UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7060
Summary Calendar

JOSE ELIGIO DE LA CRUZ,

Plaintiff-Appellee,

versus

JAMES T. HICKEY, ET AL.,

Defendants,

JAVIER RIVERA and W. H. McNELLIS,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas
(CA-C89-183)

(January 11, 1994)

Before GARWOOD, JOLLY, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Deputies Javier Rivera and W. H. McNellis appeal from the judgment on a jury verdict awarding damages to Jose Eligio De La Cruz for the use of excessive force against him while he was confined in a county jail. We **REVERSE** and **RENDER** judgment in favor of the appellants.

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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

De La Cruz, *pro se*, filed a civil rights action against deputies at the Nueces County Jail.[2] He alleged that on September 18, 1987, while he was a pretrial detainee, the two deputies used excessive force against him, breaking his arm.[3]

Rivera and McNellis raised the defense of qualified immunity and moved for summary judgment. The magistrate judge recommended dismissal of the action, but the district court rejected the recommendation, concluding that factual issues precluded summary judgment and that the appellants' qualified immunity was dependent on credibility determinations.

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[2] In his original complaint, De La Cruz named Rivera and John Does 1-5 as defendants. The same day the complaint was filed, the magistrate judge entered an order directing the clerk to style the cause as "Jose Eligio De La Cruz, Plaintiff v. James T. Hickey, Defendant". De La Cruz's amended complaint named five defendants in addition to Rivera: McNellis, Gillian, Holmes, Benesh, and Jaime. The first amended joint pretrial order, filed in February 1992, states that "[b]y this designation, counsel for Plaintiff is specifically non-suiting [Hickey, Benesh, Holmes, Gillian, and Jaime] from this lawsuit". That order was not signed by the district judge. A second amended pretrial order, signed only by De La Cruz's counsel, was filed in August 1992, and contains a similar statement. The caption of the judgment is styled "Jose Eligio De La Cruz[,] Plaintiff [versus] Javier Rivera, et al., Defendant"; and the judgment states that De La Cruz shall "recover and have judgment against the defendants, jointly and sever[al]ly ...." The clerk's docket entry reflects that judgment was entered against McNellis, Gillian, Holmes, Rivera, Benesh, Jaime, and Hickey. Only Rivera and McNellis appealed from the judgment. Inasmuch as there is a final judgment disposing of all claims against all defendants, we need not determine whether the claims against the other defendants were in fact non-suited (dismissed).

[3] The incident allegedly began when the prisoners and detainees complained because the jailers turned off the television and lights an hour earlier than usual.

Trial was held on February 20, 1992; the jury returned a verdict for Rivera and McNellis. On February 28, De La Cruz moved for a new trial in light of the Supreme Court's February 25 decision in ***Hudson v. McMillian***, ___ U.S. ___, 112 S. Ct. 995 (1992), which eliminated the significant injury element for excessive force claims. The district court granted the motion on the ground that the jury had been instructed erroneously that De La Cruz was required to prove that element.

Rivera and McNellis moved for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c), asserting that the clearly established law in effect at the time of the incident must be applied to their qualified immunity claim. The district court denied that motion, and the case proceeded to a second trial. Upon the jury being unable to reach a verdict, a mistrial was declared.

Rivera and McNellis again moved for judgment on the pleadings, asserting again that they were entitled to qualified immunity because they had not violated any law that was clearly established at the time of the incident. The record does not reflect a ruling on this motion.

After a third trial, the jury returned a verdict in favor of De La Cruz and against Rivera and McNellis, awarding $800 for physical pain and mental anguish. The district court denied the appellants' post-trial motions for reinstatement of the first verdict and for judgment notwithstanding the verdict (as a matter of law) or a new trial.

II.

Among other issues, the appellants contend that the district court erred by granting De La Cruz's motion for a new trial after the first trial.[4] We review the grant of a new trial for abuse of discretion. ***Allied Bank-West, N.A. v. Stein***, 996 F.2d 111, 115 (5th Cir. 1993).

Prior to the first trial, the parties agreed in a joint pretrial order that the excessive force claim would be governed by ***Huguet v. Barnett***, 900 F.2d 838, 841 (5th Cir. 1990),[5] while

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[4] They also contend, for the first time on appeal, that the district court erred by failing to instruct the jury at the third trial to apply the law in effect at the time of the incident. In light of our conclusion that the grant of a new trial was an abuse of discretion, we need not address this issue.

[5] ***Huguet*** held that a plaintiff must prove the following elements to prevail on an Eighth Amendment excessive force claim:

> 1. a significant injury, which
>
> 2. resulted directly and only from the use of force that was clearly excessive to the need, the excessiveness of which was
>
> 3. objectively unreasonable, and
>
> 4. the action constituted an unnecessary and wanton infliction of pain.

Id. at 841. Although De La Cruz was a pretrial detainee at the time of the incident, he agreed to the application of ***Huguet v. Barnett***, which involved a convicted prisoner and analyzed the excessive force claims under the Eighth Amendment. As our court pointed out in ***Huguet***, arrestees' excessive force claims were governed by the Fourth Amendment "reasonableness" standard set forth in ***Johnson v. Morel***, 876 F.2d 477 (5th Cir. 1989) (*en banc*). ***Huguet***, 900 F.2d at 840. Our court recently declined to extend Fourth Amendment coverage to claims of excessive force arising out of incidents occurring after the incidents of arrest were completed, after the plaintiff had been released from the arresting officer's custody, and after the plaintiff had been in detention for a significant period of time awaiting trial, and held that such

Shillingford v. Holmes, 634 F.2d 263, 265 (5th Cir. 1981), should be applied to the question of qualified immunity.[6] (As noted, the incident took place in 1987, while ***Shillingford*** was in effect/the test. *See* ***Valencia v. Wiggins***, 981 F.2d at 1448 (in 1987, ***"Shillingford***'s substantive due process standard was the clearly established law in this circuit for excessive force claims brought by pretrial detainees").) At the first trial, the jury was instructed, in accordance with ***Huguet***, and without objection by De La Cruz, that:

> In order to prove that the defendants used excessive force in violation of the Eighth Amendment, the plaintiff must prove the following elements by a preponderance of the evidence:
>
> 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, and
>
> 4. The action constituted an unnecessary and wanton infliction of pain.[7]

The jury was not instructed on qualified immunity in accordance with ***Shillingford***.

