

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-1663  
Summary Calendar

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WILLIE OLIVER EVANS,

Plaintiff-Appellant,

v.

ED SPILA, Dallas Police Officer,  
and THOMAS F. GEE, 1820 Traffic Div. 729,

Defendants-Appellees.

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Appeal from the United States District Court  
for the Northern District of Texas  
(3:89-CV-3185-H)

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(January 25, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.\*

EDITH H. JONES, Circuit Judge:

Proceeding pro se, appellant Willie Oliver Evans, an inmate of the Texas Department of Criminal Justice, Institutional Division, filed a 42 U.S.C. § 1983 action against the Dallas Police Department and appellees Spila and Gee, both Dallas police officers. Evans alleged that in 1987 Spila and Gee, responding to a traffic accident in which Evans was involved, illegally arrested

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

him for disorderly conduct and denied him proper medical care. Evans asserted various federal constitutional and state tort claims. Pursuant to the appellees' motion for reconsideration of their second motion for summary judgment, Evans's federal claims were dismissed with prejudice and his pendent state claims were dismissed without prejudice. Evans appeals the grant of summary judgment. Because the district court may have relied on evidence improper for summary judgment consideration, we vacate the judgment and remand to the district court.

#### **BACKGROUND**

On October 9, 1987, the appellant and his wife, Sharon, were involved in a car accident in Dallas, Texas. Appellee Officer Gee, a Dallas police officer, arrived at the scene to investigate the accident. As he was doing so, Evans and Officer Gee had a confrontation which culminated in Evans's arrest for disorderly conduct. Appellee Spila, also a Dallas police officer, took Evans to jail and later to Parkland Memorial Hospital in Dallas for injuries sustained in the car accident.

Evans filed a complaint against the Dallas Police Department, Officer Spila, and Officer Gee alleging violations of his First, Fourth, Fifth, Eighth, and Fourteenth Amendment rights under federal law as well as claims for false arrest, false imprisonment, assault and battery, abuse of process, and negligence under state law. The court dismissed Evans's claims against the Dallas Police Department without prejudice.

In November 1990, appellees moved for summary judgment for the first time. Their motion was denied. In March 1992, appellees filed their second motion for summary judgment. The district court denied this motion as well on the grounds that "[t]he facts alleged by [the appellant] rise to the level of specificity, and amount to the type of conduct that warrant waiver of qualified immunity." In June 1992, the appellees filed a motion for reconsideration, supported by unverified excerpts of oral depositions of Evans, Evans's wife, and Evans's dentist. Evans responded by objecting to the appellees' submission of the oral deposition excerpts because they were not verified by affidavit. He also argued that the district court should not consider the motion for reconsideration because the appellees provided no newly discovered evidence and were not entitled to qualified immunity. This time the district court granted summary judgment based on the appellees' motion for reconsideration, ruling that they were entitled to qualified immunity. On the issue of the unverified deposition excerpts, the district court observed:

[The appellant] moves to strike the supplementary evidence submitted by [the appellees] in support of their motion for reconsideration because they lack the requisite affidavit verifying the authenticity of this evidence. While the [appellant's] argument is correct on procedural grounds, there appears to be no dispute as to the authenticity of the depositions attached to [the appellees'] motion. In such circumstance, the Court denies [appellant's] request in that it would merely result in additional expenditure of time and money.

The district court dismissed Evans's federal claims with prejudice and his pendent state claims without prejudice.

#### **DISCUSSION**

In his objection to defendants' motion for reconsideration, Evans did not contend that the deposition excerpts were false or unreliable, only that they were "not competent summary judgment evidence." We agree. Depositions offered as summary judgment evidence must be sworn or reasons provided explaining why affidavits are unavailable. Fed. R. Civ. P. 56(e) & (f). Unsworn documents are not appropriate for summary judgment consideration. See Martin v. John W. Stone Oil Distributor, Inc., 819 F.2d 547, 549 (5th Cir. 1987); see also Lavespere v. Niagara Mach. & Tool Works, Inc., 910 F.2d 167, 175-76 (5th Cir. 1990) (stating the general rule that the admissibility of evidence on a motion for summary judgment is subject to the same rules that govern admissibility of evidence at trial).

Presumably, in this case, the depositions had been authenticated and the appellees merely failed to provide proof of this fact when they submitted excerpts of the depositions. However, these depositions were the only new evidence submitted by the appellees in their motion for reconsideration and apparently the only information relied upon by the district court in granting summary judgment. It is impossible for this court to determine whether the lack of authentication was harmless error because two of the three depositions from which the excerpts were taken are not

contained in the record. As the record stands, the deposition excerpts could not have been admitted into evidence at trial because they were not properly verified. This reversal may result in the expenditure of time and money by appellees to cure a technical violation of the federal rules. However, it would have been easy for their counsel to follow those rules precisely in the first place.

#### **CONCLUSION**

The judgment is vacated and the case remanded for further proceedings consistent herewith.

**VACATED and REMANDED.**