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DISTRICT II

March 24, 2021

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You are hereby notified that the Court has entered the following opinion and order:

2020AP85

Kathryn Baumann-Mader v. City of Kenosha (L.C. #2018CV894)

Before Reilly, P.J., Gundrum and Davis, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Kathryn Baumann-Mader appeals from an order granting summary judgment to the City of Kenosha, James Beller and Tyler Cochran (collectively, Respondents) and from the resulting judgment dismissing the complaint and assessing Baumann-Mader costs. Based upon our review

of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. (2017-18).¹ We affirm.

Background

Baumann-Mader's amended complaint alleges that in 2015 a neighbor's English Bulldog, Tank, escaped from the confines of Tank's yard and began attacking people. Police were called and responded. Baumann-Mader exited her home and was attacked by Tank. According to the summary judgment record and Baumann-Mader's briefing on appeal, responding officers took various actions to stop the ferocious attack that was occurring on Baumann-Mader right in front of them, including employing a Taser and firing their service weapon at Tank at "very close and within two feet" range. Tank was killed and Baumann-Mader claims she was injured by the discharge of the service weapon.

Baumann-Mader filed suit against the officers and the City, seeking monetary damages and claiming that her left foot and ankle were injured by the actions the officers took to stop the attack. Respondents moved for summary judgment claiming *inter alia* that they were entitled to governmental immunity because the acts of which Baumann-Mader complains were discretionary acts. The circuit court agreed that the officers' acts were discretionary and the Respondents are entitled to governmental immunity as no exception to immunity applied. Baumann-Mader appeals.

¹ All references to the Wisconsin Statutes are to the 2017-18 version.

Discussion

Our review of a circuit court's decision on summary judgment is de novo. *Behrendt v. Gulf Underwriters Ins. Co.*, 2009 WI 71, ¶11, 318 Wis. 2d 622, 768 N.W.2d 568. Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.* “An issue of fact is genuine if a reasonable jury could find for the nonmoving party.” *Nielsen v. Spencer*, 2005 WI App 207, ¶10, 287 Wis. 2d 273, 704 N.W.2d 390. At the summary judgment stage, all facts and reasonable inferences must be viewed in the light most favorable to the nonmoving party. *Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, ¶23, 241 Wis. 2d 804, 623 N.W.2d 751.

Baumann-Mader asserts that the circuit court erred in granting summary judgment on the grounds of governmental immunity. She insists the Respondents are not entitled to immunity because they had a ministerial duty that they failed to perform.

In this regard, she claims

the Defendant Officers were specifically tasked with the duty of gaining control over a vicious dog and not causing harm to Ms. Baumann-Mader. Officer Sorenson had the dog controlled with a leash while attempting to coax the dog into the back of his squad car. The dog was contained prior to its biting Ms. Baumann-Mader. The lack of training and proper equipment allowed the dog to escape Officer Sorenson's control and attack Ms. Baumann-Mader.

... The conduct of the Officers in this matter was wrongful in that any reasonable individual should have concluded that shooting at a dog which is biting an individual at close range was almost certain to result in injury to Ms. Baumann-Mader.... Officers Beller and Cochran wrongfully concluded that the risk of shooting Ms. Baumann-Mader did not outweigh shooting at the biting dog.

Baumann-Mader adds that she

was not warned by the Defendant Officers that they were going to [shoot], they just shot. ... Ms. Baumann-Mader was shot by undertrained City of Kenosha Police Officers.... Immunity is not appropriate.

... The Defendant officers allowed the dog to escape their control and bite Ms. Baumann-Mader....

... There were a myriad of errors made, primarily due to an admitted lack of training on how to deal with a vicious dog, which resulted in Baumann-Mader's ... injuries.

Baumann-Mader spills much ink alleging that the officers acted in a negligent manner, but the government immunity defense assumes negligence and instead focuses “on whether the municipal action (or inaction) upon which liability is premised is entitled to immunity under [WIS. STAT. § 893.80(4)], and if so, whether one of the judicially-created exceptions to immunity applies.” *Lodl v. Progressive N. Ins. Co.*, 2002 WI 71, ¶17, 253 Wis. 2d 323, 646 N.W.2d 314. Baumann-Mader develops no argument that § 893.80(4) immunity does not apply in this case other than her assertions that the ministerial duty and known-danger exceptions apply.

