United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 05-3487

David Kenyon, Plaintiff/Appellee, v. Clayton Edwards, individually, Defendant/Appellant, Lt. Jim Hale, individually; Jeremiah Ervin, individually; Dan Jarry, individually, originally sued as "Van Jarry," Defendants.	*	Appeal from the United States District Court for the Eastern District of Arkansas. [PUBLISHED]

Filed: January 18, 2007

Before LOKEN, Chief Judge, WOLLMAN, BEAM, MURPHY, BYE, RILEY, MELLOY, SMITH, COLLOTON, GRUENDER, BENTON and SHEPHERD, Circuit Judges, *en banc*.

ORDER

On rehearing en banc, the district court's judgment is affirmed by vote of an equally divided court.

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

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Attorney: Owens

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 05-3487

David Kenyon,

Appellee

v.

Clayton Edwards, individually,

Appellant

and

Lt. Jim Hale, Individually, et al.,

Appeal from U.S. District Court
for the Eastern District of Arkansas – Little Rock
(4:04-cv-00131-HDY)

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the order of this Court.

January 18, 2007

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

DAVID KENYON — PLAINTIFF

v. NO. 4:04CV00131 HDY

CLAYTON EDWARDS, Individually; LT. JIM HALE, Individually; JEREMIAH ERVIN, Individually; and DAN JARRY, Individually — DEFENDANTS

ORDER

(Filed Aug. 31, 2005)

FACTS. On September 13, 2003, plaintiff David Kenyon ("Kenyon") attended a demolition derby at the White County, Arkansas, Fairgrounds in Searcy, Arkansas. While he was attending the demolition derby, he was arrested, allegedly without justification, for domestic battery in the third degree and public intoxication by, among others, defendant Clayton Edwards ("Edwards"), a White County, Arkansas, deputy sheriff. Although Kenyon allegedly "did not resist arrest or physically threaten the [officers], *see* Document 1 at 2, he was allegedly injured during the course of the arrest. It appears from the record that he was later acquitted of domestic battery in the third degree and had the public intoxication charge against him dismissed.

COMPLAINT. Kenyon began this proceeding in February of 2004 by filing a complaint pursuant to 42 U.S.C. 1983 and joining, among others, Edwards. Kenyon alleged, *inter alia*, that during the course of his arrest, "Edwards . . . , using unnecessary and excessive force,

caused injury to [Kenyon], including but not limited to a torn rotor cuff in his left shoulder, contusions to his right knee, contusions to his neck, severe bruising to his left arm, and other contusions about his body." *See* Document 1 at 2.

TRIAL. This proceeding was tried to jury beginning on January 24, 2005. On the third day of trial, the jury retired to begin deliberating its verdict. The following day, the foreperson of the jury reported that the jury had reached a unanimous verdict on both counts and all defendants, save Kenyon's claim of excessive force against one of the four defendants. Court was then reconvened, and the jury's verdict was read in open court. The verdict provided the following:

(1) with respect to Kenyon's claim of false arrest, the jury found for all of the defendants;

(2) with respect to his claim of excessive force, the jury found for all of the defendants, save Edwards; and

(3) with respect to Kenyon's claim of excessive force against Edwards, the jury was unable to reach a verdict.

In accordance with the verdict announced by the jury, the Court ordered the following:

(A) Kenyon's claim of false arrest against all of the defendants was dismissed, although a judgment was not entered at that time;

(B) His claim of excessive force against three of the defendants was also dismissed;

(C) The three defendants exonerated by the jury's findings were dismissed from this proceeding, although a judgment dismissing them was not entered at that time.

(D) A mistrial was declared on Kenyon's claim of excessive force against Edwards.

POST-TRIAL PROCEEDINGS. Immediately after declaring a mistrial, the Court began the process of scheduling a new trial on Kenyon's claim of excessive force against Edwards. The new trial was eventually scheduled for the week beginning September 12, 2005. The Court additionally established several deadlines, two of which were a deadline for filing pre-trial motions, that being, July 14, 2005, and a deadline for the completion of discovery, that being, July 18, 2005.

The parties thereafter requested, and received, an extension of the motions and discovery deadlines. The parties were given up to, and including, August 15, 2005, to file all pre-trial motions and complete discovery.

On August 15, 2005, Kenyon filed the pending motions in limine. See Documents 33 and 35. On the same day, Edwards filed the pending motion for summary judgment. *See* Document 37. Kenyon has now submitted a response to Edwards' motion for summary judgment, and the Court is prepared to address the motion.

MOTION FOR SUMMARY JUDGMENT.[1] Edwards maintains that Kenyon's claim of excessive force should be dismissed. Edwards specifically maintains the following:

> Plaintiff's excessive force claim . . . should be summarily dismissed because Plaintiff (1) can offer no proof of an objective law enforcement standard that was violated by . . . Edwards and (2) can offer no proof to show that . . . Edwards' conduct was unreasonable under any standard.
>
> Plaintiff's claims for compensatory and punitive damages should be summarily dismissed because Plaintiff cannot establish the casual link necessary to recover compensatory damages and cannot establish the level of willful misconduct necessary to recover punitive damages.
>
> Plaintiff cannot offer any proof to show that . . . Edwards violated any clearly established law and [Edwards] is therefore entitled to summary judgment as a matter of taw.

See Document 37 at 1. For the reasons that follow, Edward's motion is denied.

Edwards first maintains that Kenyon can offer no proof that an objective law enforcement standard was violated nor can he offer any proof to show that Edwards' conduct was unreasonable under any standard. The Court disagrees. There is a material question of fact whether the

[1] "Summary Judgment is proper only where there is not genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *See Blair v. Wills*, 2005 WL 2036240 (8th Cir. 2005).

force employed by Edwards was objectively reasonable under the particular circumstances.[2]

Edwards next maintains that Kenyon's claims for compensatory and punitive damages should be summarily dismissed because he cannot establish the casual link necessary to recover compensatory damages and cannot establish the level of willful misconduct necessary to recover punitive damages. With respect to Edward's assertion regarding Kenyon's claim for compensatory damages, the Court disagrees. There is a material question of fact concerning the cause of Kenyon's rotor cuff injury. The evidence linking Edwards' conduct to Kenyon's injury is admittedly not particularly strong, but it is enough to survive Edwards' summary judgment motion.

