IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-7346

Summary Calendar

Helen Griffin, individually and as mother and next friend of Laura Anntoinette Rawls, Jonny Edmond Griffin, Arzelia Shenane Griffin, Quincy Omarr Griffin, and Johnny Griffin, Jr., and as personal representative of Johnny Griffin, Sr., deceased,

Plaintiff-Appellee,

versus

Charles Newell, individually and in his official capacity as former Chief of Police of the City of Jackson's Police Department, Steve Wilson and Preston Carter, individually and in their official capacities as officers of Jackson's Police Department, and the City of Jackson,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Mississippi
(CA J 91 0215 B)

(December 23, 1992)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Defendant Steve Wilson, a Jackson, Mississippi police officer, has filed this interlocutory appeal, seeking review of the district court's denial of qualified immunity. We hold that the question of qualified immunity presented in this case involves issues of fact rather than law and therefore dismiss the appeal for lack of jurisdiction.

I.

Johnny Griffin was shot and killed by Officer Steve Wilson on April 7, 1990. Helen Griffin, Johnny's wife, brought suit in Mississippi state court against the City of Jackson, former Jackson Police Chief Charles Newell, and police officers Steven Wilson and Preston Carter in their individual and official capacities. Her complaint included: (1) a state-law wrongful death claim against all defendants; (2) a 42 U.S.C. § 1983 claim against the City of Jackson; (3) a claim that Officers Wilson and Carter had conspired to conceal the true circumstances of the shooting; and (4) a § 1983 claim against Officer Wilson. The defendants removed the case to the United States District Court for the Southern District of Mississippi. They then filed a motion seeking the dismissal of, or summary judgment on, all of Griffin's federal claims, asserting that Griffin's complaint did not satisfy the requirements of Fed. R. Civ. P. 12 (b) 6 and that the individual defendants were entitled to qualified immunity. The district court dismissed the § 1983 claim against the city and the conspiracy charge against Wilson and Carter on grounds that these counts had not been pled with specificity and failed to state a claim for relief. The court

declined to grant summary judgment on the § 1983 claim against Wilson, however, holding that "sufficient conflicting evidence exists as to the qualified immunity issue and its possible applications on Defendant Wilson's behalf." Wilson has appealed.

II.

A district court's denial of summary judgment based on a claim of qualified immunity is an appealable final order only to the extent that it turns on issues of law. Mitchell v. Forsyth, 105 S.Ct. 2806, 2817 (1985); Brawner v. Richardson, 855 F.2d 187, 190-91 (5th Cir. 1988). With the Supreme Court's recent "clarif[ication] [of] the analytical structure under which a claim of qualified immunity should be addressed" in Siegert v. Gilley, 111 S.Ct. 1789, 1793 (1991), appellate courts must now normally resolve two distinct "purely legal" questions. Mitchell, 105 S.Ct. at 2816 n.9. Courts should first determine whether a plaintiff has "allege[d] the violation of a clearly established constitutional right." Siegert, 111 S.Ct. 1793; Duckett v. Cedar Park, 950 F.2d 272, 278 (5th Cir. 1992); Samaad v. Dallas, 940 F.2d 925, 940 (5th Cir. 1991). It is only if this logically prior question is answered in the affirmative that courts should reach the issue of qualified immunity proper and ask "whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions." Mitchell, 105 S.Ct. at 2816 (emphasis supplied). See, e.g., Anderson v. Creighton, 107 S.Ct. 3034, 3038 (1987); White v. Taylor, 959 F.2d 539, 544 (5th Cir.

1992); Jackson v. Beaumont Police Dep't, 958 F.2d 616, 620 (5th Cir. 1992).

This framework governs our consideration of those qualified immunity appeals in which a defendant responds to plaintiff's factual allegations with the contention that such harms do not constitute a violation of applicable constitutional standards. In some cases, however, defendants dispense with legal argument and assert a qualified immunity claim based solely on the defense that "we didn't do it." Elliot v. Thomas, 937 F.2d 338, 342 (7th Cir. 1991), cert. denied, 112 S.Ct 973 (1992). Such factual challenges, while perhaps phrased in terms of qualified immunity, ask the court to resolve not an issue "conceptually distinct from the merits of the plaintiff's claims," Mitchell, 105 S.Ct. at 2816, but the merits themselves. As such, they do not raise the "purely legal" questions subject to interlocutory review under Mitchell. Feagley v. Waddill, 868 F.2d 1437, 1439 (5th Cir. 1989); Lion Boulos v. Wilson, 834 F.2d 504, 509 (5th Cir. 1987); see also Kulwicki v. Dawson, 969 F.2d 1454, 1461 n.7 (3d Cir. 1992); Crawford-El v. Britton, 951 F.2d 1314, 1317 (D.C.Cir. 1991), cert. denied, 113 S.Ct. 62 (1992); Kaminsky v. Rosenblum, 929 F.2d 922, 927 (2d Cir. 1991); Velasquez v. Senko, 813 F.2d 1509, 1511 (9th Cir. 1987). Because Wilson's appeal consists of little more than a request that this court accept his version of the facts, this case must be dismissed for lack of jurisdiction.

