

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

KAM WAN HUNG,	:	
Plaintiff,	:	
	:	
v.	:	CIVIL ACTION
	:	
DERRICK WATFORD,	:	NO. 01-3580
Defendant.	:	

MEMORANDUM AND ORDER

YOHN, J.

December ____, 2002

Presently before the court is defendant’s motion for summary judgment on the basis of qualified immunity. For the reasons that follow, the motion will be denied.

BACKGROUND¹

On August 2, 1999, plaintiff, Kam Wan Hung, and her sister, Hau Wan Ng, were involved in an automobile accident with a vehicle operated by Gene Smith. Def.’s Mot. for Summ. J., Exh. A (Dep. of Kam Wan Hung at 21) (“Dep. of Hung”). The accident occurred on one of the entrance ramps to Interstate Route 76 located in Conshohocken, Pennsylvania. *Id.* at

¹ In order to determine whether summary judgment is appropriate in this particular case, all of the facts delineated above are stated in the light most favorable to the plaintiff as the non-moving party. *See Saldana v. Kmart Corp.*, 260 F.3d 228, 232 (3d Cir. 2001) (holding that court should view facts in light most favorable to non-moving party and draw all inferences in that party’s favor); *see also Skoczylas v. Atlantic Credit & Fin., Inc.*, 2002 WL 55298, at *2 (E.D. Pa. Jan. 15, 2002) (“When considering a motion for summary judgment, a court must view all facts and inferences in a light most favorable to the nonmoving party.” (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986))); *see also Brown v. Muhlenburg Township*, 269 F.3d 205, 208 (3d Cir. 2001) (citing *Beers-Capitol v. Whetzel*, 256 F.3d 120, 130 n.6 (3d Cir. 2001)).

21. Plaintiff's car, which was being driven by her sister at the time of the accident, struck Smith's vehicle from behind. Dep. of Hung at 21. After the accident, all of the individuals involved exited their vehicles to inspect the damage. *Id.* at 21-22. Plaintiff and her sister then spotted a police car on Route 76 and flagged it down. *Id.* at 24.

Trooper Derrick Watford was the officer in that police car. *Id.* at 24 (referring to Watford as the taller trooper). Upon seeing the two women, he made his way to the site of the accident. He parked his car about two to three car lengths behind plaintiff's car. *Id.* at 25. A second police car, containing Trooper Tyrone Bradford, also arrived at that time and parked in front of Smith's car. *Id.*

Pleased to see that the police had arrived, plaintiff started toward Trooper Watford's car in an effort to talk to him and to explain what had happened. *Id.* at 26. As she approached his car, Trooper Watford, was already out of his car and walking toward her. *Id.* at 27. Plaintiff tried to tell Trooper Watford that she wanted to talk to him but Trooper Watford told plaintiff to return to her car. *Id.* She admits that she kept trying to talk to Trooper Watford despite the fact that he told her to return to her car five or six times. *Id.* at 28-29.

Trooper Watford then warned plaintiff "You go, if you don't go then I will lock you up." *Id.* at 29. Plaintiff responded "Dim Gy, lock me up." *Id.* According to plaintiff's interpreter, "dim gy," in Cantonese, means "why." *Id.* Thus, by this statement, plaintiff says she was asking Trooper Watford why he was going to lock her up. *Id.* at 37.²

During this exchange, Trooper Watford continued to tell Hung to go back to her car. *Id.*

² It is not clear to me even from plaintiff's version of the facts whether this was a question (i.e., why lock me up?) or a confrontational statement (i.e., go ahead, lock me up).

at 29-30. He then starting advancing toward her. *Id.* She states that “[h]e looked fearful,” and that she was “afraid” and then decided to “back off” from him. *Id.* at 30. Plaintiff turned around, with her back to Trooper Watford, and started walking back to her car. *Id.* As she neared her car but before she was touching it, according to plaintiff, Trooper Watford came up behind her, turned her around, grabbed her by the neck and punched her in the stomach. *Id.* at 31. Although plaintiff asked Trooper Watford “Why you hit me?,” he did not respond. *Id.* His only response, plaintiff stated, was to deliver a side swipe kick that sent plaintiff to the ground. *Id.* at 32. As she lay on the ground, Trooper Watford stepped on her back and handcuffed her. *Id.* at 32, 41. He then “pulled [her] up like a dog” and placed her on a grassy area on the side of the road. *Id.* at 34. Once on the grass, Trooper Watford ordered Trooper Tyrone Bradford to place cuffs on plaintiff’s feet. *Id.* at 34-35. At no time did Trooper Watford tell plaintiff that she was under arrest. *Id.* at 33.

