

IN THE UNITED STATES COURT OF APPEALS  
for the Fifth Circuit

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No. 94-50553  
(Summary Calendar)

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DAVID EDWARD HARRIS,

Plaintiff-Appellee,  
Cross-Appellant,

versus

RALPH NIX, Waco Police  
Department

Defendant-Appellant.  
Cross-Appellee.

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Appeal from United States District Court  
for the Western District of Texas  
(W-93-CA-325)

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April 12, 1995

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:\*

David Edward Harris filed a civil rights complaint against Waco, Texas, Police Officer Ralph Nix pursuant to 42 U.S.C. § 1983. Harris alleged that Nix used excessive force by striking Harris in the head with a flashlight during an arrest. Harris sought \$25,000 in damages for his pain and suffering and mental

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

anguish and demanded compensation for his medical bills. In response, Nix filed a motion for summary judgment, asserting the defense of qualified immunity.

The magistrate judge conducted an evidentiary hearing, at which Nix testified that as he attempted to arrest Harris for driving while intoxicated, Harris "reached down to try to start the car." Nix explained that he reached into Harris's car and tried to take the keys from the ignition because Harris was "a danger to himself and anybody else that was on the road," but that Harris started the car and began backing up. Nix testified that he "was left hanging onto the side of the car as the car was moving away" and that Harris began to accelerate. Nix explained that he then struck Harris in the face with his flashlight to get him to stop the car.

Harris stated at the hearing that Nix approached his car and asked him for his driver's license. Harris testified that after he told Nix that he did not have his driver's license, Nix told him to put his hands on the steering wheel. Harris stated that he placed a hand on the gear shift and Nix then struck him in the head with a flashlight.

The magistrate judge determined that Nix's testimony was credible, that the amount of force he employed was reasonable under the circumstances, and that he was entitled to the protection of qualified immunity. The magistrate judge thus recommended that Harris's § 1983 complaint be dismissed pursuant to Fed. R. Civ. P. 12(b)(6), even though Nix had moved for summary judgment. Harris filed objections to the report, making additional factual

allegations.

After conducting a de novo review of the record, the district court determined that an issue of material fact existed with regard to whether Nix struck Harris without provocation and therefore set the case for trial. The court adopted the recommendation of the magistrate judge as to all claims except the one for excessive use of force, thus partially granting Nix's motion for summary judgment. The district court determined that Harris's allegations that Nix had no probable cause to arrest him or to make the initial stop of his vehicle and that Nix's actions violated Harris's rights under the First, Fifth, Sixth, Eighth, and Thirteenth Amendments had no basis in law or fact and dismissed them as frivolous pursuant to 28 U.S.C. § 1915(d).

Nix filed a notice of interlocutory appeal from the district court's denial of his motion for summary judgment with regard to Harris's use-of-excessive-force claim. Harris also filed a notice of interlocutory appeal from the district court's order dismissing the remainder of his claims as frivolous.

#### DISCUSSION

##### Nix's Appeal

Nix argues that the district court erred by determining that a genuine issue of material fact existed with regard to whether Nix struck Harris without provocation. This court must examine the basis of its jurisdiction *sua sponte* if necessary. Mosley v. Cozby, 813 F.2d 659, 660 (5th Cir. 1987). A denial of a motion for summary judgment pleading qualified immunity is subject

to interlocutory appeal if the denial is based upon a question of law. Feagley v. Waddill, 868 F.2d 1437, 1439 (5th Cir. 1989).

"[I]f disputed factual issues material to immunity are present, the district court's denial of summary judgment sought on the basis of immunity is not appealable." Id.

This court reviews the district court's denial of summary judgment de novo. Calpetco 1981 v. Marshall Exploration, Inc., 989 F.2d 1408, 1412 (5th Cir. 1993). Summary judgment is appropriate when, considering all of the allegations in the pleadings, depositions, admissions, answers to interrogatories, and affidavits, and drawing all inferences in the light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Newell v. Oxford Management, Inc., 912 F.2d 793, 795 (5th Cir. 1990).

This court conducts a bifurcated analysis to assess whether a defendant is entitled to qualified immunity. Harper v. Harris County, Tex., 21 F.3d 597, 600 (5th Cir. 1994). The first step is to determine whether the plaintiff has alleged a violation of a clearly established constitutional right. Id. This court uses "currently applicable constitutional standards to make this assessment." Rankin v. Klevenhagen, 5 F.3d 103, 106 (5th Cir. 1993). The second step is to determine "whether the defendant's conduct was objectively reasonable." Spann v. Rainey, 987 F.2d 1110, 1114 (5th Cir. 1993). The reasonableness of the conduct must be assessed in light of the law as it existed at the time of the

conduct in question. Harper, 21 F.3d at 601.

An allegation of the use of excessive force by a law enforcement officer during the course of an arrest implicates the Fourth Amendment guarantee against unreasonable seizures. Id. at 600. Thus, Harris has alleged a constitutional violation.

The second step of the inquiry is to determine "whether the defendant's conduct was objectively reasonable." Spann, 987 F.2d at 1114. This court will dismiss the appeal without considering the reasonableness of the defendant's actions, however, if there are disputed factual issues material to qualified immunity. Johnston v. Houston, 14 F.3d 1056, 1060 (5th Cir. 1994).

The disputed fact in the instant case is the circumstance under which Nix struck Harris. Nix states that he struck Harris because Harris put Nix and others in immediate danger. Harris states that he was not endangering anyone when Nix hit him. Summary judgment was thus denied because of the existence of a disputed fact that is material to the qualified immunity defense.

Nix contends that Harris's subsequent guilty pleas to the charges of assault and driving while intoxicated bar Harris from arguing that he was unconscious or that he was not intoxicated during the incident. Whether Harris was conscious, or intoxicated, or both during the incident, however, is not completely dispositive of whether Nix struck Harris without provocation. Nix also contends that Harris's version of the events is not credible and that the greater weight of the evidence supports Nix's version of the incident. Credibility conflicts should not be resolved on

summary judgment, however. Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc., 831 F.2d 77, 81 (5th Cir. 1987). Because disputed factual issues remain, the district court's denial of summary judgment on the basis of qualified immunity is not appealable. We

conclude that Nix's appeal should be dismissed for lack of jurisdiction.

#### Harris's Cross-Appeal

Although Nix appealed the denial of summary judgment on the excessive force claim, Harris cross-appealed the grant of summary judgment as to his remaining claims. Harris's brief contains no argument regarding the claims mentioned in his notice of interlocutory appeal, i.e., those claims dismissed by the district court as frivolous. In any event, however, the partial dismissal of a multi-claim action is not a final decision and is unappealable as an interlocutory order absent certification under Fed. R. Civ. P. 54(b), which was not present in this case. 28 U.S.C. §§ 1291-92. See also, Dillon v. State of Mississippi Military Dep't, 23 F.3d 915, 917 (5th Cir. 1994). Thus, this court has no jurisdiction over the partial dismissal that Harris seeks to appeal.

#### CONCLUSION

The appeal filed by Nix is DISMISSED for lack of appellate jurisdiction. The cross-appeal filed by Harris is also DISMISSED for lack of appellate jurisdiction.