With respect to Edwards' assertion regarding Kenyon's claim for punitive damages, the Court did not submit the issue of punitive damages to the jury in the first trial. The Court anticipates doing likewise in the second trial but will reserve a final ruling on that issue until the close of all the evidence.

Edwards next maintains that he is shielded from liability by qualified immunity. The prevailing law on that issue is clear. He is shielded by qualified immunity unless he violated a clearly established right of which a reasonable person would have known. *See Walker v. City of Pine*

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[2] Edwards represents, and the Court accepts, that "[t]he force employed by an officer is not excessive and, thus, not violative of the Fourth Amendment if it was 'objectively reasonable under the particular circumstances.'" *See* Document 38 at 2 [quoting *Greiner v. City of Champlin*, 27 F.3d 1346, 1354 (8th Cir. 1994)].

Bluff, 414 F.3d 989 (8th Cir. 2005).[3] Qualified immunity issues are oftentimes analyzed using a two step procedure. The two steps are as follows:

> First, [the court asks] whether the facts as asserted by the plaintiff "show the officer's conduct violated a constitutional right." *Saucier v. Katz,* 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). If the answer is no, [the court grants] qualified immunity. If the answer is yes, [the court goes] on to determine "whether the right was clearly established." *Id.* "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202, 121 S.Ct. 2151.

See Wright v. Rolette County, 2005 WL 1862343 at 2 (8th Cir. 2005). The facts as asserted by Kenyon, *i.e*, Edwards used excessive force in arresting Kenyon, show that Edwards' conduct violated a constitutional right.[4] Could a reasonable officer believe that Edwards' conduct was lawful in light of clearly established law? At this juncture of the proceeding, it is impossible to say because a material question of fact exists.

On the basis of the foregoing, the Court finds that material questions of fact exist. Edwards' motion for summary judgment is therefore denied. With respect to

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[3] "'The qualified immunity standard gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law.'" *See Id.* at 992 [quoting *Hunter v. Bryant*, 502 U.S. 224, 229 (1991).

[4] The Court accepts Kenyon's assertion as true solely for purposes of this order. It is not accepted as true for any other purpose.

Kenyon's claim for punitive damages, the Court will reserve a final ruling on that issue until the close of all the evidence.

MOTIONS IN LIMINE. As the Court noted above, Kenyon has filed separate motions in limine. The Court will address those motions in a separate order to be issued in the coming days.

IT IS SO ORDERED this 31 day of August, 2005.

/s/ H Daniel Young
UNITED STATES
MAGISTRATE JUDGE

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 05-3487

David Kenyon,
Plaintiff/Appellee,
v.
Clayton Edwards, individually,
Defendant/Appellant,
Lt. Jim Hale, individually; Jeremiah Ervin, individually; Dan Jarry, individually, originally sued as "Van Jarry,"
Defendants.

Appeal from the United States District Court for the Eastern District of Arkansas.

Submitted: April 11, 2006
Filed: September 7, 2006

Before RILEY, BEAM, and SMITH, Circuit Judges.

BEAM, Circuit Judge.

Clayton Edwards, a deputy sheriff for White County, Arkansas, brings this interlocutory appeal of the district court's denial of his motion for summary judgment based on qualified immunity. David Kenyon (Kenyon) sued

Edwards and three White County deputy sheriffs: Lieutenant Jim Hale, Sheriff Jeremiah Ervin, and Sheriff Dan Jarry.

I. BACKGROUND

We recount the facts in the light most favorable to Kenyon, the party asserting the injury in this qualified immunity case. *Saucier v. Katz,* 533 U.S. 194, 201 (2001). On September 13, 2003, Edwards responded to a report of an altercation at a demolition derby being held at the White County fairgrounds in Searcy, Arkansas. Edwards arrived to see an irritated Stephen Kenyon being restrained by a member of a large crowd that had gathered near the derby pits. Edwards noticed that Stephen looked as though he had been in a fight. Edwards asked what was going on, and Stephen replied, "He hit my mother." Edwards could tell Stephen was indicating that his mother was Shirley Cox, and so Edwards went over to her. Edwards described Cox's nose as being flat against her face, and that she was bleeding profusely from her nostrils. He noted that he was among a crowd of between one-hundred and two-hundred people, and described the environment as an "atmosphere of hostility" where weapons of opportunity, such as crowbars and hammers, were readily available. At first, Cox did not respond to Edwards' questions about what had happened because she was in pain. Edwards told Cox that an ambulance was on the way. Eventually, Cox told Edwards that it was David Kenyon who had hit her. Edwards learned that David Kenyon was Cox's ex-husband, and realized he had a domestic battery situation on his hands.

Edwards addressed the crowd around him and asked if there were any witnesses to the events. He also asked where David Kenyon was. No one answered at first, but then someone called out, "There he is." The crowd parted, leaving Kenyon in the middle. Edwards and the other officers on the scene approached Kenyon, and Edwards put his hand on Kenyon's elbow and asked his name. When Kenyon answered, Edwards told him he was under arrest.[1] Kenyon raised his arms in an inquiring gesture and asked, "For what?" Edwards then grabbed Kenyon's wrist and took his arm behind his back. Though precisely what happened next is in dispute, we must, as we have said, credit Kenyon's version of the facts for purposes of the qualified immunity analysis. Under that version, Edwards threw Kenyon onto the hood of a nearby car and pulled Kenyon's arms up high behind his back in order to handcuff him. Kenyon told Edwards that he was hurting his arms, but Edwards persisted until Kenyon was handcuffed. Kenyon resisted because his arms were in pain from the handcuffing, and the officers told Kenyon to stop resisting. Kenyon claims he suffered a torn rotator cuff, requiring surgery, and continues to have pain.

