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23 Stephen Earnest Eberhard

24 UNITED STATES DISTRICT COURT
25 NORTHERN DISTRICT OF CALIFORNIA
26 SAN FRANCISCO DIVISION

27 STEPHEN ERNEST EBERHARD

28 Plaintiff,

v.

29 CALIFORNIA HIGHWAY PATROL,
30 CALIFORNIA DEPARTMENT OF
31 TRANSPORTATION, CALIFORNIA
32 HIGHWAY PATROL OFFICER
33 CHRISOPHER W. DABBS, CALIFORNIA
34 HIGHWAY PATROL OFFICER KORY A.
35 REYNOLDS, CALIFORNIA HIGHWAY
36 PATROL OFFICER TEDDY M. BABCOCK,
37 CALIFORNIA HIGHWAY PATROL
38 CAPTAIN JAMES T. EPPERSON,
39 CALIFORNIA HIGHWAY PATROL CHIEF
40 BRIDGET T. LOTT, CALIFORNIA
41 DEPARTMENT OF TRANSPORTATION
42 DISTRICT 1 DIRECTOR CHARLIE
43 FIELDER, DOES 1-25

Defendants.

Case No. 14-cv-01910-JD

**PLAINTIFF STEPHEN ERNEST
EBERHARD'S TRIAL BRIEF**

Trial Date: December 14, 2015
Time: 10 a.m.
Courtroom: 11 (9th Floor)

Honorable James Donato, presiding

Complaint Filed: March 27, 2014

INTRODUCTION

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The remaining issues for trial center on the retaliatory intent of three CHP officers, who regularly worked the Bypass Project and knew Plaintiff Stephen Eberhard was a photographer for The Willits News, which regularly reported on the project and CHP’s enforcement actions, including high level criticism leveled at CHP for its tactics against protesters.

Eberhard contends that Defendant Teddy Babcock, who on July 30, 2013, professed Eberhard to be such a problem for CHP, assaulted him on May 21, 2013 – allegedly for his own safety – while he was on the site with a Caltrans’ escort. Only two weeks earlier video of Babcock threatening Eberhard’s TWN colleague with arrest while covering enforcement actions along a county-owned road were posted to a YouTube site regularly monitored by his Captain, James Epperson.

Eberhard’s subsequent arrest on July 23, 2013, by Defendants Kory Reynolds and Christopher Dabbs, took place within minutes of his entry onto the site to approach Dabbs to obtain permission to photograph two protesters who had locked on to equipment halting construction on the project. Knowing that arrests on the Bypass Project were a last resort, only to be effected after providing ample opportunity to leave and informing individuals that their actions constitute trespass – even for protesters arrested multiple times on the project – Dabbs and Reynolds arrested Eberhard knowing he already had agreed to leave and charged him with violating a penal code provision that requires a specific intent to interfere with the property owner’s business. They then confiscated his cameras (refusing to release them to Caltrans’ on-site personal for safekeeping), taking them back to CHP’s Ukiah office, through protocol called for personal items to be transported with the arrestee to county jail.

Eberhard brings claims under 42 U.S.C. Section 1983 and the California Bane Act (Cal. Civ. Code § 52.1) for violation of his First Amendment and (under the Bane Act) state constitutional rights. He seeks compensatory damages (emotional distress, harm to reputation, pain and suffering and chill to his First Amendment rights), statutory damages, punitive damages and injunctive and declaratory relief.

FACTUAL BACKGROUNDPlaintiff and the Willits Bypass Project

Eberhard is a photojournalists who for over 10-years has volunteered his services for The Willits News (“TWN”), a twice-weekly local newspaper in Willits, California. He is a retired Vietnam veteran and has worked hard to gain the respect of those in his community. In early 2013, he began covering for TWN a controversial highway construction project called the Willits Bypass Project.¹ Not surprisingly, given that protest movements are a fabric of the society in Mendocino County, according to Mendocino County Sheriff Tom Allman, the project sparked public debate and protest. Pursuant to a state-wide contract, Caltrans’ hired CHP personnel to provide security for the site and conduct enforcement actions at its request.

CHP Interactions Leading up to Eberhard’s Arrest.

