**UNITED STATES COURT OF APPEALS**
**FIFTH CIRCUIT**

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No. 94-40156

(Summary Calendar)

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ALCIDE ILLA GRIMON,

Plaintiff-Appellant,

versus

EDDIE J. COLLINS, Detective, Port Arthur Police Department and WILLIE AARON, Detective, Port Arthur Police Department,

Defendants-Appellants.

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Appeal from the United States District Court
for the Eastern District of Texas
(1:88-CV-1014)

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(July 18, 1994)

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

PER CURIAM:*

Alcide Illa Grimon, an inmate in the Texas Department of Criminal Justice, appeals from the decision of the district court granting summary judgment to defendants Eddie Collins and William Arens on his cause of action brought pursuant to 42 U.S.C. § 1983. We reverse and remand.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.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

In August 1988, the defendants arrested Grimon for possession of cocaine. In his complaint, Grimon alleged that the defendants used excessive force when arresting him by repeatedly hitting and kicking him without provocation.[1] As a result, Grimon suffered injuries to his face, which required medical attention, and a broken rib. At a *Spears*[2] hearing, Grimon testified that after he offered the cocaine in his possession to the defendants, they beat him with their pistols and kicked and choked him. Although the defendants contend that any injuries suffered by Grimon occurred as they were attempting to prevent him from swallowing multiple bags of cocaine, Grimon stated that he placed cocaine into his mouth only after the beating had started.[3]

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[1] We review the district court's grant of a summary judgment motion de novo. *Davis v. Illinois Central R.R.,* 921 F.2d 616, 617-18 (5th Cir. 1991). Summary judgment is appropriate if the record discloses "that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party seeking summary judgment bears the initial burden of identifying those portions of the pleadings and discovery on file, together with any affidavits, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265 (1986). Once the movant carries its burden, the burden shifts to the non-movant to show that summary judgment should not be granted. *Id.* at 324-25, 106 S. Ct. at 2553-54. While we must "review the facts drawing all inferences most favorable to the party opposing the motion," *Reid v. State Farm Mut. Auto. Ins. Co.,* 784 F.2d 577, 578 (5th Cir. 1986), that party may not rest upon mere allegations or denials in its pleadings, but must set forth specific facts showing the existence of a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57, 106 S. Ct. 2505, 2514, 91 L. Ed. 2d 202 (1986).

[2] *Spears v. McCotter*, 766 F.2d 179 (5th Cir. 1985).

[3] Grimon's testimony at the *Spears* hearing is somewhat unclear as he apparently speaks little English and there was not a

After the parties consented to trial by a magistrate judge, the judge granted the defendants' motion for summary judgment, holding that "the officers[']  conduct did cause injury, but not severe injury, and [their conduct] was not grossly disproportionate to the need for force."

**II**

In determining whether the defendants are entitled to qualified immunity, we must determine whether Grimon has alleged a violation of a clearly established constitutional right. *Siegert v. Gilley*, 500 U.S. 226, 232, 111 S. Ct. 1789, 1793, 114 L. Ed. 2d 277 (1992). In making this assessment, we "must utilize currently applicable constitutional standards. *Rankin v. Klevenhagen*, 5 F.3d 103, 106 (5th Cir. 1993). If Grimon has met this initial burden, we must decide whether the defendants' conduct was objectively reasonable in light of the law as it existed at the time the conduct in question occurred. *Id.* at 108.

Grimon has alleged that the defendants used excessive force in arresting him. "It is well settled that if a law enforcement officer uses excessive force in the course of making an arrest, the Fourth Amendment guarantee against unreasonable seizure is implicated." *Harper v. Harris County*, 21 F.3d 597, 600 (5th Cir. 1994). Thus, Grimon has alleged a violation of a clearly established constitutional right.

At the time of Grimon's arrest, case law required a plaintiff alleging an excessive-force case under the Fourth Amendment to

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court-appointed interpreter present.

prove: (1) a significant injury (2) resulting directly from the use of force clearly excessive to the need and (3) the excessiveness of which was plainly unreasonable. *Johnson v. Morel*, 876 F.2d 477, 480 (5th Cir. 1989) (en banc).[4] Consequently, we must determine whether Grimon has provided summary judgment evidence suggesting that significant injury resulted from the objectively unreasonable use of excessive force.

Grimon's testimony at the *Spears* hearing was given under penalty of perjury; "thus, this was competent summary judgment evidence." *Myles v. Garner*, No. 93-8371, slip op. at 12 (5th Cir. Mar. 22, 1994) (citing 28 U.S.C. § 1746; *Nissho-Iwai Amer. Corp. v. Kline*, 845 F.2d 1300, 1306 (5th Cir. 1988)). That testimony supports his claim that the defendants attacked him without provocation and caused injuries requiring medical attention. Although Grimon's testimony does not appear to be supported by the medical evidence and has been contradicted by affidavits from both defendants and deposition testimony given by Grimon's ex-wife, credibility determinations are not properly resolved on summary judgment. *E.g.*, *Brumfield v. Jones*, 849 F.2d 152, 155 (5th Cir. 1988). Consequently, a genuine issue of material fact exists as to whether the defendants unreasonably used excessive force in arresting Grimon. *See Harper*, 21 F.3d at 599, 601 (allegations that officer grabbed an arrestee's throat and struck her on the

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[4] In the wake of *Hudson v. McMillian*, ___ U.S. ___, 112 S. Ct. 995, 117 L. Ed. 2d 156 (1992), "[a] plaintiff is no longer required to prove significant injury to assert a section 1983 Fourth Amendment excessive force claim." *Harper*, 21 F.3d at 600.

knee, thereby causing a badly bruised knee and a sore throat, presented claim of excessive force sufficient to withstand summary judgment); *Hale v. Townley*, 19 F.3d 1068, 1075 (5th Cir. 1994) ("Bleeding cuts and swelling have been held legally `significant injuries' when they were intentionally inflicted in an unprovoked and vindictive attack.") (citing *Oliver v. Collins*, 914 F.2d 56, 59 (5th Cir. 1990)). The magistrate judge, therefore, erred in granting the defendants' motion for summary judgment.

**III**

For the foregoing reasons, we REVERSE the judgment of the magistrate judge and REMAND for further proceedings not inconsistent with this opinion.