions in its preliminary discussion, (at 17:2-13), but all this is abandoned when the Court gets down to the business of squashing the claim.

Instead, suddenly, in preamble to the specific ruling wiping it out, plaintiffs' punitive damages claim is reduced to "the fact of the policy decision itself" (at Line 26-27). That is simply not fair, in a big way, to set up a straw like that in place of plaintiffs' much broader actual argument and evidence showing defendants' anti-constitutional motives. Then the real mischief starts, as follows:

1. *It is undisputed* that Philp learned from special services officers that they feared a risk of injury from using the Makita grinders. (p.18:28-19:1) (Emphasis added.)

2. Even if the fears were unfounded, *the fact remains* that defendants acted in response to those concerns. (18:2-3) (Emphasis added.)

. 3. *The evidence is also undisputed* that pepper spray posed no known risk of physical injury to plaintiffs (18:3-4) (Emphasis added.), *and*

4. That Philp researched pepper spray and the legality of its use (18:4-5), *and* (apparently), that,

5. (Philp) developed a method of application to minimize exposure. (18:5)

6. *Plaintiffs do not dispute these facts*. (18:5-6) (Emphasis added.) (They merely "point out that pepper spray caused them physical pain (18:6)), *and*

7. (Plaintiffs merely) *question* (rather than competently dispute) the 'adequacy and good faith' of Philp's investigation. (18:6-7) (Emphasis added.)

Each one of these statements in the Court's Order is wrong, untrue, unfounded, contrary to the evidence and/or the record, and improper, unfair and prejudicial to plaintiffs' fundamental right to a Fair Trial of the claim for unconstitutional use of force. Analysed, it is also clear the reasoning, being so heavily flawed by improper covert fact-finding, does not support dismissal of the callous indifference claim for lack of evidence.

Rather, with all respect, it reflects the Court's own apparently "visceral" conclusion that callous indifference was not shown to its satisfaction in the trial — or was negated by the earnest response of these amiable defendants on the witness stand. In just the same way the previous Court improperly determined for itself that wrongful use of force was not shown (and could not be shown). Then, in both cases, a spurious rationale for judgment was generated, here in the form of these seven misbegotten theses. They cannot go unchallenged by plaintiffs.

II

In particular, these seven statements wrongfully find facts and preemptively determine evidentiary disputes, as follows:

1. *It is undisputed* that Philp learned from special services officers that they feared a risk of injury from using the Makita grinders.

But, it is absolutely disputed that Philp in any way in good faith "learned" of any honest and disabling "fear of a risk of injury" from the ranks. Rather, it was tacitly understood and

agreed by and between him and his involved minions — by way of their shared, perennial animus towards forest protesters — that the sheriffs would initiate the use of pepper spray against the lockdowns; they would collectively, simply, baldly, assert that their 'fear of the risk of injury' was so great that they couldn't use the grinder any more; and they would expect to have their rationale accepted because they're the cops! That dispute, at the heart of the matter, is written right out of the case by the Court's statement.

But it gets worse:

2. Even if the fears were unfounded, *the fact remains* that defendants acted in response to those concerns.

But, they did not act 'in response to those concerns'; that is not "the fact", it is the defendants' police *buncombe* pretense, nothing more or less, and this Court has No Business pronouncing it a fact in this or any other context. What defendants 'acted in response to' is for the Jury to decide. The claim that defendants' policy decision was in response to some purported intolerable fear on the part of line officers that a grinder catastrophe would occur is the defendants' false, cover-story contention. Plaintiffs' contention is that defendants acted in response to the seductive opportunity — to exercise the active animus against plaintiffs' movement which they shared with their timber company patrons — presented by someone's brilliant, sadistic idea of using pepper spray against passive protesters engaged in lockdowns. As the Court of Appeals said so emphatically, no reasonable policeman would have thought that was legal. But these few lines by the Court have set it up as eminently reasonable.

And again, the dispute over this "fact" — which in reality is a whole set of disputes over the credibility and plausibility, etc. of defendants' assertions and proofs about the allegation — is at the heart of the case, 'inextricably intertwined' with the preceding question. Thus, in reality, the defendants said: We'll do the pepper spray, and say the grinder is so dangerous we have to use this heinous force and inflict this heinous pain instead, *even though we've never had a problem with the grinder*. That is bunk, Judge Illston, pure police bunk! If a juror or jurors want to accept it that's one thing. The Court may not decide it! That is elementary. If your decision

that plaintiffs have no evidence showing callous disregard is based on statements 1 and 2, you must reverse it. Please forgive me for speaking so plainly; the problem is also quite plain...

III.

