

STATE OF MICHIGAN
COURT OF APPEALS

GARY OLIVER,

Plaintiff-Appellee,

v

CORY SMITH,

Defendant-Appellant,

and

PETE MEULLER, CITY OF DEARBORN
HEIGHTS and DEARBORN HEIGHTS POLICE
DEPARTMENT,

Defendants.

FOR PUBLICATION
January 31, 2006
9:00 a.m.

No. 254654
Wayne Circuit Court
LC No. 03-313798-CZ

Official Reported Version

Before: Smolenski, P.J., and Schuette and Borrello, JJ.

SCHUETTE, J. (*concurring in part and dissenting in part*).

I respectfully dissent from the majority opinion and would reverse the trial court's denial of summary disposition.

Although I agree with the majority opinion that plaintiff must present evidence of a physical injury in order to show gross negligence in handcuffing a suspect, I dissent because I believe that summary disposition for defendant should have been granted, even though discovery had yet to close. Plaintiff presented no evidence in response to defendant's motion for summary disposition that would show there was a genuine issue of material fact regarding any physical injury from the handcuffs. Plaintiff only restated his allegation from his complaint that he suffered from "an ulnar deviation of his wrist" and numbness and weakness of both hands. "Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Furthermore, the existence of a disputed fact must be established by admissible evidence. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163; 645 NW2d 643 (2002). Plaintiff did not submit any evidence to support his allegation that he suffered a physical injury from the handcuffs. Plaintiff's

deposition had been taken at the time of defendant's motion, but plaintiff did not even submit his own testimony that he suffered an injury, much less any medical evidence.

Although the discovery period had not yet ended when defendant filed the motion for summary disposition, "a ruling on a motion for summary disposition is appropriate 'if there is no reasonable chance that further discovery will result in factual support for the nonmoving party.'" *Mable Cleary Trust v Edward-Marlah Muzyl Trust*, 262 Mich App 485, 506-507; 686 NW2d 770 (2004), quoting *Colista v Thomas*, 241 Mich App 529, 538; 616 NW2d 249 (2000). This case was filed in April 2003, and defendant did not move for summary disposition until December 15, 2003. Plaintiff did not file his answer to the motion until March 2004, giving him ample time to compile some evidence of an injury. Therefore, I do not believe that further discovery is likely to lead to a fair chance of recovering evidence of an injury. I conclude that the trial court erred in denying defendant's motion for summary disposition, and I would remand this case for entry of summary disposition in defendant's favor.

/s/ Bill Schuette