

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 93-1747

Summary Calendar

MORTON and SUSAN HOFFMAN,

Plaintiffs-Appellees,

VERSUS

CHARLES R. SHEFFIELD, ET AL.,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Texas

(3:91 CV 0973 R)

(April 28, 1994)

Before REYNALDO G. GARZA, DUHÉ and EMILIO M. GARZA, Circuit Judges.

PER CURIAM*:

Dallas police officers Charles R. Sheffield, Thomas M. Payne, and James J. Veaser ("appellants") appeal the district court's denial of summary judgment on the basis of qualified immunity.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Veeseer also claims that the district court erred in naming him as a party defendant. We find that the district court did not err in denying the appellants summary judgment on the basis of qualified immunity. We further find that Veeseer's appeal is improper because this court lacks jurisdiction to review the decision of which he complains. Therefore, the district court is AFFIRMED in all respects.

I. PROCEDURAL HISTORY

On May 21, 1991, Morton and Susan Hoffman ("appellees") filed this action against Dallas police officers Charles R. Sheffield, Thomas M. Payne, and James J. Veeseer, Dallas County, the City of Dallas, and former Dallas Police Chiefs Mack Vines and William Rathburn.¹

The Hoffmans alleged that they were wrongfully arrested, assaulted, and falsely imprisoned, and they sought to recover actual and punitive damages under 42 U.S.C. § 1983, and several pendant state law tort claims.² Specifically, they alleged that Officers Sheffield, Payne, and Veeseer intentionally and maliciously assaulted Morton Hoffman physically and Susan Hoffman sexually, illegally arrested them, and unlawfully detained and imprisoned them. The Hoffmans also sought damages from the City of Dallas,

¹ Officer Veeseer and Police Chief Mack Vines were not named in the original complaint. Vines was added as a defendant in the Plaintiffs' Amended Complaint. Veeseer was added in the Plaintiffs' Second Amended Complaint.

² These state claims included assault and battery, false arrest, false imprisonment, intentional infliction of emotional distress, and gross negligence.

they alleged that this incident happened because the City had inadequately trained, supervised, and disciplined its police officers. Finally, the Hoffmans sought damages from Dallas County, they alleged that they were unlawfully detained, denied assistance of counsel, and that they were exposed to excessively dangerous conditions during their detention process.

The appellants filed motions to dismiss and motions for summary judgment. By memorandum opinion dated July 23, 1993, the district court granted the appellants' Motion for Summary Judgment regarding municipal and county liability, and against the individual appellants being sued in their individual capacity. The district court denied the appellants' Motion for Summary Judgment on their claim of qualified immunity, and included defendant Veese in that ruling. The appellants timely appealed to this court.

II. FACTS

The parties to this case present strikingly different versions of the facts. The appellants claim that on September 15, 1989, Morton Hoffman was arrested by Dallas police officers for disorderly conduct, a class C misdemeanor, for resisting arrest, a class A misdemeanor, and for aggravated assault, a first degree felony. Also on September 15, 1989, Susan Hoffman was arrested by Dallas police officers for hindering apprehension, a class A misdemeanor.

On September 15, 1989, at about 10:30 p.m., Officer Sheffield (accompanied by a police officer trainee) was driving his squad car westbound on the LBJ Freeway service road approaching Hillcrest

Road in Dallas. Sheffield observed a yield sign at the Hillcrest exit off of the freeway, slowed, saw no traffic, and proceeded to the intersection at Hillcrest. Sheffield stopped at the light and observed a red Porsche pull up behind him and honk its horn. After turning right onto Hillcrest and moving into the far left lane, Sheffield observed the red car following behind him, honking its horn and flashing its lights. After further similar signaling by the red car, Sheffield slowed, pulled behind the red car, activated the emergency lights and stopped to see why the red car was signaling him. Sheffield believed that a possible emergency existed.

