

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8313
(Summary Calendar)

OLIVER WEISE and
MARQUETTA JO WEISE,

Plaintiffs-Appellees,

versus

CITY OF KIRBY, ET AL.,

Defendants,

DAVID RAMSEY and
JOHN E. BOMER,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Texas
(SA-91-CV-1003)

(December 8, 1993)

Before JOLLY, WIENER and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

In this civil rights action filed by Plaintiffs-Appellees,
Oliver Weise (Oliver) and Marquetta Jo Weise, husband and wife,

*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should not be published.

pursuant to 42 U.S.C. § 1983, Defendants-Appellants David Ramsey, a former Kirby police officer, and John E. Bomer, currently a Kirby police officer (collectively, Defendants), appeal the district court's denial of their summary judgment motions grounded in qualified immunity, and Bomer's Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief may be granted. Finding first that the district court considered matters outside the Weise complaint and therefore treated Bomer's dismissal motion as a motion for summary judgment, and second, that the court's denial of summary judgment was based on the correct determination that genuine issues of material fact exist, we dismiss the instant appeal for lack of jurisdiction.

I

FACTS AND PROCEEDINGS

The Weises allege that on September 7, 1990, at Ramsey's invitation, Oliver went to the Kirby Police Department to visit his son, Gary, who had been arrested earlier that day on traffic warrants. Ramsey allegedly lured Oliver to the station to get him to pay his son's fines. Refusing to pay Gary's fines, Oliver was engaged in conversation with his son, "in a lawful and peaceful manner," when he (Oliver) "commented that every time Gary came into Kirby he got into trouble with the police and especially with . . . Ramsey." This allegedly enraged Ramsey, who yelled at Oliver, "You cannot come into MY police station and tell me how to run it. I have had it with you and your boys. You are under arrest for obstructing justice."

The Weises allege further that Ramsey knew there was no probable cause for the arrest. Officer Bomer, "who was in the immediate area and who also knew that Mr. Weise had broken no law," assisted in the arrest. During the course of the arrest, allege the Weises, Ramsey and Bomer used excessive force when they slammed Oliver's chest against a metal railing, causing a severe injury which required surgery for repair. The Weises also allege that Defendants maliciously prosecuted Oliver on charges of resisting arrest, criminal trespass, and obstruction of justice, despite knowing that the charges were unfounded. Additionally, the Weises assert that Defendants conspired to deprive Oliver of his constitutional rights by making the illegal arrest, fabricating false criminal charges, covering up what actually occurred, and lying about the reason for Oliver's arrest. Finally, the Weises allege that, at Oliver's criminal trial, Ramsey admitted that he lied in his police report concerning the crime which he told Oliver was "at issue." A jury acquitted Oliver of the charges.

Based on these allegations, the Weises assert causes of action against Ramsey and Bomer for negligence, false arrest and imprisonment, excessive force and battery, malicious prosecution, and, under § 1983, the deprivation of their "constitutional rights to be free from unreasonable seizures and from deprivation of liberty without due process of law." In response, Defendants argue that the complaint failed to state a claim for relief under any theory, that they are entitled to qualified immunity, and that the incident did not occur as the Weises allege.

Bomer moved to dismiss under Fed. R. Civ. P. 12(b)(6), arguing that the Weises had failed to allege, with sufficient particularity, facts to support their claims or to overcome his qualified immunity defense as required by Elliott v. Perez, 751 F.2d 1472 (5th Cir. 1985). Before the district court ruled on this motion, Bomer and Ramsey moved for summary judgment, arguing that the Weises could not produce "legally-competent evidence" to support their claims. Both Defendants attached to their motions the depositions of Mary Ann Alderete, Tony Ibarra, and Bomer. Bomer and Alderete's descriptions of the incident differ from that of the Weises. Bomer and Alderete state that Oliver argued with Ramsey concerning Gary's release; that Oliver would not leave despite Ramsey's repeated instructions to do so; that, as a result of these refusals, Ramsey arrested Oliver; that Oliver initially resisted arrest; and that Oliver was not injured during the arrest. Defendants, however, did not rely on or refer to the depositions in their motions.

In response, the Weises produced two affidavits from Oliver, two affidavits from Gary, hospital bills, police reports of the incident, and other documentary evidence. In his September 7, 1990, affidavit, Oliver states that he went to the police station to try to arrange for his son's release. After unsuccessfully negotiating with Ramsey, Oliver began to leave voluntarily. He then turned to Gary and said: "Everytime you come into Kirby, there is a confrontation between you and Officer Ramsey, and it ends up like this." This enraged Ramsey, who began yelling and

cursing at Oliver. Oliver avers that he told Ramsey that he (Oliver) had just had quadruple bypass surgery on April 30 and did not need this stress; yet Ramsey continued to scream and Oliver started to leave. Ramsey then arrested Oliver for obstructing justice, grabbed his right arm, and jerked it behind him. At Ramsey's request, other officers rendered assistance, one of whom twisted Oliver's other arm behind his back. This caused Oliver "considerable discomfort" in his shoulders and "excruciating pain in the area of his sternum," which was wired together from the bypass surgery. Oliver then pulled himself free and sat down.