Kenyon's suit against the four police officers ended with a jury finding in favor of the officers, save Edwards. The jury was unable to reach a verdict on the excessive force claim against Edwards, and the court declared a mistrial. After the court scheduled a new trial, Edwards moved for summary judgment based in part on qualified immunity. The district court accepted Kenyon's version of

[1] The record indicates that Kenyon admitted that Edwards had probable cause to arrest Kenyon for both domestic battery and public intoxication.

the facts as true for purposes of qualified immunity, and found that on those facts, Edwards' actions violated Kenyon's constitutional rights. But the court said it was impossible at the summary judgment stage to answer whether it would be clear to a reasonable officer that Edwards' conduct was unlawful in the situation he faced – that is, whether the constitutional right at issue was clearly established – because it found that a material question of fact remained. The court did not explain at that point what fact remained in dispute, but elsewhere in its opinion, the court stated a material question of fact remained as to whether the force Edwards used was objectively reasonable under the circumstances.

II. DISCUSSION

A district court's order denying summary judgment is generally not appealable. *Henderson v. Munn,* 439 F.3d 497, 501 (8th Cir. 2006). However, this court has limited authority to review the denial of summary judgment based on qualified immunity to the extent the appellant seeks review of purely legal determinations. *Id.* Edwards does not seek review of any factual determinations, but argues, in essence, that Kenyon has failed to show that Edwards used excessive force in his arrest, and that even if Edwards did, Kenyon's right to be free from such force under these circumstances was not clearly established. We find that Edwards is entitled to summary judgment based on qualified immunity.

A. The Qualified Immunity Analysis

Saucier provides the marching orders for courts considering qualified immunity claims. Under *Saucier,*

courts presented with a motion for summary judgment on the basis of qualified immunity undertake a two-step inquiry. The threshold question asks "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" 533 U.S. at 201. If, on the facts as alleged, no constitutional violation could be shown were the allegations established, the inquiry ends, and the defendant is entitled to qualified immunity. "On the other hand, if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established." *Id.* The second question must be asked in a "particularized" sense: "'[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Id.* at 202 (quoting *Anderson v. Creighton,* 483 U.S. 635, 640 (1987)). That is, the essential question at step two is "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.*

B. No Constitutional Violation

Edwards first argues that because Kenyon has failed to point to the violation of an "objective law enforcement standard" during the arrest, Kenyon has failed to show that reasonable officers would disagree on the proper course of action in the situation. Thus, Edwards says, there is nothing for a jury to decide. This somewhat convoluted argument challenges the district court's finding that the facts as alleged by Kenyon show that Edwards used excessive force during the arrest, violating Kenyon's Fourth Amendment right to be free from unreasonable seizure.

Excessive force claims are analyzed under the Fourth Amendment's reasonableness standard. *Graham v. Connor,* 490 U.S. 386, 394 (1989). In determining whether the amount of force used is reasonable, courts must balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Id.* at 396 (internal quotations and citation omitted). This analysis requires "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* Finally, judges must allow for the fact that police officers often make split-second decisions about the amount of force necessary in tense, uncertain, and rapidly changing circumstances. *Id.* at 396-97.

Taking the facts as alleged by and in the light most favorable to Kenyon, Edwards threw Kenyon onto the hood of a car and pulled his arms up high behind his back in an "unnatural" manner in an attempt to arrest and handcuff Kenyon for domestic battery and public intoxication. Kenyon kept asking why he was being arrested, as he continued to resist, albeit because of the pain from the handcuffing. The encounter took place amidst a large crowd of people in an atmosphere of hostility where weapons of opportunity were available. Based on all of the factors in *Graham,* Edwards did not use excessive force. Though the encounter apparently resulted in injury to Kenyon's rotator cuff, we believe under the circumstances

that Edwards' use of force was reasonable in order to bring a potentially volatile situation under control.

C. Right Not Clearly Established

Even if it could be said, on the facts as alleged, that Edwards' use of force was unreasonable, and thus unlawful, it would not necessarily have been clear to a reasonable officer that the amount of force used was problematic. That is, it could not be said that the right to be free from the kind of force Edwards used in the situation was clearly established. Because an outstanding issue of material fact remained as to whether Edwards used excessive force, the district court did not analyze whether a reasonable officer would know that the force used was unlawful. But in *Saucier,* the Supreme Court rejected this approach. The Court reversed the Ninth Circuit, which had upheld the district court's denial of summary judgment based on qualified immunity because an issue of material fact remained on the excessive force claim. The Ninth Circuit viewed the question of whether an officer was reasonable in believing his actions were lawful in light of clearly established law, and the question of reasonableness on the merits of the Fourth Amendment claim, as the same inquiry. However, the Supreme Court made clear the importance of proceeding in order through both steps – determining whether the facts alleged showed a constitutional violation, and then whether a reasonable officer would believe his actions were unlawful in light of clearly established law. This, the Court noted, allows for the elaboration of and advancement toward an understanding of the law from case to case. *Saucier,* 533 U.S. at 201. The Court said:

> [t]he approach the Court of Appeals adopted – to deny summary judgment any time a material issue of fact remains on the excessive force claim – could undermine the goal of qualified immunity to avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate.

Id. at 202 (internal quotation and citations omitted).

Thus, on the facts alleged by Kenyon, we do not believe the state of the law at the time of this incident was such that it would be clear to a reasonable officer that Edwards' conduct was unlawful in the situation he confronted at the derby. *Kuha v. City of Minnetonka,* 365 F.3d 590, 601-02 (8th Cir. 2003). Though it is clearly established that the Fourth Amendment bars the use of excessive force generally, we must keep in mind that the right must be clearly established "in a more particularized . . . sense" such that the "contours of the right" make it clear to officers what the law is in a given circumstance. *Saucier,* 533 U.S. at 202 (internal quotations omitted).

