Court of Appeals, State of Michigan

ORDER

Delshone Majors v Officer Lavon Howell

Docket No. 289972

LC No. 07-710697-NO

Richard A. Bandstra
Presiding Judge

Stephen L. Borrello

Douglas B. Shapiro
Judges

The Court orders that the May 6, 2010 opinion is hereby AMENDED. The opinion contained the following clerical error: the majority opinion signature block listed Judges Richard A. Bandstra, Stephen L. Borrello and Douglas B. Shapiro. The majority opinion signature block should list only Judges Stephen L. Borrello and Douglas B. Shapiro.

In all other respects, the May 6, 2010 opinion remains unchanged.

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

MAY 11 2010
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

DELSHONE MAJORS, as Personal Representative of the Estate of DAVID EUGENE MAJORS, Plaintiff-Appellee,	UNPUBLISHED May 6, 2010
v	No. 289972 Wayne Circuit Court
OFFICER LAVON HOWELL, Defendant,	LC No. 07-710697-NO
and TROOPER RICHARD FELL, TROOPER JAMES GRADY, and TROOPER TIMOTHY RAJALA, Defendants-Appellants.	

Before: BANDSTRA, P.J., and BORRELLO and SHAPIRO, JJ.

PER CURIAM.

Defendants Fell, Grady, and Rajala appeal as of right from the trial court's order denying in part their motion for summary disposition.[1] For the reasons set forth in this opinion, we affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff's decedent, David Majors, was shot to death by defendant police officers after a car chase. The police cars had forced Majors to crash his taxi cab into the concrete barrier on I-94 where the chase had taken place, and defendants alleged that Majors first pointed a gun at himself and then pointed two guns at them, forcing them to shoot him to prevent harm. Plaintiff's two-count suit alleged gross negligence and assault and battery. Defendants moved for summary disposition, arguing that plaintiff failed to create a question of fact about whether Majors had a gun because the police witnesses that plaintiff relied on were not in a position to

[1] The trial court found that defendant Howell did not shoot Majors, and dismissed him from the suit. This decision is not here appealed.

see and the lay witness's affidavit, made years after the event, contradicted his prior statements to officers. Thus, defendants' argue they had a reasonable belief that deadly force was necessary, and under MCL 600.2955b(2), the court should have dismissed the suit in its entirety.

The trial court found that plaintiff's gross negligence claim failed to state a cause of action under *VanVorous v Burmeister*, 262 Mich App 467, 483; 687 NW2d 132 (2004), because the allegation that the officers used excessive force was in essence an intentional tort claim. The court also found that plaintiff did not raise a triable question of fact regarding use of excessive force in the traffic maneuver. However, the court found plaintiff successfully alleged an issue of assault and battery regarding the shooting. Plaintiff presented the affidavit of a lay witness and the deposition of two police witnesses, all of whom said they did not see a gun in Majors's hand. The court noted that the "vast number of witnesses" indicated that Majors did have a gun, but the "sheer number of witnesses should not be a deciding factor." "The task of Court is not to weigh the credibility of the competing witnesses."[2]

On appeal, defendants argue that plaintiff has not presented record evidence but only speculation and conjecture that they did not act in good faith when they used deadly force on Majors. Specifically, they argue that the lay witness's affidavit contradicted the statement he made to police officers on the scene, and that the depositions of the officers do not raise an issue of fact because none of those witnesses plaintiff relies on were in a position to see whether Majors had a gun.

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although substantively admissible evidence submitted at the time of the motion must be viewed in the light most favorable to the party opposing the motion, the non-moving party must come forward with at least some evidentiary proof, some statement of specific fact upon which to base his case. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999); *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

Defendants argue that there is no genuine issue of material fact as to whether the decedent had a gun at the time he was shot by police officers. However, review of the lay witness's affidavit and record evidence raises a question of fact on this issue. The lay witness gave the following statement to police:

> *Q.* What happened next?
>
> *A.* I sat there and looked, the two officers on the right had their backs turned[.] [T]hen the gun shot went off. Then a whole bunch of shots went off. There was a pause then more shots[.]

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[2] The trial court also found there was no evidence against defendant Howell, that plaintiff could not bring a claim for violation of the Michigan Constitution, and that MCL 600.2955a (intoxication of the plaintiff as an absolute defense) did not bar the claim because plaintiff alleged facts in his favor. None of these issues had been argued or raised on appeal.

Q. Could you tell who fired that first shot or where it came from?

A. No, all I saw was police officers.

Q. What agencies did you see involved?

A. Detroit and State.

Q. Did you see the man who got out the cab with a gun?

A. No.

In his affidavit, the lay witness stated in relevant part:

> 11. Because the front of the taxi-cab was pointed south, I was able to observe the entire driver's side of the white taxi-cab which was illuminated by the street lights and the headlights of the police vehicles.
>
> 12. From the elevated vantage point provided by the driver's seat of my [semi] truck, I was able to observe the cab driver / suspect–an African American male–through the front driver's side window area of the taxi-cab.
>
> 13. The cab driver / suspect was seated in the driver's seat of the taxi-cab while several officers were yelling. Shortly thereafter, I heard several gunshots, at which point I took cover.
>
> 14. During my entire observation of the cab driver / suspect, including from the moment the cab first came to rest up through the time I heard gunshots, I never observed this person holding or possessing a gun, weapon, or other object.
>
> 15. Likewise, I never observed the cab driver / suspect holding or pointing a gun or other object to his head.
>
> 16. The lighting conditions, my vantage point, and my close proximity to the incident were such that *had* the cab driver / suspect actually held or pointed a gun or other object to his head, I would have been able to observe that. But I did not observe that.
>
> 17. I also did not observe the cab driver / suspect discharge a firearm. (emphasis in original).

