UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-4765
Summary Calendar

Eloy Guajardo and Elizabeth Guajardo,
Individually and as next friend of Rebecca Guajardo,
Erica Guajardo, Gloria Guajardo and Lisa Guajardo, and
David Guajardo,

Plaintiffs-Appellants,

VERSUS

Collin County Sheriff's Department, Et Al.,

Defendants-Appellees.

Appeal from the United States District Court
For the Eastern District of Texas

90 CV 195

(April 27, 1993)

Before THORNBERRY, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

THORNBERRY, Circuit Judge*:

Plaintiffs filed suit alleging that excessive force was used during the execution of a search and arrest warrant. The

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Defendants filed a motion for summary judgment, and the district court granted the motion, dismissing all of the Plaintiff's claims. We find that the Plaintiffs have shown a genuine issue as to a material fact concerning the § 1983 claim and therefore reverse the district court. We affirm, however, the balance of the district court's judgment.

Facts and Prior Proceedings

Eloy and Elizabeth Guajardo, individually and as next friend for Rebecca, Erica, Gloria, Lisa and David Guajardo, brought suit against Collin County, Texas (County); the Collin County Sheriff's Department and unknown deputies; the City of McKinney, Texas (City); the McKinney Police Department and unknown officers; and Joe Fernandez for violation of their civil rights under 42 U.S.C. §§ 1981, 1983, and 1985. In addition, the Guajardo's invoked the pendent jurisdiction of the district court to hear and decide various state-law claims.[1]

The Guajardos allege that these causes of action arise from the joint execution of a search and arrest warrant, obtained by police officers of the City and the County Sheriff's department. The Guajardos contend that when the officers conducted the joint raid on their residence that excessive and unreasonable force was

[1] The district court ultimately dismissed the suit against the sheriff's department and the police department because they are not legal entities subject to suit. The Guajardo's further failed to identify and to bring into the suit the unknown individuals referenced in their original complaint. The district court granted default judgment against Defendant, Joe Fernandez, and determined the amount of damages as to him. These actions are not on appeal to this Court.

used, resulting in the deprivation of their constitutional rights.[2] Specifically, the Guajardo's complaint alleges that the City and the County are liable under § 1983 for failing to train adequately their respective employees and for having the custom of conducting joint raids without delineated authority. The Guajardos contend that the lack of leadership and organization in carrying out the joint raid lead to anarchy, with officers and deputies running amok violating their constitutional rights.

The Defendants filed motions for summary judgment, asserting that the Guajardos failed to show sufficient evidence in their complaint of any unconstitutional policy, practice or custom relating to inadequate training of law enforcement or lack of authority during joint raids which would support municipal liability under § 1983 as a matter of law. The Guajardos argued in their response that, based on their personal observations during the joint raid, inadequate training and absence of authority during the raid could be inferred from the acts of the law enforcement officers. In support of their position the Guajardos also provided expert deposition testimony pertaining to the joint raid practice of the Defendants. The Guajardos failed to respond to the Defendants' arguments regarding the §§ 1981 and 1985 claims, the state-law claims, and the punitive damages claim.

The district court granted summary judgment for the Defendants, dismissing the § 1983 claim for the Guajardos' failure

[2] The Guajardos do not dispute that the police had a valid warrant to search the house and to arrest Raul Guajardo.

to "set[] forth specific facts showing a genuine issue of material fact." The district court also dismissed the §§ 1981 and 1985 claims because the Guajardos' failed to allege any facts regarding these claims and further declined to retain pendent jurisdiction over the state-law claims. The Guajardos timely appealed to this Court.

