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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.	Case No. C-97-3989 VRW **PLAINTIFFS' NOTICE AND MOTION FOR SUMMARY JUDGMENT** Date: March 27, 2003 Time: 2:00 pm. Place: Ctrm. 6, 17th Floor Judge Walker

NOTICE

TO THE COURT AND TO DEFENDANTS AND THEIR ATTORNEYS:

Plaintiffs, by and through counsel, hereby move for summary judgment on the issues of liability under F.R.Civ.P 56. This Motion is based on this Memorandum , any Reply Memoranda, the Appendices thereto, any supplemental affidavits or exhibits subsequently filed,

and any further evidence or argument adduced at the hearing. This Motion has been set to be heard on March 27, 2003, at 2:00 p.m., Courtroom 6, 17th Floor.

INTRODUCTION

Plaintiffs move for summary judgment on the issue of defendants' liability for the Fourth Amendment violations alleged in this case, on grounds that the recent decision of the Court of Appeals has left no doubt that the police use of pepper spray against the plaintiffs — ordained by the supervisory defendants, Lewis and Philp, pursuant to an express policy of the municipal defendants, Humboldt County and the City of Eureka — constituted excessive force. The Court of Appeals found itself constrained to "conclude that it would be clear to a reasonable officer that using pepper spray against the protesters was excessive under the circumstances." *Headwaters Forest Defense, etal. v. County of Humboldt, etal*., 276 F.3d 1125, 1130 (9th Cir. 2002), citing *Graham v. Connor*, 490 U.S. 386, 397, 109 S.Ct. 1865 (1989).

The Court also confirmed that officers working at the direction of Lewis and Philp smeared pepper spray fluid in and around the eyes of plaintiffs on repeated occasions, that, also at the defendants' direction, officers loosed "full spray blasts" into the faces of some plaintiffs from close range, against the express warning of the manufacturer, and that they several times withheld appropriate first aid in the form of flowing water to wash out the plaintiffs' eyes and faces after the pepper substance was applied. As set out below and in plaintiffs' Appendix of excerpts from the transcript, these and several related matters are either admitted or concluded upon defendants, and therefore — despite defendants' apparent determination to contradict them at the re-trial of this cause — indisputable.

Thus, applying the law as the Court of Appeals has stated it, and in particular, the test prescribed by the U.S. Supreme Court in *Graham v. Connor*, whereby, "[T]he force that was applied must be balanced against the need for that force," it is apparent that there is no issue for the Jury to decide — save for the proper measure of damages and punitive damages — and plaintiffs are entitled to judgment on the issue of liability as a matter of law.

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PROCEDURAL BACKGROUND

Plaintiffs were members of an historic mass movement of environmental protest, loosely known as 'Headwaters Forest Defense', who engaged in various forms of advocacy and direct action. These sometimes included sit-ins in which some participants would 'lock down', with their hands and arms fixed by spring latches ("carabiners") bolted to the wrist and hooked inside welded pipe devices, known as "black bears", where they could not be reached and unlocked. This meant they could link their bodies together so police could not take them away without carrying them together in some fashion, or cutting open the pipes to get at the latches. The latter process, 'grinding', had been used by Sheriff's deputies many times before the events in question, which occurred in late September and October, 1997, with only minor problems. Police were always able to remove the protesters and arrest them.

At that time, the struggle for the preservation of the great last stand of ancient redwoods in the Headwaters forest was at its height, and the movement was drawing more and stronger support, culminating in a mass demonstration at Stafford on September 14, 1997, and there had been several successful 'lockdowns' in the preceding year. Defendants Lewis, as Sheriff, and Chief Deputy Gary Philp, determined that, as a new tactic to overcome the lockdowns, they would use pepper spray, daubed directly on or around the eyes of protesters sitting in with black bears, as a means to coerce the protesters to release themselves.

This was done on three occasions: September 25, 1997, in the lobby of the Pacific Lumber headquarters at Scotia, California; October 3, 1997, in the woods at Bear Creek, and October 16, 1997, at the office of then-Congressman Frank Riggs, in Eureka, by groups of deputies and, at the Riggs office, members of the police force of the City of Eureka. Some unlocked, most did not. All testified they suffered unbearable pain — as the videotape famously showed — but somehow they bore it.

Later the plaintiffs brought suit under 42 U.S.C. § 1983 against the officers who daubed the noxious ointment, against Lewis and Philp as the supervisors and policy-makers, and against the County and the City on a policy theory under the rule of *Monell v. Dept. Of Social Services*. They said the painful daubing of the spray substance in and near their eyes — carried out with

some palpable, telltale violence in the grabbing and jerking back of the protesters' heads, and captured on a videotape that was played in news broadcasts around the world — constituted excessive force, in violation of the Fourth Amendment.

