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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' RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW DATE: November 12. 2004 TIME: 9:00 a.m. CTRM: 10, 19th Floor

MOTION

Defendants, County of Humboldt, City of Eureka, Dennis Lewis and Gary Philp, hereby move for judgment as a matter of law, and renew the motions for same made during the course of trial and at the conclusion of the evidence, on the grounds that the uncontroverted evidence establishes that the challenged use of force was reasonable, as a matter of law, and as to defendants Lewis and Philp, on the further grounds that each is entitled to qualified immunity, and any punitive damage claim against said defendants has failed, as a matter of law.

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Having successfully reversed judgment as a matter of law and causing the recusal of the first trial judge, plaintiffs have once again failed to convince a jury that the use of pepper spray to effect the lawful arrest of any plaintiff was excessive force.[1] More significantly, the purportedly disputed questions surrounding "historical facts" that provided the basis for such reversal, have now been answered by uncontroverted evidence.

Further, defendants submit that the evidence at trial could not possibly support a determination that defendants Lewis and Philp were "plainly incompetent" or "knowingly violated the law" with respect to the authorization of pepper spray, such that these defendants should be deprived of qualified immunity. Nor could any reasonable jury conclude that punitive damages were warranted based on the evidence presented.

The uncontroverted evidence at the second trial established that: (1) the subject incidents involved organized lawlessness, beyond the specific number of individuals employing the metal devices; (2) the continued use of the Makita grinder to extract

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[1] Although much will be made by plaintiffs of the purported 6-2 jury split in their favor, this result should take into account the fact that, had plaintiffs obtained a verdict, it would have been subject to challenge due to serious jury misconduct. See *infra*, p. 9, note 9.

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protesters from the metal devices used by plaintiffs posed significant risk of injury to the officers and/or protesters; (3) the lifting and carrying of the protesters, attached to each other with mechanical devices, posed a significant risk of injury to the officers and/or protesters; (4) the subject applications of pepper spray, while causing temporary pain, did not pose a risk of significant injury to the officers and/or protesters; and (5) the delivery of water by spray bottle and fresh air were appropriate first aid for the subject applications of pepper spray.

A fundamental difference between the first and second trials was the testimony of David DuBay, the former Director of Research for Defense Technology, who was unable to testify in the first trial because of an injury. Mr. DuBay provided uncontroverted testimony regarding the use and effects of the specific formulation of pepper spray applied in the subject incidents, including testimony that all of the ingredients in the subject pepper spray were FDA-approved food grade products which posed no known health risks to any of the plaintiffs, that the selected product contained the lowest percentage of active ingredient available on the market, that the "hydraulic needle effect" and 3-foot instruction were non-issues because the applications by spray were to *closed* eyes, that the Q-tip and close-range applications insured minimal effect because airways were avoided, that a substantially reduced amount of pepper spray was used in comparison to a full-face continuous spray, and that application of water by spray bottle was precisely the first aid treatment recommended by the manufacturer.

Another key difference between the first and second trials was the testimony of Special Services Deputy Phil Daastol. He testified in the second trial that a protester had subsequently been injured while being manually cut-out of a black bear device – confirming previous concerns that "it was only a matter of time" before use of mechanical means to extract protesters would result in physical injury. In the first trial

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this concern was, strictly speaking, theoretical. By the time of the second trial, it was a reality.

Uncontroverted testimony was also elicited from plaintiffs, and supported by videotape evidence, that conclusively established that each "direct action" staged by the plaintiffs was part of a larger, well-organized operation, involving other groups of protestors – thereby presenting increased law enforcement concerns.

Finally, new evidence at the second trial included the testimony of Rhonda Pellegrini (the office worker in the local office of Congressman Riggs) that officers at the scene discussed "waiting the protesters out," as an alternative to plaintiffs' removal by law enforcement. Pellegrini explained to the officers that simply waiting for the plaintiffs to leave "was not an option," given the nature of the services provided at the federal office (assisting constituents in accessing vital federal aid) and the confidential constituent information that was available at the office.

In addition, there was not one scintilla of evidence presented at trial to support a reasonable inference that the authorization for the use of pepper spray by defendants Lewis and Philp demonstrated malice or callous indifference to the rights of plaintiffs. Although plaintiffs' counsel *argued* that the use of pepper spray as an alternative to Makita grinders was a result of a "get tough policy" and/or a conspiracy between the County and the Pacific Lumber Company, there was absolutely no *evidence* to support this claim. Rather, the uncontroverted evidence was that Chief Deputy Philp's research and subsequent approval of the pepper spray option was prompted solely by concerns from officers in the field that the manual extraction of activists was becoming too dangerous for both the protestors and the officers. Accordingly, defendants Lewis and Philp are also entitled to judgment as a matter of law with respect to plaintiffs' punitive damage claims.

