

STATE OF MICHIGAN  
COURT OF APPEALS

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ARNETTA GRABLE, Personal Representative of  
the Estate of LAMAR GRABLE, Deceased,

Plaintiff-Appellee,

v

EUGENE BROWN,

Defendant-Appellant.

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UNPUBLISHED  
December 20, 2005

No. 256215  
Wayne Circuit Court  
LC No. 99-906156-NO

Before: Gage, P.J., and Hoekstra and Murray, JJ.

HOEKSTRA, J. (*concurring*).

I concur with and join in the majority opinion. I write separately, however, to explain my reasons for concluding that defendant was not entitled to judgment notwithstanding the verdict (JNOV) on plaintiff's claim of assault and battery.

As argued in his brief on appeal and at oral arguments, defendant's claim is grounded in the assertion that plaintiff's proofs on assault and battery were insufficient because plaintiff's evidence could not "persuade a reasonable jury that [defendant's] discharging of his weapon was not justified." To support that assertion, defendant maintained that "no factual explanation, other than that offered by Brown, was established by any record evidence" and that any alternative theories regarding what happened were speculative.

The reason defendant's argument fails, in my judgment, is that as instructed by the trial court and is unchallenged on appeal, defendant, not plaintiff, had the burden of proof regarding whether defendant was justified under the circumstances in using deadly force. Plaintiff's burden was to prove assault and battery, which was conclusively established by defendant's admission that he fired the shots that killed Lamar Grable. In light of that admission, the focus of the trial became the defense of justification for which defendant had the burden of proof. Because defendant had the burden of proof, plaintiff had no obligation to establish or even offer a defensible alternate explanation. Admittedly, defendant presented through his own testimony and that of his partner that evening, Vicki Yost, evidence that, if believed, would have proved justification. Like any evidence, however, the credibility of defendant's evidence is subject to attack and ultimately may be rejected by the jury. *Detroit/Wayne Co Stadium Authority v Drinkwater, Taylor & Merrill, Inc*, 267 Mich App 625, 644; 705 NW2d 549 (2005) ("[t]he jury is the judge of the credibility of witnesses and the truthfulness of their statements"). As outlined in detail in the majority opinion, plaintiff presented a significant attack on the credibility of

defendant's version of what transpired that evening. In light of this credibility attack, I believe that reasonable jurors could honestly have reached differing conclusions regarding whether defendant established his claim of justification. *Zantell Marketing Agency v Whitesell Corp*, 265 Mich App 559, 568; 696 NW2d 735 (2005). Consequently, defendant's claim of entitlement to JNOV fails.

/s/ Joel P. Hoekstra