As a result of this incident, plaintiff and her sister brought claims against Trooper Watford and others alleging violations of federal and state laws. As all other claims were dismissed in an earlier order of the court, the only claim remaining is plaintiff’s Section 1983 claim for excessive force in violation of the Fourth Amendment against Trooper Watford. Presently before the court is Trooper Watford’s motion for summary judgment based on the ground of qualified immunity.

STANDARDS OF REVIEW

I. Summary Judgment

Either party to a lawsuit may file a motion for summary judgment, and the court will grant it “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 a judgment as a matter of law.” FED. R. CIV. P. 56(c). Furthermore, i.e., “[f]acts that could alter the outcome are ‘material,’ and disputes are ‘genuine’ if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct.” *Ideal Dairy Farms, Inc. v. John Lebatt, LTD.*, 90 F.3d 737, 743 (3d Cir. 1996) (citation omitted). When a court evaluates a motion for summary judgment, “[t]he evidence of the non-movant is to be believed.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).³ Additionally, “all justifiable inferences are to be drawn in [the non-movant’s] favor.” *Id.* In addition, “[s]ummary judgment may not be granted . . . if there is a disagreement over what inferences can be reasonably drawn from the facts even if the facts are undisputed.” *Ideal Dairy*, 90 F.3d at 744 (citation omitted). An inference, however, “based upon a speculation or conjecture does not create a material factual dispute sufficient to defeat entry of summary judgment.” *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 382 n.12 (3d Cir. 1990). The nonmovant must show more than “[t]he mere existence of a scintilla of evidence” for elements on which he bears the burden of production. *Anderson*, 477 U.S. at 252. Thus, “[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no ‘genuine issue for trial.’” *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citations omitted).

II. Qualified Immunity

³ Much of defendant’s memorandum mistakenly fails to follow this tenet.

The standard by which courts are to determine whether an executive officer is entitled to qualified immunity in an excessive force case was recently clarified by the Supreme Court in *Saucier v. Katz*, 533 U.S. 194, 200-208 (2001). The Court reiterated that the first issue to be resolved in the qualified immunity inquiry is whether, “[t]aken in the light most favorable to the party asserting the injury, . . . the facts alleged show [that] the officer’s conduct violated a constitutional right” *Id.* at 2156. If so, the court must next determine whether that right was clearly established at the time of the alleged violation. *See id.* Yet, the Court clarified that it is not enough to decide merely that the abstract right to be free from excessive force was clearly established. Indeed, as the Court indicated in *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) and reaffirmed in *Saucier*, plaintiffs must demonstrate that the contours of this right were sufficiently established at the time of its alleged usurpation that a reasonable officer in defendant’s position would have “underst[ood] that what he [was] doing violate[d] that right.” *Saucier*, 533 U.S. at 202 (quoting *Anderson*, 483 U.S. at 640). In other words, the relevant question is whether it was clearly established on August 2, 1999, such that a reasonable officer would understand, that the unprovoked grabbing, punching, kicking and handcuffing of a non-threatening individual who was not fleeing the scene nor resisting arrest (the facts as testified to by plaintiff which the court must accept as true for this purpose) violated that individual’s Fourth Amendment rights to be free from excessive force.⁴

If plaintiff is able to demonstrate that the constitutional right was clearly established at

⁴ Notably, these determinations—like that made pursuant to the first step of the *Saucier* analysis—are purely legal in nature. *See Johnson v. Jones*, 515 U.S. 304, 313 (1995) (describing the question of “whether the facts alleged . . . support a claim of violation of clearly established law” as one that is “purely legal” (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 528 n.9 (1985))).

the time of the incident and that defendant's actions—as described by plaintiff—violate this right, there remains a third inquiry in which the court must engage.⁵ Specifically, I must determine whether Trooper Watford has established that he mistakenly but reasonably believed that his actions were constitutionally permissible. This question must be answered affirmatively if he 1) “correctly perceive[d] all of the relevant facts but ha[d] a mistaken understanding as to whether [the] amount of force [employed was] legal in those circumstances”; or 2) had “reasonable, but mistaken, beliefs” that facts warranting the use of such force existed. *Saucier*, 533 U.S. at 206. If there is no genuine issue of fact as to whether defendant acted with such a reasonable but mistaken belief, then he is entitled to qualified immunity regardless of whether his actions actually were constitutional.⁶ *Id.* at 206.

