
**IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT**

No. 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**

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

This is an action for damages brought by Plaintiff/Appellant Harry Dilworth for injuries he allegedly suffered on July 31, 2007, at the end of a driveway of a residence located near the boundaries of the cities of Ferguson and Berkeley (L.F. 5-6). Plaintiff's Petition contained three (3) counts (L.F. 4-10). On November 6, 2008, Plaintiff dismissed Count III without prejudice (not in Legal File but certified, file-stamped copy of this dismissal was attached as an exhibit by Plaintiff/Appellant to the memorandum he filed with this Court on April 16, 2009, and is attached hereto in the Appendix). On July 7, 2009, Plaintiff/Appellant dismissed Count II of his Petition without prejudice (Supp. L.F. 4). On February 27, 2009, the Honorable Michael T. Jamison granted the motion of Defendant/Respondent City of Berkeley to dismiss Count I (L.F. 50). It is from this February 27, 2009 order dismissing Count I that Plaintiff/Appellant filed his Notice of Appeal on March 2, 2009 (L.F. 52-55).

In her order of April 28, 2009, the Honorable Nanette A. Baker instructed the parties to address in their Jurisdictional Statement whether a determination of the claims against Defendant Eaves in his favor would render moot this appeal since there would be no liability of the City of Berkeley under the doctrine of respondeat superior. Plaintiff/Appellant's Petition was filed against both the City of Berkeley and Gary Eaves, a Berkeley police officer. However, Defendant Gary Eaves was never brought before the court; his motion to quash the return of summons was granted by the trial court on October 8, 2008 (L.F. 2). The claims contained in Plaintiff/Appellant's Petition against

the City of Berkeley are premised on the doctrine of respondeat superior for the actions of its police officer, Gary Eaves (L.F. 4-8). Defendant/Respondent agrees that a determination of the claims against Defendant Gary Eaves in his favor should result in the finding of no liability against the City of Berkeley. However, since Gary Eaves has not been served with suit papers and all claims against him have been dismissed by Plaintiff without prejudice, Plaintiff's appeal of the dismissal of the only remaining claim against the only remaining defendant, City of Berkeley, is ripe for determination.

No issues herein fall within the exclusive appellate jurisdiction of the Supreme Court as designated in Article V §3 of the Constitution of Missouri, as amended, and therefore this case falls within the general appellate jurisdiction of the Court of Appeals.

The judgment which is the subject of this appeal was entered by the Circuit Court of St. Louis County which is within the territorial jurisdiction of the Eastern District of this Court. §477.060, R.S.Mo. (1978).

STATEMENT OF FACTS

In is Petition Plaintiff/Appellant brought claims against the City of Berkeley and its police officer Gary Eaves in three Counts (L.F. 4-10). Plaintiff voluntarily dismissed Count III without prejudice on November 6, 2008 (not in Legal File but a certified, file-stamped copy of dismissal was attached by Plaintiff as Exhibit 1 to the Memorandum he filed with this Court on April 16, 2009, and is attached hereto in the Appendix). Plaintiff voluntarily dismissed Count II on July 7, 2009 (Supp. L.F. 4).

In Count I of his Petition, Plaintiff brought a negligence claim against the City of Berkeley based upon the doctrine of respondeat superior for the actions of its police officer Gary Eaves (L.F. 4-8). Plaintiff alleges in paragraph 2 of his Petition that the “City of Berkeley (‘the City’) is a municipal corporation formed under the laws of the State of Missouri. The City operates the Berkeley Police Department (‘Berkeley Police’), which is the city department having law enforcement authority in the City” (L.F. 5). Plaintiff alleges in paragraph 3 of his Petition that “Defendant Gary Eaves is an adult resident of St Louis County, Missouri and police officer and canine officer for the City of Berkeley Police Department and was working within the course and scope of his employment at all times relevant to this Petition” (L.F. 5).

Plaintiff claimed in paragraphs 4 and 5 of the Petition that on July 31, 2007, as part of his duties as a police officer, Plaintiff was dispatched and arrived to the scene of a disturbance near the boundaries of the cities of Ferguson and Berkeley (L.F. 5).

