

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

ED92697

HARRY DILWORTH,

Appellant,

vs.

CITY OF BERKELEY,

Respondent.

Appeal from the Circuit Court of St. Louis County
State of Missouri
Honorable Judge Michael T. Jamison

REPLY BRIEF OF APPELLANT HARRY DILWORTH

Submitted by:

Kevin J. Dolley, #54132
Law Offices of Kevin J. Dolley, LLC
Clayton Plaza West
7750 Clayton Road, Suite 102
St. Louis MO 63117-1343
(314)645-7900 (office)
(314)645-7901 (fax)
dolleylaw@yahoo.com

K. Jasman Lutz, #54036
818 Lafayette
St. Louis, MO 63104
(314)231-0777
(314)231-3704 (fax)
jasman_lutz@hotmail.com

Attorneys for Plaintiff/Appellant Harry Dilworth

Table of Contents

	<u>Page</u>
Table of Contents.....	2
Table of Cases and other Authorities	3
Response to Respondent’s Statement of Facts.....	4
Argument	5
Conclusion.....	12
Certificate of Service.....	13
Certificate of Compliance.....	14
Appendix.....	15

Table of Cases and Other Authorities

Cases

Alexander v. State, 756 S.W.2d 539 (Mo. banc 1988) 6, 7, 8

Cain v. State of Missouri, 239 S.W.3d 590 (Mo. banc 2007) 6, 7

Daugherty v. City of Maryland Heights, 231 S.W.3d 814 (Mo. banc 2007) 9, 10

Grellner v. Foremost Signature Ins., Case No. ED92196 (Mo.App. E.D. July 14, 2009).. 9

Turner Eng'g, Inc. v. 1491155 Weldon Parkway, L.L.C, 40 S.W. 3d 406 (Mo.App. E.D. 2001) 9

Velda City v. Williams, 41 S.W.3d 915 (MoApp. E.D. 2001) 9

Statutes

Section 537.600 RSMo. (2000).....5, 6, 7, 8, 11

Response to Respondent's Statement of Facts

Respondent provided an additional rehashing of the facts as provided in Appellant's Brief without indicating any dissatisfaction with the accuracy or completeness of the statement of facts contained within Appellant's Brief in violation of Rule 84.04(f). Included within Respondent City of Berkeley's ("City") Brief are disputed questions of fact and law which require inferences to be drawn in favor of Appellant Harry Dilworth ("Dilworth").

Argument

I. In its Brief, Respondent misstated the legal standard in determining whether the City’s canine was in a dangerous condition at the time of injury to Appellant; Respondent argued that the negligent acts and omission of canine handler Eaves are not relevant to this Court’s analysis; and Respondent asked this Court to consider matters entirely outside of the pleadings and make factual determinations outside the scope of a Motion to Dismiss.

A. Summary of Defendant’s Argument

Respondent argued that Appellant is required to prove a physical defect in the property of the City of Berkeley. (Respondent’s Brief, pp. 16-25). Respondent argued that the actions of its police officer in handling the canine are not relevant to the analysis under Section 537.600.1(2). (Respondent’s Brief, p. 14). Respondent argued that Plaintiff’s claim against the City should fail because Appellant has failed to establish that City’s police canine was dangerous or defective because the canine allegedly acted as it was trained. (Respondent’s Brief, pp. 13, 14).

1. Respondent wholly misstated the applicable legal standard under Section 537.600.1(2) in that there are questions of fact at issue as to whether the canine was in a dangerous condition at the time of the injury to Appellant.

Respondent argued that Appellant is required to prove a physical defect in the physical condition or physical deficiency in the property of the City of Berkeley in order to establish a claim. Respondent stated as a matter of law in its Brief that “[a] ‘dangerous

condition' under Section 537.600 requires some defect, physical in nature, in the sovereign's property." Respondent indicated in its Brief that "Plaintiff has failed to allege that there was a defect or anything wrong with the physical condition of the City of Berkeley's police canine which caused his injury." Respondent finally indicated that Plaintiff was not injured on the real property of the City of Berkeley.

