

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Jennings v. Jones

499 F.3d 2 (1st Cir. 2007) · Decided August 17, 2007

SUMMARY

The First Circuit reviewed a post-verdict judgment as a matter of law granting a police officer qualified immunity in an excessive-force action under 42 U.S.C. § 1983. The court held that, viewing the evidence favorably to the jury’s verdict, the officer violated Jennings’s clearly established Fourth Amendment right by increasing pressure on his previously injured ankle after he had stopped resisting, causing a fracture. The court vacated the judgment, ordered reinstatement of the jury award, and remanded for the district court to rule on the officer’s motions for a new trial and remittitur.

CASE DETAILS

COURT	United States Court of Appeals for the First Circuit
WRITING FOR THE COURT	Lipez, Circuit Judge; Lipez; Lynch; Torruella
JURISDICTION	Federal
DECIDED	August 17, 2007
DISPOSITION	vacated
PROCEDURAL POSTURE	Jennings appealed the district court's post-verdict grant of judgment as a matter of law to Officer Jones on Jennings's 42 U.S.C. § 1983 Fourth Amendment excessive-force claim. The jury had found for Jennings and awarded \$301,100 in compensatory damages. The appeal also concerned the district court's failure to rule conditionally on Jones's alternative motions for a new trial and remittitur.
STANDARD OF REVIEW	De novo review of the district court's qualified-immunity determination and judgment as a matter of law. When qualified immunity is asserted after a jury verdict, the evidence is construed in the light most favorable to the party who prevailed at trial, with deference to the jury's discernible resolution of disputed factual issues.
PRECEDENTIAL VALUE	Published and precedential First Circuit opinion.
PARTIES	Adam Jennings v. Kenneth Jones

TOPICS

- qualified immunity
- section 1983
- police misconduct
- civil rights
- appellate procedure

PRACTICE AREAS

civil rights

constitutional torts

police misconduct

appellate procedure

QUESTIONS PRESENTED

1. Whether the evidence, viewed in the light most favorable to the jury verdict, supported the jury's finding that Jones used excessive force in violation of the Fourth Amendment.
2. Whether Jones was entitled to qualified immunity because the constitutional right was not clearly established or because a reasonable officer would have believed his conduct was lawful.
3. Whether the district court erred by failing to rule conditionally on Jones's alternative motions for a new trial and remittitur under Federal Rule of Civil Procedure 50(c)(1).

HOLDINGS

1. The evidence, construed in the light most favorable to the jury verdict, was legally sufficient for a reasonable jury to find that Jones used excessive force by increasing pressure on Jennings's ankle after Jennings had stopped resisting and stated that the force was hurting his previously injured ankle.
2. At the time of the incident, it was clearly established that an officer could not increase the force used against an arrestee who had ceased resisting and warned that the existing force was injuring a previously injured ankle.
3. An objectively reasonable officer in Jones's circumstances would have understood that increasing the force on Jennings's ankle after Jennings stopped resisting and reported pain violated the Fourth Amendment.
4. The district court erred by treating Jones's motions for a new trial and remittitur as moot; it was required to rule conditionally on those motions under Federal Rule of Civil Procedure 50(c)(1).

KEY QUOTATIONS

“To establish a Fourth Amendment violation based on excessive force, a plaintiff must show that the defendant officer employed force that was unreasonable under the circumstances.” (11)

“Although Officer Delaney did not offer expert testimony that no reasonable officer would have acted as Jones did under the circumstances, he did offer expert testimony that gave the jury a useful framework for thinking about the excessive force issue.” (16)

“When an individual has been forcibly restrained by several officers, has ceased resisting arrest for several seconds, and has advised the officers that the force they are already using is hurting a previously injured ankle, we cannot think of any basis for increasing the force used to such a degree that a broken ankle results.” (18)

FACTUAL BACKGROUND

Jennings, a member of the Narragansett Indian Tribe, worked at a tribal smoke shop on tribal land in Charlestown, Rhode Island, during a dispute between the tribe and Rhode Island over tax-free cigarette sales. State police executing a warrant arrested Jennings for disorderly conduct after he protested their presence and

resisted handcuffing. During the struggle, Officer Kenneth Jones used an ankle turn control technique; viewing the evidence in the light most favorable to the verdict, Jones increased the pressure after Jennings had stopped resisting and warned that the force was hurting a previously injured ankle, breaking the ankle.

PROCEDURAL HISTORY

After a jury found for Jennings on his excessive-force and state-law battery claims against Jones, the district court granted Jones judgment as a matter of law under Federal Rule of Civil Procedure 50(b), holding that no constitutional violation occurred and, alternatively, that Jones was entitled to qualified immunity. The court treated Jones's motions for a new trial and remittitur as moot. The First Circuit held that the district court improperly viewed the evidence and erred in granting qualified immunity, vacated the judgment, reinstated the jury award, and remanded for rulings on the alternative motions.

DISPOSITION

vacated

REMAND INSTRUCTIONS

Vacate the district court's grant of judgment as a matter of law based on qualified immunity, reinstate the jury verdict and \$301,100 award, and remand for the district court to rule on Jones's motions for a new trial and remittitur. The First Circuit did not retain jurisdiction.

CASES CITED

- Cruz-Vargas v. R.J. Reynolds Tobacco Co., 348 F.3d 271, 275 (1st Cir. 2003)
- Iacobucci v. Boulter, 193 F.3d 14, 23 (1st Cir. 1999)
- Borges Colón v. Román-Abreu, 438 F.3d 1, 18-19 (1st Cir. 2006)
- Whitfield v. Meléndez-Rivera, 431 F.3d 1, 6, 8 (1st Cir. 2005)
- Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 432 (1996)
- Kelley v. LaForce, 288 F.3d 1, 7 n.2 (1st Cir. 2002)
- Prokey v. Watkins, 942 F.2d 67, 72 (1st Cir. 1991)
- Settlegoode v. Portland Public Schools, 371 F.3d 503, 503 (9th Cir. 2004)
- Tamez v. City of San Marcos, 118 F.3d 1085, 1091 (5th Cir. 1997)
- Henderson v. DeRobertis, 940 F.2d 1055, 1057 (7th Cir. 1991)
- Saucier v. Katz, 533 U.S. 194, 201-05 (2001)
- Starlight Sugar, Inc. v. Soto, 253 F.3d 137, 141 (1st Cir. 2001)
- Wilson v. City of Boston, 421 F.3d 45, 52, 54 (1st Cir. 2005)
- Graham v. Connor, 490 U.S. 386, 396-97 (1989)
- Lee v. Ferraro, 284 F.3d 1188, 1200 (11th Cir. 2002)
- Isom v. Town of Warren, 360 F.3d 7, 8, 11-12 (1st Cir. 2004)
- Kopf v. Skyrn, 993 F.2d 374, 379 (4th Cir. 1993)

- *Adewale v. Whalen*, 21 F. Supp. 2d 1006, 1014 (D. Minn. 1998)
- *Riverdale Mills Corp. v. Pimpare*, 392 F.3d 55, 61, 65 (1st Cir. 2004)
- *Suboh v. District Attorney's Office of Suffolk*, 298 F.3d 81, 93 (1st Cir. 2002)
- *United States v. Lanier*, 520 U.S. 259, 271 (1997)
- *Smith v. Mattox*, 127 F.3d 1416, 1418-20 (11th Cir. 1997)
- *Rice v. Burks*, 999 F.2d 1172, 1174 (7th Cir. 1993)
- *Gray ex rel. Alexander v. Bostic*, 458 F.3d 1295, 1306 (11th Cir. 2006)
- *Casteel v. Pieschek*, 3 F.3d 1050, 1053 (7th Cir. 1993)
- *Anderson v. Creighton*, 483 U.S. 635, 643-44 (1987)
- *Cox v. Hainey*, 391 F.3d 25 (1st Cir. 2004)
- *Brady v. Dill*, 187 F.3d 104 (1st Cir. 1999)
- *Wilson v. Layne*, 526 U.S. 603, 613, 615 (1999)
- *Iacurci v. Lummus Co.*, 387 U.S. 86, 86-88 (1967)
- *Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16 (1st Cir. 2006) (en banc)

OPINION

LIPEZ, J.