In the district court below, Griffin and Wilson presented very different accounts of the circumstances surrounding the

shooting. Relying upon the affidavits of Johnny Griffin, Jr. and John Barber, Griffin stated that this incident began when Johnny Griffin and John Barber noticed a woman knocking out the windows of an apartment building on their way to a local store. After Griffin attempted to persuade the woman to stop, they continued on to the store. On their way back, however, Griffin and Barber were chased by eight male friends of the woman. Griffin ran home to retrieve a gun and then went to a nearby creek. After firing two shots into the air, Griffin placed the gun back in its holster and began walking home. When Griffin and Barber reached the front yard of Griffin's house, they were confronted by Officers Wilson and Carter, who shouted: "Stop, hands up and drop the bag." Within seconds of issuing this single warning, Officer Wilson shot Griffin in the chest as he bent down to place the holster on the ground. When Griffin asked "What did I do wrong, Officer?", Officer Wilson responded by firing a second shot to his chest.

Wilson's version of events contradicted Griffin's account on several fundamental points. According to Wilson, he and Carter received a call over the police radio that an individual was firing a weapon. As they approached the reported location, they noticed Griffin and Barber walking across the street. Griffin fit the description supplied by the police dispatcher and was carrying a gun in his hand. Wilson and Carter stopped the car and informed Griffin and Barber that they were police officers. When Griffin pointed the gun in his direction, Wilson shouted: "Police, drop the gun." After three additional warnings, Wilson shot Griffin in the

chest. When Griffin continued to point the gun in his direction, Wilson fired a second, fatal shot.

The district court denied Wilson's motion for summary judgment on grounds that "sufficient conflicting evidence exists as to the qualified immunity issue and its possible applications on Defendant Wilson's behalf." On appeal, Wilson does not argue that Griffin's allegations do not implicate a constitutional right, see, e.g., Siegert, 111 S.Ct. at 1793, or that his actions did not violate clearly established legal norms in effect at the time. See, e.g., Anderson, 107 S.Ct. at 3038. Wilson instead contends that the district court should have granted him qualified immunity because Griffin's allegations are not true.[1] The district court's treatment of such factual issues is plainly outside of Mitchell, which established immediate review of legal questions, not "a general exception to the finality doctrine for public employees." Elliot, 937 F.2d at 342; see, e.g., Lion Boulos, 834 F.2d at 509; Crawford-El, 951 F.2d at 1317. We accordingly DISMISS Wilson's appeal from the district court's denial of qualified immunity for lack of jurisdiction.

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[1] The parties main legal arguments address issues that are not relevant to this appeal. The defendants' extended discussion of Police Chief Newell's liabilty under § 1983 is entirely unnecessary, for only Officer Wilson, as the district court noted, is named as a defendant in this count of the complaint. Griffin's brief stresses that the district court did not err in declining to dismiss her state-law wrongful death claim. This argument is superfluous as well, since the defendants have not appealed this portion of the district court's holding. In Griffin's partial defense, it appears that this error stems from the defendants' mistaken designation of the § 1983 claim as "Count 1" in their brief, when in fact it is Count 4.

The use of deadly force is a seizure within the meaning of the Fourth Amendment. Tennessee v. Garner, 105 S.Ct. 1694 (1985). This case is governed by the standards set out in Graham v. Conner, 109 S.Ct 1865 (1989).[2]

in Johnson v. Morel, 876 F.2d 477, 480 (5th Cir. 1989), we stated: "A plaintiff can thus prevail on a Constitutional excessive force claim by proving each of these 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 excessivness of which was 3) objectively unreasonable."

However, we have noted that the Supreme Court's decision in Hudson v. McMillian, 112 S.Ct. 995 (1992), that significant injury is not required to establish an excessive force claim under the Eighth Amendment, has called Johnson into question. Mouille, at 965; King v. Chide, 974 F.2d 653, 657 (5th Cir. 1992); Knight v. Caldwell, 970 F.2d 1430, 1432 (5th Cir. 1992).

If the facts are as Wilson states them, he might prevail. Fraire v. City of Arlington, 957 F.2d 1268, 1277 (5th Cir. 1992); if they are as Griffin avers, then she might win.

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[2] There appears to be some disagreement among the panels as to whether Graham is to be applied retroactively. Compare Martin v. Thomas, 973 F.2d 449, 455 (5th Cir. 1992) (yes) with Mouille v. City of Live Oak, slip. op. at 963 (5th Cir. Nov. 20, 1992) (no); Jackson v. Beaumont Police Dep't, 958 F.2d 616, 620 (5th Cir. 1992). Since the shooting took place in 1990, Graham obviously applies in this case.

"[T]he district court's denial of a motion for summary judgment because of the perceived lack of qualified or absolute immunity constitutes an appealable 'final judgment' only if . . . the immunity defense turns upon an issue of law and not of fact." Stem v. Ahearns, 908 F.2d 1, 3 (5th Cir. 1990);

Here, there is little question that the facts alleged would constitute constitutionally excessive force. Simpson v. Hines, 903 F.2d 400, 403 (5th Cir. 1990). Therefore, this case turns on this factual dispute and the district court's denial of summary judgment rested upon the existence of this factual dispute.