

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL MODUGNO :  
 : CIVIL ACTION  
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 v. :  
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 PENNSYLVANIA STATE POLICE, et al. : NO. 00-3312  
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 O'NEILL, J. : NOVEMBER , 2001

MEMORANDUM

Plaintiff Michael Modugno has sued police officer Andrew Skelton, the Pennsylvania State Police, and various unnamed state police officers claiming Skelton used excessive force during a traffic stop in violation of a number of state laws, 42 U.S.C. § 1983, and the Pennsylvania Constitution. Before me now is Skelton's motion for summary judgment pursuant to Fed. R. Civ. P. 56.

BACKGROUND<sup>1</sup>

On July 1, 1998, at approximately 8:40 a.m. while driving in Montgomery County Pennsylvania Modugno was pulled over by Skelton. (Comp. ¶ 22). Modugno pulled into a hotel parking lot, exited his vehicle and called to Skelton to find out why he had been stopped. Id. ¶ 24. Skelton did not answer Modugno's inquiries but instead ordered him to get back into his

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<sup>1</sup> As I am deciding a motion for summary judgment the facts below are presented in the light most favorable to Modugno, the non-moving party. See Andersen v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

vehicle. Id. ¶ 25. Modugno did not reenter his vehicle and continued to ask Skelton why he had been pulled over. Id. ¶ 26. Skelton responded by again insisting that Modugno return to his vehicle. (Mod. Dep. at 41). The space between the two men closed to a span of inches with both of them shouting angrily at each other. Id. Eventually, Skelton ordered Modugno to put his hands on the top of his car and spread his legs. Id. at 42. Modugno refused. Id. at 43. Modugno testified that the reason he refused to comply with this request was because he was “not a criminal.” Id. at 47. Skelton then grabbed Modugno’s wrist in an apparent effort to force his hands behind his back. Id. at 43. Modugno pulled his arm away from Skelton. Id. at 43, 44. Skelton again attempted to grab Modugno who again pulled away. Id. at 44. The men continued to shout at each other as they struggled with Modugno continuing to demand that Skelton tell him what he had done wrong. Id. at 45. At some point Modugno heard Skelton say “put your hands behind you, I’m going to cuff you.” Id. At no point did Modugno strike Skelton. Id. at 47.

While standing face to face, eventually Skelton managed to bend Modugno over the hood of Modugno’s car by placing his knee on Modugno’s leg. Id. at 48, 50. Modugno then managed to turn around and free himself. Id. at 50. Shortly thereafter a civilian passerby, Richard Buck, approached the two men and said to Modugno “sir, please don’t do this.” Id. at 48, 50. At that point Modugno ceased struggling and allowed Skelton to handcuff him. Id. at 48. Modugno states that he allowed himself to be subdued because he didn’t want Buck, “an older gentleman . . . getting involved.” Id. at 50.

During the course of the encounter Skelton sprayed pepper spray into Modugno’s face and threatened Modugno with severe injury stating “he had military training.” (Comp. at ¶ 29-

30.) Modugno was sprayed three or four times within the space of approximately one minute: twice before he struggled with Skelton on the hood of his car and once or twice thereafter. (Mod. Dep. at 54-55). Modugno states that he was not sprayed before he initially pulled away from Skelton, while he grappled with Skelton on the hood of his car, or after he ceased struggling. Id. at 55.

After handcuffing Modugno Skelton called for an ambulance. Id. at 63. While waiting for the ambulance Skelton forced Modugno to lay down on the ground face up. Id. Modugno then had trouble breathing and asked if he could sit up. Id. Skelton at first refused but eventually let Modugno sit up after he realized Modugno was having trouble breathing. Id. Modugno was then taken to Grandview Hospital for medical treatment. (Comp. at ¶ 31.) As a result of his encounter with Skelton Modugno's glasses were broken and he sustained "abrasions and contusions to his face and head, discharge and mucus from mouth and nose and emotional trauma . . . ." Id. ¶ 29, 33. Modugno did not go to work on the day of the incident but took no further time off as a result of his encounter with Skelton. (Mod. Dep. at 78). Modugno later pled guilty to disorderly conduct and was fined \$100. Id. at 85.