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In a concurring opinion, a member of the Ninth Circuit panel that overturned judgment as a matter of law following the first trial admitted that this was "a close case."[2] Defendants submit that the new evidence in the second trial, particularly the uncontroverted testimony of research scientist DuBay, now conclusively establishes all material facts needed for this court to render judgment as a matter of law in favor of all defendants.

II. EVIDENCE AT TRIAL

The evidence presented by the plaintiffs was, for the most part, immaterial to the fundamental jury question, i.e., whether or not the use of pepper spray in the subject incidents was a reasonable use of force under the circumstances.

Plaintiffs' second witness was Carl Anderson, the head of security for the Pacific Lumber Company. Although Mr. Anderson was an eyewitness to the use of pepper spray at the Scotia and Bear Creek incidents, it was immediately apparent that his presence at trial had nothing to do with what he witnessed. Instead, it was obvious that plaintiffs' sole purpose in calling Mr. Anderson was to suggest, through innuendo and shear speculation, that there was some connection between the Pacific Lumber Company and the authorization to use pepper spray on the plaintiffs. However, no *evidence* of any kind was presented at trial to support this claim.[3]

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[2] *Headwaters v. County of Humboldt*, 211 F.3d 1121,1143 (9th Cir. 2000). Justice Bright also prophetically proclaimed that "this judge entertains great doubt that a second jury will be any more successful than the hung jury in the first case."

[3] Even if the plaintiffs had presented evidence to support their "crush the movement" claim – it would have been irrelevant. It is fundamental that the subjective intent of law enforcement – good or evil – is not germane to a determination of whether or not the use of force is objectively reasonable. *Graham v. Connor*, 490 U.S. 386, 396 (1989)("...an officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional.") *Billington v. Smith*, 297 F.3d 1177, 1187 (9th Cir. 2002) ("The reasonableness inquiry is objective, without regard to the officer's good or bad motivations or intentions.")

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Further attempts by plaintiffs' counsel to advance the "crush the movement" theory were equally futile. For example, Sgt. Ciarabellini and defendant Philp explained that the purpose of the formation of the "response team" was to address a personnel problem caused by calls to remove trespassers in remote locations during the end of the "graveyard shift." Without a separate response team, the Sheriff's Department was unable to provide adequate law enforcement coverage to the rest of the community during the protest events.

As for the "secret meeting" between then-Sheriff Lewis and Charles Hurwitz (the owner of Pacific Lumber Company) – the only evidence on this issue was the testimony of Sheriff Lewis that the event was a Pacific Lumber sponsored lunch attended by other law enforcement officials, two County Board of Supervisor members, and a member of the press. As for the notion of the supposed favoritism of Sheriff Lewis towards Pacific Lumber Company, he testified that he and his sisters took sides against the Company when it appeared likely that his father would lose his company pension benefits, and that a friend since kindergarten had essentially devoted his legal career to suing Pacific Lumber Company.

Plaintiffs also utterly failed to support their case theme of "movement busting" with the testimony of former Eureka City Police Chief Arnold Millsap. Quite to the contrary, Chief Millsap testified that he had made a concerted effort to *facilitate* the lawful demonstrations by environmental protesters, and had numerous friendly meetings in his office with former EarthFirst! leader Judy Bari.

In short, even assuming for the sake of argument that plaintiffs' theme in the case had any bearing whatsoever on the issues that the jury was called upon to decide, plaintiffs failed to adduce one shred of evidence that the pepper spray authorization was given for any reason other than to reduce the risk of serious injury to the protesters and officers.

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The jury also heard testimony from Sgt. Ciarabellini regarding the genesis of the pepper spray authorization, as well as the circumstances which led to its use in the Scotia and Bear Creek incidents. Sgt. Ciarabellini confirmed that Chief Deputy Philp approved the use of pepper spray "if the circumstances warranted," in the summer of 1997, in response to repeated expressions of safety concerns by the Special Services Deputies with respect to the continued use of the Makita grinders and other power tools on increasing sophisticated lock-down devices. Sgt. Ciarabellini also testified that the authorization included the instruction that it was to be applied to the outside corner of the eyes, and away from the airways, in order to minimize exposure and discomfort. Sgt. Ciarabellini testified that he consulted with his Special Services Deputies prior to the use of pepper spray in Scotia and Bear Creek, who informed him that both situations involved the risk of injury and/or fire if the Makita grinders were used.[4]

