UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 91-7309

(Summary Calendar)

GLORIA WALLACE,

Plaintiff-Appellant,

VERSUS

JAMES HARBER, ETC., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
For the Southern District of Mississippi
(W89 0066 (B))

(March 19, 1993)

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:[*]

Gloria Wallace appeals several orders of the district court, including the granting of a directed verdict, in her suit under 42 U.S.C. §§ 1983, 1988 (1988) against the City of Yazoo, Mississippi, and certain members of its police force. We affirm.

I

Wallace brought suit for damages under 42 U.S.C. §§ 1983, 1988 (1988) against police officers James Harber and Bruce

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[*] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Collins, in their individual and official capacities; the Chief of Police, Doyle Jones, in his official capacity; and the City of Yazoo, Mississippi. She alleged that the officers used excessive force while arresting her, causing her severe physical injury and mental suffering. She also brought a state claim against the officers for assault and battery.

Wallace brought a motion to have the judge recused, which the judge denied. Thereafter, Wallace's attorney arrived on the day set for trial))July 15, 1991))without her client, stating that Wallace was not available because of illness. Jury selection proceeded without Wallace that day. The trial was set to reconvene on July 17. On July 16, Wallace's attorney contacted the court, stating that she was going to file a continuance because Wallace was ill and had sought medical attention in Memphis, Tennessee. The court denied the motion, finding "a very definite inference that the Plaintiff is trying to take advantage of [the] . . . Court and of the Defendant . . . ." Record on Appeal, vol. 2, at 30-31. The trial proceeded without Wallace.[1] After presentation of Wallace's case, the court granted defendants' motion for a directed verdict and dismissed all the claims.

On appeal, Wallace argues that the district court: (a) abused its discretion by denying her motion to disqualify; (b) abused its discretion by denying her motion for a continuance;

[1] Wallace's attorney apparently had the opportunity to present Wallace's deposition to the district court in lieu of live testimony. *See* Record on Appeal, vol. 1, at 63, 65.

and (c) erred in directing the verdict for the defendants, on both Wallace's federal and state claims.

II

A

Wallace first argues that the district judge abused his discretion by not disqualifying himself from the trial, pursuant to 28 U.S.C. § 455(a) (1988).[2] *See* Brief for Wallace at 27-30. We review for abuse of discretion a denial of a motion to disqualify. *Matter of Billedeaux,* 972 F.2d 104, 105 (5th Cir. 1992). "A party proceeding under [§ 455(a)] `must show that, if a reasonable person knew of all the circumstances, he would harbor doubts about the judge's impartiality.'" *Id.* (quoting *Chitimacha Tribe v. Harry L. Laws Co.,* 690 F.2d 1157, 1165 (5th Cir. 1982), *cert. denied,* 464 U.S. 814, 104 S. Ct. 69, 78 L. Ed. 2d 83 (1983)). Wallace contends that an appearance of partiality existed because the judge's former law firm represented the City of Yazoo and the Yazoo police department in other matters. *See* Brief for Wallace at 28. We find this argument without merit.

The record indicates that the judge's former law firm did not represent the City of Yazoo in the instant matter, and had "no interest whatsoever in the lawsuit." Record on Appeal, vol. 3, at 37. Moreover, the judge stated that he had no ties to the

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[2] Section 455(a) provides that "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a).