On June 29, 2000 Modugno filed a complaint against the Pennsylvania State Police, Skelton and numerous John Doe defendants asserting: (1) a violation of 42 U.S.C. § 1983 against all defendants for violations of his rights to be free from excessive force and from illegal searches and seizures under the United States and Pennsylvania Constitutions; (2) a violation of § 1983 against all defendants for engaging in a conspiracy to deprive Modugno of his rights under the United States and Pennsylvania Constitutions; (3) a violation of § 1983 against the Pennsylvania State Police and a number of unknown higher ranking police officers for having

“adopted and maintained for many years a recognized and accepted policy, custom, and practice of condoning and/or the acquiescence of the use of excessive force by its officers . . .”, (Comp. ¶ 53), as well as for failing to properly train, supervise or discipline its officers, id ¶¶ 54-55, and being “deliberately indifferent to the rights of the citizens of the Pennsylvania State Police<sup>2</sup> to be free from illegal seizures of persons and the use of excessive force,” Id. ¶ 56;<sup>3</sup> state law claims against Skelton for (4) false arrest and false imprisonment and (5) assault and battery, as well as a claim for (6) intentional infliction of emotional distress against Skelton and three unnamed officers. Skelton moved for summary judgment on August 16, 2001.

#### STANDARD OF REVIEW

Summary judgment is appropriate where “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 a matter of law.” Fed. R. Civ. P. 56(c). My task is not to resolve disputed issues of fact, but to determine whether there exist any factual issues to be tried. See Andersen v. Liberty Lobby, Inc., 477 U.S. 242, 247-49 (1986). In making this determination, all of the facts must be viewed in the light most favorable to the non-moving party. Id. at 248. However, the non-moving party must raise “more than a mere scintilla of evidence in its favor” in order to overcome a summary judgment motion, and cannot survive by relying on unsupported assertions, conclusory allegations, or mere

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<sup>2</sup> I assume plaintiff meant to allege indifference to the rights of the citizens of Pennsylvania.

<sup>3</sup> Count 3 of plaintiff’s complaint occupies eighteen paragraphs spread out over nine pages that essentially repeat the information I have summarized above.

suspicious. Williams v. Borough of W. Chester, 891 F.2d 458, 460 (3d Cir. 1989). “[I]f the opponent [of summary judgment] has exceeded the ‘mere scintilla’ [of evidence] threshold and has offered a genuine issue of material fact, then the court cannot credit the movant’s version of events against the opponent, even if the quantity of the movant’s evidence far outweighs that of its opponent.” Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358, 1363 (3d Cir.1992).

## DISCUSSION

### A. § 1983 Claim Against Skelton

To establish a claim under § 1983, a plaintiff must show that his federal statutory or constitutional rights were violated. See Flagg Bros., Inc. v. Brooks, 426 U.S. 149, 155 (1978). The basis for Modugno’s § 1983 suit is his claim that Skelton used excessive force in executing a traffic stop against him thereby violating his rights under the Fourth and Fourteenth Amendments. Skelton makes two arguments in support of his motion for summary judgment: (1) the force used against Modugno did not rise to the level of a constitutional violation and (2) he is entitled to qualified immunity.

Qualified immunity is an affirmative defense to § 1983 claims. Although “actions[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees” when power is abused by government officials, it is also true that permitting such suits “can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties.” Anderson v. Creighton, 438 U.S. 635, 638 (1987). The doctrine of qualified immunity attempts to balance these two

interests, granting government officials performing discretionary functions immunity from suit “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

The analytical framework generally used in evaluating claims of qualified immunity consists of two steps. First the court “must determine if the plaintiff has alleged a deprivation of a clearly established constitutional right.” Sterling v. Borough of Minersville, 232 F.3d 190,193 (3d Cir. 2000). Second, if such a violation is found to exist “the immunity question focuses on whether the unlawfulness of the action would have been apparent to a reasonable official.” Id. (citations omitted).

The Supreme Court recently examined the relationship between a claim of excessive force against a government official and the doctrine of qualified immunity in Saucier v. Katz, 121 S. Ct. 2151 (2001). The Saucier Court stated that in “a suit against an officer for an alleged violation of a constitutional right, the requisites of a qualified immunity defense must be considered in the proper sequence.” 121 S. Ct. at 1255. In evaluating such claims the threshold question is: “[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?” Id. at 2156.

### 1. Constitutional Violation

Freedom from the use of excessive force is clearly an established constitutional right under the Fourth Amendment. See Graham v. Conner, 490 U.S. 386, 394 (1989). The Saucier Court noted that claims of excessive force by the police that implicate the Fourth Amendment continue to be governed by the framework the Court established in Graham. Saucier, 121 S. Ct.

at 2158. This standard calls for an evaluation of the objective reasonableness of the officer's conduct. See Graham, 490 at 388. The police have the right to use some degree of force, or threat of force, in carrying out arrests or investigatory stops. See id. at 396.

Because the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. . . its proper application requires careful attention to 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 officer[] or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

Id. (citations omitted). Whether or not a particular use of force is “reasonable” is to “be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” Id. “The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force necessary in a particular situation.” Id. at 396-97.