The videotapes of the three incidents confirm that each plaintiff was repeatedly warned that, if he or she did not release, pepper spray would be used. The uncontroverted videotape evidence establishes that each plaintiff refused to comply with the lawful orders to release prior to the use of pepper spray, and that pepper spray was never applied to any plaintiff once that plaintiff had complied. The videos show that each plaintiff was repeatedly offered and provided water by spray bottle once compliance was achieved, and in several cases, before compliance was achieved.[5]

Similarly, Eureka Police Sgt. Manos testified that he consulted with Humboldt County Special Services Deputies before pepper spray was used at Congressman Riggs' office, and was informed that, once again, the grinders posed a significant safety hazard.

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[4] As clearly depicted in the Scotia videotape, all of the plaintiffs had intentionally wrapped their legs around the steel tubes, making it impossible to safely use the Makita grinders.

[5] Water by spray was repeatedly provided to Jennifer Schneider, Sam Neuwirth, Vernell Lundberg, Molly Burton (Scotia Incident), Noel Tendick and Eric McCurdy (Bear

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Mr. DuBay testified in detail about the product used by the Humboldt County Sheriff's Department in the three incidents, as well as the minimizing effect of the methods of application and appropriateness of the first aid depicted on the videotapes. His uncontroverted testimony establishes that the pepper spray product was composed entirely of FDA-approved food grade ingredients, i.e., distilled water, ethyl alcohol, propylene glycol (found in food products such as ice cream) and .18 percent capsaicinoids, derived from dried chili powder. This was the lowest concentration of capsaicinoids available on the market.

Mr. DuBay confirmed that he had reviewed the videotapes of all three incidents, and concluded that both the application technique and the amount used resulted in "minimal" exposure, compared to the recommended full burst to the entire face. Mr. DuBay also confirmed that the delivery of water by spray bottle was appropriate first aid, and that Defense Technology sold similar -- but smaller -- spray bottles for this purpose.

Mr. DuBay confirmed that the three-foot warning, as well as the "hydraulic needle effect" only applied in cases where pepper spray is sprayed directly into an open eye.[6] This concern has no relevance to the subject applications because the uncontroverted videotape evidence shows that each plaintiff who received a spray had their eyes tightly shut due to previous application by Q-tip.

Finally, and perhaps most importantly, Mr. DuBay provided uncontroverted testimony that the use of pepper spray in the subject incidents posed absolutely no health risk to the plaintiffs. That is, the only documented effect of such use of pepper spray is a temporary burning sensation and irritation.

Creek), even though all were continuing to resist arrest by ignoring lawful orders to release.

[6] He also testified that only a single instance of this had ever been reported.

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The testimony of Special Services Deputies Randy Held, Roy Reynolds, and Phil Daastol established that the lock-down devices used by forest protesters had steadily evolved since 1990 in response to the success of the deputies in dismantling the devices with the Makita grinders and jackhammers. The "black bear" devices used by the plaintiffs represented the "state-of-the-art" of lock-down devices. Unlike earlier devices, these were much heavier (25 – 30 pounds), sturdier, with thicker metal cylinders (1/4 inch steel), and welds that were generally superior. In addition, these devices forced the Special Services Deputies to cut *into* the tubes themselves in order to gain access to the wrist chains and attachment posts, within inches of flesh and bone.[7]

Former Chief Deputy Gary Philp provided detailed testimony of his extensive research regarding the use of pepper spray, which included review of a U.S. Institute of Justice study showing no instances of injury or death caused by the use of pepper spray by law enforcement, review of pertinent case law, including the Ninth Circuit's decision in *Forrester v. City of San Diego*, 25 F.3d 804 (9th Cir. 1994), discussions with his chemical agents trainer, consultation with law enforcement officials from other agencies, county counsel and the district attorney.

Finally, the jury learned that the direct application of pepper spray as a pain compliance technique had been incorporated by the California Department of Justice,[8] through P.O.S.T. certified training with respect to appropriate law enforcement responses to acts of civil disobedience. (Exhibit JJ.)

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[7] Testimony of the Special Services Deputies demonstrated that the assertions of plaintiffs that the deputies had successfully used the Makita grinders "hundreds of times" to extract protesters was misleading. That is, the deputies estimated that they had used the Makita grinders on the more sophisticated black bear devices approximately twenty to thirty times before the subject incidents.