The driver of the red car, later identified as Morton Hoffman, immediately jumped out of his car and ran toward Sheffield, yelling at him about Sheffield's alleged failure to yield to him on the service road as he exited the freeway. Hoffman's yelling continued and was at a high volume. Believing that perhaps, Hoffman had been drinking, Sheffield asked him for his license and insurance card. After initially accusing the officer of harassment, Hoffman gave Sheffield the items, accompanied with more yelling. Hoffman's verbal assault continued, and he repeatedly disregarded Sheffield's commands to get out of the street. Hoffman's yelling caused people in nearby houses to come out to see what was going on. Finally, after Hoffman's continued refusal to quiet down and get out of the street, as requested, Sheffield attempted to arrest Hoffman for disorderly conduct. Hoffman resisted violently, causing them both to fall to the ground, including hitting Sheffield on the head with

the officer's flashlight while they were on the ground. Eventually, Sheffield overcame Hoffman's resistance and handcuffed him.

During Morton Hoffman's resistance, Susan Hoffman attempted to pull the officer away from Morton Hoffman, and also attempted to pull Morton Hoffman away from Sheffield in an attempt to prevent Morton Hoffman's arrest. After Morton Hoffman's arrest, Sheffield directed other officers (who had arrived by now) to arrest Susan Hoffman, and Officer Veaser handcuffed her and put her in the squad car over her resistance. Later, Officer Payne, hearing Mrs. Hoffman's complaints that the seat belt was too tight, loosened the seatbelt for her. Sheffield and Payne then transported the Hoffmans to jail. The criminal charges were later dismissed.

The appellees, however, offer this version of the facts. On Friday, September 15, 1989, around 10:30 p.m., the Hoffmans were returning home from their son's high school football game in Mesquite. As their red Porsche exited LBJ Freeway at Hillcrest Road, Morton had to brake suddenly and swerve to avoid hitting a police car -- driven by Officer Sheffield on the service road -- which had failed to yield the right-of-way. The Hoffmans watched Sheffield as he turned right onto Hillcrest, pulled over at a break in the median, and turned off his lights. The Hoffmans also turned onto Hillcrest to go home and, as they passed Sheffield's parked car, Morton blinked his bright lights once at Officer Sheffield as a signal "that he nearly caused an accident by not obeying the yield sign."

Officer Sheffield immediately started his car and followed the Hoffmans. Morton stopped just as soon as he saw the flashing red lights on Sheffield's police car. Morton and Officer Sheffield got out of their cars and met in the street between them. Officer Sheffield asked Morton for his drivers license. Morton replied: "I should ask you for yours; you nearly caused an accident by not yielding to me on the access road." In response, Officer Sheffield said: "I slowed down enough." Officer Sheffield twice accused Morton of drinking -- so Morton explained that he and Susan were just returning from a high school football game and that they had nothing to drink. Hoffman also offered to take a sobriety test, but Officer Sheffield refused to administer one.

Next, Officer Sheffield took Morton's drivers license, returned to his squad car, and remained there for about five minutes. Officer Sheffield then returned and asked Morton for his insurance card -- so Morton got the card from the Porsche and handed it to Sheffield, saying: "Stop harassing us, and give us the cards and let us go." Instead, Officer Sheffield went back to his car and stayed there for ten minutes. Morton walked over to the police car and said: "If you're accessing the computer, you won't find anything; I am 50 years old, have lived in Dallas for 15 years, have never been arrested, and probably haven't had a ticket in 10 years."

In response, Officer Sheffield told Morton to get out of the street and either get on the curb or in the car. Morton got on the curb, and then asked for Sheffield's name and badge number, but

Sheffield "didn't say anything." Morton then asked for his cards back and said, "I really would like to go home, I have to go to the bathroom" -- but Officer Sheffield did not reply. Morton went back to his car for a pen and paper, then returned to the police car and wrote down the vehicle and license numbers. He again asked for Officer Sheffield's name and badge number, and was ignored again. Hoffman said: "You are harassing me and as soon as I leave here I am going to report this entire incident to the McCallum police station."

