

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11-1139

M.B., a minor, by her parent and natural guardian Elizabeth Bey;
ELIZABETH BEY, in her own right,

Appellants

v.

CITY OF PHILADELPHIA; CITY OF PHILADELPHIA POLICE DEPT; POLICE
OFFICER JOHN DOE; POLICE OFFICER JANE DOE; THE PENNSYLVANIA
SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, a/k/a The Society
for the Prevention of Cruelty to Animals of Pennsylvania; MICHELLE A. HODGES

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil Action No. 2-10-cv-00635)
District Judge: Honorable Stewart Dalzell

Submitted Under Third Circuit LAR 34.1(a)
September 23, 2011

Before: FISHER, HARDIMAN, and GREENAWAY, JR., *Circuit Judges*.

(Opinion Filed: November 17, 2011)

OPINION

GREENAWAY, JR., *Circuit Judge*.

Appellant M.B. (“M.B.”) is a minor who was attacked by a pit bull and suffered damage to her foot. Her parent and natural guardian, Elizabeth Bey, is suing on M.B.’s behalf and individually (collectively, “Appellants”). Appellants seek review of the District Court’s grant of Appellees’ summary judgment motion.¹ The complaint alleged that the City of Philadelphia Police Department violated M.B.’s constitutional rights under the state-created danger theory of substantive due process, when the police placed a stray pit bull in a fenced yard. The pit bull later escaped from the yard and ran towards a group of children, including M.B. In an attempt to get away from the approaching dog, M.B. ran into the street where she was hit by a car and injured. The City Defendants filed a motion for summary judgment, arguing that the police officers’ actions did not violate M.B.’s constitutional rights. The District Court agreed with the City Defendants and granted summary judgment, pursuant to FED. R. CIV. P. 56(c).²

For the following reasons, we will affirm the District Court’s Order granting summary judgment to the City Defendants.

I. BACKGROUND

We write primarily for the benefit of the parties, and therefore recount only the essential facts. On August 22, 2009, two Philadelphia police officers, Krystal Thornton

¹ Appellees include City of Philadelphia, City of Philadelphia Police Dept., Police Officer John Doe and Police Officer Jane Doe (collectively, “the City Defendants”), the Pennsylvania Society for the Prevention of Cruelty to Animals, a/k/a The Society for the Prevention of Cruelty to Animals of Pennsylvania (“PSPCA”), and Michelle A. Hodges (who has not participated in this lawsuit). The two police officers were later identified as Troy Ragsdale and Krystal Thornton.

² Federal Rule of Civil Procedure 56(a) replaces 56(c). Although Appellants reference Rule 56(c), we refer to the Rule as 56(a).

and Troy Ragsdale, responded to an emergency call reporting a vicious stray pit bull terrorizing a neighborhood in southwest Philadelphia. The officers found the pit bull, coaxed it to come toward them, subdued the pit bull, and led it into a residential yard enclosed by a two foot high fence. After securing the dog in the yard, the officers reportedly notified their dispatcher and requested that the PSPCA be contacted. The officers left the dog unattended in the yard and told the children in the immediate area to stay away from the dog. They also assured the assembled neighbors that the PSPCA was on its way. The pit bull escaped the yard and ran toward a group of children. M.B. was among the group and ran away from the dog, fearing she would be attacked. M.B. ran into the street, was hit by a car, and suffered severe injuries to her foot.

Shortly after witnessing the incident, Larry Wilder (“Wilder”), the neighborhood block captain who had initially called the police for assistance, called the PSPCA. The PSPCA informed Wilder that there was no record of a telephone call from the police department. The PSPCA arrived about an hour after Wilder’s call.

Elizabeth Bey filed a complaint in District Court on her daughter’s behalf and in her individual capacity, against the City Defendants, the PSPCA and Michelle Hodges, the driver of the car. Bey asserted a substantive due process claim, asserting a state-created danger theory against both the City Defendants and against the PSPCA, in separate counts. The remaining three claims asserted negligence causes of action.

Following Rule 12 dispositive motions, the City Defendants moved for summary judgment on Count I, the surviving constitutional claim. The District Court granted

summary judgment on Count I, but refused to exercise its supplemental jurisdiction over the remaining state law claims.

Appellants filed a timely notice of appeal.

