

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-3452
Summary Calendar

Darrell Johnson,

Plaintiff-Appellant,

VERSUS

Gary Dubroc, Et Al.,

Defendants-Appellees.

Appeal from the United States District Court
For the Middle District of Louisiana

CA 90 1205 B M1

(August 11, 1993)

Before THORNBERRY, DAVIS and SMITH, Circuit Judges.

THORNBERRY, Circuit Judge*:

In this civil rights action filed pursuant to 42 U.S.C. § 1983, the plaintiff-appellant complains about the district court's grant of summary judgment in favor of all defendants. We agree that the district court erred in granting summary judgment as to

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Dubroc. As to all other defendants, we affirm the grant of summary judgment.

Facts and Prior Proceedings

Darrell Johnson is an inmate of the Louisiana State Penitentiary in Angola, Louisiana. In this § 1983 action, Johnson alleges that Captain Gary Dubroc and others used excessive force in violation of the Eighth Amendment while punishing him for an alleged disturbance. Johnson also alleges that he was denied due process in a subsequent related disciplinary hearing. After Johnson filed this § 1983 action, Dubroc and the other defendants moved for summary judgment. A magistrate judge recommended granting summary judgment in favor of all defendants on the grounds that (1) Johnson did not suffer a significant injury and (2) "[t]here is no evidence in the record that Dubroc sprayed the plaintiff with mace for any purpose other than to restore discipline." The magistrate also concluded that there was no merit to Johnson's claim that his disciplinary hearing was unfair. The district court agreed with the magistrate's recommendation and granted summary judgment as to all defendants.¹ Johnson timely appeals to this Court.

Discussion

This Court reviews the grant of summary judgment motions de

¹ After the district court granted summary judgment to the defendants, Johnson filed a timely motion under Fed. R. Civ. P. 59(e), pointing out that the **Huguet v. Barnett**, 900 F.2d 838, 841 (5th Cir. 1990) "significant injury" doctrine had been overruled by **Hudson v. McMillian**, 112 S.Ct. 995 (1992). **Hudson** was decided four days after the magistrate judge filed his report. The district court denied Johnson's motion.

novo. **Hanks v. Transcontinental Gas Pipe Line corp.**, 953 F.2d 996, 997 (5th Cir. 1992). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as matter of law." Fed.R.Civ.P. 56(c). The party seeking summary judgment carries the burden of demonstrating that there is an absence of evidence to support the non-moving party's case. **Celotex Corp. v. Catrett**, 106 S.Ct. 2548, 2554 (1986). After a proper motion for summary judgment is made, a non-moving party who wishes to avoid summary judgment by establishing a factual dispute must set forth specific facts showing that there is a genuine issue for trial. **Hanks**, 953 F.2d at 997. This Court applies the same standards as those that govern the district court's determination for summary judgment. **King v. Chide**, 974 F.2d 653, 655-656 (5th Cir. 1992). The district court begins its determination by consulting the applicable substantive law to determine what facts and issues are material. **Id.** The court then reviews the evidence relating to those issues, viewing the facts and inferences in the light most favorable to the non-moving party. **Id.** If the non-moving party sets forth specific facts in support of allegations essential to his claim, a genuine fact issue is presented and summary judgment is not appropriate. **Celotex**, 106 S.Ct at 2555.

Summary judgment rulings must be based on the record of the proceedings in the district court. **See Sanders v. English**, 950

F.2d 1152, 1154-55 (5th Cir. 1992). Because Johnson's complaint was certified, it may be considered summary judgment evidence. **Nissho-Iwai American Corporation v. Kline**, 845 F.2d 1300, 1306 (5th Cir. 1988); 28 U.S.C. § 1746.

