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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

HEADWATERS FOREST DEFENSE, et al.

Plaintiffs,

vs.

COUNTY OF HUMBOLDT, et al.,

Defendants.

No. C-97-3989-SI

PLAINTIFFS' TRIAL BRIEF

Date: March 29, 2005
Time: 3:30 p.m.
Judge ILLSTON
Trial Date: April 11, 2005

Factual Background.

This case arises from the actions of police officers, at the direction of the two individual defendants and pursuant to the official policy of defendants Humboldt County and the City of Eureka, in using repeated, violently painful, wholly unorthodox and unprecedented swabbed-on applications of pepper spray base ointment, and spray itself at close range, on the eyes and faces

of nine young, non-violent protesters, in prolonged and agonizing attempts to break their will to continue with sit-ins, where they bound themselves together in human chains, by means of heavy-gauge metal 'lockboxes' covering their hands and forearms, and refused to release themselves when ordered to do so by the police. This — torture is not too strong a word for it[1] — was systematically and quite brutally administered, despite the fact that the protesters never physically resisted or otherwise threatened the officers or others in any way, and remained in the complete and unchallenged physical control of the police at all times. Likewise, it was done despite the long experience of the defendants and their minions with the use of "grinders" to cut open the big pipes to unlock the protesters and take them to jail — which made the spray totally unnecessary — and despite undoubted clear knowledge on the part of the police that the use of the substance in such circumstances would be extremely painful and likely to be seriously harmful, would not be effective for so-called 'pain compliance', was contrary to limits and warnings specified by the manufacturer, and against the explicit message of defeendants' own written policeis and of all the legal precedents which govern police use of force.

~~It is undisputed that the repeated actions were carried out by the officers at the considered~~ direction of the Sheriff and his Chief Deputy, supposedly pursuant to the official use of force policy of Humboldt County, adopted and embraced by the Eureka P.D. through Chief Millsap, and continued and escalated with defendants' approval after their review of the videotapes of each incident.

The sit-ins were part of an intense campaign by the Earth First! movement and various allied groupings in Humboldt County, in the Fall of 1997, protesting clear-cutting and other

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[1] "Torture", under international law, according to the 1984 Convention Against Torture, signed by the U.S., "torture" is "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

destructive corporate logging practices on the California north coast, the continued heedless "harvesting" of one- to two thousand-year-old redwood trees in the region, and a then-pending sell-out deal in the U.S. Congress for the supposed preservation of the Headwaters Forest, which actually promised a lingering doom for that last great forest stand of ancient redwoods then still mostly in a natural habitat, and privately owned.

The protesters fashioned their lockboxes from large metal pipes, with metal rods fixed inside, to which they could attach spring latches, or 'carabiners', fixed to short chains which they first bolted around their wrists. Since their hands were secure inside the pipes, officers — on those occasions when they could not persuade the protesters to release voluntarily — had to cut open the pipes to reach the latches and release them. The delay thus occasioned worked symbolically to delay 'liquidation logging' operations or related activities for the short span of time needed to cut the people loose and take them to jail. The lockboxes, sometimes called "black bears", had been used in this fashion in the region for several years; and police had developed a familiar methodology for opening them, with hard-edged, steel-cutting electric wheels, called 'grinders', and they could normally disengage the protesters from the boxes in just a few minutes.

The grinders were routinely used to end literally dozens of sit-ins, in offices, roads and forest locations over a period of several years, without mishap. By the Summer of 1997, however, there had been a series of increasingly effective and visible demonstrations aimed at saving Headwaters from the sellout and the axe, and a corresponding sharp rise in public attention to the issue. These protests began with a rally of six to eight thousand (6-8000) people, at a Pacific Lumber Company ("PL") logging gate near Carlotta, California, in September, 1996. There, to the embarrassment of these defendants, more than a thousand people stepped across the property line to be arrested, and kept coming, until there were too many for the Sheriff's Department and allied agencies to accommodate, and many were turned away. Thereafter, the protest activities continued through the year, leading to another huge rally at Stafford, on Sept. 14, 1997, and included a number of actions where black bears had been used to good effect.