Respondent's argument wholly misstates controlling Missouri case law. As the Missouri Supreme Court indicated in Cain v. State of Missouri, 239 S.W.3d 590 (Mo. banc 2007), the definition of "dangerous condition" was expanded in Alexander v. State, 756 S.W.2d 539 (Mo. banc 1988). The Court in Cain noted that in Alexander the Court previously determined that "the placement of a partition at the bottom of a ladder created a dangerous condition even though there was no physical defect in any of the property." Id. The Court in Alexander explained that the "danger was created not by any intrinsic defect in the property involved, but by the dangerous condition created by the positioning of various items of property." Id. The condition was "dangerous because its existence, without intervention by third parties, posed a physical threat to plaintiff." Id. The Court further stated that

The commission argues that there was no physical defect in the tree before the crew arrived to fell it. That is true, but under Alexander, it has no legal bearing on the issue. In Alexander, when the plaintiff climbed the ladder, there was no dangerous condition. Before he descended, someone placed the partition at the bottom of the ladder creating the dangerous condition.

Id.

As in Alexander, where the positioning of a ladder created a dangerous condition, the position of the City's police canine in this case created a dangerous condition that directly resulted in injury to Appellant. The police canine was not dangerous until Dilworth began foot pursuit of the suspects in front of the canine and, despite such action, the City's canine handler released the canine behind Dilworth's pursuit of the suspects causing the canine to begin its own pursuit, locate the first target in its path, Dilworth, and attack him by biting him repeatedly on his arms and hands. The canine became dangerous upon being released by Eaves when Appellant was the first target in the line of sight of the canine. (Lf 26).

Appellant stated a cause of action under Subdivision (2) in lock-step with controlling Missouri case law. Respondent asks this Court to adopt a narrow reading of Subdivision (2) based upon outdated case law that has since been expanded by the Missouri Supreme Court. The argument of Respondent has been specifically rejected as having "no legal bearing." Cain v. State of Missouri, 239 S.W.3d 590 (Mo. banc 2007). Respondent seeks to have this Court not engage in the proper factual analysis of whether there are questions of fact as to whether the positioning of the canine by the City's police officer, could be considered a dangerous condition under the facts and circumstances.

The term "property" in the context of § 537.600.1(2) has been interpreted to include both real and personal property. Alexander v. State, 756 S.W.2d 539 (Mo. banc 1988). In this case, the dangerous property at issue is the City's canine. The City's argument that Appellant must be standing on real property of the City at the time of injury creates a requirement not contained within Section 537.600.1(2) and ignores case

law specifically determining that the term property includes both real and personal property. Id.

2. *Defendant's contention that the negligence of canine handler Eaves is not material to this claim is erroneous as a matter of law.*

Respondent argued that Appellant is seeking to have the court ignore the statutory language at issue and create an exception for negligent handling of police canines by the sovereign's police officers. (Respondent's Brief, p. 14). However, under Section 537.600(2), the statute requires as an element of the claim that "either a negligent or wrongful act or omission of an employee of the public entity within the course of the employment created the dangerous condition *or* a public entity had actual or constructive notice of the dangerous condition in sufficient time prior to the injury to have taken measures to protect against the dangerous condition." (Emphasis added.)

Here, Appellant's reference to the negligent acts and omissions of the City's canine handler are relevant to the issue of pleading and establishing the negligent conduct and omissions which created the dangerous condition at issue. Simply put, Eaves' negligent release of the canine created the dangerous condition at issue. (Lf 7, par. 21). Eaves' alleged negligence is based upon releasing the canine out of the line of sight of the criminal suspects and behind Dilworth who was thereafter attacked by the canine. (Lf 26). After causing the dangerous condition by releasing the dog, Eaves is further alleged to have failed to stop the canine from injuring Dilworth by not recalling the City's canine. (Lf 26).

Therefore, based on the above, Appellant's negligence claim contained within Count I of Plaintiff's Petition pled the necessary facts and assertions to meet the elements for waiver of sovereign immunity and a claim of negligence against Respondent City of Berkley.

3. Defendant's Motion to Dismiss asks this Court to consider matters entirely outside of the pleadings and make factual determinations outside the scope of a Motion to Dismiss.

This Court most recently in Grellner v. Foremost Signature Ins., Case No. ED92196 (Mo.App. E.D. July 14, 2009), reminded parties that matters outside the pleadings should not be considered as part of a motion to dismiss. An affirmative defense is a defendant's assertion raising new facts and arguments that, if true, will defeat the plaintiff's or prosecutor's claim, even if all the allegations in the complaint are true. Id. (citing Velda City v. Williams, 41 S.W.3d 915, 918 (MoApp. E.D. 2001)). Before a trial court may treat a motion to dismiss as a motion for summary judgment, it must notify the parties that it is going to do so and give the parties an opportunity to present all materials pertinent to a motion for summary judgment. Id. (citing Turner Eng'g, Inc. v. 1491155 Weldon Parkway, L.L.C., 40 S.W. 3d 406, 408 (Mo.App. E.D. 2001)).

