IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8688

LORRAINE POOLE, ET AL.,

Plaintiffs-Appellants,

versus

CITY OF KILLEEN, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas
(W 92 CA 158)

August 4, 1993

Before KING, DAVIS and WEINER, Circuit Judges.

PER CURIAM:[*]

Lorraine Poole, her children, and her neighbor Mozell Carter brought a federal civil rights action against the city of Killeen, Texas and Killeen police officer Paul Carey. The Pooles and Carter also brought various pendent state-law claims, including false arrest, false imprisonment, and malicious prosecution, against both defendants. In district court Killeen

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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 Pursuant to that rule, the court has determined that this opinion should not be published.

and Carey filed a motion for summary judgment to dismiss all claims. The district court granted the motion, and the plaintiffs appeal from that judgment to this court. We affirm.

I. Factual and Procedural Background

A. Facts

On January 2, 1988, Lorraine Poole's husband, John Poole, Sr., suffered chest pains at his home in Killeen, Texas. Mrs. Poole contacted Darnall Army Hospital, which dispatched a city ambulance that arrived at the Poole home some time later. The ambulance attendants began to care for Mr. Poole inside the ambulance, which remained on the Poole's driveway. A second ambulance arrived in the meantime with oxygen equipment to supplement the supplies of the first ambulance. At some point an attendant from one of the two ambulances called the Killeen Police Department for backup. Officer Carey was sent to the scene.

As the attendants of the two ambulances cared for Mr. Poole, and before Officer Carey arrived, a crowd consisting of the Poole family and their neighbors gathered around the driveway. The members of the crowd became concerned that the first ambulance had remained on the driveway for what seemed to them a long time, instead of taking Mr. Poole directly to the hospital. Mr. Poole's son, John Earl Poole, Jr., appeared particularly upset. He paced back and forth near the first ambulance, and other members of the crowd encouraged him to drive the ambulance

himself.

There is some dispute as to the exact sequence of the events that followed. According to the appellants, John Earl Poole vented his frustration by shouting, "Well, then, I'll drive this [epithet], then." An attendant from the first ambulance, Ralph Hebert, then tackled John Earl Poole. Appellants insist that Officer Carey did not arrive until after John Earl Poole had shouted; and therefore witnessed, at the most, an unprovoked attack by Mr. Hebert. On the other hand, appellees contend that Officer Carey observed an argument in progress, heard John Earl Poole's shout, and saw Mr. Hebert grab John Earl Poole only after the latter had run around the ambulance toward Mr. Hebert.

Officer Carey's actions upon his arrival at the scene are also disputed. According to the appellants, Mrs. Poole ran up to Officer Carey and tried to warn him that John Earl Poole had a bad back and could be severely injured. Officer Carey responded by telling her to stand back. When Mrs. Poole continued to shout her warning rather than backing up, Officer Carey allegedly hit her in the stomach with his billy-club and knocked her to the ground. When she continued to warn him about her son's back, he allegedly struck her at least two more times. For their part, the appellees contend that after repeatedly warning Mrs. Poole and twice pulling her away from the scene, Officer Carey was forced to take a defensive position and strike her twice on her lower leg with his baton and then once in her midsection. Mrs. Poole was later examined by a Darnall Army Hospital physician,

who found no evidence of significant injury resulting from Officer Carey's blows.

During the time of the interaction between Mrs. Poole and Officer Carey, Monica Poole Clayton, Mrs. Poole's daughter, and Mozell Carter, a neighbor, gathered near John Earl Poole and Mr. Hebert. According to the appellants, they were attempting to comfort John Earl Poole; according to appellees, they were trying to pull him away from Mr. Hebert. After ordering them to stand back, Officer Carey placed them under arrest and charged them with resisting arrest. Mrs. Poole was arrested on the same charge. Officer Carey also arrested John Earl Poole, initially charging him with criminal attempt of the unauthorized use of a vehicle, but eventually dropping that charge for one of resisting arrest. John Earl Poole was taken by Mr. Hebert in the second ambulance to Metroplex hospital after his arrest, where he was diagnosed with lower back strain. Mrs. Poole, Mrs. Clayton, and Mr. Carter were taken to the police station. Mr. Poole died while they awaited their release.

