

RENDERED: JANUARY 13, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000786-MR

JAMES THOMAS HURST, II

APPELLANT

v. APPEAL FROM MERCER CIRCUIT COURT
HONORABLE ROBERT G. JOHNSON, JUDGE
ACTION NO. 08-CI-00461

JAMES CALDWELL;
CITY OF BURGIN, KENTUCKY;
JASON ELDERIDGE AND
CITY OF HARRODSBURG,
KENTUCKY

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, J. LAMBERT, AND VANMETER,¹ JUDGES.

VANMETER, JUDGE: James Thomas Hurst, II appeals from the Mercer Circuit Court's order denying his motion to vacate the court's December 21, 2011, order

¹ Judge Laurence B. VanMeter authored this opinion prior to being elected to the Supreme Court of Kentucky. Release of this opinion was delayed by administrative handling.

granting summary judgment in favor of Police Chief James Caldwell and the City of Burgin, Kentucky on Hurst's state tort (negligence) claims and federal claims for deprivation of constitutional rights under the color of state law pursuant to 42 U.S.C.² §1983. For the following reasons, we affirm.

I. Factual and Procedural Background.

On November 30, 2007, following a report of a disturbance at the trailer of Aaron Nichols, Hurst had an encounter with Officer Jason Eldridge of the Harrodsburg Police Department, which ultimately led to Eldridge's shooting Hurst once in the stomach. Leading up to the encounter was a 911 call placed by Aaron Nichols's mother, during which she reported that Hurst was outside Aaron's trailer in his truck and had a gun. Ms. Nichols told dispatch that Hurst had shown up at Aaron's trailer with a gun on a prior occasion and threatened Aaron. Ms. Nichols then clarified that she was unsure whether Hurst had a gun or not on this occasion. Ms. Nichols asked dispatch to send Caldwell to Aaron's trailer since Caldwell knew where it was located.

Dispatch communicated to Caldwell that there was a male subject at Aaron's trailer with a gun. Based on dispatch's description of the vehicle, Caldwell identified Hurst as the subject and communicated over dispatch that Hurst possibly had a weapon; it had not been seen, just implied. Dispatch reported that records showed two active warrants on Hurst.

² United States Code.

Caldwell arrived at Aaron's trailer and, after hearing Aaron's description of the event, reported to dispatch "I'm pretty sure he's a convicted felon [referring to Hurst]. They did not see a weapon on this occasion but the subject gestured down his crotch like he had a weapon and has brandished a weapon out here in the past."

After receiving Caldwell's dispatch communication, Eldridge spotted Hurst's parked vehicle outside of a house and pulled over. The parties disagree as to what happened next. As recapped in the trial court's April 4, 2011, order, Caldwell and the City of Burgin allege the following facts:³

Eldridge spotted Hurst's vehicle in Harrodsburg. Hurst was allegedly outside Ricky Goodlett's home. Hurst exited Goodlett's home onto the front porch, and Eldridge allegedly told him to "stop right there" and that he was "under arrest." Hurst then ran back inside the house and exited the back door. Eldridge spotted bullets in Hurst's console when securing his vehicle. Eldridge thereafter drove a short distance, and spotted Hurst running through a nearby field. Eldridge caught up with Hurst and Deputies Parks and Elder arrived at the scene. With his flashlight out, Eldridge told Hurst he was under arrest and instructed him to lie on the ground. Hurst refused and ran toward Eldridge, inducing Eldridge to draw his gun and order Hurst to get down on the ground again. Eldridge started backing up and Hurst slowed his pace to a walk. Hurst pointed toward his chest, telling Eldridge, "shoot me," and indicated that he wanted his life to be ended. Hurst also said, "let's end this, I'm tired, tell my family I love them," all while walking towards. After repeated orders from Eldridge and Parks to get on the ground, Hurst repeated that he wanted them to end his life and that he no longer desired to live. Eldridge told Hurst he was not backing up anymore and to get on the ground. Hurst again exclaimed "let's end

³ The trial court took these facts from pleadings citing Eldridge's deposition.

this” and quickly ran his hands through his coat pocket. This act caused Eldridge to fire one round into Hurst’s stomach.

