**UNITED STATES COURT OF APPEALS**
**For the Fifth Circuit**

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No. 92-1383
Summary Calendar

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Levi Wooderts, Jr.,

Plaintiff-Appellee,

VERSUS

City of Dallas, Texas, et al.,

Defendants,

and

J. Mismash and D.O. Gilmore,

Defendants-Appellants.

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Appeal from the United States District Court
For the Northern District of Texas
(CA3-91-0951-C)

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(December 14, 1992)

Before THORNBERRY, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

THORNBERRY, Circuit Judge[*]:

Pro se plaintiff alleging excessive force in arrest survived

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[*]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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

motion for summary judgment by defendants, and defendants appealed. We remand to the district court with instructions to rule on defendant's contention in their motion for summary judgment that they are entitled to qualified immunity since the plaintiff admitted by default that his constitutional rights were not violated during arrest.

## I. Facts and Prior Proceedings

Proceeding pro se, Levi Wooderts filed suit in state district court against the City of Dallas and officers, J. Mismash and D.O. Gilmore, alleging that during arrest, excessive force was used against him, thereby violating his civil rights. After removing the suit to federal court, defendants moved for summary judgment asserting that: (1) the force used against Wooderts did not rise to the level of a constitutional violation; therefore, the officers were entitled to qualified immunity; (2) Wooderts had failed to state a cognizable claim against the City of Dallas; and (3) Woodert's failure to timely respond to defendants' requests for admission conclusively established facts which defeated his claim. Wooderts did not respond to the defendants' motion for summary judgment.

The district court granted summary judgment to the City of Dallas, finding that plaintiff's allegations failed to state a claim against the City. The court denied, however, the motion for summary judgment by the defendant officers, concluding that Woodert's original complaint was sufficient to overcome the

qualified immunity defense and the record revealed that there were genuine issues of material fact. Apparently, the district court felt that the plaintiff's original complaint would suffice as a response to the defendant's motion for summary judgment. The defendant officers' motion for summary judgment specifically requested relief based on the plaintiff's untimely answers to requests for admission. Plaintiff was 86 days late in responding to defendants' requests for admission. The court in its order, however, did not specifically address the defendants' contention that Wooderts's failure to timely respond to their requests for admission deemed the facts admitted.

The officers appealed, arguing that the district court erred by considering Wooderts's original complaint in lieu of a response to their motion for summary judgment and by failing to consider the admissions made by default under Fed. R. Civ. P. 36.

## II. Standard of Review

We review the record of an appeal from summary judgment de novo, examining the evidence in the light most favorable to the nonmovant below. **Duckett v. City of Cedar Park, Texas**, 950 F.2d 272 (5th Cir. 1992).

## III. Discussion

Wooderts's complaint alleges that the officers used excessive force during his arrest. An excessive-force claim brought under 42 U.S.C. § 1983 alleges the violation of a constitutional right. **See**

**Graham v.Connor**, 490 U.S. 386, 394-95, 109 S.Ct. 1865, 104 L.Ed. 2d 443 (1989). However, the defendants argue that because Wooderts failed to answer their requests for admission in a timely manner, he has admitted that his constitutional rights were not violated, thus, in essence, his complaint fails to state that his constitutional rights were violated.[1] Defendants argue, therefore, that they are entitled to the defense of qualified immunity and plaintiff's claims must be defeated.[2]

Each matter on which an admission has been requested is admitted unless the party to whom the request is directed responds with a written answer or objection within 30 days after service of the request or within such shorter or longer time as the court may allow. Fed. R. Civ. P. 36(a). Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Fed. R. Civ. P. 36(b). This conclusive effect applies equally to those admissions made affirmatively and those established by default, even if the matters admitted relate to material facts that defeat a party's claim.

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[1] Admission number fifteen reads: Admit or deny, "Your treatment as alleged in your complaint did not violate clearly established statutory or constitutional rights of which a reasonable person would have known."