LIPEZ, Circuit Judge.

Appellant Adam Jennings, a member of the Narragansett Indian Tribe, worked at a “smoke shop” operated by the tribe and located on Indian tribal land in Charles-town, Rhode Island. The smoke shop sold an array of cigarettes to members of the tribe and the general public. During a search of the smoke shop by the Rhode Island State Police, Jennings was arrested for disorderly conduct. Jennings initially resisted the arrest, requiring the use of force by state police officials to subdue him. As a result of that confrontation, *4appellee Kenneth Jones used an “ankle turn control technique” which broke Jennings’ ankle. Jennings brought suit under 42 U.S.C. § 1983 against Jones and other officers, claiming that they had violated his Fourth Amendment rights by using excessive force to restrain him. Jennings also brought a claim under state law for battery.

Although a jury found in favor of most of the defendants, it ruled for Jennings on his excessive force and battery claims against Jones and awarded compensatory damages of \$301,100. The district court then granted Jones’ post-verdict motion for judgment as a matter of law, ruling for Jones on all three prongs of the qualified immunity inquiry. It first held that there was no constitutional violation because there was no evidence from which a reasonable jury could have concluded that the force used to subdue Jennings was excessive. It then concluded that, even if there had been a constitutional violation, Jones was entitled to qualified immunity because the relevant law was not clearly established and a reasonable officer would not have believed that the force was excessive and thus in violation of the Fourth Amendment. The court also granted judgment as a matter of law for Jones on the battery claim. Along with his motion for judgment as

a matter of law, Jones filed motions for a new trial and a remittitur. In contravention of Federal Rule of Civil Procedure 50, the district court did not rule on these motions.

On appeal, Jennings challenges the court's determinations on his Fourth Amendment claim. After careful review, we conclude that the court erred in granting qualified immunity to Jones. First, viewing the evidence in the light most favorable to the jury verdict, we conclude that the record establishes that Jones violated Jennings' constitutional right to be free of excessive force. Second, we find that this right was clearly established at the time of Jennings' injury. Third, we conclude that a reasonable officer in Jones' position would have believed that his actions violated Jennings' constitutional right. Consequently, we vacate the judgment of the district court and order reinstatement of the jury award. However, because the district court failed to rule on Jones' motions for a new trial and a remittitur in accordance with Federal Rule of Civil Procedure 50, we remand to that court for a ruling on those motions.

I.

A. Factual Background

In reviewing a grant of judgment as a matter of law following a jury verdict, "[w]e examine the record as a whole, reading the evidence in the light most favorable to the jury verdict." *Cruz-Vargas v. R.J. Reynolds Tobacco Co.*, 348 F.3d 271, 275 (1st Cir.2003).

On July 14, 2003, Jennings was at work in a trailer referred to as the "smoke shop" owned and operated by the Narragansett tribe and located on tribal land in Charlestown, Rhode Island. The tribe and the State of Rhode Island were engaged in an ongoing dispute about whether the tribe could sell cigarettes tax-free.¹ Pursuant to this dispute, the Rhode Island State Police had obtained a warrant to seize the cigarettes at the smoke shop, and several plain clothes officers were stationed inside the shop. After uniformed officers arrived in marked cars in the parking lot, the undercover officers inside the shop instructed Jennings to take a seat behind the sales counter. Jennings initially grabbed onto the counter, but then complied and seated himself behind the counter. He also complied when the state police asked him to move to a different seat.

Jennings testified that he was "upset" during these events. He complained loudly that the Rhode Island police had no right to be on his property, and he expressed concern over their treatment of his mother, who was also in the shop. He repeatedly used profanity in his comments. Eventually, Officer Ken Bell asked Jennings to leave the shop without informing him that he was under arrest for disorderly conduct. A video taken by the state police shows that as Jennings was leaving the shop, an officer issued an order to handcuff him, and Jennings responded, "I'm not getting arrested." The video also shows that Jennings resisted handcuffing and that several officers subsequently wrestled him to the floor. Jones was one of the officers involved in subduing Jennings. He used an ankle restraint technique called the "ankle turn control technique" to control Jennings' leg.

During this conflict, the officers repeatedly instructed Jennings to stop resisting and to show them both of his hands because they were concerned that he might have a weapon. Jennings was

initially unable to produce his left hand for handcuffing because it was trapped underneath his body. Officer Hill, one of the officers who was attempting to subdue Jennings, testified that he pulled Jennings' left arm out from under his body. The video shows that Hill then got up and walked away.

Jennings testified that he had ceased resisting before his arm was pulled out from underneath his body. About sixteen months prior to the smoke shop confrontation, Jennings had broken the ankle that Jones was restraining and had surgery performed on it. The officer's use of the "ankle turn control technique" caused Jennings considerable pain. Jennings informed Jones that the force Jones was using was hurting his previously injured ankle. Jones then increased the amount of force he was using and broke Jennings' ankle.

On the video, several seconds elapse from the time that Hill got up and left to the time that Jennings yelled in pain as his ankle was broken.² Within seconds after Jennings' injury, the officers brought Jennings to his feet, already handcuffed, and escorted him outside the smoke shop.

B. Procedural History

Jennings brought this action against Jones and several other police officers seeking damages under 42 U.S.C. § 1983 for excessive use of force and for battery under state law.³ The officers moved for judgment as a matter of law after the close of Jennings' evidence, raising the qualified immunity defense for the first time.⁴ The court denied the motion with respect to Jennings' excessive force claim against Jones,⁵ noting:

There was testimony as to Trooper Jones that he continued twisting the ankle of Mr. Jennings even after Mr. Jennings had been subdued and even after Mr. Jennings says that he told him that he'd had a previous injury to the ankle and he was breaking the ankle. So as to Detective Jones, there's enough evidence from which a jury at this point could conclude that the force was excessive.

The court did not explicitly address the issue of qualified immunity. After the close of all the evidence, defendants renewed their motion for judgment as a matter of law, but did not specifically renew their qualified immunity argument. The court again denied the motion with respect to Jennings' excessive force claim against Jones,⁶ explaining:

[W]e have very different versions as to what happened. According to Mr. Jennings, Trooper Jones grabbed his ankle, he wasn't kicking, he wasn't doing anything that would warrant it. Trooper Jones grabbed his ankle, twisted his ankle, he told him that he had had previous surgery on the ankle, and that the ankle, he was in the process of breaking his ankle. And according to Mr. Jennings, Trooper Jones actually increased the pressure on the ankle and broke his ankle.... If the jury accepts Mr. Jennings' version, it might very well find that Trooper Jones used excessive force. Again, the court did not explicitly address the issue of qualified immunity.