City of Yazoo in this matter, and if he had, he would have recused himself. *See id.* Therefore, a reasonable person would not have doubted the judge's impartiality in this case. *See Billedeaux,* 972 F.2d at 105 ("[T]hat [the judge] once represented [the defendant] in unrelated matters does not forever prevent him from sitting in a case which [the defendant] is a party[, as t]he relationship between [the judge] and [the defendant] is too remote and too innocuous to warrant disqualification under § 455(a) . . . ." (alterations in original) (quoting *Chitimacha,* 690 F.2d at 1166)). Accordingly, the district court did not abuse its discretion in denying Wallace's motion for disqualification.[3]

B

Wallace next argues that the district court abused its discretion in denying his motion for a continuance. Brief for Wallace at 30-33. We review for abuse of discretion a denial of a motion for a continuance. *Fontenot v. Upjohn Co.,* 780 F.2d 1190, 1193 (5th Cir. 1986). The district court's discretion is

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[3] Wallace maintains that the district judge should have recused himself because of his criticism of her counsel's handling of the case. *See* Brief for Wallace at 29-30. Because the record indicates that the judge's criticism: (1) stemmed from a judicial source))i.e., from what the judge learned from his participation in the case))rather than from a personal source; and (2) did not reflect pervasive bias or prejudice, we do not find the judge's comments a valid ground for recusal. *See Phillips v. Joint Legislative Committee on Performance and Expenditure Review,* 637 F.2d 1014, 1020 (5th Cir. 1981) ("Bias `must stem from an extrajudicial source [absent pervasive bias and prejudice] and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.'"), *cert. denied,* 456 U.S. 960, 102 S. Ct. 2035, 72 L. Ed. 2d 403 (1982)).

particularly broad in handling its calendar, because of the broad effect on both court and counsel. *See id.* at 1193. "Denial of a continuance requested in order to locate a witness scheduled to appear is not an abuse of discretion where deposition testimony, the content of which is not substantially different from what live testimony would have revealed, is available." *See Wells v. Rushing,* 755 F.2d 376, 380 (5th Cir. 1985). Here, Wallace's attorney apparently had the opportunity to present Wallace's deposition to the district court. *See* Record on Appeal, vol. 1, at 63, 65. Wallace is silent as to how her deposition testimony would have been different from the testimony presented at trial. Therefore, we cannot conclude that the district court's denial of Wallace's motion for a continuance was an abuse of discretion.[4]

C

Wallace also challenges the district court's directed verdict on both her federal excessive force and state assault and battery claims. We review de novo the district court's grant of of a directed verdict. *Becker v. Painewebber, Inc.,* 962 F.2d 524, 526 (5th Cir. 1992). In reviewing a directed verdict, we must examine the "entire record in the light most favorable to the nonmovant and draw all inferences in that party's favor."

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[4] Wallace's reliance on *Wells* is misplaced. In *Wells,* we held that the district court abused its discretion by denying the plaintiff's motion for a continuance where the defendant was not available at trial, even when deposition testimonty was available. *See id.* at 380-81. However, because the deposition testimony in *Wells* was materially different from what the live testimony would have revealed, Wallace's case is factually distinguishable.

Id. "[T]he reviewing court must uphold the directed verdict or the summary judgment if `under the governing law, there can be but one reasonable conclusion as to the verdict.'" *Landry v. Huthnance Drilling Co.,* 889 F.2d 1469, 1470 (5th Cir. 1989) (quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986)).

(i)

Wallace first contends that the court erred in directing the verdict for the defendants on her claim of excessive force under the Eighth Amendment. Brief for Wallace at 39-41. As part of her claim of excessive force, Wallace had to prove that the use of force was "clearly excessive to the need."[5] *Knight v. Caldwell,* 970 F.2d 1430, 1432 n.3 (5th Cir. 1992) (citing *Johnson v. Morel,* 876 F.2d 477 (5th Cir. 1989) (en banc), *overruled on other grounds, Hudson v. McMillian,* ___ U.S. ___, 112 S. Ct. 995, 117 L. Ed. 2d 156 (1992)), *petition for cert. filed,* (Nov. 27, 1992) (No. 92-6745).

