IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
March 18, 2019

Lyle W. Cayce
Clerk

No. 17-50848

CHERYL JONES, Individually and as Natural Mother to Marquise Jones, and as Representative of the Estate of Marquise Jones, Deceased; BLAKE LAMKIN, Individually and as Natural Father to Marquise Jones; WHITNEY JONES, Individually; K. J., a Minor, By and Through Her Mother and Guardian, Melkay L. Nation,

Plaintiffs - Appellants

v.

CITY OF SAN ANTONIO; ROBERT ENCINA; SAN ANTONIO POLICE DEPARTMENT,

Defendants - Appellees

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:14-CV-328

Before BARKSDALE, SOUTHWICK, and HAYNES, Circuit Judges.

PER CURIAM:*

This 42 U.S.C. § 1983 case is an appeal from a jury verdict in favor of Appellees Robert Encina and the City of San Antonio (the "City"). Appellants

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

the Joneses[1] appeal the district court's denial of their motion for new trial and motion to bifurcate the trial. We AFFIRM the district court's judgment.

I. Background

In early 2014, San Antonio Police Officer Encina shot Marquise Jones after Marquise exited a vehicle and began running from a confrontation between Encina and the vehicle's driver. Marquise died from his wounds. Encina testified that he shot Marquise because he believed Marquise had a gun and was turning to shoot him. Other witnesses corroborated Encina's testimony. Police found a revolver twenty to twenty-five feet from Marquise's body.

The Joneses sued under 42 U.S.C. § 1983. They claimed Encina used unreasonably excessive force against Marquise. They also asserted that the City had an official policy or custom of failing to supervise or discipline officers and of covering up excessive force in the San Antonio Police Department. Encina claimed qualified immunity.

Before trial, the district court denied the Joneses' motion to exclude evidence of Marquise's prior bad acts. The Joneses then moved to bifurcate the liability and damages phases of the trial. They claimed evidence of Marquise's criminal history, probation record, and drug and alcohol use, though arguably relevant to damages, would be unduly prejudicial in the liability phase. The district court denied the motion. But it issued a limiting instruction telling the jury to consider Marquise's criminal history only in connection with the Joneses' damages. The Joneses agreed to the instruction.

[1] The "Joneses" are Cheryl Jones, individually and as natural mother to Marquise Jones, and as representative of the estate of Marquise Jones; Blake Lamkin, individually and as natural father to Marquise Jones; Whitney Jones, individually; and K.J., a minor, by and through her mother and guardian, Melkay L. Nation.

After trial, the jury determined that the Joneses had not "proven by a preponderance of the evidence that Defendant Robert Encina used excessive and unnecessary deadly force, in violation of Marquis[e] Jones'[s] federal constitutional rights." It thus issued a verdict in favor of Encina and the City. The Joneses now appeal.[2]

II. Discussion

A. The Motion for New Trial

The Joneses first appeal the district court's denial of their motion for new trial. In this context, we will find abuse of discretion "only when there is an 'absolute absence of evidence to support the jury's verdict.'" *Wellogix, Inc. v. Accenture, L.L.P.*, 716 F.3d 867, 881 (5th Cir. 2013) (quoting *Seidman v. Am. Airlines, Inc.*, 923 F.2d 1134, 1140 (5th Cir. 1991)).

Sufficient evidence supported the jury's verdict. Multiple witnesses—including Encina—said Marquise was behaving suspiciously before he exited the car. Encina also claimed he saw Marquise holding a gun while he was sitting in the car, and that after Marquise left the car, he "had the gun in his

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[2] We have jurisdiction over this dispute under 28 U.S.C. § 1291 despite the presence of other claims and parties in the district court. In addition to suing Encina and the City, the Joneses sued several entities known as the "Chacho's Defendants." The parties filed a joint stipulation of dismissal with prejudice, but the Joneses then rejoined the Chacho's Defendants. The parties later filed a second joint stipulation of dismissal—this time without prejudice—after they "settled all matters in dispute."

A plaintiff may not manufacture appellate jurisdiction by obtaining a voluntary dismissal without prejudice to immediately appeal less-than-final decisions while preserving the dismissed issues for later. *See 84 Lumber Co. v. Cont'l Cas. Co.*, 914 F.3d 329, 332 & n.4 (5th Cir. 2019). But the Joneses are not attempting to evade our jurisdictional requirements; they simply settled the case. Moreover, under Federal Rule of Civil Procedure 41(a)(1)(B), "if the plaintiff previously dismissed any federal- or state-court action based on *or including the same claim*, a notice of dismissal operates as an adjudication on the merits". (Emphasis added.) Because the third amended complaint included the same six claims against the Chacho's Defendants as the original complaint, the notice of dismissal of the third amended complaint operated as an adjudication on the merits. Therefore, we have jurisdiction over this appeal.

hand and he was turning towards" Encina. Other witnesses corroborated Encina's testimony. Encina claimed he did not fire until he saw Marquise turning toward him and he stopped shooting when he believed Marquise was no longer a threat. Police found a gun twenty to twenty-five feet from Marquise's body after the encounter. There was not an "absolute absence of evidence to support the jury's verdict." *See id.*, 716 F.3d at 881 (quoting *Seidman*, 923 F.2d at 1140). The district court did not abuse its discretion in denying the Joneses' motion for new trial.[3]

B. The Motion to Bifurcate

The Joneses next claim the district court abused its discretion in denying their motion to bifurcate. *See Nester v. Textron, Inc.*, 888 F.3d 151, 162 (5th Cir. 2018) (noting that we review a district court's denial of a motion to bifurcate for abuse of discretion). A district court may bifurcate a trial "to avoid prejudice." FED. R. CIV. P. 42(b).

Here, the district court instructed the jury that it could consider Marquise's previous charge of unlawful possession of a firearm only in connection with the Joneses' damages. "A jury is presumed to follow its instructions." *Weeks v. Angelone*, 528 U.S. 225, 234 (2000) (citing *Richardson v. March*, 481 U.S. 200, 211 (1987)). The Joneses claim the limiting instruction was insufficient, but they point to no authority holding that even an insufficient limiting instruction (to which they agreed at the time) requires bifurcation. The district court did not abuse its discretion in denying the Joneses' motion to bifurcate.

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[3] While not directly challenging the jury charge on appeal, as part of their new trial arguments, the Joneses make an argument about alleged deficiencies in Question No. 1 (which asked about use of excessive force) to which they did not object. As the defendants point out, any failure to submit an issue that is a plaintiff's burden to prove falls on the plaintiff. In any event, we agree with defendants that the charge as a whole made clear what was required to prove excessive force, and sufficient evidence supported the jury's verdict that Encina did not use excessive force.

III. Conclusion

For the foregoing reasons, we AFFIRM the judgment of the district court.