I. Summary Judgment in Favor of Dubroc

Johnson argues that the district court erred by awarding summary judgment in favor of Dubroc because there is a factual dispute concerning the use of excessive force. The Supreme Court held in **Whitley v. Albers**, 106 S.Ct. 1078 (1986) that the legal standard governing excessive force claims under the Eighth Amendment is whether the action taken amounts to the "unnecessary and wanton infliction of pain...." **Id.**, 106 S.Ct. at 1084. When a court is called upon to determine whether the measure taken inflicted unnecessary and wanton infliction of pain depends on "whether force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically for the very purpose of causing harm." **Valencia v. Wiggins**, 981 F.2d 1440, 1446 (5th Cir. 1993)(citing **Hudson v McMillian**, 112 S.Ct. 995, 998-999 (1992)). Determining whether force was used maliciously requires inquiry into the prison official's subjective intent. **Valencia**, 981 F.2d at 1446. In **Valencia**, we summarized some of the relevant objective factors to be considered by the trier of fact which are suggestive of intent. However, the case presently before us has been dismissed on the basis of summary judgment, not a trial on the merits. As such, the district court was not entitled to weigh the evidence or make credibility choices. **Orthopedic & Sports Injury**

Clinic v. Wang, 922 F.2d 220, 223 (5th Cir. 1991).

The district court agreed with the magistrate judge that there was "no evidence in the record that Dubroc sprayed [Johnson] with mace for any purpose other than to restore discipline." Johnson's verified complaint used to defend the motion for summary judgment, however, alleges facts to the contrary. In his complaint, as well as in his brief on appeal, Johnson alleges that on June 2, 1990, he was in a one-person isolation cell, surrounded by an outer sound-proof wall. Captain Gary Dubroc allegedly entered Johnson's tier and asked Johnson who was responsible for the loud disturbances on that level. Johnson responded the he did not know who was making the disturbance. Johnson admitted that he was calling to some of the other inmates on the same isolation tier. A short time later, Johnson was told that he would be charged with causing a disturbance. Johnson alleges that he then attempted to explain to Dubroc that he did not cause any disturbances, and as a result, Dubroc pulled out a can of 287 tier dust and sprayed Johnson in the face. Johnson alleges that Dubroc continued to spray the tier dust into his cell, forcing him to hide under his bunk. The continued spraying caused Johnson to regurgitate. Johnson alleges that shortly thereafter he requested medical treatment because his skin was burning. He was allowed to shower and receive medical treatment, but he was then returned to the same cell where he was once again exposed to the residuals of the tier dust. Johnson alleges that Dubroc's actions amounted to excessive force in light of the fact that Johnson was behind bars, surrounded by an outer

sound-proof wall, was therefore never a threat to Dubroc, yet Dubroc continued to spray the mace, forcing Johnson to hide under his bunk. Dubroc, however, contends that he only used the force necessary to stop the disturbance. Affidavits used to support Dubroc's motion for summary judgment state that on June 12, 1990, at approximately 11:35 p.m., Captain Dubroc and Lieutenant Price discovered that inmate Johnson was creating a disturbance in his cell. Dubroc gave Johnson a direct order to cease the disturbance. Johnson refused. The officers got a can of tier dust and gave Johnson three more direct orders to discontinue the disturbance. When Johnson refused to comply, Dubroc gave him a two-second burst of tier dust. Johnson then complied with the order to stop making the disturbance.

Because this case was decided on summary judgment, we are obliged to review the record and construe the facts in the light most favorable to Johnson, the non-moving party in the court below. **Lindsey v. Prive Corp.**, 987 F.2d 324, 326 (5th Cir. 1993). All reasonable inferences which can be drawn from the facts must be construed to support Johnson's theory of the case, and any genuine dispute of fact must be resolved, for purposes of the summary judgment motion, in Johnson's favor. **Sanders v. English**, 950 F.2d 1152, 1155 (5th Cir. 1992)(citation omitted). We do not weigh the evidence or determine the credibility of the parties' statements. **Berry v. Armstrong Rubber Co.**, 989 F.2d 822, 824 (5th Cir. 1993); **Lindsey**, 987 F.2d at 328 (need for credibility assessment not fit for summary judgment determination). We merely review the

record to determine whether there is evidence, which if submitted to and credited by a jury, could support a verdict for Johnson. **Sanders**, 950 F.2d at 1155. If there is, Johnson is entitled to a trial. **Id.**