The Court awarded qualified immunity to the daubers, dismissing them on summary judgment. At trial, defendants Lewis and Philp were also granted qualified immunity, at the close of plaintiffs' case; and, after the Jury deadlocked without reaching a verdict on the liability of Humboldt County or the City of Eureka, the Court entered judgment as a matter of law in favor of both entities. On appeal, the U.S. Court of Appeals for the Ninth Circuit held that reasonable officers would have known that the use of the pepper spray to inflict pain on protesters where it was not needed to "subdue, remove or arrest" them, the repetition of such use including "full spray blasts" to the face, and the withholding of First Aid from some of those who would not agree to release themselves, constituted excessive force, forbidden by the Fourth Amendment under the rule of *Graham v. Connor*, 490 U.S. 386 (1989). Therefore the Court reversed the award of summary judgment to defendants Lewis and Philp — where the award to the daubing officers themselves had not been appealed — and also reversed the dismissal of the County and the City, remanding the case for a new trial.

FACTUAL BASIS FOR SUMMARY JUDGMENT

From the decision of the Court of Appeals and the record in the previous trial, plaintiffs take it that the essential facts are established beyond dispute, as follows:

1. The Unreasonable Use of Pepper Spray Against Plaintiffs

As the Court of Appeals stated, "The facts reflect that pepper spray was unnecessary to subdue, remove or arrest the protesters." 276 F.3d at 1130. There was no allegation of any 'need to subdue', at any time. It was admitted by several officers that protesters also utilizing 'black bears' had been removed from different locations on various prior occasions, without force, by cutting open the black bears with 'grinders' — and at least once by lifting them up and carrying them out — whereupon they were placed under arrest. See Appendix, Ex. A, pgs. 423, 1369. These methods were eschewed on the occasions complained of, in favor of the pepper spray method now challenged by plaintiffs.

As the Court of Appeals noted, defendants' attempts at trial to characterize the protesters' use of the black bear devices as "active resistance to arrest" was contrary to their own definition of active resistance — meriting the use of force — "as occurring when the 'subject is attempting to interfere with the officer's action by inflicting pain or physical injury to the officer...' "; and the Court found it contrary to the facts of the case, viewed in the plaintiffs Best Light. 276 F.3d at 1130.

Viewed in defendants' Best Light, the facts are the same. As the Court said, "The protesters were sitting peacefully, were easily moved by the police, and did not threaten or harm the officers." *Id*. Therefore, "Defendants' repeated use of pepper spray was also clearly unreasonable." *Id***.** The protesters were never out of the control of the officers commanded by defendants. *Id*. The defendants specifically authorized "full spray blasts" in the face, despite the manufacturer's warnings. *Id*. The defendants at least ratified, if they did not ordain, the withholding of rinse water for long minutes on several occasions. Exhibit C, pg. 1092ff. Both individual defendants admitted they made no effort to check with any medical professionals about any danger of injury to the protesters before the policy was adopted and the orders given to go ahead and daub. Exhibit D, pg. 479.

2. The Defendants' Policy of Unreasonable Use of Force

It was affirmed by the two command defendants in their trial testimony that, consulting together, they had reached a considered decision to use pepper spray, by swabbing it in the eyes and face, as was done on the three occasions in question, as a means to break up sit-ins by the Headwaters protest movement in which black bears were employed. Defendants and various other officers testified that at a certain point, the officers were instructed that, when they next encountered protesters using black bears, they were to attempt to force them to release themselves by swabbing the base substance used to form pepper spray in or around their eyes, until a person would let go. See Appendix, Exhibit B.

There was no question but that defendants Lewis and Philp deliberately and knowingly adopted this expedient as their policy for dealing with protesters in black bears. The officers who did the actual swabbing testified that they proceeded on the express orders and approval of

Philp, given pursuant to the policy adopted by him and Lewis. Exhibit B. Philp and Lewis affirmed this, without qualification. Exhibits C and D. Moreover, defendant Philp watched videotapes showing the daubing after each time it was done, expressly approved the ad hoc daubing methodology of the officers, and affirmed the results. Exhibit C, pg. 1054. Defendant Lewis also watched the videos, and agreed — even though, for the most part the protesters did not release, despite the great pain they all suffered — that this was what he and Philp had in mind. Exhibit C, pg. 1056. The policy was embraced on behalf of the Eureka Police Department at the Riggs office by Chief Millsap, who was present, and testified the daubing action was consistent with his department's policy on use of force, and was approved by him. Exhibit E, pg. 1288, 1304.