Plaintiff alleged in paragraphs 5 and 6 of his Petition that Defendant Gary Eaves, a Berkeley police officer, also arrived at the scene of this disturbance (L.F. 5).

Plaintiff claimed in paragraphs 7 and 8 that he and Defendant Gary Eaves canvassed the area on foot and observed the suspects on the front porch of a home at 6712 Torlina, and Plaintiff ordered the suspects to stop (L.F. 5).

Plaintiff claimed in paragraph 10 of his Petition that the suspects leaped from the porch of the home and began to escape on foot (L.F. 5).

Plaintiff alleged in paragraphs 12 and 13 of the Petition that he began foot pursuit of the suspects and gave chase until the end of the driveway of the residence until he lost visual contact and the chase ended (L.F. 6).

Plaintiff alleged in paragraphs 12, 13 and 14 of the Petition that Defendant Gary Eaves, a Berkeley police officer, who was working with a police canine, released the canine without warning (L.F. 6).

Plaintiff alleged in paragraph 15 of the Petition that “Defendant Eaves failed to maintain proper control of the canine under the circumstances, released the canine prematurely and under unsafe circumstances and released and failed to recall the canine safely. This conduct constituted negligent and reckless conduct on the part of Eaves within the course and scope of his employment” (L.F. 6).

Plaintiff does not allege in his Petition that there was a physical defect in the City of Berkeley’s property (police canine) (L.F. 4-10). Plaintiff also does not allege in his Petition that the police canine itself was dangerous or defective or that it failed to do anything other than what it was trained to do, apprehend an individual (L.F. 4-10).

Instead, Plaintiff alleged in paragraph 22 of his Petition that “Defendant Eaves’ failures were the proximate cause of Plaintiff’s injuries” (L.F. 7).

Defendant City of Berkeley filed an answer to the Petition, raising a number of affirmative defenses, including sovereign immunity and the immunity of police officer Gary Eaves under the doctrines of qualified immunity, official immunity and the public duty doctrine (L.F. 11-16).

Defendant City of Berkeley also filed a motion to dismiss Plaintiff’s Petition (L.F. 17-20).

The only claims against the City of Berkeley were contained in Count I and Count III of the Petition (L.F. 4-10). Plaintiff voluntarily dismissed Count III prior to the hearing on the motion of the City of Berkeley to Dismiss (not in Legal File but certified, file-stamped copy of this dismissal was attached as an exhibit by Plaintiff/Appellant to the memorandum he filed with this Court on April 16, 2009, and attached hereto in the Appendix). The trial court judgment from which Plaintiff takes this appeal is the dismissal of Count I of Plaintiff’s Petition (L.F. 50).

Since the sufficiency of the allegations contained in Count I is at issue in this appeal, the City of Berkeley will reprint Count I in its entirety:

COUNT I – NEGLIGENCE

COMES NOW Plaintiff, Harry Dilworth, by and through counsel,
and for Count I of his cause of action against Defendants states as follows:

17. Plaintiff re-pleads and incorporates herein by reference, as if more fully set forth, paragraphs 1-16.

18. Defendant Eaves failed to use proper care and failed to properly handle the canine under the circumstances presented. Eaves conduct was negligent and of a nature to constitute reckless and/or wanton negligence.

19. Eaves owed Plaintiff a duty to protect Plaintiff from the injury that occurred and Eaves failed to perform in that duty.

20. The duty that Defendant Eaves owned [sic] Plaintiff was a specific, direct and particular duty that he owed to Plaintiff due to the circumstances at the time of the release of the canine.

21. Defendant Eaves' negligence resulted in the canine constituting a dangerous condition of property.

22. **Defendant Eaves' failures were the proximate cause of Plaintiff's injuries** [emphasis added].

23. The injuries to Plaintiff directly resulted from the dangerous condition of property and negligence of Defendant Eaves.

24. There was a reasonably foreseeable risk that the dangerous condition could create the kind of injuries suffered by Plaintiff.

25. Defendants had actual or constructive knowledge of the resulting dangerous condition in sufficient time to have taken necessary measures to alleviate the danger.