In response, defendants Philp and Lewis developed the idea of smearing pepper spray ointment around the eyes of protesters who would refuse police orders to release themselves from the black bears, and then refusing to wash the substance away, as a means of forcing them to unlock, to receive relief from the pain by rinsing with water. To the knowledge of both parties, this had never been done before; but, with the controversy over the Headwaters sell-out at a high pitch, the defendants ordered it done on three occasions in quick succession after the Stafford rally: in the outer lobby of the PL headquarters in Scotia, on Sept. 25, 1997; at a logging site at Bear Creek, way out in the woods, on Oct. 3, 1997; and in the reception area of the local office of then-Congressman Frank Riggs, in Eureka, on October 16, 1997. Each time, as shown on videotape, officers acting on defendants' orders held back the heads of protesters sitting on the floor or the ground, and, sometimes forcing open the eyes with their fingers, used Q-tips to smear the liquid ointment along the crack of the eyes and on the skin of the eyelids and eye sockets, whence it sometimes also ran down the face and into the nose and mouth. After each episode, defendants Philp and Lewise reviewed videotapes of the police action, and approved and ratified what was done; after the first incident, at Scotia, defendant Philp directed the officers to use "longer and stronger" doses, including direct blasts sprayed in the face at close range, to coerce the plaintiffs to unlock.

Despite the intense pain, the plaintiffs remained steadfast in the first two incidents — although others unlocked when threatened with swabbing — even when the smearing of ointment was followed up with full spray blasts directly in their faces from close range; they were ultimately released quickly and easily by officers using a grinder. The third time, at the Riggs office, two women unlocked, after being swabbed, when they were threatened with direct spray in the face at close range. The officers then sprayed one of the two remaining, plaintiff Terri Slanetz, directly in the face, whereupon her partner unlocked, basically freeing Ms. Slanetz also, and all four were duly taken to jail.

Procedural History.

Plaintiffs brought suit. Injunctive relief was denied. The Court granted summary judgment to the underling officers who carried out the swabbing, finding they were entitled to

qualified immunity. At trial, a further award of immunity was made to the supervisors, Lewis and Philp, at the close of plaintiffs' case. The jury hung on the liability of Humboldt County and the City of Eureka by way of official policy, and the Court ordered a new trial. Thereafter, however, the Court vacated the trial date and dismissed the claims against the two entities, reversing itself to hold that no reasonable jury could find that the swabbing etc. shown at trial violated the Fourth Amendment.

Finding that this Court had failed its obligation to assess the evidence in the light most favorable to plaintiffs, and had incorrectly applied the Supreme Court test for excessive force established in *Graham v. Conner*, the Court of Appeals reversed the dismissal of the municipal entities as a matter of law and the grant of qualified immunity to defendants Lewis and Philp. *Headwaters I*, 240 F.3d 1185 (9th Cir. 2001). A (wholly unfounded, misguided) grant of qualified immunity to the officers in the field was not appealed.

On certiorari, the U.S. Supreme Court vacated this decision, with instructions to reconsider it in the light of *Saucier v. Katz* 533 U.S. 194 (2001). On remand, the Ninth Circuit reaffirmed its decision and re-ordered the new trial, which is now before us. In its new decision, viewing the evidence in the light most favorable to plaintiffs, of course, the Court of Appeals made the following statements, *seriatim*:

+ [I]t would be clear to a reasonable officer that using pepper spray against the protesters was excessive under the circumstances.

+ The facts reflect that... the pepper spray was unnecessary to subdue, remove, or arrest the protesters (citing *Graham v. Conner*).

+ Characterizing the protesters' activities as "active resistance" is contrary to the facts of the case.

+ Defendants' repeated use of pepper spray was also clearly unreasonable.

+ [A] continued use of the weapon or a refusal without cause to alleviate its harmful effects constitutes excessive force.

+ Because the officers had control over the protesters it would have been clear to any reasonable officer that it was unnecessary to use pepper spray to bring them under

control, and even less necessary to repeatedly use pepper spray against the protesters when they refused to release from the "black bears."

+ It also would have been clear to any reasonable officer that the manner in which the officers used the pepper spray was unreasonable. (Defendants) Lewis and Philp authorized full spray blasts..., not just Q-tip applications," despite the fact that the manufacturer's label on the canisters... "'expressly discouraged' spraying... from distances of less than three feet."

+ [I]t would have been clear to any reasonable officer that defendants' refusal to wash out the protesters' eyes with water constituted excessive force under the circumstances. * * * * Spraying the protesters with pepper spray and then allowing them to suffer without providing them with water is clearly excessive under the circumstances.

See *Headwaters II*, 276 F.3d 1125, 1130-1131.

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PLAINTIFFS' CLAIMS

I. The evidence shows the use of force by County and City officers on the occasions in question was unnecessary — and punitive, cruel *and* ineffective — and it was therefore excessive, and unconstitutional, as a matter of law.