Eberhard documented the protest activities beginning in March of 2013, after a young women who went by the name “Warbler” climbed a tree and staged a sit-in for over 60 days. At all times he wore press credentials issued by TWN and the Mendocino County Sherriff on straps around his neck and carried two large camera.

When CHP SWAT teams, with air support and over 60 officers moved in to extract the five tree sitters, at Caltrans request, Eberhard was threatened by CHP officers with arrest when he attempted to photograph the arrest activity from the pedestrian right of way. CHP’s tactics, including the use of projectile guns on one of the tree-sitters, garnered outrage by some members of the community, including California Senator Noreen Evans, who issued a press release about her concerns, which was published by TWN.

Protests continued throughout the months of April, May and June, often halting construction on the project and causing significant delays. After several complaints by Williams about continuing threats of arrest and harassment by CHP personnel against Eberhard, Caltrans eventually facilitated TWN’s access to the site by agreeing to make available an escort (Matt McKeon) during

¹ The project, overseen by Caltrans, is a four-year, \$210 million highway construction project involving a 5.9 mile long, four-lane freeway around the City of Willits. It impacts an area known as the Little Lake Valley, a historical cultural resource site where thousands of American Indians once lived, and necessitated one of the largest wetland fill-permits in California’s history.

1 Caltrans' normal business hours. Despite having obtained some cooperation from Caltrans, CHP's
2 harassment of Eberhard continued, often in the presence of his Caltrans' escort. As relevant here:

- 3 • On April 17, 2013, Babcock confronted Eberhard while he was parked along a county-
4 owned road waiting for his Caltrans escort. He was hostile and agitated, saying "What are
5 you doing here? What's going on? You can't be here?"
- 6 • On May 13, 2013, Babcock yelled at Eberhard while he was attempting to photograph an
7 arrestee in the back of a patrol car parked along Highway 101. While claiming this was
8 out of concern for Eberhard's safety given his position between two parked cars, several
9 CHP personnel are photographed by Eberhard standing in the same spot just a few
10 moments later. Eberhard was accompanied by a Caltrans' escort, and photographed
11 Babcock and Defendant Kory Reynolds during the enforcement actions. These
12 photographs were later published on the Save our Little Lake Valley (SOLLV) web site, a
13 group actively opposed to the project and whose actions were regularly monitored by CHP,
14 including through embedded undercover operations and monitoring of its website.
- 15 • Later that day, Babcock threatened to arrest videographer Tony Ellis, who was accompanied
16 by Eberhard, when he was filming Babcock arresting the leader of SOLLV using a
17 hobbling technique. This video was later posted to a YouTube site that Captain Epperson
18 regularly monitored. Sgt. Lott was the on-duty sergeant this day, and would later discuss
19 media issues with Captain Epperson.²
- 20 • On June 12, 2013, Sergeant Braden Moffett, who would later approve the arrest report,
21 promised that CHP would arrest Eberhard and Ellis first, after reading a dispersal order to
22 a group of protesters standing apart from them. Video of this also was posted the YouTube
23 channel monitored by Captain Epperson. Officer Babcock was on scene during this
24 incident and can be seen talking to Moffett before Moffett threatened Eberhard with arrest.
25 Sgt. Lott later describes this incident in a recorded conversation on July 30, 2013, as why
26 CHP and the media were in a "boxing match."
- 27 • On July 1, 2013, Eberhard was excluded from the site during a major enforcement action
28 when Captain Epperson threatened to shut down CHP operations if Caltrans allowed the
press onto the site. This, despite the fact that the escort arrangement was created, in part, to
allow TWN access to the site during enforcement actions. Reynolds was the Public
Information Officer on this occasion, in charge of media interactions. Eberhard was forced
to document the events from adjacent property. In the weeks before this action, press
accounts of CHP's handling of the matter raised concerns about whether CHP was starving
the protester, who had perched himself on top of a wick drain boom, used to drive piles
into the ground, and engaging in intentional acts threatening his safety. Eberhard's
photographs of the protester were published in TWN, ABC-7 and in the Santa Rosa Press
Democrat just before July 1, 2013. Though Epperson would say Eberhard's exclusion was
for sensitive security reasons, the regular PIO of the Ukiah office testified that once
Caltrans provided the go-ahead there would be no reason to exclude Eberhard from the site
to record enforcement actions. And, after Eberhard's arrest, he was allowed onto the site
to do just that.

24 May 21, 2013 Assault by Babcock.

25 On May 21, 2013, Babcock forcefully and violently shoved Eberhard in the shoulder area
26 four times, two times after Eberhard turned to directly face him, asking him to stop. Eberhard was

28 ² On this same day, Captain Epperson complained to Caltrans that allowing the press onto the site was
"counterproductive" and "actually assisting the protesters."

1 at the site with his Caltrans escort documenting the first pile driving activity at the project. The
2 activity had been a community concern because the noise. Before the assault, Eberhard explained to
3 Babcock that Caltrans told him it was okay to go within the roped off area after the pile had been
4 driven into the ground a certain distance. Eberhard nevertheless followed Babcock's direction and
5 walked back to the rope. Only when he turned to take a photograph did Babcock come rushing up
6 from behind pushing Eberhard hard, knocking him off balance and compelling him forward.
7 Though Babcock claims this was for Eberhard's own safety, he did not request others who were in
8 the same roped off area to leave, much less violently shove them. Eberhard's escort would later tell
9 Eberhard that Babcock had complained to him that morning before the assault about the press's
10 presence.³

11 Eberhard's Arrest on July 23, 2013.

12 On July 23, 2013, the day of Eberhard's arrest, Eberhard got word of protest activities
13 occurring at the site. At about 6:20 a.m., he drove to the area. He called McKeon and when he did
14 not pick up, left a message for him to meet him at the site.⁴ A dozen or so protesters were standing
15 along Highway 101 and two individuals had locked on to equipment, shutting down construction.
16 He walked onto the site, which was a wide open field in this area, shook hands with Officer Dabbs
17 and introduced himself as "Steve Eberhard from The Willits News." His press passes were clearly
18 visible. Eberhard asked Dabbs if he could move in a little closer to take a photograph of the
19 protesters. Dabbs said he could not take any photographs and that he would have to leave.
20 Eberhard explained that he had called his Caltrans escort and left a message with him to meet him at
21 the site. Dabbs told Eberhard that he was not allowed on the site without an escort. Eberhard said
22 he was just trying to do his job. Dabbs then told Eberhard that he had to leave or he was going to
23 read him the dispersal order and arrest him thereafter if he refused to leave. Eberhard told Dabbs to
24 go ahead and read him the dispersal order and he would leave. Dabbs admits that Eberhard agreed
25 to leave. This exchange lasted only about a minute. While Dabbs was looking at his phone for the
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27 _____
28 ³ TWN Editor Williams complained about this to Captain Epperson, and while he apologized for the incident and talked to Babcock about it, Babcock says Captain Epperson never indicated to him that he had done anything wrong.

⁴ The evidence will show that Eberhard met his escort at the site at least seven time before his arrest.

1 dispersal order, Officer Reynolds approached from the side grabbing his wrists saying “you’re going
2 in, you’re under arrest.” Eberhard told Reynolds that Dabbs was going to read him the dispersal
3 order and that he had told him he would leave. Reynolds then said, “you know what the dispersal
4 order says, we’re not going to read it to you.”⁵ Reynolds would later testify that he witnessed
5 sergeants Lott and Elrod, on different occasions, tell Eberhard he Lott denies this and Eberhard
6 knows Elrod and he never told him to leave the site, threatened him with arrest or told him he
7 needed an escort to be on the site.

8 The officers then proceeded to arrest Eberhard, cuffing his wrists behind his back,
9 conducting a pat down search and seizing his cameras, phone and journalist note book. They
10 proceeded to place him in the back of the patrol car, leaving him in the car on site for over an hour.
11 At one point, while held in the back of the patrol car, Eberhard complained to Dabbs that his
12 shoulder was hurting. Dabbs responded, “You should have thought about that before you walked
13 out here.” Once Sgt. Lott arrived on the scene, he talked to officers Dabbs and Reynolds for less
14 than five minutes. He determined that Eberhard committed trespass (602(k)) and decided not to
15 intervene in his transportation to county jail, though California law with limited exceptions requires
16 that individuals be cited and released – not incarcerated – for misdemeanor violations. Sgt. Lott
17 knew Eberhard was a photojournalist, had interacted with him on two occasion in the past without
18 incident and had no reason to believe he would likely reoffend if released. In fact, Sgt. Lott claims
19 that Eberhard was apologetic when he briefly spoke with him while he was held in the back of the
20 patrol car, and had acted professionally on prior occasions.⁶ A week later, Sgt. Lott remarks on the
21 cite and release issue in a recorded conversation, saying he “thinks it sends the wrong message when
22 someone is in custody then release him like a little parakeet. No way was I going to send the wrong
23 message to the officers there.”

24 The dozen protesters who had walked onto the site on the morning of July 23, 2013, were
25

26 ⁵ According to Reynolds, when Eberhard initially walked into the site he recognized him and asked Dabbs to make
27 contact with him. He then approached Caltrans Construction Engineer Melanie Collins to find out if Eberhard had
28 permission to be on the site. Collins testified that she did not talk to Reynolds until after Eberhard had been arrested and
was in handcuffs, and even then – according to interrogatory responses – only said she did not know who he was or why
he was there.

⁶ Sgt. Lott also commented to Eberhard that he had heard about Eberhard’s past encounters with Babcock.

1 read a dispersal order, told that they would be arrested if they did not leave and were given an
 2 opportunity to leave. The two protesters who locked onto the equipment stopping all construction
 3 that morning were cited and released. Eberhard was booked and incarcerated at county jail.

4 CLAIMS

5 A. Section 1983 Claims Predicated on Retaliatory Arrest and Assault on May 21, 6 2013.

7 To prevail on the 1983 claim, the evidence must show that (1) the defendants' conduct
 8 would chill a person of ordinary firmness from future First Amendment activities; and (2) that the
 9 defendants' actions "were motivated (at least in part) by a desire to chill the First Amendment
 10 activity." Barich v. City of Cotati, 2015 WL 6157488, *1 (N.D. Cal. 2015) (citing Mendocino Envl.
 11 Ctr. v. Mendocino Cty., 192 F.3d 1283, 1300 (9th Cir. 1999)) and Brodheim v. Cry, 584 F.3d 1262,
 12 1271 (9th Cir. 2009)). Addressing causation, the court in Lacey v. Maricopa County, 696 F.3d 896,
 13 917 (9th Cir. 2012), explained that "[the plaintiff] must allege facts ultimately enabling him to
 14 'prove the elements of retaliatory animus as the cause of injury,' with causation being 'understood
 15 to be but-for causation.'" Id. (quoting Hartman v. Moore, 547 U.S. 250, 259-60 (2006)). However,
 16 the U.S. Supreme Court in Hartman makes clear that it is not the plaintiff's burden to prove that the
 17 adverse action would not have happened but-for the retaliatory impetus. As the Court explained:

18 It is clear, moreover, that the causation is understood to be but-for causation, without
 19 which the adverse action would not have been taken; we say that upon a prima facie
 20 showing of retaliatory harm, the burden shifts to the defendant official to
 21 demonstrate that even without the impetus to retaliate he would have taken the
 22 action complaint of (such as firing the employee). [Citation omitted.] If there is a
 23 finding that retaliation was not the but-for cause of the discharge, the claim fails for
 24 lack of causal connection between the unconstitutional motive and resulting harm,
 25 despite proof of some retaliatory animus in the official's mind. [Citation omitted.]
 26 It may be dishonorable to act with an unconstitutional motive and perhaps in some
 27 instances be unlawful, but action colored by some degree of bad motive does not
 28 amount to a constitutional tort if that action would have been taken anyway.

24 Hartman, 547 U.S. at 260 (emphasis added) (citing Mt. Healthy City School Dist. Bd. of Educ. v.
 25 Doyle, 429 U.S. 274, 285-286 (1977), and Crawford-El v. Britton, 523 U.S. 574, 588 n. 10 (1998)).
 26 In so concluding, the Supreme Court drew on its earlier decision in Mt. Healthy City School Dist.
 27 Bd. of Educ., v. Doyle, 429 U.S. 274 (1977), which was a retaliatory discharge case on appeal
 28 following judgment in favor of plaintiff after a bench trial. There, the Court stated:

1 Initially, in this case, the burden was properly placed upon respondent to show that
 2 his conduct was constitutionally protected, and that this conduct was a ‘substantial
 3 factor’ or to put it in other words, that it was a ‘motivating factor’ in the Board’s
 4 decision not to rehire him. Respondent having carried that burden, however, the
 5 District Court should have gone on to determine whether the Board had shown by a
 6 preponderance of the evidence that it would have reached the same decision as to
 7 respondent’s reemployment even in the absence of the protected conduct.

8 Id., at 429 U.S. at 287 (emphasis added).⁷

9 Addressing the first prong of Plaintiff’s prima facie case, this Court already has recognized
 10 that being arrested or threatened with arrest is sufficient to show the likelihood of First Amendment
 11 chill. Dkt. # 188 at 11.⁸ Nor can it reasonably be disputed that Plaintiff’s newsgathering and
 12 photography were quintessential First Amendment activities. See Adkin v. Guam Police Dep’t.,
 13 2010 WL 3385180 (D. Guam 2010) (taking of photograph of accident scene “enjoys constitutional
 14 protection because it embodies an expression of First Amendment freedoms, the creation, storage, or
 15 reproduction of a depiction.”); Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995)
 16 (recognizing right to record police officers in performance of their duties on public property in
 17 overturning grant of summary judgment in favor of officer on videographer’s First Amendment
 18 claim). Contrary to a running contention by Defendants in this case, it is not necessary that Plaintiff
 19 be exercising a First Amendment right at the time of arrest to prove his case. Indeed, this Court
 20 recently rejected a similar argument where a chief of police claimed a plaintiff could not state a First
 21 Amendment retaliation claim because the plaintiff was not recording the chief at the time of the
 22 arrest. Barich v. City of Cotati, 2015 WL 6157488, * 1 (N.D. Cal., Oct. 20, 2015). In granting
 23 plaintiff’s motion for summary judgment, the Court noted that the plaintiff “frequently records or
 24 seeks to record public officials in Cotati. Chief Parish’s threat was therefore significant from a First
 25 Amendment standpoint regardless of whether Barish sought to exercise his right during this
 26 encounter with Chief Parish.” Id. See also Benjamin v. Peterson, 41 Med.L.Rptr. 2336, 2340 (D.

27 ⁷ Plaintiff realizes that Ford v. City of Yakima, 706 F.3d 1188, 1193 (9th Cir. 2013), cites Lacey for the proposition that
 28 this ultimate burden is on the plaintiff, and that this Court in its Order Re Summary Judgment (Dkt. # 188 at 11:1-2) also
 cites Ford for this proposition. But neither Lacey nor the Supreme Court decisions on which Lacey relies place the
 burden on the plaintiff at trial to prove essentially a negative – that defendants would not have acted if not for the
 retaliatory impetus. Nor were the Lacey and Ford courts concerned with the burden of proof at trial, as both involved
 motions addressing the sufficiency of the facts on plaintiff’s prima facie case. Thus, the Supreme Court’s precedents in
Hartman and Mt. Healthy should govern the proper burden of proof in this case once Eberhard presents a prima facie
 case.

1 Min. 2013) (“[A] reasonable jury could also conclude that Benjamin’s First Amendment rights were
2 violated by the continued processing of his arrest and booking in jail after it became clear he was a
3 member of the media.”) (emphasis added).

4 Here, both Dabbs and Reynolds knew Eberhard was a photojournalist with TWN, yet he
5 was the only person sent to jail that morning. Everyone else was read a dispersal order, including
6 the two locked down to equipment, who were eventually cited and released. That Eberhard was left
7 to sit in the back of a patrol car for over an hour while the officers knew he was in pain, and the
8 unprofessional comments by Dabbs further support a finding of retaliatory animus. And, protesters
9 arrested on the site were routinely taken to jail immediately after arrest. Not Eberhard.

10 Moreover, Dabbs fabricated facts in the arrest report to support the arrest, and Reynolds’
11 claims that he had witnessed others instruct Eberhard to leave will be disproven. Reynolds’ claim
12 that he told Eberhard to leave before he was arrested finds no support in his own account of matters
13 to dispatch just moments after the arrest.