[8] In fact, the testimony was that the instruction by P.O.S.T. - application of liquid pepper spray with gauze - results in far more exposure to pepper spray than the Q-tip method (now cotton balls).

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As for the plaintiffs, apart from the innuendo of counsel, their testimony established, among other things, that (1) their actions were part of a well-organized plan to *resist lawful arrest* as long as possible, (2) other activists were involved in each event, (3) each plaintiff could have complied with the lawful orders to release from the black bear devices prior to application of pepper spray, but chose not to, (4) each was offered and provided water by spray bottle once they released, and, in most cases, before they released, and (5) no plaintiff sustained any physical injury (other than temporary pain) or suffered from any condition related to the subject use of pepper spray, for which medical treatment was sought.

The evidence also included the videotaped "Ecotopia News" interview of Vernell Lundberg, taken shortly after the Scotia incident. Ms. Lundberg appeared comfortable, relaxed, and in no visible distress, and admitted that the delivery of water by spray bottle "ameliorated" the effects of the pepper spray that had been applied to her. All of this was directly contrary to the plaintiffs' trial testimony regarding the after-effects of pepper spray and use of the spray bottle.

After approximately three hours of deliberation, the Court received a note from the foreperson, stating "[r]egretfully, there are jurors that are adamantly opposed and resolution does not seem likely." The next day, following repeated direction to continue deliberation, and the reading of the "Deadlocked Jury" instruction (Ninth Circuit Model Instruction 4.6), the jury produced another note announcing it was "hopelessly deadlocked," and a mistrial was declared.[9]

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[9] The jury foreman, a psychiatrist who arranged for the entire jury to lunch at his private club at the Presidio before deliberations commenced, admitted to the media that he provided his own opinions to the jury regarding "post traumatic stress syndrome" as a consequence of the applications. (See *Attachment 1.*) In other words, the juror so clearly misunderstood his obligations as a juror that he made public pronouncements of his violation of his oath. Fellow jurors reported that he also offered this as an explanation for Ms. Lundberg's videotaped interview and provided purported medical opinions in an attempt to refute Mr. DuBay's testimony. This violates the well-established rule (and

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III. ANALYSIS

A. Standards For Entry Of Judgment As A Matter Of Law

The legal standards for judgment as a matter of law under Rule 50 are the same as those for a motion for summary judgment under Rule 56(c). *Numez v. Monterey Peninsula Engineering*, 867 F.Supp. 895, 901(N.D. Cal. 1994). Accordingly, all reasonable evidentiary inferences must be drawn in favor of the non-moving party. *Id.* However, if there is "no substantial evidence" to support the non-moving party's claim, the court must grant judgment as a matter of law. *Cal. Computer Products v. IBM*, 613 F.2d 727, 733 (9th Cir. 1979). The revised Rule 50 authorizes the court to perform its duty to enter judgment as a matter of law at any time during the trial, as soon as it is apparent that either party is unable to carry a burden of proof that is essential to that party's case. Thus, the motion is properly made at the close of the plaintiff's case, or at the close of all evidence. Rule 50(a)(1) and (2).

A Rule 50 motion may also be renewed after trial. Rule 50(b). If no verdict was returned by the jury, the court may direct entry of judgment as a matter of law. Rule 50(b)(2)(B). Accordingly, a court may grant a motion for judgment as a matter of law following a mistrial due to a deadlocked jury. *City and County of Honolulu v. Hawaii Newspaper Agency*, 559 F.Supp. 1021, 1026 (D. Hawaii 1983), citing *Noonan v. Midland Capital Corp.*, 453 F.2d, 459, 463 (2d Cir. 1971) and *Daniels v. Pacific-Atlantic S.S. Co.*, 120 F.Supp. 96 (E.D.N.Y. 1954).

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instruction) that a jury must base the verdict only on evidence presented in trial – and amounted to serious misconduct by the foreperson. See, e.g., *Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965) (jurors have a duty to consider only the evidence which is presented to them in open court); *Marino v. Vasquez*, 812 F.2d 499, 504 (9th Cir. 1987) (evidence not presented at trial is deemed "extrinsic"); *In re Malone*, 12 Cal.4th 935, 963 (juror misconduct occurs where a juror uses specialized knowledge to contradict evidence presented at trial and to unduly sway other jurors' opinions by the projection of authoritative specialized knowledge). Another member of the six was reportedly concerned about the manner in which plaintiffs' heads were held at the Riggs' incident but not by the applications at Scotia or Bear Creek.