II. JURISDICTION AND STANDARD OF REVIEW

The District Court had jurisdiction under 28 U.S.C. § 1331. “We have jurisdiction under 28 U.S.C. § 1291 to review the District Court’s grant of summary judgment.” Busch v. Marple Newtown Sch. Dist., 567 F.3d 89, 95 n.7 (3d Cir. 2009). We review the District Court’s order granting summary judgment de novo. Azur v. Chase Bank, USA, Nat’l Ass’n, 601 F.3d 212, 216 (3d Cir. 2010). “To that end, we are required to apply the same test the district court should have utilized initially.” Chambers ex rel. Chambers v. Sch. Dist. of Phila. Bd. of Educ., 587 F.3d 176, 181 (3d Cir. 2009) (internal quotation marks omitted).

III. ANALYSIS

To prevail on a motion for summary judgment, the movant must demonstrate “that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The Court must take all the well-pleaded allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the pleadings, the plaintiff may be entitled to relief. Colburn v. Upper Darby Twp., 838 F.2d 663, 665-66 (3d Cir. 1988).

Appellants have not provided evidence of a genuine dispute of any material fact. Even reviewing the evidence and construing the complaint in a light most favorable to Appellants, we find that Appellants are not entitled to relief.

Appellants contend that the City Defendants violated M.B.'s substantive due process rights under the Fourteenth Amendment. They seek relief pursuant to 42 U.S.C. §1983,³ under a theory of state-created danger, and also assert claims for municipal liability under Monell v. Dep't. of Soc. Servs., 436 U.S. 658 (1978).

“A State’s failure to protect an individual against private violence does not constitute a violation of due process.” See Nicini v. Morra, 212 F.3d 798, 806 (3d Cir. 2000) (citation omitted). However, there are two exceptions to this rule. These include the special relationship exception⁴ and the state-created danger exception⁵. Here, Appellants argue there was a state-created danger.

We have held that there are four elements for a state-created danger claim. They are:

(1) the harm ultimately caused is foreseeable and fairly direct; (2) a state actor acts with a degree of culpability that shocks the conscience; (3) a relationship between the state and the plaintiff exists such that the plaintiff is a foreseeable victim of the defendant’s acts, or a member of a discrete class of persons subjected to the potential harm brought about by the state’s actions as opposed to a member of the public in general; and (4) a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all.

Burella v. City of Philadelphia, 501 F.3d 134, 147 (3d Cir. 2007) (citation

³ 42 U.S.C. § 1983 establishes a federal remedy against a person who, acting under color of state law, deprives another of constitutional rights. In order to establish a prima facie case under § 1983, a plaintiff must demonstrate that: (1) a person has deprived her of a federal right; and (2) the person who deprived her of that right, acts under state or territorial law. Burella v. City of Phila., 501 F.3d 134, 139 (3d Cir. 2007).

⁴ Id. at 808.

⁵ See Bright v. Westmoreland Co., 443 F.3d 276, 281 (3d Cir. 2006).

omitted).

The elements of the state-created danger test are conjunctive. Appellants fail in their attempt to create a genuine dispute of fact regarding any of the elements.

Appellants do not support the foreseeability prong with facts suggesting that M.B.'s harm was foreseeable and the direct result of the police officers' actions. The police department received an emergency call seeking assistance with "a vicious dog." See Appellants' Br. at 5. Police officers responded and attempted to secure the animal. When the police officers captured the stray pit bull, fed it and placed it in the fenced yard, it was not foreseeable that the dog would escape. Nor was it foreseeable that M.B., playing with children at a location not close to the dog, would run into the street and be hit by a passing car. M.B.'s accident, while unfortunate, was not caused by the officers' actions.

Appellants also fail to satisfy the second element of state-created danger. The actions of the police officers do not shock the conscience. We have held that "the substantive component of the Due Process Clause can only be violated by governmental employees when their conduct amounts to an abuse of official power that 'shocks the conscience'". Fagan v. City of Vineland, 22 F.3d 1296, 1303 (3d Cir. 1994) (internal citations omitted). "The judicial conscience is shocked by a governmental employee's reckless disregard of the constitutional rights of an individual" Id. at 1306.