The case was submitted to the jury, which awarded Jennings \$301,100 in compensatory damages for his claims against Jones. Following the verdict, Jones moved for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(b) on the ground that he was shielded from liability

by the doctrine of qualified immunity. Jones also moved for a new trial, or, in the alternative, to amend the judgment by granting a remittitur.

The district court granted Jones' motion for judgment as a matter of law, concluding that it had erred in submitting the case to the jury to determine whether excessive force was used and ruling for Jones on all three prongs of the qualified immunity inquiry. It first held that there was no constitutional violation because there was no evidence from which a reasonable jury could have concluded that the force used to subdue Jennings was excessive. It then concluded that, even if there had been a constitutional violation, Jones was entitled to qualified immunity because the relevant law was not clearly established and a reasonable officer would not have believed that the force was excessive and thus in violation of the Fourth Amendment. In granting judgment as a matter of law, the court also held that the remaining motions for a new trial and for a remittitur had become moot.⁷ This appeal ensued.⁸

II.

The issue before us is whether the district court properly found appellee Jones entitled to qualified immunity from damages. When a defense of qualified immunity is pressed after a jury verdict, we have determined that "the evidence must be construed in the light most hospitable to the party that prevailed at trial." *Iacobucci v. Boulter*, 193 F.3d 14, 23 (1st Cir.1999); see also *Borges Colón v. Román-Abreu*, 438 F.3d 1, 18 (1st Cir.2006) (citing *Iacobucci*). In such an analysis, "deference should be accorded to the jury's discernible resolution of disputed factual issues." *Iacobucci*, 193 F.3d at 23. Thus, where the jury has issued a general verdict, as it did here, we "view[] the facts in the light most favorable to the verdict." *Whitfield v. Meléndez-Rivera*, 431 F.3d at 8. This view of the facts persists throughout the three prongs of the qualified immunity analysis. See *Borges Colón*, 438 F.3d at 19 (rejecting, on the third prong of the qualified immunity analysis, a factual scenario proposed by defendants on the ground that "a jury easily could have found that this was not so").

In this case, we must take this approach with respect to a critical factual dispute: whether Jones increased the force he applied after Jennings already had ceased resisting for several seconds. Jennings' claim of excessive force does not rest on the allegation that Jones merely used the ankle turn control technique, but rather that Jones increased the amount of force he applied after Jennings had stopped resisting and stated that Jones was hurting his previously injured ankle. Indeed, this theme of increased force by Jones without justification was the core of Jennings' case. Jennings' opening statement immediately described this version of events to the jury. His attorney stated: "[O]ther witnesses will say that [Jennings] was warning [Jones] that he was breaking his leg. The evidence will show that... the way [Jones] responded to that information was to twist harder, even though there was no reason to be twisting at all." At trial, three witnesses testified about Jones' restraint of Jennings. Jennings himself testified: "It was almost, not just incremental... I'm telling the guy, look, you're going to break my ankle and so forth, and he twisted it more." Similarly, Domingo Monroe, who was seated across the room when the struggle occurred,

testified: “Adam Jennings said, you’re hurting my ankle, it was already injured at one point in time... and then the officer said, well... if you wouldn’t resist, then your ankle... wouldn’t be hurting, and then as he said that, he cranked down harder on the ankle.” Finally, Daniel Piccoli testified that he observed the struggle through the open door of the smoke shop:

*8Q: Mr. Piccoli, could you describe the movements, if any, of the person who was on the floor?

A: There weren’t any.

Q: Did there come a point in time when you heard the person on the floor say something?

A: Yes.

Q: What did you hear him say?

A: He said something in regard to, “let go, you’re going to break my ankle.”

Q: And what, if anything, did the officer who was holding onto his ankle do?

A: Just twisted more.

Jennings’ attorney emphasized this increased use of force in his closing argument:

Now, Adam Jennings himself has testified that he was on the floor, he was saying to somebody... you’re breaking my ankle or I just had surgery. And you heard testimony that the immediate response was [] a greater application of force than there already had been, you heard that from Dan Piccoli.

Near the end of the closing argument, Jennings’ attorney returned to this theme:

[Jones] never increased his force, he said, never decreased it. Now you tell me, if you’ve got constant force on somebody’s ankle and their foot, why at some point does it break?... [D]id Trooper Jones who had Adam Jennings totally under control, lose it and just decide that because this guy was still complaining, that he was going to teach him a little bit of a lesson and put a little bit more pressure on.

As highlighted by the arguments of counsel,⁹ the consistent testimony from Jennings and two eye-witnesses would allow a reasonable jury to conclude that Jones increased the force he used to restrain Jennings after Jennings had already ceased resisting. This version of events correctly construes the facts “in the light most favorable to the verdict.” *Whitfield*, 431 F.3d at 8.

The district court failed to view the facts in this light. In its written decision granting judgment as a matter of law to Jones on the basis of qualified immunity, the district court stated that the testimony of the police officers was more credible than the contrary testimony of Jennings, Piccoli and Monroe. Therefore, it did not believe that “Jones continued to twist Jennings’ ankle after Jennings had stopped resisting and was under control.” (Emphasis in original.) However, the district court also correctly noted that it could not grant judgment as a matter of law on that basis. See 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2524 (2d ed.1995)(explaining that, in granting judgment as a matter of law, a court “is not free to weigh the parties’ evidence or to pass on the credibility of witnesses or to substitute its judgment of the facts for that of the jury.”)(internal footnotes omitted). Instead, the court granted judgment as a matter of law on the basis of qualified immunity, finding that Jennings had not presented evidence from

which the jury could conclude that the force used to subdue Jennings was excessive, and that, in any case, Jones was entitled to qualified immunity because the *9relevant law was not clearly established and a reasonable officer would not have believed that the force was excessive and thus in violation of the Fourth Amendment.

We reserve discussion of the court's ultimate ground for granting judgment as a matter of law for our qualified immunity analysis in the next section of this opinion. Here, we wish only to emphasize an important inconsistency in the district court's analysis of the evidence. The court acknowledged that it could not supplant the jury's view of the facts with its own. Assessing credibility was the jury's role, and, as the court also acknowledged, the evidence permitted a reasonable finding by the jury that Jones increased the force he used after Jennings had ceased resisting. Yet the district court's qualified immunity analysis incorporated its skepticism about the jury's fact-finding on the critical issue of whether Jones increased his use of force. At one point, the court stated in its decision that "the jury determined that Jones' use of the ankle turn control technique amounted to excessive force." (Emphasis added.) Later, it referred to Jones "maintaining" the ankle hold after Jennings ceased resisting. Given the witness testimony discussed above, the district court's characterization is incomplete. Jennings and his two witnesses testified that Jones increased his force after Jennings ceased resisting, and we adopt this view of the evidence in accordance with the principle that we take facts in the light most favorable to the verdict.

