

STATE OF MICHIGAN
COURT OF APPEALS

DIANE AUSTIN, Personal Representative of the
Estate of GERALD AUSTIN, Deceased,

UNPUBLISHED
December 30, 1996

Plaintiff-Appellant,

v

No. 189923
Wayne County
LC No. 93-324564-NO

WILLIE MIDDS, STANLEY KNOX and
CITY OF DETROIT,

Defendants-Appellees.

Before: Taylor, P.J., and Markman and P. J. Clulo,* JJ.

PER CURIAM.

Plaintiff appeals by right an order granting defendant Willie Midds' motion for summary disposition pursuant to MCR 2.116(C)(10).¹ We affirm.

This matter arises out of an armed robbery. Midds, a police officer who was off-duty at the time, observed three men attempt to carjack a vehicle. Midds identified himself as a police officer and ordered the three men to stop but they attempted to flee. Midds shot at them, killing plaintiff's decedent.

The United States Supreme Court considered a police officer's use of deadly force against a fleeing felon in *Tennessee v Garner*, 471 US 1; 105 S Ct 1694; 85 L Ed 2d 1 (1985). The *Garner* Court concluded that deadly force "may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Garner, supra* at 3.

Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally

* Circuit judge, sitting on the Court of Appeals by assignment.

unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given. [*Garner*, at 11-12.]

In *Graham v Connor*, 490 US 386; 109 S Ct 1865; 104 L Ed 2d 443 (1989), the Court considered the proper constitutional standard for claims of use of excessive force by police officers. The *Graham* Court held at 397:

As in other Fourth Amendment contexts, however, the “reasonableness” inquiry in an excessive force case is an objective one: the question is whether the officers’ actions are “objectively reasonable” in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.

The *Graham* Court cautioned that “proper application” of this reasonableness standard “requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.” *Graham*, at 396.

Recent decisions of this Court have found the *Garner* standard applicable to the use of force by police officers. *People v Hampton*, 194 Mich App 593, 597; 487 NW2d 843 (1992); *Washington v Starke*, 173 Mich App 230, 238; 433 NW2d 834 (1988). This Court has also stated that “the determination of reasonable force hinges upon the facts of the particular case and [is] thus a question for the jury.” *Alexander v Riccinto*, 192 Mich App 65, 69; 481 NW2d 6 (1991).

Here, the trial court granted Midds’ motion for summary disposition on the following basis:

This Court is of the opinion that at the time Officer Midds fired that shot, he had probable cause to believe that a felony was being committed by three individuals, one of whom was plaintiff[’s] decedent, . . . and that at that time he was firing in the protection of himself or at a minimum for the protection of other individuals who might have been injured by the dangerous acts that these three individuals were committing.

This Court reviews decisions on motions for summary disposition de novo to determine if the moving party was entitled to judgment as a matter of law. *Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994).

MCR 2.116(C)(10) permits summary disposition when, except for the amount of damages, there is no genuine issue concerning any material fact and the moving party is entitled to [judgment] as a matter of law. A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the opposing party and grant the benefit of any reasonable doubt to the opposing party. [*Id.*]

Plaintiff raises several issues that she contends made summary disposition inappropriate here. First, she contends that the car-jacking victim's testimony contradicted Midds' testimony that he saw one of the perpetrators draw a gun on the carjacking victim. Midds testified that he saw one of the perpetrators point a gun at the carjacking victim and that when he approached them, this perpetrator turned the gun toward Midds and the other two reached into their clothing as if reaching for weapons. The carjacking victim testified that he did not see a gun drawn. However, the victim also testified that he saw that two of the men were carrying guns in their waistbands and that he only could only see their backs at the time Midds approached them. Two other witnesses also indicated in their police statements that the three men kept their hands at their waists as if they had guns. One of the three perpetrators stated in his guilty plea that he did, in fact, have a gun on him at the time of this incident. Accordingly, while there is a factual dispute whether a gun was drawn on the carjacking victim, there is no factual dispute that the perpetrators appeared to be armed and that at least one of them was, in fact, armed. Even if we assume that no gun was drawn, Midds had probable cause to believe that the three men "pose[d] a threat of serious physical harm" and were attempting to commit "a crime involving the infliction of serious physical harm" and that, accordingly, he could use deadly force to prevent their escape. *Garner, supra* at 11-12.

Second, plaintiff claims that there is a factual dispute regarding whether decedent was shot from the front or from the back. Specifically, she claims that expert testimony indicated that Midds shot decedent in the back. This conflicts with the conclusion of the medical examiner that the bullet entered decedent's chest. Any factual dispute regarding this issue is not material to the issue on appeal, because under the circumstances here, Midds could appropriately use deadly force to prevent the escape of any of the perpetrators.

Third, plaintiff focuses on Midds' deposition testimony that the bullet hit decedent, rather than the perpetrator holding the gun, by "mistake." In his deposition, Midds stated that he aimed for the perpetrator whom he claims drew the gun but hit decedent instead. In an affidavit, Midds clarified that when he fired the shot, the three men were close to each other and accordingly all within his field of fire. He stated that he believed he was justified in the use of deadly force against all three of them and accordingly accepted decedent and the third perpetrator as "secondary targets" when he fired the shot. As concluded above, Midds was entitled to use deadly force against all three perpetrators under the circumstances at issue. Midds' testimony that he hit decedent rather than the perpetrator he was aiming for does not diminish the justification to use deadly force against all three perpetrators under the circumstances.

None of the issues argued by plaintiff raise a genuine factual issue that is material to the issue whether Midds' was justified in using deadly force here. Even granting the benefit of any reasonable doubt to plaintiff, the trial court properly granted summary disposition to Midds. It is undisputed that Midds personally observed the three perpetrators stealing a tape recorder and attempting to steal a car from a present victim; that the perpetrators appeared to be carrying weapons; and that the perpetrators attempted to escape when Midds identified himself as a police officer. Further, there is substantial evidence that at least one of the perpetrators appeared on the verge of actually directing his weapon toward the carjacking victim or Midds. Based on these facts, Midds fired his gun only after he

reasonably believed that the three men were attempting to commit a crime that threatened the immediate infliction of physical harm to the carjacking victim or to Midds. *Graham, supra* at 396; *Garner, supra* at 11.

Accordingly, we affirm the trial court order granting Midds' motion for summary disposition.

Affirmed.

/s/ Clifford W. Taylor
/s/ Stephen J. Markman
/s/ Paul J. Clulo

¹ Stanley Knox was dismissed from this action by an April 26, 1995, order. On October 3, 1995, the parties stipulated to an order dismissing the matter with prejudice, on condition that the case be reinstated against the City of Detroit if defendant Midds' motion for summary disposition was reversed on appeal.