UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7051
Summary Calendar

JOSE JAVIER LINARES RAMIREZ and
FLORENTINA MATA MORALES,

Plaintiffs-Appellees,

versus

UNITED STATES OF AMERICA, ET AL.,

Defendants,

JOSE ESPERICUETA and
ROBERT GARZA,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas
(B-89-CV-88)

July 30, 1993

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

United States Border Patrol agents Jose Espericueta and Robert Garza appeal from an interlocutory order denying summary judgment on qualified immunity on the excessive force claim asserted by Jose Javier Linares-Ramirez.[2] We **REVERSE**.

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[1] Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

[2] The denial of a motion to dismiss or for summary judgment based on qualified immunity is immediately appealable. *E.g.,* ***Spann***

I.

Linares and his wife, Florentina Mata-Morales, are Honduran aliens. They were arrested with other Hondurans in April 1987, and detained overnight by the United States Border Patrol at the Sarita checkpoint in Texas. In May 1989, they filed a complaint against the United States and border patrol agents Espericueta and Garza, including a ***Bivens***[3] claim by Linares against Espericueta and Garza for the use of excessive force.[4] Linares alleged that the agents made an unprovoked attack against him because he stopped in front of the women's detention cell to greet his wife. Espericueta and Garza moved to dismiss the excessive force claim, asserting that they are entitled to qualified immunity. The district court, considering matters outside the pleadings, treated the motion as one for summary judgment, and denied it. *See* Fed. R. Civ. P. 12(b); ***Washington v. Allstate Ins. Co.***, 901 F.2d 1281, 1284 (5th Cir. 1990).

II.

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is

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v. Rainey, 987 F.2d 1110, 1114 (5th Cir. 1993).

[3] ***Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics***, 403 U.S. 388 (1971).

[4] Linares also asserted claims for false imprisonment, failure to provide necessary medical care, and malicious prosecution. The complaint also included claims against the United States under the Federal Tort Claims Act. Those claims are not at issue in this interlocutory appeal.

no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Our review of summary judgment is plenary, and we view all facts and the inferences to be drawn from the facts in the light most favorable to the non-movant. ***LeJeune v. Shell Oil Co.***, 950 F.2d 267, 268 (5th Cir. 1992). If the summary judgment evidence could not lead a rational trier of fact to find for the non-movant, there is no genuine issue for trial. ***Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.***, 475 U.S. 574, 587 (1986).

The movant has the initial burden of demonstrating the absence of a genuine issue of material fact. ***St. Paul Ins. Co. v. AFIA Worldwide Ins. Co.***, 937 F.2d 274, 279-80 & n.6 (5th Cir. 1991). If the movant satisfies that burden, the non-movant must identify specific evidence in the summary judgment record demonstrating that there is a genuine issue of material fact for trial. Fed. R. Civ. P. 56(e); ***Celotex Corp. v. Catrett***, 477 U.S. 317, 324 (1986).

In considering claims of qualified immunity, "[w]e must first determine whether [Linares] has `allege[d] the violation of a clearly established constitutional right.'" ***Spann v. Rainey***, 987 F.2d at 1114 (quoting ***Siegert v. Gilley***, ___ U.S. ___, ___, 111 S. Ct. 1789, 1793 (1991)). "If he has, we then decide whether the defendant[s'] conduct was objectively reasonable". ***Id***. (citing ***Salas v. Carpenter***, 980 F.2d 299, 305-06 (5th Cir. 1992)).

The agents do not dispute that Linares has alleged a violation of his constitutional right to be free from the use of

excessive force.[5] They contend, instead, that the district court applied an incorrect legal standard in determining qualified immunity *vel non*.

"[T]he objective reasonableness of an official's conduct must be measured with reference to the law as it existed at the time of the conduct in question." ***Pfannstiel v. City of Marion***, 918 F.2d 1178, 1185 (5th Cir. 1990). The excessive force allegedly occurred in 1987; therefore, the standard expressed in ***Shillingford v. Holmes***, 634 F.2d 263 (5th Cir. 1981), controls. ***Pfannstiel***, 918 F.2d at 1185. Under that standard, a valid claim for excessive force required showing (1) a severe injury, (2) action grossly disproportionate to the need for action under the circumstances, and (3) "malice rather than merely careless or unwise excess of zeal so that it amounted to an abuse of official power that shocks the conscience". ***Shillingford***, 634 F.2d at 265. To establish a deprivation of constitutional rights, a plaintiff must prove all three of these elements. ***King v. Chide***, 974 F.2d 653, 657 (5th Cir. 1992). Here, the element at issue is whether Linares suffered a severe injury. In order to avoid summary judgment on the ground of qualified immunity, he was required to "come forward with summary judgment evidence sufficient to raise a genuine issue as to

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[5] In ***Valencia v. Wiggins***, 981 F.2d 1440, 1449 (5th Cir.), *cert. denied*, ___ U.S. ___, 1993 WL 137474 (1993), our court held that the excessive force standard applicable to pretrial detainees' excessive force claims is that stated in ***Hudson v. McMillian***, ___ U.S. ___, 112 S. Ct. 995 (1992). Under ***Hudson***, the central inquiry is "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." 112 S. Ct. at 999.

whether [his] injuries were objectively `severe' enough to constitute a [constitutional] violation ... under ***Shillingford***". ***Pfannstiel***, 918 F.2d at 1185.