Hurst’s account of the incident differs. As recapped in the trial court’s April 4, 2011, order, Hurst describes the confrontation as follows:⁴

Hurst was set to leave town on the night in question to restart a job that he had previously lost. He had just learned that his ex-wife had filed a complaint for failure to pay child support and there was a warrant out for his arrest based on that complaint. His ex-wife was attempting to withdraw her complaint at the time in question, and the charges for nonsupport were later dropped. Hurst had called the sheriff to avoid being arrested on his ex-wife’s complaint. Hurst denied walking out the front door of Goodlett’s home, instead claiming that he had walked out the back door to make his way home when he saw a police cruiser. While walking through a nearby field, he heard a police officer call out to him, and he stopped. Eldridge drove his cruiser up to where Hurst was standing and exited the vehicle, carrying a gun. Eldridge told Hurst to get on the ground or he would shoot him. Hurst responded, asking the whereabouts of Chris Card, who Hurst claimed knew that the warrant was to be recalled. Eldridge again told Hurst to get on the ground or he would shoot, and Hurst responded “If you want to shoot me, go on and shoot me.” Eldridge thereafter shot one round into Hurst’s stomach. Hurst did not lie on the ground because he had been arrested in Harrodsburg numerous times, and usually had not been asked to lie down or placed in handcuffs. He was not aware that dispatch had told Eldridge that he may have had a weapon. Hurst believed that he was being arrested on a warrant for failure to pay child support, and did not understand why Eldridge was threatening to use deadly force when attempting to arrest him. Hurst’s hands were in his jacket pocket when the confrontation initiated, and he removed his hands from his pockets as soon as Eldridge told him to do so. Hurst

⁴ The trial court took these facts from pleadings citing Hurst’s deposition.

never put his hands back in his pockets or advanced toward Eldridge at any time.

Hurst was treated at the scene by EMS. Caldwell arrived at the scene after the shooting and accompanied Hurst in the ambulance to the helipad.

Thereafter, Hurst filed the instant action against Caldwell and the City of Burgin, as well as against Eldridge and the City of Harrodsburg. In his Complaint, Hurst sought damages for the injuries he sustained on grounds that the alleged wrongful shooting violated his constitutional rights under 42 U.S.C. §1983 as an unreasonable seizure, and that the actions of the defendants were negligent, reckless, wanton and/or intentional so as to violate Kentucky tort law.

With respect to Caldwell, Hurst claimed that Caldwell negligently and erroneously reported to dispatch that Hurst was armed with a weapon and dangerous, and that Hurst had a criminal history. Hurst alleged that Caldwell's false report to dispatch substantially contributed to his injuries. Hurst also alleged that the City of Burgin was vicariously liable for Caldwell's negligence in reporting to dispatch.

Caldwell and the City of Burgin filed a motion for summary judgment, which the trial court granted by order entered April 4, 2011. Therein, the trial court noted that the issues presented concerned whether Hurst was lawfully permitted to bring a tort action against Caldwell and the City of Burgin, and if so, whether Caldwell's conduct was a substantial factor in causing Hurst's injuries. Ultimately, the trial court determined that Hurst's claims failed as a

matter of law since neither a special relationship existed between Hurst and these defendants, nor did there exist a state-created danger. The trial court further held as a matter of law that the encounter between Hurst and Eldridge constituted a superseding cause that cut off any potential liability on the part of Caldwell and the City of Burgin.

Hurst then filed a motion pursuant to CR⁵ 52.02 to alter, amend or vacate the April 4, 2011, order granting summary judgment, citing additional case law and presenting new evidence for the trial court's consideration. Upon review, the trial court found that the parties disagreed on a number of relevant facts, including whether Caldwell transmitted his dispatch message in good faith, or whether he knew the information he transmitted was erroneous, and whether Hurst advanced toward Eldridge during their confrontation, causing him to shoot, or whether Hurst merely ignored orders to get on the ground. The trial court found that if Caldwell negligently transmitted an erroneous dispatch message, then the confrontation between Hurst and Eldridge could not supersede foreseeability as a matter of law. By order entered July 15, 2011, the trial court vacated its April 4, 2011, summary judgment order with respect to Hurst's state tort claims, and reinstated those claims against Caldwell and the City of Burgin, but affirmed its grant of summary judgment with regards to Hurst's 42 U.S.C. §1983 claims.