26. As a direct and proximate result of the attack and bite by the canine and Defendant Eaves conduct, Plaintiff suffered severe injuries.

27. Plaintiff suffered injuries and damages and has incurred pain and suffering and loss of enjoyment of life, surgical treatment, medical bills, lost wages and continuing need for medical treatment.

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment in his favor and against Defendants, jointly and severally, and based upon respondeat superior for such damages as will fairly and adequately compensate Plaintiff and are determined to be a fair and reasonable amount, and which meet the jurisdictional threshold of this Court, for his costs incurred herein and for such other and further relief as the Court deems just and proper.

(L.F. 6-8)

POINT RELIED ON

THE TRIAL COURT DID NOT ERR IN DISMISSING COUNT I OF PLAINTIFF/APPELLANT'S PETITION BROUGHT AGAINST THE CITY OF BERKELEY BECAUSE PLAINTIFF/APPELLANT DID NOT ALLEGE AN EXCEPTION TO THE DOCTRINE OF SOVEREIGN IMMUNITY BY ALLEGING A PHYSICAL DEFECT OR DEFICIENCY IN THE CITY OF BERKELEY'S PROEPRTY OR A DANGEROUS CONDITION CREATED BY THE POSITIONING OF VARIOUS ITEMS OF PROPERTY BUT INSTEAD ALLEGED THAT HE WAS INJURED AS A PROXIMATE RESULT OF THE FAILURE OF A BERKELEY POLICE OFFICER TO PROPERLY HANDLE A POLICE CANINE.

ARGUMENT

THE TRIAL COURT DID NOT ERR IN DISMISSING COUNT I OF PLAINTIFF/APPELLANT'S PETITION BROUGHT AGAINST THE CITY OF BERKELEY BECAUSE PLAINTIFF/APPELLANT DID NOT ALLEGE AN EXCEPTION TO THE DOCTRINE OF SOVEREIGN IMMUNITY BY ALLEGING A PHYSICAL DEFECT OR DEFICIENCY IN THE CITY OF BERKELEY'S PROEPRTY OR A DANGEROUS CONDITION CREATED BY THE POSITIONING OF VARIOUS ITEMS OF PROPERTY BUT INSTEAD ALLEGED THAT HE WAS INJURED AS A PROXIMATE RESULT OF THE FAILURE OF A BERKELEY POLICE OFFICER TO PROPERLY HANDLE A POLICE CANINE.

Standard of Review

In reviewing the trial court's dismissal of a petition for failure to state a claim upon which relief can be granted, the sole issue to be decided is whether the averments, allowing the pleading its broadest intendment, treating all facts as true and construing all allegations favorably to Plaintiff, invoke the principles of substantive law upon which relief can be granted. Lowrey v. Horvath, 689 S.W.2d 625, 626 (Mo. banc 1985).

Plaintiff correctly cites the standard of review on pages 9-10 of his brief: In reviewing a motion to dismiss for failure to state a claim upon which relief can be granted, the standard is solely a test of the adequacy of plaintiff's petition. Bosch v. St. Louis Healthcare Network, 41 S.W.3d 462, 464 (Mo. banc 2001).

In his Statement of Facts and again in his Point Relied Upon, Plaintiff went beyond the four corners of his Petition and made new allegations about "first target in the line of sight of the canine" and "nearest target" in lines 7-10 that were not contained in the Petition (L.F. 4-10) but instead contained in an opinion letter of an expert witness which he attached to his Memorandum of Law (L.F. 26).

Discussion

The right of the sovereign to immunity from suit has long been recognized in Missouri. Beatty v. Metro. St. Louis Sewer District, 914 S.W.2d 791, 796 (Mo. banc 1995).

The general rule of sovereign immunity is that the sovereign may not be sued without its consent. McNeill Trucking Co. Inc. v. Missouri State Highway and Transportation Comm., 35 S.W.3d 846, 848 (Mo. banc 2001). The sovereign, subject to constitutional limitations, may prescribe the terms and conditions under which it may be sued, and the decision to weigh immunity, and to what extent it is waived, lies within the legislature's purview. Murray v. Missouri Highway and Transportation Commission, 37 S.W.3d 228, 235 (Mo. banc 2001).