Kenyon points principally to *Goff v. Bise,* 173 F.3d 1068 (8th Cir. 1999), *Kopec v. Tate,* 361 F.3d 772 (3d Cir.), *cert. denied,* 543 U.S. 956 (2004), and *Kostrzewa v. City of Troy,* 247 F.3d 633 (6th Cir. 2001), to argue that the right to be free from the force Edwards used in the situation he faced was clearly established. But these cases do not present facts akin to those faced by Edwards in his confrontation with Kenyon. In *Goff,* we affirmed the denial of qualified immunity where a police officer and town mayor arrested the plaintiff, tightly cuffed him, threw him to the

ground, and choked him to unconsciousness in a situation where personal animosity may have motivated the arrest and where the plaintiff did not pose a threat. In *Kopec,* a police officer handcuffed the plaintiff so tightly that he began to faint and writhed in pain on the ground for about ten minutes after the plaintiff refused to provide the officer personal information, following the officer's demand that the plaintiff and his girlfriend desist their frolicking trespass onto a frozen pond. The court in *Kopec* held that the officer's failure to respond promptly to the plaintiff's painful pleas in what were "rather benign circumstances" where the officer did not face a "dangerous situation" constituted excessive force. 361 F.3d at 777. In *Kostrzewa,* the court denied qualified immunity where the plaintiff was stopped for a routine traffic violation, tightly handcuffed, and then battered about the back of a squad car by the intentionally reckless driving of the arresting officers. In *Kukla v. Hulm,* 310 F.3d 1046 (8th Cir. 2002), the court upheld the denial of qualified immunity where officers arrested plaintiff for refusing to sign a ticket for failure to produce a trucker log book, and in the process forced him against his truck, twisted his arm high behind his back injuring his collar bone, and broke his wrist with the handcuffs. The court found that the minor infraction and lack of a safety threat merited denial of immunity. In none of these cases did the officers face the charged and potentially dangerous atmosphere that Edwards faced in arresting Kenyon, where physical violence had already occurred and a large crowd with access to weapons of opportunity stood nearby.

Based on the state of the law and given the facts as alleged by Kenyon, we do not find that a reasonable officer

would have believed that the force Edwards used was unlawful.

III. CONCLUSION

Because, given the facts as alleged by Kenyon, we believe no constitutional violation occurred and, alternatively, that a reasonable officer would not believe the force used here to be excessive, we find that Edwards is entitled to qualified immunity. We therefore reverse and remand.

SMITH, Circuit Judge, dissenting.

I respectfully dissent. When reviewing a grant or denial of qualified immunity, we recite the facts and view the evidence in the light most favorable to plaintiff Kenyon, accepting his account of the facts as true where there are material inconsistencies. *E.g., Guite v. Wright,* 147 F.3d 747, 749 (8th Cir. 1998). The majority opinion, however, gives too little deference to Kenyon's version of the facts. The facts alleged by Kenyon, if true, establish that Edwards violated a clearly established constitutional right to be free from excessive force.

Kenyon alleged that as he was being handcuffed – in what several witnesses testified was an unnatural motion – he yelled that Edwards was badly hurting his arm. Edwards replied, "If you don't shut your mouth, I'm gonna break the thing off." Several witnesses at trial, including Kenyon, also testified that Kenyon did not resist arrest and that he only told the deputies that they were hurting his arm. Virginia Noah, Judith Rhodes, and Karen Cummins testified that Kenyon's head was banged repeatedly against the car during the handcuffing. Assuming, as we

must, that Kenyon did not resist, Edwards's conduct potentially classifies as gratuitous and excessive force.

The majority adopts Edward's characterization of the crowd, viewing it as hostile and with easy access to weapons, and also ignores the fact that four armed policemen were present during the handcuffing. The threat posed by the crowd, if any, to Edwards is a fact that should be resolved by the jury. The threat posed by Kenyon, if any, was minor, according to his account and that of several witnesses at trial. Although Kenyon was arrested on two misdemeanor charges, he was acquitted of one and the other was dismissed.[2]

Finally, the majority makes no mention of the testimony favorable to Kenyon's claim that Edwards used an unorthodox method of handcuffing that was not officially sanctioned. Officer Folk, who received training from the same employer as Edwards, testified that when properly handcuffing an arrestee, one should bring the arm and hand down by the arrestee's side and then around to the back. Edwards contends that Officer Folk's testimony supports the notion that the technique of bringing a suspect's raised arm behind his back represents a law enforcement technique that is taught in training classes, pointing to Officer Folk's statement that "[w]ell, it depends on which training class you take" after he was asked if the raised-arm technique was proper. However, Edwards's argument takes Officer Folk's statements out of context. Folk went on to state that he had been shown the raised-arm technique

[2] A jury *acquitted* Kenyon on the third-degree battery charge, and the public intoxication charge was dismissed. The majority makes no mention of any of this. Instead, the majority implies Kenyon's guilt on the charges.

informally by an ex-Marine in 1969. He further stated that "I never did hear nothing about using that style but he [the ex-Marine] wasn't certified back then" and that his training updates have continued to teach the method of bringing the arm behind the back after it has been lowered. Viewing the evidence in the light most favorable to Kenyon, it appears that Officer Folk considered the raised-arm technique unorthodox and not officially sanctioned.

These questions – whether Kenyon was resisting; whether Edwards made comments indicating an intent to cause gratuitous injury; whether the four deputies actually had control over the crowd; and whether the handcuffing technique was unorthodox – constitute material, disputed issues of material fact that should not be tried by this court on appeal.

