

STATE OF MICHIGAN  
COURT OF APPEALS

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

UNPUBLISHED  
May 6, 2010

Plaintiff-Appellee,

v

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

OFFICER LAVON HOWELL,

Defendant,

and

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

Defendants-Appellants.

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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