In support of his contention that he has alleged sufficient facts “from which a jury could reasonably infer that the use of pepper spray [by Skelton] constituted excessive force,” (Pl.’s Resp. to Mot. for S.J. at 8), Modugno relies on McNeill v. Koch, No. Civ. A. 98-4578, 1999 WL 77244 (E.D. Pa. Feb. 8, 1999). In McNeill the defendant’s motion for summary judgment was denied due to the plaintiff’s allegations that a police officer, without warning, pepper sprayed her after the altercation had concluded, and after she screamed “no!” upon seeing him approach with the pepper spray. Id. at \*4. McNeill is distinguishable from the case before me however in that Modugno was sprayed only after he repeatedly refused to comply with Skelton’s verbal and physical attempts to get him to cooperate. Modugno conceded this fact during his deposition wherein the following exchange took place:

Q. Did [Skelton] mace you when he first got out of the car?

A. No ma'am.

Q. Did he mace you before you pulled away from him?

A. No ma'am.

Q. So you pulled away from him at least three times before he actually maced you?

A. That I remember, yes, ma'am.

(Mod. Dep. at 55). Unlike the plaintiff in McNeil, by his own admission Modugno was neither cooperative nor taken by surprise.

Modugno also points out that he was initially stopped for the minor violation of exceeding the speed limit by ten miles per hour. He contends such a violation “doesn’t create the implication that [p]laintiff is, or could be, a dangerous person or threat.” Id. at 9. I agree that the nature of the crime for which Modugno was stopped is not one that would ordinarily suggest a heightened degree of danger; yet I note Skelton’s actions upon pulling Modugno over were initially simply to ask him to return to his vehicle. This is not an unreasonable response for an officer in Skelton’s situation. Every routine traffic stop creates a situation of considerable uncertainty for the police officer involved, who must perform his office having no idea as to the nature or disposition of the person he has pulled over. From the perspective of that officer it is reasonable to require people to remain in their vehicles for the reason that it confines these individuals to an enclosed space thereby limiting potential threats to officer safety.

Before employing the pepper spray Skelton repeatedly requested Modugno to return to his vehicle. Modugno refused. Skelton then asked then Modugno to put his hands on the car and spread his legs. Modugno again refused. Skelton then attempted to subdue Modugno who still

refused to cooperate, repeatedly pulling his arms away from Skelton's grip. It was only at this point that Skelton resorted to the use of pepper spray. It was Modugno's actions that turned the encounter with Skelton from a routine traffic stop into a physical altercation culminating in the use of pepper spray. Modugno disagrees, pointing to deposition testimony given by Skelton describing Modugno's behavior as "passive" and not "assaultive," and that up to the point Skelton employed the pepper spray "there hadn't been any struggle with the plaintiff." (Pl.'s Resp. to Mot. for S.J. at 3, 3 n.2). In support of this latter assertion Modugno cites page twenty-eight of Skelton's deposition which contains the following exchange:

- Q. And after you had him up against his vehicle. . .what did you do next?
- A. I was attempting to get his hands behind his back so I could put some handcuffs on his hands.
- Q. What happened at that point?
- A. [Modugno] became very resistive and it was clear to me it was a futile attempt to do it because he's quite a strong individual and rather than get into a physical confrontation, I gave myself some space behind him and then reached for my pepper spray and deployed it.

However one characterizes the encounter between Modugno and Skelton, I do not believe that a reasonable juror could conclude that "at the time of the defendant employed the pepper spray against plaintiff . . . there was no altercation or struggle between [Skelton] and the plaintiff." (Pl.'s Resp. to Mot. for S.J. at 11).

I recognize that excessive force claims are fact bound inquiries frequently left for resolution by the fact-finder. However, the summary judgment "standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine*