I also disagree with the majority on the qualified immunity analysis. "We analyze excessive force claims occurring in the context of seizures under the Fourth Amendment, using its reasonableness standard." *Henderson v. Munn,* 439 F.3d 497, 502 (8th Cir. 2006). "To establish a constitutional violation under the Fourth Amendment's right to be free from excessive force, the test is whether the amount of force used was objectively reasonable under the particular circumstances." *Id.* (quoting *Littrell v. Franklin,* 388 F.3d 578, 583 (8th Cir. 2004) (quoting *Greiner v. City of Champlin,* 27 F.3d 1346, 1354 (8th Cir. 1994))) (internal quotations omitted). "Circumstances such as the severity of the crime, whether the suspect posed a threat to the safety of the officers or others, and whether the suspect was resisting arrest are all relevant to the reasonableness of the officer's conduct." *Id.* (quoting *Foster v. Metro. Airports Comm'n,* 914 F.2d 1076, 1081 (8th Cir. 1990) (citing *Graham v. Connor,* 490

U.S. 386, 396 (1989))). At this procedural juncture, we must decide whether Kenyon "presented sufficient proof in support of his claim, if believed, to allow a reasonable jury to find the degree of force used against him was not 'objectively reasonable.'" *Id.* On this record, Kenyon satisfies this standard.[3]

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[3] Kenyon presented sufficient proof to allow a jury to reasonably conclude that the force used against him was objectively unreasonable: First, Officer Folk testified that the proper manner of handcuffing someone was to bring the arm and hand down by their side and then around to the back. Officer Folk also indicated that the raised-arm technique is unorthodox. Second, Kenyon presented the testimony of several witnesses to his arrest, all of whom testified that Kenyon was not resisting arrest other than to the extent that he sought to avoid sustaining injury to his arm from Edwards's technique. Third, Kenyon was being arrested for misdemeanors. Fourth, at the time that Edwards allegedly used excessive force, Kenyon was immobilized. Deputies Edwards and Hale held Kenyon by the arms with his face down on a car, and Edwards proceeded to handcuff Kenyon. Edwards testified that he had control of Kenyon even before Hale arrived. (App. 62). Again, several witnesses testified that Kenyon was not resisting arrest. Fifth, Kenyon's alleged injury, a torn rotator cuff that required surgery, tends to establish that excessive force may have been used by Edwards. *Cf. Wertish v. Krueger,* 433 F.3d 1062, 1067 (8th Cir. 2006) ("[B]ecause some force was reasonably required to arrest and handcuff [the plaintiff], his relatively minor scrapes and bruises and the less-than-permanent aggravation of a prior shoulder condition were *de minimis* injuries that support the conclusion that [the officer] did not use excessive force.").

Edwards's torquing of Kenyon's arm "may have been a 'gratuitous and completely unnecessary act of violence,'" in violation of Kenyon's Fourth Amendment rights. *Henderson,* 439 F.3d at 503 (quoting *Fontana v. Haskin,* 262 F.3d 871, 880 (9th Cir. 2001)) (brackets omitted). Accepting these facts as true, which we must at this procedural posture, Kenyon presented sufficient proof in support of his claim to allow a jury to conclude reasonably that the degree of force used was not objectively reasonable under the Fourth Amendment.

"The right to be free from excessive force is a clearly established right under the Fourth Amendment's prohibition against unreasonable seizures of the person." *Guite,* 147 F.3d at 750 (citing *Graham,* 490 U.S. 386); *accord Henderson,* 439 F.3d at 503. The right "must be defined at the appropriate level of specificity before a court can determine whether it was clearly established." *Craighead v. Lee,* 399 F.3d 954, 961 (8th Cir.), *cert. denied,* 126 S. Ct. 472 (2005) (citing *Saucier v. Katz,* 533 U.S. 194, 202 (2001); *Brosseau v. Haugen,* 543 U.S. 194, 199-200 (2004) (per curiam)). "Although earlier cases involving 'fundamentally similar' facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding." *Id.* (quoting *Hope v. Pelzer,* 536 U.S. 730, 741 (2002)) (internal quotations omitted). Instead, the issue is whether prior cases would have put a reasonable officer on notice that the degree of force used would violate the plaintiff's right not to be subjected to excessive force. *Craighead,* 399 F.3d at 962-63.

The relevant case law supports the conclusion that the right to be free from excessive force in handcuffing was clearly established when Edwards arrested Kenyon – in this circuit and in other circuits. *Goff v. Bise,* 173 F.3d 1068, 1073 (8th Cir. 1999); *accord Kopec v. Tate,* 361 F.3d 772, 777 (3d Cir. 2004); *Kostrzewa v. City of Troy,* 247 F.3d 633, 641 (6th Cir. 2001); *see Henderson,* 439 F.3d at 503; *Guite,* 147 F.3d at 750.

Goff bolsters the denial of qualified immunity in the case at bar. In *Goff,* the plaintiff was tightly cuffed and choked, receiving a less substantial injury than Kenyon's torn rotator cuff. Moreover, although personal animosity was present in *Goff,* Edwards's comments during his

arrest of Kenyon could indicate an intent to cause gratuitous injury. Whether an officer's desire to inflict unnecessary pain is motivated by personal animosity, as in *Goff,* or by some other inappropriate intent is immaterial. Furthermore, Edwards testified that he had control of Kenyon even before the other three deputies arrived. Considering that four deputies were present and that Kenyon was not resisting, it is unclear how Kenyon posed any more of a threat than did the plaintiff in *Goff* – both men were subdued before the unnecessary force was used against them. In sum, *Goff* supports Kenyon's contention that the right to be free from excessive force in handcuffing was clearly established.

Other circuits have held that the right to be free from excessive force in handcuffing is clearly established. *E.g., Kopec,* 361 F.3d at 777-78 (holding that officer used excessive force by placing excessively tight handcuffs on the plaintiff and refusing to loosen them for ten minutes); *Kostrzewa,* 247 F.3d at 641 (holding that allegation of excessively tight handcuffing establishes constitutional violation). In *Kostrzewa,* the Sixth Circuit stated, "This circuit has held that the right to be free from excessive force, including 'excessively forceful handcuffing,' is a clearly established right for purposes of the qualified immunity analysis." 247 F.3d at 641 (citations omitted). Given this language, *Kostrzewa* turned upon the tight handcuffing of the plaintiff independently and without regard to the officers' intentionally reckless driving, as the majority indicates.