Discussion

1. Standard of Review

The Guajardos argue that the district court erred in granting summary judgment as to their § 1983 claim.[3] Summary judgment is proper if the court determines that "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party seeking summary judgment carries the burden of demonstrating that there is an absence of evidence to support the nonmoving party's case. **Celotex Corp. v. Catrett**, 477 U.S. 317, 91 L.Ed.2d 265, 106 S.Ct. 2548, 2554 (1986). Once the moving party has satisfied its burden, the nonmovant must "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). This Court applies the same standards as those that govern the district court's determination for summary judgment. **King v. Chide**, 974 F.2 d 653, 655-656 (5th Cir. 1992)(citations omitted). The district court begins its determination by consulting the

[3] Because the Guajardos have failed to argue the propriety of granting summary judgment on the §§ 1981 and 1985 claims to this Court, these issues are deemed abandoned. **Nissho-Iwai Co. v. Occidental Crude Sales, Inc.**, 729 F.2d 1530, 1539 n.14 (5th Cir. 1984).

applicable substantive law to determine what facts and issues are material. **Id**. The court then reviews the evidence relating to those issues, viewing the facts and inferences in the light most favorable to the non-moving party. **Id**. If the nonmoving party sets forth specific facts in support of allegations essential to his claim, a genuine fact issue is presented and summary judgment is not appropriate. **Celotex**, 106 S.Ct at 2555.

2. Municipal Liability under § 1983

The Guajardos' arguments primarily focus on municipal liability under § 1983. When a § 1983 claim is asserted against a municipality, the proper analysis requires evaluation of two issues:

1) whether plaintiff's harm was caused by a constitutional violation, and

2) if so, whether the city is responsible for that violation.

Collins v. City of Harker Heights, Texas, ___ U.S. ___, 112 S.Ct. 1061, 1066, 117 L.Ed.2d 261 (1992).

a. Issue One: The Constitutional Violation

Whether a plaintiff's harm was caused by a constitutional violation depends on: 1) whether the conduct in question was committed by a person acting under the color of state law; and 2) whether that conduct deprived the plaintiff of a right secured by the Constitution or laws of the United States. **Martin v. Thomas**, 973 F.2d 449, 452-53 (5th Cir. 1992). It is undisputed in this case that the persons conducting the joint raid were acting under

the color of state law; therefore, the next issue is whether the conduct of the City and the County amounted to a constitutional violation.

The Guajardos contend that excessive force was used in carrying out the joint raid which resulted in a violation of the Guajardos' constitutional rights. Claims that law enforcement officers used excessive force in the course of an arrest or other seizure, amounting to a constitutional violation, are analyzed under the reasonableness standard of the Fourth Amendment. **Graham v. Connor**, 490 U.S. 386, 395, 109 S.Ct. 1865, 104 L.Ed. 2d 443 (1989). [4] "[T]he `reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are `objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." **Graham**, 490 U.S. at 397. The record before us contains affidavits by the Guajardos which describe how an unknown man knocked at their door asking for Raul Guajardo. The man was told that Raul was not there. Minutes later, the police and deputies allegedly broke the door frame, ransacked the house,

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[4] In past cases, this Court has required the § 1983 plaintiff alleging excessive force to prove "three elements: (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, 480 (5th Cir. 1989) (en banc). In **Hudson v. McMillian**, ___U.S. ___, 112 S.Ct. 995, 1000, 117 L.Ed.2d 156 (1992), the Supreme Court removed the Fifth Circuit's requirement of significant injury on an excessive-force claim arising under the Eighth Amendment. In dictum, this Court stated that **Hudson** overturned **Morel's** significant-injury requirement in the Fourth Amendment context. **Knight v. Caldwell**, 970 F.2d 1430, 1432 (5th Cir. 1992).

confiscated scales, brandished their weapons in front of the children, threatened the family cat, stepped on Rebecca Guajardo's hand, forcefully handcuffed both Eloy and Elizabeth, forced the family out of their house, interrogated the parents while the children stood outside in the rain, forced David Guajardo out of his truck, threatened to shoot him, kicked David's worker out of the truck, and forced David to lie face-down in the mud for over twenty minutes. Based upon these affidavits, a trier of fact could find that the officers' forceful conduct was unreasonable. For this reason, there is a genuine issue whether a constitutional violation occurred. Whether this fact issue is material, however, depends upon whether the Guajardos have provided sufficient evidence to support their claims of municipal liability. **Collins**, 112 S.Ct. at 1066.