At this point, Officer Sheffield got out of his car and walked directly to Morton (who thought Sheffield was going to return the drivers license and insurance card). Instead, Officer Sheffield spun Morton around and choked him across the front of his throat with a black, two-foot-long flashlight. The choke hold took Morton by surprise and Morton was not able to yell to Susan for help. Officer Sheffield continued to assault Morton, repeatedly throwing him to the ground and lifting him up with the flashlight across his neck, and jamming his knee into Morton's back. He ground Morton's face into the pavement, and continued to choke him, when Morton finally caught his breath, he called for his wife, Susan.

Susan had been sitting in the Hoffman's car looking straight ahead. However, when she heard her husband's screams -- "You're hurting me, you're choking me" -- she jumped out of the car, ran to the police car, and saw Officer Sheffield choking Morton with the black flashlight. Susan also heard her husband crying out in pain,

because of being choked, and his injured knee.³ She yelled at Officer Sheffield: "Stop hurting Mort and stop harassing him," and she pleaded with Sheffield to leave her husband alone. Susan then saw a walkie-talkie lying on the ground, picked it up and yelled: "Please come to this location, the police are trying to hurt my husband and are harassing me." A female Police Academy trainee then came out of Sheffield's police car and forced Susan to put down the walkie-talkie.

However, Officer Sheffield continued his assault on Morton Hoffman. Sheffield punched Morton, rolled him over, and then handcuffed him (so tightly that the marks were visible for at least five days). Three other police cars then arrived at the scene. Officer Sheffield and other officers pulled Morton off the ground -he was not able to walk because of his injured knee - and then threw him into the rear seat of the police car. Officer Thomas Payne told Morton to move over to the other side. When Morton complained that he couldn't slide because of his injured knee, Officer Payne kicked and shoved him to the other side.

Officer Sheffield then told another officer to "cuff" Susan Hoffman. Susan asked "for what reason," and said she had a right to know "what they thought we did and why we were being treated this way." One of the officers replied, "he had just arrived and it was not his position to make judgments and he couldn't give [her] any other information." Before she was handcuffed, Susan

³ Morton's left knee had been injured the previous week, and he was being treated by an orthopedic surgeon for this injury.

told Officer James Veaser that her arms would not bend behind her back because of her mastectomy. Ignoring this plea, Officer Veaser handcuffed Susan's arms behind her back. Susan again demanded to know "why they were doing this," but no one would answer her. Officer Veaser then threw Susan into the front passenger seat of the police car.

Susan was then strapped into the front seat by a police officer who brushed his hands across her breasts. She told him "to please move his hands from my breasts." The Hoffmans were then transported to Lew Sterrett Justice Center. Throughout this entire trip, Susan Hoffman continued to ask "Why we were being arrested," and continued to say "Our rights are being violated." The officers did not respond. Finally, one officer asked who the Hoffmans "wanted called in case of an emergency," and Susan said: "Jack Evans and Annette Strauss (both former Dallas Mayors) and Pete Schenkel." The officers only snickered.

Morton Hoffman was charged with disturbing the peace, resisting arrest, and assaulting an officer. Susan Hoffman was charged with interfering with the arrest of her husband. Immediately after their release from jail, the charges for disturbing the peace (against Morton) and of interfering with an arrest (against Susan) were dropped. The grand jury "no billed" Morton on the assault charge. The misdemeanor charge against Morton for resisting arrest was later dismissed by the District Attorney's office.

III. DISCUSSION

The appellants claim the district court erred in: (1) including Officer Veeseer as a party defendant; (2) denying summary judgment on the Hoffmans' federal law claims; and (3) denying summary judgment on the Hoffmans' state law claims.

We find that the district court did not err in denying the appellants summary judgment on the Hoffmans' federal and state law claims. We further find that Veeseer's appeal is improper because this court lacks jurisdiction to review the decision of which he complains. Therefore, the district court is affirmed in all respects.