For the foregoing reasons, I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 05-3487

David Kenyon,

Appellee

v.

Clayton Edwards, individually,

Appellant

Lt. Jim Hale, Individually, et al.,

Appeal from U.S. District Court for the Eastern District of Arkansas – Little Rock
(4:04-cv-00131-HDY)

ORDER

(Filed May 1, 2007)

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

BEAM, Circuit Judge, with whom RILEY, Circuit Judge, joins, dissenting.

Before this en banc panel is defendant's motion to reconsider the court's order dated January 18, 2007, affirming, "by vote of an equally divided court" a district court order concerning defendant's right to qualified immunity. This en banc affirmance, by its adoption of a district court order that (1) failed to rule on defendant's

timely motion for qualified immunity and (2) made qualified immunity a question of fact, erroneously denies Officer Edwards' well-established qualified immunity protections, in clear violation of recent, substantial and binding Supreme Court and circuit precedent. From this result, I dissent.

BACKGROUND

I adopt by reference the factual emanations found in the panel opinion and dissent, *Kenyon v. Edwards,* 462 F.3d 802 (8th Cir. 2006), *vacated,* (Nov. 22, 2006), although, for reasons outlined later, I reject as wholly irrelevant factual contentions in the panel dissent concerning Officer Edwards' state of mind at the time of the incidents in question. I set forth specific facts from these sources and elsewhere in the record as they may be helpful in explaining my concerns.

The plaintiff, David Kenyon, was arrested at a demolition derby in Searcy, Arkansas, by Officer Edwards and three other policemen, Lt. Jim Hale, Jeremiah Ervin and Dan Jarry. In the course of the arrest, Kenyon was handcuffed, with some or all of the other officers physically participating. During this occurrence, Kenyon claims that his rotator cuff was injured. Whether or not this injury resulted from the cuffing is a disputed fact. The stated grounds for the arrest were domestic battery and public intoxication. There is no dispute that when Officer Edwards arrived at the scene, Shirley Cox, Kenyon's ex-wife, was injured, Cox told Edwards that Kenyon had hit her and Kenyon smelled of alcohol when approached by Edwards. Indeed, Kenyon concedes that Edwards had probable cause to arrest him for domestic battery and

public intoxication. Joint Appendix at 98 (Response to Statement of Indisputable Material Facts). He was later acquitted of battery. The intoxication charge was dismissed.

Thereafter, Kenyon sued Edwards, Hale, Ervin and Jarry claiming violations of his rights under the Fourth and Fourteenth Amendments to the Constitution. The alleged offending transgressions resulted in charges of false arrest and use of excessive force by the officers. The issue of the immunity of the police officers was not raised initially and the case went to trial before a jury. The jury unanimously found that there was no false arrest by any defendant and that Hale, Ervin and Jarry used no excessive force. The jury was divided on whether Edwards had applied excessive force, causing the district court to declare a mistrial and schedule a new trial. Subsequently, Edwards sought qualified immunity through a motion for summary judgment. The parties tendered, by depositions and otherwise, trial and discovery evidence in support and defense of their respective positions. Appellate review of the district court's handling of this qualified immunity defense is the only matter now before this en banc panel, the three judge panel opinion having been vacated by vote of the circuit judges in regular active service.

In considering the question of qualified immunity, the district court correctly articulated the two-step analysis outlined in *Saucier v. Katz,* 533 U.S. 194 (2001), a case I discuss in more detail hereinafter. In this regard, the district court said:

> First, [the court asks] whether the facts as asserted by the plaintiff "show the officer's conduct violated a constitutional right." *Saucier v. Katz,* 533 U.S. 194, 201 (2001). If the answer is no, [the

> court grants] qualified immunity. If the answer is yes, [the court goes] on to determine "whether the right was clearly established." *Id.* "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202.

Kenyon v. Edwards, No. 4:04CV00131, 2005 WL 2176937, at *3 (E.D. Ark. Aug. 31, 2005) (alterations in original).

In its opinion and order dealing with these issues, the district court further held that if the facts on the issue of excessive force are "as asserted by Kenyon, . . . Edwards' conduct violated a constitutional right." *Id.* But, on the second *Saucier* question, i.e., whether a constitutional violation would have been clear to a reasonable officer under "the situation he confronted," the district court stated, "[a]t this juncture of the proceeding, it is impossible to say because a material question of fact exists." *Id.* Qualified immunity was denied. There is no further explication of what fact or facts remained to be decided and by whom or at which of the two *Saucier* steps they must be determined. The opinion and order of the district court, now affirmed by the en banc panel, answered neither of the two *Saucier* questions, both of which are questions of law under relevant precedent. The district court also wholly ignored this court's holding in *Schatz Family ex rel. Schatz v. Gierer,* 346 F.3d 1157 (8th Cir. 2003), which requires a district court to actually rule on a public official's timely motion for qualified immunity. Taken together, the two courts' respective orders throw the qualified immunity law of this circuit into ever increasing disarray.

DISCUSSION

A.

The Supreme Court in *Saucier* explained, as noted by the district court, that qualified immunity is a two-step inquiry. The first inquiry is whether a constitutional right is violated under the facts alleged. *Saucier,* 533 U.S. at 200. The second inquiry, assuming that such a violation is established, is whether the violated right was clearly established upon consideration of the particular incident at a specific factual level, and not on a basis of legal generalities. *Id.* Both inquiries are questions of law, which, on appeal, are reviewed de novo. *Robinette v. Jones,* 476 F.3d 585, 591 (8th Cir. 2007) (citing *Liebe v. Norton,* 157 F.3d 574, 576 (8th Cir. 1998)). This is so because "[w]hether an official is entitled to qualified immunity depends upon the 'objective legal reasonableness' of the official's actions 'assessed in light of the legal rules that were "clearly established"' at the time of the actions in question." *Id.* (quoting *Anderson v. Creighton,* 483 U.S. 635, 639 (1987)).