ARGUMENT

I. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is properly granted when no genuine and disputed issues of material fact remain, and when, viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law. F.R.Civ.P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322- 23, 106 S.Ct. 2548, (1986); *Eisenberg v. Ins. Co. of North America*, 815 F.2d 1285, 1288-89 (9th Cir.1987). Material facts which would preclude entry of summary judgment are those which, under applicable substantive law, may affect the outcome of the case. The substantive law will identify which facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505 (1986).

II. THE ESSENTIAL FACTS ARE NOT IN DISPUTE

The facts showing the repeated use of what the Court of Appeals has now made clear is excessive force have not and cannot be disputed by defendants. Rather, their argument has been that they "need" this "option" — i.e., the authority to cause injury and inflict pain upon protesters who are not resisting them (and are known to them to be pledged to Non-violence) — for "safety", in light of a supposed risk of injury from the grinding. But the facts showed the grinding had been successful (where the daubing generally was not), and that waiting and persuasion had also worked on occasion.

More to the point, as the Court of Appeals' decision (and its discussion in the previous decision, at 240 F.3d 1185) make clear, such a circumstance does not give rise to the lawful authority to use force, because the need for the use of force, under *Graham* and its progeny, only arises where physical resistance creates a requirement that a person be "subdued, removed or arrested". When the subject is under the control of the officer, force is no longer needed, and it becomes unreasonable to apply it. Here the plaintiffs have alleged from the start that the resort to force by defendants was vindictive, and aimed at punishing them and retaliating against them for their success in protesting "liquidation logging" on the North Coast. But, since motive is said to be irrelevant in the Fourth Amendment context, the question is control, pure and simple, as the required foundation for a legitimate police "need" to use force.

Here, the essential facts showing wrongful use of force, the two command defendants' responsibility as supervisors for such use, and the County's and the City's part, through policy, in causing such use — in the absence of any legitimate need — were clearly established in the earlier trial.[1] The use of force occurred in the absence of resistance, while officers enjoyed complete control, at the direction and through the policy of the defendants.

III. PLAINTIFFS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW

A. Individual Defendants

The Court of Appeals obviously was not faced with the ultimate issue when this case was before it previously; instead, its attention was limited to whether the command defendants were

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[1] 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). "Supervisory indifference or tacit authorization of subordinates' misconduct may be a causative factor in constitutional injuries they inflict." *Slakan v. Porter*, 737 F.2d 368, 373 (4th Cir. 1984).

rightly granted qualified immunity, and whether the case against the municipalities would fail as a matter of law. Nevertheless, in deciding these questions in the negative and remanding the matter for another trial, the Court made an unmistakable pronouncement — pursuant to its own responsibility on remand from the Supreme Court — on the underlying rule: "[W]e...conclude [under *Saucier v. Katz*] that it would be clear to a reasonable officer that using pepper against the protesters was excessive under the circumstances." 276 F.3d at 1130.

From the text, it is evident that the Court found unequivocally that the use of force in the form of pepper spray against unresisting protesters violates the standard of "objective reasonableness" established by the Supreme Court in *Graham v. Connor*, 490 US 386, 397 (1989). Drawing on its own prior decisions under *Graham*, the Court said, " 'The essence of the Graham objective 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*, 120 F.3d 965, 976 (9th Cir. 1997) (quoting *Alexander v. City & County of San Francisco*, 29 F.3d 1355, 1367 (9th Cir. 1994)." It then went on to hold that,

> The facts reflect that: (1) The pepper spray was unnecessary to subdue, remove or arrest the protesters; (2) the officers could safely and quickly remove the protesters, while in 'black bears,' from protest sites: and (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.

This was not a qualified statement; nor is there any qualification on "the facts" as they were adduced at trial. The defendants admitted and affirmed all of the essentials: They made a decision to use pepper spray in the attempt to thwart the protesters use of black bears, instructed their officers to do it, repeatedly, either by swabbing or 'full spray blasts' in the face at close range, and approved of the execution of their policy — including those times when First Aid was withheld — as reported to them via videotape. They said they believed they were justified, but the Court held, in effect, that they weren't, and that they should have known it.

There were four distinct holdings in the Court's decision:

+ That the force used was unnecessary, as stated above;

+ That the repeated use of pepper spray was excessive;

+ That the manner of use, and particularly the "full spray blasts" from close range, despite an express contrary warning from the manufacturer, was unreasonable; and,

+ That "defendants' refusal to wash out the protesters' eyes with water constituted excessive force under the circumstances," 276 F.3d at 1130-31, citing *LaLonde v. County of Riverside*, 204 F.3d 947, 961 (9th Cir. 2000).

