

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3602

Summary Calendar

BRIAN EDMOND, ET AL.,

Plaintiffs-Appellees,

versus

CITY OF NEW ORLEANS, ET AL.,

Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA-91-4342-M)

(April 7, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:*

The lower court denied the defendants' motion for summary judgment on qualified immunity in this section 1983 action, stating that material facts were in dispute. We agree and dismiss the appeal for want of jurisdiction.

I.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

This case began in the Algiers area of New Orleans at around 8:00 p.m. on August 22, 1991, when plainclothes police officers driving an unmarked police car cut off a vehicle driven by the plaintiffs, Brian Edmond and Marquis Oden. Officer Sam Poole, the passenger in the police car, testified that he told his partner to cut off the plaintiffs' car because he thought he had seen the car involved in a narcotics transaction earlier that night, and because he saw one of the plaintiffs put something under his seat when the officers' car pulled alongside.

Officers Poole and Officer Lloyd Clark got out of their car after blocking the plaintiffs' car in place. Officers Dwayne Carkum and Dwayne Marshall, who had been patrolling nearby in another car, also began to approach. Edmond and Oden allege that the officers got out with their guns drawn and did not identify themselves.

Past victims of armed robbery, Edmond and Oden believed they were about to be robbed. Oden attempted to drive away in reverse but was blocked by a second car. He then began to make a sharp turn to the right in an effort to drive past the first vehicle.

At this point, according to Edmond and Oden, one of the officers from the car in front of theirs approached and fired his weapon through the window, after which other officers began to fire as well. According to police, however, after Oden backed up his car and struck the car behind him, he struck Officer Poole with the right front part of his car and knocked him to the ground when

pulling away. Officers then began firing to stop the car. Oden says he does not recall hitting Poole.

Oden was shot once in the back and once in the shoulder, and Edmond was shot in the hand. Police officers then arrested Edmond and Oden and charged them with attempted first degree murder and resisting an officer. A grand jury dismissed all charges against the two men.

The plaintiffs sued the City of New Orleans and four police officers under 42 U.S.C. § 1983, alleging claims for excessive force, malicious prosecution and wrongful detention. All defendants moved for summary judgment. The officers claimed the defense of qualified immunity. The magistrate who heard the motions granted the City's motion and denied the officers', stating that material facts were in dispute. The officers appeal that denial of summary judgment.¹

II.

We first address the plaintiffs' excessive force claim. The two disputed elements of the plaintiffs' claim are whether the plaintiffs' injury resulted directly and only from the use of force clearly excessive to the need, and whether the excessiveness of the force was objectively unreasonable.²

¹An earlier opinion of this court in this case established a briefing schedule. Edmond v. City of New Orleans, No. 93-0086 (5th Cir. Aug. 19, 1993).

²Johnson v. Morel, 876 F.2d 477, 480 (5th Cir. 1989) (en banc). Johnson recognized as a third element that the plaintiff must show he suffered significant injury. Since Johnson, Hudson v. McMillian, 112 S. Ct. 995 (1992), eliminated the significant injury requirement in a prisoner excessive force suit based on

We see fact issues on both elements. The officers justify the use of force against Edmond and Oden because Oden drove directly at Poole at a high rate of speed, in what appeared to be an intentional manner. The plaintiffs contest whether Oden drove at Poole. The plaintiffs also argue that they would not have tried to get away if the police officers had identified themselves. Resolving whether the police had a need to use force, and whether they used force in an objectively reasonable way, requires resolving disputed testimony about what happened when the police stopped the plaintiffs' car.

Defendants place reliance on Fraire v. City of Arlington³ and Reese v. Anderson,⁴ recent cases of this court finding that qualified immunity protected officers involved in chases. In both cases, however, the police officers announced who they were before using force.⁵ Further, there was no real dispute in those cases about the danger the plaintiffs posed to the police. In Fraire, for example, there was no dispute that the plaintiff drove his pickup truck straight at a police officer in attempt to hit him.⁶

the Eighth Amendment. The question whether Hudson overruled this part of Johnson "remains unresolved." Bender v. Brumley, 1 F.3d 271, 278 n.7 (5th Cir. 1993). It is not an issue in this case because the gunshot wounds both plaintiffs suffered qualify as significant.

³957 F.2d 1268 (5th Cir.), cert. denied, 113 S. Ct. 42 (1992).

⁴926 F.2d 494 (5th Cir. 1991).

⁵Fraire, 957 F.2d at 1271-72, 1275; Reese, 926 F.2d at 501.

⁶957 F.2d at 1275-76.

In this case, it is unclear whether Oden was aiming his car at Poole when he tried to get around the unmarked police car, and it is unclear whether Oden even hit Poole.

This case raises the kind of issue that confronted the Seventh Circuit in Estate of Starks v. Enyart,⁷ where fact issues existed about whether a police officer's use of force was justified or was "unreasonably created" when he stepped in front of a moving car.⁸ Summary judgment is properly denied in such a case.

The same analysis holds for the plaintiffs' claims alleging illegal detention and malicious prosecution. The officers say that they had an objectively reasonable basis for believing probable cause was present because Oden drove his car at Officer Poole. Assessing the reasonableness of this belief requires finding the facts about what Oden did with his car and why he felt compelled to do so.

III.

This court lacks jurisdiction over appeals from denials of summary judgment motions based on qualified immunity if there are disputed fact questions.⁹ This appeal is DISMISSED.

⁷5 F.3d 230 (7th Cir. 1993).

⁸Id. at 234.

⁹Pfannstiel v. City of Marion, 918 F.2d 1178, 1182 (5th Cir. 1990).