As *Mitchell v. Forsyth* noted, the Supreme Court in *Harlow v. Fitzgerald,* "purged [the] qualified immunity doctrine of its subjective components." 472 U.S. 511, 517 (1985) (citing *Harlow,* 457 U.S. 800 (1982)). In *Graham v. Connor,* the Court said "[a]s in other Fourth Amendment contexts . . . the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." 490 U.S. 386, 397 (1989).

Qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation." *Mitchell,* 472 U.S. at 526. The privilege "is an *immunity from suit* rather than a mere defense to liability." *Id.* "[A]nd like an absolute immunity, it is effectively lost if a case is erroneously permitted [or required] to go to trial." *Id.* As a result, the Supreme Court has repeatedly stressed the importance of resolving immunity questions at the earliest stage of litigation. *E.g., Hunter v. Bryant,* 502 U.S. 224, 227 (1991) (per curiam). Accordingly, Officer Edwards was and is clearly entitled to have the district court rule on his immunity defense, using the *Saucier* two-step approach. This, of course, has not occurred and will not occur given the en banc panel's proposed implementation of the equally divided court rule.

While it is not entirely clear what the district court purported to do, it is perfectly clear what it did not do. It did not follow the requirements of either *Schatz* or *Saucier.* The district court appears to have ruled that if a jury (or other undisclosed fact-finder) gives Kenyon's allegations their best factual gloss, Edwards violated Kenyon's constitutional right to be free from the use of excessive force. The district court does not appear to have dealt with *Saucier's* second question at all. If the district court's cryptic order means that there are facts yet to be determined at this second step, this would constitute an even more egregious violation of both Supreme Court and circuit precedent. In reality, then, as earlier indicated, the district court ignored both *Schatz* and *Saucier* but the en banc panel now affirms this procedure through misuse of the evenly divided court affirmance rule.

Schatz and the equally divided court rule aside, the district court apparently attempted to follow the route

taken by the Ninth Circuit in *Saucier,* a pathway that was specifically and soundly rejected by the Supreme Court. In *Saucier,* the Supreme Court, rejecting the approach taken by the Ninth Circuit and the en banc and district courts here, said, "because of the limits imposed upon us by the questions on which we granted review, we will assume [as a matter of law] a constitutional violation could have occurred under the facts alleged based simply on the general rule prohibiting excessive force," 533 U.S. at 207, and we will "then proceed to the question whether this general prohibition against excessive force was the source for clearly established law that was contravened in the circumstances this officer [Saucier] faced." *Id.* at 207-08. But, the district court, and the en banc panel by its affirmance of the district court, did not and does not now propose to afford Officer Edwards either the full benefit of the first *Saucier* step or any of the benefits of the second *Saucier* step. The approach the district court adopted " – to deny summary judgment any time a material issue of fact remains on the excessive force claim – [undermines] the goal of qualified immunity to 'avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment.'" *Id.* at 202 (quoting *Harlow,* 457 U.S. at 818).

B.

Another important question raised by the present posture of this appeal is whether, as a matter of law, the en banc panel was correct in its failure to grant, on de novo review, Officer Edwards' motion for summary judgment, given the evenly divided en banc court.

If the state of the law did not put Officer Edwards on notice that his conduct was clearly unconstitutional, qualified immunity is required. *Malley v. Briggs,* 475 U.S. 335, 345 (1986). And, Edwards is not required to be a constitutional specialist as the en banc panel now seemingly holds. Clearly established, for purposes of qualified immunity, means that the contours of the right must be clear enough that a reasonable officer under the particular circumstances of a specific arrest would understand that what he is doing violates a constitutional right. *Anderson v. Creighton,* 483 U.S. 635, 640 (1987). There are few, if any, cases that definitively outline the nature and character of this inquiry. Nonetheless, the Supreme Court has provided some guidance that clearly places Edwards on the immunity side of the line. *Wilson v. Layne,* 526 U.S. 603 (1999), cited by Edwards in his petition for reconsideration, provides one such test. In *Wilson,* a police agency allowed the presence of ride-along members of the media inside homes where the agency was serving arrest warrants. This was ultimately deemed to be a constitutional violation by the Supreme Court. But, when it became evident that at the time of the acts there existed a split among the federal courts on whether media "ride-alongs" could constitutionally enter homes with police personnel, the Supreme Court said, "[i]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Id.*, at 618.

Likewise, the Sixth Circuit, in a *Bivens* case involving a search using a defective warrant, citing *Wilson v. Layne,* held that federal agents "did not violate clearly established law," because there were disagreements on the constitutional issue between it and the Ninth Circuit. *Baranski v.*

Fifteen Unknown Agents, 452 F.3d 433, 449 (6th Cir. 2006) (en banc); *see also McCabe v. Macaulay,* 450 F. Supp. 2d 928, 948 (N.D. Iowa 2006) (when the right has not been clearly established by the Supreme Court or the circuit in which the district court sits and other circuits are split on the issue, it cannot be said that the defendant has violated a clearly established right); *Johnson v. Riggs,* No. 03-C-219, 2005 WL 2249874, at *12 (E.D. Wis. Sept. 15, 2005) (same). While not precisely on point here because the disagreements in these cases were between courts and not an evenly divided number of judges in the same circuit, these holdings should guide us to a reasonable outcome in this case.