The district court correctly noted that the objective reasonableness of the agents' conduct must be measured with reference to the law in effect at the time of the conduct, but it nevertheless applied the ***Johnson v. Morel***, 876 F.2d 477 (5th Cir. 1989) (*en banc*) "significant injury" test.[6] Under that standard, the district court found that Linares had sufficiently shown a significant injury because his injuries necessitated medical treatment at a hospital. "`Severe injury' is an imprecise term, but it represents a higher standard than `significant injury'". ***Pfannstiel***, 918 F.2d at 1185. Espericueta and Garza contend that, although Linares' injuries may have been "significant" under ***Morel***, they did not rise to the level of a "severe" injury under ***Shillingford***.

As of 1987, our court had held that the following injuries could be considered "severe": (1) lacerated forehead, leaving a scar, sustained when a police officer smashed a camera with a nightstick while a photographer was taking a picture, ***Shillingford***, 634 F.2d at 264, 266; (2) multiple bruises and scars to the head and body, resulting from a severe beating, ***Roberts v. Marino***, 656 F.2d 1112, 1114-15 (5th Cir. 1981); (3) partial paralysis from the

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[6] ***Johnson v. Morel*** "changed the standard for Fourth Amendment excessive force claims, and among other things, reformulated ***Shillingford***'s `severe injury' prong to `significant injury.'" ***King v. Chide***, 974 F.2d at 658.

chest down resulting from a gunshot wound in the neck, ***Languirand v. Hayden***, 717 F.2d 220, 222 (5th Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984); (4) multiple contusions and lacerations resulting in a two-day hospital stay after a beating by an officer, with continuing occasional numbness in one arm, ***Hinshaw v. Doffer***, 785 F.2d 1260, 1267 (5th Cir. 1986); (5) injury to groin and various abrasions on head, back, arm, and wrists, requiring two-week hospital stay, ***Johnston v. Lucas***, 786 F.2d 1254, 1256-57 (5th Cir. 1986); and (6) injuries severe enough to require hospitalization resulting from being sprayed with a high-pressure fire hose, and change in personality resulting from being drugged and beaten, ***Lynch v. Cannatella***, 810 F.2d 1363 (5th Cir. 1987).

On the other hand, the following injuries were considered not "severe" as of 1987: (1) bruises on arm, scrapes on face, welts raised by handcuffs, sore throat and hoarse voice for two weeks, resulting from choke holds, ***Raley v. Fraser***, 747 F.2d 287, 289 (5th Cir. 1984); (2) slaps to the face that caused no bleeding and did not knock the plaintiff down, ***Mark v. Caldwell***, 754 F.2d 1260, 1261 (5th Cir.), *cert. denied*, 474 U.S. 945 (1985); (3) pain in lower back and medical expenses of $44.85 caused by door handle striking plaintiff after her supervisor shoved her out of his office and closed the door, ***Dretar v. Smith***, 752 F.2d 1015, 1017 (5th Cir. 1985); and (4) verbal threats, severe nightmares and hallucinations, ***Lynch v. Cannatella***, 810 F.2d at 1376-77.[7]

[7] Recently our court stated that "[r]ecitation in appellate opinions of such subjective determinations as the relative severity of an injury do not lend themselves to useful or instructive

In his complaint and deposition, Linares stated that Espericueta pushed him into a door; that Espericueta and Garza grabbed him "roughly" and threw him into a room; that Garza pressed him against the wall and struck him sharply in the stomach with his elbow; that Espericueta pinned him to the wall by grabbing his neck and throat and then kneed him in the groin area and testicles; and that Espericueta referred to him as "maricones," a derogatory Spanish term for homosexuals. Linares testified that he was examined by a physician at a hospital or clinic, and that the physician told him that he had "small inflammation" in the groin and that he was fortunate not to have any broken bones. Linares stated that he had pain in his testicles for three days. At his deposition, taken three months after the incident, he testified that he continued to suffer periodic abdominal pain when he made sudden movements, as the result of Garza elbowing him in the stomach.

To the extent that we can productively compare the description of Linares' alleged injuries with the descriptions of those reported in appellate opinions decided prior to the alleged incident, we conclude that Linares has not met his burden of coming forward with evidence sufficient to raise a genuine issue as to

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comparison". ***Valencia***, 981 F.2d at 1448 & n.42 (holding that district court did not clearly err in finding momentary unconsciousness, scratches, cuts, and bruises, which did not require medical attention, to be severe injury). The court noted that there is case law suggesting that injuries such as those sustained by Valencia "might not constitute `severe' injury under ***Shillingford***", but that there was also "case law indicating that such injuries are indeed `severe.'" ***Id***. at 1448.

whether his injuries were objectively severe enough to constitute a constitutional violation. Accordingly, Espericueta and Garza were entitled to summary judgment based on qualified immunity with respect to Linares' excessive force claim.[8]

III.

The interlocutory order denying summary judgment on Linares' excessive force claim is **REVERSED**, and the case is **REMANDED** for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

[8] Linares contends that Espericueta and Garza are not entitled to qualified immunity with respect to his false imprisonment, deliberate indifference to serious medical needs, and malicious prosecution claims. The district court's order denying summary judgment addressed only the excessive force claim. Therefore, we have jurisdiction to consider only the denial of summary judgment with respect to that claim, and need not address the remaining contentions.