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U.S. Court of Appeals for the D.C. Circuit

ATTORNEYS FEES

PREVAILING PARTY

Fee application was improperly denied in voting rights case where court imposed improper standards on applicants.

COMMISSIONERS COURT OF MEDINA COUNTY, TEXAS, ET AL. v. UNITED STATES, ET AL., U.S.App.D.C. No. 82-2416, October 28, 1983. *Order vacated and case remanded per curiam* (Mikva, Ginsburg and Bazelon, JJ. concur). *Norman J. Chachkin* with *William L. Robinson* and *Jose Garza* for appellants. *Keith Rosenberg* for appellees Commissioners Court of Medina County, Texas, et al. Trial Court—Pratt, J.

PER CURIAM: Appellants seek review of the district court's second peremptory rejection of their application for attorneys' fees filed pursuant to 42 U.S.C. §1973*l*(e) (1976) (authorizing fees to prevailing parties in litigation to enforce the voting guarantees of the Fourteenth or Fifteenth Amendments). We vacated the district court's prior order denying the fee application because the district judge had given "determinative weight to an improper factor." *Commissioners Court v. United States,* 683 F.2d 435, 437 (D.C. Cir. 1982).

The same "improper factor" infects the district court's disposition on remand. Moreover, that disposition displays other basic errors. We therefore vacate the district court's order again and remand once more, this time with an explicit instruction to hold a hearing on the application for fees. In a motion for a new trial or to alter or amend the judgment, filed in the district court on October 4, 1982, appellants indicated the evidentiary showing they would make if afforded the opportunity to do so. We further instruct the district court that, if appellants make the proffered showing, they will be entitled to an award of reasonable attorneys' fees.

I.

Our prior opinion sets out the background of this case, 683 F.2d at 437-39, which we summarize briefly here. Appellants are Mexican-American citizens residing and registered to vote in Medina County, Texas. They were defendant-intervenors in a declaratory judgment action brought against the United States by the Commissioners Court of Medina County (County), pursuant to section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973c (1976); in that action, the County sought court approval of its 1978 and 1979 redistricting plans. During the pendency of the litigation, the County adopted a new redistricting plan (the 1980 plan) which the Attorney General precleared. Thereafter, the district court dismissed the County's action as moot, but permitted appellants to file an application for attorneys' fees.

Without holding a hearing or awaiting the completion of discovery appellants had initiated, the district court denied the fee application. "Defendant-Intervenors did not prevail," the

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U.S. Court of Appeals for the D.C. Circuit

CONSTITUTIONAL LAW

NATIONAL SECURITY SURVEILLANCE

Attorney General who authorized warrantless national security surveillances is entitled to qualified immunity in civil suit for damages because action did not violate clearly established law at the time.

ZWEIBON, ET AL. v. MITCHELL, ET AL., U.S.App.D.C. No. 82-1626, October 21, 1983. *Affirmed* per MacKinnon, J. (Edwards, J. concurs; Swygert, J. (7th Cir.) dissents). *Nathan Lewin* with *Jamie S. Gorelick* for appellants. *Larry Lee Gregg* with *Stanley S. Harris* and *Barbara L. Herwig* for appellees. Trial Court—Pratt, J.

MacKINNON, J.: This is our fourth foray into this protracted litigation. Past history notwithstanding, this decision should dispose of the matter.

Appellants, members of the Jewish Defense League (JDL), brought this action in 1971 against John N. Mitchell, who as Attorney General authorized warrantless electronic surveillance of the JDL during 1970 and 1971. Appellants now challenge the district court's order, entered after our third remand, which dismissed their complaint pursuant to Fed.R.Civ.P. 37(b) for their refusal to comply with deposition notices. Because we find that Mitchell is entitled to qualified immunity under the Supreme Court's recent decision in *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727 (1982), we affirm the decision of the district court without reaching the question whether dismissal was an appropriate sanction.

* * *

Our task after *Harlow,* therefore, is to measure Mitchell's conduct by reference to clearly established law at the time these wiretaps were authorized. The precise contours of what constitutes "clearly established law" for immunity purposes are difficult to delimit, and the Supreme Court has offered little guidance in this regard. *See id.* at 2738 n.32 ("As in *Procunier v. Navarette,* 434 U.S. 555, 565 (1978), we need not define here the circumstances under which 'the state of the law' should be 'evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the Local District Court.' "). We too are spared that Herculean labor, since we conclude that the illegality of Mitchell's conduct was not "clearly established" by any reasonable definition of the phrase.

As noted above, the Supreme Court issued no pronouncement on the legality of warrantless domestic national security surveillance until a year *after* the JDL wiretaps had been terminated. Even then, in declaring such searches illegal, the Court declined to articulate a crisp distinction between "foreign" and "domestic" threats to national security. *See Keith, supra,* 407 U.S. at 309 n.8. It is not surprising, therefore, that the district court should have reached one conclusion as to the legality of the JDL taps and that this court should have expended six separate opinions and over one hundred

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D.C. Court of Appeals

EVIDENCE

FALSE ARREST

Evidence of disposition of criminal charges improperly admitted in false arrest case was harmless error.

DISTRICT OF COLUMBIA, ET AL. v. COLSTON, D.C.App. No. 81-993, October 24, 1983. *Affirmed* per Newman, C.J. (Kern, J. and Henry Greene, J. concur). *William J. Earl* with *Judith W. Rogers* and *Charles L. Reischel* for appellants. *J. Gordon Forester, Jr.* for appellee. Trial Court—McIntyre, J.

NEWMAN, C.J.: The District of Columbia and Metropolitan Police Officer Charles Aldridge (Aldridge) appeal from a judgment against them on a jury verdict in appellee Johnny M. Colston's (appellee or Colston) action for false arrest and assault and battery. Appellee alleged that during the Farmers' March on Washington in February 1979, Aldridge improperly fired a chemical agent into the cab of Colston's tractor, causing permanent loss of the vision in his left eye. He also claimed that he was then arrested and imprisoned without probable cause on charges of assault on a police officer and of reckless driving. After a four day trial, the jury returned a verdict in favor of appellee, awarding him $400,000.

Following the verdict, the District of Columbia and Aldridge moved for a new trial. They alleged that the trail court erred in three particulars: (1) it failed to declare a mistrial after Colston's opening statement, in which the jury was advised of the disposition of the criminal charges on which Colston was allegedly falsely arrested; (2) it permitted Colston to present evidence of the disposition of those charges during his case; and (3) it permitted a closing argument by Colston's counsel allegedly replete with inflammatory and prejudicial comments regarding the injury to Colston's eye. The trial court denied the motion for a new trial. This appeal followed, raising the same issues as those presented in the new trial motion. We affirm.

On February 5, 1979, a sixteen-mile long procession of farm vehicles arrived in Washington, D.C. The farmers in this procession had come to present their grievances to their elected representatives in Congress. The tractorcade, led by District of Columbia police officers, proceeded east on Independence Avenue toward the Capitol. As it crossed Seventh Street, S.W. through the morning rush-hour traffic, the caravan completely blocked the street and prevented any further movement of traffic. In response, police officers directed the tractors to

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