

STATE OF MICHIGAN
COURT OF APPEALS

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

UNPUBLISHED
July 18, 2013

Plaintiff-Appellee,

v

No. 309925
Wayne Circuit Court
LC No. 07-710697-NO

OFFICER LEVON HOWELL,

Defendant,

and

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

Defendants-Appellants.

Before: Wilder, P.J., and OWENS and MURRAY, JJ.

PER CURIAM.

Defendants appeal as of right the trial court's denial of their renewed motion for summary disposition after remand. For the reasons set forth in this opinion, we reverse and remand for entry of summary disposition in favor of defendants.

This case was previously before this Court when defendants appealed the trial court's partial denial of summary disposition. *Majors v Howell*, unpublished opinion per curiam of the Court of Appeals, issued May 6, 2010 (Docket No. 289972). In that appeal:

defendants argue[d] that plaintiff ha[d] 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[d] that the lay witness's affidavit contradicted the statement he made to police officers on the scene, and that the depositions of the officers d[id] 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. [*Id.* at 2.]

We concluded that

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 [Patterson]*, 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. [*Id.* at 5 (emphasis added).]

After our Supreme Court denied leave, *Majors v Howell*, 488 Mich 980 (2010), the case was remanded to the trial court.

On remand, defendants again moved for summary disposition. First, defendants argued that both the trial court and this Court had failed to consider common-law governmental immunity under *Odom v Wayne Co*, 482 Mich 459, 461; 760 NW2d 217 (2008). Defendants also argued that plaintiff had failed to produce Patterson and that, without Patterson, there was no question of fact on the issue of governmental immunity, thereby entitling them to summary disposition. The trial court denied the motion without prejudice and ordered plaintiff to present Patterson for deposition prior to trial. Plaintiff was apparently unable to locate Patterson as he was neither presented for deposition nor subpoenaed. On the eve of trial, defendants renewed their motion, which the trial court denied. Defendants again appealed to this Court.

Defendants first contend that neither the trial court nor this Court considered common-law immunity under *Odom* and that, had we done so, summary disposition would have been granted. We disagree. As defendants concede, even under *Odom*, one of the elements is whether the actors were acting in good faith. *Odom*, 482 Mich at 468. In the prior appeal, the sole question before this Court was whether there was a question of fact about whether the defendants were acting in good faith because there was a question of fact regarding whether the decedent held a weapon. Thus, regardless of this Court's lack of citation to *Odom* in the prior opinion, there is no question from the opinion itself that this Court expressly concluded that there was a question of material fact on the issue of whether defendants acted in good faith, which precluded summary disposition.

“Under the law-of-the-case doctrine, this Court's determination of an issue in a case binds both the trial court on remand and this Court in subsequent appeals.” *Augustine v Allstate Ins Co*, 292 Mich App 408, 425; 807 NW2d 77 (2011). “On remand, the trial court may not take action that is inconsistent with the judgment of this Court.” *Id.* The doctrine applies to questions specifically determined in a prior decision and to questions necessarily determined to arrive at the prior decision. *Schumacher v DNR*, 275 Mich App 121, 128; 737 NW2d 782 (2007); *Kalamazoo v Dep't of Corrections (After Remand)*, 229 Mich App 132, 135; 580 NW2d 475 (1998). Here, because the question of whether the officers acted in good faith was previously raised and decided by this Court in the prior appeal, neither the trial court on remand, nor this Court in this appeal, could alter the result. Accordingly, the trial court properly denied defendant's motion on this basis.

Defendants also argue that the trial court erred in denying their motion for summary disposition because of plaintiff's failure to produce Patterson for deposition or at trial. We agree. This Court's prior decision could not have been more clear that the officers' affidavits, standing alone, were insufficient to create a question of fact. Rather, only when considered "in combination with the affidavit of the lay witness" was there was sufficient evidence to create a question of fact. *Majors*, Docket No. 289972, op at 5.

Here, litigation between the parties has been ongoing for years, yet plaintiff has never presented Patterson for deposition. Moreover, Patterson's affidavit is not admissible evidence at trial. See *Maiden v Rozwood*, 461 Mich 109, 124 n 6; 597 NW2d 817 (1999) (noting that affidavits are generally not admissible evidence at trial and that affidavits only preclude summary disposition because their substance would be admissible). Thus, on the eve of trial, when no deposition had been obtained, and it became clear that Patterson would not be presented at trial, defendants rightfully requested summary disposition be granted in their favor on the ground that plaintiff would be unable to provide admissible evidence to prove her claim at trial. Given this Court's previous determination that, absent the testimony alleged in Patterson's affidavit, there was no question of material fact that defendants acted in good faith, the trial court was bound by that decision, *Augustine*, 292 Mich App at 425, and should have granted defendants' motion.

Reversed and remanded for entry of summary disposition in favor of defendants. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Donald S. Owens
/s/ Christopher M. Murray