UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-7772
Summary Calendar

JOSE HILBARDO VALDEZ-ORTEGA and
LUIS FERNANDO QUEZADA,

Plaintiffs-Appellees,

versus

JOHN DOES, Etc., ET AL.,

Defendants,

JOSEPH DAN CABRAL, S.J. MAURICIO, TRAVIS EPPERSON,
MICHAEL TYLER, and JEFFREY RICHARDS,
in their individual capacities as
United States Border Patrol Agents,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas
(CA-M-91-215)

(December 27, 1993)

Before DAVIS, JONES and DUHÉ, Circuit Judges.

PER CURIAM:[1]

Five U. S. Border Patrol Agents appeal the district court's rejection of their qualified immunity defense to a § 1983 action. We dismiss the appeal.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

I.

Jose Hilbardo Valdez-Ortega and Luis Fernando Quezada-Cabrera filed a **Bivens** action against five United States Border Patrol agents. **See Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics**, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). In their complaint, Valdez and Quezada alleged that the defendants brutalized them during an interrogation following their arrest near a Border Patrol Inspection Station at Falfurrias, Texas, on March 10, 1991. Valdez and Quezada alleged that they had suffered cuts, abrasions, bruises, contusions, and severe emotional distress and anxiety.

Arguing that they are entitled to qualified immunity as to the excessive-force claims,[2] defendants filed a motion to dismiss or in the alternative for summary judgment. The district court denied the motions for summary judgment, and this appeal ensued.

II.

Appellants contend that their conduct was objectively reasonable under the law in effect at the time of the plaintiffs' arrest and interrogation. Alternatively, the appellants suggest that they should be absolved because the law was not clearly established at that time. The appellants argue that this court's opinion in **Johnson v. Morel**, 876 F.2d 477 (5th Cir.1989) (en banc), established the law in effect at the time of the plaintiffs' arrest

[2]Appellants concede that their motion for summary judgment put at issue the excessive force claims only and that further proceedings on plaintiffs' remaining constitutional claims will be necessary even if they prevail in this appeal.

and interrogation. **Johnson**, a Fourth Amendment case, established a three-part test for excessive-force claims:

> A plaintiff can thus prevail on a Constitutional excessive force claim only by proving each of these three elements: (1) a significant injury, which 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.

Id. at 480. Appellants contend that plaintiffs did not suffer a "significant injury" under **Johnson**. The district court held that defendants' alleged conduct was not objectively reasonable under **Johnson**.

This case is similar to **Oliver v. Collins**, 914 F.2d 56 (5th Cir. 1990), an Eighth Amendment case, in which this court reasoned that the resolution of the question whether a claimant's injury is "significant" depends, to some extent, on the circumstances in which the injury was sustained:

> There must in all these cases be "a significant injury." But where there is a plausible claim that there was no provocation, and no force or other actions whatever were even apparently called for, and the guards' action was not all in connection with attempting to carry out any arguable employment function but was rather wholly vindictive and punitive from the inception, then our precedents do not foreclose considering these circumstances in determining whether the resultant injury is "significant."

Id. at 59. (citations omitted). The injuries suffered by the plaintiff in **Oliver**, cuts and bruises, were similar to those allegedly suffered by plaintiffs in the instant case. We vacated the district court's dismissal of the case as frivolous under 28 U.S.C. § 1915(d) and remanded the case for further proceedings. **Oliver**, 914 F.2d at 60. Although we did not expressly hold that

plaintiff had suffered a significant injury, it is implicit in our reasoning that cuts and bruises can constitute a significant injury when the beating that caused them was unprovoked and unnecessary.

A genuine issue of material fact exists regarding the seriousness of plaintiffs' injuries. **See Valencia v. Wiggins**, 981 F.2d 1440, 1448 (5th Cir. 1993); **Johnson**, 876 F.2d at 479 (constitutional significance of plaintiff's injuries was a question of fact). An order denying a motion for summary judgment based on qualified immunity is not immediately appealable if factual issues material to immunity are in dispute. Accordingly, this court lacks jurisdiction, and the appeal is dismissed. **See Mitchell v. Forsyth**, 472 U.S. 511, 530, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985); **Feagley v. Waddill**, 868 F.2d 1437, 1441-42 (5th Cir. 1989).

APPEAL DISMISSED.