The District Court concluded that the conduct of the police officers was not sufficiently outrageous or grossly negligent as to shock the conscience of the Court. At most, the officers may have been negligent in making the assumption that the pit bull would not be able to escape the fenced yard. "The Supreme Court has thus far held that

mere negligence is insufficient to trigger constitutional liability.” See Davidson v. Cannon, 474 U.S. 344, 347-48 (1986) (“lack of care simply does not approach the sort of abusive government conduct that the Due Process Clause was designed to prevent.”) We agree with the District Court’s conclusion that the officers did not engage in activities which shock our judicial conscience.

In examining the third element, we determine whether a relationship exists between the state and the plaintiff, and whether the plaintiff is a foreseeable victim of the defendant’s acts, or a member of a discrete class of persons subjected to the potential harm brought about by the state’s actions as opposed to a member of the public in general. Here, no relationship existed between the officers and M.B.; M.B. was not a foreseeable victim of the officers’ actions; and M.B. is not a member of a discrete class of persons subjected to the potential harm brought by the officers’ actions.

The fourth element requires that three conditions be satisfied. Those conditions are:

(1) a state actor exercised his or her authority; (2) the state actor took an affirmative action; and (3) this act created a danger to the citizen or rendered the citizen more vulnerable to danger than if the state had not acted at all.

See Ye v. United States, 484 F.3d 634, 639 (3d Cir. 2007) (internal citations omitted).

Appellants contend that the police officers acted affirmatively to create a danger by: “(1) actually leading the dog further into the 2600 block than it was when the officers arrived at the block; (2) feeding the dog on the subject block, thereby making it more likely that he might revisit or stay around the block; (3) feeding the dog in the yard where

they led the dog, thereby making it more likely that he might revisit or stay around the center of that block where the yard is; (4) affirmatively placing the dog in a non-confining area, and labeling it a ‘confinement’, so that the officers could leave the area.” See Appellants’ Br. at 40-41.

Although we find that the police officers exercised their authority when they answered the call regarding a vicious dog roaming the neighborhood, we do not believe that the police officers’ actions made it more likely that the dog would revisit or remain near the block on which the yard is located. In addition, although the police officers assured the individuals present that the dog was confined, that statement alone cannot constitute the affirmative action required for a state-created danger. We have held that “a mere assurance cannot form the basis of a state-created danger claim.” Ye, 484 F.3d at 640. Further, the officers in no way restricted M.B.’s freedom to act on her own behalf.

[I]t is the state’s affirmative act of restraining the individual’s freedom to act on his own behalf - through incarceration, institutionalization, or other similar restraint of personal liberty - which is the deprivation of liberty triggering the protections of the Due Process Clause.

Id. at 640-41 (quotation marks omitted.)

The police officers did not affirmatively use their authority in a way that created a danger to M.B., nor did they render her more vulnerable to danger than had they not acted at all. We affirm the District Court’s grant of summary judgment in favor of the City Defendants.

Appellants also assert claims for municipal liability under Monell v. Dep’t. of Soc. Servs., 436 U.S. 658 (1978). In Monell, the Supreme Court held that a § 1983 complaint

against a municipality must allege: (1) the existence of a custom or policy of the municipality that is of such long standing as to have the force of law; and (2) that one of the municipality's employees violated the plaintiff's civil rights while acting pursuant to this custom or policy. Id. at 691-94. Further, the Supreme Court held that municipal liability only attaches when the "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury . . ." Id. at 694.

Appellants assert that they did have valid § 1983 claims and a jury could conclude that the Philadelphia Police Department's failure to provide its officers with a copy of the policy for handling vicious animals, which existed but was not disseminated, amounted to deliberate indifference to the rights of its citizens, including M.B. See Chambers, 587 F.3d 176 at 193 ("in order for a governmental entity (generically referred to as a 'municipality') to be liable for the violation of a constitutional right under § 1983, the plaintiff must identify a policy or custom of the entity that caused the constitutional violation. A plaintiff can establish causation by demonstrating that the municipal action was taken with deliberate indifference as to its known or obvious consequences.") See also Santiago v. Warminster Twp., 629 F.3d 121, 135 (3d Cir. 2010) ("In the context of 42 U.S.C. § 1983, for municipal liability to attach, any injury must be inflicted by execution of a government's policy or custom.")

Our determination that the police officers did not violate M.B.'s constitutional rights requires a conclusion that there are no valid § 1983 claims. Therefore, Appellants' Monell claims must fail. We will affirm the District Court's grant of summary judgment

on those claims.

IV. CONCLUSION

For the reasons set forth above, we will affirm the District Court's Order granting summary judgment.