

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4531
Summary Calendar

THERESA WESTRICK, Individually and as
Representative of the Estate of
Curtis Terance Rose,

Plaintiff-Appellee,

versus

CITY OF LEWISVILLE, ET AL.,

Defendants,

STEVE McFADDEN, As an Individual and
in his official capacity as Police
Chief of Lewisville, Texas,

Defendant-Appellant.

Appeals from the United States District Court for the
Eastern District of Texas
(CA4 90 153)

March 18, 1993

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:*

A Lewisville, Texas police officer stopped Curtis Terance Rose
and arrested him for driving with a suspended license. After being

*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that this opinion should not be published.

admitted to the city jail, Rose hanged himself with a blanket and died later at a hospital.

Rose's mother, Theresa Westrick, filed suit in state court against the City of Lewisville (the City) and Steve McFadden, the City's chief of police, pursuant to Texas tort law and 42 U.S.C. § 1983. Westrick then filed a petition to remove the case to federal court. In the second amended complaint, Westrick specified that she was suing McFadden individually and in his official capacity as the City's police chief. She alleged in that pleading that McFadden had failed to supervise or train the police officers under his command. The City and McFadden then filed a motion for summary judgment, which the district court denied. Westrick later filed a third amended complaint. McFadden now appeals the denial of the motion for summary judgment.

McFadden argues on appeal that the district court erred in denying his motion for summary judgment because he is entitled to qualified immunity from suit. This court may review a district court's denial of an immunity defense because such a denial amounts to an appealable final decision under 28 U.S.C. § 1291, notwithstanding the absence of a final judgment. Geter v. Fortenberry, 849 F.2d 1550, 1552 (5th Cir. 1988). McFadden, however, does not appear to have raised the issue of qualified immunity in his motion for summary judgment.

In denying the motion, the district court simply provided that "there are material fact issues for trial as to all defendants."

It is not apparent from the record that the question of qualified immunity was before the district court and whether the district court denied summary judgment on that basis. If qualified immunity was not the basis for the district court's ruling, the interlocutory order does not fall within the exception to the final-judgment rule and is not appealable.

Because the district court did not indicate whether qualified immunity was the basis of its denial of the summary judgment, this court, as a court of error, cannot adequately determine whether it has appellate jurisdiction to review the district court's denial of summary judgment. See Myers v. Gulf Oil Corp., 731 F.2d 281, 284 (5th Cir. 1984); see also White v. Texas American Bank/Galleria, N.A., 958 F.2d 80, 82 (5th Cir. 1992). The summary judgment is therefore VACATED and the case is REMANDED for further findings, conclusions, and order concerning the question of qualified immunity. The district court is free, of course, to conduct such further proceedings on the question of immunity as in its discretion it deems appropriate. Once a summary judgment has been entered a new notice of appeal--if appeal is desired--will be required.

SUMMARY JUDGMENT VACATED;
VACATED and REMANDED.