The dissent intimates that the jury's fact-finding role may be different in a case involving qualified immunity, noting our prior statement that "the Supreme Court has not clearly indicated whether the judge may act as fact-finder when there is a factual dispute underlying the qualified immunity defense or whether this function must be fulfilled by a jury." *Kelley v. LaForce*, 288 F.3d 1, 7 n. 2 (1st Cir.2002). The dissent also claims that, by taking the facts in the light most favorable to the jury verdict, we engage in "a bit of legal fiction." It argues that we have no way of knowing what facts the jury found, and lists the various factual scenarios that the jury might have found in a lengthy footnote.¹⁰ Finally, it suggests that the jury may have reached a compromise verdict.¹¹

*10The dissent's speculations ignore the fundamental principle that, in civil actions, our federal judicial system "distributes trial functions between judge and jury and, under the influence — if not the command— of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury." *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 432, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996) (citation omitted). Indeed, we acknowledged this principle in *Kelley* by stating that "when facts are in dispute, 'we doubt the Supreme Court intended this dispute to be resolved from the bench by fiat.' " *Kelley*, 288 F.3d at 7 n. 2 (quoting *Prokey v. Watkins*, 942 F.2d 67, 72 (1st Cir.1991)). Consistent with this principle, other courts have taken the facts in the light most favorable to the jury verdict in reviewing a district court's grant of judgment as a matter of law in cases involving qualified immunity. See, e.g., *Settlegoode v. Portland Pub. Schs.*, 371 F.3d 503, 503 (9th Cir.2004) ("Many facts were hotly disputed at trial. We state them here consistent with

the verdict.”); *Tamez v. City of San Marcos*, 118 F.3d 1085, 1091 (5th Cir.1997) (“[W]e consider all of the evidence in the light most favorable to the nonmoving party.”); *Henderson v. DeRobertis*, 940 F.2d 1055, 1057 (7th Cir.1991)(“We must view all the evidence and inferences in the light most favorable to [plaintiffs], who prevailed with the jury; any conflicts in the evidence must be resolved in favor of those [plaintiffs] and every permissible inference must be drawn in their favor.”).

In this case, the only view of the evidence consistent with the principle that we take the facts in the light most favorable to the jury verdict is that Jones increased the force he used to restrain Jennings after Jennings had ceased to resist and after Jennings had announced his prior ankle injury. That increased use of force broke Jennings’ ankle. Our acceptance of these facts is no legal fiction. It is an acknowledgment of the deference that we must give to juries in the performance of their fact-finding role.

With this controlling legal principle in mind, and the view of the evidence required by that principle, we turn to the legal question of Jones’ entitlement to qualified immunity. Our review is *de novo*. *Whitfield*, 431 F.3d at 6.

III.

The Supreme Court explained the process for determining qualified immunity in *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). *Saucier* held that a court first must determine whether “the facts alleged show the officer’s conduct violated a constitutional right.” *Id.* at 201, 121 S.Ct. 2151. Second, the court must determine whether the right was “clearly established” so that “it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.” *Id.* at 201-02, 121 S.Ct. 2151. The Supreme Court emphasized that the constitutional question must be decided before determining whether the right was clearly established to facilitate the elaboration of the law. See *id.* at 201, 121 S.Ct. 2151.

We have typically applied *Saucier* using a three-part test in which we inquire:

(1) whether the claimant has alleged the deprivation of an actual constitutional right; (2) whether the right was clearly established at the time of the alleged action or inaction; and (3) if both of these questions are answered in the affirmative, whether an objectively reasonable official would have believed that the action taken violated that clearly established constitutional right.

Starlight Sugar, Inc. v. Soto, 253 F.3d 137, 141 (1st Cir.2001); see also *Wilson v. City of Boston*, 421 F.3d 45, 52 (1st Cir.2005). Although this inquiry subdivides the second prong of the *Saucier* analysis into two separate questions, it is functionally identical to that analysis. Thus, we turn to this three-pronged inquiry, mindful of our obligation to evaluate any disputed evidence in the light most favorable to the jury verdict. Specifically, as we have already explained, we must take the view that Jones increased the pressure on Jennings’ ankle after Jennings stopped resisting the officers and stated that the force used was hurting his previously injured ankle.

A. Prong One: The Constitutional Violation

In granting Jones’ motion for judgment as a matter of law, the district court indicated that Jennings

had not presented sufficient evidence for a reasonable jury to find that Jones had used excessive force in violation of the Constitution.¹² To explore this question, we must first examine what constitutes excessive force under the Fourth Amendment, and then determine whether the evidence presented here was sufficient to support the jury verdict.

To establish a Fourth Amendment violation based on excessive force, a plaintiff must show that the defendant officer employed force that was unreasonable under the circumstances. See *Graham v. Connor*, 490 U.S. 386, 397, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). Whether the force used to effect a particular seizure is reasonable “must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” *Id.* at 396, 109 S.Ct. 1865. The reasonableness inquiry is objective, to be determined “in light of the facts and circumstances confronting [the officers], without regard to their underlying intent or motivation.” *Id.* at 397, 109 S.Ct. 1865. There must be “careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.” *Id.* at 396, 109 S.Ct. 1865.

We recognize the difficult situation confronting the police. It is undisputed that Jennings was challenging authority and resisting arrest. For much of the struggle, the police could not see Jennings’ hands, and they reasonably could have believed that he might have a weapon. In making an arrest, a police officer has “the right to use some degree of physical coercion or threat thereof to effect it.” *Id.* The fact that Jennings’ ankle was broken does not, in itself, prove a constitutional violation: “[T]he use of force is an expected, necessary part of a law enforcement officer’s task of subduing and securing individuals suspected of committing crimes.” *Lee v. Ferraro*, 284 F.3d 1188, 1200 (11th Cir.2002).

However, the focus of Jennings’ excessive force claim was not merely Jones’ use of force, but rather Jones’ increased use of physical force after Jennings had ceased resisting for several seconds and stated that the force Jones was using was hurting his previously injured ankle. Jennings *12 used one of Jones’ own witnesses to help establish that such force was unreasonable. Defendants initially called Officer Delaney, an instructor at the Rhode Island State Police Training Academy, to provide testimony about the training of officers and the use of various restraint techniques. During Jennings’ cross-examination the parties agreed to treat Delaney as an expert witness.¹³ Delaney testified that the ankle turn control technique is taught to police officers as “a compliance technique and a restraint technique devised to control somebody from kicking.” These techniques are taught in conjunction with the “Use of Force Continuum,” a chart explaining that the degree of force that an officer uses should correlate with the degree of resistance offered by the arrestee. On cross-examination, Delaney testified that it was appropriate for an officer to continue to apply the ankle turn control technique after a suspect stops kicking:

Q: [If] Adam Jennings is not kicking and his hands have been put behind his back and officers are attempting to put the flex cuffs on him... would it be appropriate for an officer in the position of

Trooper Jones to still be twisting his ankle?

A: It would be appropriate for him to maintain that control over the leg.

(Emphasis added.)

However, Delaney's testimony about the continuum of force also supports the view that it would be unreasonable for an officer to increase his use of force when an arrestee has ceased to resist. Delaney testified during cross-examination that the continuum of force was a "two way street," meaning that, if the level of resistance changes, the level of force should be adjusted upward or downward correspondingly:

Q: [E]ven if an officer feels at one point in time that one level of force is appropriate, he is supposed to adjust the amount of force he uses in response to a lessening of the arrestee; isn't that true?

A: Yes. That would be the Trooper's own assessment of where that lies, yes, sir.

Still on cross-examination, Delaney testified further:

Q: You don't get stuck at any level, an officer has to be cognizant of what's going on during the arrest and adjust his use of force accordingly, right?

A: Correct.