⁵ Indeed, this is the import of the *Saucier* holding. The plaintiff in that case argued that there is no meaningful distinction between the excessive force and qualified immunity analyses, *i.e.*, that if there exists a genuine issue of fact as to whether the force exerted by a defendant law enforcement officer in a given case was excessive, then that official is not entitled to qualified immunity. The Court disagreed, holding that “[t]he inquiries for qualified immunity and excessive force remain distinct . . .” *Saucier*, 533 U.S. at 204. Specifically, the Court held that even if a law enforcement officer did use an unreasonable amount of force, he is entitled to qualified immunity if he reasonably believed that the amount of force employed was reasonable. *Id.* at 205; *see Bennett v. Murphy*, 274 F.3d 133, 137 (3d Cir. 2002) (“The decision in *Saucier* clarified what was not apparent before—that the immunity analysis is distinct from the merits of the excessive force claim.”).

⁶ Because the court currently is confronted with defendant's motion for summary judgment, the determination of whether defendant acted reasonably but mistakenly must be made considering the facts in the light most favorable to plaintiff. If, upon undertaking this analysis, it is revealed that a genuine factual issue exists regarding the reasonableness of defendant's belief that the use of such force was warranted under the circumstances, defendant is not entitled to qualified immunity. *See Bennett*, 274 F.3d at 137 (“*Saucier*'s holding regarding the availability of qualified immunity at the summary judgment stage does not mean that an officer is precluded from arguing that he reasonably perceived the facts to be different from those alleged by the plaintiff. An officer may still contend that he reasonably, but mistakenly, believed that his use of force was justified by the circumstances as he perceived them; this contention, however, must be considered at trial.”).

Notably, the allocation of the burden of proof shifts during the course of this analysis. As stated by the Third Circuit:

Where a defendant asserts a qualified immunity defense in a motion for summary judgment, the plaintiff bears the initial burden of showing that the defendant's conduct violated some clearly established statutory or constitutional right. Only if the plaintiff carries this initial burden must the defendant then demonstrate that no genuine issue of material fact remains as to the objective reasonableness of the defendant's belief in the lawfulness of his actions. This procedure eliminates the needless expenditure of money and time by one who justifiably asserts a qualified immunity defense from suit.

Sherwood v. Mulvihill, 113 F.3d 396, 399 (3d Cir. 1997) (citations omitted).

When the above-delineated summary judgment and qualified immunity standards are amalgamated, the question ultimately to be resolved by the court is whether, as a matter of law, the evidence, viewed in the light most favorable to plaintiff, would support a reasonable jury finding that Trooper Watford's actions were objectively unreasonable. *Groman v. Township of Manalapan*, 47 F.3d 628, 634 (3d Cir. 1995). If not, then he will be entitled to summary judgment on the ground of qualified immunity.

DISCUSSION

As noted above, the central question pending before the court is whether, as a matter of law, the evidence, taken in a light most favorable to plaintiff, would support a reasonable jury finding that Trooper Watford's actions were objectively unreasonable. *Groman*, 47 F.3d 628, 634 (3d Cir. 1995). Based on plaintiff's deposition testimony, which I must accept as true for this purpose, I conclude that the evidence would support a jury finding that Trooper Watford's actions were objectively unreasonable, thus precluding qualified immunity. As such, I will deny Trooper Watford's motion for summary judgment on the ground of qualified immunity.

I. Taken in the Light Most Favorable to Plaintiffs, Do the Facts Alleged Show that Defendant Violated a Constitutional Right Possessed by Plaintiffs?

Plaintiff presents sufficient evidence from which a reasonable jury could find that Trooper Watford's conduct, did in fact, result in a violation of the Fourth Amendment. Distilled to its essence, plaintiff's factual account is as follows: Plaintiff, after being involved in a car accident, attempted to talk with Trooper Watford, the police officer who arrived on the scene to investigate the accident. *Id.* at 26. Despite five or six orders from Trooper Watford to return to her car, plaintiff continued trying to talk to him until he began to advance toward her and she became afraid of him. *Id.* at 28-29. At that time, plaintiff decided to comply with his order. *Id.* at 30. She turned around, with her back to Trooper Watford, and started walking back to her car. *Id.* Before she got there, Trooper Watford came up behind her, grabbed her by the neck, punched her in the stomach, gave her a sweeping kick that sent her to the ground, stepped on her back and handcuffed her. *Id.* at 31-32, 41. At no time, however, did Trooper Watford tell plaintiff that she was under arrest. *Id.* at 33.⁷ Based on these facts, plaintiff claims that Trooper Watford used

⁷ Because this case is presented at the summary judgment stage, it is not enough for plaintiffs merely to allege these facts in her complaint. Indeed, to establish the existence of constitutional violations, plaintiffs must present evidence of such "on which the jury could reasonably find for [them]." *Anderson*, 477 U.S. at 252.