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The fact that a mistrial was declared due to the jury's inability to reach a verdict does not indicate that reasonable minds could differ, or that the non-moving party has introduced substantial evidence to support its claim. This was explained in *Demaine v. Bank One, Akron, N.A.*, 904 F.2d 219, 220 (4th Cir. 1990), where the court granted the defendant's motion for directed verdict following a mistrial and concluded that the plaintiffs failed to introduce substantial evidence to support the existence of the subject contract on a breach of contract claim:

> The appellants also argue that the jury's inability to reach a verdict showed that reasonable minds could differ on whether the parties have entered a contract. For this reason, they claim that the direction of a verdict in favor of the defendant bank was improper. We refuse to hold that a jury's inability to reach a verdict, by itself, will operate to prevent the entry of a directed verdict under Rule 50. The Rule specifically provides for motions "if a verdict was not returned." In this case the jury's deadlock appears to have been the product of unreasonable disagreement since the evidence wholly fails to establish the contract in question [citation omitted].

Similarly, the court in *Noonan v. Midland Capital Corp.*, *supra*, affirmed the granting of defendant's renewed motion for a directed verdict following a deadlocked jury. As stated by the court:

> That the case was originally sent to the jury which twice reported itself deadlocked, after considerable deliberation, does not mean that the actual disagreement was fair and reasonable. If the position of some jurors favoring plaintiff is enough, there could never be a judgment for insufficiency of the evidence notwithstanding a verdict, nor the direction of judgment on that ground after a mistrial. Both are commonplace and envisioned by Rule 50(b), F.R.C.P.
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> 453 F.2d at 462.

For the reasons set forth below, the defendants are entitled to entry of judgment as a matter of law.

B. Defendants Are Entitled To Judgment As A Matter Of Law On The Underlying Excessive Force Claim

The reasonableness inquiry in excessive force cases is an objective one, the question being whether the officer's actions are objectively reasonable in light of the

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facts and circumstances confronting them, without regard to their underlying intent or motivation, *Graham v. Connor*, 490 U.S. 386, 397 (1989), and without "20/20 hindsight." *Id.*, at 396. Furthermore, law enforcement officers are not required to determine and use the "least intrusive alternative" in effecting an arrest. *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994) (requiring officers to find and choose the least intrusive alternative would require them to exercise "super human judgment"), *cert. denied*, 115 S.Ct. 2612 (1995).

Determining whether the force used to effect an arrest is reasonable requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interest against the countervailing interests at stake. *Graham*, 490 U.S. at 396.

Whether or not excessive force was used is generally a question of fact for the jury. However, it is not unusual for a court to decide the issue as a matter of law. See e.g., *Forrett v. Richardson*, 112 F.3d 416 (9th Cir. 1997) *cert. denied*, 118 S.Ct. 1366 (1998) (use of deadly force against fleeing suspect); *Reynolds v. County of San Diego*, 84 F.3d 1162,1167 (9th Cir. 1996) (shooting of erratic armed suspect); *Mendoza v. Block*, 27 F.3d 1357, 1362 (9th Cir. 1994) (use of attack dog in effecting arrest after initial warning); *Eberle v. City of Anaheim*, 901 F.2d 814, 820 (9th Cir. 1990) (pain compliance hold); *White v. Roper*, 901 F.2d 1501, 1507 (9th Cir. 1990) (force used to subdue non-compliant pretrial detainee which resulted in cuts and bruises); *Palacios v. City of Oakland*, 970 F.Supp. 732, 740 (N.D. Cal. 1997) (shoving individual to keep him from lunging at police dog, resulting in alleged head injury); *Denney v. Takaoka*, 1993 WL 96602 (N.D. Cal. 1993) (pain compliance holds).

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As discussed above, additional evidence was provided at the second trial which answer by uncontroverted evidence, the "historical fact" questions raised by the Ninth Circuit in the *Headwaters* decisions.[10]

The uncontroverted testimony of David DuBay established that the pepper spray product was composed entirely of non-injurious food grade ingredients, that the product selected by the Sheriff's Department contained the lowest concentration of active ingredient on the market, that the so-called "hydraulic needle effect" and 3-foot instructions were non-issues because the plaintiffs who were sprayed had their eyes tightly shut due to previous exposure by Q-tip, that the application techniques insured that exposure was minimal compared to a full spray to the face, that the use of the product was appropriate in all instances, and that the delivery of water by spray bottle was precisely the first aid recommended by the manufacturer.

In other words, the "nature and quality of the intrusion" implicating plaintiffs' Fourth Amendment interests amounted to a temporary burning sensation caused by a food grade product with no known risk of physical injury or adverse health effects.