Oliver's 1992 affidavit amplifies his description of the incident. He explains that "at no time did [Ramsey] ever tell me to leave or that I was interfering with his duties, or that if I did not do something he told me to do, I would be arrested." Oliver further states that, at his criminal trial, "Ramsey took the stand and admitted, under oath, that he had falsified his report of the incident made the basis of this civil lawsuit." Oliver asserts that Ramsey admitted at trial that he did not warn Oliver that he would be arrested for criminal trespass, as stated in the report, but for interfering with an officer. Oliver denied hearing this warning. The first time Oliver heard Ramsey say anything about an arrest was when Ramsey arrested him for obstructing justice. Oliver reiterated that before Ramsey's outburst, he (Oliver) had been conducting himself in a "lawful and peaceable manner."

Oliver states that Bomer was standing nearby while the incident transpired, and thus had to know that Oliver was being

arrested for no legitimate reason. During the arrest Ramsey and Bomer pushed Oliver into the metal railing in the booking area, causing his chest wound from the bypass to reopen. Oliver avers that immediately after the incident his chest began to hurt and continued to hurt for several months; and that his surgeon later confirmed that the sternum was no longer joined together. According to Oliver, he subsequently underwent surgery to repair the damage.

Gary's 1992 affidavit corroborates Oliver's version of the events leading up to the arrest. Gary avers that Ramsey never told his father to leave the station before placing him under arrest. Gary also states that he later overheard Ramsey tell the other officers that they had better get their stories straight and make their reports alike.

The district court denied the motions, concluding that the evidence submitted by the parties offered contradictory versions of the events of September 7, 1990. The court stated that if the Weises' version were accepted, there would be a violation of clearly established rights, depriving Ramsey and Bomer of qualified immunity because no reasonable officer would find an arrest, imprisonment, and prosecution of any person justified if no crime had been committed.

II

ANALYSIS

A. Motion to Dismiss

Bomer contends that the district court erred by denying his

motion to dismiss because the Weises failed to allege with factual detail and particularity the basis for their claims and the reason Bomer was not entitled to qualified immunity, as required by Elliott v. Perez, 751 F.2d 1472, 1473 (5th Cir. 1985).¹ Ramsey did not file a separate motion to dismiss or join Bomer's.

Generally, the denial of a motion to dismiss raising a colorable claim of immunity is immediately appealable. Malina v. Gonzales, 994 F.2d 1121, 1124 (5th Cir. 1993). "However, when reviewing a summary judgment order this court may not limit its consideration to the facts alleged in the complaint." King v. Chide, 974 F.2d 653, 656 (5th Cir. 1992). Instead, the court "must examine the record as a whole to determine whether there are genuine issues of material fact and whether the movant is entitled to a judgment as a matter of law." Id. Here, the district court did not base its ruling on Bomer's dismissal motion strictly on the complaint, but considered matters outside the pleadings to deny Defendants' motions for summary judgment. Thus, "the procedural posture of the case . . . precludes an analysis of whether [the] complaint, by itself, could withstand scrutiny." King, 974 F.2d at 656.

B. Summary Judgment

An order denying a motion for summary judgment based on a claim of qualified immunity in a § 1983 action, to the extent that

¹ Whether Elliott's heightened pleading standard is viable in light of Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, _____ U.S. _____, 113 S.Ct. 1160, 1163, 122 L.Ed.2d 517 (1993), is an open question.

it turns on an issue of law, is immediately appealable. Mitchell v. Forsyth, 472 U.S. 511, 530, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). If, however, disputed factual issues material to immunity are present, the order is not appealable. Feagley v. Waddill, 868 F.2d 1437, 1439 (5th Cir. 1989). In examining a claim of qualified immunity, the first step is to ascertain whether the plaintiff has alleged the violation of a clearly established constitutional right. Siegert v. Gilley, ___ U.S. ___, 111 S.Ct. 1789, 1793, 114 L.Ed.2d 277 (1991). We use "currently applicable constitutional standards to make this assessment." Rankin v. Klevenhagen, ___F.3d ___, slip op. at 476 (5th Cir. Oct. 21, 1993, No. 92-2627). The second step is to "decide whether the defendant's conduct was objectively reasonable." Spann v. Rainey, 987 F.2d 1110, 1114 (5th Cir. 1993). Reasonableness is assessed in light of the legal rules clearly established at the time of the incident. Id.