Under Section 537.600, R.S.Mo., the Missouri Legislature outlined the scope of sovereign immunity along with its exceptions:

Such sovereign or governmental tort immunity as existed at common law in this state prior to September 12, 1977, except to the extent waived, abrogated or modified by statutes in effect prior to that date shall remain in full force and effect; except that, the immunity of the public entity from liability and suit for compensatory damages for negligent acts or omissions is hereby expressly waived in the following instances:

(1) Injuries directly resulting from the negligent acts or omissions by public employees arising out of the operation of motor vehicles or motorized vehicles within the scope of their employment;

(2) Injuries caused by the condition of a public entity's property if the plaintiff establishes that the property was in dangerous condition at the time of the injury, that the injury directly resulted from the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of harm of the kind of injury which was incurred, and that either a negligent or wrongful act or omission of an employee of the public entity within the course of his 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. . . .

In his brief Plaintiff asserts that he has properly pled a case under the second exception to sovereign immunity: Injuries caused by the dangerous condition of a public entity's property. However, Plaintiff did not allege that the police canine in and of itself was dangerous or defective or that it failed to do anything other than what it was trained to do, apprehend an individual. Plaintiff did not allege in his Petition a defect in the physical condition or allege a physical deficiency of the City of Berkeley's property

(police canine). Instead, Plaintiff alleged negligence on the part of police officer Gary Eaves in failing to properly handle this police canine (L.F. 6-7). Plaintiff explains his claim when he alleges in paragraph 22 of the Petition that “Defendant Eaves’ failures were the proximate cause of Plaintiff’s injuries” (L.F. 7) and alleged that failures on the part of the officer were the proximate cause of his injuries (L.F. 7). In effect, Plaintiff is requesting this Court to ignore the language of the statute and carve out a third exception to sovereign immunity: (3) injuries caused by the negligent handling of police canines by the sovereign’s police officers.

Strict Construction

The provisions in the statute waiving sovereign immunity must be narrowly construed. Richardson v. State Highway and Transportation Commission, 863 S.W.2d 876, 880 (Mo. banc 1993); McNeill Trucking Co. Inc. v. Missouri State Highway Transportation Commission, 35 S.W.3d 846, 848 (Mo. banc 2001). The state’s immunity from negligence liability under the doctrine of sovereign immunity is a general rule, and exceptions to this rule are to be strictly construed. Missouri Highway and Transportation Commission v. Kansas City Cold Storage Inc., 948 S.W.2d 679, 682 (Mo. App. 1997). Sovereign immunity does attach to the operation and maintenance of a police force. Fantasma v. Kansas City, Missouri, Board of Police Commissioners, 913 S.W.2d 388, 391 (Mo. App. 1996).

Because finding a municipality liable for torts is the exception to the general rule of sovereign immunity, a plaintiff must plead with specificity facts demonstrating his

claim falls within an exception of sovereign immunity. Topps v. City of Country Club Hills, 272 S.W.3d 409, 415 (Mo. App. 2008).

Immunity is waived for injuries caused by the defective condition of a public entity's property only if the plaintiff establishes the following elements:

- (1) the property was in dangerous condition at the time of the injury;
- (2) the injury directly resulted from the dangerous condition;
- (3) the dangerous condition created a reasonably foreseeable risk of harm of the kind of injury that was incurred; and
- (4) either a negligent or wrongful act or omission of an employee of the public entity within the course of his 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.

Section 537.600.1(2).

Cain v. Missouri Highways and Transportation Commission, 239 S.W.3d 590, 593 (Mo. banc 2007).

