UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-2947
Summary Calendar

DARRIN KEITH EDWARDS,

Plaintiff-Appellant,

versus

DAVID J. SALAS, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(CA H 89 2245)

(July 6, 1995)

Before POLITZ, Chief Judge, KING and STEWART, Circuit Judges.

PER CURIAM:*

Texas prisoner Darin Keith Edwards appeals the entry of an adverse judgment following a bench trial on his excessive force

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

claim. Finding no error, we affirm.

Background

Edwards filed the instant civil rights complaint against David Salas, David Sallee, and Glen Breder, individually and in their official capacities as officers with the Texas Department of Corrections.[1] Edwards alleged that on June 16, 1986, Salas and Sallee pulled him from his cell, threw him to the floor, and hit him in the back and ribs. Supervising officer Breder allegedly kicked Edwards in the head. Edwards alleged a further assault after the defendants took him to the infirmary for treatment of his injuries. Edwards sought money damages for the alleged violations of his constitutional rights[2] and rights under Texas tort law.

Edwards served Sallee with requests for admissions related to his alleged use of excessive force. Sallee's counsel, an Assistant Attorney General for the State of Texas,[3] failed to respond and Edwards moved to have the requests deemed admitted under Fed.R.Civ.P. 36. The trial judge deemed the requests admitted and proceeded with the bench trial.

After Edwards testified to his version of the events Breder and Sallee testified that Edwards resisted efforts to put him back into his cell after he took a shower. They maintained that Edwards had soaped himself to make handling him difficult in anticipation

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[1]Edwards did not serve Salas; thus, Salas is not a party to these proceedings.

[2]42 U.S.C. §1983 (1988).

[3]After reviewing the record and briefs, we join the trial judge in her assessment of the grossly inadequate performance of the Assistant Attorney General assigned to defend Sallee.

of the encounter and that, in an attempt to control Edwards, the officers were forced to take him to the floor. According to their testimony, Breder placed his foot on Edwards head to restrain him while Salas and Sallee secured his arms and legs. The subsequent encounter in the infirmary resulted from Edwards' refusal to follow the instructions of the officers and becoming belligerent. Other evidence included a video tape of part of the incident, including the use of force in the infirmary, and medical testimony characterizing Edwards injuries as two minor cuts, only one of which required as much as a band-aid.

Despite the admissions attributed to Sallee, the trial court found the officers' testimony to be more credible in light of Edward's conduct at trial, the video evidence, and the medical testimony. The court further concluded that Breder and Sallee were entitled to qualified immunity and that Edwards failed to prove an injury sufficient to state a constitutional claim for excessive use of force.[4] The state law tort claims were held to be time-barred and without merit.

Edwards' appeal contends that the court erred in failing to give binding and conclusive effect to the matters deemed admitted by Sallee, and in requiring proof of a "severe" injury as a requisite for the excessive force claim.

Analysis

Edwards first challenges the trial court's decision to weigh admissions attributed to defendant Sallee against trial testimony

[4]See **Shillingford v. Holmes**, 634 F.2d 263 (5th Cir. 1981).

rather than considering them conclusive and binding on the issue of Sallee's use of excessive force. We review the district court's decision in this regard under the abuse of discretion standard.[5]

Federal Rule of Civil Procedure 36 provides that requests for admissions are admitted if not answered within thirty days. Once deemed admitted, a matter is "conclusively established unless the court on motion permits withdrawal or amendment of the admission."[6] When such a motion is made prior to trial, withdrawal or amendment of the admission is proper only when the presentation of the merits of the claim would be subserved thereby and the party obtaining the admission would not be prejudiced in the presentation of his case.[7] When a motion for withdrawal is made after a trial on the merits has begun, we impose a more restrictive standard for the withdrawal of admissions; the trial court should not permit withdrawal "unless failure to do so would cause 'manifest injustice.'"[8]

The trial court accepted testimony from Sallee midway through trial, over the objection of Edwards, and weighed that testimony against the admissions. It is clear that the court permitted the withdrawal or amendment of the admissions. This withdrawal would be considered inappropriate unless the trial court's failure to

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[5]**American Auto Ass'n v. AAA Legal Clinic**, 930 F.2d 1117 (5th Cir. 1991)(applying abuse of discretion standard to sua sponte decision to ignore admissions).

[6]Fed.R.Civ.P. 36(b) (1995).

[7]**American Auto Ass'n**.

[8]**Id.** at 1120 (citations omitted).

permit same would have resulted in manifest injustice.

The record reflects that Edwards sought relief against two defendants in factually identical situations. Both were corrections officers, involved in the same use of force against the same prisoner at the same time. The trial court found that the guards did not act sadistically or maliciously and that Edwards suffered only the most minor of injuries. Edwards recognizes that we must accord these findings of fact the great deference to which they are entitled in relation to Breder but, he asks us to close our eyes to these facts when evaluating his claim against Sallee because of the attributed admissions.

We previously have recognized that enforcing Rule 36 admissions may sometimes lead to a harsh result, justifying that outcome on the grounds that a party securing an admission should be able to rely thereon, thereby narrowing the issues for litigation. When, as here, however, two corrections officers are accused of the same acts and the party securing the admissions is required to present his case against one of the officers, the narrowing function of Rule 36 and the overriding interests of justice are not served by a slavish holding of the other officer to the deemed admissions despite overwhelming evidence to the contrary.[9]

When the purpose of Rule 36 will not be served, the evidence clearly preponderates in favor of the party deemed to have admitted

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[9]Cf. **Hadley v. United States**, 45 F.3d 1435 (9th Cir. 1995)(noting that manifest injustice standard is met when judge concludes that no jury could have found for the party securing the conclusive admissions).

requests, and that party is one of two identically situated defendants, the other of whom is found free of liability, we are not prepared to say that the trial court abused its discretion in implicitly concluding that the failure to withdraw or amend such admissions would lead to a manifestly unjust result. Accordingly, we perceive no reversible error in the trial court's disposition of this case.

Edwards next contends that the trial court erred in requiring him to prove severe injury in order to state a claim of excessive use of force. Although the 1992 Supreme Court decision in **Hudson v. McMillian**[10] taught that "severe injury" was not necessary to state a claim, we review the reasonableness of the defendants' conduct in light of the law applicable at the time of the incident.[11] Under the law applicable on June 16, 1986, a severe injury was required to establish a constitutional violation.[12] There was no error in the trial court's application of the then prevailing rule.

We DENY Edward's motion for further discovery and AFFIRM the judgment of the trial court.

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[10]112 S.Ct. 995 (1992).

[11]**Valencia v. Wiggins**, 981 F.2d 1440 (5th Cir.), **cert. denied**, 113 S.Ct. 2998 (1993).

[12]**Shillingford**; **Valencia**.