

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10064
Summary Calendar

TIMOTHY PEREZ, ET AL.,

Plaintiffs-Appellants,

versus

DAVID COX, Individually and as
a Police Officer of City of
Brownfield, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Texas
(5:93-CV-117-C)

(July 18, 1994)

Before GOLDBERG, JOLLY, and JONES, Circuit Judges.

PER CURIAM:*

On May 10, 1993, the plaintiffs-appellants filed this suit against the City of Brownfield and Brownfield Police Officers David Cox and Darwin Houston, suing the officers in both their individual and official capacities. In the complaint, Emily and Timothy Perez alleged that on May 12, 1991, Cox and Houston entered their home

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

without any warning and violently assaulted them. Sylvia P. Medina, one of the Perez's daughters, and her husband, Antonio Medina, claimed that when they entered the Perez's home--carrying their infant daughter, Magan Medina--they too were beaten by the officers. Alice Perez Tarango, who is also one of the Perez's daughters, claimed that she was assaulted by the officers in front of the Perez's home. The complaint acknowledged that, except for Antonio Medina and his daughter Magan, all of the plaintiffs were charged with various state offenses for the events that occurred that night.

The plaintiffs raised various claims under 42 U.S.C. § 1983 and Texas state common law, seeking monetary damages from the officers for their alleged violations of the plaintiffs's constitutional rights and for their alleged tortious conduct. The plaintiffs also sought damages from the City for its alleged custom and policy of tolerating the unconstitutional activity of its police officers and for its alleged tortious conduct. In their answer, the defendants denied the allegations of wrongdoing made in the complaint. Cox and Houston also raised their qualified immunity from suit as a defense to the plaintiffs's claims.

On July 1, 1993, the defendants filed a motion for summary judgment. This motion was supported by affidavits signed by Cox and Houston. In his affidavit, Cox stated that on the night in question, he observed a yellow pick-up truck blocking traffic on a residential street in Brownfield. He stated that after he activated his emergency lights, the truck backed towards his patrol

car, forcing him to take evasive action. According to Cox, after the truck stopped, Frank Perez, the son of Emily and Timothy Perez, got out of the truck and began walking up to his parents's house. Cox explained that, as he caught up to Frank, he smelled alcohol on Frank's breath. Cox stated that when he attempted to restrain Frank, Emily and Timothy Perez along with Alice Tarango ran up to Cox and pushed him away from Frank. At this point, Frank attempted to flee into the Perez's home. As Frank was attempting to flee, Emily Perez, Timothy Perez, and Alice Tarango began striking Cox. When two other police officers arrived, one of whom was defendant Houston, Cox informed the other officers that Emily and Timothy Perez and Alice Tarango were under arrest. Cox stated that these plaintiffs and plaintiff Sylvia Medina then resisted, requiring the officers to subdue them. When more officers arrived, the resisting plaintiffs were finally placed under arrest. Officer Houston's affidavit corroborated Officer Cox's account of this incident. The officers's affidavits also explained that they, along with two other Brownfield police officers, entered the Perez's house to search for Frank Perez; however, the officers were unable to locate him. Each officer swore that the force used to subdue the resisting plaintiffs was only that necessary to overcome the resistance and to protect themselves from bodily harm and injury. The City submitted evidence of court proceedings against Sylvia Medina, Emily and Timothy Perez, and Alice Tarango.

The Local Rules for the United States District Court for the Northern District of Texas provide that responses to motions,

including motions for summary judgment, must be filed within 20 days from the date the motion is filed. The Local Rules also state that oral arguments on motions will not be held unless the presiding judge orders otherwise. The district court thus usually hears summary judgment motions on paper alone. See Hamman v. Southwestern Gas Pipeline, Inc., 721 F.2d 140, 142 (5th Cir. 1983) (finding the Northern District of Texas's procedure acceptable and explaining that the "hearing" contemplated by Federal Rule of Civil Procedure 56(c) "need not necessarily be an oral one."). The district court directed the parties to follow these rules, ordering responses and replies to dispositive motions to be filed in accordance with the Local Rules for the Northern District of Texas. The plaintiffs did not file a response to the defendants's motion for summary judgment, nor had they previously presented any competent summary judgment evidence to controvert the defendants's properly supported submissions. Moreover, the plaintiffs declined to request a continuance to allow them to collect any needed summary judgment evidence. See Fed.R.Civ.P. 56(f).

More than 20 days after it was filed, the district court took up the motion for summary judgment. The defendants argued that their summary judgment evidence established a prima facie case that the plaintiffs could prove no set of facts that would entitle them to judgment. Indeed, the plaintiffs submitted no facts contradicting the Cox and Houston affidavits. Stating that no genuine issues of material fact existed, the district court

concluded that the defendants were entitled to judgment as a matter of law and granted the defendants's motion for summary judgment.

The plaintiffs then filed a motion to reconsider. The attorney for the plaintiffs candidly acknowledged that he failed to file a response to the defendants's summary judgment motion because he was unaware of the requirements of the Local Rules. He asked the district court to set aside the summary judgment and allow him to file a response to the defendants's motion. The district court summarily denied this motion. After the district court entered a take nothing judgment on the plaintiffs's claims, this appeal was filed.

On appeal, the plaintiffs first argue that the defendants failed to carry their initial summary judgment burden of showing that they were entitled to summary judgment. See Topalian v. Ehrman, 954 F.2d 1125, 1131 (5th Cir.) (explaining the shifting burden framework of a motion for summary judgment), cert. denied, 113 S. Ct. 82 (1992). We disagree. The defendants presented competent summary judgment evidence showing that there was an absence of evidence to support any of the plaintiffs's claims. The burden of production thus shifted to the plaintiffs to "come forward with `specific facts showing that there is a genuine issue for trial.'" Matsushita Elec. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (quoting Rule 56(c)). The plaintiffs wholly failed to meet this burden.

The plaintiffs argue that the allegations contained in their complaint are sufficient to create a genuine issue of material

fact. However, Rule 56(e) does not allow the plaintiffs to rest on the allegations in their pleading and still avoid summary judgment. "The very mission of the summary judgment procedure is to pierce the pleadings and assess the proof in order to see whether there is a genuine issue for trial." Advisory Committee Note to the 1963 Amendments to Rule 56. Since the defendants demonstrated that there was an absence of evidence to support the plaintiffs's claims and since the plaintiffs failed to present any controverting summary judgment evidence, the district court properly granted the defendants's motion for summary judgment.

The plaintiffs also argue that the district court abused its discretion when it denied the motion to reconsider. We find no abuse of discretion. The attorney for the plaintiffs acknowledged that he did not file a response to the defendants's motion for summary judgment because he was ignorant of the Local Rules. It was not an abuse of discretion for the district court to conclude that such ignorance does not constitute a sufficient reason to reconsider the disposed-of motion. See Lavespere v. Niagara Mach. & Tool Works, Inc., 910 F.2d 167 (5th Cir. 1990), cert. denied, 114 S. Ct. 171 (1993). To hold otherwise would render the Local Rules a nullity and thwart the orderly administration of justice in the district court.

The judgment of the district court is AFFIRMED.