Special Services Deputy Phil Daastol testified that – after the events in question – he cut the hand of a protestor in the process of cutting open the same "black bear" device used by plaintiffs. It was also clarified that, while the Special Services Deputies had safely used the Makita grinders and other power tools on hundreds of prior occasions, they had only been used to cut-off the newer, and much sturdier, black bear devices on approximately 20 to 30 previous occasions. This was in stark contrast to the 35,000

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[10] These include purported disputes regarding whether the pepper spray was used "at a safe distance," *Headwaters I*, 240 F.3d 1185, 1207 (9th Cir. 2001) and *Headwaters II*, 276 F.3d 1125, 1130, whether application of water by spray bottle was appropriate first aid, *Headwaters I*, 240 F.3d at 1201,1207, whether the protest events involved the organized participation of others, *Headwaters I*, 240 F.3d at 1202, 1207, whether "waiting them out" was an option considered by law enforcement, *Headwaters I*, 240 F.3d at 1205, 1207, whether cutting out the protestors posed a risk of injury, *Id.*, *Headwaters II*, 276

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applications of pepper spray documented by the California Department of Justice, without serious injury, in the years following approval for use by California law enforcement.

Evidence in the second trial was further developed regarding the unique governmental interests at stake. The testimony in the second trial conclusively established that each "direct action" staged by the plaintiffs was part of a larger, well-organized operation, involving other groups of protestors – thereby presenting increased law enforcement concerns.

Finally, the testimony of Ronda Pellegrini establishes that the "wait them out"[11] option was discussed by law enforcement – but rejected because of the interruption of government services this would cause, and the potential for violation of the privacy rights of others.

In short, defendants submit that no reasonable jury could conclude that the subject use of force was unreasonable under the unique circumstances confronting law enforcement. In the absence of a constitutional violation, all defendants are entitled to judgment as a matter of law. *Forrester*, 25 F.3d at 808 (departmental authorization of the use of force in question is "quite beside the point" without a violation of the Fourth Amendment).

C. Defendants Lewis And Philp Are Entitled To Qualified Immunity

The threshold inquiry in a qualified immunity analysis is whether the plaintiffs' allegations, if true, establish a constitutional violation. *Saucier v. Katz*, 533 U.S. 194,

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F.3d at 1130, and whether the use of pepper spray was limited to use against "hostile or violent" subjects, *Headwaters I*, 240 F.3d 1185 and *Headwaters II*, 276 F.3d at 1131.

[11] In similar fashion, the unavailability of such an option was established for the Scotia incident (Ms. Lundberg confirms in her videotaped interview that their commitment was to not voluntarily vacate the offices and Sgt. Ciarabellini was concerned about the potentially volatile situation at Bear Creek in that loggers had gathered to commence work with the involved equipment.

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201 (2001); *Billington v. Smith*, 292 F.3d 1177, 1183 (9th Cir. 2002). The court must then determine whether the actions alleged violate a clearly established constitutional right, where "clearly established" means that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202. In *Graham v. Connor*, 490 U.S. 386, 388 (1989), the Supreme Court established that the use of force is contrary to the Fourth Amendment's prohibition against unreasonable seizures, if that force is excessive as measured by objective standards of reasonableness. In *Saucier*, the Supreme Court explained that this rule is applied in the first stage of the qualified immunity analysis by inquiring whether it would be objectively reasonable for the officer to believe that the amount of force employed was required by the situation he confronted. *Id.*, 533 U.S. at 205. (Explaining that this rule would protect a reasonable belief that the force was required, even if that belief were mistaken.)

The second step of the analysis, which the court reaches only if it determines that the alleged conduct violates a clearly-established constitutional right, is to inquire whether the officer was reasonable in his belief that his conduct did not violate the constitution. This step, in contrast to the first, is an inquiry into the reasonableness of the officer's belief in the legality of his actions. *Saucier*, 533 U.S. at 206; *Wilkins v. City of Oakland*, 350 F.3d 949, 954 (9th Cir. 2003). "Even if his actions did violate the Fourth Amendment, a reasonable but mistaken belief that his conduct was lawful would result in the grant of qualified immunity." *Wilkins*, 350 F.3d at 949. Qualified immunity thus "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). If "officers of reasonable competence could disagree on the issue, immunity should be recognized." *Id.*, at 341.

