

IN THE UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-20749
(Summary Calendar)

O. L. HARRISON, ET AL.,

Plaintiffs-Appellees,

versus

JOSEPH K. MCGOWEN, ET AL.,

Defendants

JOSEPH K. MCGOWEN,

Defendant-Appellant.

Appeal from United States District Court
for the Southern District of Texas
(CA-H-93-3907)

(April 20, 1995)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:*

O. L. and William A. Harrison, the surviving parents of Susan Harrison White, and Gloria Hamilton and Sandra Harrison, individually and on behalf of White's estate, filed a 42 U.S.C. § 1983 complaint against Harris County, Texas; the county's Sheriff, Johnny Klevenhagen; and Sheriff's Deputy Joseph K. McGowen. The

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

plaintiffs alleged that McGowen and two other deputies had forcibly entered Susan White's home, allegedly to serve a warrant on her. The plaintiffs alleged that, without provocation, McGowen shot White three times and killed her. McGowen moved for summary judgment on the basis of qualified immunity. The district court denied his motion, and McGowen appeals.

DISCUSSION

Although the parties agree that the denial of McGowen's motion for summary judgment is an appealable interlocutory order, this court must examine the basis of its jurisdiction on its own motion, if necessary. See Mosley v. Cozby, 813 F.2d 659, 660 (5th Cir. 1987).

A denial of a motion for summary judgment which pleads qualified immunity is subject to interlocutory review if the denial is based upon a question of law, but such a denial is not appealable if disputed factual issues material to immunity are present. Feagley v. Waddill, 868 F.2d 1437, 1439 (5th Cir. 1989). As the second step of the bifurcated qualified immunity analysis, the court determines whether the defendant's conduct was objectively reasonable in light of the law as it existed at that time. See Spann v. Rainey, 987 F.2d 1110, 1114 (5th Cir. 1993); Harper v. Harris County, Texas, 21 F.3d 597, 601 (5th Cir. 1994).

In the instant case, the plaintiffs contend that, prior to the shooting, McGowen had harassed White in his capacity as deputy sheriff, and had threatened to kill her. By contrast, McGowen's motion for summary judgment asserts that White refused to

open her door for him to serve a felony arrest warrant, that he then forcibly entered her residence, and that she pointed a pistol at him. In opposition to the motion, the plaintiffs presented summary judgment evidence that White had reported sexual harassment by McGowen several days before he killed her, and that the path of the bullet refutes McGowen's claim that White was pointing the pistol.

These disputed facts center upon the issue of whether McGowen's conduct was objectively reasonable--an issue material to the determination of his immunity. Because material disputed factual issues remain, the district court's denial of summary judgment on the basis of qualified immunity is not appealable. For this reason, this appeal is DISMISSED for lack of jurisdiction.