The validation of defendants' supporting claims contained in the next three statements must also be reversed, or set aside. Defendants offered these claims in the trial and they were met with contrary evidence, fair inference and credibility challenge from plaintiffs — all of which were accepted and sustained by the six jurors who were not "adamantly opposed" to any consideration of the claim that plaintiffs' rights were violated — and yet the Court has adopted the defendants' version and pronounced it fact; intolerable! Likewise, defendants argued that their pepper spraying policy was reasonable because, (3.) Pepper spray posed no known risk of physical injury to plaintiffs; (4.) Philp researched pepper spray and the legality of its use (and thereby determined, supposedly, that there was 'no known risk of physical injury'); and (5.) Philp 'developed a method of application to minimize exposure'. Those are the defendants' fact claims; the Court has embraced them all, and empowered itself to do so by simply, baldly, calling them undisputed, and by advancing another straw dog in place of plaintiffs' contrary case on these points.

Plaintiffs showed there was substantial risk of harm that Philp knew and should have known of, and that his research in any case was focused only around possible liability for his department, and the possibility of disrupting the prosecution of protesters who might be spray victims. We showed there was information before him, in his own department's training materials (Dfts' Exhibit AA-4), and in an ACLU study he admitted he read, advertising all kinds of dangers — and 26 "associated" fatalities. The witness DuBay conceded that injury might arise from direct application to the eyeball, and we showed proof that had occurred. And we showed that Philp — far from concerning himself with "minimal exposure" — actually directed Kirkpatrick & Co. to make their applications of spray "longer and stronger", and to spray directly in the eyes at close range! We showed that all the testimony supporting the assertions reprised by the Court in items 3, 4 and 5 was Cover Story. Six Jurors knew it, too

Yet, finally, the Court in items 6 and 7 reduces all these things we said and showed to some apparently irrelevant proof of physical pain (the emotional-psychological pain and the brutal physical manhandling are ignored), and a "question" as to the good faith of Philp's purported research, raised somehow in lieu of any real, competent, evidentiary contestation of defendants' pretenses in Nos. 3, 4 and 5. Plaintiffs' evidence and inferences, and the issues of credibility, are *desesparacidos*; gone from the discourse: "*Plaintiffs do not dispute these facts*," the Court states (emphasis added), simply, baldly, wrongly. It isn't true; and it isn't fairly stated, by a mile, and all of it, each statement, is enormously prejudicial to plaintiffs and it must all be undone if we are to receive a Fair Trial on the remaining claim that the pepper spray use by defendants herein was unconstitutional.

IV.

Plaintiffs therefore implore the Court to reflect on the hugely prejudicial impact of the statements identified above on the claim-in-chief of unconstitutional use of force herein, beyond their implication in its decision to quash the corollary punitive damages claim, and to act appropriately and effectively to protect plaintiffs from such prejudice.

That is, we ask that the Court not preemptively constrain its own or the jury's consideration of the whole context from which a fair and reasoned judgment upon defendants' claim of justification for the use of force must be drawn, including defendants' animus, and we ask that the Court withdraw, disown and otherwise negate the statements in its Order which — by treating crucially disputed allegations of fact and points of evidence as concluded against plaintiffs — have or threaten that effect so strongly. We trust the Court will also resolutely deal with any hint of prejudice in its own mind or feelings that may have been embodied in the statements.

And, if the great cure for great prejudice functionally requires reinstatement of the punishment claim, so be it. That is all plaintiffs can honestly say, with all respect. We are that consternated by the Court's pronouncements. As to the First Amendment claim, mentioned above, it was a legitimate element of the original complaint — precisely because of the

overriding element of animus, and maltreatment, in the factual history leading to and including the pepper spray assaults. Evidence of that animus gives rise to a more than fair inference that an impermissible intent to repress and intimidate the plaintiffs' movement — much leavened by fraternal stimuli from the timber community — drove defendants' policy decision. Like the punitive damages claim, a political repression claim under the First Amendment rests on defendants' malign motivation for the decision to use pepper spray, and their false pretense that the grinder was too unsafe. Thus all three claims rest in the end on the same facts, and all are hugely compromised by the exoneration of defendants implicit in the Court's characterizations of the record.

WHEREFORE, plaintiffs respectfully but earnestly ask the Court to revise the section of its Order dealing with the punitive damages claim so that the listed offending statements and their separate and collective import are wholly cancelled out. If this is not feasible without reconsideration of its action in that section, we ask leave to file a motion for reconsideration, per C.L.R. #7-9(b)(3), and, that the Court take this Motion for Revision as such motion, without further ado, leading to the same underlying relief from the challenged statements. Likewise, plaintiffs ask the Court to grant them leave to revive their original First Amendment claim for inclusion in the upcoming trial; or, in the alternative to allow them to amend their Complaint in its current version to add such claim, since it relates back to the time of filing under R.15(c), F.R.Civ P. Plaintiffs pray for such other and further relief as is meet and just in the premises.

Respectfully submitted,

DATED: January 14, 2005

Dennis Cunningham
Attorney for Plaintiffs

CERTIFICATE

I certify that I served the within Notice of Motion and Motion, etc. on defendants by FAX and mailing a copy Nancy Delaney and Wm. Mitchell, Esqs. at their offices in Eureka, CA on January 14, 2005

Dennis Cunningham