Wallace did not present evidence that the police officers used force that was clearly excessive to the need in arresting her. Looking at the evidence in the light most favorable to Wallace, police officers arrived at her house and requested that she put out a fire in her driveway where she was reportedly burning her husband's clothes. *See* Record on Appeal, vol. 4, at 191-95. After Wallace doused the fire with water from a mixing

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[5] In directing the verdict for the defendants, the district court apparently erred in also requiring that Wallace prove a "severe injury." *See* Record on Appeal, vol. 5, at 371; *Johnson v. Morel,* 876 F.2d 477, 480 (5th Cir. 1989) (en banc) (reformulating "severe injury" prong for excessive force claims to "significant injury"); *Hudson v. McMillian,* ___ U.S. ___, 112 S. Ct. 995, 999, 117 L. Ed. 2d 156 (1992) (overruling "significant injury" requirement for constitutional claims of excessive force). However, as Wallace has not proven that the use of force was clearly excessive to the need, we find this error harmless. *See* Fed. R. Civ. P. 61 ("No error . . . or defect in any ruling or order or in anything done or omitted by the court . . . is ground for . . . disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice.").

bowl, *see id.* at 194, 196, her husband arrived. He said something to her, whereupon Wallace hit her husband in the head with the mixing bowl. *See id.* at 195-97, 260-63. Officer Collins and Harber proceeded to arrest her by pulling her back to her car, which was parked in the driveway. *See id.* at 263-64. Wallace tried to get away by "yanking, pulling, [and] kicking," *id.* at 215, but the officers managed to restrain her by holding her by her arms and wrists. *See id.* As the officers attempted to put handcuffs on Wallace, she continued to struggle, informing the officers that she was pregnant. *See id.* at 217. After handcuffing Wallace, the officers proceeded to take her to their patrol car. *See id.* at 219. Because Wallace refused to walk voluntarily to the car, the officers picked her up by her armpits and carried her. *See id.* at 219-20. Upon reaching the car, Wallace complained that "her baby was hurting," and continued to resist being put into the car. *See id.* at 221. Due to her lack of cooperation, the officers decided to let Wallace sit on the ground. *See id.* at 223. Police Chief Jones was called, *see id.,* vol. 3, at 84, and he ordered the officers to remove the handcuffs from her and call an ambulance. *See id.* at 84-85; vol. 4, at 210. Wallace then went in the ambulance to the emergency room. *See id.,* vol. 3, at 90. Based upon these facts, a reasonable jury could not have found that the police officers used force clearly excessive to the need. As the district court correctly pointed out, "[t]here is absolutely no testimony indicating that she was struck, shoved, or in any other way

forced down to the ground." *See id.,* vol. 5, at 370. Accordingly, the district court did not err in granting a directed verdict for the defendants on Wallace's claims of excessive force.[6]

(ii)

Lastly, Wallace contends that the district court erred in directing a verdict on her state assault and battery claim against officers Collins and Harber. *See* Brief for Wallace at 44-45. Under Mississippi law, an assault occurs when a person acts "intending to cause a harmful or offensive contact . . . or an imminent apprehension of a such a contact," and the victim is "thereby put in such imminent apprehension." *Webb v. Jackson,* 583 So. 2d 946, 951 (Miss. 1991) (quoting *Restatement (Second) of Torts* § 21 (1965)). "A battery goes one step beyond an assault in that a harmful contact actually occurs." *Id.* However, in effectuating an arrest, a police officer "may exert such physical force as is necessary to effect the arrest by overcoming the resistance he encounters." *Id.* (quoting *Holland v. Martin,* 214 Miss. 1, 9, 56 So. 2d 398, 400 (1952)). Wallace did not present evidence that the police officers used more force than necessary to arrest Wallace. Therefore, the district court did not err in determining that no reasonable jury could conclude that the officers committed an assault and battery against Wallace.

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[6] Because Wallace cannot prevail on her constitutional excessive force claim, we find moot her arguments concerning the qualified immunity of the police officers, *see* Brief for Wallace at 41, and the exclusion of testimony relevant to municipal liability and the extent of her injuries. *See id.* at 41-44.

III

For the foregoing reasons, we **AFFIRM.**