Although the issue of qualified immunity is typically determined prior to trial, by way of a motion for summary judgment, a determination can also be made following a trial, by way of a Rule 50 motion. See, e.g., *Robinson v. Solano County*, 278 F.3d 1007

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(9th Cir. 2002) (*en banc*) (affirming trial court's grant of qualified immunity to police officers in an excessive force case after the jury deadlocked); *Lewis v. Cowen*, 165 F.3d 154, 166 (2nd Cir. 1999) (reversing district court's denial of qualified immunity following jury verdict for plaintiff); *Ringuette v. City of Fall River*, 146 F.3d 1 (1st 1998) (affirming Rule 50 grant of qualified immunity); *Chan v. Wodnicki*, 123 F.3d 1005 (7th Cir. 1997) (*Id.*).

It is difficult to imagine a stronger case for qualified immunity than this case.

The uncontroverted evidence at trial established that the use of pepper spray was authorized by Chief Deputy Philp (and ultimately by Sheriff Lewis) *solely* in response to concerns up the chain of command that the continued use of the Makita grinders and other power tools on evolving lock-down devices posed a serious threat of injury to both the protestors and the Special Services Deputies.

It was uncontroverted that, prior to the authorization, Chief Deputy Philp (1) had himself been subjected to direct application of pepper spray in police training with no adverse health effects; (2) consulted with the Sheriff Department's chemical agents trainer and confirmed that application by Q-tip avoided the airways and resulted in the most minimal exposure possible; (3) reviewed pertinent reports and literature regarding the use and effects of pepper spray – which revealed that it had been used safely by law enforcement on tens of thousands of occasions, and posed no known risk of injury; (4) consulted with other County officials and law enforcement officials form other jurisdictions; and (5) reviewed pertinent case law, including the Ninth Circuit's leading case on the use of pain compliance, which affirmed a jury determination that the use of nunchakus (a martial arts weapon) on non-compliant abortion protestors, that resulted in serious wrist injuries, did ***not*** amount to excessive force.

Furthermore, as discussed above, the uncontroverted evidence established the approved application of pepper spray posed absolutely no known risk of physical injury

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or adverse health effects, and the administration of water by spray bottle was an entirely appropriate first aid treatment.

In short, the additional evidence conclusively establishes that a law enforcement official in the position of defendants Lewis and Philp could have reasonably believed that the use of pepper spray – a substance with no known risk of serious injury – to effect the lawful arrests of non-compliant activists, was a reasonable use of force under the unique circumstances confronting the defendants, which included the use of 25 pound steel sleeves to resist and delay arrest as long as possible.

D. No Evidence Was Presented To Support A Claim Of Punitive Damages

Punitive damages are proper under Section 1983 "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56 (1983); *Bouman v. Block,* 940 F.2d 1211 (1991).

The issue of punitive damages is generally a jury question. However, the issue may also be determined by the court under Rule 50.

In *Ward v. City of San Jose*, 967 F.2d 280 (9th Cir. 1992), relatives of a man that was shot and killed by three police officers during a drug raid brought a Section 1983 claim for excessive force. The decedent was killed when he emerged from a neighboring apartment with a shotgun, apparently concerned about the possibility of intruders.

The case was tried to a jury, which returned a verdict in favor of the plaintiffs. The trial court held that the evidence could not support a finding that the officers acted "maliciously, wantonly, or oppressively," and granted the officers a directed verdict on punitive damages.

The Ninth Circuit affirmed the directed verdict. The Ninth Circuit explained that the issues of whether or not the defendants were liable for punitive damages, on the one hand, and the issue of excessive force, were separate and distinct claims:

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> "Whether the officers responded in the moments that followed will be determined, as we have failed, by a jury on remand. There is absolutely no evidence, however, that the officers acted with evil intent. A directed verdict on punitive damages was therefore appropriate, and we affirm the district court's decision to grant it." 967 F.2d at 286. See also, *Beauford v. Sisters of Mercy-Province of Detroit, Inc.*, 816 F.2d 1104, 1109 (6th Cir. 1987) (granting judgment NOV and stating ". . .while the plaintiff presented sufficient evidence to submit to the jury the issue of intentional discrimination . . . no testimony was adduced evidencing the requisite malice or reckless or callous indifference of an egregious character on the part of either defendant as to support a jury verdict imposing punitive damages.")

Similarly, plaintiffs failed to adduce any evidence which would even remotely support the notion that defendants Philp and Lewis acted with malice or callous indifference towards the rights of plaintiffs in authorizing the optional use of pepper spray. On the contrary, the evidence supports the *opposite* conclusion. That is, it was uncontroverted that the pepper spray authorization resulted from concerns from officers in the field that use of Makita grinders and other power tools was becoming too dangerous for both the officers and the activists. The uncontroverted evidence established that, while the use of the Makita grinders and other power tools posed obvious risk of serious injury, the use of pepper spray posed no risk of serious injury. Furthermore, the uncontroverted evidence established that the method of application was selected to insure minimal exposure by limiting the quantity of pepper spray, and by avoiding the airways.