B. Proceedings

In December, 1989, Mrs. Poole, joined by Mrs. Clayton, John Earl Poole, and Mozell Carter, sued Officer Carey and the city of Killeen in state court. Their action was removed to district court in May, 1992, when a federal civil rights claim was added. Beyond the § 1983 claim, the plaintiffs brought pendent state-law claims of false arrest, false imprisonment, and malicious prosecution against both defendants, as well as an additional

claim of negligence against Killeen. Killeen and Officer Carey moved for summary judgment on all grounds, and their motion was granted by the district court. The plaintiffs now appeal from the district court's judgment to this court.

II Standard of Review

In reviewing a grant of summary judgment, we apply the same standard as the district court. Waltman v. International Paper Co., 875 F.2d 468, 474 (5th Cir. 1989) (grants of summary judgment are reviewed de novo). In particular, we examine whether there exists no genuine issue of material fact such that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). In our analysis, we review all of the evidence and inferences drawn from that evidence in the light most favorable to the party opposing the motion for summary judgment. Reid v. State Farm Mutual Auto Ins. Co., 784 F.2d 577, 578 (5th Cir. 1986).

To defeat a motion for summary judgment, the non-moving party must set forth specific facts sufficient to establish that there is a genuine issue for trial. FED. R. CIV. P. 56(e); see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). A mere allegation of the existence of a dispute over material facts is insufficient to defeat a motion for summary judgment; however, if the evidence shows that a reasonable jury could return a verdict for the non-moving party, then a genuine issue exists. Anderson, 477 U.S. at 247-48. On the other hand, if a rational

trier of fact could not find for the non-moving party after reviewing the record, then there is no genuine issue for trial and summary judgment should be granted. Amoco Production Co. v. Horwell Energy, Inc., 969 F.2d 146, 147-48 (5th Cir. 1992). The absence of evidence to establish an essential element of the non-moving party's case can support a finding of summary judgment. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Topalian v. Ehrman, 954 F.2d 1125, 1131 (5th Cir. 1992). Finally, if the non-moving party supports the essential elements of its claim by presenting evidence that is "merely colorable, or is not significantly probative, summary judgment may be granted." Anderson, 477 U.S. at 249-50 (citations omitted).

III. Discussion

A. State-Law Claims Against Killeen

1. Immunity under § 101.057(2) of the Texas Tort Claims Act

Appellants object to the district court's determination that Killeen is immune from liability for the state-law claims of false arrest, false imprisonment, and malicious prosecution. They argue that § 101.0215 of the Texas Tort Claims Act (TTCA) establishes liability for municipalities when they pursue their "governmental functions," which specifically include police protection and control.[1] They contend further that § 101.0215

[1] The relevant portion of the TTCA reads:

> A municipality is liable under this chapter for damages arising from its governmental functions, which are those functions that are enjoined on a municipality by

supersedes a later section of the TTCA, § 101.057(2), which exempts municipalities from liability for claims "arising out of assault, battery, false imprisonment, or any other intentional tort . . . ."

Whether § 101.0215 supersedes § 101.057(2) is a legal question; we accordingly review it de novo. In re Missionary Baptist Foundation of America, 712 F.2d 206, 209 (5th Cir. 1983). The Texas courts have held that § 101.0215 does not automatically subject a municipality to possible liability for the section's enumerated "governmental functions." A municipality can be immune from liability for an activity that qualifies as a "governmental function" under § 101.0215 if the TTCA grants immunity for that activity elsewhere in the Act:

> [E]ven assuming that the [c]ity's actions fall within section 101.0215, we do not view this as waiving the [c]ity's governmental immunity. This section clearly provides that "[a] municipality is liable under this chapter for damages arising from its governmental functions . . . ." "Under this chapter" refers to the TTCA. . . . [I]f the action engaged in by a municipality is considered to be a governmental function, . . . further analysis under the Act is required to determine a municipality's liability.

McKinney v. City of Gainesville, 814 S.W.2d 862, 865 (Tex. App.--Fort Worth 1991, no writ). In McKinney, the court faced a question very similar to that posed by the case at hand: §

> law and are given it by the state as part of the state's sovereignty, to be exercised by the municipality in the interest of the general public, including but not limited to: (1) police and fire protection and control . . . .

TEX. CIV. PRAC. & REM. Code § 101.0215(a) (Vernon Supp. 1993).

101.0215 provided for liability on the claim; and another section of the TTCA, § 101.056, established immunity. The court held that § 101.0215 must be read in light of the other provisions of the TTCA, and concluded that the section providing immunity prevailed. McKinney, 814 S.W.2d at 866-67.