The district court's jury instructions noted that a factor in determining excessive force is whether "the degree of force used and also whether the degree of force was proportional to what was appropriate under the circumstances." Moreover, Jennings' closing argument specifically connected the content of Delaney's testimony to Jones' increased use of force:

Now, the Judge is going to instruct you that, as does the Use of Force Continuum... what goes up can come down *13and should come down if there's no need any longer to be applying that kind of force. Now, Adam Jennings himself has testified that he was on the floor, he was saying to somebody... you're breaking my ankle or I just had surgery. And you heard testimony that the immediate response was [] a greater application of force than there already had been....

Thus, guided by the court's instructions on proportional force, the jury could conclude from Delaney's testimony that it would have been unreasonable for an officer to increase the pressure on Jennings' ankle several seconds after Jennings stopped resisting arrest and, moreover, stated that the pressure already applied was hurting his previously injured ankle.

The district court considered Delaney's testimony. It noted that "Delaney did acknowledge that the continuum of force was a 'two-way street,' meaning that, if the level of resistance changes, the level of force used should be adjusted upward or downward to correspond to what is appropriate at the level of resistance." Critically, though, the court failed to relate Delaney's testimony to the Anew of the evidence that we must take in light of the jury verdict. It explained that "Delaney testified that it would have been appropriate for Jones to maintain the ankle turn control technique even if Jennings was not kicking and the officers were 'just trying to get the flex cuffs on him.' " (Emphasis added.) However, Jones did not simply maintain the ankle turn control technique after Jennings gave up resistance; rather, he increased pressure to the point that he broke Jennings'

ankle.

In finding that a reasonable jury could not have concluded that Jones used excessive force, the district court relied on our decision in *Isom v. Town of Warren*, 360 F.3d 7 (1st Cir.2004). In that case, the police used pepper spray on Robert Isom, a “distraught, seemingly suicidal man, who had briefly held two hostages and was refusing to comply Avith continuous officer requests that he put doAvn an axe.” *Id.* at 11. After the spray stopped, Isom “responded not by dropping to the ground, as the officer had hoped, but by raising the axe and running toward two officers.” *Id.* at 8. The officers then shot and killed Isom. *Id.*

At trial, the representative of Isom’s estate argued that the use of pepper spray in that situation was “a colossal misjudgment, resulting in a needless and Avrongful death,” and that no reasonable officer would have used pepper spray under such circumstances. *Id.* However, we found this argument inadequately supported because “[i]n the presence of such danger, the plaintiffs could not prevail at trial Avith-out providing evidence that would bring into question the officers’ judgment call to use pepper spray.” *Id.* at 11. Because the plaintiff did not present any such evidence, we found that “[t]here was no evidence from which the jury could rationally draw the conclusion that the officers’ actions were objectively unreasonable.” *Id.* at 12.

The district court held that this case is “markedly similar to *Isom*,” quoting *Isom*’s explanation for finding that the plaintiff had not presented sufficient evidence:

No expert testified that, under the circumstances faced by Detective Clancy, no reasonable officer would have used pepper spray; in fact, the plaintiffs did not produce any expert testimony at all. Nor did the plaintiff produce any Avritten policy or text stating that the use of pepper spray in circumstances such as those faced by Clancy was not reasonable.

Id. The district court also emphasized *Isom*’s holding that, “[f]or the jurors to *14have been given an opportunity to exercise their common sense on the ultimate question of whether no objectively reasonable officer would have used pepper spray, there must have been some basis in the evidence on which to ground that determination.” *Id.* Relying on these propositions from *Isom*, the district court found that

there was an absence of any evidence that ‘no objectively reasonable officer’ would have used the level of force used by Jones and, therefore, the jury unfairly was put in the untenable position of trying to decide that question without sufficient evidence of the applicable standard for measuring the lawfulness of Jones’ conduct.

As a result, the district court concluded that in this case, as in *Isom*, there was no basis in the evidence to support a jury finding of excessive force.¹⁴

Contrary to the district court’s assessment, this case differs from *Isom* in two important respects. First, in contrast to the plaintiff in *Isom*, Jennings did provide expert testimony about the use of force. He directed the jury to the testimony of Officer Delaney on the Use of Force Continuum, a concept relevant to the court’s own instructions about the proportionality of force under the circumstances. As described above, Jennings’ closing argument emphasized that “the Judge is

going to instruct you that, as does the Use of Force Continuum, like I said, what goes up can come down and should come down if there's no need any longer to be applying that kind of force." Thus, unlike the plaintiff in *Isom*, Jennings explicitly directed the jury to expert testimony in the record that could assist the jury in determining that no reasonable officer under the circumstances Jones confronted would have applied more pressure to Jennings' ankle.

We acknowledge that the expert testimony in this case was not precisely the sort described in *Isom*. As the district court noted, "[n]o expert testified that, under the circumstances faced by [Jones], no reasonable officer would have" acted as Jones did. *Isom*, 360 F.3d at 12. In fact, Delaney testified to the contrary on redirect examination by the government:

Q. Did Officer Ken Jones use force that you would consider reasonable under the circumstances?

A. Yes.

However, Officer Delaney's testimony in response to the next few questions makes clear that he did not make his assessment with the relevant factual circumstances in mind. When asked what factors informed his finding of reasonableness, Delaney explained:

The fact that, you know, the suspect did not comply with the order of arrest, that he was assaultive, he was trying to kick the Trooper and he was offering enhanced defiance by bringing his arms in, at that point the appropriate application of force, which was the technique employed by Trooper Jones.

(Emphasis added.) The factors Delaney lists all occurred prior to the time that Jennings ceased to resist, and Delaney's testimony thus indicates only that the use of force was reasonable "at that point" in time. Given that, viewing the evidence in *15the light most favorable to the verdict, Jones increased the force he used after Jennings ceased resisting, Delaney's expert testimony about the Use of Force Continuum actually supports a finding that the force Jones used was excessive.

Second, although this case happened to include expert testimony by Officer Delaney, we do not read *Isom* to require such testimony to support a finding that an officer's use of force was unreasonable.¹⁵ *Isom* requires only that "there must have been some basis in the evidence on which to ground" a finding of excessive force, leaving open the possibility that some cases may be susceptible to a common sense determination by the jury. *Isom* itself involved pepper spray, a substance whose use may be unfamiliar to many jurors, and consequently the question of whether it is reasonable to use pepper spray in an attempt to subdue a distraught but threatening suspect may have been best addressed through expert testimony. By contrast, this case involves the common sense proposition that it is not reasonable for police officers to increase their use of physical force after an arrestee who has been resisting arrest stops resisting for several seconds and warns the officers that they are hurting his previously injured ankle. Although Officer Delaney did not offer expert testimony that no reasonable officer would have acted as Jones did under the circumstances, he did offer expert testimony that gave the jury a useful framework for thinking about the excessive force issue. Thus informed, the jurors were in a better position to apply their common sense to the facts of this case.¹⁶

Other courts have recognized that some factual scenarios permit common sense determinations by the jury as to whether the police used excessive force. In *Kopf v. Skyrn*, 993 F.2d 374, 379 (4th Cir.1993), the Fourth Circuit noted:

[A] blanket rule that expert testimony is generally admissible in excessive force cases would be just as wrong as a blanket rule that it is not.

The facts of every case will determine whether expert testimony would assist the jury. Where force is reduced to its most primitive form — the bare hands— expert testimony might not be helpful.

See also *Adewale v. Whalen*, 21 F.Supp.2d 1006, 1014 (D.Minn.1998) (“If plaintiffs version of the facts is believed, the jury could conclude without expert testimony that [defendant] used excessive force, and that his actions caused plaintiffs broken arm:”). This case, involving force applied with bare hands, did not require expert testimony to establish whether the force used was reasonable.