As our supreme court has recently reaffirmed, immunity applies to the discretionary acts of government officers or employees. *Engelhardt v. City of New Berlin*, 2019 WI 2, ¶¶22-24, 385 Wis. 2d 86, 921 N.W.2d 714. Government immunity does not apply, however, where there is a “ministerial dut[y] imposed by law” or a “known and compelling danger[] that give[s] rise to [a] ministerial dut[y] on the part of public officers or employees.” *Id.*, ¶29. These two exceptions “overlap to an extent, inasmuch as they both require the identification of a ministerial duty.” *Id.*, ¶31 (citation omitted). “A public officer’s duty is ministerial only when it is absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion.” *Id.*, ¶32 (citation omitted). Related to the known danger exception, the “circumstances may give rise to such a certain duty, where ...

the nature of the danger is compelling and known to the officer and is of such force that the public officer has no discretion not to act.” *Id.*, ¶33 (citation omitted).

As Baumann-Mader recognizes, the “first step in the ministerial duty analysis is to identify a source of law or policy that imposes the alleged duty.” *American Fam. Mut. Ins. Co. v. Outagamie County*, 2012 WI App 60, ¶13, 341 Wis. 2d 413, 816 N.W.2d 340. In attempting to satisfy this “first step,” Baumann-Mader refers generally to “the Animal Control, Stray Animals contract with Community Services ... Policy Number 3.1.” She states that

[t]he policy imposed a duty upon the City to timely dispatch an Animal Control Officer when there was an animal issue within the City of Kenosha, particularly that of a vicious animal. As there was a known policy pertaining to the handling of animal issues, the City had a ministerial duty to timely dispatch a trained Animal Control Officer to the dog bite incident involving Ms. Baumann-Mader.

But Baumann-Mader does not identify any language from this “policy,” much less language that creates a duty that is “absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion.” See *Engelhardt*, 385 Wis. 2d 86, ¶32 (citation omitted). Without showing policy language establishing such a specific and unambiguous duty, she cannot establish a ministerial duty.

The Respondents provide us with the policy language to which Baumann-Mader appears to be referring. That language states: “If an incident is in progress and involves a vicious animal that is placing the safety of people or other animals in danger, officers will be dispatched immediately. The Animal Control Agent will also be dispatched.” This language of course says

nothing about how officers are to handle a vicious animal situation that they encounter, such as when Tank was attacking Baumann-Mader's neighbors and then Baumann-Mader. There is nothing in this policy that establishes such a ministerial duty.

Baumann-Mader adds that there was a ministerial duty "to timely dispatch the Animal Control Officer so as to protect Baumann-Mader from harm." This "argument" is insufficiently developed, and we do not consider insufficiently developed arguments. See *Wisconsin Conf. Bd. of Trs. of United Methodist Church, Inc. v. Culver*, 2001 WI 55, ¶38, 243 Wis. 2d 394, 627 N.W.2d 469. That said, there is no dispute that the City did in fact dispatch an Animal Control officer and that officer did arrive at the scene. The policy upon which Baumann-Mader appears to be relying only says "[t]he Animal Control Agent will also be dispatched." There can be no dispute that this policy requirement was satisfied. Baumann-Mader has failed to show that a policy-based ministerial-duty exception applies.

Baumann-Mader also contends that the known-danger exception applies to this case. She states that "[h]ere, there was a known and compelling immediate danger in that there was knowledge of a vicious dog who had already bitten at least one individual." Baumann-Mader's "argument" on this point is also insufficiently developed and conclusory, and so we do not consider it. See *M.C.I., Inc. v. Elbin*, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988) (we need not consider arguments which are "unexplained and undeveloped"); see also *Associates Fin. Servs. Co. of Wis. v. Brown*, 2002 WI App 300, ¶4 n.3, 258 Wis. 2d 915, 656 N.W.2d 56 (declining to address conclusory arguments). If we did consider it, however, we would note that Baumann-Mader completely fails to indicate what the City or responding officers should have done differently. Even if this situation constituted a known, compelling, and immediate danger, calling for City officials to take action—such as dispatching officers to

the scene and then those officers taking immediate steps to try to thwart the danger—this action is exactly what happened in this case. Had the officers sat on their hands and failed to take action to prevent Tank from continuing to maul Baumann-Mader, she may have had a basis to assert that the known-danger exception identified a ministerial duty that they failed to satisfy. But, the opposite is true here. The City and officers took immediate and aggressive action, just as the situation called for.

IT IS ORDERED that the order and judgment of the circuit court are summarily affirmed.
See WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals