No. 07-2196

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ASOCIACIÓN DE PERIODISTAS DE PUERTO RICO, Puerto Rico Journalists Association; OVERSEAS PRESS CLUB OF PUERTO RICO; NORMANDO VALENTIN, individual capacity and on behalf of his respective Conjugal Partnership; VICTOR SANCHEZ, individual capacity and on behalf of his respective Conjugal Partnership; JOEL LAGO-ROMAN, individual capacity and on behalf of her respective Conjugal Partnership; COSSETTE DONALDS-BROWN, individual capacity and on behalf of her respective Conjugal Partnership; VICTOR FERNANDEZ, individual capacity and on behalf of his Conjugal Partnership; ANNETTE ALVAREZ, individual capacity and on behalf of her respective Conjugal Partnership

Plaintiffs-Appellants,

v.

ROBERT MUELLER, in his official capacity as Director of the Federal Bureau of Investigation; TEN UNKNOWN AGENTS OF THE FEDERAL BUREAU OF INVESTIGATION, individually and in their official capacity and on behalf of their Conjugal Partnership; KEITH BYER, individually and in his official capacity and on behalf of his Conjugal Partnership; LUIS S. FRATICELLI, individually and in his official capacity and on behalf of his Conjugal Partnership; JOSE FIGUEROA-SANCHA, individually and in his official capacity and on behalf of his Conjugal Partnership.

Defendants-Appellees.

On Appeal from the United States District Court for the District of Puerto Rico

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

Defendants claim that they are entitled to summary judgment on the basis of qualified immunity. Their argument is based on a radically different view of the facts than the view put forth by the plaintiff-journalists. Plaintiffs contend that they were peaceful and complied with the instructions of law enforcement agents. Plaintiffs further contend that defendants nevertheless obstructed their ability to gather the news and then used force against them to prevent them from reporting on a matter of extreme public interest. Defendants, on the other hand, claim that the FBI agents were confronted by an unruly and disobedient crowd that posed a safety risk. These divergent and contradictory versions of the facts preclude summary judgment in this case. This Court should reverse the district court's grant of summary judgment.

I. Plaintiffs' Fourth Amendment Claims Survive Summary Judgment

Defendants argue that plaintiffs have no Fourth Amendment claim because they were neither searched nor seized, and that even if the Fourth Amendment does apply, plaintiffs failed to state a claim. Def. Br. at 20. These arguments are at odds with the case law.

Defendants contend that plaintiffs were not seized because "the reporters were free to leave their encounter with the agents at any time, and, in fact, did

leave their encounter with agents when they finally decided to retreat to outside of the access gate." Def. Br. at 31. Contrary to defendants' argument, a seizure occurs "when government actors have, by means of physical force or show of authority, . . . in some way restrained the liberty of a citizen." *Graham v. Connor*, 490 U.S. 386, 395 n. 10 (1989) (internal citation and quotation marks omitted). "Violation of the Fourth Amendment requires an intentional acquisition of physical control." *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989).

Courts have applied this standard to conclude that a seizure occurs where officers spray an individual with pepper spray to gain control over that person's movements. For example, in *Logan v. City of Pullman*, the court reasoned:

> [T]he Plaintiffs . . . who were intentionally sprayed with O.C. were seized within the meaning of the Fourth Amendment because the Defendant Officers dispersed O.C. in an attempt to gain physical control over those individuals. Therefore, those Plaintiffs may pursue their excessive force claims under the Fourth Amendment.

392 F. Supp. 2d 1246, 1260 (E.D. Wash. 2005).[1] See also *McCracken v. Freed*, 243 Fed. Appx. 702, 708-09 (3d Cir. 2007) (unpublished opinion) (holding that occupant of home was "seized" where law enforcement officers threw pepper spray canisters into home for the purpose of debilitating those inside). More frequently, courts skip directly to analyzing whether the use of pepper spray was

[1]O.C. stands for Oleoresin Capsicum, which is the formal name for pepper spray.

excessive force under the Fourth Amendment, thereby implicitly holding that use of pepper spray is a seizure if not stating so outright. See, e.g., *Headwaters Forest Def. v. County of Humboldt*, 276 F.3d 1125 (9th Cir. 2002) (analyzing whether use of pepper spray was excessive force); *Park v. Shiflett*, 250 F.3d 843, 853 (4th Cir. 2001) (same).

Even defendants' version of the facts demonstrates that defendants' conduct amounted to "an intentional acquisition of physical control" over plaintiffs. *Brower*, 489 U.S. at 596. As defendants put it, "[t]he SA advised the crowd that he would deploy pepper spray if the crowd did not return to outside the perimeter." Def. Br. at 17. The SA did fire the pepper spray, and "[t]he pepper spray was effective in inducing crowd members to return to outside the perimeter." Def. Br. at 18.

Plaintiffs were seized. The question in this case is whether that seizure comported with the Fourth Amendment.

Summary judgment is only appropriate if the record shows "there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c). Defendants do not make the argument that, on plaintiffs' facts, they are entitled to summary judgment. This would have been the more standard approach at the summary judgment stage, where the court is required to view the facts in the light most favorable to

plaintiff-appellants. *Buchanan v. Maine*, 469 F.3d 158, 162 (1st Cir. 2006). Nor do defendants argue, as they did at the district court, that plaintiffs' facts are "blatantly contradicted by the record, so that no reasonable jury could believe it." *Scott v. Harris*, 127 S. Ct. 1769, 1776 (2007). Before the district court, defendants' primary argument was that plaintiffs' account was conclusively refuted by the DVD containing excerpts of footage from the incident. Defendants appear to have abandoned that argument.

Instead, defendants simply claim that those inside the complex gate were unruly. Def. Br. at 29, 32-34. One of the few points of agreement between plaintiffs and defendants is that this factual dispute is material. Under these circumstances, summary judgment should be denied.

Plaintiffs submitted evidence that those within the complex gate were peaceful and obedient. For example, plaintiffs did not enter the condominium complex until they were invited in. App. 84, 94. Once they entered, they peacefully approached the FBI agents for a quote. App. 84. When they were ordered back by the FBI agents, they did their best to comply. App. 89-90. Indeed, the evidence submitted by plaintiffs shows that no police perimeter existed, and that many private citizens were permitted to enter the condominium complex. App. 83-84, 89, 94-95. Defendants paint a different picture. They

argue that an "unruly crowd" breached a law enforcement perimeter and physically resisted efforts to remove them from the complex grounds. Def. Br. at 29, 32-34.

This factual dispute - whether FBI agents were confronted by an unruly crowd - is material because it "has the potential to affect the outcome of the suit." *Velazquez-Garcia v. Horizon Lines of Puerto Rico, Inc.*, 473 F.3d 11, 15 (1st Cir. 2007) (internal citations and quotation marks omitted). Whether plaintiffs have stated a viable excessive use of force claim depends on whether the amount of force used was unreasonable under the circumstances. *Graham*, 490 U.S. at 397. This inquiry hinges, in part, on whether the individuals subject to force were "an immediate threat to the safety of the officers or others." *Id.* at 396. Whether the crowd was unruly and threatened the FBI agents or whether the crowd was peaceful is central to whether defendants' use of force was reasonable. Because of the clear factual dispute on this issue, there are material facts in dispute that preclude summary judgment.

II. Plaintiffs' First Amendment Claims Survive Summary Judgment

Defendants attack plaintiffs' First Amendment arguments on two grounds: (1) they argue that plaintiffs have no First Amendment claim because they were on private property, Def. Br. at 28-29, and (2) they claim that the cases plaintiffs rely

on are too "general" to support their claim, Def. Br. at 26. Neither argument has merit.

Defendants' private property argument is not entirely clear. Their argument may be that plaintiffs did not have a right to be on condominium complex grounds in the first place, in which case defendants were essentially enforcing trespass laws when they ejected plaintiffs. Alternately, defendants may be arguing that First Amendment rights simply do not exist on private property. Finally, it may be defendants' position that even if plaintiffs did have a right to be present on the property, the agents had a right to eject them because they were acting like an unruly mob. Def. Br. 28-29.

Whether plaintiffs had permission to be on the property is a subject of factual dispute. Plaintiffs have submitted evidence that there was no police perimeter cutting off their access. App. 83-84, 89, 94-95. Further, after Liliana Laboy's daughter, Natalia Hernandez Laboy, gained entry to the apartment complex, she waved her hand to invite the reporters into the complex. App. 59, 84, 94. Plaintiffs reasonably understood this to be an invitation from someone who was herself permitted on the premises. In contrast, defendants assert that plaintiffs impermissibly crossed a police perimeter. Def. Br. at 29, 32-34.

Because at summary judgment this Court must credit plaintiffs' version of the facts, this Court cannot conclude that the reporters were trespassers.

The next question is whether defendants were free to expel plaintiffs because the First Amendment does not apply to private property. Def. Br. at 29. This argument must be rejected also. It is clear that First Amendment rights apply on private property. See *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978) (holding that a search of a private newspaper's offices had to be carried out with "scrupulous exactitude" because of the First Amendment interests at stake). The cases defendants cite are not to the contrary, because they all involve speakers foisting themselves on unwilling private property owners. *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972) (no First Amendment right to distribute handbills at private mall); *Strahan v. Frazier*, 62 Fed. Appx. 359, 360 (1st Cir. 2003) (unpublished) (holding that "The First Amendment does not prevent a property owner from restricting the exercise of free speech on private property."); *Cape Cod Nursing Home Council v. Rambling Rose Rest Home*, 667 F.2d 238, 243 (1st Cir. 1981) (same); *Demarest v. Athol/Orange Cmty. Television*, 188 F. Supp. 2d 82, 94 (D. Mass 2002) (holding that the reporter "Plaintiffs, for example, could not have invaded private homes, no matter how newsworthy the subject.") (emphasis added).

Defendants' reliance on *Wilson v. Layne*, 526 U.S. 603 (1999), is particularly misplaced. *Wilson* bolsters plaintiffs' case. In *Wilson*, the Court held that the Fourth Amendment rights of homeowners were violated when police brought members of the media into a private home to observe and record the execution of an arrest warrant. *Id.* at 605-06. Far from stating that the media had no First Amendment right to gather the news in private spaces, the Court in *Wilson* extolled the important role of the press, emphasizing the "importance of the First Amendment in protecting press freedom from abridgment by the government." *Id.* at 613. It was just that, in the context of *Wilson*, the freedom of the press was outweighed by the homeowners' Fourth Amendment interest in not having the media enter their private residence unbidden. *Id.* Here, unlike in *Wilson*, no Fourth Amendment privacy interest is implicated. When the plaintiffs stepped onto condominium complex grounds, they entered an area that, although private property, was an outdoor common area where their presence did not violate the privacy of any of the residents. They never enter the condominium building let alone an apartment.

That leaves the question of whether the FBI agents had the right to remove plaintiffs because they were unruly. Again, as described above, there is a material dispute regarding whether plaintiffs were unruly, with plaintiffs' evidence

demonstrating that they were peaceful and compliant. This Court must accept plaintiffs' version for purposes of summary judgment.

Defendants also argue that the cases plaintiffs rely on are too "general" to support their claim. Def. Br. at 26. Plaintiffs do not need to point to a factually identical case in order to establish a First Amendment violation. In fact, courts regularly rely on cases arising from disparate factual circumstances, recognizing that cases without identical facts can nonetheless articulate controlling legal principles. *Rankin v. DeSarno*, 89 F.3d 1123, 1130 (3d Cir. 1996) (holding that "the principles of [*GMAC v. Jones*, 999 F.2d 63 (3d Cir.1993)] must be given effect, even if it is not factually identical."); *KLK, Inc. v. U.S. Dep't of Interior*, 35 F.3d 454, 456 n. 3 (9th Cir. 1994) ("KLK's argument that [*Lehman v. Nakshian*, 453 U.S. 156 (1981)] has no relevance to this case is incorrect. Lehman's holding is not limited to cases under the Age Discrimination in Employment Act . . . or factually identical scenarios. Lehman discussed the right to a jury trial in a broad, general sense, and its analysis has been applied in a wide variety of contexts by courts determining whether a particular waiver of sovereign immunity provided a jury trial right."); *Alvarado Guevara v. I.N.S.*, 902 F.2d 394, 396 (5th Cir. 1990) ("While both Plaintiffs and Defendants admit that there are no cases dealing directly with factually identical circumstances, several cases have held that prison

inmates, who are similar to detainees in that they have been incarcerated and are under the direct supervision and control of a governmental entity should not be protected under the FLSA.").[2]

In fact, even where plaintiffs face a higher evidentiary burden, and the relevant legal question is whether a legal principle is clearly established, the Supreme Court has held that it is not necessary to cite to an identical case. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (rejecting the argument that government officials are immune "unless the very action in question has previously been held unlawful.").

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[2]*See also Watsy v. Ames*, 842 F.2d 334, * 3 (6th Cir. 1988) (unpublished opinion) ("Although the situation in this case is not factually identical, the manner in which the Court dealt with the eighth amendment claim based on the alleged use of excessive force provides the framework for evaluating other claims of a similar nature."); *Public Serv. Co. of New Mexico v. F.E.R.C.*, 832 F.2d 1201, 1225 (10th Cir. 1987) ("The facts in that case helped the court, as they should, decide the proper construction of the statutory term, but the interpretation was not thereby limited to cases factually identical to *Electrical District No. 1*. The legal issue there was phrased identically to the issue we must decide here: '[T]he question it presents is the lawfulness of FERC's decision to make a rate increase effective as of the date of its order directing a compliance filing, rather than upon the date of acceptance of the compliance filing.'"); *Westinghouse Elec. Corp. v. CX Processing Labs. Inc.*, 523 F.2d 668, 675 (9th Cir. 1975) ("Although these decisions are not factually identical to the present case, the analysis they provide is applicable nonetheless."); *McCord v. Granger*, 201 F.2d 103, 107 (3d Cir. 1953) ("In our opinion the *Horsting* and *Manton* cases are highly persuasive although not factually identical with the instant case.")

If plaintiffs' version of the facts is accepted, then one of the central First Amendment questions in this case boils down to whether law enforcement agents can remove members of the press from a place where they are lawfully located, in the absence of a compelling law enforcement or safety reason.[3] The answer is that they cannot. This case is no different from the numerous other cases, set out at length in plaintiffs' opening brief, in which courts have held that plaintiffs cannot be excluded from places where they are lawfully entitled to be, absent interference with law enforcement or a compelling safety reason. *See, e.g., Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (reversing a district court's grant of summary judgment where "a genuine issue of material fact does exist regarding whether Fordyce was assaulted and battered by a Seattle police officer in an attempt to prevent or dissuade him from exercising his First Amendment right to film matters of public interest."); *Daily Herald Co. v. Munro*, 838 F.2d 380, 384 (9th Cir. 1988) (striking down a state law that prohibited exit polling within 300 feet of polling place and recognizing that "the First Amendment protects the media's right to gather news"); *Schnell v. City of Chicago*, 407 F.2d 1084, 1085 (7th Cir. 1969) (holding that a class of news photographers who covered the 1968

[3] No matter how the court resolves the private property issue it does not dispose of all of plaintiffs' First Amendment claims. It is undisputed that some of defendants' wrongful acts, such as pointing a gun at a plaintiff in an intimidating manner took place outside the condominium complex. App. 93-94.

Democratic National Convention and attendant demonstrations in Chicago stated a claim against the police for "interfering with plaintiffs' constitutional right to gather and report news, and to photograph news events") (overruled on other grounds by *City of Kenosha v. Bruno*, 412 U.S. 507 (1973)).

Defendants, like the district court, attempt to distinguish plaintiffs' case from these other cases by portraying the FBI's interference as minimal. Def. Br. at 28 ("Plaintiffs have not cited any case where a First Amendment violation was found based on law enforcement agents pushing away a microphone or temporarily seeking to obstruct a recording by placing a hand in front of a camera."). This can only be accomplished by ignoring serious allegations of interference by plaintiffs. Plaintiffs also alleged that FBI agents pointed a gun at a plaintiff in an intimidating manner, and that they punched and kicked plaintiffs and sprayed them with pepper spray. App. 93-94. There is no basis for discounting this evidence.

Other than their factually disputed claim that the crowd was unruly, defendants have not presented any argument, let alone any evidence, that plaintiffs were interfering with law enforcement or that defendants had a compelling safety reason for punching, kicking, or spraying plaintiffs in the face with pepper spray. Indeed, the evidence submitted by plaintiffs shows that there was no such

justification. Under the case law, plaintiffs have therefore stated a viable First Amendment claim. The district court erred in concluding that plaintiffs did not state such a claim.

CONCLUSION

For the reasons stated above, defendants are not entitled to summary judgment on plaintiffs' First and Fourth Amendment claims. The district court's decision should be reversed.

DATED: January 25, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the twenty-fifth day of January 2008, I served the foregoing REPLY BRIEF OF APPELLANTS by causing the required number of copies of the brief to be delivered to the Court by Federal Express next-day delivery and served upon the following counsel by Federal Express next-day delivery:

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