In keeping with our decision in *Isom*, a reasonable jury could have exercised its common sense, informed by Officer Delaney’s expert testimony, to find that Jones used excessive force by increasing pressure on Jennings’ ankle after Jennings stopped resisting for several seconds and stated that Jones was using force that hurt *16his previously injured ankle. Consequently, we conclude that Jones violated Jennings’ Fourth Amendment right to be free from an unreasonable seizure.

B. Prong Two: Whether the Law Was Clearly Established

The second prong of the qualified immunity analysis asks “whether the constitutional right... was ‘clearly established’ at the time of the incident such that it would ‘be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.’ ” *Riverdale Mills Corp. v. Pimpare*, 392 F.3d 55, 65 (1st Cir.2004) (quoting *Saucier*, 533 U.S. at 202, 121 S.Ct. 2151). We consider whether existing case law gave the defendants “fair warning that their conduct violated the plaintiffs constitutional rights.” *Suboh v. Dist. Attorney’s Office of Suffolk*, 298 F.3d 81, 93 (1st Cir.2002). In other words, the law is clearly established either if courts have previously ruled that materially similar conduct was unconstitutional, or if “a general constitutional rule already identified in the decisional law [applies] with obvious clarity to the specific conduct” at issue. *United States v. Lanier*, 520 U.S. 259, 271, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997). We therefore consider whether materially similar cases or general Fourth Amendment principles gave Jones fair warning that it was unconstitutional for police officers to increase their use of physical force after an arrestee who has been resisting arrest stops resisting for several seconds and warns them that they are hurting his previously injured ankle.

We conclude that Jones had such notice. In *Smith v. Mattox*, 127 F.3d 1416 (11th Cir.1997), the Eleventh Circuit denied qualified immunity to a police officer accused of breaking the plaintiffs arm while putting on handcuffs.¹⁷ According to the plaintiff, he was at his mother’s house when a uniformed police officer, acting on a tip from an informant, entered the yard. The plaintiff then “raised [a] baseball bat in a threatening posture” and ignored the officer’s order to drop it. *Id.* at 1418. When the officer threatened to shoot, the plaintiff fled. He soon encountered the police

officer again, and then plaintiff “docilely submitted to arrest upon [the officer’s] request for him to ‘get down.’ ” *Id.* In the process of putting on handcuffs, the officer bent the plaintiff’s arm in a way that caused discomfort. *Id.* When the plaintiff complained, the police officer, “with a grunt and a blow — but no sign of anger,” broke his arm so severely that it required surgery for multiple fractures. *Id.* The court concluded that such use of force would be excessive and that the officer was not entitled to qualified immunity. *Id.*

Although *Smith* helps to demonstrate that the law protecting *Jennings* from *Jones*’ increased use of force was clearly established, our conclusion does not depend on this strikingly similar case. Instead, *Smith* emphasizes the obvious unconstitutionality of increasing the force used on an arrestee to such a degree that a broken ankle results, after the arrestee has ceased resisting for several seconds and stated that the force already used is hurting his previously injured ankle. The Supreme Court has explained that

general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though ‘the very action in question has [not] previously been held unlawful.’

Lanier, 520 U.S. at 271, 117 S.Ct. 1219 (1997) (citation omitted). Accordingly, we conclude that *Jones*’ conduct was such an obvious violation of the Fourth Amendment’s general prohibition on unreasonable force that a reasonable officer would not have required prior case law on point to be on notice that his conduct was unlawful. Indeed, even in *Smith*, which was decided six years before the incident at issue here, the court concluded that the law was clearly established against the use of increased force on a suspect no longer offering resistance because “the unlawfulness of the conduct is readily apparent even without clarifying caselaw.” 127 F.3d at 1420.¹⁸

Other circuits have rejected qualified immunity without a prior case exactly on point. In *Rice v. Burks*, 999 F.2d 1172 (7th Cir.1993), the Seventh Circuit noted that a plaintiff can defeat a qualified immunity defense

without identifying a closely analogous case if he show[s] that the force used was so plainly excessive that the police officers should have been on notice that they were violating the Fourth Amendment. Indeed, police officers should not be shielded from liability just because their excessive use of force happens to be original.

Id. at 1174 (internal citations omitted). Similarly, other courts have found that case law is not required where the constitutional violation is obvious. See, e.g., *Gray ex rel. Alexander v. Bostic*, 458 F.3d 1295, 1306 (11th Cir.2006)(rejecting qualified immunity for handcuffing compliant nine-year-old girl because “[e]ven in the absence of factually similar case law, an official can have fair warning that his conduct is unconstitutional when the constitutional violation is obvious”); *Smith*, 127 F.3d at 1419 (stating that law is clearly established when “the official’s conduct lies so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent to the official, notwithstanding the lack of case law”); *Casteel v.*

Pieschek, 3 F.3d 1050, 1053 (7th Cir.1993) (stating that plaintiffs may show that the violation was clearly established using “either a closely analogous case or evidence that the defendants’ conduct is so patently violative of the constitutional right that reasonable officials would know without guidance from the courts”).

Although the dissent professes to accept, *arguendo*, that Jones increased the force he used to restrain Jennings after Jennings had ceased resisting for several seconds, it continues to describe a different version of events with the cases it cites to show that the law was not clearly established. Some of these cases involve the use, rather than the increase, of force.¹⁹ *18Others are inapplicable because the arrestee was still resistant.²⁰ Critically, these cases do not address the key conduct at issue here: the increased use of force on a previously resisting but now non-resisting arrestee.²¹ The dissent’s reliance on such cases demonstrates its refusal to acknowledge that Jones’ increased use of force was integral to Jennings’ excessive force claim and that, consistent with our obligation to take the facts in the light most favorable to the jury verdict, we must accept this version of the facts in evaluating qualified immunity.

When an individual has been forcibly restrained by several officers, has ceased resisting arrest for several seconds, and has advised the officers that the force they are already using is hurting a previously injured ankle, we cannot think of any basis for increasing the force used to such a degree that a broken ankle results. At the time of Jones’ action, both existing caselaw and general Fourth Amendment principles had clearly established that this use of force was excessive in violation of the Constitution.

D. Prong Three: Whether a Reasonable Officer Would Have Believed a Violation Occurred

The final prong of the qualified immunity analysis is “whether an objectively reasonable official would have believed that the action taken violated that clearly established constitutional right.” *Starlight*, 253 F.3d at 141. As we have previously explained, “[i]t is not always evident at the time an official takes an action that a clearly established right is involved. For example, the factual situation might be ambiguous or the application of the legal standard to the precise facts at issue might be difficult.” *Riverdale Mills*, 392 F.3d at 61. Thus, even if an officer’s conduct violated clearly established Fourth Amendment law, he may still be eligible for qualified immunity if he was reasonably mistaken as to the degree of force he should have used.

At first glance, this inquiry appears indistinguishable from that in the first prong. Both involve the reasonableness of the officer’s conduct. However, the key distinction is that prong one deals with whether the officer’s conduct was objectively unreasonable, whereas prong three deals with whether an objectively reasonable officer would have believed the conduct was unreasonable. See *Saucier*, 533 U.S. at 204-05, 121 S.Ct. 2151 (explaining that “claims of excessive force in the context of arrests... should be analyzed under the Fourth Amendment’s ‘objective reasonableness standard’ ” but that “[i]f the officer’s mistake as to what the law requires is reasonable... the officer is entitled to the immunity defense” (internal citation omitted)).