[2] The first inquiry in the examination of a defendant's claim of qualified immunity is whether the plaintiff "allege[d] the violation of a clearly established constitutional right." **Id.** (quoting **Siegert v. Gilley**, ___ U.S. ___, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991).) The second inquiry is to determine whether the Defendants are entitled to qualified immunity. **Id.** at 279. State officials are entitled to qualified immunity unless they violate a constitutional right that was clearly established at the time of their conduct. **Pfannstiel v. City of Marion**, 918 F.2d 1178, 1183 (5th Cir. 1990).

**American Auto. Ass'n v. AAA Legal Clinic**, 930 F.2d 1117, 1120 (5th Cir. 1991).[3]

Wooderts was untimely in answering defendants' requests for admission.[4] This court has examined issues regarding the violation of discovery rules and orders in the context of 42 U.S.C. § 1983 actions filed by pro se plaintiffs.[5] In **Hulsey v. State of Texas**,[6] a pro se prisoner filed a civil rights action against the arresting officer and the State of Texas but failed to perfect proper service or answer requests for admissions. On review by this Court, we said that "The district court was appropriately lenient with

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[3] A request may also be made to admit any matters that relate to the application of law to fact. **See** Notes of Advisory Committee on Rules, 1970 amendment.

[4] Wooderts was 86 days late in responding to Defendants' requests.

[5] In **Brinkmann v. Dallas County Deputy Sheriff Abner**, 813 F.2d. 744 (1987), the district court dismissed a pro se plaintiff's claim because he intentionally disregarded an order of the court to supply witness lists. On review of the dismissal, this Court affirmed dismissal because the pro se plaintiff intentionally disregarded discovery orders, severely hampering defendants trial preparation. This Court enunciated several general principles regarding the appropriateness of dismissal as a sanction for disregarding discovery orders. We said that if the refusal to comply with discovery orders is due to honest confusion or sincere misunderstanding of the order, the inability to comply, or the nonfrivolous assertion of a constitutional privilege, dismissal is almost always an abuse of discretion (citing **Marshall v. Segona**, 621 F.2d 763, 768 (5th Cir. 1980)). Generally, dismissal is only appropriate under the circumstances when there is clear evidence of delay or defiant conduct by the plaintiff (citing **Silas v. Sears, Roebuck & Co.**, 586 F.2d 382, 385 (5th Cir. 1978)). Finally, if the other party's preparation for trial has not been substantially prejudiced, dismissal may be inappropriate (citing **Batson v. Neal Spelce Associates, Inc.**, 765 F.2d 511, 514 (5th Cir. 1985)).

[6] 929 F.2d 168 (5th Cir. 1991).

[Plaintiff] because of his status as a pro se plaintiff. It not only allowed him a second chance at obtaining service but also instructed him on the proper procedure." **Hulsey**, 929 F.2d at 171. "[C]ourts must be especially careful to `guard against premature truncation of legitimate lawsuits merely because of unskilled presentations.'" **Hulsey,** 929 F.2d at 170-71 (quoting **Murrell v. Bennett**, 615 F.2d 306, 311 (5th Cir. 1980)). However, Hulsey also failed entirely to respond to the defendants' requests for admission, and then failed to make a motion for withdrawal or amendment of the subsequent admission by default. This resulted in conclusively establishing facts which allowed the defendants to prevail in a motion for summary judgment. **Id.** Together with the failure to answer the admission entirely or make a motion to withdraw or amend the admission, this court affirmed that the defendants were entitled to summary judgment. **Id.**

In Wooderts's case, the district court did not address the defendants' contention that Wooderts had admitted by default that there was no violation of his constitutional rights. It is entirely possible that the district court did not address this issue because the court afforded the pro se plaintiff in this case some degree of leniency because he represented himself and he was incarcerated. Wooderts did at least answer the requests for admission, although he was untimely. In addition, there is no evidence in the record that Wooderts received any warning from the court that his admissions were past due or that he was ordered by the court to answer the requests for admission. Nor can we find

evidence in the record of a motion to compel filed by the defendants. While we agree that even pro se litigants must follow the rules of procedure, they are required to do so with some degree of latitude since they are not practicing members of the legal profession.

## Conclusion

We remand this case to the district court to consider and then rule upon defendants' summary judgment contention that plaintiff's untimely answers to their requests for admission requires dismissal of plaintiff's claim. The defendants' remaining appellate arguments are rendered moot at this time by the remand to the district court.