The lay witness's answer of "no" to the question he was asked in response to the statement, "Did you see the man who got out the cab with a gun?" does not necessarily indicate that he did not see the man in the cab at all, but can be read as indicating that he did not see the man get out of the cab, or that he did not see him with a gun. In deciding a motion under MCR 2.116(C)(10), the trial court had to view the evidence in favor of plaintiff and thus had to construe the statement as not contradicting the affidavit. "The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion. A reviewing court may not

employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules." *Maiden*, 461 Mich at 121.

The deposition testimony of Officer Brian Ball also supports plaintiff's theory. Ball was part of the traffic maneuver by which the police were able to bring Majors's vehicle to a stop. He testified that he was driving "door to door" next to Majors, trying to get in front of Majors's vehicle, when he saw Majors raise and lower his hand twice. "I was trying to identify if he had a weapon in his hand at that point until I saw the glow from the cell phone." Ball stated that after the stop was made, he got out of his car and squatted "[b]ehind the trunk of my vehicle." He went on to state:

Q. Then you told me that you saw the suspect in the door of the vehicle, right?

A. Yes, sir.

Q. Okay. Through what door, the passenger door of the cab?

A. He was on the driver's side.

Q. Okay. But from your vantage point you were able to see him?

A. Yes. That is what I have written in my report, yes, sir.

Q. Did you see a gun?

A. No, sir.

Q. What part of him could you see?

A. I do not remember.

* * *

Q. . . . [I]n your own words tell me what he was doing when you made this observation, if anything.

A. I just saw the suspect. That is all I remember.

Q. Did you see him move at all?

A. I cannot remember, no.

Q. Do you recall him opening the door?

A. No, sir. I do not remember.

Q. Do you recall observing him lifting up either of his hands?

A. I could not see anything. I can't remember.

Q. If you did see that, you would have put that in your report, I'm assuming?

A. Yes, sir.

Q. I would also take it that, from your vantage point, if you were able to see the suspect in the door of the vehicle, if he did have a gun pointed towards his head, you would be able to see that?

A. I cannot say what I saw because there is pillars in the way as far as the pillar in the car. So all I can remember is seeing the suspect. That is all I wrote down, so that is all I can remember.

Ball also stated that he never saw Majors with a gun, but also stated that did not mean there were no guns present. He also admitted he could not tell if anyone was yelling because the sirens and road noise were too loud.

The affidavit of Trooper David Jeffries provides less support for plaintiff's case. He stated he could only see the shadow of the cab and could not see any portion of the driver or even his silhouette because of the spotlights shining on the scene. He apparently also gave contradictory statements: "Yes, I did see him with a weapon;" and in answer to "You never saw the driver with a gun period, correct?" stated, "That is correct."

In sum, while the officers' testimony by itself would not be sufficient to sustain plaintiff's case, when viewed in the light favorable to plaintiff and in combination with the affidavit of the lay witness, the trial court was correct in its assertion that it is possible for a reasonable jury to decide that defendants' witnesses are not credible and that Majors did not point a gun at anyone. Whether the officers could see well enough is a matter of credibility and the statement of the lay witness is not conclusively contradictory to his affidavit. If the jury disregarded the contrary evidence, as it would be free to do, there remains some evidence supporting plaintiff's claim. Thus, the reviewing court properly evaluated the motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence offered in opposition to the motion and correctly found that a question of fact exists. *Maiden*, 461 Mich at 121.

Affirmed.

/s/ Richard A. Bandstra
/s/ Stephen L. Borrello
/s/ Douglas B. Shapiro

STATE OF MICHIGAN

COURT OF APPEALS

DELSHONE MAJORS, a Personal Representative of the Estate of DAVID EUGENE MAJORS,

Plaintiff-Appellee,

v

OFFICER LAVON HOWELL,

Defendant,

and

TROOPER RICHARD FELL, TROOPER JAMES GRADY, and TROOPER TIMOTHY RAJALA

Defendants-Appellants.

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No. 289972
Wayne Circuit Court
LC No. 07-710697-NO

Before: BANDSTRA, P.J., and BORRELLO and SHAPIRO, JJ.

BANDSTRA, P.J., (*dissenting*).

I respectfully dissent from the conclusion that a genuine issue of material fact was presented as to whether the cab driver had a gun. I agree with my colleagues' view that the testimony of Officer Ball and Trooper Jeffries does not suffice to sustain plaintiff's case in this regard. However, I disagree with their conclusion that the affidavit of the lay witness is sufficient to create a genuine issue of material fact.

Even though that affidavit was made many years after the incident giving rise to this lawsuit, it was properly considered by the trial court because, as my colleagues reason, it did not directly contradict the lay witness's statement to police immediately after the incident. However, the affidavit apparently quite carefully only states that the lay witness would have seen the cab driver with a gun if the driver "actually held or pointed a gun or other object to his head." While somewhat relevant, that has nothing to do with the more crucial fact at issue, whether the cab driver pointed a gun or guns at the officers and thus provoked the use of deadly force. As the trial court here noted, there were a "vast number of witnesses" stating directly that the cab driver did have weaponry and used it in that fashion. No reasonable fact-finder could conclude, simply on the basis of the ambivalent and late affidavit of the lay witness, that the officers and troopers here colluded together to plant evidence that a gun was present in the cab and lie about what they saw.

I would reverse and remand this case for entry of an order granting summary disposition to defendants.

/s/ Richard A. Bandstra