Thereafter, Caldwell and the City of Burgin filed a CR 52.02 motion to alter, amend or vacate the July 15, 2011, order which reinstated Hurst's state tort

⁵ Kentucky Rules of Civil Procedure.

claims against them. On this motion and for the first time in this case, the trial court was provided with a recorded copy of the dispatch communications. Upon review of the recorded dispatch, the trial court granted summary judgment again, this time on all of Hurst's claims against Caldwell and the City of Burgin. The trial court found that Caldwell's dispatch message simply stated that he was "pretty sure" Hurst was a convicted felon, and accurately relayed that no one had seen a weapon on Hurst's person during the incident in question. Based on Hurst's criminal history and the active warrant out for his arrest for flagrant nonsupport, the trial court held Caldwell had a reasonable basis to believe Hurst was a felon. The trial court found as a matter of law that the encounter between Hurst and Eldridge was unforeseeable to Caldwell and the City of Burgin. By order entered December 21, 2011, the trial court vacated its July 15, 2011, order and reinstated its April 4, 2011, order.

However, none of these orders were made final and appealable. On August 22, 2014, approximately three years after the trial court granted summary judgment to Caldwell and the City of Burgin, Hurst filed a CR 52.02 motion to alter, amend or vacate the court's December 21, 2011, order. In support, Hurst alleged inconsistencies between Aaron Nichols's 2014 deposition testimony and his 2011 affidavit with respect to what occurred the evening of November 30, 2007. The trial court found that nothing in Aaron's deposition testimony changed the legal conclusions the court had reached in its December 21, 2011, order. Accordingly, by order entered January 21, 2015, the trial court denied Hurst's

motion to alter, amend or vacate. The trial court made that order, as well as its April 4, 2011, July 15, 2011, and December 21, 2011, orders final and appealable by order entered April 27, 2015. Hurst now appeals.

II. Standard of Review.

CR 56.03 provides that summary judgment is appropriate when no genuine issue of material fact exists and the moving party is therefore entitled to judgment as a matter of law. Summary judgment may be granted when “as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant.” *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 483 (Ky. 1991) (internal quotations omitted). Whether summary judgment is appropriate is a legal question involving no factual findings; so a trial court’s grant of summary judgment is reviewed *de novo*. *Coomer v. CSX Transp., Inc.*, 319 S.W.3d 366, 370-71 (Ky. 2010).

III. Analysis.

Whether Hurst’s constitutional claims under 42 U.S.C. §1983 and his state tort (negligence) claims against Caldwell and the City of Burgin survive summary judgment as a matter of law depends on whether Caldwell owed a legal duty to Hurst; and if so, whether Caldwell’s dispatch message breached that duty, causing Eldridge to inflict injury upon Hurst.

42 U.S.C. §1983 “imposes civil liability on a person acting under color of state law who deprives another of the ‘rights, privileges, or immunities

secured by the Constitution and laws.”” *Kallstrom v. City of Columbus*, 136 F.3d

1055, 1060 (6th Cir. 1998). The Kentucky Supreme Court has held:

In order to establish an affirmative legal duty on public officials in the performance of their official duties, there must exist a special relationship between the victim and the public officials. *Ashby v. Louisville, Ky. App.*, 841 S.W.2d 184 (1992). Such a requirement relates not only to actions pursuant to 42 U.S.C. § 1983, but to an ordinary tort case such as this one.

Fryman v. Harrison, 896 S.W.2d 908, 910 (Ky. 1995). To establish this special relationship, two conditions must exist: “1) the victim must have been in state custody or otherwise restrained by the state at the time the injury producing act occurred, and 2) the violence or other offensive conduct must have been committed by a state actor.” *City of Florence v. Chipman*, 38 S.W.3d 387, 392 (Ky. 2001).

The issue of whether the victim was in state custody is a question of law. *Id.*

Hurst alleged that Caldwell’s dispatch message contained false information and was transmitted negligently, which led to Eldridge shooting him. However, as the trial court correctly found, Hurst failed to establish the threshold requirement that he was in state custody when Caldwell transmitted his dispatch call so as to establish a special relationship between Caldwell and Hurst.