Dangerous Condition: Definition

The terms “dangerous condition” for the purpose of interpreting the exception to sovereign immunity have a narrow meaning and refer to defects in the **physical condition of the public entity's property** or the positioning of various items of property

on the public entity's property. Cain v. Missouri Highways and Transportation Commission, 239 S.W.3d 590, 594 (Mo. banc 2007). A "dangerous condition" under Section 537.600 requires some defect, physical in nature, in the sovereign's property. State ex rel Div. of Motor Carrier and R. R. Safety v. Russell, 91 S.W.3d 612, 616 (Mo. banc 2002); Sisk v. Union Pacific Railroad Company, 138 S.W.3d 799, 807 (Mo. App. 2004). Here, 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. Plaintiff has also failed to allege that he was injured on property owned by the City of Berkeley as a direct result of the positioning of various items of personal property on the State's real property. Consequently, Plaintiff has failed to plead a waiver of the sovereign immunity doctrine by bringing suit challenging the way a City of Berkeley police officer handled a police dog out in the community, on the driveway of a private residence.

In his brief Plaintiff/Appellant argues that "the City of Berkeley's canine constituted a dangerous condition of property that posed a physical threat to Plaintiff at the time of the incident in question" (Appellant's brief, p. 12). In support of that proposition, Plaintiff relies primarily upon two cases: Alexander v. State and Cain v. State of Missouri.

In Alexander v. State, 756 S.W.2d 539 (Mo. banc 1988), Plaintiff was dispatched to the Jefferson State Office Building to service elevators located therein. *Id.* at 540. Plaintiff averred that the Jefferson State Office Building was owned and operated by the State of Missouri. *Id.* at 541. While descending the ladder, plaintiff stepped off the last

rung onto a folding room partition which had been laid at the foot of the ladder while plaintiff was up on it. *Id.* at 540-541. The Supreme Court ruled that “the alleged placement of the partition against the ladder created a physical deficiency in the state’s property which constituted a ‘dangerous condition.’” *Id.* at 542. The Court further noted that “the condition here was dangerous because of its existence, without intervention by third parties, posed a physical threat to plaintiff.” *Id.* at 542.

The Alexander decision teaches us that a property owner is responsible for dangerous conditions on its property causing an injury to invitees no matter if the condition involves an intrinsic defect such as a hole in the property owner’s floor or the placement of an object (personal property) in a dangerous location on the property owner’s floor, thereby causing someone to fall over it. In both cases the owner’s real property is not safe for invitees.

Likewise, Cain v. Missouri Highways and Transportation Commission, 239 S.W.3d 590 (Mo. banc 2007) involved an accident which took place on state-owned property; in that case it was a state-owned highway right of way. *Id.* at 592. Cain was a prison inmate injured while working on a crew assigned to maintain the highway right of way under the supervision and control of the Missouri Department of Transportation. *Id.* at 592. Another inmate cut notches in a tree with a chain saw. The tree stood for several minutes before it fell onto the plaintiff. The court found that during this time, a dangerous condition existed on the state highway right of way. *Id.* at 594.

In our case on appeal, Plaintiff-Appellant was not injured in a state-owned office building or on a state-owned highway right of way. There is no question that Plaintiff

was not injured while on state-owned property. At the time of his injury, Plaintiff was not on property owned or controlled by the City of Berkeley. Instead, Plaintiff admits in his Petition that his injuries took place out in the community on a privately owned driveway (L.F. 5-6).

In Sisk v. Union Pacific Ry. Co., 138 S.W.3d 799 (Mo. App. 2004), the court ruled that a pedestrian failed to establish a dangerous condition on property owned by the county because the county did not own or control the railroad tracks or bridge upon which Plaintiff was injured. Sisk was injured when struck by a train as she walked across the only bridge that connected both sides of a park. *Id.* at 801. Sisk asserted that the operation of a public park with an active railroad line running through it, without safeguards such as barriers or signs, constituted a dangerous condition. *Id.* at 801. Judge Breckenridge, writing for the court, disagreed and found that the county was immune from liability. *Id.* at 809.