1) Did the district court err in naming Officer Veeseer as a party defendant?

Appellant Veeseer claims that the district court erred in naming him as a party defendant. Veeseer asserts that although he was named as a party defendant for the first time in the appellees' Second Amended Original Complaint, he has never been served with process, has never filed an answer, and has not otherwise legally appeared in this action. Veeseer further asserts that the order entered by the district court finding that he was a party defendant should be reversed, and judgment rendered that the appellees take nothing as to him.

As the appellees point out, this court lacks jurisdiction to hear Veeseer's appeal because the July 23, 1993 decision of which he objects is not final, as required by 28 U.S.C. § 1291, nor does it fall within the it does not fall within the "collateral order doctrine" exception to the final judgment rule.

A narrow exception to the final judgment requirement of 28

U.S.C. § 1291 was set forth by the Supreme Court in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949). In Cohen, the Court created the "collateral order doctrine" exception, applicable to a "small class [of decisions] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." The collateral order doctrine was further defined in Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978), in which the Court listed three criteria that must be present for an interlocutory order to come within Cohen's narrow exception to the final-judgment rule. The order in question must: (1) conclusively determine the disputed question; (2) resolve an important issue completely separable from the merits of the action; and (3) be effectively unreviewable on appeal from a final judgment.

In Van Cauwenberghe v. Biard, 486 U.S. 517, 527 (1988), the Supreme Court specifically held that orders involving issues of personal jurisdiction are not subject to review on an interlocutory basis, but instead must be reviewed after a final judgment is rendered.

Therefore, Veesser will have to take this matter up with the district court or wait until the appropriate time to appeal to this court.

- 2) Did the district court err in determining that the appellants were not entitled to qualified immunity from the Hoffmans' federal law claims?

Standard of review

We review a district court's decision to grant or deny summary judgment de novo. Arrington v. County of Dallas, 970 F.2d 1441 (5th Cir. 1992). Summary judgment is appropriate,

if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

FED.R.CIV.P. 56(c).

Heightened pleading standard

The appellants claim that the district court erred in denying their motion for summary judgment on the Hoffmans' federal claims based on the defense of qualified immunity. The appellants assert that a plaintiff who sues a public official must plead facts with particularity and specificity to overcome or defeat the official's claim of qualified immunity. Elliott v. Perez, 751 F.2d 1472, 1476, 1482 (5th Cir. 1985); Brown v. Glossip, 878 F.2d 871, 874 (5th Cir. 1989).

Once a complaint against a defendant state [officer] adequately raises the likely issue of immunity . . . the district court should on its own require of the plaintiff a detailed complaint alleging with particularity all material facts on which he contends he will establish his right to recovery, which will include detailed facts supporting the contention that the plea of immunity cannot be sustained.

Elliot, 751 F.2d at 1482. A complaint which fails to allege sufficiently that the defendant public official reasonably should have known that his particular actions violated clearly established

law should be dismissed. Brown, 878 F.2d at 874.⁴ The appellants claim that the Hoffmans have failed to state a claim upon which relief can be granted because they have not pleaded sufficiently to defeat the appellants defense of qualified immunity.

"We have held repeatedly, however, that where the defense of qualified immunity may be raised, a plaintiff is required by his pleadings to state facts which, if proved, would defeat a claim of immunity." Id. We further stated in Brown that "[t]his will require an elaboration on the circumstances of the plaintiff's arrest" Id. Finally, we elaborated on the types of facts that would be pertinent in such a case, including "[w]hether the plaintiff resisted arrest or was armed, whether more than one arrestee or officer was involved, whether the plaintiff was sober, whether other dangerous or exigent circumstances existed at the time of arrest, and on what charges the plaintiff was arrested would be pertinent circumstances" Id.