Similarly, in the case at hand, § 101.0215 is limited by § 101.057(2). Accordingly, Killeen remains immune from liability for all claims arising from intentional torts, despite the fact that the intentional torts were allegedly committed in the context of the governmental function of police control and protection. See City of San Antonio v. Dunn, 796 S.W.2d 258, 261 (Tex. App.--San Antonio 1990, no writ) (holding that a city's immunity is not waived under the TTCA if a claim arises out of an intentional tort). It follows that Killeen is immune from the plaintiffs' false imprisonment, false arrest, and malicious prosecution claims. See TEX. CIV. PRAC. & REM. § 101.057(2) (Vernon's 1986) (including false imprisonment in its list of intentional torts); Dunn, 796 S.W.2d at 261 (recognizing that false arrest is an intentional tort); Browning-Ferris Industries, Inc. v. Lieck, 845 S.W.2d 926, 948 (Tex. App.--Corpus Christi 1992, writ granted) (labeling malicious prosecution an intentional tort).[2]

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[2] Appellants argue that Killeen cannot establish immunity from their intentional tort claim because there has not yet been any finding that an intentional tort was actually committed. In support of this proposition, they cite City of Amarillo v. Langley, 651 S.W.2d 906, 919 (Tex. App. 7 Dist. 1983, no writ): "Before the [c]ity can demonstrate immunity . . . it is required to either conclusively establish, or obtain a finding, that an

2. Immunity under § 101.055(3) of the Texas Tort Claims Act

Appellants argue that even if § 101.057(2) prevents their intentional tort claims, their negligence claim against Killeen survives. The negligence claim is based on an alleged failure to "properly use its training manuals and to train its employees regarding assault, excessive force, and false arrest." Appellants contend that their negligence claim is not invalidated by § 101.055(3) of the TTCA, which provides that municipalities are immune from all claims arising "from the failure to provide or the method of providing police or fire protection."

Under Texas law, a municipality is immune from liability for damages resulting from "the formulation of policy -- i.e., the determining of the method of police protection to provide . . . ." State v. Terrell, 588 S.W.2d 784, 788 (Tex. 1979, no writ); see also Robinson v. City of San Antonio, 727 S.W.2d 40 (Tex. App.--San Antonio 1987, writ ref'd). It is only when an officer or an employee acts negligently in executing the

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intentional tort was committed." Appellants fail to realize, however, that the city in Langley sought immunity for a claim of excessive force, which does not necessarily constitute an intentional tort. The court held that because specific intent is not required for an excessive force claim, the city had to establish intent before it could be granted immunity. By contrast, false imprisonment, false arrest, and malicious prosecution are by definition intentional torts. Therefore, in this case, it would be a waste of the court's resources to hold a trial to establish if intentional torts were committed in order to determine whether Killeen is liable. Only two possibilities exist, and under each Killeen is free from liability: either Killeen is not liable for the intentional tort claims because intentional torts were not committed; or Killeen is immune from prosecution because intentional torts were committed. We accordingly find appellants' argument to be without merit.

policy that a municipality may be liable. See Terrell, 588 S.W.2d at 788. The appellants' assertion that Killeen was negligent in its failure to "properly use its training manuals and to train its employees regarding assault, excessive force, and false arrest" is nothing more than a criticism of the city's training policy. It is accordingly insufficient to overcome Killeen's immunity under § 101.055(3).

Appellants also assert that Officer Carey was negligent in his implementation of Killeen's policy, regardless of the merits of the policy itself. However, they provide no evidence to support the contention that Officer Carey responded in a way that differed from official policy such as to establish his negligence. A legal adviser and an investigating officer of the Killeen Police Department reviewed the file on the incident in question and concluded that Officer Carey's actions were consistent with Killeen policy. Appellants never counter this testimony with any evidence, beyond mere allegation, that Officer Carey's actions did not comply with Killeen policy. The district court therefore did not err in dismissing the negligence claim against Killeen on the ground that it is barred by § 101.055(3) of the TTCA.

B. State-Law Claims against Officer Carey

Appellants also contend that Officer Carey did not have probable cause to arrest them, and accordingly the district court should not have dismissed their state-law claims against him for false arrest, false imprisonment, and malicious prosecution.

They argue that a genuine issue of material fact exists as to whether Officer Carey actually heard John Earl Poole's threat to drive the ambulance. According to their line of reasoning, if Officer Carey did not hear the threat, then he could only have observed an unprovoked attack by Mr. Hebert and so had no probable cause to arrest John Earl Poole. They argue further that Officer Carey did not have probable cause to arrest any of the four appellants because he could not have established the elements of a charge of resisting arrest against them.