14 Separately, the evidence will show that Babcock’s action on May 21, 2013, were preceded
15 by a series of interactions with Eberhard and his TWN colleague that present a clear case of
16 retaliatory animus. His complaints to Caltrans that morning about allowing the press (i.e. Eberhard)
17 on site, further evidences his motive for violently shoving Eberhard. That he regularly worked the
18 Bypass Project, engaging in enforcement actions against protesters, without ever once shoving
19 anyone, further shows that he exercised his authority on May 21 to single-out Eberhard for his
20 protected conduct. His safety justifications for the assault are clearly belied by the fact that two
21 other individuals standing in the same area were not shoved or told to leave the roped-off area. That
22 he nearly begged Sgt. Lott to arrest Eberhard on July 30, 2013, should he cross a white line on the
23 side of the highway to record enforcement actions, while complaining what a problem he had
24 become, confirms as much.

25 **B. Bane Act Claims Predicated on False Arrest and Assault on May 21, 2016.**

26 Under the Bane Act claim, based on the same facts, Eberhard must show that his First
27 Amendment and Article 1, Section 2 rights were interfered with through “threats, intimidation or
28 coercion.” Cal. Civ. Code § 52.1 (a); CACI 3066. Unlike a retaliation claim, however, “plaintiffs

1 need not allege that defendants acted with discriminatory animus or intent, so long as those acts
 2 were accompanied by the requisite threats, intimidation, or coercion.” D.V. v. City of Sunnyvale,
 3 65 F. Supp. 3d 782, 787 (N.D. Cal. 2014).⁹

4 Here, Eberhard will show that his state and federal constitutional rights were interfered with
 5 when the officers arrested him, seized his newsgathering materials, and detained him in violation of
 6 California law. Separately, he will show that Babcock’s actions on May 21, 2013, constitute
 7 violence and intimidation that reasonably caused Eberhard to fear further reprisals should he
 8 continue his newsgathering activities.

9 **D. First Amendment Claims Based on Booking and Jailing Rather than Immediate**
 10 **Cite and Release.**

11 Eberhard also states a First Amendment claim under Section 1983 stemming from his
 12 incarceration for a misdemeanor offense, rather than his immediate cite and release. Ford, 706 F.3d
 13 at 1196.¹⁰ Under California Penal Code Section 853.6 every person arrested for an offense declared
 14 to be a misdemeanor, who does not demand to be taken before a magistrate, “shall, instead of being
 15 taken before a magistrate, be released according to the procedures set forth by this chapter, although
 16 nothing prevents an officer from first booking an arrestee pursuant to subdivision (g).” Cal. Pen.
 17 Code § 853.6 (a)(1). Subdivision g allows an officer to book a misdemeanor arrestee at the scene
 18 prior to release or at the arresting agency, here CHP, prior to release. Cal. Pen. Code § 853.5(g).
 19 Deviation from these procedures, none of which were implemented here, is only justified under 10
 20 specifically defined circumstances set out under the code. See Cal. Pen. Code § 853.6. Two are
 21 relevant here – one because it was the reason Dabbs provided to the jail as the basis for non-release
 22 (subdivision (3)(which incorporates Section 40302 and 40303 of the Vehicle Code)), and the other
 23 because it was provided as an after-the-fact justification for nonrelease in the arrest report submitted

24 _____
 25 ⁹ The prevailing view in the Northern District of California is that an intentional arrest that is unlawful – here a
 26 violation of the First Amendment – itself constitutes “threats, intimidation or coercion” sufficient to state a Bane Act
 27 claim. No showing of coercion or intimidation separate from that inherent in the arrest is required. See D.V. v. City of
 28 Sunnyvale, 65 F.Supp.3d 782, 787-89 (N.D. Cal., 2014) (collecting cases); Hampton v. City of Oakland, 2014 WL
 5600879 *18 (N.D. Cal., Nov. 3, 2014); Estate of Lopez ex rel Lopez v. City of San Diego, 2014 WL 7330874 *15
 (S.D. Cal., Dec. 18, 2014).

¹⁰ This Court dismissed Eberhard’s state false arrest claims predicated on these same facts, though separately actionable
 as a state tort claim under Ninth Circuit law. Dkt. # 188 at 17; see Edgerly v. City and Cnty. of San Francisco, 599 F.3d
 946, 959 (9th Cir. 2010).