The third prong analysis seems nonsensical at first blush because, in effect, officers receive

protection if they acted reasonably in exercising unreasonable force. In *Anderson v. Creighton*, 483 U.S. 635, 643, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987), the Supreme Court acknowledged the argument made by the appellant in that case that “[i]t is not possible... to say that one *19‘reasonably’ acted unreasonably.” However, the Court excused this apparent contradiction as merely linguistic, explaining:

We have frequently observed, and our many cases on the point amply demonstrate, the difficulty of determining whether particular searches or seizures comport with the Fourth Amendment. Law enforcement officers whose judgments in making these difficult determinations are objectively legally reasonable should no more be held personally liable in damages than should officials making analogous determinations in other areas of law.

Id. at 644, 107 S.Ct. 3034 (internal citation omitted). Thus, qualified immunity affords protection to officers who reasonably, yet mistakenly, employ excessive force in violation of the Fourth Amendment.

Again, we are sympathetic to the situation that Jones confronted. Jennings had to be subdued while he was resisting arrest, and the chaos caused by his struggle may have made it difficult for Jones to gauge the appropriate level of force. These circumstances would arguably allow a reasonable officer in Jones’ circumstances to believe that it was lawful to maintain the level of force he used even after Jones ceased resisting.

However, we reiterate that we must take the facts in the light most favorable to the jury verdict. See, e.g., *Iacobucci v. Boulter*, 193 F.3d 14, 23 (1st Cir.1999). Thus, we accept that Jones increased, rather than merely maintained, the force he applied to Jennings’ ankle, even after Jennings had ceased resisting and stated that Jones was hurting his previously injured ankle.²²

Under such circumstances, even the “added measure of protection” provided by the third prong of the qualified immunity analysis does not insulate Jones from damages. *Cox v. Hainey*, 391 F.3d 25 (1st Cir.2004). We find that an objectively reasonable officer in Jones’ circumstances would not have believed that it was lawful to increase the amount of force that he used after Jennings ceased resisting and stated that Jones was hurting him.²³

Because the first and third prongs of the qualified immunity analysis are so closely related in these Fourth Amendment excessive force cases, the evidence that supports our conclusion on the first-prong, that a reasonable jury could have found that the force Jones used was unreasonable, is likewise relevant here, on the third prong, to demonstrate that an objectively reasonable officer in Jones’ position would have believed that the force used was unreasonable. More specifically, Officer Delaney’s testimony about the training that officers *20receive and the Use of Force Continuum is relevant both to the prong one question of whether there was a violation at all and to the prong three question, which we address here, of whether a reasonable officer in Jones’ circumstances would have believed that his conduct violated the Constitution.

Officer Delaney’s testimony about the training that officers undergo and the Use of Force Continuum made clear that officers should adjust their force in a manner proportional to the

resistance offered by the arrestee. Instead, Jones adjusted his force inversely, increasing the force he used after Jennings stopped resisting and stated that the restraint was causing him pain. Under such circumstances, a reasonable officer would have believed that increasing his use of force would violate Jennings' constitutional right to be free from excessive force.²⁴

The district court concluded that Jones was entitled to qualified immunity because a reasonable officer in his position would not have believed that his conduct violated Jennings' constitutional rights. However, this conclusion again indicates that the court did not construe the facts in the light most favorable to the jury verdict. In discussing the third prong of the qualified immunity analysis, the court stated that "the evidence clearly demonstrates that, even if he was mistaken, Jones reasonably could have believed that his utilization of the ankle turn control technique was lawful." (Emphasis added.) As we have repeatedly emphasized, the conduct at issue was not the mere utilization of the technique, but rather the increase of force after Jennings ceased resisting. It is this increased force that an objectively reasonable officer would not have believed was lawful.

The dissent once again avoids the central issue — Jones' use of increased force on a nonresisting arrestee — by describing Jones' conduct and Delaney's testimony in sanitized terms. It states that "Jones testified that he tried to secure Jennings' ankle," emphasizes Delaney's testimony that "it was appropriate for Jones to continue using the same compliance technique," and refers repeatedly to the "use" of the ankle turn control technique. (Emphases added.) These characterizations ignore the view of the facts we must take in light of the jury verdict and, consequently, result in a misapplication of the qualified immunity analysis.

In light of the circumstances, we hold that a reasonable officer in Jones' position would have believed that increasing the force with which he restrained Jennings was a violation of Jennings' constitutional right to be free from excessive force. Thus, Jones is not entitled to qualified immunity.

IV.

We conclude that the district court erred in granting judgment as a matter of law to appellee Jones based on qualified immunity. Jones' use of increased force after Jennings ceased resisting violated the Fourth Amendment, the law was clearly established, and a reasonable officer in Jones' circumstances would have believed that his conduct was a violation. Therefore, we vacate the district court's decision on that motion and reinstate the jury verdict.

At the close of trial, in addition to his motion for judgment as a matter of law, Jones filed alternative motions for a new trial and a remittitur. After granting his motion for judgment as a matter of law, the district court held that the alternative motions were moot. This holding was error. Federal Rule of Civil Procedure 50(c)(1) requires the district court to rule conditionally on such motions in the event that the grant of judgment as a matter of law is overruled on appeal.

We now remand to the district court for a ruling on the undecided motions. However, since we already have vacated the district court's ruling on Jones' motion for judgment as a matter of law,

its ruling on the other motions will not be conditional. Instead, it will control the future course of proceedings. We do not retain jurisdiction over the case.

So ordered.

. This court addressed other issues arising out of this dispute in *Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16 (1st Cir. 2006) (en banc), which provides further background on the events that precipitated the search of the smoke shop.

. There is some uncertainty as to the precise length of time that elapsed between the time that Hill got up and the time that Jennings yelled in pain. In his closing argument to the jury, Jennings' attorney described the interval as "twelve seconds at least," while Jennings' appellate brief describes the interval as eighteen seconds, citing only to the videotape of the incident. Although the videotape was played for the jury several times at trial and the jury also viewed the videotape during its deliberations, no one actually testified to the length of time that elapsed. Jones' appellate brief describes the time as "12-15 seconds" without citation. Consequently, we will describe the length of time as "several seconds." Dictionaries typically define "several" as "being more than two but fewer than many in number or kind." See *Random House Dictionary of the English Language* 1754 (2d ed.1987). While this definition is necessarily inexact, we can do no better with this record.

. This case originally was brought by Jennings, his mother Paulla Dove Jennings, and *6Keith Huertas, another employee of the smoke shop. The plaintiffs alleged a wide array of claims against various defendants, including excessive force under the Fourth Amendment, violation of equal protection under the Fourteenth Amendment, negligent infliction of emotional distress, intentional infliction of emotional distress, false imprisonment, and assault and battery. Aside from Jennings' excessive force and battery claims against Jones, all the claims were resolved in defendants' favor, either by the court on defendants' motions for judgment as a matter of law or by the jury in its verdict. No other plaintiffs or defendants are involved in this appeal.

. The government explains that it did not file a pretrial motion raising the qualified immunity issue because Jones and other officers were not named in their individual capacities until shortly before the deadline for filing motions.

. At this juncture, the court granted judgment as a matter of law on various other claims that have no bearing on this appeal.