Under Texas law a warrantless misdemeanor arrest is valid if the police officer has probable cause to believe that a criminal offense has been committed in his or her presence. See Bodzin v. City of Dallas, 768 F.2d 722, 724 (5th Cir. 1985); TEX. CODE CRIM. PROC. ANN. art. 14.01(b) (Vernon 1986). Probable cause

> exists only "when the facts and circumstances within the knowledge of the arresting officer and of which he has reasonably trustworthy information are sufficient in themselves to warrant in a person of reasonable caution the belief that an offense has been or is being committed." The factors considered in determining whether probable cause exists "are not technical ones, `but rather factual and practical ones of everyday life on which reasonable and prudent persons, not legal technicians, act.'"

United States v. Tarango-Hinojos, 791 F.2d 1174, 1175 (5th Cir. 1986) (citations omitted); see also Jones v. State, 493 S.W.2d 933, 935 (Tex. Cr. App. 1973, no pet.). Under that standard, the arrest of appellants in this case was valid. Officer Carey was dispatched to the Poole home to assist with a medical emergency. The record establishes that when he arrived, he saw at the very

least a crowd of agitated people, two ambulances, and a paramedic tackling a member of the crowd. A reasonable person in those circumstances would conclude that the paramedic was being interfered with in the discharge of his duty and that a misdemeanor was in the process of being committed. Officer Carey accordingly had probable cause to arrest John Earl Jones.

It is true that John Earl Jones was officially charged with resisting arrest and that each of the elements of the charge may not have been present. Nonetheless, as stated above, Officer Carey was required only to have probable cause that a criminal offense occurred in his presence before he could make a warrantless arrest. See Bodzin 768 F.2d at 724. Appellees presented uncontroverted expert testimony that there were a number of state or local misdemeanors with which John Earl Poole could have been charged, including disorderly conduct and interference with a city official in the exercise of his or her duties. Moreover, it is well established that the standard required to prove probable cause is less stringent than the standard required to prove the actual commission of the offense. See Edgar v. Plummer, 845 S.W.2d 452, 454 (Tex. App.--Texarkana 1993, no writ) ("Proof of the actual commission of the offense is not required for a showing of probable cause."). It follows that Officer Carey made a valid arrest of John Earl Poole, whether or not the charge of resisting arrest would be rejected in court.

The above analysis applies equally to the arrests of Mrs. Poole, Mrs. Clayton, and Mr. Carter for resisting arrest. It is

undisputed that when Officer Carey ordered everyone away from the scene of the struggle between Mr. Hebert and John Earl Poole, the three remaining appellants refused to comply. Whatever their intentions, they interfered with Officer Carey in the discharge of his duties. He had probable cause to arrest them without a warrant for the commission of a misdemeanor. As in the case of John Earl Poole, the charge of resisting arrest may prove insufficient in court; nonetheless, probable cause existed for the arrests.

Because Officer Carey had probable cause to arrest each of the appellants, their state-law claims against him fail. Under Texas law, to establish "malicious prosecution" parties must show that legal proceedings against them were filed "maliciously and without probable cause." Kale v. Palmer, 791 S.W.2d 628, 632 (Tex. App.--Beaumont 1990, no writ) (quoting Morris v. Hargrove, 351 S.W.2d 666, 667 (Tex. Civ. App.--Austin 1961, writ ref'd.)). Similarly, false arrest and false imprisonment claims require a showing of willful detention without legal justification. See Morales v. Lee 668 S.W.2d 867, 869 (Tex. App. 4 Dist. 1984, no writ); Zuniga v. State, 664 S.W.2d 366, 370 (Tex. App. 13 Dist. 1983, no writ). We agree with the district court's holding that probable cause existed for the arrests of the appellants and that their state-law claims should be dismissed as a result.

C. Federal Civil Rights Claims against Officer Carey

In addition to their state-law claims, appellants filed a federal civil rights action against both Officer Carey and

Killeen. The Supreme Court has held that governmental officials performing discretionary functions have a qualified immunity which shields them from civil damages liability, if their action is objectively reasonable in light of legal rules that are clearly established at the time the action is taken. See Anderson v. Creighton, 483 U.S. 635, 638-39 (1987) (citing Harlow v. Fitzgerald, 457 U.S. 800, 818-19 (1982)).[3] We can accordingly dispose of the claim against Officer Carey based on our finding that he had probable cause to arrest the appellants. This court has specifically held that regardless of whether individuals arrested are eventually acquitted of the charges against them, probable cause for the arrest gives rise to a qualified immunity defense to a § 1983 claim against the officer. See Pfannstiel v. City of Marion, 918 F.2d 1178, 1184 (5th Cir. 1990). Therefore the district court correctly held that Officer Carey is protected by qualified immunity from the appellants' civil rights claim.