In State ex rel Div. of Motor Carrier and R. R. Safety v. Russell, 91 S.W.3d 612 (Mo. banc 2002), the plaintiffs sought damages against several defendants, including the Division of Motor Carrier and Railroad Safety (the “Division”), for the wrongful death of their son, which resulted from an accident at a railroad crossing. *Id.* at 614. The plaintiffs alleged that the railroad crossing was a dangerous condition for various reasons such as broken asphalt, potholes, loose gravel, and broken and loose railroad ties. The Division filed a motion to dismiss the plaintiffs’ petition, asserting sovereign immunity because it did not own or control the railroad crossing. *Id.* at 615. The Supreme Court agreed, holding that, if the Division did not own the railroad crossing, nor have the

railroad crossing under its exclusive control or possession, then it could not be subject to suit under the dangerous condition waiver. *Id.* at 616. Specifically, the Court held that “[f]or a dangerous condition waiver of sovereign immunity to apply, the dangerous condition must ‘describe, define, explain, denote or reference only and exclusively the physical defects in, upon and/or attending to *property of the public entity.*’” *Id.* at 616 (emphasis added).

In Vonder Haar ex rel. Mehochko v. Six Flags, this court ruled that the ownership and control of the roadway by the Missouri Highway and Transportation Department precluded application of the waiver of sovereign immunity against a municipality, even if the city used its police force to direct traffic at the intersections. Vonder Haar ex rel. Mehochko v. Six Flags, 261 S.W.3d 680, 688 (Mo. App. 2008).

Plaintiff alleges that for purposes of the exception to the sovereign immunity doctrine, a dangerous condition of property can relate to either real or personal property. However, this is not a case where Plaintiff is alleging that there was a defect on or about real property of the City of Berkeley which caused Plaintiff’s injuries. Plaintiff pleads in his Petition that the incident took place not on any property owned or controlled by the City of Berkeley, but instead, took place out in the community, on the driveway of a private residence, while Officer Eaves was attempting to apprehend fleeing burglary suspects. Second, this is not a case where Plaintiff is alleging that there was anything wrong with the police dog or a physical defect in the police dog. Plaintiff is not alleging that the police canine did anything other than what it was trained to do, apprehend the individual. The issue here is not with the canine. Plaintiff alleges that the incident here

was caused by the negligent conduct of Officer Gary Eaves and the manner in which he handled the canine out in the community on a private driveway (L.F. 6-7).

In addition to failing to allege that the police canine itself did anything wrong or was itself inherently dangerous or defective, Plaintiff does not allege that his injury directly resulted from the dangerous condition of the canine. Instead, Plaintiff alleges in paragraph 15 of his Petition that “Defendant Eaves failed to maintain proper control of the canine under the circumstances, released the canine prematurely and under unsafe circumstances and released and failed to recall the canine safely. **“This conduct constituted negligent and reckless conduct on the part of Eaves** within the scope of his employment” (L.F. 6) [emphasis added]. Plaintiff alleges in paragraph 22 of his Petition that **“Defendant Eaves’ failures were the proximate cause of Plaintiff’s injuries”** (L.F. 7) [emphasis added].

The cases cited by Plaintiff involving personal property of the sovereign involve situations where the real or personal property itself was in a dangerous condition or by its placement created a physical deficiency on the sovereign’s property upon which the accident occurred. Warren v. State, 939 S.W.2d 950 (Mo. App. 1997) [lack of safety guard on table saw in state-owned prison furniture factory]. Alexander v. State, 756 S.W.2d 539 (Mo. banc 1988) [improper placement of partition against ladder upon which plaintiff was standing created a physical deficiency in state-owned and state-operated building in which accident occurred]. Cain v. Missouri Highways and Transportation Commission, 239 S.W.3d 590 (Mo. App. 2007) [state prison inmate injured when fellow

inmate partially cut limb of tree which eventually fell on state-owned highway right of way].

In Kanagawa v. State of Missouri, 685 S.W.2d 831 (Mo. banc 1985), a victim of rape and assault by an escaped prison inmate brought an action against the State, alleging that the fences surrounding the prison were inadequate to confine one who intended to get out and the gates were not properly locked. *Id.* at 833. The circuit court dismissed the petition and the Supreme Court affirmed, holding that these allegations fall short of averring a “dangerous condition” in the public entity’s property. *Id.* at 835. The Court further held that the facts alleged demonstrate beyond doubt that the escaped inmate and not the condition of the State’s property caused plaintiff’s injuries. *Id.* at 835. “It is readily apparent that the legislature . . . sought to narrowly delimit the scope of §537.600(2).” “It would violate both this manifest legislative purpose and our policy of strictly construing provision waiving sovereign immunity to hold that ‘a dangerous condition’ refers to a condition other than a defect in the physical condition of public property.” *Id.* at 835.