While I express no opinion as to what actually transpired on August 2, 1999 between plaintiff and Trooper Watford, a jury could reasonably find plaintiff's version of the facts to be the more credible of the competing accounts in this case. See generally *Dep. of Hung*. As such, the quantum of evidence needed to satisfy the summary judgment standard has been presented by plaintiffs. See generally *Saucier*, 533 U.S. at 216 (Ginsburg, J., concurring in the judgment) ("[I]f an excessive force claim turns on which of two conflicting stories best captures what happened on the street, *Graham* will not permit summary judgment in favor of the defendant official. . . . [A] trial must be had."); *Groman*, 47 F.3d at 634 (finding the existence of a genuine issue of fact as to the reasonableness of the force used by the defendant officer); *DiJoseph v. City of Philadelphia*, 947 F. Supp. 834 (E.D. Pa. 1996) (same).

excessive force in violation of her Fourth Amendment rights.

In *Graham v. Connor*, the Supreme Court clarified that “*all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest . . . or other ‘seizure’ of a free citizen should be analyzed under the Fourth Amendment and its ‘reasonableness’ standard.” 490 U.S. 386, 394 (1989); *see also United States v. Johnstone*, 107 F.3d 200, 204-05 (3d Cir. 1997). The *Graham* Court then proceeded to set forth the analytical framework to be employed in determining whether the amount of force used in a particular case was reasonable.

It stated:

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. . . . “Not every push or shove, even if it may later seem unnecessary in the peace of a judge’s chambers,” violates the Fourth Amendment. 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 that is necessary in a particular situation.

As in other Fourth Amendment contexts, however, 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 An officer’s evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer’s good intentions make an objectively unreasonable use of force constitutional.

490 U.S. at 396-97 (citations omitted). *See also Curley v. Klem*, 298 F.3d 271, 279 (3d Cir. 2002) (adopting and applying *Saucier* and *Graham* analyses).

In determining whether the force used in effecting a seizure is reasonable, courts should consider “the ‘totality of the circumstances,’ including whether the suspect posed an immediate

threat to the safety of the officer or others, whether the suspect was actively resisting arrest, and the severity of the crime at issue. *Curley*, 298 F.3d at 279 (citing *Abraham v. Raso*, 183 F.3d 279, 289 (3d Cir. 1999)). At this stage of the qualified immunity analysis, where I am discerning only whether plaintiff demonstrates conduct in violation of a constitutional right, I will consider only the facts alleged by plaintiff, taken in the light most favorable to her. *Curley*, 298 F.3d at 279-280.

Plaintiff's factual account depicts circumstances under which a reasonable jury could find a violation of the Fourth Amendment. Plaintiff was not a suspect in a criminal case; rather, Trooper Watford was merely investigating a traffic accident. Plaintiff's version of the facts does not suggest that she posed an immediate threat to the safety of the officer or to others. Her deposition testimony presents no evidence that she was actively resisting arrest or attempting to flee. I conclude that these facts, as stated by plaintiff and viewed in the light most favorable to her as the non-moving party, are sufficient to support a jury finding that Trooper Watford violated her Fourth Amendment right to be free from excessive force. *See generally Saucier*, 533 U.S. at 201-202. Plaintiff accordingly has overcome the first obstacle posed by the qualified immunity inquiry insofar as her excessive force claim is concerned.

II. Assuming Plaintiff's Factual Account to be True, Was it Clearly Established at the Time of the Incident that Defendant's Specific Actions Violated Plaintiff's Fourth Amendment Right to be Free From Excessive Force?

Having found that the facts alleged by plaintiff demonstrate a violation of a constitutional right, the second question that the court must answer is whether that right was clearly established at the time of the incident. *Curley*, 298 F.3d at 280. More precisely stated, would it "be clear to

a reasonable officer that his conduct was unlawful *in the situation he confronted.*” *Id.* (quoting *Saucier*, 533 U.S. at 202). Thus, on the facts of this case, I must determine whether it would be clear to a reasonable officer that forcefully throwing a non-threatening individual to the ground without provocation was unlawful as a violation of that individual’s Fourth Amendment rights.

The Supreme Court has clarified that

“clearly established” for purposes of qualified immunity means that “[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.”

