IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

JACKIE BROOKS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 02-230-KAJ
	)	
DESHAWN L. PRICE	)	
	)	
Defendant.	)	

MEMORANDUM ORDER

This matter is scheduled to be tried this morning beginning at 9:30 a.m. It is a case brought under 42 U.S.C. § 1983, alleging that the defendant, a New Castle County Police Officer, using the prong of his handcuffs, struck the plaintiff in the left eye and thus caused plaintiff to go blind in that eye. (Docket Item ["D.I."] 1 at ¶¶ 5-8.) The defendant, though he raised qualified immunity as an affirmative defense in his Answer (*see* D.I. 4 at Tenth Affirmative Defense), did not at any point ask the court for a ruling on the defense and has chosen this last moment to raise the issue by seeking jury instructions that would put the question of immunity before the jury. (*See* D.I. 53 at 21; D.I. 73 at 1-2.) The plaintiff has objected, arguing that the defendant has waived any claim to qualified immunity by failing to raise the matter by dispositive motion prior to the deadline for such motions set in the court's scheduling order. (D.I. 71 at 1.) The defendant responds that he is not required to raise the matter by dispositive issue, that application of the doctrine may involve questions of fact which are reserved for the jury, and that he should therefore be permitted to place the question of immunity before the

jury. The logic of that reasoning is flawed, but that does not mean that the defense has been waived.

It is true, as plaintiff notes (*id.* at 1), that immunity questions should be resolved at the earliest possible stage in litigation. *See Saucier v. Katz*, 553 U.S. 194, 200-01 (2001). Typically, the issue is raised by dispositive motion early in the case because, "[q]ualified immunity is 'an entitlement not to stand trial or face the other burdens of litigation.' The privilege is 'an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.'" *Id.* (emphasis in original; citations omitted). Nevertheless, despite the defendant's decision to forego seeking an early ruling on the defense, it remains a bar to liability if the proper factual predicate has been laid. *Cf. Istvanik v. Rogge*, 2002 WL 31412508 (3d Cir. 2002) (non-precedential) (upholding post-trial ruling on question of qualified immunity).

The defendant is wrong, however, in believing that the question can be placed before the jury. The question is one for the court. *See Bennett v. Murphy*, 274 F.3d 133, 136-37 (3d Cir. 2002). *Saucier* imposes a two-step analysis: first, the court must determine whether the plaintiff has shown a constitutional violation. If not, the inquiry is ended and the defendant is entitled to immunity. *Id.* at 136. If the plaintiff has raised a constitutional violation, the question then becomes whether, "in the factual scenario established by the plaintiff, ... a reasonable officer [would] have understood that his actions were prohibited[.]" *Id.* As a matter of law, "[i]f it would have been clear to a reasonable officer *what the law required* under the facts alleged, he is entitled to qualified immunity." *Id.* at 136-37 (emphasis in original).

Here the plaintiff has alleged an unprovoked attack by the police officer, constituting, at a minimum, the use of excessive force. The allegation is made that, though the plaintiff had done nothing wrong, the defendant approached him and told him to "put his hands against a car ... . When Plaintiff turned and asked if he was under arrest, the Defendant suddenly, and without warning, struck [Plaintiff] in his left eye with the prong of his handcuff, causing serious injury to his left eye." (D.I. 1 at ¶ 6.) The facts taken favorably to the plaintiff, as they must be at this stage of the case, *see Saucier*, 553 U.S. at 201,[1] do raise a violation of the plaintiff's constitutional rights under the Fourth Amendment, since it is objectively unreasonable to strike a citizen, without reason or provocation, let alone to strike him in the eye with a metal object. *See Bennett*, 274 F.3d at 136 ("the use of force contravenes the Fourth Amendment if it is excessive under objective standards of reasonableness"). The question then becomes whether it would have been clear to a reasonable officer that, under those circumstances, the force was excessive and prohibited by law. The answer to that question must be "yes," for the unprovoked assault, as it is alleged, would surely be understood to be unlawful.

The foregoing, of course, says nothing about the actual evidence that may come in at trial. The defendant will have the opportunity to make an appropriate motion for

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[1]I note that the "eleventh hour and fifty-ninth minute" timing of defendant's request has a bearing on this. It is impossible to know how the issue of immunity from suit, in the sense of freedom from the trial itself, may have been determined if the matter had been raised and briefed before the day before the trial. Under the press of the present circumstances, however, and without a full explication of the defendant's version of events, I feel compelled to say that the best view of the facts for the plaintiff, on this record, overcomes immunity, in the sense described, although it may yet prove a defense to liability.

judgment as a matter of law, under Federal Rule of Civil Procedure 50, at the close of the plaintiff's case, again at the close of all the evidence, and, under Rule 50(b), yet again within ten days of the entry of judgment, should it be against him.

Kent A. Jordan
UNITED STATES DISTRICT JUDGE

November 17, 2003
Wilmington, Delaware