Under the “dangerous condition” waiver of sovereign immunity, a “dangerous condition” requires a defect in the physical condition of public property. State ex rel. Div. of Motor Carrier and R. R. Safety v. Russell, 91 S.W.3d 612 (Mo. banc 2002).

The concept of a dangerous condition does not include property which is not itself physically defective but may be the site of injuries and the result of misuse or other intervening acts. Kraus v. Hy-Vee, Inc., 147 S.W.3d 907, 915 (Mo. App. 2004). Trumbo v. Metropolitan St. Louis Sewer District, 877 S.W.2d 198, 201 (Mo. App. 1994).

In Stevenson v. City of St. Louis School District, 820 S.W.2d 609 (Mo. App. 1991), a student filed a petition for damages for injuries she sustained when she fell into a school stairwell. Plaintiff alleged that the stairwell was open and guarded by an inadequate banister. The trial court granted defendant's motion to dismiss and this court affirmed. *Id.* at 611. The failure to barricade an open stairwell in an elementary school was not a physical defect, and therefore, the stairwell was not a dangerous condition under the statute governing waiver of sovereign immunity. *Id.* at 613. The dangerous condition exception has a narrow meaning and refers to defects in the physical condition of the public entity's property. *Id.* at 612. For purposes of determining whether the dangerous condition exception to sovereign immunity applies, physically defective public property does not include property which, although not physically defective, may be the site of injuries as a result of misuse or other intervening act. The stairs and banisters were not unsound, broken, loose or otherwise in a defective condition. There was no litter or foreign object on the stairs. The danger was created solely as a result of students sliding down the banisters, and therefore, the school district is protected by the doctrine of sovereign immunity. *Id.* at 613.

Allegations by a plaintiff who was attacked by an unknown assailant while on the city library premises who alleged that the library failed to provide adequate security, failed to aver a defect in the physical structure of the library property and thus the claims were insufficient to constitute an exception to the library district's sovereign immunity. Consequently, this Court affirmed the trial court's dismissal of the petition in Dreon v. City of St. Louis, 780 S.W.2d 60, 62 Mo. App. 1989).

The dangerous condition of property exception to sovereign immunity was not applicable to allow plaintiffs to assert a negligence claim against the school district based upon a theory of improper supervision of a student who threw a broken piece of asphalt which struck plaintiff in the head, even assuming that the condition of the asphalt pavement was defective. Patterson v. Meramec Valley R-III School District, 864 S.W.2d 14 (Mo. App. 1993). Consequently, this Court affirmed the dismissal of plaintiff's petition by the trial court. *Id.* at 16-17.

In Goben v. School District of St. Joseph, 848 S.W.2d 20 (Mo. App. 1992), a student was injured when she was required to jump over a hurdle placed on the concrete floor in gym class when she caught her foot on the hurdle. The court held that plaintiff failed to establish a dangerous condition exception to sovereign immunity for purposes of holding the school district liable, notwithstanding the contention of the student that the gym teacher created the dangerous condition by setting hurdles on the concrete floor and urging students to jump over them since there was no allegation of any defect in the floor or in the hurdle, and there was no allegation that the student's injury directly resulted from such dangerous condition. Likewise, there is no allegation here that there was any defect in the police canine. Instead, Plaintiff alleges that the negligence involved the directions, instructions and handling of the police officer himself.

In Dale By and Through Dale v. Edmonds, 819 S.W.2d 388 (Mo. App. 1991), this court held that a school district enjoyed sovereign immunity from liability for injury sustained by a student on the playground when she was hit in the eye by a piece of debris thrown by another student, although the playground itself was littered with debris. In

order to state a claim under the dangerous condition exception, plaintiff must plead that his injuries directly resulted from the dangerous condition. *Id.* at 390.