The Hoffmans alleged and detailed facts describing the specific unlawful actions of the officers and the severe damages they suffered as a result. The Hoffmans further alleged that Morton was not intoxicated at the time of his arrest, and that Morton specifically informed Officer Sheffield of his sobriety, and even asked Sheffield to administer a field sobriety test on him.

⁴ The Supreme Court recently ruled in Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, ___ U.S. ___, 113 S.Ct. 1160 (1993), that the heightened pleading standard previously applicable to claims against municipalities under § 1983 is no longer required. The City of Dallas is not a party to this appeal, therefore, Leatherman is not applicable.

The Hoffmans alleged facts showing that they did not resist arrest, but instead tried to protect themselves from excessive force inflicted upon them by the appellants. The Hoffmans alleged sufficient facts regarding all of their constitutional causes of action, which if accepted as true, precluded the appellants' qualified immunity defense.

Therefore, we find that the Hoffmans plead with sufficient particularity their causes of action.

False Arrest

The appellants claim that they are shielded from liability by the doctrine of qualified immunity with respect to the Hoffmans' false arrest claims.

A police officer is entitled to the defense of qualified immunity if he can establish that his conduct was lawful in light of clearly established law and the information he possessed. Anderson v. Creighton, 483 U.S. 635, 641 (1987). Thus, the ultimate question regarding the issue of qualified immunity in this case is whether a reasonable police officer could have believed that stopping the Hoffmans and then detaining them, under the circumstances in question, was lawful in light of clearly established law at the time of the arrest. Id.

Because of the gross disparity between the parties' versions of the facts underlying the Hoffmans' arrests, there exists a genuine issue of material fact. Therefore, the district court properly denied summary judgment on the basis of qualified immunity with respect to the Hoffmans' false arrest claims.

Excessive force

The appellants claim that the level of force used against the Hoffmans did not rise to the level of a constitutional violation.

The test formerly applied by this court required a showing of: (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). However, this test was overruled by the Supreme Court in Hudson v. McMillan, ___U.S.___, 112 S.Ct. 995 (1992). As we stated in Shabazz v. Lynaugh, 974 F.2d 597, 598 (5th Cir. 1992),

In overruling this court's precedents, the Hudson Court held that in order to establish an eighth amendment violation in an excessive force case, the complainant need not plead and prove significant injury as a necessary requisite for his claim. Accordingly we must vacate the dismissal and remand for reconsideration in light of the teachings of Hudson. In this reconsideration the district court should look to: the extent of the injury suffered; the need for application of force; the relationship between that need and the amount of force used; the threat reasonably perceived by responsible officials; and any efforts made to temper the severity of a forceful response.

Again, there is a gross disparity between the parties' versions of the facts surrounding the Hoffmans' arrests. This creates a genuine issue of material fact with regard to whether the officers used excessive force in light of Shabazz. Therefore, the district court properly denied summary judgment on the basis of qualified immunity with regard to the Hoffmans' excessive force claims.

- 3) Did the district court err in determining that the appellants were not entitled to qualified immunity from

the Hoffmans' state law claims?

Appellants claim that they are shielded from liability by the doctrine of qualified immunity with respect to the Hoffmans' state law claims.

Texas law specifies that a government official, acting in the course and scope of his employment and authority, performing a discretionary function and acting in good faith, is entitled to immunity from suit. Vaquera v. Salas, 810 S.W.2d 456, 461 (Tex. App.--San Antonio 1991, writ denied).

Because of the gross disparity between the parties' versions of the facts, there are genuine issues of material fact as to whether the appellants performed their duties in good faith. Therefore, the district court properly denied summary judgment with regard to the Hoffmans' state law claims.

IV. CONCLUSION

We find that Veaser's appeal is improper because this court lacks jurisdiction to review the decision of which he complains. We further find that the district court properly denied the appellants' motions for summary judgment on the basis of qualified immunity with regard to the Hoffmans' federal and state law claims. Therefore, we AFFIRM the district court in all respects.