Nor could Chief Deputy Philp's extensive research and consultation concerning the application of pepper spray be considered "callous indifference" to the rights of the plaintiffs. This demonstrated that the risks were intensely considered by the defendants prior to the authorization.

Accordingly, defendants request judgment as a matter of law with respect to plaintiff's punitive damage claims.

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IV. CONCLUSION

For all the above-stated reasons, defendants are entitled to judgment as a matter of law.

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ATTACHMENT 1

SAN FRANCISCO

Mistrial in pepper spray suit

Jurors deadlock 6-2 in favor of demonstrators

By Bob Egelko
CHRONICLE STAFF WRITER

The second trial of a lawsuit filed by anti-logging protesters whose eyes were doused with pepper spray ended Wednesday the same way the first did — with jurors unable to agree whether police and sheriff's deputies in Humboldt County had inflicted unnecessary pain to break up sit-ins.

U.S. District Judge Susan Illston declared a mistrial after jurors in her San Francisco courtroom told her they were hopelessly deadlocked in 6½ hours of deliberations over two days. Several jurors told reporters afterward that the vote had been 6-2 in favor of the plaintiffs, who argued that the use of pepper spray on nonviolent demonstrators was excessive force.

The jury in the first trial in 1998, a year after the incidents, deadlocked 4-4. The activists and their lawyers quickly announced plans Wednesday for a third trial.

"We will win next time," declared attorney J. Tony Serra. "It'll be a different kind of trial. It'll still be political. It'll still be vehement."

"It is a long haul," said plaintiff Spring Lundberg, 24. "Post-Sept. 11, it may be hard for people to realize that a badge, a uniform may be misused."

The defendants — Humboldt County, its current and former sheriff and the city of Eureka — argued that pepper spray was a temporarily painful but safe option for dislodging demonstrators who occupy private property and resist legitimate demands to leave. They noted that a state advisory commission approved guidelines for applying liquid pepper spray alongside the eyes of demonstrators in 1998.

Defense lawyer Nancy Delaney said she would ask Illston to dismiss the suit rather than retry it.

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2nd mistrial in pepper spray suit

▶ SPRAY
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U.S. District Judge Vaughn Walker granted Delaney's request for a dismissal after the first trial, saying no reasonable juror could find excessive force, but he was overruled by an appeals court and later removed from the case.

The suit stems from demonstrations during a three-week period in September and October 1997 at Pacific Lumber Co. headquarters in Scotia, at a company logging site and at the Eureka office of a pro-logging congressman.

The protesters, including the eight plaintiffs, locked themselves together inside heavy metal sleeves and refused to leave. After warnings, officers applied liquid pepper spray to the corners of their eyes with Q-tips, then sprayed the chemical in the faces of those who still refused to unlock. Videotapes of demonstrators screaming in pain were shown on national television and played for the jury.

In the past, the sheriff's office had used electric grinders to cut through the metal sleeves. But Sheriff Dennis Lewis and his chief deputy, Gary Philp, who is now the sheriff, said they changed their policy in 1997 after officers voiced fears that the grinders would injure someone or start a fire, and after they reviewed studies that concluded pepper spray was safe.

The plaintiffs said they suffered lasting physical and psychological effects from the pepper spray, and accused the sheriff's office of acting at the behest of Pacific Lumber, the county's largest employer, to crack down on a growing movement protesting the logging of old-growth forests.

After the mistrial, juror Elva Ibarra of Livermore said the officers had gone too far.

"They used pepper spray on nonviolent people," she said. "They had other options."

The two jurors who voted for a finding of reasonable force declined to speak to reporters. But the jury foreman — E.M. Feigenbaum, a psychiatrist from San Rafael who sided with the plaintiffs — said the dissident jurors "thought pepper spray was not so terrible, that it was only temporary. I tried to point out that there was post-traumatic stress disorder."

Illston made a last-minute attempt to settle the case Wednesday, calling lawyers into her chambers after jurors first reported they were stymied. But the judge ran into the same obstacle that has thwarted settlement efforts for years: The plaintiffs want Humboldt County and Eureka to stop using pepper spray against political demonstrators, a demand the law enforcement agencies reject.

"We cannot resolve a legal case by urging the sheriff to change policy in a way that would potentially pose a greater risk of injury," Delaney said.

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