

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-1038
Summary Calendar

BILLY WAYNE PRICE,

Plaintiff-Appellant,

VERSUS

CHRIS L. BACHMAN, Lubbock Police
Department Officer, ET AL.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(CA-5-91-190-C)

(February 15, 1993)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:¹

Price appeals the dismissal of his § 1983 action against Lubbock, Texas, and one of its police officers. We affirm.

Billy Wayne Price filed a pro se and in forma pauperis § 1983 complaint against Chris Bachman, a Lubbock police officer, and the City of Lubbock, alleging that he was subjected to excessive force during an arrest. Defendants answered the complaint and moved for

¹ Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

dismissal under Fed. R. Civ. P. 12(b)(6). In his answer, Bachman contended, inter alia, that he was entitled to qualified immunity.

Price then filed an amended pro se complaint. The magistrate judge issued a report recommending dismissal of the complaint for failure to state a claim for relief under Rule 12(b)(6) and for frivolousness under 28 U.S.C. § 1915(d). The district court adopted the magistrate judge's recommendation over Price's objections and dismissed his complaint without prejudice.

The failure-to-state-a-claim standard of Rule 12(b)(6) and the frivolousness standard of § 1915(d) are distinct. **See Neitzke v. Williams**, 490 U.S. 319, 326, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989). In reviewing a court's dismissal for failure to state a claim under Rule 12(b)(6), this Court must take the plaintiff's factual allegations as true and must not affirm "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." **McCormack v. National Collegiate Athletic Ass'n**, 845 F.2d 1338, 1343 (5th Cir. 1988) (quoting **Conley v. Gibson**, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). This Court reviews the district court's dismissal under Fed. R. Civ. P. 12(b)(6) **de novo**. **Walker v. South Cent. Bell Tel. Co.**, 904 F.2d 275, 276 (5th Cir. 1990). The review is limited solely to an evaluation of Price's amended complaint. **See Jackson v. City of Beaumont Police Dept.**, 958 F.2d 616, 618 (5th Cir. 1992).

A complaint "is frivolous where it lacks an arguable basis either in law or in fact." **Denton v. Hernandez**, ___ U.S. ___, 112

S.Ct. 1728, 1733, 118 L.Ed.2d 340 (1992) (quoting **Neitzke v. Williams**, 490 U.S. at 319). This Court reviews a § 1915(d) dismissal under the abuse-of-discretion standard. **Denton**, 112 S.Ct. at 1734.

Assuming that the district court erred by mingling or merging the standards, any error was harmless. **See** Fed. R. Civ. P. 61. A **de novo** review of Price's amended complaint under Rule 12(b)(6) reveals that he has failed to state a claim for relief.

This Court has adopted the heightened pleading requirement for cases against state actors in their individual capacities. **Elliot v. Perez**, 751 F.2d 1472, 1479 (5th Cir. 1985); **see also Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit**, 954 F.2d 1054, 1057-58 (5th Cir. 1992), **cert. granted**, 112 S.Ct. 2989 (1992). Thus, in cases which involve the likely defense of immunity, a plaintiff's complaint must state with detailed facts and particularity the basis for the claim, including why the defense of immunity cannot be sustained. **Elliot**, 751 F.2d at 1473.

In examining a defendant's claim of qualified immunity, this Court considers first whether the plaintiff "has `alleg[ed] the violation of a clearly established constitutional right.'" **King v. Chide**, 974 F.2d 653, 656 (5th Cir. 1992) (quoting **Seigert v. Gilley**, ___ U.S. ___, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991)). Price's complaint alleges that Bachman used excessive force to arrest him. An allegation that an officer has used excessive force in the course of an arrest implicates the Fourth Amendment's guarantee against unreasonable seizure. **See Graham v. Connor**, 490

U.S. 386, 394-95, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989).

Guided by the Supreme Court's analysis in **Graham**, this Court held that a plaintiff bringing an excessive force claim would prevail only by proving a significant injury which resulted directly and only from the use of force that was clearly excessive to the need, the excessiveness of which was objectively unreasonable. **Johnson v. Morel**, 876 F.2d 477, 480 (5th Cir. 1989) (en banc). The "significant injury" element has, however, been recently overruled by **Hudson v. McMillian**, ___ U.S. ___, 112 S.Ct. 995, 999, 117 L.Ed.2d 156 (1992) (excessive force claim viable in Eighth Amendment context even without significant injury). Although, three recent Fifth Circuit cases have acknowledged the tension between **Johnson** and **Hudson** (**Mouille v. City of Live Oak, Tex.**, 977 F.2d 924, 929 (5th Cir. 1992); **King**, 974 F.2d at 657 ; **Knight v. Caldwell**, 970 F.2d 1430, 1432 (5th Cir.), **petition for cert. filed** (Nov 27, 1992)), these cases declined to decide whether **Hudson** impaired **Johnson's** vitality. Thus, in light of the uncertainty regarding the current Fifth Circuit standard for Fourth Amendment excessive-use-of-force claims, it is unclear whether Price has alleged a violation of a clearly established constitutional right. Nevertheless, because the remainder of the qualified immunity analysis is dispositive, this Court need not decide this issue. **See Mouille**, 977 F.2d at 929.

Determining the standard by which to judge the reasonableness of the officer's conduct is the next step in a qualified immunity analysis. Under the doctrine of qualified immunity, a police

officer is shielded from liability "if a reasonably competent law enforcement agent would not have known that his actions violated clearly established law." **Jackson**, 958 F.2d at 620. "A constitutional right must be implicated, and the contours of the right must be sufficiently clear that a reasonable officer would understand that what [he is] doing violates that right." **Id.** (internal quotations and citations omitted). Furthermore, "the objective reasonableness of an official's conduct must be measured with reference to the law as it existed at the time of the conduct in question." **Pfannstiel v. City of Marion**, 918 F.2d 1178, 1185 (5th Cir. 1990). At the time of Price's 1990 arrest, **Johnson v. Morel**, 876 F.2d 477 (5th Cir. 1989) (en banc), stated the clearly established law in this Circuit for showing an unconstitutional use of excessive force by a police officer against an arrestee.

We turn next to Price's amended complaint and review it in light of the heightened pleading requirement. Price alleges in the complaint that he was chased and apprehended by officer Bachman after fleeing from "a vehicle that apparently was stolen." He further alleges that during the arrest Bachman "deliberately with excessive force" and with "callous indifference" hit him on the head with Bachman's police radio. Price states that the blow caused injury "and could have caused more injury than it produce [sic]."

Price's amended complaint contains no factual predicate for his factual conclusion that the amount of force Bachman used in arresting him was unreasonable. Price also alleged no details

about the nature of his injury. detail concerning the injury he allegedly suffered as a result of the arrest. In fact, his complaint contains virtually no facts which would allow this Court to determine whether officer Bachman's conduct was unreasonable in light of **Johnson**. Thus, Price's conclusional allegations about the assault are insufficient to meet the heightened pleading requirement.

Price's claim against the City of Lubbock hinges on his excessive-force claim against the officer Bachman. **Burns v. City of Galveston, Tex.**, 905 F.2d 100, 102 (5th Cir. 1990) (a complainant must demonstrate a policy or custom which causes or occasions a constitutional deprivation to establish municipal liability under § 1983). Because he has failed to state a claim for use of excessive force, his claim against the city fails as well.

AFFIRMED.