As earlier noted, the jury, upon receiving Eighth Circuit Model Jury Instruction No. 3.04 on the elements of excessive force, acquitted three of the four police officers and could not agree upon Officer Edwards. On appeal before the three-judge panel, two of the three United States Circuit Judges found that no constitutional violation was made out by Kenyon and that a reasonably objective police officer would not have believed he or she was violating the Constitution. When the two issues were presented to the en banc panel of twelve judges, six found either no constitutional violation or, at least, that the contours of the asserted right were not reasonably discernible to an objective police officer confronted by this same situation. To now require Officer Edwards to go through another jury trial under these circumstances is clearly contrary to the above-cited cases and abundant other binding precedent of this circuit carefully considered by the three-judge panel majority.

I concede that the Supreme Court rule affirming a district court when the appellate court is evenly divided is

venerable and often utilitarian, but it should not lead to violation of other, later binding Supreme Court precedent. The divided court rule insofar as it might be applicable here, dates at least to Justice Field's 1868 opinion for the Supreme Court in *Durant v. Essex Co.,* 74 U.S. (7 Wall.) 112 (1868), if not earlier. A more recent explication of the rule is found in *Neil v. Biggers,* 409 U.S. 188, 191-92 (1972). *Neil* discusses some of the history of the equally divided court rule, citing *The Antelope,* 23 U.S. (10 Wheat.) 66, 126-27 (1825), *Etting v. Bank of United States,* 24 U.S. (11 Wheat.) 59, 78 (1826) and *Durant.* These cases and all other cases that I have found, deal with matters in which the lower court entered judgments fully dealing with the underlying merits of particular litigation, contrary to the *Schatz* violation we have here.

Neil stands for the proposition that even a merits judgment affirmed by an evenly divided court has neither binding effect on a collateral issue nor precedential weight. In *Neil,* Justice Powell noted that the Tennessee Supreme Court had earlier affirmed Biggers' rape conviction which was, in turn, on certiorari, affirmed by an equally divided United States Supreme Court. *Biggers v. Tennessee,* 390 U.S. 404 (1968) (per curiam). The issue before the United States Supreme Court in *Neil,* was whether this affirmance by an equally divided court in *Biggers v. Tennessee* was an "actual adjudication [statutorily] barring subsequent consideration" of a station house identification issue in a later federal habeas proceeding. *Neil,* 409 U.S. at 190. The Supreme Court permitted federal habeas review of the identification issue, deciding not to impose a statutory bar arising from the *Biggers v. Tennessee* affirmance "because of the absence of a majority position" by the Supreme Court on the state conviction. *Id.*

at 192. Here, contrary to *Neil* precedent, the en banc court's equally divided affirmance of a district court non-merits order will have the effect of taking Officer Edwards back to trial without any actual adjudication of his right to qualified immunity.

Durant, decided well before the day that interlocutory appeals on the issue of qualified immunity appeared on the judicial horizon, likewise demonstrates, but in a slightly different way, the impropriety of the en banc panel's order in this case. Justice Field states that affirmance of the court below, here the district court,

> is, indeed, the settled practice in such [a] case . . . ; but this is only the most convenient mode of expressing the fact that the cause is finally disposed of in conformity with the action of the court below, and that that court can proceed to enforce its judgment. The legal effect would be the same if the appeal, or writ of error, were dismissed.

Durant, 74 U.S. at 112. If this appeal is in essence dismissed and the district court's present order is enforced as a result, as Justice Field opined it should be, Officer Edwards goes back to trial before a jury in clear violation of Supreme Court precedent established one hundred and thirty-three years later.

Two additional cases dealing directly with the equally divided rule and qualified immunity, *Kissinger v. Halperin,* 452 U.S. 713 (1981) (per curiam) and *Norwood v. Bain,* 166 F.3d 243 (4th Cir. 1999) (en banc) (per curiam), are likewise unhelpful. Neither involve a failure or refusal to determine the availability of qualified immunity and

neither had the benefit of the immunity determination procedures mandated by *Saucier*.

Application of any court-made rule should not result in a judicial attempt to force a square peg into a round hole. Its use must be rational, must accommodate binding precedent and must serve the ends of justice. Instead of forcing this untoward result, the en banc panel order should, at least, follow *Schatz's* reasoning and remand this matter to the district court with directions to follow the marching orders of *Saucier*, rather than affirming the entirely improvident district court order. More appropriately though, the en banc panel should follow the dictates of *Wilson v. Layne* and grant Officer Edwards qualified immunity as a matter of law.

SUMMARY AND CONCLUSION

In summary, giving plaintiff Kenyon's allegations the most charitable reading possible, the district court tentatively determined that Officer Edwards possibly violated Kenyon's constitutional right to be free from excessive force. On this tenuous basis alone, and without ruling on Edwards' contention that a reasonable officer under the specific facts of this situation would not have known he was violating Kenyon's rights, the district court denied Edwards qualified immunity and set the underlying dispute for trial. At the previous trial, as also earlier noted, some number of the members of the jury rejected Kenyon's factual allegations. On appeal to a three-judge panel, two members of the panel rejected Kenyon's constitutional and reasonable knowledge claims. On appeal to a twelve-member en banc panel, six members of the en banc court would have granted Edwards immunity on one or

both of his *Saucier* claims. So, although Kenyon has not mustered a necessary majority vote on any of the underlying or interlocutory claims at any point in this dispute, Officer Edwards is headed back to a jury trial on the excessive force claim through the unfortunate misapplication of the so-called equally divided court rule.

We should never condone police brutality. Neither should we disregard the difficulties inherent in the work of our police community. The people of Searcy, Arkansas, sent Officer Edwards into a dicey situation in which he was forced to encounter plaintiff Kenyon, a less than cooperative individual based on undisputed portions of the record before us. Although Edwards handled his duties in a totally lawful manner in the view of some jurors and at least two (or perhaps more) of the circuit judges reviewing the matter, he now finds his time, reputation and personal assets in jeopardy at a jury trial that should not be allowed to occur.

From this result I dissent. And if a majority of the en banc panel insists on pursuing this course of action, I urge Officer Edwards to seek relief through writ of certiorari to the United States Supreme Court.

May 01, 2007

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

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