> "[W]here there is no need for force, any force used is constitutionally unreasonable."
> — *Headwaters I*

"The Fourth Amendment permits law enforcement officers to use only such force to effect and arrest as is 'objectively reasonable' under the circumstances. *Graham v. Conner*, 490 U.S. 386, 397, 109 S.Ct 1865, (1989)(citations omitted). 'The essence of the Graham reasonableness analysis' is that "'the force which was applied must be balanced against the need for that force: it is the need for force which is at the heart of the Graham factors."' *Liston v. County of Riverside*, 1220 F.3d 965, 976 (th Cir. 1997) (quoting *Alexander v. City and County of San Francisco*, 29 F.3d 1355, 1367 (9th Cir. 1994). *Headwaters Forest defense v. County of Humboldt, et al. ("Headwaters II"),* 276 F.3d 1125, 1130-31 (9th Cir. 2002).

The need for force is at the heart of the matter, as everyone knows, and, as the Court re-affirmed in the earlier opinion, quoted above, where there is no need, no force is allowed.[2] See *Headwaters Forest Defense v. County of Humboldt et al., ("Headwaters I")*, 240 F.3d 1175, 12?? (9th Cir. 2001). See also, *Chew v. Gates*, 27 F.3d 1432, 1440-44, (9th Cir. 1994); *Fontana v. Haskins*, 262 F.3d 871, 880 (9th Cir. 2001); *P.B. v. Koch*, 96 F.3d 1298, 1304 (9th Cir. 1996), cited in *Headwaters I.*

Here there was no need for any force (Besides that represented by the grinder), much less outright torture (however mild this activity may seem in comparison to various hideous stories abroad in history, and in the present moment of the world). The defendants' minions had complete physical control of the plaintiffs from the moment they arrived on the scene(s), and they had the knowledge, means and ability to reduce plaintiffs to custody handily, and take them off to jail, throughout the time of each arrest operation. All plaintiffs were fully submissive to the police throughout each incident. Neither did the plaintiffs (or their supporters who were present at the three scenes) defy, denounce or disrespect the officers who tormented them, despite the malicious and oppressive nature — and inherent sadism — of the police activity. The Sheriff's Department had vast experience with lockdown sit-ins before these events, and had removed demonstrators from black bears quite readily, using grinders, on numerous occasions. As shown in the video evidence, the grinder technique was simple, quick and completely effective, causing no pain and no appreciable risk of harm — defendants' gravely-intoned, broken-record litany of their supposed "nightmares" about possible catastrophic injury notwithstanding.

Defendants knew the swabbing of spray ointment in and around the plaintiffs' eyes would cause enormous pain, and that the pain could not be readily ended — as it can be when so-called compliance holds are used. Cf. *Forrester v. City of San Diego*, 25 F.3d 809 (9th Cir. 1994). They knew they would encounter no 'active' resistance from the plaintiffs — no fighting

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[2] By the same token, where there is a *slight*, or highly specific, limited need — as for the grinder — only that force is allowed.

back or threats, no attempt to flee, etc. — and they knew they could easily and harmlessly extricate protesters from lockboxes, using the grinder, in a relative trice. Thus, as the Court of Appeals made clear in both its opinions, defendants knew or should have known there was no reasonable basis for the decision to use the pepper rather than the grinder, and that the pain and injury they would inflict would be unnecessary, excessive, and unconstitutional; but they went ahead, not once but several times, using repeated swabbings and full spray blasts to the face from inches away, withholding the rinsing that would have begun to relieve the pain and harm, and relentlessly, remorselessly, demanding that their victims comply with their orders. That's the very essence of torture; which can never be justified under Our Constitution — notwithstanding the heinous recent and current attempts in high places to compose rationale for it, in pursuit of the so-called War on Terror — or under international law, and binding treaties, etc, etc. (See above, Note 1.)

II. The plaintiffs' 'passive resistance' — despite all semantic manipulations — did not provide lawful justification for the use of force and infliction of great pain on these unresisting subjects, because such force was not necessary to 'subdue, remove and arrest' the plaintiffs when they refused police orders to release themselves from the lockboxes.

The plaintiffs' 'passive resistance' in refusing to obey the police order to release from the boxes and submit to custody— made in the teeth of defendants' clear understanding that such refusal was the whole reason plaintiffs were there in the first place, as part of the long history of civil disobedience resulting in just such encounters between the two sides — can not, as a matter of law, serve as justification for deliberately inflicting terrible pain on plaintiffs, supposedly to force them to give in. The usual measures needed to "subdue, remove and arrest" the members of the sit-in were fully available, as always — and as shown in the outcome of two of the three incidents and at later times: Cut them loose with the grinder, take them to jail, and punish them only by due process of law. Defendants acted to accomplish the punishment — and retaliation, and intimidation — on the spot.