D. Federal Civil Rights Claim against Killeen

Appellants argue that Killeen is subject to a § 1983 action for an alleged policy of "approving abusive and violent behavior by its employees." They contend that Officer Carey used

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[3] The Supreme Court has held that the first step in an analysis of a defendant's qualified immunity claim is to establish that the plaintiff has stated a clearly established constitutional right. See Duckett v. City of Cedar Park, Texas, 950 F.2d 273, 276 (1992), citing Siegert v. Gilley, 111 S. Ct. 1789, 1793 (1991). In this case, appellants assert violations of their Fourth Amendment right to be free from unreasonable seizure without probable cause and their Fourteenth Amendment right not to be deprived of liberty without due process. Both are clearly established constitutional rights.

excessive force when he arrested them and that Killeen ratified his conduct when they found it to be consistent with city policy. In other words, they derive a municipal policy of promoting excessive violence from the fact that Killeen supported Officer Carey's actions.

In order for a municipality to be held liable under § 1983, it must be established that a municipal policy or custom caused a constitutional violation. Leatherman v. Tarrant County Narcotics Unit, 113 S. Ct. 1160, 1162 (1993). The appellants' § 1983 claim hinges on their contention that Killeen's reaction to Officer Carey's behavior proves that the city has a policy of supporting the use of excessive force by its employees. Therefore we must examine whether Officer Carey in fact used excessive force.

This court has recently held that proof of an injury, whether significant or insignificant, is the first element required to sustain a civil rights claim for alleged use of excessive force. Knight v. Caldwell, 970 F.2d 1430, 1432 (5th Cir. 1992), citing Hudson v. McMillan, 112 S. Ct. 995, 1000 (1992) (holding that constitutional protection is not available for minimal use of force as long as the force "is not of a sort repugnant to the conscience of mankind"). In Knight, we sustained a jury charge that defined injury as "damage or harm to the physical structure of the body, including diseases that naturally result from the harm." Knight, 970 F.2d at 1433. We have further held that to sustain a civil rights claim, the injury must be proved to have "resulted directly and only from

the use of force that was clearly excessive to the need; and the excessiveness of which was . . . objectively unreasonable." Spann v. Rainey, 987 F.2d 1110, 1115 (5th Cir. 1993) (emphasis added) (citing Johnson v. Morel, 876 F.2d 477, 480 (5th Cir. 1989) (en banc), and noting that the initial requirement of significant injury prescribed in Johnson was overruled by the Supreme Court in Hudson, 112 S. Ct. at 117).

In the case at hand, none of the appellants have established the elements of an excessive force claim. Neither Mrs. Clayton nor Mr. Carter has alleged any injury resulting from the interaction with Officer Carey. John Earl Poole did sustain back strain, but the injury resulted largely, if not entirely, from his struggle with Mr. Hebert. In other words, the injury did not result only from Officer Carey's actions and so cannot support a claim of excessive force. See Spann, 987 F.2d at 1115.

Finally, there is some evidence in the record that Mrs. Poole suffered bruises caused by Officer Carey. That evidence is supplied by a report submitted from the Darnall Army Hospital's emergency room, where Mrs. Poole was examined after the incident in question. Mrs. Poole did not allege injuries on appeal, other than claiming that she has had nightmares resulting from the incident. Moreover, appellees offered testimony by an expert witness and by official investigators of the incident that Officer Carey's force was not "clearly excessive" in light of the circumstances he faced. Mrs. Poole offered no evidence to contest their conclusions, beyond mere conclusory allegations.

We therefore conclude that all of the appellants, including Mrs. Poole, have failed to establish that Officer Carey used excessive force in his interaction with them. As a result, we reject the contention that Killeen's support of Officer Carey's actions proves a policy of encouraging the use of excessive force by its employees. In short, the district court did not err when it dismissed the appellants' federal civil rights claim against Killeen.

IV. Conclusion

For the foregoing reasons, we AFFIRM the district court's grant of summary judgment in favor of the appellees.