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. As we shall explain, this ruling of mootness was incorrect. See *infra* Section IV.

. On appeal, Jennings does not contest the district court's grant of judgment as a matter of law with respect to his state law battery claim.

. Our conclusion that a reasonable jury could have found that Jones increased the force he used after Jennings had already ceased resisting is based on the principle that we must view the evidence in the light most favorable to the jury verdict. This conclusion does not depend on the substance of the opening statements and closing arguments. However, the opening statements and closing arguments emphasize that this principle is consistent with the way that the case was argued to the jury-

. To buttress this criticism, the dissent relies on an idiosyncratic and distinguishable case. In *Iacurci v. Lummus Co.*, 387 U.S. 86, 86-87, 87 S.Ct. 1423, 18 L.Ed.2d 581 (1967), the jury was instructed that, if it found that a "hoist" was negligently designed, it should indicate which of five specified design aspects was found unsafe by answering "yes" or "no" to five questions on a special interrogatory form. The jury found negligent design, but answered only one question in the affirmative, leaving the other four blank. *Id.* at 87, 87 S.Ct. 1423. From this lack of response, the appellate court concluded that the jury would have answered the other four questions in the negative. *Id.* The Supreme Court stated that it did not "share the Court of Appeals' confidence as to the meaning" of the jury verdict, explaining that "[p]erhaps the jury intended to resolve these questions in respondent's favor; but the jury might have been unable to agree on these issues, or it simply might not have passed upon them because it concluded that respondent had negligently designed the hoist in another respect." *Id.* at 87-88, 87 S.Ct. 1423. In *Iacurci*, the jury's lack of response to a set of specific instructions made it impossible either to "take the facts in the light most favorable to the verdict," *Whitfield*, 431 F.3d at 8, or to extract the jury's "discernible resolution of disputed factual issues," *Iacobucci*, 193 F.3d at 23. Such circumstances are not present here, where the jury issued a general verdict in favor of Jennings and we are bound, by numerous precedents, to take the facts in the light most favorable to that verdict.

. The jury found for defendants on five other claims, indicating that it carried out its responsibilities carefully. Any judgment beyond that is pure speculation.

. Appropriately, the jury was not asked to address the qualified immunity issue. Nevertheless, in delivering the general verdict on Jennings' claim of excessive force under the Fourth Amendment, the jury essentially was addressing the first prong of the qualified immunity inquiry. Because we now address the question of qualified immunity after this jury verdict for the plaintiff, our task on the first prong of the qualified immunity analysis is to "inquire whether the evidence at trial, viewed in the light most favorable to the verdict, is legally sufficient to support the jury's verdict that the plaintiff was deprived of a constitutional right." *Wilson*, 421 F.3d at 54.

. During the government's direct examination of Delaney, Jennings' attorney objected to certain questions because Delaney had not been qualified as an expert. The record does not disclose why

the government had not qualified Delaney as an expert, but the court sustained Jennings' objections on these grounds. However, on cross-examination Jennings' attorney also attempted to ask Delaney questions that would ordinarily require expert qualifications. When the government objected, Jennings' attorney indicated that he now wanted Delaney to be qualified as an expert. The court stated that if Jennings wanted to use Delaney as an expert, the government would also have the opportunity, on redirect, to ask the questions requiring expert qualifications to which Jennings had originally objected. The parties agreed to this arrangement, and the court subsequently allowed both parties to use Delaney as an expert.

. The dissent claims that we do a "disservice" to the district court by stating that the district court would have reached a different conclusion from the jury on the excessive force issue. However, the district court explicitly included in its qualified immunity analysis the conclusion that "Jennings failed to present any evidence that Jones' actions deviated from the standard of conduct that should have been expected from an objectively reasonable police officer under the circumstances." This statement is equivalent to a holding that there was no excessive force.

. Jennings argues that the district court erred in requiring expert testimony to prove excessive force. However, the district court did not actually impose this requirement. Instead, it noted that the jury had to have "sufficient evidence of the applicable standard for measuring the lawfulness of Jones' conduct." We read this as a requirement that Jennings produce some evidence, whether in the form of expert testimony, lay testimony, or other evidence, from which the jury could evaluate the reasonableness of Jones' conduct.

. We are not suggesting that Officer Delaney's expert testimony was or was not essential to the submission of the excessive force issue to the jury. We are simply explaining how that testimony might have been useful to the jury in this case.

. Since the court's ruling was made in the context of summary judgment, it took the facts in the light most favorable to the plaintiff. 127 F.3d at 1417. The point seemingly made by the dissent about this case (that a jury might not ultimately find those facts) does not undermine the value of the case as indicative of clearly established law.

. The dissent misconstrues the Supreme Court's precedents relating to qualified immunity when it states that "[t]he very fact-intensive nature of the test for excessive force itself requires particularized prior case law." It is true that the "right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it is clearly established," *Wilson v. Layne*, 526 U.S. 603, 615, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999) (emphasis added), but this requirement does not imply that the relevant case law must be particularized to address the alleged violation. Rather, once the right allegedly violated has been defined, the court must examine whether "the unlawfulness of particular conduct will be apparent ex ante to reasonable public

officials." See *Brady v. Dill*, 187 F.3d 104 (1st Cir.1999) (citing *Wilson*, 526 U.S. at 613, 119 S.Ct. 1692).

. *Rodriguez v. Farrell*, 294 F.3d 1276, 1278-79 (11th Cir.2002); *Jackson v. City of Bremer*, 18 F.3d 646, 650-53 (9th Cir.2001); *Eberle v. City of Anaheim*, 901 F.2d 814, 820 (9th Cir.1990).

. *Huang v. Harris County*, No. 00-20806, 2001 WL 822534 (5th Cir. June 22, 2001) (unpublished disposition); *Brownell v. Figel*, 950 F.2d 1285, 1288, 1293 (7th Cir.1991).

. Indeed, the dissent's insistence on "particularized prior cases with similar facts," see *supra* note 18, is inconsistent with its use of these cases, which, for the reasons already stated, differ significantly from the circumstances present here.

. See *supra* Section II for a description of the evidence on this point.

. The dissent argues that Jones' use of force was justified because Jennings was not totally secured at the time his ankle was broken and the officers were having a difficult time getting the flex cuffs on Jennings. The more important point, however, is that Jennings had ceased resisting before Officer Hill got up and walked away, and, as shown on the video, several seconds elapsed between the time that Officer Hill left and the time that Jennings yelled in pain as his ankle was broken. Thus, any difficulty or delay that the officers experienced in handcuffing Jennings was not due to resistance on Jennings' part, and does not alter our conclusion that an objectively reasonable officer in Jones' circumstances would not have believed that it was lawful to increase force after Jennings ceased resisting and stated that the restraint was hurting his previously injured ankle. Relatedly, the dissent's statement that "Hill got out of the way because other officers were having trouble cuffing Jennings" incorrectly suggests that Jennings was still resisting when Hill got up and walked away.

. In our discussion of prong one, we were careful to point out that we were not suggesting that Delaney's testimony was or was not essential to the jury's determination that the force used by Jones was excessive. We simply explained how that testimony could have been helpful to the jury in reaching its excessive force verdict. We make a similar point here. The Delaney testimony is certainly relevant to the prong three determination that was to be made by the court: whether a reasonable official would have believed that the force being used was excessive. However, we are not suggesting that this testimony was or was not essential to that legal determination.