Summary judgment is only appropriate where the moving party has demonstrated, on the basis of acts as to which there is no genuine dispute, a right to judgment as a matter of law. Daugherty v. City of Maryland Heights, 231 S.W.3d 814 (Mo. banc 2007). A "genuine issue" that will prevent summary judgment exists where the record shows two plausible, but contradictory, accounts of the essential facts and the "genuine

issue” is real. Id. The Court reviews the record in the light most favorable to the party against whom judgment was entered. Id.

In order for the City to prevail in its Motion to Dismiss, a number of factual matters would necessarily have to be established favorable to the City and are based upon determination of factual disputes that would require ruling upon the evidence and determination of contested factual issues. The trial court did not convert the Motion before it to one for summary judgment before considering matters outside the pleadings and determining contested factual issues. Despite the conclusions that Respondent asks this Court to draw, there are a multitude of factual disputes and issues not appropriately resolved through a Motion to Dismiss. There are questions as to the circumstances surrounding the release of the canine and whether police officer Eaves’ release of the canine created a dangerous condition. There are questions of fact as to how dangerous the canine was at the time of the incident in question and questions regarding the conduct of officer Eaves causing the release of the canine under circumstances that resulted in the canine being in a dangerous condition at the time of the injury to Appellant Dilworth.

The City asks this Court to presumptively establish that the City’s canine was in no way dangerous and was acting in a wholly proper manner as it was trained at the time of the incident in question. Appellant proffered an expert opinion to the contrary in this case that a canine would not be trained to act in such a manner and that the manner in which the canine was release violated protocol for handling of a police canine and that because of the way that the canine was released “at the time of injury” the canine was

extremely dangerous as it was outside the eye sight of the handler and there was a target between the handler and the intended target. See Section 527.600.1(2).1.

Respondent would have this Court make a determinative finding that the actions of police officer Eaves at the time of the incident in question were in no way negligent or reckless in nature. Respondent's argument simply ignores the language of Section 527.600.1(2).1, in that, Section 2 of the statute indicates that "the property was in a dangerous condition at the time of the injury." The statute requires that in order to determine whether the canine was in a dangerous condition at the time of the injury in question, all facts and circumstances surrounding the point in time in which the injury occurred must be examined and that such an evaluation is an inherently fact-based analysis not properly resolved through a motion to dismiss.

Conclusion

For the aforementioned reasons, the trial court erred in granting City of Berkeley's Motion to Dismiss Count I of Plaintiff's Petition. As a result of the foregoing, Appellant respectfully requests that this Court remand this cause back to the trial court for further proceedings. In the alternative, Appellant requests that this court remand this case for further factual findings based upon dismissal of this case solely on the pleadings as part of a Motion to Dismiss.

Respectfully Submitted,

By:

Kevin J. Dolley, #54132
Law Offices of Kevin J. Dolley, LLC
Clayton Plaza West
7750 Clayton Road, Suite 102
St. Louis MO 63117-1343
(314)645-7900 (office)
(314)645-7901 (fax)
dolleylaw@yahoo.com

and

K. Jasman Lutz, 54036
818 Lafayette
St. Louis, MO 63104
(314) 231-0777
(314) 231-3704 fax
jasman_lutz@hotmail.com

*Attorneys for Plaintiff/Appellant
Harry Dilworth*

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was mailed, by U.S. mail, postage prepaid, on September 22, 2009, to:

J. Michael Waller
LAW OFFICES OF ROBERT J. HAYES
940 West Port Plaza, Suite 208
St. Louis, MO 63146-3118

CERTIFICATE OF COMPLIANCE

Pursuant to Supreme Court Rule 84.06(c), I certify that this brief is typed in Times New Roman, 13 point type, Microsoft Word. This brief contains 1,810 words, which is in compliance with the 31,000 word count allowed. This brief is otherwise in compliance with Rule 84.06(b).

I also certify that the computer diskette that I am providing has been scanned for viruses under Norton Anti-Virus for windows and has been found to be virus free.

Appendix

Section 537.600 RSMo. (2000).....A1

Cain v. State of Missouri, 239 S.W.3d 590 (Mo. banc 2007).....A3