IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20762
Summary Calendar

MICHAEL DWYER MCCULLOUGH,

Plaintiff-Appellee,

versus

CITY OF HOUSTON, ET AL.,

Defendants,

W.C. CATES and S.H. BUMGARDNER,

Defendants-Appellants.

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Appeal from the United States District Court
for the Southern District of Texas
USDC No. CA-H-90-1430

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December 18, 1995

Before JOHNSON, HIGGINBOTHAM, and SMITH, Circuit Judges.

PER CURIAM:[1]

Defendants Officer W.C. Cates and Officer S.H. Bumgardner appeal the denial of their motions for summary judgment based on qualified immunity against Michael Dwyer McCullough's 42 U.S.C. § 1983 action against them for excessive use of force during their arrest of McCullough. Because there are disputed material fact issues present regarding whether any force used was excessive to the need, the district court's denial of summary judgment sought on the basis of immunity is not appealable. *See Feagley v.*

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Waddill, 868 F.2d 1437, 1439 (5th Cir. 1989) (citations omitted). Accordingly, Cates' and Bumgardner's appeal of the district court's denial of their motions for summary judgment is DISMISSED.[2]

[2]Cates and Bumgardner also argue that McCullough's criminal conviction of knowingly striking a peace officer collaterally estops him from bringing this excessive-force claim because both the excessive force claim and the criminal conviction arose from the same set of circumstances. The critical issue in the criminal charge was whether McCullough intentionally struck a peace officer. *See* TEX. PENAL CODE §§ 22.02(b) & (d)(1). Although this litigated issue would preclude McCullough from asserting that he did not strike the arresting officers, it does not preclude the issue of whether Bumgardner and Cates may have used force excessive to the situation during or after their arrest of McCullough. *See Haring v.Prosise*, 462 U.S. 306, 316 (1983).