b. Issue Two: Municipal Responsibility

A local government may not be sued under § 1983 unless the government's policy or custom inflicted an injury amounting to a constitutional tort. **Monell v. New York City Dept. of Social Services**, 436 U.S. 658, 691, 98 S.Ct. 2018 (1978); **Johnson v. Moore**, 958 F.2d 92, 93 (5th Cir. 1992). Therefore, the Guajardos must present evidence of a policy or custom which causes a constitutional deprivation. **Burns v. City of Galveston, Texas**, 905 F.2d 100, 102 (5th Cir. 1990). Municipalities are not simply vicariously liable under § 1983 for the constitutional torts of its agents, however. Municipalities are liable only when it is shown that the municipality itself is a wrongdoer. **Collins**, 112 S.Ct. at

1067. The Guajardos have alleged two policies or customs of the Defendants that could rise to the level of a constitutional tort: failure to train and lack of delineated authority during joint raids.

i. Failure to Train

The Guajardos argue that the City and the County are liable under § 1983 for failure to train adequately their respective police officers and deputy sheriffs. "Only where a municipality's failure to train its employees in a relevant respect evidences a `deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a city [or county] `policy or custom' that is actionable under § 1983." **City of Canton, Ohio v. Harris**, 489 U.S. 378, 389, 109 S.Ct. 1197, 103 L.Ed 2d 412 (1989). To support their failure-to-train claim, the Guajardos point to other lawsuits brought against the two municipalities which allege misconduct. In addition, they presented personal observations about the alleged misconduct during the joint raid on their home. The other lawsuits that the Guajardos cite for support of their failure-to-train claim, however, do not involve joint raids between the City and the County as in the instant case. This makes the joint raid on the Guajardo home a single incident, and a single incident is insufficient to show an identified failure-to-train amounting to deliberate indifference by a municipality. **See Rodriguez v. Avita**, 871 F.2d 552, 555 (5th Cir. 1989). The district court, therefore, did not err in granting summary judgment in favor of the Defendants on the failure-to-train claim.

ii. The Delineation of Authority during Joint Raids

In their response to the Defendants' motions for summary judgment, the Guajardos allege that the lack of authority apparent during the joint raid of their home resulted in serious psychological injury. They argue that the absence of authority and operational organization in executing joint raids amounts to a policy or custom of omission and this is sufficient to support a § 1983 cause of action. To support their contentions, the Guajardos submitted the affidavit of an expert witness, the former police chief of Dallas, who reviewed the written policy manuals of both defendants, the depositions of the police chief and a deputy sheriff present at the raid, and statements by the Guajardos. In the expert's opinion, the County and the City had conducted joint raids that resulted in confusion by failing to delineate command responsibility.[5] The deposition of certain officers involved in the joint raid revealed the absence of any special policy regarding the delineation of authority pertaining to joint raids.

In order to prevail on this issue, the Guajardos must show that the failure to delineate authority during the joint raid evidences deliberate indifference on the part of the City and the County. **See Canton**, 489 U.S. at 390; **Rhyne v. Henderson County**, 973 F.2d 386, 392 (5th Cir. 1992) (applying the **Canton** deliberate indifference standard to the alleged policy of failure to supervise a suicidal inmate). There is no summary judgment evidence showing

[5] The expert attested that, "An absence of command and proper supervision results in chaos and an indiscriminate disregard for the victims in this type of terroristic assault..."

that the failure to delineate authority amounted to deliberate indifference of the rights of the people being raided this establishing a "policy" that is actionable under § 1983. Again, there is no evidence that other joint raids led to the use of excessive force. Therefore, this makes the joint raid on the Guajardo home a single incident, and a single incident is insufficient to establish policy amounting to deliberate indifference by a municipality. **See Rodriguez**, 871 F.2d at 555. Moreover, this does not appear to be a situation where the consequences of the municipality's omission is obvious. **See Canton**, 489 U.S. at 390 n.10; **Rhyne**, 973 F.2d at 392. Based on the summary judgment record before us, it is not obvious that the failure to appoint a leader in this joint raid resulted in the use of excessive force. Finally, even assuming there was evidence of a "policy" of failure to delineate authority, the record fails to demonstrate causation. The failure to delineate authority must have been closely related to or the moving force behind the use of excessive force in this joint raid. The Guajardos must show that their injuries would have been avoided had there been a more defined chain of command. There is simply no evidence that the lack of authority resulted in the amount of force used.

Conclusion

For the foregoing reasons, we affirm the district court judgment.