There is no "wiggle room" for the two command defendants in this decision. There is no way they can change the facts in a new trial to justify their actions, and no alternative construction of the law that will rescue them from the Court's unqualified pronouncements. In light of the opinion, the pretense that defendants "need to retain the option" of inflicting pain on unresisting protesters, to coerce by torment their compliance with a police order to release themselves from the black bears, is untenable; the idea that they can reverse the Court's decision by way of a defense verdict — which they apparently hope against hope to obtain in the 'friendly confines' of their home county — is contrary to law. Since the Court of Appeals has stated that the use of force was unreasonable in the circumstances, and defendants have made binding admissions that the use of force occurred at their express direction, summary judgment for plaintiffs on the issue of these defendants' liability for Fourth Amendment violations is entirely appropriate. Q.E.D.

B. Liability of the Municipalities under *Monell*

A municipality can be held liable under § 1983 for an unconstitutional policy, custom, or practice. *Monell v. New York Department of Social Services*, 436 U.S. 658, 691 (1978). A policy of inaction can be a municipal policy within the meaning of *Monell*. *Oviatt v. Pearce*, 954 F.2d 1470, 1474 (9th Cir.1992). See also, *City of Canton v. Harris*, 489 U.S. 378, 388, 394-96 (inaction is actionable through deliberate indifference). Thus, a single incident or series of incidents can trigger municipal liability if a final policymaker ratified a subordinate's actions, or acted with deliberate indifference to a subordinate's constitutional violations. *Christie v. Iopa*, 176 F.3d 1231, 1235, 1238-41 (9th Cir. 1999). Ratification and approval can be constructively inferred from a policymaker's failure to stop an ongoing violation. *Id*. at 1239-40.

Here, the ratification is icing on the cake. The defendant policy-makers have affirmed the policy in no uncertain terms, as shown above. Their statements and their actions as supervisors, together with those of their subordinates in carrying out their orders, are merely underscored — as embodiments of the policy they fashioned on behalf of the County, also indisputably embraced and adopted by Chief Millsap as the policy-maker for the City of Eureka — by their approval and ratification after viewing the videotapes. Clearly they have bound the County (as the City is also bound) under the *Monell* rule, and there is no issue remaining as to its joint liability with them for the violations shown.

CONCLUSION

One seldom sees a more categorical, unequivocal affirmation of a legal principle as applied to particular circumstances than is found the Court of Appeals decision(s) in this case. In light of the second decision, in particular, the defendants' insistence that they can obviate the Court's holding with a contrary determination at trial exposes an intention to appeal for nullification of the law by the jury, which would be improper, we all know. The Court can avoid that possibility — and save lot of wasted effort — by entering summary judgment on liability, consistent with the Court of Appeals' decision, leaving only the questions of damages and punitive damages for the Jury, and — speaking of hope against hope — possibly waking defendants up to the reality that their cause is lost.

But, regardless of particular purposes, hopes or possible side effects, plaintiffs have shown that the relevant material facts are not in dispute, and that they are entitled to judgment as a matter of law. In the premises of this particular case, that law has been articulated plainly, and bindingly, and it requires that plaintiffs be awarded summary judgment on liability against all defendants.

WHEREFORE, plaintiffs respectfully ask this Honorable Court to enter summary judgment for them and against all defendants on the issues of liability for Fourth Amendment

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violations arising out of the use of pepper spray as shown in the evidence, and to grant such other and further relief as is deemed meet and just in the circumstances of the case.

Respectfully Submitted,

DATED: February 20, 2003:

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DENNIS CUNNINGHAM
Attorney for Plaintiffs

APPENDIX CONTENTS

Exhibit A.....Testimony of various officers re prior use of 'grinders'

Exhibit B.....Testimony of various officers re defendants' orders to daub pepper spray

Exhibit C.....Testimony of Defendant Philp (excerpts)

Exhibit D.....Testimony of Defendant Lewis (excerpts)

Exhibit E.....Testimony of Eureka Police Chief Arnold Millsap (excerpts)

CERTIFICATE OF SERVICE

I am a citizen of the United States, over the age of 18, and not a party to this action. I certify that I served the within "Plaintiffs' Notice and Motion for Summary Judgment" on Defendants, by faxing (to 707-444-9586), and thereafter mailing a true copy, first class U.S. postage prepaid, to their attorney of record, Nancy Delaney, at 814 7th Street, Eureka, CA 95501, on February 20 and 21, 2003, respectively.

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Dennis Cunningham