Wilson v. Layne, 526 U.S. 603, 614-15 (1999) (quoting *Anderson*, 483 U.S. at 640). The Third Circuit also has specified that the decisional law on which the court must focus is its own precedent and that of the Supreme Court, although the Court of Appeals has further noted that holdings of other federal appellate tribunals and district courts also “may be relevant to the determination of when a right was clearly established for qualified immunity analysis.” *Doe*, 257 F.3d at 321 & n.10.

As applied to plaintiff’s allegations, I conclude that the incompatibility of Trooper Watford’s actions with plaintiff’s Fourth Amendment right to be free from excessive force was clearly established on August 2, 1999. It is apparent that an unprovoked grab, punch, kick and handcuffing of an individual who is not resisting arrest or even being arrested, not fleeing the scene of a crime and not engaging in any threatening activity to an officer or others, was clearly established as a violation of a constitutional right at the time of the incident. *See Nelson v. Mattern*, 844 F. Supp. 216, 222 (E.D. Pa. 1994) (finding that forcefully tackling a fleeing suspect

who was unarmed constituted excessive force). This proposition is also so obvious as to be apparent to a reasonable officer regardless of the specific facts of relevant case law. Under the facts of this case, viewed in the light most favorable to plaintiff, a reasonable officer would understand such conduct to be unlawful in the situation.

III. Has Defendant Demonstrated that No Genuine Issue of Fact Exists Concerning the Objective Reasonableness of His Actions?

As indicated above, once a civil rights plaintiff has presented sufficient evidence as to the first two components of the qualified immunity inquiry, the burden shifts to the law enforcement officer to demonstrate that “the evidence [will] not support a reasonable jury finding that [his] actions were objectively unreasonable.” *Groman*, 47 F.3d at 634; *see also* Sheldon H. Nahmod, *Civil Rights and Civil Liberties Litigation: The Law of Section 1983* § 8:1 (4th ed. 1999) (“The defendant should have the burden of proving this qualified immunity by a preponderance of the evidence, at least in those situations where evidentiary considerations are relevant.”). Stated differently, if the plaintiff’s evidence supports a reasonable finding that defendant’s actions were objectively unreasonable, he is not entitled to qualified immunity.

Plaintiff presents sufficient evidence to support such a finding, and thus, I conclude that Trooper Watford is not, as a matter of law, entitled to qualified immunity. Significant facts remain in dispute as to whether and when Trooper Watford decided to arrest and physically seize plaintiff. Plaintiff, however, asserts that she was following Trooper Watford’s command and thus, was returning to her car at the time he assaulted her. Dep. of Hung at 30. She claims she was walking toward her car with her back to Trooper Watford when he grabbed her neck, punched her in the stomach, threw her to the ground with a sweeping kick and then stepped on

her back while he handcuffed her. *Id.* at 30-33. In contrast, Trooper Watford asserts that plaintiff was acting in a disorderly manner and that he felt he had to arrest her. Def.'s Mot. for Summ. J., Exh. B (Testimony of Watford at 37-38) ("Test. of Watford"). He states that when he tried to arrest her, she actively resisted. *Id.* at 39. He states that he then used a bent wrist move to handcuff her and then took her down to the ground. *Id.* at 39-40. Depending on which version of the story is believed by a rationale jury, a different outcome will result. If the jury accepts plaintiff's version of the facts, it would be clear to a reasonable police officer that his conduct was unlawful in the situation confronted.

As such, a reasonable jury could decide to believe plaintiff's version over Trooper Watford's and thus find that his actions were objectively unreasonable. In short, whether or not Trooper Watford's conduct was objectively reasonable, and consequently whether or not he is entitled to qualified immunity, will come down to credibility determinations. Where the outcome of a case turns on the credibility of witnesses' testimony, it should not be resolved on summary judgment. *Abraham*, 183 F.3d at 287.

Insofar as plaintiff's excessive force claim is concerned, defendant failed to demonstrate that "the evidence would not support a reasonable jury finding that the police officer's actions were objectively unreasonable." *Groman*, 47 F.3d at 634. Thus, I will deny Trooper Watford's motion for summary judgment on the ground of qualified immunity.

CONCLUSION

Based on the foregoing analysis, defendant's motion for summary judgment will be denied with respect to the plaintiff's excessive force claim. An appropriate order follows.

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

KAM WAN HUNG,
Plaintiff,

v.

DERRICK WATFORD,
Defendant.

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CIVIL ACTION

NO. 01-3580

ORDER

And now, this ____ day of December 2002, upon consideration of defendant's motion for summary judgment (Doc. # 32) and plaintiff's response in opposition thereto (Doc. # 33), it is hereby ORDERED that defendant's motion is DENIED.

William H. Yohn, Jr., Judge