In Twente v. Ellis Fichel State Cancer Hospital, 665 S.W.2d 2 (Mo. App. 1983), suit was brought by a person who was assaulted and raped in the parking lot of a state hospital. Plaintiff alleged in her petition that a dangerous condition was created on the state property as a result of the negligence of the security guard. *Id.* at 4. The trial court granted sovereign's motion to dismiss, finding that the state hospital was entitled to sovereign immunity. The Court of Appeals affirmed holding that the 537.600(2) does not say that the negligent or wrongful act or omission of an employee or the actual or constructive notice are unto themselves a dangerous condition. *Id.* at 11.

What appellant seeks is to engraft upon the term "dangerous condition" any and all conditions or events which, if foreseeable, cause or produce injury arising out of or in conjunction with the property or employees of a public entity. If appellant's argument were carried to its logical conclusion, § 537.600(2) would become a nullity. . . .

When one reviews authority in our own state concerning the question of "dangerous condition," it becomes readily apparent that this term (dangerous condition) refers exclusively to some physical condition upon the property and not other "conditions." Milne v. Pevely Dairy Co., 641 S.W.2d 158 (Mo. App. 1982).

It must be kept in mind that with the enactment of § 537.600, the General Assembly sought a legislative curb or limitation upon the previous ruling by the Missouri Supreme Court in *Jones, supra*. Thus, § 537.600 reflects legislative limitation upon judicial effort to eliminate or reduce the application of the doctrine of sovereign immunity as a defense for public entities. This legislative intent is clearly noted in the very first paragraph of § 537.600, wherein the General Assembly first reinstates the doctrine of sovereign immunity and then creates two exceptions to the doctrine within § 537.600(1) and (2). If, as appellant contends, any “condition” falls within the term “dangerous condition,” then § 537.600(2) becomes mere surplusage if it be shown that there was an injury, that such injury was foreseeable, and there is a showing of an act or omission by an employee, or that the public entity had actual/constructive notice of such “condition.” As viewed by this court, § 537.600(2) does not lend itself to such a broad interpretation as insisted upon by appellant.

Twente v. Ellis Fichel State Cancer Hospital, 665 S.W.2d 2, 12 (Mo. App. 1983).

CONCLUSION

Plaintiff asserts that he has properly pled a case under the second exception to sovereign immunity: Injuries caused by the dangerous condition of a public entity's property. However, Plaintiff did not allege in his Petition a defect in the physical condition or a physical deficiency of the City of Berkeley's property (police canine) but instead alleged that he was injured as a proximate result of the failure of a Berkeley police officer to properly handle a police canine. Plaintiff did not allege that the police canine in and of itself was dangerous or defective or that it failed to do anything other than what it was trained to do, apprehend an individual. Instead, Plaintiff alleged negligence on the part of police officer Gary Eaves in failing to properly handle this police canine and alleged that "Defendant Eaves' failures were the proximate cause of Plaintiff's injuries." Consequently, the trial court did not err in dismissing Count I of Plaintiff's Petition.

CERTIFICATE OF COMPLIANCE AND SERVICE

I, J. Michael Waller, attorney for Respondent, hereby certify, pursuant to Rule 84.06(c), that this brief includes the information required by Rule 55.03, complies with the limitations contained in Rule 84.06(b) and according to the Microsoft Word program contains 5,753 words and 500 lines.

I, J. Michael Waller, attorney for Respondent, hereby certify, pursuant to Rule 84.06(g), that the disks in Word format provided to the Court and opposing counsel have been scanned for viruses and they are virus-free.

I, J. Michael Waller, hereby certify, pursuant to Rule 43.01(e) and Local Rule 13, that the original and nine copies hereof with disk were filed with the Missouri Court of Appeals, Eastern District, and that two copies hereof with disks were mailed this 31st day of August, 2009, to:

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Subscribed and sworn to before me this 31st day of August, 2009.

Notary Public

My Commission Expires:

APPENDIX

Stipulation for Dismissal of Count III (Strict Liability) Without Prejudice.