issue of *material* fact.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)(emphasis in original). Taken in the light most favorable to Modugno, the encounter between Skelton and him was an increasingly tense situation in which Skelton progressed from verbal commands, to a balked attempt at physical restraint, and finally to the use of pepper spray in an effort to get Modugno to comply with his commands. Applying the standard established in Graham, in my view no reasonable juror could conclude that the amount of force applied by Skelton was objectively unreasonable under these circumstances. See Gainor v. Georgia, 59 F. Supp. 2d 1259, 1287 (N.D. Ga. 1998)(finding use of pepper spray reasonable as a matter of law where an officer had repeatedly asked plaintiff to stop, twice unsuccessfully attempted to subdue plaintiff by tripping him, and twice ordered him to “get down”); Griffen v. City of Clanton, Ala., 932 F. Supp. 1359, 1369 (M.D. Ala. 1996)( “as a means of imposing force, pepper spray is generally of limited intrusiveness, . . . designed to disable a suspect without causing permanent injury”); Cf. Adams v. Metiva, 31 F.3d 375, 384 (6th Cir. 1994)(summary judgment in favor of defendant not appropriate where plaintiff maintained he was maced after he was incapacitated and blinded); Burns v. Childs, No. Civ. A. 3:97-CV-1269-P, 1998 WL 460286, at \*2 (N.D. Tex. July 27, 1998)(summary judgment in favor of defendant not appropriate where plaintiff alleges he was pepper sprayed by defendants on three different occasions even though he did nothing to provoke the officers or resist their attempts to arrest him); Jackson v. Mills, No. Civ. A. 96-3751, 1997 WL 570905 (E.D. Pa. Sept. 4, 1997)(accepting plaintiff’s claims as true that she was peacefully leaving the scene during the arrest of another when she was pepper sprayed, a reasonable officer could not have believed that he was justified in spraying plaintiff). As I have determined that no constitutional violation has taken place Skelton’s motion for summary judgment will be granted.

## 2. Qualified Immunity

Even if I were to hold that there was a material factual dispute with respect to a constitutional violation, I would grant the motion on the basis of qualified immunity since in my view Skelton's actions were based on a reasonable belief that in the particular situation he confronted his conduct was lawful. See Saucier at 2156.

In Saucier the Court made clear that the inquiry pertaining to whether an officer's use of force is reasonable is distinct from that required to establish that the officer is entitled to qualified immunity. 121 S. Ct. at 1258. In the words of the Saucier Court, "[t]he qualified immunity inquiry . . . has a further dimension." Id. This "dimension" allows an officer who has exerted an objectively unreasonable, and therefore excessive, amount of force to qualified immunity from suit if he had a reasonable belief that his actions were nonetheless constitutional. Id. at 1258-59. In other words, where an officer "correctly perceives all the relevant facts but [has] a mistaken understanding as to whether a particular amount of force is legal in those circumstances[,] [i]f the officer's mistake as to what the law requires is reasonable [he] is entitled to the immunity defense." Id. at 1258.

Mudugno denies that Skelton is entitled to such immunity contending that "[i]n this case there is at least a question as to whether trooper Skelton's [sic] conduct violated the Pennsylvania State Police's own standards on the use of pepper spray." (Pl.'s Resp. to Mot. for S.J. at 14). In support of this assertion plaintiff cites a manual issued in 1998 to Pennsylvania state police officers during a mandatory training session on the use of force. The sentence quoted by Modugno reads: "The criteria for the use of OC spray is active resistance or its threat from subject." Accepting the facts in the light most favorable to Modugno, I believe that a belief on

the part of Skelton that in Modugno he faced an individual actively resisting him was reasonable. This conclusion is supported by additional language from the manual cited by plaintiff which states: "The subject need not attack the officer. Belligerent resistance that might otherwise require force to resolve is all that is needed." In the case before me Skelton did not even have to speculate as to whether force might be required since his attempts to use force had already failed by the time he resorted to pepper spray.

As I have found no constitutional violation to have occurred as a matter of law, Modugno's remaining claims against various John Doe police officers and the Pennsylvania State Police predicated upon their knowledge or duty to prevent such violations are moot. (Comp. Counts 1 , 3). The same is true with respect to Modugno's allegation of a conspiracy to deprive him of his constitutional rights. (Comp. Count 2). I note that the record is completely devoid of any evidence that might suggest the existence of a conspiracy. These claims will be dismissed.

Having dismissed plaintiff's federal claims, I decline to exercise jurisdiction over plaintiff's state law claims, which will be dismissed without prejudice. 28 U.S.C. § 1367(c)(3).

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL MODUGNO

v.

PENNSYLVANIA STATE POLICE, et al.

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CIVIL ACTION

NO. 00-3312

**ORDER**

AND NOW, this        day of November, 2001, in consideration of defendant Andrew Skelton's motion for summary judgment, plaintiff's response thereto, and for the reasons set forth in the accompanying memorandum, it is ORDERED:

1. Defendant Skelton's motion for summary judgment is GRANTED and judgment is entered in his favor and against plaintiff.
2. Plaintiff's claims under 42 U.S.C. § 1983 against the Pennsylvania State Police and various John Doe police officers contained in counts 1-3 of the complaint are DISMISSED.
3. Plaintiff's claims under the Constitution of the Commonwealth of Pennsylvania contained in counts 1-3, and plaintiff's state law tort claims contained in counts 4-6 of the complaint are DISMISSED without prejudice.

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THOMAS N. O'NEILL, JR., J.