The decision to use pepper spray rather than the grinder was a gross escalation by the defendants, essayed in the midst of an intense, aggravated phase in a long-running struggle between Earth First! and the forest protection movement it was leading, on one side, and an

unholy alliance of the Sheriff' Department with the timber company on the other. The decision to use intense physical torment to break the activists' will to continue, or repeat, their "resistance", rather than simply ending the resistance in the reasonable, regular way, was clearly intended to punish and retaliate against them for demonstrating, and thereby generally intimidate and deter the movement from using the lockbox tactic in the future. That is not a legitimate law enforcement purpose; rather, it is illicit coercion, intimidation, summary punishment and prior restraint, rolled into one. It violates the Constitution and the Law of Nations. Law Enforcement is not authorized to presume disobedient conduct in the future, any more than they can summarily punish it in the present. See, e.g., *Collins v. Jordan*, 110 F.3d 1363, 1371-72 (9th Cir. 1997) ("The generally accepted way of dealing with unlawful conduct that may be intertwined with First Amendment activity is to punish it after it occurs, rather than to prevent the First Amendment activity from occurring in order to obviate the possible unlawful conduct.")

Defendants have attempted to rationalize their torment of plaintiffs by recasting their training nomenclature, and apparently persuading the POST Commission to do the same, after the fact, apparently with the notion that they can justify, and legalize, the pepper spray torture with semantics, by re-classifying plaintiffs' conduct after the fact as "active" resistance — and eliminating the concept of passive resistance altogether, by calling it an "oxymoron". But this did not change the requirement that 'the force used must be balanced with the need for that force', under *Graham*, and the major *Graham* factor is whether the subject on whom force is used is actively resisting, creating a need for force.

Clearly, there are no semantic manipulations which will change the fact that the grinders worked fine against the lockdowns, these included, and had for years; and the swabbing and close spraying of the noxious pepper substance in plaintiffs' eyes and faces, which was so wanton, and hurt so much, was altogether unnecessary. Likewise, simply because the cops conjure up the specter of a possible accident, and mouth it as a rationale for using force which was actually intended as punishment and intimidation, does not change the true nature of what was done, or the law which makes it wrong. Defendants cannot legitimately vindicate the police use of force reflected in the conduct shown on the tapes, it's that simple.

III. Defendants have confirmed their responsibility for the unconstitutional actions of the officers, by dint of the admitted role of defendants Lewis and Philp as commanders and supervisors, and the official policy of Humboldt County and the City of Eureka sanctioning this wrongful use of force.

The police actions against plaintiffs were taken under color of law, at the explicit direction and with the review and approval of defendants Lewis and Philp, as the top supervisors and commanders of the officers who actually applied the wrongful force, and as policy-makers for the County, so they have caused and helped cause violation of the Fourth Amendment in each case. A supervisor is liable under § 1983 if s/he "does an affirmative act, participates in another's affirmative acts, or omits to perform an act which [s/]he is legally required to do," causing constitutional injury. *Johnson v. Duffy*, 588 F.2d 740, 743-44 (9th Cir. 1978). A supervisor is liable for "his own culpable action or inaction in the training, supervision, or control of his subordinates; for his acquiescence in the constitutional deprivation...; or for conduct that showed a reckless or callous indifference to the rights of others.' " *Watkins v. City of Oakland*, 145 F.3d 1087, 1093 (9th Cir.1997). A supervisor can be liable in his individual capacity if "he set in motion a series of acts by others, or knowingly refused to terminate a series of acts by others, which he knew or reasonably should have known would cause others to inflict the constitutional injury." *Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991).

The two command defendants have admitted and affirmed their responsibility. By the same token, there is no dispute as to the adoption by Humboldt County and the City of Eureka, through the Sheriff's Department and the Eureka P.D., of a policy of using swabbed pepper spray, etc. — in the described fashion, which is or isn't excessive force — to break lockbox sit-ins. Defendants have stipulated that the officers' actions in each case were taken pursuant to the Use of Force policies of the County and City, respectively.

Plaintiffs assume the individual defendants do not and will not contest their responsibility as supervisors, nor the entity defendants theirs, as sources of the effective policy, for any liability found to flow from the coercive swabbing program. They obviously stand behind it — even in the despairing, mortifying wake of the monstrous revelations about American torture at Abu Ghraib, Bagram, Guantanamo, and secret sites around the world — and reject the contrary

pronouncement by the Court of Appeals. They seek vindication — and future license, no mistaking it — by way of a Jury verdict; thus defendants must win on the single issue of wrongful or excessive force, *vel non*, or go down with the ship...

DATED: March 18, 2005

Respectfully submitted,

Dennis Cunningham
Attorney for plaintiffs

CERTIFICATE:

I certify that I served the within **Trial Brief** on defendants by FAX and mailing a copy to Nancy Delaney and William Mitchell, Esq. at their offices in Eureka, CA on March 18, 2005.

Dennis Cunningham