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claims are governed by the Due Process Clause and ***Hudson***. ***Valencia v. Wiggins***, 981 F.2d 1440, 1445-47 (5th Cir. 1993).

[6] Under ***Shillingford***, a valid claim for excessive force required proving (1) 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". ***Id***. at 265.

[7] The instruction given at the third trial was identical, with the exception of the first element, which was changed to "That he suffered an injury, a broken arm, which".

Five days after the jury returned a verdict for the appellants in the first trial, the Supreme Court decided ***Hudson v. McMillian***, and held that the use of excessive force against an inmate may violate the Eighth Amendment, even though the inmate does not suffer a significant injury. 112 S. Ct. at 999. As noted, the district court granted a new trial on the ground that, in light of ***Hudson***, its charge was erroneous because it required De La Cruz to prove that he had suffered a significant injury. The district court stated:

> [E]ven though the plaintiff agreed at trial that the Huguet standard controlled, the court cannot, in all fairness, force the plaintiff to accept a verdict based upon a standard which, only five days later, was specifically rejected as wrong by the United States Supreme Court.

The appellants contend that a new trial should not have been granted, because De La Cruz was bound by his agreement that ***Huguet*** would govern the excessive force claim. We are inclined to agree. The jury was instructed in accordance with the agreement of the parties as set forth in the pretrial order, and in accordance with the controlling law at the time of trial. *See* ***Save Barton Creek Ass'n v. Federal Highway Admin.***, 950 F.2d 1129, 1131 n.3 ("matters which are stipulated in the pretrial order are binding upon the parties, absent some modification, and usually cannot be pursued on appeal"); ***Hay v. City of Irving, Tex.***, 893 F.2d 796, 798-99 (5th Cir. 1990) (appellants not entitled to new trial because of post-trial changes in governing law); ***Del Rio Distributing, Inc. v. Adolph Coors Co.***, 589 F.2d 176, 178-79 (5th Cir. 1979) (no abuse of discretion in denial of new trial sought because of a change in the

law that occurred during trial as a result of a Supreme Court decision).

In any event, we conclude that the grant of a new trial was an abuse of discretion, because the appellants are entitled to qualified immunity on the basis of the jury verdict in the first trial. As our court recently explained, we engage in a "bifurcated analysis" in assessing claims of qualified immunity. ***Rankin v. Klevenhagen***, 5 F.3d 103, 105 (5th Cir. 1993). Under the first prong of this analysis, "we determine whether the plaintiff has `allege[d] the violation of a clearly established constitutional right'". ***Id***. (quoting ***Siegert v. Gilley***, 500 U.S. 226, 111 S. Ct. 1789, 1793 (1991)). This determination is governed by "currently applicable constitutional standards". ***Id***. at 106. If the first prong is satisfied, "we then decide if the defendant's conduct was objectively reasonable, because `"[e]ven if an official's conduct violates a constitutional right, he is entitled to qualified immunity if the conduct was objectively reasonable"'". ***Id***. at 105 (quoting ***Spann v. Rainey***, 987 F.2d 1110, 1114 (5th Cir. 1993) (quoting ***Salas v. Carpenter***, 980 F.2d 299, 310 (5th Cir. 1992))). This second prong of the analysis "`must be measured with reference to the law as it existed at the time of the conduct in question'". ***Id***. at 108 (quoting ***Mouille v. City of Live Oak***, 918 F.2d 548, 551 (5th Cir. 1990)).

In granting a new trial, the district court applied ***Hudson*** to both prongs of the qualified immunity analysis: (1) whether De La Cruz had proved a constitutional violation and, (2) the objective

reasonableness of the appellants' conduct. This was error, because ***Hudson*** did not affect the second prong of the qualified immunity analysis. ***Rankin***, 5 F.3d at 109. Instead, the objective reasonableness of the appellants' conduct should have been reviewed in light of the law that was clearly established at the time of the incident -- September 1987.

Under the law that was clearly established in September 1987, an official could not be held personally liable for the use of excessive force unless, *inter alia*, the official took action grossly disproportionate to the need for action under the circumstances, and such action resulted in "severe" injury. ***Shillingford v. Holmes***, 634 F.2d at 265. "`Severe injury' is an imprecise term, but it represents a higher standard than `significant injury'". ***Pfannstiel v. City of Marion***, 918 F.2d 1178, 1185 (5th Cir. 1990). In the first trial, the jury found that De La Cruz failed to meet his burden of proving (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, and (4) the action constituted an unnecessary and wanton infliction of pain. Because De La Cruz failed to prove the elements of an excessive force claim under ***Huguet***, it is clear that he could not satisfy the more stringent requirements of ***Shillingford***, which would have been necessary in order to overcome the appellants' claim to qualified immunity. We therefore hold that the district court abused its discretion in granting a new trial.

III.

For the foregoing reasons, the judgment of the district court is **REVERSED**, and judgment is **RENDERED** in favor of the appellants.

REVERSED and **RENDERED**.