

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2941
Conference Calendar

ANDRE WINTERS,

Plaintiff-Appellee,

versus

D. CULAK ET AL.,

Defendants,

D. RAIBON, D. DEBLANC
and M. MARTIN,

Defendants-Appellants.

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Appeal from the United States District Court
for the Southern District of Texas
USDC No. CA-H-91-878
- - - - -
(October 29, 1993)

Before POLITZ, Chief Judge, and SMITH and WIENER, Circuit Judges.

PER CURIAM:*

The appellants, police officers of the City of Houston, appeal the district court's denial of their motion for summary judgment based on qualified immunity and argue that, because plaintiff Andre Winters never filed an affidavit in response to their motion, the district court should have granted summary judgment.

Under Fed. R. Civ. P. 56(c), the party moving for summary

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

judgment must show that no genuine issue of material fact remains in order to mandate a granting of the motion. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The dispute is genuine if the evidence shows that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986); see Enlow v. Tishomingo County, 962 F.2d 501, 511-13 (5th Cir. 1992) (existence of genuine issue of material fact will preclude summary judgment based on qualified immunity).

The burden under Rule 56 lies initially on the moving party; if the moving party fails to demonstrate the absence of a genuine issue of fact, the non-moving party can defeat the motion without providing additional affidavits and may point to the evidence already in the record. See Isquith v. Middle South Utilities, Inc., 847 F.2d 186, 198-99 (5th Cir.), cert. denied, 488 U.S. 926 (1988). To the extent that the defendants argue that a non-moving party must always submit an affidavit to defeat a motion for summary judgment, their argument misstates the law. However, the defendants' appeal fails on a more fundamental ground.

Although an order denying a motion for summary judgment based on a claim of qualified immunity in a § 1983 action is immediately appealable to the extent that it turns on an issue of law, Mitchell v. Forsyth, 472 U.S. 511, 530, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985), if disputed factual issues material to

immunity are present, the district court's denial of summary judgment sought on the basis of immunity is not appealable. Feagley v. Waddill, 868 F.2d 1437, 1439 (5th Cir. 1989).

In qualified-immunity cases, the plaintiff must initially "allege a violation of a clearly established constitutional right" under current law, then must defeat qualified immunity under "clearly established law" at the time of the incident. Mouille v. City of Live Oak, 977 F.2d 924, 927-28 (5th Cir. 1992), cert. denied, 113 S.Ct. 2443 (1993).

Winters's complaint alleged the use of excessive force, a constitutional violation under the Fourth Amendment's guarantee of freedom from unreasonable searches. See id. at 927. In order to prevail on a constitutional excessive-force claim, the "clearly established law" at the time of the incident required Winters to show the following: "(1) a significant injury, which (2) resulted directly and only from the use of force that was clearly excessive to the need; and the excessiveness of which was (3) objectively unreasonable." Johnson v. Morel, 876 F.2d 477, 479-80 (5th Cir. 1989) (en banc). Winters's alleged injuries, a broken neck and spine resulting in paralysis, were indisputedly significant, thereby satisfying the first prong of Morel.

In support of their summary judgment motion, the defendants attached Winters's deposition and Officer DeBlanc's affidavit. That affidavit stated that Winters apparently was injured when he hit a window while trying to escape. In his opposition to the

motion, Winters pointed out that Officer DeBlanc's affidavit asserted facts that he admittedly did not witness. He also referred to his own deposition testimony, which stated that he was attempting to "freeze," in accordance with the officers' instructions, when he was assaulted. He further stated that the only officers with whom he had contact were DeBlanc and a white female.

The summary-judgment evidence submitted by the defendants raises, rather than dispels, genuine issues of material fact. The district court's denial of summary judgment sought on the basis of immunity is therefore not appealable. Feagley, 868 F.2d at 1439. Accordingly, the appeal is DISMISSED for lack of appellate jurisdiction.