Accordingly, the trial court properly granted summary judgment in favor of Caldwell and the City of Burgin as a matter of law since no special relationship and resulting legal duty existed.⁶

⁶ The trial court also found Hurst’s actions on the evening of the shooting were a superseding cause that cut off any potential liability on the part of Caldwell. However, since we have determined that no duty existed, we need not reach the issue of causation.

We note that Hurst attempted to circumvent the special relationship requirement by improperly relying on the state-created danger theory of liability, which is inapplicable under Kentucky law. In its order, the trial court correctly explained that Kentucky had not adopted the state-created danger theory of liability for state tort claims and, even if it had, that theory of liability is inapplicable under the facts of this case since the act of violence (shooting) was committed by a state actor, Eldridge, and not by a private tortfeasor.

Briefly, we will address Hurst’s state-created danger theory allegation since the Sixth Circuit has adopted that theory of liability, explaining it as follows:

Liability under the state-created-danger theory is predicated upon affirmative acts by the state which either create or increase the risk that an individual will be exposed to **private acts of violence**. . . . because many state activities have the potential to increase an individual's risk of harm, we require plaintiffs alleging a constitutional tort under [§ 1983](#) to show “special danger” in the absence of a special relationship between the state and either the victim or the **private tortfeasor**. The victim faces “special danger” where the state's actions place the victim specifically at risk, as distinguished from a risk that affects the public at large. The state must have known or clearly should have known that its actions specifically endangered an individual.

Kallstrom, 136 F.3d at 1066 (internal citations omitted) (emphasis added).

In *Kallstrom*, the Sixth Circuit found the state liable under 42 U.S.C. § 1983 for **private acts of violence** where the state increased an individual’s risk of danger, even in the absence of a special relationship. *Id.* In applying the state-created danger theory in that case, the court found that the City’s release of

undercover officers' private information to the defense counsel involved in a gang-related drug conspiracy investigation endangered the personal safety of the officers and their families, as opposed to endangering the public at large. *Id.* at 1067. The court found the undercover officers' anonymity essential to their personal safety, especially where the gang had demonstrated a propensity for violence. *Id.*

Despite the lack of a special relationship between the City and the officers and their families, the *Kallstrom* court held that “[t]he City either knew or clearly should have known that releasing the officers' addresses, phone numbers, and driver's licenses and the officers' families' names, addresses, and phone numbers to defense counsel . . . substantially increased the officers' and their families' vulnerability to private acts of vengeance.” *Id.* Accordingly, the court held that “the City's policy of freely releasing this information from the undercover officers' personnel files under these circumstances creates a constitutionally cognizable ‘special danger,’ giving rise to liability under § 1983.” *Id.*

In the case at bar, Hurst does not allege that any act on the part of Caldwell and the City of Burgin increased his individual risk of danger from a private act of violence committed by a private tortfeasor. Rather, Hurst's allegations stem from an act of violence (shooting) committed by another police officer, Eldridge. As a result, even if Kentucky had adopted the state-created danger theory of liability, Hurst's claims would not be actionable pursuant to it.

IV. Conclusion.

Hurst has failed to establish a special relationship between himself and Caldwell/City of Burgin and, therefore, has failed to prove the existence of a legal duty so as to allow his state negligence claims and 42 U.S.C. § 1983 claims to survive summary judgment. Additionally, Hurst's claims under the state-created theory of liability fail as a matter of law as well. Accordingly, we affirm the Mercer Circuit Court's order granting summary judgment in favor of Caldwell and the City of Burgin on all of Hurst's claims.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Andrew Horne
Louisville, Kentucky

BRIEFS FOR APPELLEES
JAMES CALDWELL AND
CITY OF BURGIN, KENTUCKY:

Erica K. Mack
Lexington, Kentucky

BRIEF FOR APPELLEES
JASON ELDRIDGE AND
CITY OF HARRODSBURG:

Christina L. Vessels
Barry M. Miller
Casey C. Stansbury
Lexington, Kentucky