The summary judgment evidence presented by both Johnson and Dubroc show that there is a factual dispute as to whether Dubroc used force maliciously and sadistically to cause harm, and therefore not in a good-faith effort to restore discipline. We cannot resolve the factual dispute over whether Dubroc's application of force was done with malice, but must defer to the fact-finder on this issue. **See Valencia**, 981 F.2d at 1446 n.29.² Construing the facts in the light most favorable to Johnson, we hold that Johnson's verified contention that Dubroc continued to spray mace into his cell for no reason but malice would justify a reasonable jury in returning a verdict in Johnson's favor, thus precluding summary judgment. **See Anderson v. Liberty Lobby, Inc.** 106 S.Ct. 2505, 2510 (1986). Dubroc is not entitled to summary judgment because his submissions have not foreclosed the possibility of the existence of certain facts from which a jury might infer from the circumstances that excessive force had been used. **See Adickes v. S.H. Kress & Co.**, 90 S.Ct. 1598, 1608-09

² This Court has suggested that the following factors should be considered in determining the subjective intent of a prison security officer: (1) the extent of the injury suffered; (2) the need for the application of force; (3) the relationship between the need and the amount of force used; (4) the threat reasonably perceived by the responsible officials; and (5) any efforts made to temper the severity of the forceful response). **Valencia**, 981 F.2d at 1446 n.29 (citation omitted).

(1970).

Our decision that it was improper to dispose of this action relative to Dubroc by summary judgment, in no way speaks to the merits of Johnson's case.

2. Due Process at the Disciplinary Hearing

As a result of the incident forming the basis of this civil rights action, Johnson was brought before the prison disciplinary board for a hearing. The board was comprised of appellees Galett and Calvert. The board convicted Johnson of aggravated disobedience and sentenced him to ten days in isolation. They convicted Johnson on the basis of Dubroc's report, rejecting Johnson's version of the incident. In his brief, Johnson contends that he was denied due process at his disciplinary hearing because Dubroc did not testify in person. Because Johnson makes this argument for the first time on appeal, we will not consider it.³ **Alford v. Dean Witter Reynolds, Inc.**, 975 F.2d 1161, 1163 (5th Cir. 1992). We only consider issues raised for the first time on appeal when the issue is a purely legal one and when consideration is necessary to avoid a miscarriage of justice. **Id.** Our decision to deny consideration of this issue will not result in a manifest miscarriage of justice because Dubroc's disciplinary report was competent evidence at the hearing. **See Stewart v. Thigpen**, 730 F.2d 1002, 1005, 1006 (5th Cir. 1984) (written statement of witness

³ In Johnson's complaint, he alleged that his hearing was unfair because the board members found him guilty even though Dubroc had violated a prison policy by unnecessarily spraying him with tier dust.

was "some" evidence at disciplinary hearing, therefore no justification for reversing on appeal).

3. Summary Judgment in Favor of the Other Defendants

Johnson contends that the district court erred by granting summary judgment to Louisiana Department of Corrections Secretary Bruce Lynn, Louisiana State Penitentiary Warden John P. Whitley, and prison official Major Donnie Parker.⁴ Specifically, Johnson contends that the other three above-named appellees should be held liable on grounds that they were knowledgeable of Dubroc's wrongful infliction of corporal punishment on Johnson and acquiesced in it. These defendants cannot be held liable for Dubroc's having sprayed Johnson with tier dust, because there is no allegation whatsoever of their personal involvement in that incident. **See Baskin v. Parker**, 602 F.2d 1205, 1207-08 (5th Cir. 1979) (official cannot be held liable unless action is by the officer or pursuant to official policy caused a constitutional tort).

4. Dismissal of Pendent State-Law Claims

In his brief, Johnson states that one of the issues presented to this Court is whether the district court erred in finding that his pendant state-law claims are barred by the Eleventh Amendment. However, Johnson merely lists this as an issue and presents no support for this contention. This issue is not adequately presented or briefed and accordingly will not be considered on appeal. **Thompkins v. Belt**, 828 F.2d 298, 302 (5th Cir. 1987). In

⁴ In his original complaint, Johnson also named Lt. Co. Darrell Vannoy as a defendant. Apparently he has abandoned his claim against Vannoy.

addition, a thorough review of the record shows that the district court dismissed any state-law claims without prejudice and without reference to the Eleventh Amendment.

Conclusion

Finding no merit in any other arguments presented by Johnson, we vacate the grant of summary judgment as to defendant Dubroc and accordingly remand to the district court for further proceedings. We affirm the grant of summary judgment as to the other appellees.