We review the denial of summary judgment on the basis of qualified immunity de novo, examining the evidence in the light most favorable to the nonmoving party. Salas v. Carpenter, 980 F.2d 299, 304 (5th Cir. 1992). Summary judgment is proper if the moving party establishes that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. Campbell v. Sonat Offshore Drilling, Inc., 979 F.2d 1115, 1118-19 (5th Cir. 1992). The nonmovant must respond to a properly supported motion by setting forth specific facts on each of the challenged elements of the case, showing that a genuine issue of

fact exists for trial. See Anderson v. Liberty Lobby, 477 U.S. 242, 256-57, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

Defendants argue that the Weises failed to adduce competent evidence to show that (1) the force used was excessive to the need and objectively unreasonable, and (2) significant injury resulted from the use of that force. This argument goes to the first step of the Siegert analysis and requires analysis of the evidence under current standards. See Rankin, slip op. at 476.

Claims that law enforcement officers have used excessive force in the course of an arrest are analyzed under the Fourth Amendment's "reasonableness" standard. Graham v. Connor, 490 U.S. 386, 395, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). The current status of the law in this area is unclear. At the time of this incident, to state a claim for excessive force, we required proof 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) (en banc) (footnote omitted). It is unclear whether the significant injury element is still valid. Compare Valencia v. Wiggins, 981 F.2d 1440, 1443 n.6 (5th Cir.), cert. denied, 113 S.Ct. 2998 (1993) (in context of pretrial detainees protected by the Fourth Amendment, "Hudson v. McMillian, ____ U.S. ____, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992), overturned Morel's significant injury element."), with Bender v. Brumley, 1 F.3d 271, 278 n.7 (5th Cir. 1993) (noting whether Hudson overruled significant injury requirement for claims

of excessive force during arrest is open question).

Even if we were to assume arguendo that significant injury is still an essential element of the claim, Oliver's affidavits are sufficient to raise an issue of fact on this element. See Rankin, slip op. at 478 (claim that officer's acts caused or aggravated knee injury, necessitating surgery, sufficient to satisfy injury element of Eighth Amendment excessive force claim). Defendants' contention that Oliver is not qualified to testify as to the severity of his injury because he is not a medical doctor is meritless. See Mouille v. City of Live Oak, 918 F.2d 548, 553 (5th Cir. 1990) (plaintiff not required to establish significance of injury by medical testimony).

Oliver's and Gary's affidavits are also sufficient to create a factual issue whether the force used was excessive in light of the need, and whether the officers' conduct was objectively unreasonable. Oliver stated that he was conducting himself in a lawful, peaceful, non-threatening manner before Ramsey's outburst, that he (Oliver) did nothing to justify being arrested, and that he was leaving at the time of the arrest, when Ramsey and Bomer twisted his arms behind his back and pushed him into the metal railing causing the injury. Gary's affidavit corroborates Oliver's statements concerning his conduct before the arrest. See Spann, 987 F.2d at 1116 (plaintiff's statements, that he was not violating any laws, not interfering with officers, and not engaged in threatening behavior, sufficient to establish fact issues on whether force used was excessive in light of need and was

objectively unreasonable).

Regarding the false arrest claim, Defendants insist that Oliver's affidavit is insufficient to establish that there was no probable cause for his arrest. "A police officer has probable cause to arrest if, at the time of the arrest, he had knowledge that would warrant a prudent person's belief that the person arrested had already committed or was committing a crime." Duckett v. City of Cedar Park, 950 F.2d 272, 278 (5th Cir. 1992). Viewing the evidence in the light most favorable to the Weises, the affidavits of Oliver and Gary set forth sufficiently specific facts to support this element of the false arrest claim. Both indicate that Oliver engaged in no illegal activity and was attempting to leave the station peacefully when Ramsey placed him under arrest. Likewise, these affidavits raise factual issues on the malicious prosecution claim for the same reason. See Thomas v. Kippermann, 846 F.2d 1009, 1011 (5th Cir. 1988) (allegation of arrest, detention, and prosecution without probable cause supports § 1983 action premised on malicious prosecution).

Defendants maintain that the statement in Oliver's 1992 affidavit that Ramsey never told him to leave or threatened to arrest him is not credible because it did not appear in his 1990 affidavit. Cf. Thurman v. Sears, Roebuck & Co., 952 F.2d 128, 136-37 n.24 (5th Cir.) (plaintiff cannot contradict earlier testimony to create fact question), cert. denied, 113 S.Ct. 136 (1992). Oliver's 1992 affidavit does not contradict his 1990 affidavit, however, and, more importantly, the credibility of the statement is

not an issue to be determined at the summary judgment stage. Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc., 831 F.2d 77, 81 (5th Cir. 1987). As Oliver's affidavit is sufficient to establish the severity of his injury without the hearsay statements from the doctors that he includes in the affidavit, we need not address Defendants' contentions concerning the admissibility of this evidence or the medical records.

Finally, Defendants' argument that the evidence they submitted negate the factual elements of the Weises' claims, is meritless. Defendants' evidence simply conflicts with the Weises' on the material issues.

Accordingly, the district court correctly denied the motions for summary judgment. As the court's denial turned entirely on a determination that genuine issues of material fact existed, we have no jurisdiction to hear this type of interlocutory appeal of a denial of a motion for summary judgment based on qualified immunity.

DISMISSED.